



Good practice guide

# Procurement guidance for public entities

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# Procurement guidance for public entities

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This guide outlines our view of the good practice that public entities should use to procure goods or services. The guide outlines expectations that we may use when carrying out performance audits or inquiries under section 16 or section 18 respectively of the Public Audit Act 2001, or in annual financial audits. The expectations are neither exhaustive nor exclusive.

## **Disclaimer**

This document provides references to other websites as a convenience for the reader. Reference to any website does not mean that we endorse the contents of the site. The websites referred to in this document are not under our control, and they may change over time.

## Foreword

In this good practice guide, which updates and replaces our 2001 publication *Procurement: A Statement of Good Practice*, I encourage every public entity to think smarter about procurement so that it adds value to the entity's service delivery.

Public entities need to be clear about the overall objective of the procurement and select a procurement method that will give them the best value for money. To do this, public entities must have a detailed understanding of what they are procuring, the value and risk of the procurement, and how important the procurement is to achieving their overall goals and business strategy.

This guide also expands on the different methods that public entities can use to approach the market and the factors they need to take into account when deciding on the appropriate method.

I have also issued an overarching guide *Public sector purchases, grants, and gifts: Managing funding arrangements with external parties* to help public entities select the appropriate type of funding arrangement and determine the appropriate expectations that apply to the arrangement. I recommend that public entities familiarise themselves with the overarching guide before aligning their own policies and procedures with this good practice guide to ensure that they clearly understand which funding arrangements their policies and procedures apply to.

I would like to thank those organisations whose publications, websites, reports, and views we examined or discussed before we published this guide. I would also like to thank those organisations who gave generously of their time and expertise during the preparation of this guide. In particular, I would like to thank the Government Procurement Development Group of the Ministry of Economic Development for the assistance they have provided to my staff.



K B Brady  
Controller and Auditor-General

16 June 2008

# Contents

Glossary	5
<b>Part 1 – Introduction</b>	<b>7</b>
What is the focus of the procurement guidelines?	7
Who are the procurement guidelines for?	7
How should these guidelines be used?	8
The overarching guide for managing public sector funding arrangements	8
Relationship between these guidelines and the overarching guide	9
<b>Part 2 – Overriding considerations</b>	<b>11</b>
Good practice principles, government policies, and rules	11
General approach to procurement	15
Legal and ethical considerations	17
Sustainability	25
<b>Part 3 – Strategic procurement planning</b>	<b>27</b>
Developing a procurement strategy	27
Planning for the procurement	32
Selecting the type of contract	36
Independent oversight or assurance over the process	38
<b>Part 4 – Direct procurement</b>	<b>39</b>
Procuring directly from a supplier	39
Standing arrangements	42
<b>Part 5 – Competitive processes</b>	<b>49</b>
Quotations	49
Competitive tenders or proposals	51
<b>Part 6 – Relational purchases</b>	<b>55</b>
Partnering and project alliances	56
Contracting for services with non-government organisations	57
<b>Part 7 – Conducting a tender or proposal process</b>	<b>59</b>
Choosing the appropriate procurement method	59
Selecting an evaluation model	61
Inviting and receiving tenders and proposals	63
Evaluation	72
Awarding the contract	78
<b>Part 8 – Managing the contract</b>	<b>83</b>
The transition to a new supplier	83
Types of contract management	85
Completion and contract review	89
<b>Part 9 – Information technology and procurement</b>	<b>93</b>
E-procurement policy and standards	93
Information technology procurement	96
<b>Appendix – Our other reports that discuss procurement</b>	<b>97</b>
<b>Figures</b>	
1 Categories of funding arrangements with external parties	9
2 Analysing type of procurement to identify procurement method	29
3 Options for approaching markets	30

# Glossary

**Approving authority** is the person or persons responsible for approving different types and levels of procurement.

**Commercial in confidence** (CIC) is a description applied to confidential information provided for a specific purpose that is not to be used for any other purpose.

**Common use provision** (CUP) clause is a clause included in procurement and contract documents to enable eligible public entities to join the contract during its term. The clause is used in syndicated procurement arrangements.

**Cluster** refers to a group of public sector entities that collaborate before going to the market and approach the market collectively (that is, they aggregate their requirements). This arrangement is used in syndicated procurement.

**Expression of interest** (EOI) is similar to a registration of interest (ROI) in that it is used to identify suppliers interested in, and capable of, delivering the required goods or services. Potential suppliers are asked to provide information on their capability to do the work. It is usually the first stage of a multi-stage tender process.

**Government Electronic Tender Service** (GETS) is a government website ([www.gets.govt.nz](http://www.gets.govt.nz)) that provides information about New Zealand Government business opportunities.

**Market**, in the context of these guidelines, means the sellers of a good or service who are potentially available as suppliers to a public entity.

**Panel contracts** are a contractual arrangement with a group of suppliers to provide goods or services as and when required, under a schedule of rates for each supplier or on a quotation basis.

**Procurement** is all the business processes associated with purchasing, spanning the whole cycle from the identification of needs to the end of a service contract or the end of the useful life and subsequent disposal of an asset.

**Procurement cards** are charge cards that work in a similar way to credit cards.

**Public entity** and **entity** have the same meaning as in section 5 of the Public Audit Act 2001. This includes schools, State-owned enterprises, government departments, Crown entities, and local authorities, as well as any subsidiary or other controlled entity of the principal entity.

**Public sector** means, collectively, all public entities in central and local government.

**Registration of interest** (ROI) is similar to an expression of interest (EOI) in that it is used to identify suppliers interested in, and capable of, delivering the required

goods or services. Potential suppliers are asked to provide information on their capability to do the work. It is usually the first stage of a multi-stage tender process.

**Request for information (RFI)** is a formal request for information to gain a more detailed understanding of the supplier market and the range of solutions and technologies that may be available.

**Request for proposal (RFP)** is a formal means of seeking proposals from the market for goods or services where the public entity is open to supplier innovation – that is, where the outputs and outcomes are important, rather than the process the supplier follows to deliver them.

**Request for quotation (RFQ)** is a formal means of seeking quotations from the market for goods or services where price is the main selection criterion, the requirement is for “stock standard” or “off the shelf” goods or services, and the procurement is low risk.

**Request for tender (RFT)** is a formal means of seeking tenders from the market to provide goods or services where the public entity’s specification or requirements are clearly defined and there is little room for flexibility or innovation.

**Staff** means all members, trustees, office holders, managers, and employees of a public entity.

**Syndicated procurement** involves groups of public entities aggregating their procurement requirements to achieve improved outcomes through greater purchasing power and reduced procurement costs. The two most widely used syndicated procurement models are the common use provision and cluster.

**Sustainability** is about meeting the needs of today, without adversely affecting the needs of tomorrow. In a business sense, the key messages of sustainability tie in with what are considered sound business practices, such as building efficiency, minimising waste, and maximising resources.

**Value for money** means using resources effectively, economically, and without waste, with due regard for the total costs and benefits of an arrangement, and its contribution to the outcomes the entity is trying to achieve. In addition, the principle of value for money when procuring goods or services does not necessarily mean selecting the lowest price but rather the best possible outcome for the total cost of ownership (or whole-of-life cost). Value for money is achieved by selecting the most appropriate procurement method for the risk and value of the procurement, and not necessarily by using a competitive tender.

**We, us, and our** refer to the Office of the Auditor-General, including the Auditor-General’s appointed auditors.



# Part 1

## Introduction

- 1.1 Procurement covers all the business processes associated with purchasing, spanning the whole cycle from the identification of needs through to the end of a service contract or the end of the useful life and subsequent disposal of an asset.
- 1.2 Public entities often work in a complex environment in terms of both the type and range of goods or services being procured. To be effective and efficient in procuring goods or services, entities need to be clear about the overall objective of the procurement and select a procurement method that will give them best value for money. To do this effectively, public entities must have a detailed understanding of what they are procuring, the value and risk of the procurement, and how important the procurement is to achieving their overall goals and business strategy.

### **What is the focus of the procurement guidelines?**

- 1.3 In these guidelines, which update and replace our 2001 publication *Procurement: A Statement of Good Practice*, we encourage every public entity to focus on the strategic management of their procurement function – to think smarter about procurement so that it adds value to the entity’s service delivery.
- 1.4 These guidelines also expand on the different methods that public entities can use to approach the market (ranging from simple credit card purchases with local suppliers through to complex multi-stage offers) and the factors that they need to take into account when deciding on the appropriate method.

### **Who are the procurement guidelines for?**

- 1.5 These guidelines are written to assist all public entities that are covered by section 5 of the Public Audit Act 2001. This includes schools, State-owned enterprises, government departments, Crown entities, and local authorities, as well as any subsidiaries or other controlled entities of the principal entity.
- 1.6 A public entity may use an agent to act on its behalf in procurement activities. This does not change the basic obligation of the entity to ensure that the procurement done on its behalf follows good practice. The entity remains accountable for the outcome of the procurement and any liability that attaches to it. Even if the agent is from the private sector, when acting for a public entity, they must meet the same standards of good procurement practice that apply to the public entity.

## How should these guidelines be used?

- 1.7 These guidelines are a statement of good practice. They are not a set of rules. Rather, they outline the principles, considerations, and processes that should help public entities to meet ethical standards and act with integrity when procuring goods or services.
- 1.8 We expect a public entity to develop its own procurement policies and procedures that reflect the value and risk of the procurement that it does and that are appropriate to its overall business objectives and operations. A public entity may use these guidelines as a benchmark and guide on what its own procurement policies and procedures should contain.
- 1.9 As the auditor of public entities, we expect a public entity's procurement policies and procedures to compare favourably with these guidelines.

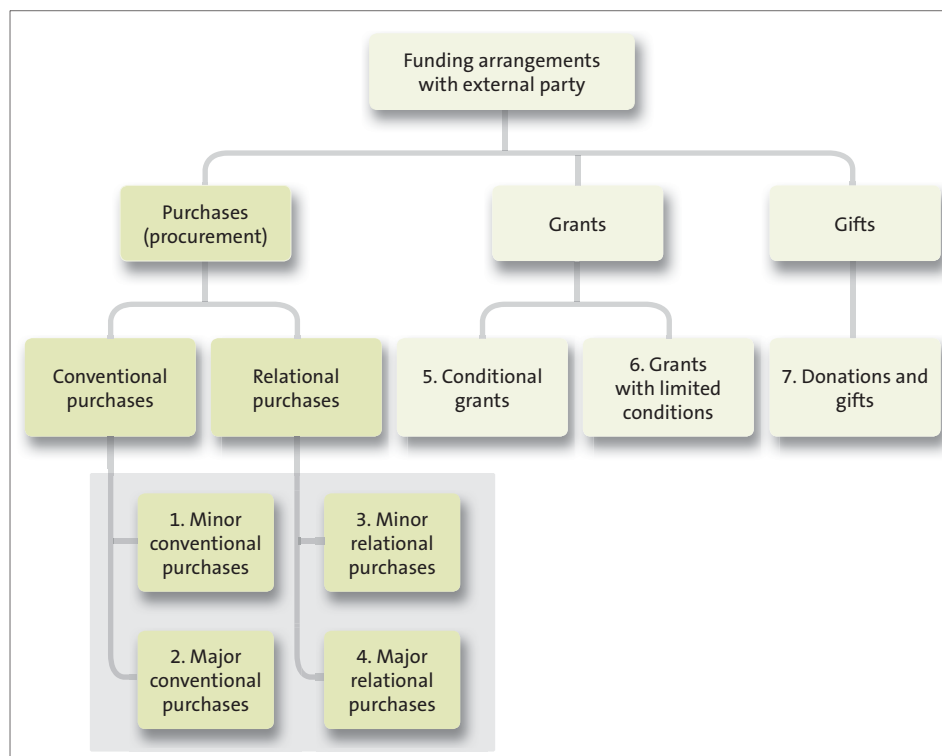
## The overarching guide for managing public sector funding arrangements

- 1.10 We have produced an overarching guide *Public sector purchases, grants, and gifts: Managing funding arrangements with external parties*, which is available on our website ([www.oag.govt.nz](http://www.oag.govt.nz)). It is designed to recognise the complex mix of different organisations, types of funding arrangements, and procedural rules and requirements that public entities face in delivering services and working with their communities, other levels of government, businesses, and non-government organisations. This guide should help public entities make sense of how the different processes and expectations fit together, to understand the basic principles that should guide their thinking, and to work logically through the choices that they need to make when they plan for, and enter into, any kind of funding arrangements with external parties.
- 1.11 The overarching guide describes the different types of funding arrangements, their common features, the factors that should guide decisions on the most appropriate form of a funding arrangement, and the high level expectations in terms of planning, selection, management, and review that accompany each type of funding arrangement.
- 1.12 The overarching guide should give public entities a clearer understanding of the expectations that we apply when we assess the conduct and performance of public entities (whether in annual audits, performance audits, other assurance work, or inquiries).
- 1.13 Public entities should familiarise themselves with the content of the overarching guide.

## Relationship between these guidelines and the overarching guide

- 1.14 The overarching guide breaks down the general area of funding arrangements with external parties into three broad groups according to the fundamental purpose of the arrangement and then into seven subsidiary categories according to the type of contract, the available market, and the value of the purchase. Figure 1 shows the breakdown of the general area of funding arrangements with external parties into the three broad groups and seven categories.

**Figure 1**  
Categories of funding arrangements with external parties



- 1.15 These guidelines set out our expectations and guidance on the four categories in the shaded area of Figure 1:
- **Minor conventional purchases** – These are goods or services that a public entity buys regularly, are of relatively low value, and are able to be bought through ordinary procurement systems. There will usually be a reasonable range of suppliers or providers to choose from, so that ordinary market disciplines and competitive processes are likely to be effective as a way of managing the price and value for money.

- **Major conventional purchases** – As with the previous category, the presence of an effectively functioning market is the main factor in a major conventional contracting environment. That means that ordinary market-based procurement techniques can be expected to operate well to manage the price and value for money. Major conventional purchases are high value – possibly worth millions of dollars. Inevitably, they carry higher risk to the organisation and require a different level of planning, authorisation, documentation, monitoring, and general management.
- **Minor relational purchases** – For the contracts in this category, conventional market-based systems may not be appropriate or particularly effective. This is largely due to the absence of an effective or meaningful market to provide the goods or services, and the strategic importance of the goods or services, or the relationship with the provider, for the public entity. In these situations, it may be more useful to give greater weight to the relationship or strategic dimensions of the contract and to develop other systems to manage the dimensions usually managed by competitive market mechanisms.
- **Major relational purchases** – The same factors identified under minor relational purchases apply here. The main difference between the previous category and this one is the value or size of the goods or services being purchased. A larger contract will inevitably require additional attention and management throughout its whole life cycle. There is an overlap between this category and that of major conventional purchases, through the growing use of relationship-based contracting arrangements in major projects such as infrastructure development.

- 1.16 These guidelines are particularly relevant to minor and major conventional purchases in a market context. These guidelines do comment on relational purchases (see Part 6), but we give these types of contracts more in-depth consideration in our good practice guide *Principles to underpin management by public entities of funding to non-government organisations*.
- 1.17 These guidelines do not provide guidance on the policies and procedures that public entities will need for grants and gifts. The Appendix lists some of our other publications, which may provide guidance on grants and gifts.

## Part 2

# Overriding considerations

- 2.1 In this Part, we outline the broad government procurement policy context and the obligations and considerations that provide the framework for good procurement practice by public entities.
- 2.2 This guidance is principles-based. While we draw attention to government policy requirements that may apply, we do not tell public entities what procurement decisions to make or what policies and procedures they should follow in any particular case.

## Good practice principles, government policies, and rules

### Basic principles that govern all public spending

- 2.3 There are some basic principles that govern the use of all public funds. They should be considered when considering any funding arrangement with an external party. This includes procuring goods or services. The international literature on this area includes many different versions of the principles that need to be considered. They cover similar ground. We summarise the basic principles as:
- **Accountability** – Public entities should be accountable for their performance and be able to give complete and accurate accounts of the use they have put public funds to, including funds passed on to others for particular purposes. They should also have suitable governance and management arrangements in place to oversee funding arrangements.
  - **Openness** – Public entities should be transparent in their administration of funds, both to support accountability and to promote clarity and shared understanding of respective roles and obligations between entities and any external parties entering into funding arrangements.
  - **Value for money** – Public entities should use resources effectively, economically, and without waste, with due regard for the total costs and benefits of an arrangement, and its contribution to the outcomes the entity is trying to achieve. In addition, the principle of value for money for procuring goods or services does not necessarily mean selecting the lowest price but rather the best possible outcome for the total cost of ownership (or whole-of-life cost).
  - **Lawfulness** – Public entities must act within the law, and meet their legal obligations.
  - **Fairness** – Public entities have a general public law obligation to act fairly and reasonably. Public entities must be, and must be seen to be, impartial in their decision-making. Public entities may also at times need to consider the imbalance of power in some funding arrangements, and whether it is significant enough to require a different approach to the way they conduct the relationship.

- **Integrity** – Anyone who is managing public resources must do so with the utmost integrity. The standards applying to public servants and other public employees are clear, and public entities need to make clear when funding other organisations that they expect similar standards from them.

2.4 By applying these principles sensibly, public entities can demonstrate that they are spending public money wisely, and properly managing the process for spending it.

### Practical considerations

2.5 When deciding how to give effect to the principles set out in paragraph 2.3, public entities should consider a number of things.<sup>1</sup> These are:

- **The goal** – It is important for the public entity to focus on what it is trying to achieve. The process should not dominate at the expense of the outcome.
- **Simplicity and proportionality** – The requirements put in place for the funding arrangement should be as simple and practical as possible, considering the amounts involved, the complexity, and the level of risk. It is appropriate to consider compliance costs for both parties, and seek to reduce them where possible.
- **The context** – The arrangements need to fit with the overall context of the funding arrangement, including any more general relationship that the external party has with the entity or with other relevant government organisations. For example, a funding arrangement between a department and a non-government organisation may need to take account of any general government policy on relationships with the community and voluntary sector.
- **The risk** – Public entities need to identify risks in or around the funding arrangement and to consider how to manage those risks. This should not be seen as encouragement to be overly risk averse. The key is to get the right balance between risk and expected benefit, and to do so consciously.
- **The nature of the parties** – The needs and standards of public entities – for example, for accountability or transparency – may be quite different from those that the external party usually encounters. Equally, the external party's needs may be quite different from those of the public entity. For example, a non-government organisation may have unique obligations to constituent groups or members. Relationships are likely to proceed more constructively and effectively if each party understands the needs of the other and the consequences of those needs for them.

<sup>1</sup> United Kingdom National Audit Office, *Financial Relationships With Third Sector Organisations – a Decision Support Tool for Public Bodies in England*.

## Government policies

- 2.6 The Government expects its departments to conduct all their procurement within the framework of the policy principles set out in *Government Procurement in New Zealand: Policy Guide for Purchasers – August 2007*, issued by the Ministry of Economic Development. To these must now be added sustainability, so that the complete framework of government policy principles comprises:
- best value for money over whole-of-life;
  - open and effective competition;
  - full and fair opportunity for all eligible suppliers;
  - improving business capability, including e-commerce capability;
  - recognition of New Zealand’s international trade obligations and interests; and
  - requiring sustainably produced goods or services whenever possible, having regard to economic, environmental, and social impacts over their life cycle.
- 2.7 Government policies are generally binding on government departments. A public entity that is not a government department will be bound to the extent that the relevant legislation requires it to comply with, or take account of, such policies. It is appropriate, however, that those public entities not bound by government policies consider policies that are relevant to them and treat the requirements as sound guidance.
- 2.8 The Auditor-General expects a public entity to:
- be aware of current government policies on procurement; and
  - comply with such policies if they are applicable to the entity.
- 2.9 The Ministry of Economic Development’s Government Procurement Development Group holds up-to-date details of current government policies concerning procurement in the public sector, and the effects of international agreements on procurement. More information on these policies can be found under the procurement section of the Ministry of Economic Development’s website ([www.procurement.govt.nz](http://www.procurement.govt.nz)).
- 2.10 In addition, the Department of Labour provides guidance on government policies and legislation relating to employment, including contracts for the procurement of services in the public sector. This includes guidance on relevant legislation and policy on occupational health and safety, being a “good employer”, and pay and employment equity. See [www.dol.govt.nz](http://www.dol.govt.nz) for more information.

### Government mandatory rules

- 2.11 The Government has also endorsed *Mandatory Rules for Procurement by Departments*,<sup>2</sup> which implement obligations on New Zealand under several international trade agreements. These rules set out mandatory standards and procedural requirements for procurement by government departments (defined as the “public service departments” listed in Schedule 1 of the State Sector Act 1988, as well as the New Zealand Defence Force and New Zealand Police) and contain some limited exceptions and exclusions. Other agencies are encouraged to follow the practices set out in the rules, as appropriate.
- 2.12 Although these rules provide policy advice and mandatory procedural rules, individual government departments and agencies are responsible and accountable for their own procurement decisions.

### Financial delegations and other authorities

- 2.13 A public entity must comply with any applicable financial delegations when it procures goods or services.
- 2.14 For government departments, Cabinet circulars set out the limits of the authority of chief executives to commit to particular types of expenditure.
- 2.15 A public entity must also comply with any legislation that:
- limits its procurement authority; or
  - governs its internal delegation practices.
- 2.16 For local authorities, council policies and delegations may limit the authority of chief executives and other staff to commit to particular types of expenditure.
- 2.17 A public entity should cross-reference its procurement policies and procedures to the up-to-date list of financial delegations, and ensure that all relevant staff are aware of them.
- 2.18 Once the total cost of procurement has been approved, financial delegations for payments to suppliers within the approved amount should be set at a level that does not place undue restrictions and administrative burden on the contract manager. In deciding on the levels of financial delegations in a contract, entities may wish to consider:
- the value and complexity of the contract;
  - the function that the individual is responsible for performing in the project; and
  - the fiscal risk to the entity.

<sup>2</sup> See [www.procurement.govt.nz](http://www.procurement.govt.nz) for the current version.



## General approach to procurement

### Procurement policies and procedures

- 2.19 A public entity should develop its own procurement policies and procedures that are tailored to its working environment and that take into account the basic principles in paragraph 2.3, the practical considerations in paragraph 2.5, any relevant government policy on procurement, the *Mandatory Rules for Procurement by Departments* (where appropriate), and other applicable statements of good practice and guidelines.
- 2.20 Publishing an unambiguous procurement policy and following that policy reduces the risk of challenges to the decision-making process and may reduce the cost of procuring. It also helps retain credibility with suppliers. Clear processes can help ensure that the procurement policy is consistently followed.
- 2.21 A public entity should be aware of the risk of developing an overly rigid or prescriptive procurement policy that effectively fetters its discretion. When developing procurement policies and specific tender or proposal documentation, entities need to be aware of the risks of limiting their ability to exercise discretion. The risks may be greater when the public entity is performing a statutory function in procuring goods or services.
- 2.22 Organisational policies and procedures are more effective when they are up to date and easily available to all staff who need to access them. For these reasons, a public entity's procurement policies and procedures should include:
- a process for regularly reviewing the policies and procedures, and assigning responsibility for updating them;
  - version control to identify the most recent version;
  - a process for educating staff, including any agent that the public entity uses to procure on its behalf, about the policies and procedures; and
  - the need to retain a copy of updated policies and procedures so that a copy of the policies and procedures that applied at the time of the procurement is available if the procurement is subsequently challenged.

### Using discretion in selecting the method of procurement

- 2.23 A public entity may have considerable discretion in how it procures goods or services. However, each public entity is responsible for managing its resources in an effective and efficient manner.
- 2.24 It is important for public entities to think about the appropriate type of funding arrangement when they enter into individual transactions and arrangements.

Our overarching guide *Public sector purchases, grants, and gifts: Managing funding arrangements with external parties* covers how to choose the appropriate approach. Essentially, this guide advises public entities to:

- Focus on the goal – What is the public entity trying to achieve in this particular context?
- Establish the relationship background – Is there a general sectoral relationship or strategic context that it needs to consider? What type of organisation is to receive the funding? Are the funding arrangements long or short term? Are there many potential providers of the goods or services? What are the needs of the end users?
- Identify potential risks and consider how to manage them – What level of control does the public entity want over the detail of what is done and the outcome? What happens if the external party does not do what is intended? Is the intention to create legally enforceable obligations? What level of risk is the public entity prepared to tolerate? What level of risk does the particular activity carry?
- Consider the monetary value of the funding arrangement – High value contracts should attract more attention, at every stage of their life cycle, than contracts for small amounts. At this broad level, high value is an initial indicator of risk. The definition of high and low value will differ between public entities, depending on the nature of their activities and budgets. However, a public entity's policies and procedures should support an approach that tailors the level of planning, documentation, and monitoring to the financial significance of the arrangement for the entity.

2.25 The overarching guide identifies four categories of procurement according to the type of contract, the available market, and the value of the purchase. We discuss these categories in paragraphs 1.14-1.15.

### Using consultants or procurement agents

2.26 If a public entity engages a consultant or an agent to assist in the procurement process, the contract of engagement should require the consultant or agent to observe the same ethical standards, principles, and behaviour that apply to the public entity's employees.

2.27 This includes the consultant or agent complying with the public entity's own procurement policies and procedures, and the public entity appropriately managing any conflicts of interest on the part of the consultant or agent.

### Competent people

- 2.28 A public entity should ensure that each employee or agent involved in a procurement process has the required skills for the type and level of procurement.
- 2.29 When engaging an agent, the public entity also needs to ensure that an experienced employee with the necessary delegated authority works with the agent.

### Keeping records

- 2.30 A public entity should keep adequate records of procurement decisions. The Public Records Act 2005 requires public entities to maintain full and accurate records in keeping with normal, prudent business practice.
- 2.31 The value and risk of the procurement will determine the nature and amount of documentation that is desirable. However, a public entity should keep adequate records to:
- show that it followed due process and observed the basic principles set out in paragraph 2.3;
  - establish that it identified and appropriately managed potential conflict of interest issues;
  - respond to queries from unsuccessful suppliers;
  - record the outcome of meetings during the procurement process;
  - provide evidence for accountability and audit purposes; and
  - plan any subsequent procurement.
- 2.32 A public entity should keep records in a manner that facilitates audit and other normal processes of accountability. This includes ensuring that records of all decisions and supporting documentation are available for audit.

### Legal and ethical considerations

- 2.33 Although these guidelines are not a comprehensive guide to an entity's legal obligations, we outline below some of the legal risks that a public entity needs to consider when procuring. An entity should get legal advice, when necessary, to assess and manage these (and any other) risks.
- 2.34 Legal advice should be sought early in the process. If a public entity has an in-house legal adviser, it should involve that legal adviser in developing templates for documents to be used in procurement processes and in developing a business case for a particular procurement. For complex procurements, the public entity will often need legal advice or professional expertise on technical or probity matters, particularly when developing or reviewing procurement documentation.

- 2.35 A public entity should be ethical and act with integrity when procuring goods or services. A public entity should:
- act, and be seen to be acting, in a fair, open, and unbiased manner; and
  - observe ethical standards, principles, and behaviour throughout the procurement process.

### Complying with legislation

- 2.36 A public entity should be aware of, and comply with, all applicable legislation when it procures goods or services.
- 2.37 Examples of applicable legislation are:
- the entity's enabling legislation;
  - the Official Information Act 1982;
  - the Local Government Official Information and Meetings Act 1987;
  - the Commerce Act 1986;
  - the Fair Trading Act 1986;
  - the Dumping and Countervailing Duties Act 1988;
  - the Public Records Act 2005;
  - the Local Government Act 2002;
  - the Crown Entities Act 2004;
  - the Local Authorities (Members' Interests) Act 1968;
  - the Public Finance Act 1989;
  - the Electronic Transactions Act 2002; and
  - the Land Transport Management Act 2003.
- 2.38 Sometimes a public entity's governing legislation will include requirements to consult on significant issues – for example, with the community or with stakeholders. Examples include the Local Government Act 2002, the New Zealand Public Health and Disability Act 2000, and the Land Transport Management Act 2003.
- 2.39 A procurement process may result in significant changes to the content or form of the services that a public entity delivers or a change of approach to the way it funds some services. If a public entity has statutory consultation obligations, it may need to consider the relationship between the procurement process and these obligations. A public entity should seek legal advice on consultation obligations when considering significant changes of this kind.

### Public law considerations

- 2.40 A public entity will have public law obligations that could apply to aspects of a procurement process.
- 2.41 A public entity's fundamental public law obligation is always to act fairly and reasonably, and in keeping with the law. This imposes a higher standard of conduct than that which may apply in the private sector.
- 2.42 A public entity should always take account of the risk that its procurement actions and decisions could be subject to judicial review, or a complaint to the Government Procurement Development Group of the Ministry of Economic Development, an Ombudsman, or the Auditor-General.
- 2.43 The extent to which a public entity's procurement actions or decisions are subject to judicial review depends on several factors, including the nature of the public entity and the decision-making framework it operates under. The courts have shown a willingness to intervene in commercial relationships in a wide range of situations to ensure that a public entity acts fairly and in keeping with its public law obligations.
- 2.44 A public entity also needs to be aware of public law obligations when it receives unsolicited proposals from potential suppliers. When approached, a public entity needs to be clear with the suppliers that, if it proceeds with considering the proposal, it may choose a competitive tender or proposal process, depending on the type and value of the procurement and any statutory obligations it may have. Being approached by a potential supplier does not in itself justify a direct or selective procurement process.

### Contractual considerations

- 2.45 A public entity should be aware of, and comply with, the relevant law on the formation and performance of contracts.
- 2.46 Particular legal risks may exist when procuring with a competitive tender or proposal process. At times, it may be appropriate for a public entity to create a contractual situation during the procurement process itself (a "process" contract). However, a public entity needs to be careful that it deliberately and not inadvertently creates any legal obligations.
- 2.47 In general, an invitation to submit a tender or proposal, or a request for tender or proposal, is an "invitation", not an "offer" to purchase goods or services. However, a preliminary contract may sometimes exist for the tender or proposal process itself.
- 2.48 For example, if a public entity specifically defines the process in the procurement documentation that it issues to participants, that definition could be construed as

an offer to proceed in that manner, which a participant accepts by submitting to the procurement process. That may be enough to create a binding contract for the process. If a process contract is created, it will contain express and implied terms. The express terms will be those in the procurement documentation, and the implied terms will include a requirement to treat all participants fairly and equally.

2.49 If the public entity then follows a different process, it may risk legal action for breach of contract. A public entity may seek to minimise this risk by excluding or limiting its liability in the procurement documentation for any breach by the public entity during the procurement process. Where participants participate on that basis, a court may be likely to recognise such an exclusion or limitation provision as being contractually effective.

2.50 Legal advice can help address these risks.

### Intellectual property risks

2.51 A public entity should consider the risks associated with developing intellectual property during the procurement.

2.52 Under the Copyright Act 1994, the Crown owns the copyright of new works created for Ministers, government departments, or Offices of Parliament by a contractor unless otherwise provided for in the contract.

2.53 All public entities should consider the value of any intellectual property rights, and whether it would be more beneficial for them to be held by the supplier or the entity. Relevant factors may include the effect on the price of the contract and the ongoing ability of the parties to develop innovations. In any case, a public entity should:

- identify all intellectual property likely to be developed or created during a procurement;
- seek legal advice on how to secure its continuing right to use intellectual property as required – including if the public entity procures the goods or services from a different supplier in future;
- be clear about the difference between what is intellectual property and what is said commercially in confidence;<sup>3</sup> and
- determine who should own any intellectual property.

2.54 For information and communication technology contracts, the Government has issued guidelines on its approach to ownership and commercialisation of intellectual property rights.<sup>4</sup> The guidelines set a default position that the supplier

<sup>3</sup> A public entity may need to seek legal advice on this distinction, and on the interplay between intellectual property rights and confidentiality obligations.

<sup>4</sup> State Services Commission (2008), *Guidelines for the Treatment of Intellectual Property Rights in ICT Contracts*, available at [www.ssc.govt.nz](http://www.ssc.govt.nz).

owns new intellectual property, with licences granted to the entity and other state agencies.

- 2.55 Public entities should also satisfy themselves that claims of intellectual property by suppliers are valid.

### Liability

- 2.56 When contracting for goods or services, a supplier or purchaser may wish to exclude or limit its liability under the contract. It is not uncommon for suppliers to:
- propose excluding their liability for any losses that are not the direct result of their acts or omissions (for example, for indirect loss, consequential loss, loss of profits); and/or
  - limit their liability to an amount that is a specified multiple of the value of the contract.
- 2.57 Public entities need to understand that accepting a limitation on liability is different from giving a supplier an indemnity. In accepting a limitation on liability, a public entity agrees to limit the liability of a supplier to an amount specified in the contract. If the public entity suffers loss through the supplier's actions or omissions in performing the contract, the public entity will not seek to recover more than the agreed amount and will bear any loss above that amount.
- 2.58 An indemnity, however, involves a public entity agreeing to accept the risk of loss or damage that the supplier may suffer, and to meet any costs to the supplier for that loss or damage. Public entities need to be aware of statutory restrictions on giving indemnities – for example, in the Public Finance Act 1989 and the Crown Entities Act 2004.
- 2.59 Limiting a supplier's liability in a contract has the effect of exposing the public entity to liability above the limit in the contract, which is therefore exposure to unrecoverable loss. This may have both direct and indirect costs to the entity. Some public entities may have a policy of not accepting any exclusion or limitation on liability. However, in some areas, insisting on unlimited supplier liability may be a barrier for suppliers to participate, particularly smaller firms. It may also reduce market competition and/or increase the price.
- 2.60 A public entity should take a risk-based approach to considering whether to agree to an exclusion or limitation on liability by a supplier (this is an important aspect of achieving value for money). If the entity accepts an exclusion or limitation, the contract needs to be very clear about its scope and extent. Where there is an exclusion or limitation on a supplier's liability, the public entity should take associated costs into account when considering that supplier's goods or services.

Without a limitation in the contract, the supplier's liability will be determined by the general law.

- 2.61 Equally, a public entity may decide that it is appropriate for it to limit its own liability or to seek an indemnity.
- 2.62 Legal advice can help address these issues and assist a public entity with negotiating exclusions and limitations of liability and assessing risks.

### Managing conflicts of interest

- 2.63 As part of the general obligation to act fairly, public entities must take care that their decision-making processes cannot be challenged on the basis of actual or potential bias and/or conflicts of interest. These legal obligations will often be mirrored in the ethical standards that govern public sector conduct.
- 2.64 Sometimes a public entity's governing legislation will include requirements for disclosing and managing conflicts of interest. The Crown Entities Act 2004 and the New Zealand Public Health and Disability Act 2000 both contain detailed requirements. For the local government sector, specific rules are set out in the Local Authorities (Members' Interests) Act 1968.
- 2.65 Complying with any relevant statutory requirements will not necessarily be enough to ensure that decision-making processes meet the more general public law requirement of fairness. Public entities must also take steps to ensure that no other aspect of the process could be tainted by a conflict of interest arising outside of those processes regulated by statute. For example, the statutory requirements tend to be confined to the declaration and management of conflicts of interest by members of a governing board or council. But conflict problems might also arise as a result of the interests or associations of officials, staff members, or other participants in the procurement process.
- 2.66 In June 2007, we produced two guides on conflict of interest issues to assist public entities:
- *Managing conflicts of interest: Guidance for public entities* applies to all public entities and sets out an approach for dealing with conflict of interest issues when they arise. It includes a number of case studies.
  - *Guidance for members of local authorities about the law on conflicts of interest* has been developed specifically for local authorities and other entities that are subject to the Local Authorities (Members' Interests) Act 1968.
- 2.67 Public entity staff should be aware of the potential for conflicts of interest for every staff member and adviser who is directly or indirectly involved in any aspect of the process. This includes governance, management, operational staff, and



the approving authority. All staff involved in the procurement process should be required to declare any personal interest that may affect, or could be perceived to affect, their impartiality. The public entity will then need to decide what steps are necessary to manage the conflict, having regard to any relevant statutory requirements. It should maintain a register of declarations of conflicts of interest that records any conflicts of interest and how they will be managed.

- 2.68 Conflicts of interest can have both legal and ethical dimensions. Under no circumstances should a procurement process allow a public entity's staff to receive preferential treatment.
- 2.69 Gifts, hospitality, or other incentives from suppliers should be subject to the public entity's code of conduct, which should comply with the *Standards of Integrity and Conduct* published by the State Services Commission. A copy of this code is on the State Services Commission's website ([www.ssc.govt.nz](http://www.ssc.govt.nz)). We also provide more detailed guidance on gifts and hospitality in our good practice guide *Controlling sensitive expenditure: Guidelines for public entities*. A copy of this guide is on our website ([www.oag.govt.nz](http://www.oag.govt.nz)).
- 2.70 Concerns may arise, for example, if a person who is managing a current contract has received gifts or hospitality from the supplier, and then participates in the selection process for a new contract.

### Confidentiality

- 2.71 Confidentiality is a common characteristic of any competitive procurement process. A public entity should take particular care when handling commercially sensitive information. Entities should note that confidentiality obligations apply throughout the entire procurement process and also after the contract has terminated or expired.
- 2.72 A public entity may face particular risks in its handling of confidential information when it procures goods or services in a statutory context. A public entity may, for example, have a statutory obligation to consult third parties in the course of procuring goods or services. This may require the entity to disclose some information that it has received from potential suppliers. A public entity should seek legal advice on how to reconcile duties of this nature with its contractual or common law obligations to maintain commercial confidentiality.
- 2.73 Public entities will also need to consider their obligations under either the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987. These Acts mean that public entities are not able to give comprehensive assurances about the protection of sensitive information. There are relevant

grounds for withholding information under those Acts, such as unreasonable prejudice to the commercial position of a potential supplier, but these can be overridden if there is a greater public interest in disclosing the information.

### **Accuracy and use of information**

- 2.74 A public entity should require its staff to:
- respect the confidentiality of information received in the course of their work;
  - not use this information for personal gain; and
  - always communicate information accurately, impartially, and in a manner not designed to mislead, to all interested participants.
- 2.75 A public entity should respect the sensitivity of information provided by participants during the procurement process. A public entity should not use confidential information to influence or advantage other participants.

### **Contact with participants during the procurement process**

- 2.76 A public entity should set a clear and preferably single point of contact in its organisation for participants to use during a procurement process. This may entail the staff member who is the point of contact arranging for others in the organisation to deal with technical queries. This will reduce the risk of any potential supplier extracting an advantage by playing off one member of the entity's procurement team against another.
- 2.77 A public entity should include a requirement in the procurement documentation that during the procurement process participants may not contact any member, director, employee, or adviser of the public entity about the procurement other than the person nominated.
- 2.78 Informal communication between evaluation personnel and participants could prejudice the integrity of the evaluation. A public entity should ensure that all communication is formal.
- 2.79 When contracts come up for renewal, current suppliers may be perceived to have an advantage in their knowledge of the public entity and its requirements. The public entity should therefore put in place a formal process to govern contact with any current supplier when tendering or proposing for a future contract. This process should include a requirement that the current supplier must not discuss the requirements and contents of the new tender or proposal with public entity staff or members of the evaluation panel, unless the discussion is part of the formal procurement process.

### Fraud and impropriety

- 2.80 Public entities should consider developing a specific fraud policy.
- 2.81 Conducting procurement in a fair and transparent manner should reduce the risk of fraud or impropriety. Following appropriate procurement policies and procedures, and having appropriate internal controls in place, should assist this.
- 2.82 Procuring from a single source or selective procurement may increase the risk of fraud or impropriety. A public entity's policies and procedures will need to address this.
- 2.83 In an international context, the Organisation for Economic Co-operation and Development has recognised that public procurement is an area that is vulnerable to corruption and bribery.
- 2.84 If public sector managers find instances of fraud, bribery, or corruption, they have an obligation to refer them to the Police and/or the Serious Fraud Office.

### Sustainability

- 2.85 It is becoming increasingly important for public entities to work and think in ways that take account of long-term sustainability. Sustainability involves thinking broadly about objectives, considering long-term as well as short-term effects; assessing indirect as well as direct effects; considering economic, social, and environmental aspects; and taking extra care when procurement causes changes that might be irreversible or uncertain (the precautionary principle).
- 2.86 Sustainability is a statutory or strategic requirement for many public entities. For example, the Local Government Act 2002 requires local authorities to take a sustainable development approach, by taking into account the social, economic, environmental, and cultural well-being of people and communities, the need to maintain and enhance the quality of the environment, and the needs of future generations. In other parts of the public sector, a sustainable development approach can be a means of planning and reporting on the achievement of outcomes and statutory requirements.
- 2.87 The New Zealand government is collaborating with the Australian Commonwealth, State, and territory governments on, and has entered into, a joint Framework for Sustainable Procurement. It provides a set of guiding principles and best practice examples for public sector organisations. The four principles used to guide public entities to develop sustainable procurement strategies, policies, guidance material, training, and tools are:
- adopting strategies to avoid unnecessary consumption and manage demand;
  - in the context of whole-of-life value for money, selecting products and services that have lower environmental impacts throughout their life cycle compared with competing products and services;

- fostering a viable Australian and New Zealand market for sustainable products and services by supporting businesses and industry groups that demonstrate innovation in sustainability; and
- supporting suppliers to government who are socially responsible and adopt ethical practices.

2.88 In addition, core government departments have mandatory standards and targets for the sustainable procurement and use of some goods or services. A copy of the framework and details of the mandatory standards and targets can be found under the government procurement section of the Ministry of Economic Development's website ([www.procurement.govt.nz](http://www.procurement.govt.nz)).

2.89 Given the growing strategic importance of sustainability in public entities, considerations of sustainability may occur throughout the entire procurement process. For simplicity, we have not included references to sustainability throughout all stages of the procurement process described in these guidelines. Examples<sup>5</sup> of the types of activities that might be carried out, as part of procurement, to assist sustainability include:

- specifying products and services considered to be sustainable;
- verifying suppliers' sustainable management standards;
- including a sustainability clause in contracts;
- rating supplier performance against sustainability criteria;
- insisting on sustainability improvement targets for suppliers;
- assisting suppliers to improve their sustainability performance; and
- encouraging sustainable innovation in the supply of goods or services.

<sup>5</sup> These have been modified from those identified by the Chartered Institute of Purchasing and Supply Australia (2003), *Environmental Purchasing and Supply Management – CIPS Positions on Practice*, page 7.

## Part 3

# Strategic procurement planning

### Developing a procurement strategy

- 3.1 In Part 3 of our overarching guide *Public sector purchases, grants, and gifts: Managing funding arrangements with external parties*, we discuss the need for a public entity to take a strategic approach to managing public funds. Although it may not always be separately identified as a specific discussion, this high level thinking will often involve considering the different types of funding arrangement a public entity could use. In these processes, a public entity will often make fundamental decisions on the types of funding arrangements it will use to achieve its goals, and on how important a particular type of funding arrangement is for its work.
- 3.2 If these issues have been well considered, it should be relatively simple to understand the importance of procurement to the public entity achieving its overall goals and business strategy. This Part provides guidance on developing a procurement strategy when procurement has been identified as integral to the business strategy.

### Strategic procurement planning and analysis

#### Expectations

- 3.3 We expect that each public entity will have a thorough understanding of the:
- type of procurement that it does;
  - value and risk associated with the procurement; and
  - importance of procurement to achieving its overall goals and business strategy.
- 3.4 A public entity should develop a procurement strategy if procurement is integral to achieving the overall business strategy.
- 3.5 Where procurement is not integral, a public entity should still be able to demonstrate:
- a knowledge of the type, value, and risk associated with the goods or services it procures; and
  - that policies and procedures are in place for those involved in procurement activity to ensure that good procurement principles and practices are adopted.

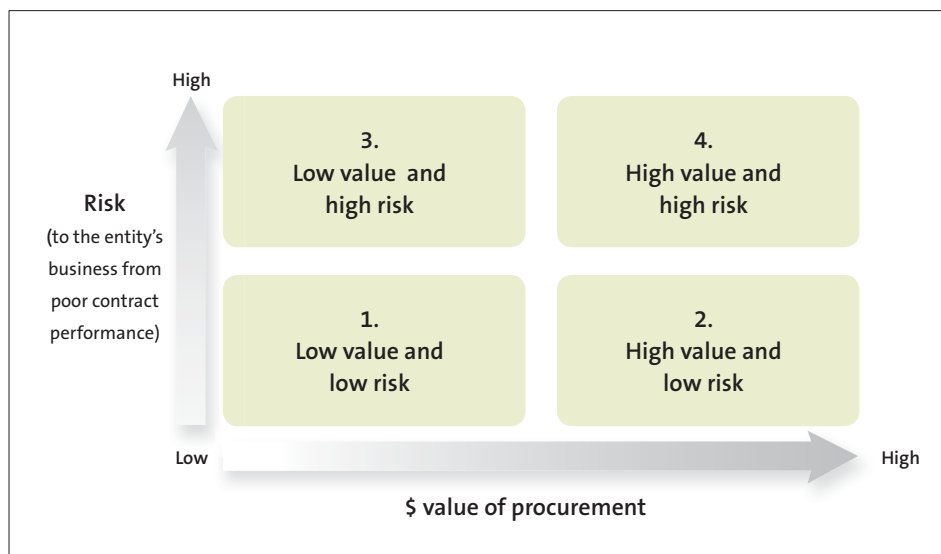
#### Guidance

- 3.6 A public entity's relevant policies and procedures should include a strategic component that assesses whether procurement is sufficiently integral to the business strategy that it warrants a separate procurement strategy. To do this, a public entity will need to understand what it is procuring and how integral this is to its overall business goals.

- 3.7 Regardless of the size of the function, a public entity should know:
- what goods and services it procures;
  - how much it spends by category type and also on individual procurements;
  - its main suppliers and the volume and value of the procurements; and
  - the main markets it procures in.
- 3.8 The public entity should include guidance in its policies and procedures on how it will develop and implement its procurement strategy. The guidance should cover:
- who will have overall responsibility for procurement planning;
  - who will be involved in the planning process and when they will be involved; and
  - how the procurement strategy will be linked with the public entity's broader strategic planning processes.
- 3.9 If the procurement function is large, a public entity may need to have systems in place to gather and analyse information on its procurement activities. It will also need to decide:
- how it will gather this information; and
  - how the information will be analysed and used for decision-making.
- 3.10 The strategies a public entity uses to approach markets can range from simple credit card purchases with local suppliers to complex multi-stage offers. When deciding which strategy to use, a public entity should take into account:
- the value and risk of the goods and services;
  - the availability of the goods and services;
  - the importance of the goods and services to the public entity;
  - the characteristics of the market and any action the public entity may want to take to develop or otherwise influence the market;
  - the transaction costs associated with the procurement; and
  - government policy objectives – for example, sustainability.
- 3.11 There are a variety of tools and techniques public entities can use to help them with their strategic procurement analysis. One tool that is widely used in strategic analysis is matrix analysis (sometimes referred to as quadrant or portfolio analysis). Typically, some aspect of risk, difficulty of supply, importance to the organisation, or equivalent is plotted on a graph against expenditure on various goods or services. Combinations of these factors and the goods or services are then categorised into four quadrants on the graph.

- 3.12 Figure 2 shows how the risk and value of the procurement provides a useful categorisation of goods and services as a means for identifying and developing different strategic responses for each category. This approach can help a public entity to choose an appropriate procurement strategy to address the risk and value of the goods or services being procured. A public entity may also find it useful to establish what proportion of its total expenditure on procured items is in each quadrant. Typically, quadrant 4, high risk and high value items, can make up more than half the value of the public entity's total expenditure on procured goods and services.

**Figure 2**  
Analysing type of procurement to identify procurement method



- 3.13 Figure 3 is derived from the Queensland Government Department of Public Works' Better Purchasing Guide *Developing "Agency Purchasing Procedures"* (which can be found on its website at [www.qgm.qld.gov.au](http://www.qgm.qld.gov.au)). Figure 3 shows how four-quadrant analysis can be developed into a basic procurement strategy. It also sets out the issues a public entity should consider when developing procurement procedures for each category.

**Figure 3**  
Options for approaching markets

Characteristics	Basic procurement strategy	Issues to consider when developing procurement procedures
<b>Low value and low risk (Quadrant 1)</b>		
<p>Goods or services in this category are usually low value. These goods or services can be routinely procured or procured as required. They are generally goods or services for which demand cannot be aggregated to establish standing offers. The transaction costs associated with procuring them may be of greater cost than the items themselves.</p> <p>Generally, there are competitive local supply markets for goods or services in this category, even at the local level.</p> <p>The skills required for these types of transactions are generally administrative.</p>	<p>Keep procurement in this quadrant relatively simple to minimise procurement and transaction costs.</p> <p>Devolve procurement and associated budgets to the lowest practical geographic level where competitive local markets exist.</p> <p>Establish efficient local procurement arrangements to minimise processing costs.</p> <p>Document the administrative procedures for procuring goods or services in the entity's procurement policies and procedures.</p>	<p>What are the goods or services procured in this category?</p> <p>For the different goods, services, or groups of items in this category, what procurement methods will minimise processing costs and deliver value for money?</p> <p>How will the number of competitive offers needed to deliver value for money, probity, and accountability be determined?</p> <p>Who will be doing procurement activities in this category?</p> <p>What skill levels are required to do the various types of procurements?</p> <p>What expenditure and procurement authorities/approvals are needed for management control and to ensure probity and accountability?</p> <p>What other procedures, documentation and records are needed to manage the procurement function in this category?</p>
<b>High value and low risk (Quadrant 2)</b>		
<p>Goods or services in this category are generally widely used by public entities, they have no special quality, safety, reliability, or environmental implications, they are simple to specify, and they have common standards.</p> <p>Procurement of these items is often in high volumes but with sometimes low value individual transactions. There are often whole-of-entity or syndicated arrangements for supply of these goods or services.</p>	<p>Aim to ensure that total costs, including the costs of processing large numbers of low value transactions, are reduced.</p> <p>Consider using standing offer arrangements with electronic ordering and transaction processes.</p> <p>Aggregate procurement to increase the attractiveness of buying the goods or services, thus increasing the competitiveness of the pricing.</p>	<p>What are the goods or services purchased in this category?</p> <p>Where are the competitive markets for these goods or services?</p> <p>Does the aggregation of procurement at the local level for particular product types warrant a full service provider with regional delivery capability?</p> <p>Where is it practical to establish standing offer arrangements or other methods of supply?</p> <p>Are processes such as electronic ordering/paying or other processes available to reduce processing costs?</p>



Characteristics	Basic procurement strategy	Issues to consider when developing procurement procedures
<p>Buying is usually an administrative task (for example, booking travel). However, high level procurement skills are required to establish and manage these arrangements (for example, setting up travel arrangements).</p>	<p>Document the administrative procedures for buying in the entity's procurement policies and procedures.</p> <p>Consider if there is a need to address environmental issues about disposal, waste management recycling, handling, or storage.</p>	<p>How will the buying strategies to deliver value for money, probity and accountability be determined?</p> <p>What skills are needed to establish and buy from standing offer arrangements?</p> <p>What skills are needed for the other buying methods used in this category?</p> <p>What expenditure and procurement authorities/approvals are needed for management control and to ensure probity and accountability?</p> <p>What systems and supporting procedures, including expenditure and procurement authorities/ approvals, are needed for management control and to ensure probity and accountability?</p>
<b>Low value and high risk (Quadrant 3)</b>		
<p>Goods or services in this category are usually highly specialised (for example, high-tech medical equipment).</p> <p>There are often very few potential suppliers. There are relatively few transactions in this category.</p> <p>High-level procurement and technical skills are required to establish and manage these arrangements.</p> <p>Price may not be the principal factor in the procurement.</p>	<p>Reduce exposure to limited sources of supply. This can be done through actively identifying alternative sources of supply and/ or changing the demand requirements of the public entity.</p> <p>Prepare individual strategies or procurement plans for each procurement project in this category.</p>	<p>An individual procurement strategy/plan will need to be developed for each item in this category. The public entity's procurement policies and procedures need to provide an efficient mechanism to do these procurement projects.</p> <p>What organisational systems and procedures need to be in place to do procurement and contract management in this category?</p> <p>How will the required procurement, technical and other expertise be identified for each project?</p> <p>How will project managers be identified and what responsibilities and authority will they have?</p> <p>How will projects be integrated into the public entity's other business activities?</p> <p>What systems and supporting procedures, including expenditure and procurement authorities/ approvals, are needed for management control and to ensure probity and accountability?</p>

Characteristics	Basic procurement strategy	Issues to consider when developing procurement procedures
<b>High value and high risk (Quadrant 4)</b>		
<p>Goods or services in this category are often a complex “bundle” or “package” of services and associated goods that are critical to the service delivery of the public entity.</p> <p>Long-term relationships with suppliers are common. Supplier attitudes to the public entity as a customer are often critical to the value the entity will derive from the delivery of the goods and/or services.</p> <p>High-level purchasing and technical skills are required to establish and manage the procurement process.</p>	<p>Focus on ensuring that the successful supplier has the ability, availability, and resources needed to work with the public entity.</p> <p>Manage the relationship with the supplier to obtain value for money.</p> <p>Have a detailed understanding of what is required, how the arrangement should be managed, and the market characteristics.</p> <p>Develop individual procurement strategies or plans for each procurement project in this category.</p>	<p>Buying strategies will have been developed for each item in this category. The public entity’s policies and procedures need to provide an efficient mechanism to do these procurement projects.</p> <p>What organisational systems and procedures need to be in place for doing purchasing and contract management in this category?</p> <p>How will the required purchasing, technical, and other expertise be identified for each project?</p> <p>How will project managers be identified and what responsibilities and authority will they have?</p> <p>How will the projects be integrated into the public entity’s other business activities?</p> <p>What systems and supporting procedures, including expenditure and procurement authorities, are needed for management control and to ensure integrity and accountability?</p>

## Planning for the procurement

### Preparing a business case

#### Expectations

- 3.14 We expect a public entity to:
- prepare a business case to support the procurement of higher value and higher risk items; and
  - require the business case to be part of the project approval process.
- 3.15 In some instances, a public entity may use a preliminary business case or equivalent document in the early stages of a particularly large or complex procurement. It will then refine this case into a full business case.
- 3.16 A public entity should carry out an appropriate level of market research to ensure that it prepares a good business case and that it makes an informed decision on the procurement method.

3.17 In all cases, the scale and complexity of the business case should be proportionate to the risk and value of the procurement.

**Guidance**

3.18 A public entity should include guidance on preparing a business case in its relevant policies and procedures. This guidance should outline:

- when a business case needs to be prepared; and
- what the business case should contain.

3.19 As a minimum, the guidance should require every business case to:

- identify the outputs and outcomes to which the procurement process contributes;
- identify the specific objectives of the proposed procurement;
- assess the costs, benefits, and risks involved;
- examine whether the initiative is feasible;
- identify the preferred strategy and method for the procurement;
- identify and assess options;
- provide for consultation with affected persons;
- show that the preferred option will meet the procurement objective; and
- justify any departure from a procurement method that the public entity is required to follow.

3.20 The guidance should also cover the type of situation where market research should be considered and examples of the types of market research that may be done.

3.21 The extent of the research required will depend on the value and risk of the procurement. Doing market research is particularly important when the public entity does not have comprehensive knowledge of the market.

3.22 In some cases, the public entity will be looking for a more detailed understanding of the supplier market and the range of technologies that might be available. In these cases, a formal request for information (RFI) may be appropriate.

3.23 Local authorities will need to take account of the decision-making requirements in the Local Government Act 2002, including requirements to assess the costs and benefits of options and to consider community views at various stages of the decision-making process. In some cases, a business case may need to provide for consultation or engagement with affected persons.

3.24 Local authorities may also wish to refer to relevant guidelines produced by the New Zealand Society of Local Government Managers. Reference to the guidelines is included on its website ([www.solgm.co.nz](http://www.solgm.co.nz)).

## Specifying the goods or services

### Expectations

- 3.25 We expect a public entity to clearly specify goods or services before procuring them. If a public entity is using a competitive proposal process and the public entity is open to innovation, the specification may focus on the outputs and outcomes rather than the process to be followed to deliver the outputs or outcomes.
- 3.26 The specification should contain a clear, concise, logical, and accurate description of the goods or services being procured. This will help potential suppliers and those who will be involved in making the procurement decision.
- 3.27 Government departments' specification of goods or services must adhere to the applicable government policies and the *Mandatory Rules for Procurement by Departments*.

### Guidance

- 3.28 A public entity should include guidance on specifying goods or services in its relevant policies and procedures. This could include the different types of specification of goods or services (such as the examples in paragraph 3.29), and when each should be used.
- 3.29 Examples of different types of specifications are:
- a functional specification, which focuses on what is to be achieved from the procurement – that is, the desired outcome, rather than how it will be reached;
  - a performance-oriented specification, which defines the performance parameters required of the goods or services but not the methods to be used to achieve them;
  - a technical specification, which usually sets out the physical characteristics of goods (for example, their size or capacity, the type of materials they contain, or their tolerance) in a highly prescriptive way; or
  - a combination of the above.
- 3.30 Other potential contents of a specification include:
- mandatory requirements and non-mandatory preferences for the goods or services;
  - requirements relating to timetable, delivery date, and so on; and
  - performance standards, including key performance indicators and targets that cover inputs (the total resources), outputs (what will be produced), and outcomes (the effects of the service).

### Procurement plan

- 3.31 Individual procurement plans should usually be considered for higher value and higher risk procurement – that is, those goods or services identified by public entities as being in quadrants 2, 3, and 4 of Figure 2 – and occasionally for those in quadrant 1.
- 3.32 Procurement planning is necessary to identify:
- the best way to approach the procurement of goods or services (through information gathering and analysis);
  - risks associated with the procurement of goods or services early so that they can be managed; and
  - ways of achieving the objectives defined for the procurement, in line with the public entity's procurement strategy.

### Expectations

- 3.33 We expect a public entity to prepare a procurement plan that brings together the previous analysis and requirements in the planning process.
- 3.34 The content and size of the procurement plan will vary depending on the value and risk of the procurement, and the size and resources of the public entity.

### Guidance

- 3.35 A public entity should include guidance on developing a procurement plan in its relevant policies and procedures. This guidance should cover when a procurement plan needs to be prepared and the expected contents of a plan.
- 3.36 The amount of detail in the plan will depend on the value and associated risk of the procurement. The content may include:
- the project scope;
  - the procurement method;
  - selecting an evaluation model (including the evaluation criteria) and process (see paragraphs 7.21-7.30);
  - the type of contract and contractual conditions (see paragraphs 3.37-3.46);
  - the responsibilities of the public entity's staff and any other stakeholders;
  - the risks;
  - the need for independent oversight or assurance over the process (see paragraphs 3.47-3.52);
  - the timelines and key milestones;
  - the resources needed (for example, project manager, evaluation team members, tender or proposal manager, and approving authority); and

- the budget, including the budget for conducting the procurement (for example, for external quality assurance, independent assurance, legal advice, and project management).

### Selecting the type of contract

- 3.37 The form of the contract will depend on the value and complexity of the purchase as well as the nature of the goods or services being procured, the uncertainties that may be involved in contract performance, and the extent to which the public entity or the supplier is to assume the risk of the cost of performance of the contract. Contracts differ in the degree of responsibility assumed by the supplier.
- 3.38 For low value, low risk purchases, the contract will be as simple as completing a purchase order or requesting goods and services with a procurement card (see paragraphs 4.8-4.9). For medium value, low risk purchases, a short form contract may be required. For higher value and higher risk purchases, a more detailed contract will be required that reflects the risk and nature of the goods and services being procured. The following expectations and guidance relates to higher value and higher risk purchases.

#### Expectations

- 3.39 We expect the contract terms used to be appropriate to:
- the nature of the goods or services;
  - any anticipated uncertainties in the supplier's ability to perform its contractual obligations; and
  - the extent of any risk that the supplier will be required to assume.
- 3.40 A public entity's procurement contract should:
- be comprehensive enough to meet the objectives of the procurement;
  - reflect the full specification of the goods or services;
  - be consistent with the conditions specified for the procurement process;
  - define and protect the rights and obligations of all parties;
  - be consistent with the entity's statutory functions, duties, and powers;
  - be fair to both parties and pass the "sense test", particularly where clauses cover limitations or exclusions of liability, indemnities, warranties, and intellectual property;
  - be included in the procurement documents, and respondents should be required to confirm whether they would accept the proposed contract terms (or propose alternative terms); and
  - comply with relevant public sector constraints – for example, the contract may not be able to contain indemnities, and cannot contract out of the Official Information Act 1982.

**Guidance**

- 3.41 A public entity should include guidance in its relevant policies and procedures on the factors that should be taken into account when selecting the type of contract – for example:
- the nature of the goods or services;
  - the type and complexity of the procurement;
  - the likely administrative costs for both parties;
  - any likely difficulty in clearly defining the contract requirements;
  - how much technical or operational co-ordination the public entity will need to provide;
  - the intended duration of the contract;
  - the likely volatility of cost inputs; and
  - the extent of risk that either party will have to assume.
- 3.42 The guidance should also set out the circumstances when the public entity should seek legal advice or assistance in preparing the contract. Legal advice will often be required in a procurement process, particularly for high risk, complex, or strategic procurements. The public entity should consider this advice early in the planning stage, since it may need to develop specific documentation, including a draft contract, to accompany the procurement documents.
- 3.43 An incomplete understanding of limitations or exclusions of liability, indemnities, warranties, and intellectual property and the resulting risks can lead to unnecessarily conservative contractual positions, which reduce the opportunities that may evolve from a contract.
- 3.44 The guidance should specify that the contract needs to reflect the relationship that the public entity wishes to establish with the supplier. For example, as well as the more traditional “arm’s length” contracts, partnering or alliances are increasingly being used (see paragraphs 6.9-6.13 for further details on these two methods).
- 3.45 The guidance should set out the types of issues that the contract should cover – for example, who owns intellectual property created under the contract, and defining and ensuring the public entity’s right to use background intellectual property.
- 3.46 The guidance should also set out the types of standard conditions that the contract might include – for example:
- conditions relating to termination, default, and insurance liabilities; and
  - special conditions specific to the procurement – for example, delivery and payment conditions, financial and performance guarantees, liquidated damages, copyright, confidentiality, and dispute resolution.

## Independent oversight or assurance over the process

- 3.47 The public entity team managing the procurement and other personnel either directly or indirectly involved must be fully accountable for the procurement process and ensure that it is in line with accepted standards. To help them fulfil this role, a public entity may appoint an independent adviser for high value, high risk procurement to oversee the process.

### Expectations

- 3.48 We expect that appointing an independent adviser should not be seen as a way of avoiding having sound processes. It does not reduce the accountability of the public entity for running a good process. The public entity must retain primary responsibility for ensuring that appropriate professional standards are met. The public entity is accountable for the decisions that it makes.
- 3.49 The appointment of an independent adviser cannot be used to transfer risk from the public entity to someone else.
- 3.50 An independent adviser should be engaged early in the procurement process. The public entity should prepare terms of engagement that clearly set out the role and scope of the engagement.

### Guidance

- 3.51 A public entity should include guidance in its relevant policies and procedures on the situations where a public entity should consider engaging an independent adviser. An independent adviser may be engaged for particularly large, complex, or sensitive transactions. However, complexity alone is not enough to justify using an independent adviser, because a public entity should be able to monitor compliance with its own procurement standards and not have to rely on “contracting in” such expertise.
- 3.52 The terms of engagement should include:
- who the independent adviser will report to (this should normally be to the person or body responsible for the procurement);
  - the scope of the engagement;
  - the timing of the independent adviser’s reports (usually at important stages of the procurement process and at the end of the process);
  - attendance at meetings; and
  - remuneration, or the method for determining it.



## Part 4

### Direct procurement

- 4.1 Open competitive processes – for example, inviting quotes, tenders, or proposals from more than one supplier – will not be applicable for all procurement by a public entity. In some instances, a public entity may procure directly from a supplier. In deciding to take this approach, a public entity will need to consider the value and risk of the purchase as well as the outcome that it intends from the procurement.
- 4.2 A public entity's policies and procedures need to include guidance so staff understand when they are able to go directly to a supplier to procure goods or services. This guidance could include indicative dollar thresholds.

#### Procuring directly from a supplier

##### Low value, low risk goods or services

###### Expectations

- 4.3 We expect that a public entity will consider purchasing directly from a supplier where:
- the value of the goods or services is very low;
  - the purchase of these goods or services is on an as-required basis;
  - it is not practical to aggregate separate orders for the goods or services; or
  - the cost of seeking quotes or tenders would be out of proportion to the value of the benefits likely to be obtained or impractical in the circumstances.
- 4.4 We expect a public entity to have clear policies and procedures in place that set out what is reasonable expenditure in these situations, the method of payment, and the documentation that staff members must retain to support the procurement.
- 4.5 We expect a public entity to ensure that staff are aware of, and comply with, its sensitive expenditure policies.

###### Guidance

- 4.6 A public entity should include guidance in its policies and procedures on:
- the types and values of the goods or services that can be procured directly from a supplier; and
  - the procedures to be followed, including the method of payment, the documentation to be retained for proof of procurement, and the requirements for authorising the procurement.

- 4.7 A public entity should also have procedures in place to ensure that:
- the rates are reasonable and consistent with the market rates for items of a similar nature;
  - it does regular reviews to ensure the reasonableness of prices, including randomly inviting quotations at appropriate time intervals;
  - the required goods or services are not split into components or a succession of orders to enable orders to be placed without seeking competitive prices; and
  - fairness and equity are assured.

### Procurement cards

- 4.8 Using procurement cards can be an efficient way to procure low value and low risk goods and services, because:
- Cardholders can purchase directly from a supplier, which reduces costs. They do not have to fill in purchase request forms that have to be processed by purchasing staff.
  - Cardholders can order and receive items much more quickly – often the same day. This reduces the need for large inventory holdings.
  - Less time spent checking and authorising purchases improves efficiency. The price of the item is charged to the card. At the end of an agreed period, the public entity will receive a statement listing the purchases so that they can be verified. The card company sends a consolidated invoice to the public entity, which is settled in one payment.
- 4.9 A public entity should ensure that it has robust policies and procedures around the use of procurement cards. A public entity should consider procedures that:
- assign the procurement card to a named individual and a cost centre;
  - limit the procurement cardholder to certain suppliers, certain types of goods or services, and a certain monetary value;
  - limit the monthly expenditure on the procurement card; and
  - ensure that the monthly transactions are reviewed and verified by the procurement cardholder's manager.

### Selective procurement

#### Expectations

- 4.10 We expect that, for higher risk and higher value procurement, a public entity will normally use a competitive process (for example, a quote or tender). However,

there are circumstances where a public entity will be justified in procuring from a selected supplier. Examples include where:

- the goods or services require specialised skills or are very complex and there is a limited number of qualified suppliers;
- the required goods or services are available from only one source;
- only one supplier has the capacity to deliver at the time required, and this can be adequately attested; or
- standardisation or compatibility with existing equipment or services is necessary, and can be achieved through only one supplier.

4.11 We expect selective procurement decisions to be supported by a properly developed business case and market research to reveal those suppliers that have the appropriate level of skill to provide the goods or services.

#### **Guidance**

- 4.12 A public entity should include guidance in its policies and procedures on:
- the procedures for deciding when a selective procurement is warranted;
  - the procedures required to identify a supplier and confirm the supplier's capability to deliver the goods or services;
  - the need to assess the supplier's performance against established criteria; and
  - the need for market testing. A public entity should satisfy itself from time to time that a selective procurement is still justified. This might include advertising to seek expressions of interest from other suppliers.
- 4.13 Each decision to make a selective procurement should be:
- taken systematically by staff who have the necessary knowledge and experience of the procurement environment – assisted, as required, by external expert advice; and
  - supported by an approved business case.
- 4.14 A public entity should identify a supplier using information about all known possible alternative suppliers. Before deciding to make a selective procurement, a public entity should take adequate steps to ensure the supplier's suitability, and to document what information it obtained in this check. Steps might include obtaining references (with the supplier's consent) that attest to the standards of the supplier's past performance.

## Emergency procurement

- 4.15 In an emergency, it may not be possible to satisfy the principle of open and effective competition throughout the procurement process. A public entity may therefore dispense with parts of the procurement process if it needs to react quickly to genuinely unforeseen events.

### Expectation

- 4.16 We expect a public entity to use emergency procurement only in genuinely unforeseen urgent circumstances. Poor planning or organisation of a procurement does not justify using an emergency process.

### Guidance

- 4.17 A public entity should include guidance in its relevant policies and procedures on what constitutes an emergency. Relevant criteria may include when:
- life, property, or equipment is immediately at risk; or
  - standards of public health, welfare, or safety need to be re-established without delay, such as disaster relief.
- 4.18 The guidance should set out the procedures that should be used in an emergency. Relevant issues include:
- lines and levels of authority and control – who is authorised to do what; and
  - quality control – in general, the procurement should be limited to what is necessary to cope with the emergency.
- 4.19 The guidance should also set out what quality assurance and self-review needs to be put in place. Points to cover could include:
- Were the staff used in the procurement process appropriately qualified and trained?
  - Were the prescribed criteria and procedures followed?
  - Was the outcome satisfactory, and what lessons can be learned?
  - Did the public entity's management systems identify procurement requirements in a timely way?

## Standing arrangements

- 4.20 Standing arrangements are procurement arrangements where a public entity is able to procure directly from suppliers for an agreed period of time. A public entity can set up these standing arrangements after a competitive process, or a public entity may wish to take advantage of competitive processes used by other public entities (for example, by joining a syndicated procurement arrangement).

- 4.21 Entering into standing arrangements is a reasonable procurement strategy for the goods or services identified as being in quadrant 2 of Figure 2 – goods or services that have high value but where the risk to the entity is low. These goods or services are generally widely used by public entities. They have no special requirements, are simple to specify, and have common standards.
- 4.22 Examples of the types of goods or services that could be considered for these arrangements, depending on their value, include:
- fuel;
  - motor vehicles;
  - air travel; and
  - stationery.

### **Syndicated procurement**

- 4.23 Syndicated procurement involves groups of public entities aggregating their procurement requirements to achieve improved outcomes through greater purchasing power and reduced procurement costs.
- 4.24 The two syndicated procurement models most widely used by public entities are:
- the common use provision (CUP) – where a public entity includes a CUP clause in its procurement and contract documents to enable eligible public entities to join the contract for its remaining term; and
  - a cluster – where a group of public entities collaborate before going to the market and approach the market collectively (that is, they aggregate their requirements). Other public entities cannot subsequently join the contract unless the contract contains a CUP clause.
- 4.25 Both models may be combined to provide the greatest degree of flexibility for all potential participants.

### **Expectations**

- 4.26 We expect public entities to be aware of the Commerce Act 1986 and avoid anti-competitive conduct and arrangements.
- 4.27 We expect a public entity to be aware of, and comply with, the conditions that apply to public entities setting up and joining syndicated CUP contracts. A full list of those conditions can be found in the government procurement section of the Ministry of Economic Development's website ([www.procurement.govt.nz](http://www.procurement.govt.nz)).

### **Guidance**

- 4.28 If a public entity has had involvement with, or intends to be involved in, syndicated procurement, its relevant policies and procedures should cover those arrangements.

- 4.29 A public entity should include guidance in its policies and procedures on the need for the public entity to carefully consider the effects of the syndicated procurement on the market.
- 4.30 The guidance should include what a public entity should consider when looking at the effects of syndicated procurement on the market and what it needs to do to comply with the Commerce Act 1986. For example, a further increase in volume delivered by a single supplier, even at more favourable rates than competitors, might create a position of market dominance, reducing future competitiveness in the relevant market.
- 4.31 The guidance should also cover the need for the public entity to seek legal advice before entering into arrangements with other entities to jointly procure goods or services. In most cases, such arrangements will not be prohibited by the Commerce Act 1986, but they must be carefully structured. Particular care is needed if the entity is a large purchaser with a substantial degree of market power. Similarly, if a public entity wishes to procure goods or services from joint suppliers, when those suppliers would otherwise compete to supply the goods or services, the public entity should seek legal advice at the earliest possible stage.
- 4.32 The guidance should set out the requirements that apply to public entities when setting up or joining a CUP contract. These include the requirements that a public entity have the Syndicated Contracts Review Board endorse the use of the CUP before the public entity approaches the market with such an arrangement and that a public entity must not join a CUP contract that has not been so endorsed.
- 4.33 Guidance on CUP contracts should also cover the need for a public entity:
- to satisfy itself through market research and analysis that joining a CUP contract offers value for money; and
  - to ensure that the terms and conditions of the contract will meet its needs. The core terms and conditions, including pricing, must not be renegotiated for individual participants. Any negotiation should be limited to service levels and schedules.
- 4.34 Guidance on cluster arrangements should cover the need for a public entity to clearly understand the terms of the contract, especially:
- responsibilities for managing the contract;
  - responsibilities for contract reviews;
  - responsibilities for arranging additional terms;
  - termination provisions, including options on termination;
  - pricing options; and
  - protection of supplier pricing and contract information.

- 4.35 Guidance on cluster arrangements should also address the need for a procurement plan. It is necessary that each entity in the cluster has a common understanding of:
- the role of the syndicate members and the responsibilities of the designated lead public entity – for example, to issue the RFP and receive tenders or proposals;
  - the procurement requirements and the specifications;
  - the method of procurement;
  - how the goods or services will be evaluated;
  - the form and content of the contract with the supplier;
  - the initial contract management strategy, transition arrangements, and performance management measures; and
  - termination and re-tender or proposal procedures.
- 4.36 If the cluster appoints a private sector agent to conduct the procurement process on its behalf, additional considerations include:
- the form and content of the contract with the agent;
  - potential changes to the risk profile of the procurement that arise from involving a third party; and
  - the need for the agent to comply with important principles and practices (see the over-riding considerations in Part 2).
- 4.37 In line with the *Mandatory Rules for Procurement by Departments*, government departments need to publish a notice on GETS inviting interested suppliers to submit a tender or proposal or apply to meet conditions of participation in the syndicated procurement process.
- 4.38 The lead entity is not responsible for managing the contractual relationship between the supplier and any participating public entity, but it is responsible for any contract benchmarking, review negotiation, and price changes for participating public entities during the term of the contract. A contract management plan is essential to ensure that benefits anticipated from the contract are achieved. Cluster members need to assure themselves that:
- each entity has appointed a manager to manage its relationship with the supplier;
  - each entity understands the lead entity's responsibility for managing the core contractual conditions;
  - there is a process for resolving disputes and settling grievances between the cluster members and the supplier; and

- there is provision for identifying problem areas at an early stage and for initiating remedial action.

4.39 The contract should set out how a cluster member can exit the arrangement. Careful consideration should also be given to conditions for terminating the contract during the period of the contract. Lead entities should consult with cluster members when completing or renewing the contract. Any extension of the contract should be in keeping with the contract extension clause in the contract.

4.40 If the procurement will involve the development of intellectual property, cluster members should:

- clearly identify who (the cluster or the supplier) owns any intellectual property developed; and
- identify any background intellectual property and secure the cluster's right to use it.

### Panel contracts

4.41 A panel contract (or panel arrangement or standing offer) is a contractual arrangement with a group of suppliers to provide services as and when required, under a schedule of rates for each supplier or based on a quotation.

4.42 Panel contracts are appropriate where:

- fixed prices, fees, or rates can be agreed with each supplier;
- the “demand” or requirement for goods or services cannot be predicted;
- the goods or services do not all need to be provided by the same supplier;
- there are specific requirements, such as specialist skills and knowledge;
- allowing for greater choice of supplier is seen as an advantage or provides a contingency in case an alternative supplier is required because a conflict of interest arises with a preferred supplier;
- goods or services may need to be procured at short notice;
- a public entity may need a variety of skills at different stages; and
- it cannot be predicted that one supplier could provide the goods or services at any point in time – for example, the work cannot be handled by one particular supplier alone.

4.43 This method is most commonly used for the supply of professional services, such as legal advice, IT advice, financial and accounting advice, and specialist consultancy services.



**Expectations**

- 4.44 We expect a public entity to set up panel contracts through a competitive process.
- 4.45 We expect a public entity to decide the method it will use to divide the work between the panel members before it invites potential suppliers to participate in the competitive process. The potential suppliers should be made aware of the method, and the method should be followed.
- 4.46 A public entity should ensure that the panel contract has a provision that enables the public entity to review membership and remove panel members if required. The contract should specify grounds for terminating a supplier's membership of the panel.
- 4.47 If the rate of use of the panel falls below expectations, a public entity should review the need for retaining the panel contract.

**Guidance**

- 4.48 A public entity's relevant policies and procedures should include guidance on the need for the procurement documentation to make it clear that the public entity is seeking to engage a panel. For example, the documentation should include:
- how many suppliers will be on the panel – if this is undetermined, the documentation should set out how the evaluation team will decide it;
  - the criteria the public entity will use to evaluate suppliers against each other and against the public entity's needs;
  - what will be required of suppliers in terms of service levels, response times, and other performance measures;
  - how the public entity will engage panel members to do particular work; and
  - circumstances that may lead to a supplier being removed from a panel, such as insolvency.
- 4.49 The public entity needs to decide how it will allocate the work to panel members before it advertises its intention to set up the panel. This information needs to be included in the procurement documents. The type of methods that may be used are:
- **Hierarchical** – One panel member receives most of the work unless they are unable to supply the public entity's needs or have a conflict of interest. In this case, the work is allocated to the next available panel member.
  - **Equal division of work** – This can be handled by an upper limit arrangement, where the next supplier is chosen once a specified dollar limit is reached by one supplier.
  - **Rotational basis** – Work is distributed to each panel member in turn regardless of value or time.

- **Reliability and expertise** – Work is allocated to the panel member who is most suitable and available.
- 4.50 A public entity's policies and procedures should cover the need to treat panel members fairly and to maintain a competitive supply base.
- 4.51 Public entities should also provide guidance on the types of method of engagement and the circumstances where each applies. For example:
- **Standing offer arrangements** are usually used for services as required, often on the basis of a tender or proposal, quotation, or other arrangement (for example, a fixed fee arrangement). Generally, the “offer” has a limited time frame after which it would lapse and a new set of fees or arrangements would be negotiated.
  - **Period contracts** involve an individual contract with each panel member for a fixed period of time. Generally, period contracts incorporate other more complex elements than time.
  - **Retainers** are generally used for professional advisory or consultancy services. The panel member is paid a prescribed fee to ensure access to defined services or to a defined amount of services, for a period when required. This is probably the least common arrangement because it involves a forward payment for services that may or may not be used.
- 4.52 The guidance should also specify the number of suppliers to include on a panel. This is a matter of judgement and may differ for each type of goods or services being provided. In determining the number of suppliers on the panel, the public entity should consider:
- the anticipated amount of work to be performed;
  - the type and breadth of work to be performed and whether individual panel members are able to fulfil all requirements;
  - the cost to the panel members and the public entity of the procurement arrangement; and
  - the numbers that would ensure a reasonable level of work for all panel members.

## Part 5

# Competitive processes

- 5.1 Decisions on how to approach the market are best made in the context of a public entity's procurement strategy.
- 5.2 Depending on the value and risk of the procurement, competitive processes can involve verbal quotations, written quotations, or formal written tenders or proposals.
- 5.3 In principle, advertising an open request for tender or proposal should be the preferred method for higher value and/or higher risk procurement (quadrants 2, 3, and 4 of Figure 2). It offers all interested suppliers fair and equitable opportunity, and allows a range of competing offers to be evaluated when assessing value for money. However, the method should be appropriate to the market for the particular goods or services, and the circumstances of the procurement. These considerations may mean that an open call for tender or proposal is not practicable or cost-effective, or may not produce the best procurement outcome.

### Quotations

#### Verbal quotations

- 5.4 Verbal quotations provide a quick and convenient way of exploring the market and determining availability and price for low value, low risk goods or services.

#### Expectations

- 5.5 We expect that using quotations will not change the requirement for good procurement practices.
- 5.6 The procurement objective is still to achieve value for money (that is, a combination of quality, reliability, timeliness, service, and whole-of-life cost).
- 5.7 The value and risk of the procurement and the number of potential suppliers should determine the number of quotations the public entity will seek.
- 5.8 Records of decisions, including reasons for recommending and deciding on the selection and rejection of offers, should be kept in a manner that facilitates audit and other normal processes of accountability.

#### Guidance

- 5.9 A public entity's relevant policies and procedures should include guidance on requesting verbal quotations. The guidance should cover the need for the person requesting the quotation to have a clear, written statement of the requirements and any questions to ask before speaking to suppliers. This helps to ensure that they seek the same information from suppliers and can properly compare the goods or services offered.

- 5.10 When staff have received pricing and all other details from suppliers, they can then appropriately decide which supplier to procure the goods or services from.
- 5.11 The public entity's guidance should also specify the need to record the reasons for selecting a particular supplier and maintain an audit trail.
- 5.12 If staff are only getting quotations, they need to be careful when talking to suppliers to avoid inadvertently making a verbal promise to purchase from the supplier.

### Written quotations

#### Expectations

- 5.13 Our expectations are the same as those required for verbal quotations (see paragraphs 5.5-5.8).
- 5.14 As the value and risk of these goods or services is likely to be higher, the process and documentation should be more comprehensive. However, the process and details recorded should still depend on the value and risk of the goods or services.
- 5.15 The value and risk of the procurement and the number of potential suppliers should determine the number of quotations the public entity will seek.

#### Guidance

- 5.16 A public entity's procurement policies and procedures should include guidance on the process that should be followed when requesting written quotations.
- 5.17 The emphasis, time, and detail given to each stage of the process should be proportionate to the value of the goods or services being procured and the level of the risks involved. In every case, however, the process should:
- define the need and specification;
  - establish the potential sources of supply;
  - get the appropriate approval for the procurement;
  - seek written quotations;
  - evaluate responses and select a supplier;
  - get approval for the decision;
  - advise the decision – when the evaluation process is completed, both the successful and unsuccessful participants should be advised of the decision; and
  - monitor performance of the service provider.
- 5.18 There must be a clear understanding of the goods or services to be procured. Generic product names or descriptions may be adequate.

- 5.19 A public entity should provide guidance on the information sources that may be used to ascertain potential service providers – for example, previous orders, common use or period contracts, newspapers and trade journals, telephone directories, catalogues, and the Internet.
- 5.20 The evaluation process should provide a fair comparison between the responses. The evaluation should be conducted by staff with the relevant skills and knowledge appropriate to the value and importance of the procurement. Conflicts of interest should be declared and resolved. The same evaluation method should be applied to each response. The selected quotation should provide the best value for money when evaluated against the evaluation criteria. When the responses have been evaluated and a supplier selected, a short report should be produced outlining the findings of the evaluation process, the recommendation, and reasons for the recommendation (especially if the supplier offering the lowest price is not recommended). For smaller, less complex procurement, the reasons for the selection may be noted on the relevant procurement documents.
- 5.21 The recommendation to accept a quotation should be approved by a staff member with the appropriate delegation. The staff member should satisfy themselves that the best offer, as measured against the evaluation criteria, is being accepted.
- 5.22 The performance of the supplier against the specifications and requirements needs to be monitored. Any goods or services that do not meet the specified requirements should be rejected and the supplier advised. Instances of poor performance should be documented for future reference. Invoices should be reviewed before they are paid to ensure that the goods or services have been accepted and the invoice amount is correct and in line with the agreed terms and conditions.

### Competitive tenders or proposals

- 5.23 There are many expressions used both in government and the private sector that relate to the process of inviting tenders or proposals from the market:
- A *registration of interest (ROI)* or *expression of interest (EOI)* is generally used to request information from suppliers that may be used to identify potential suppliers before seeking tenders or proposals. Usually the information sought is high level and specific.
  - A *request for proposal (RFP)* is a formal means of seeking proposals for goods or services where the public entity is open to innovation on the part of a supplier – that is, where the outputs and outcomes are important, not the process the supplier follows to deliver them. The RFP therefore normally invites suppliers to make a proposal based on specifications, with scope for variety and innovation. This method is usually used to seek a solution to a problem or process.

- A *request for tender (RFT)* is a formal means of seeking tenders to provide goods or services. It is used where the public entity's specification or requirements are clearly defined and there is little room for flexibility or innovation. An RFT is often based on technical, highly prescribed specifications. This method is often used in the construction industry.

- 5.24 In complex procurement activities where the public entity needs to learn more about the goods or services or the market, it may be helpful to use a multi-stage process:
- Stage 1: An ROI or EOI is issued to find out more about the goods or services, the market, and the capability of suppliers to satisfy the procurement need.
  - Stage 2: An RFP or RFT is issued requesting suppliers to submit an offer for goods or services or propose a solution.
  - Stage 3: The public entity evaluates the tenders or proposals received at stage 2 and awards a contract to the preferred supplier.
- 5.25 In addition, a public entity may include another stage between stages 2 and 3 – the best and final bid, where the public entity invites the most promising of the suppliers from stage 2 to submit their final bid.
- 5.26 It is important that a public entity using a multi-stage approach clearly understands the purpose of the approach.
- 5.27 Multi-stage processes are time consuming and expensive for all parties. They should only be used for goods or services categorised as high value and high risk. In these circumstances, a multi-stage process may reduce tendering costs.

### Closed and open tenders

- 5.28 The method of inviting tenders or proposals may also be “open” (all possible suppliers are invited to respond) or “closed” (only some of the possible suppliers are invited to respond). A closed tender or proposal involves inviting a predetermined list of suppliers to respond without an open pre-selection or pre-qualification process as part of a multi-stage process.
- 5.29 Part 7 sets out our expectations and recommended guidance on conducting a tender or proposal process.

### Registered or qualified supplier lists

- 5.30 A variation on the open or closed tender or proposal process is pre-qualification using registered or qualified supplier lists.
- 5.31 Pre-qualification is a method where a public entity assesses suppliers of particular goods and/or services against predetermined criteria and then invites only those

suppliers who satisfy the pre-qualification criteria to respond. The public entity generally includes suppliers that are successful in meeting the pre-qualification criteria on a database it maintains.

- 5.32 Pre-qualification in itself does not form a contractual or legal relationship between the public entity and the pre-qualified supplier. Essentially, the supplier has simply met preliminary standard criteria and will be required to meet other evaluation and performance criteria as part of a procurement process.
- 5.33 Pre-qualification differs from multi-staged procurement and panel contracts in that there is no specific contract in mind when suppliers are pre-qualified. Although there is the potential for pre-qualified suppliers to win many tenders or proposals over time, pre-qualified suppliers are not necessarily given any guarantee of work. Similarly, pre-qualification is not normally used to get price information from suppliers.

#### **Expectations**

- 5.34 A public entity should carefully consider the need for a pre-qualification process. For example, pre-qualification adds no value and is not an appropriate procurement strategy when procuring off-the-shelf goods or services where there are several sources of supply and the value is low.
- 5.35 Government departments should also be aware that the *Mandatory Rules for Procurement by Departments* contain specific requirements relating to registered or qualified suppliers.

#### **Guidance**

- 5.36 A public entity's relevant policies and procedures should include guidance on:
- the information that is required from potential suppliers;
  - the method the public entity will use to evaluate registered or qualified suppliers for inclusion on the list;
  - who will approve a supplier's inclusion on the list;
  - the way the list will be maintained;
  - the way suppliers will be notified of the results; and
  - the documentation and records of the process and the results of the process that need to be retained for probity and audit processes.





## Part 6

### Relational purchases

- 6.1 In our overarching guide, we have minor relational purchase and major relational purchase categories for procurement. We have established these categories to recognise situations where a contract may not fit the conventional market model because:
- there is not an effective or meaningful market to provide the goods or services; or
  - the strategic importance of the goods or services, or of the relationship with the provider, is such that the objectives of the procurement may not be achieved through the market.
- 6.2 These two factors may be more often present for public entities that often purchase goods or services that are essential to the delivery of public sector (and implicitly non-market) services, are highly specialised, or are provided by non-commercial and public interest bodies such as non-governmental organisations.
- 6.3 Other factors that might suggest a relational purchase include the nature of the goods or services purchased, the duration of the relationship between the public entity and external party, the relationship between the public entity or external party and an end user (such as a person receiving health care or other social services), and the specialist nature of the goods or services. For some external parties, there may be other policy goals that are relevant and would suggest a relational approach, such as a goal to support the development of a strong and stable non-government organisation or civil society sector, or a goal to develop strategic relationships or build capacity in some part of the wider state sector.
- 6.4 In such situations, conventional market-based systems for managing a contract may not be appropriate or particularly effective. It may be more useful to give greater weight to the relationship or strategic dimensions of the contract and to develop other systems to manage the dimensions usually managed by competitive market mechanisms.
- 6.5 Common examples of minor relational purchases include contracts to purchase policy or other advice from specialist advocacy or special interest representative groups, highly specialised professional advice, small and specialised research work, or the supply of minor health services or a niche product for a particular and unusual requirement.
- 6.6 Common examples of major relational purchases include residential care or other social support services where the funding arrangement may need to provide stability for end users over many years, major and long-term research contracts, or significant professional or consultancy relationships.

- 6.7 There can be some overlap between major conventional contracts (where an effective market is present and used) and major relational purchases. The growing pattern of managing major contracts through more strategic arrangements, such as alliancing and public private partnerships, have a lot in common with major relational purchases, even if they are developed in the market context.
- 6.8 It is important that public entities recognise that using relational contracts depends on the characteristics of the market and the desired relationship with the supplier. If either of these change, more conventional contracts may be more appropriate.

### Partnering and project alliances

- 6.9 Partnering and project alliances between public and private sector organisations are gaining in popularity as an approach to procuring major infrastructure projects and related services in the public sector.
- 6.10 Partnering refers to mutually beneficial commercial procurement relationships between public and private sector parties that involve a collaborative approach to achieving public sector outcomes. The two main variables in a partnering arrangement are:
- the type of the relationship between the public and private sector parties; and
  - the nature of the outcome and how it is to be achieved.
- 6.11 In a project alliance, the public and private sector parties (often referred to as “participants”) work together as an integrated team to deliver a specific project where their commercial interests are aligned with actual project outcomes. The team is selected on a “best-for-project” basis and is provided with incentives to achieve high performance. All members commit to working through collaboration, innovation, and mutual support. This arrangement requires:
- performance obligations to be stated as collective rather than individual obligations, with an equitable sharing of risk and reward, and adoption of a “no blame, no dispute” culture;
  - governance of the project by the project alliance board (or equivalent), including representatives from all parties, with agreement that all decisions must be unanimous;
  - day-to-day management of the project by a project team that operates as a separate entity from each of the public and private sector parties involved in the alliance agreement; and
  - a transparent and “open-book” approach towards all financial matters, including cost and profit.

- 6.12 The process for selecting alliance participants is normally based on quality criteria alone.
- 6.13 We have reported on partnering and project alliances in our publication *Achieving public sector outcomes with private sector partners*, which can be found on our website ([www.oag.govt.nz](http://www.oag.govt.nz)). Public entities should refer to that report when considering what guidance they need to include in their policies and procedures. The report includes guidance and advice on:
- the need for leadership, expertise, and market development;
  - considering partnering or project alliancing as a procurement choice; and
  - managing those types of contracts.

### **Contracting for services with non-government organisations**

- 6.14 A public entity may enter into both conventional and relational purchases with non-government organisations. These guidelines cover the more conventional contracts. A public entity looking to fund relational arrangements with non-government organisations should also refer to the Treasury's *Guidelines for Contracting with Non-Government Organisations for Services Sought by the Crown* and our good practice guide *Principles to underpin management by public entities of funding to non-government organisations*.



## Part 7

# Conducting a tender or proposal process

### Choosing the appropriate procurement method

- 7.1 Procurement methods are governed by legislation in some circumstances. For example, the Land Transport Management Act 2003 requires certain procedures to be used for approved activities relating to transport.
- 7.2 If there is no statutory requirement to use a particular method, public entities need to decide the method they will use to interact with the potential suppliers of goods or services (the “procurement method”).

#### Expectations

- 7.3 To ensure that the benefits of the method outweigh the costs, we expect a public entity, when selecting the procurement method, to consider:
- the need, wherever possible, to promote open and effective competition throughout the procurement process; and
  - the value of, and risk associated with, the procurement.
- 7.4 The public entity should decide on the monetary levels, the level of risk, and the types of goods or services that will and will not be subjected to a competitive procurement process and the type of process (for example, seeking quotations or using a tender or proposal process).
- 7.5 Government departments should be aware of the requirements in the *Mandatory Rules for Procurement by Departments* on the monetary limits and the procurement method to be used.<sup>1</sup> It should be noted that those monetary limits are a minimum requirement. They should not preclude government departments from using a competitive tender if applying good practice means that it is the most appropriate method.
- 7.6 Open tender or proposal processes are used to promote transparency and value for money. In our view, open tender or proposal processes are most appropriate for middle to high value procurements where there are a number of potential suppliers in the market.
- 7.7 Although closed tender or proposal processes may be appropriate in some circumstances, our preference is for public entities to make limited use of this procurement method. This is because using a closed tender or proposal method does not allow equal access to all suppliers in the market, which means that a better source of supply may be missed. When a public entity uses a closed tender or proposal process, it should document its reason for doing so. It should also properly justify using the closed tender or proposal method.

<sup>1</sup> The Rules will prevail in the event of a conflict between the Rules and these guidelines.

- 7.8 The closed tender or proposal method should not be used to limit the number of potential tenders or proposals. If a public entity wishes to limit the number of tenders or proposals for procurement, it should use the multi-stage method.
- 7.9 We expect a public entity, in deciding whether to use a multi-stage open tender or proposal process, to consider:
- the value and risk associated with the procurement;
  - the degree to which the entity is able to specify the requirement;
  - whether the entity is looking for innovative solutions; and
  - the cost and resources required of both the entity and the potential suppliers.
- 7.10 We expect a public entity to consider using a multi-stage open tender or proposal process only where there are multiple potential suppliers or the public entity is unsure about the size of the market and the likely number of interested suppliers. In other situations, a public entity should carefully consider whether a single-stage open tender or proposal process is more appropriate.
- Guidance**
- 7.11 A public entity should ensure that its relevant policies and procedures outline when a closed tender or proposal may be used – for example, when:
- appropriate market research has identified that the goods or services are only available from a few suppliers;
  - the public entity can demonstrate that it is not practical or cost-effective to conduct an open tender or proposal; or
  - there is genuine limited time for the procurement process and it is not limited because of poor contract management.
- 7.12 A public entity's relevant policies and procedures should also outline how to identify potential suppliers – for example:
- canvassing the market using a variety of sources of information; and
  - making use of any past experience with any particular supplier.
- 7.13 When compiling a list of potential suppliers, a public entity should:
- take account of any applicable government policies (for example, fair opportunity for regional, national, or overseas suppliers);
  - document the method used, and keep adequate records to show that it has followed the method; and
  - ensure that it has addressed any risks under the Commerce Act 1986 and other applicable legislation.
- 7.14 A public entity should include guidance on the multi-stage tender or proposal method in its relevant policies and procedures. This should include guidance on the circumstances when a multi-stage tender or proposal should be used.

- 7.15 The guidance should also set out the information the public entity should seek during the first stage – for example:
- the potential supplier’s contact details;
  - the potential supplier’s qualifications and experience;
  - in the case of services, the potential supplier’s capacity to meet the public entity’s specified requirements; and
  - in the case of goods, what the potential supplier is able to provide.
- 7.16 The guidance should also specify how the evaluation panel (or tender evaluation team) will be appointed. The guidance should also set out the process the panel will use to evaluate the tenders or proposals.
- 7.17 To ensure that it asks the right questions, a public entity should develop and approve the evaluation criteria before it invites potential suppliers to participate. The evaluation criteria should normally consist of:
- compliance check or mandatory criteria (scored as a pass/fail or yes/no); and
  - non-mandatory criteria (which are normally scored on a 0-5 or 0-10 scale) that compliant tenders or proposals are fully evaluated against.
- 7.18 Compliance checks or mandatory criteria should, as a matter of good practice, be highlighted as part of the first stage specification to ensure that potential suppliers who are not able to meet these requirements do not waste their time submitting a response.
- 7.19 A public entity should draw up a shortlist by scoring each response against the criteria. It should also record enough information to keep a full record of the pre-qualification process, and to demonstrate that each response received due consideration.
- 7.20 The guidance should also set out the process for advising shortlisted suppliers that they have been shortlisted and for notifying unsuccessful suppliers that they have not been shortlisted. Unsuccessful suppliers should be offered an opportunity to be debriefed on the reasons they were not shortlisted. The offer of a debriefing should set out the scope and likely format, and should make it clear that the process will not be used to change the selection decision or reopen the process. For other relevant guidance on debriefings, see paragraphs 7.144-7.149.

### Selecting an evaluation model

- 7.21 The main objective of the procurement process is to achieve a good outcome for the public entity – that is, selecting a supplier that has the capability to deliver the goods or services and provides the best value for money. Tender or proposal evaluation models help the evaluation panel decide which potential supplier this is.

- 7.22 Evaluation models are not a science but rather tools to support the evaluation panel in making their decision. Ultimately, the evaluation team is responsible for deciding which option provides the best value for money. However, the chosen tender or proposal evaluation model should provide a rationale to support the evaluation team's decision.

### **Expectations**

- 7.23 We expect a public entity to decide at the procurement planning stage how it will evaluate the tender or proposal. Depending on the value and risk associated with the procurement, it may require an evaluation plan. In any case, a public entity should select and document an evaluation model at the procurement planning stage, and also document the reason why it chose that particular model.
- 7.24 The evaluation model should be set out in the procurement documents so that suppliers know how the tender or proposal will be evaluated. The evaluation criteria should be detailed enough to enable the public entity to assess the relative strengths and weaknesses of each respondent.

### **Guidance**

- 7.25 A public entity should include guidance in its relevant policies and procedures on the types of procurement that will require an evaluation plan.
- 7.26 A public entity should also provide guidance on the types of evaluation models that are available, and when each may be used. For example, the three most commonly used models are the lowest-price conforming model, the weighted-attribute model, and the target-price model. The Brooks' Law model is also used in evaluating proposals for professional services for building and roading contracts.
- 7.27 The lowest-price conforming model is the most basic model, and has the strongest emphasis on price. With this model, the lowest-priced tender or proposal is selected once a prerequisite level of quality is met. It is applicable where additional quality over and above a minimum threshold is not important (that is, it does not offer greater value for money).
- 7.28 The weighted-attribute model is the most common model used in public sector procurement. This model seeks to balance the trade-off between price and quality, and it can be used for goods or services. Under this model, the criteria are weighted to reflect their relative importance. Each criterion in the tender or proposal is scored, and each is multiplied by the relevant weighting to give a weighted score. The weighted scores for each tender or proposal are added up to find the highest scoring tender or proposal. Some weighted-attribute models weight all the evaluation criteria, including price, while others only weight the non-price criteria. If weighting price, it is important to carry out some level of



sensitivity analysis as part of the weighting process to ensure that the price weighting is appropriate. For example, if the price weighting is too high, the evaluation effectively becomes a lowest-price conforming model.

- 7.29 The target-price model<sup>2</sup> is useful when it is difficult to define the scope of the work in the tender documentation or in situations where the budget that is available is the main constraint. In such instances, the public entity would be likely to receive a range of tenders or proposals and prices that are not easily compared, and that may exceed the available budget. The solution is for the public entity to make the potential suppliers aware of the available budget (the “target price”) as a guide for defining the scope of the services desired, and then inviting potential suppliers to specify what they can do for that price. The focus of the evaluation is then on the quality and quantity of the services to be provided rather than price.
- 7.30 The Brooks’ Law model assesses proposals on the basis of technical merit. The highest ranked supplier is invited to discuss the proposal, contract, terms, and fees. The terms of reference and the contractual and legal requirements are reviewed to ensure a mutual understanding. When agreement on fees is reached, the supplier is appointed. If no agreement on fees is reached, the second ranked potential supplier is invited to negotiate. The process continues until a satisfactory agreement is negotiated. A supplier, once rejected, should not be recalled for further negotiations.

## Inviting and receiving tenders and proposals

- 7.31 The procurement plan should identify the method the public entity will use to approach the market for a particular good or service. This method will determine how an invitation will be issued and the extent of the invitation process.

## Preparing the tender or proposal package

### Expectations

- 7.32 We expect a public entity to determine the structure and content of a tender or proposal package according to the value and risk associated with the goods or services being procured.
- 7.33 We expect a public entity to follow the rules, procedures, and criteria it has specified in the tender or proposal documents and distributed in the tender or proposal package.

<sup>2</sup> This should not be confused with the term “target cost”, which is used in alliance contracts.

- 7.34 We expect a public entity to treat all participants in a fair and equitable manner. This includes:
- ensuring that information given to one participant that could significantly affect its understanding of the procurement is also conveyed to all other participants (unless the information is commercial in confidence); and
  - advising all participants if some unforeseen and exceptional circumstance changes the rules, procedures, or criteria during the tender or proposal process. Such a change should not benefit one participant over another.

**Guidance**

- 7.35 A public entity's relevant policies and procedures should include guidance on the content of the tender or proposal package. The contents should include:
- the specification;
  - the evaluation model that will be used, including the evaluation criteria (see paragraphs 7.21-7.30);
  - the rules and procedures governing the tender or proposal (see paragraph 7.37);
  - the information required from the participant, which should enable a public entity to measure each participant's performance against the evaluation criteria, and support an assessment of the best value for money;
  - the type of contract envisaged, the main conditions that are contemplated, and any business terms that summarise a public entity's important commercial and legal positions;
  - any rights that a public entity wishes to reserve; and
  - a declaration that participants do not have conflicts of interest.
- 7.36 If the procurement has a limited budget and the public entity will not consider participants with goods or services over the budget, the public entity should advise the budget as part of the documentation and invite responses from suppliers who can provide goods or services within the budget.
- 7.37 The rules and procedures governing the tender or proposal should cover:
- how the tender or proposal process will be conducted (see paragraph 7.38);
  - participant briefings (see paragraphs 7.48-7.55);
  - managing requests for additional information (see paragraphs 7.56-7.59);
  - receipt of tenders or proposals (see paragraphs 7.60-7.61);
  - alternative tenders or proposals (see paragraphs 7.62-7.65);
  - treatment of late tenders or proposals (see paragraphs 7.66-7.68);

- extending the tender or proposal period (see paragraphs 7.69-7.72);
- suspending a tender or proposal process (see paragraphs 7.73-7.75);
- cancelling a tender or proposal process (see paragraphs 7.76-7.78);
- content of tenders or proposals;
- participant presentations (see paragraphs 7.108-7.116); and
- clarification during the evaluation process (see paragraphs 7.117-7.120).

7.38 The process for conducting the tender or proposal should include:

- identifying a single contact for participants to request additional information or to clarify conflicts (see paragraphs 2.76-2.79);
- due diligence (see paragraphs 7.121-7.127), including:
  - any requirements for references;
  - the right to inspect premises or facilities;
  - the provision of samples; and
  - confidentiality of information obtained by participants during due diligence, and limitations on future use of the information; and
- post-evaluation negotiations (see paragraphs 7.128-7.136).

7.39 The rights the public entity may want to reserve include:

- a statement that it will not necessarily accept the lowest or any tender or proposal;
- a statement that it may accept alternative tenders or proposals;
- the right to extend the date of the tender or proposal period; and
- the right to suspend or cancel the tender or proposal process.

## Advertising

### Expectations

7.40 The type and extent of advertising should be in keeping with the value and risk associated with the goods or services.

7.41 We expect government departments to take account of the *Mandatory Rules for Procurement by Departments* on the time and method of advertising, including advertising on GETS.

### Guidance

7.42 A public entity's relevant policies and procedures should ensure that any tender or proposal-related advertising is appropriate for the target market. The cost of the advertising should not outweigh the expected benefits of the advertising.

- 7.43 Guidance should require the contents of the advertisement to include:
- a description of the nature and scope of the proposed procurement;
  - any conditions that suppliers must fulfil to participate in the tender or proposal;
  - the time limits for submitting tenders or proposals; and
  - contact details for obtaining all relevant documents (including the tender or proposal package) and for asking questions.
- 7.44 The tender or proposal should be advertised for long enough to allow interested suppliers to prepare and submit a tender or proposal.

### Distribution of the tender or proposal package

#### Expectation

- 7.45 We expect a public entity to choose a distribution method that ensures that:
- no participant gets an undue time advantage or disadvantage;
  - a record is kept of all participants who request a copy of the tender or proposal package; and
  - each participant confirms that they have received the package.

#### Guidance

- 7.46 A public entity's relevant policies and procedures should provide guidance on:
- keeping a register of all suppliers who request a copy of the tender or proposal packages, so that the public entity can send them any amendments to the documents in the package;
  - ensuring that responses to any queries are provided to all participants on an equal basis (providing they are not commercial in confidence); and
  - asking participants to confirm that they have received the package and each amendment (usually as part of the tender proposal).
- 7.47 If tender or proposal documents are available from the public entity's website, the public entity should ensure that it can identify suppliers that have downloaded the documents so that it can send any subsequent amendments to them.

### Participant briefings

#### Expectations

- 7.48 We expect a public entity to consider holding briefings for participants for procurements:
- that are complex, unusual, or sensitive;
  - that are strategic to the public entity's core business; or

- where relationships will be an important component and the public entity needs to explain its own culture, strategic direction, and imperatives.

7.49 The public entity must notify all participants of the briefing. As the briefing is a formal part of the procurement process, the public entity must supply the same information to all participants.

7.50 The tender or proposal package would normally include how the participants will be advised of the briefing.

#### **Guidance**

7.51 A public entity's relevant policies and procedures should include guidance on:

- the timing of the briefings;
- the need to keep a register of those who attend; and
- the process to ensure that the public entity provides all participants with:
  - a record of the questions asked and answers given; and
  - any amendments to, or clarification of, the tender or proposal documents, by way of a formal written addendum.

7.52 The briefings could occur:

- as part of the release of the tender or proposal package;
- after the release of the tender or proposal package; or
- as individual participant briefings.

7.53 When the briefing is held at the same time as the release of the tender or proposal package, public entities should consider the need to advertise the briefing. As this process does not allow participants time to familiarise themselves with the public entity's requirements before attending the briefing, it should be used only when the procurement has straightforward and easily defined requirements.

7.54 Briefings held after the release of the tender or proposal package provide participants time to read the documentation and arrange for appropriate people to attend the briefing. This is useful when the procurement has more complex requirements.

7.55 Individual participant briefings after the release of the package have the advantages that participants can tailor their questions and ensure that they have a clear understanding of the requirements. However, it can be an onerous process to ensure that each participant receives the same information on an equal basis, that no participant receives an unfair advantage, and that the public entity is able to demonstrate that this was the case. This approach should be used only when the requirements for the procurement are complex. Participants have to be given

enough time before the briefing to familiarise themselves with the procurement. Afterwards, they need time to consider any issues raised at the briefing and address the issues in their response.

### Managing requests for additional information

#### Expectations

7.56 We expect public entities to have:

- a clear point of contact for participants seeking additional information during the tender or proposal process; and
- a policy on how requests for additional information will be handled.

7.57 The process must be fair to all participants, and any information given to one participant must be given to all other participants (unless the question is considered commercial in confidence to the participant who has made a request for information).

#### Guidance

7.58 A public entity should include guidance in its relevant policies and procedures on how to handle requests for information during the tender or proposal stage. These policies and procedures should ensure that the public entity:

- gives consistent answers to questions;
- distributes all questions and answers to all participants, subject to any confidentiality obligations; and
- treats all participants fairly and equally.

7.59 The guidance should set out what is commercial in confidence, and what action should be taken if the participant asks a question that they consider to be commercial in confidence but the public entity does not. In these cases, it is appropriate to advise the participant accordingly and provide them with the opportunity either to withdraw the question or to have it answered with the knowledge that the public entity will circulate the question and answer to all participants.

### Receipt of tenders or proposals

#### Expectation

7.60 We expect a public entity to have policies and procedures that cover the receipt and secure storage of tenders or proposals until they are opened and throughout the remainder of the tender or proposal process.

**Guidance**

- 7.61 A public entity should include guidance in its relevant policies and procedures on:
- the methods by which a tender or proposal can be submitted (for example, electronic or hard copy);
  - where and how tenders or proposals will be stored until the time of opening, and arrangements to safeguard their security and confidentiality until they are opened and registered; and
  - the procedures to be followed in opening tenders or proposals, which should include recording the date and time of their receipt and where these details will be recorded.

**Alternative tenders or proposals****Expectations**

- 7.62 We expect that, in some instances, a public entity may wish to encourage participants to generate innovative ideas that depart from its own basic contract specification. If this is the case, the public entity should take care to explain in the tender or proposal documents the approach it intends to take to evaluating these alternative tenders or proposals.
- 7.63 The crucial point is that, when the public entity evaluates the tender or proposal, it will need to do so against consistent and equitable criteria.

**Guidance**

- 7.64 A public entity should provide guidance on when it will seek alternative tenders or proposals. The guidance should specify how this requirement should be worded in the tender or proposal documents.
- 7.65 The guidance should also set out how alternative tenders or proposals will be evaluated. Alternative tenders or proposals cannot be compared on a like-for-like basis with those that do meet the requirements. The tender or proposal documents could therefore require that, as a minimum, all participants should submit conforming tenders or proposals to provide a basis for comparative evaluation, and that alternative tenders or proposals may be submitted as optional extras.

**Late tenders or proposals****Expectations**

- 7.66 We expect a public entity to accept a late tender or proposal only in exceptional circumstances. The tender or proposal documents should clearly state whether the public entity will receive late tenders or proposals.

- 7.67 As a general rule, a public entity should accept late tenders or proposals only if:
- it can be certain that there is no possibility of unfair advantage;
  - the late participant has no knowledge of other tenders or proposals; and
  - the late tender or proposal conforms in all other respects to the criteria set out in the tender or proposal documents.

**Guidance**

- 7.68 A public entity should include guidance in its relevant policies and procedures on:
- the circumstances in which late tenders or proposals may be received;
  - advising the participant that the tender or proposal was received late and the action that the public entity intends to take about it; and
  - the procedures for dealing with late tenders or proposals, which may include:
    - labelling an accepted tender or proposal as “late”, with the time and date stamped on it;
    - keeping a late tender or proposal that does not meet the criteria on file with the accompanying envelope, so that it is not considered further; or
    - returning the late tender or proposal unopened to the participant.

**Extending the tender or proposal period****Expectations**

- 7.69 A public entity should exercise caution when extending the tender or proposal period, especially if an extension has been requested by only one participant.
- 7.70 A public entity must have specifically reserved the right to extend the date in the tender or proposal documentation and must grant the time extension to all participants.
- 7.71 When extending a tender or proposal period, a public entity must ensure that no participant gains an unfair advantage, and that there is no actual or perceived bias toward a participant.

**Guidance**

- 7.72 A public entity should include guidance in its relevant policies and procedures on:
- when extensions may be given; and
  - the procedures to be used when an extension is given – for example, the extension should be advised by means of a notice being sent to all participants with enough time to enable all to benefit.



## Suspending a tender or proposal process

### Expectations

- 7.73 We expect a public entity to be prudent when considering suspending a tender or proposal process.
- 7.74 A public entity should be alert to the possibility that suspension will be appropriate in some circumstances and should make participants aware of that possibility.

### Guidance

- 7.75 It is not possible to develop clear rules for when a tender or proposal process should be suspended, because it will depend on the nature of the entity and the procurement. However, a public entity should include guidance in its relevant policy and procedures on:
- the need to alert participants that the public entity may need to suspend a tender or proposal if a material change or significant issue emerges during the process, and that further consultation with interested parties and stakeholders may occur during the period of the suspension; and
  - whether consultation is required or appropriate. This will depend on the nature of the procurement, the nature of the entity, and any statutory requirements.

## Cancelling a tender or proposal process

### Expectation

- 7.76 We expect a public entity to cancel a tender or proposal only in exceptional circumstances and after seeking legal advice about the risks and its options in such situations.

### Guidance

- 7.77 A public entity should include guidance in its relevant policies and procedures on the circumstances that may lead to cancellation of a tender or proposal. Examples include:
- All of the tenders or proposals received are non-compliant.
  - The tenders or proposals received cannot be adequately or fairly compared.<sup>3</sup>
  - There is evidence of collusion between participants.
  - A significant probity concern arises during the process that creates a risk of legal action.
  - There has been a significant change to the goods or services being sought.

<sup>3</sup> This is usually the result of a poorly defined specification.

- 7.78 The guidance should set out the procedures to be followed when considering cancellation, including the need to seek legal advice and to formally advise all participants of the cancellation and the reasons for the decision.

## Evaluation

- 7.79 Evaluation is a process that enables selection of the most appropriate tender or proposal. This involves considering the nature, value, and significance of the goods or services.
- 7.80 Evaluation allows the selection of the offer that achieves the best value for the money being spent. A good evaluation will result in the objectives of the procurement being achieved.

## The evaluation process

### Expectations

- 7.81 We expect a public entity to have documented the evaluation process in the procurement plan, or in the evaluation plan if one has been prepared.
- 7.82 The process should require the public entity to:
- carefully consider each tender or proposal, on an equal basis, against the evaluation criteria; and
  - assure itself that the preferred participant has the capacity and capability to meet the requirements of the proposed contract.
- 7.83 Where necessary, a public entity should seek independent verification of a participant's capacity and capability. If a public entity requires verification from referees, this should be provided for in the tender or proposal documentation.
- 7.84 A public entity should keep a record of the evaluation process, at least a summary of the scores awarded to each participant, and the reasons for the scores. These should be kept as a matter of good practice and as evidence if the result is challenged.
- 7.85 If a public entity is required to use particular decision-making criteria when awarding a contract, the staff involved in designing the evaluation process need to be aware of those criteria. Aligning evaluation criteria and decision-making criteria reduces the risk of a decision-making body rejecting a recommendation made under evaluation criteria that are inconsistent or do not align with the decision-making body's criteria.

**Guidance**

- 7.86 A public entity should include guidance in its relevant policies and procedures on the contents of an evaluation plan and the process to be used for the evaluation.
- 7.87 Depending on whether a single or multi-stage procurement method is being used, the process should generally follow the steps in paragraphs 7.88-7.93.
- 7.88 The evaluation team members and any advisers complete conflict of interest declarations. Any actions necessary to manage any conflicts of interest are agreed and implemented (see our guidance *Managing conflicts of interest: Guidance for public entities* on our website [www.oag.govt.nz](http://www.oag.govt.nz)).
- 7.89 The evaluation team members and any advisers are briefed on the evaluation process and receive training if necessary.
- 7.90 Copies of the tenders or proposals, scoring scale, and evaluation forms are distributed to each evaluation team member. If a two-envelope method is being used (that is, the price has been requested in a separately sealed envelope), only the non-price parts of the tenders or proposals are distributed to the evaluation team members, with the price envelopes remaining unopened and securely stored. The two-envelope method may be used where a public entity wants to ensure that price does not influence the evaluation of the non-price (or technical) criteria of a request for tender or proposal. This method would normally be considered for high value and/or high risk procurement activities.
- 7.91 The evaluation team members complete individual assessments of the tenders or proposals. This ensures that each team member has adequately reviewed the tenders or proposals before the team evaluation meeting. It also ensures that no single team member is able to exert inappropriate influence on the outcome by being better prepared. In some simple evaluations, it may not be necessary for the evaluation team members to complete individual evaluations. In these cases, the evaluation team should meet and complete a team evaluation.
- 7.92 Team scores may be reached by a number of methods. Discussing the scores and reaching a team consensus is preferable to averaging the scores, because it allows a score to be agreed based on consideration of all the evaluation team members' opinions and observations. The averaging method may not prevent a persuasive or dominant individual from being able to exercise undue influence. However, it does mean any individual scores that would have been higher or lower, based on re-consideration of the tender or proposal in the light of other team member's comments, still form part of the calculation for a final score.
- 7.93 If the price has been requested in a separately sealed envelope, these envelopes are opened after the team has scored the non-price criteria. An overall score

and ranking is then determined. The ranking method will be determined by the evaluation model used. A comparison of technical worth and price in keeping with the evaluation model being used will determine which tender or proposal represents the best value for money.

- 7.94 It may be necessary to make changes to the tenders or proposals to allow each tender or proposal to be evaluated on a like-for-like basis. Such changes must be made for the purpose of the evaluation only. For example, adjustments may be needed for:
- firm and variable pricing;
  - inclusion or exclusion of extras (for example, maintenance and training);
  - settlement discounts; or
  - differing warranty periods.
- 7.95 A public entity needs to ensure that these adjustments do not produce significant changes in the individual tenders or proposals.
- 7.96 Financial comparisons for competitive tendering and bidding usually entail additional consideration of issues such as:
- capital-related costs;
  - whole-of-life costs;
  - financing;
  - costs of contracting out; and
  - transition costs.
- 7.97 A public entity should scrutinise any tender or proposal that is priced very low compared to others, to determine:
- the technical merits of the tender or proposal, and whether it involves particularly high risks or levels of uncertainty;
  - whether the participant has included all costs associated with providing the goods or services;
  - whether the tender or proposal price is sustainable;
  - whether the participant has proposed a new or innovative way of meeting the requirement that would enable a reduction in cost; and
  - whether the tender or proposal may involve dumped or subsidised imports that would compete unfairly with domestic products, and that could be subject to an application for trade remedies under the Dumping and Countervailing Duties Act 1988.
- 7.98 If a public entity is concerned about the price, the participant should be asked to confirm the tender price. The participant should not be allowed to adjust the price.

## Evaluation team

### Expectations

- 7.99 We expect a public entity to consider the composition of the evaluation team (alternatively referred to as the evaluation panel) at the planning stage of the procurement.
- 7.100 The size and membership of the evaluation team will depend on the value, complexity, and risk of the procurement.
- 7.101 The evaluation team should have adequate skills and experience to appropriately evaluate the tender or proposal.
- 7.102 Terms of reference could be prepared to govern how the evaluation team will operate and the process that will be followed.

### Guidance

- 7.103 A public entity should include guidance in its relevant policies and procedures on the composition and size of the evaluation team. In general, all members should be able to assess and evaluate the tender or proposal against the evaluation criteria. Where that is not the case, the team may need to seek expert advice.
- 7.104 As a general rule, the evaluation team should include:
- a procurement specialist, who ensures that the evaluation process is managed in a fair, robust, and defensible manner, and who understands the rules of the evaluation and ensures that they are followed;
  - a person with commercial or financial expertise; and
  - a person with appropriate technical expertise.
- 7.105 A chairperson should be appointed from within the team.
- 7.106 For high value or complex procurements, a person with legal expertise should be on the evaluation team or at least involved as an adviser to the team. This will usually be the in-house legal counsel.
- 7.107 If specific technical advice is required during the evaluation, the evaluation team should seek a report from an appropriately qualified person.

## Participant presentations

- 7.108 A public entity may, as part of the evaluation process, invite some or all participants to make a presentation to expand on and clarify their tenders or proposals, depending on the process set out in the tender or proposal documentation.

**Expectations**

- 7.109 We expect a public entity to inform participants in the tender or proposal documents whether presentations will be invited, and the way the evaluation scoring will take the presentations into account.
- 7.110 As a presentation is part of the evaluation of a participant's capability to carry out the procurement, each participant should be asked to involve those personnel who:
- have contributed to the preparation of the tender or proposal; and
  - will be involved in providing the goods or services if the tender or proposal is successful.
- 7.111 A public entity should treat each participant fairly and equally about its presentation.

**Guidance**

- 7.112 A public entity should include guidance in its relevant policies and procedures on when presentations from participants should be required, how those presentations should be conducted, and the areas of particular focus to be covered in the presentation.
- 7.113 As the presentations are part of the evaluation process, it is important to continue to treat participants equally. This means, for example, providing the same period of notice for participants to prepare for the presentation and providing the same length of time for presentation.
- 7.114 The public entity should also provide guidance on how to assess the presentations. The evaluation team should keep a record of both the pre- and post-presentation scores, and the reasons for any differences. After the presentations, the evaluation team should review the participants' scores and agree the final ranking.
- 7.115 Presentations should not be used to compare tenders or proposals openly.
- 7.116 The members and roles of the audience for the presentation should be made known to the participants.

**Clarification during the evaluation process****Expectation**

- 7.117 During the evaluation, it may be necessary for a public entity to clarify aspects of the tenders or proposals that are unclear or may contain errors (for example, comparatively low or high prices). Clarification may be required from participants about:
- quality and performance or particular terms and conditions of the contract;

- uncertainty as to the meaning of the content of the tender or proposal; and
- the effect of “tags” or qualifications contained in the tender or proposal.

7.118 We expect a public entity to take care to ensure that this process does not provide a participant with the opportunity to improve their offer and so gain an unfair advantage over another participant.

7.119 A public entity should record all communications that seek clarification with a participant, including any clarifications presented by the participant, so that an audit trail is maintained.

#### **Guidance**

7.120 A public entity should include guidance on when clarification may be required, and the process to be used. For example:

- Questions should be kept to “clarification” – that is, clarifying aspects of the tender or proposal to help the evaluation and not to provide a participant with the opportunity to improve its tender or proposal and so gain an unfair advantage over any other participant.
- When the evaluation team needs to ask questions of a participant, one person should co-ordinate the sending of all questions to participants. This ensures that a consistent process is followed and that participants continue to be treated equally throughout the process.
- All questions and answers should be in writing.

### **Due diligence**

#### **Expectations**

7.121 We expect a public entity to carry out due diligence<sup>4</sup> of the preferred participants for high value, high risk, or complex procurements to ensure that the participant has the capacity and stability to fulfil all of the requirements of the contract.

7.122 Due diligence should be done only where the expected benefits outweigh the costs.

#### **Guidance**

7.123 A public entity should include guidance in its relevant policies and procedures on when to carry out due diligence. Due diligence checks are generally necessary only where the procurement is high value, high risk, or complex. It also helps to eliminate the risk of fraud and corruption. Formal due diligence is usually unnecessary for simple, routine procurements.

<sup>4</sup> “With the process of due diligence, a purchaser ... is protected by being given full access to the records and assets of the vendor, and thus proof of accuracy of the vendor’s representations regarding them” (*Laws of New Zealand: Sale of Business*, paragraph 29).

- 7.124 Advising participants of the due diligence process should be done in the tender or proposal documents, which should:
- say whether due diligence will be carried out;
  - set out the anticipated timing of the process (which is normally done only for the preferred participant); and
  - the contact details of the person responsible for managing it.
- 7.125 The due diligence process should, as a minimum, confirm the financial ability,<sup>5</sup> technical ability, and capacity of the participant and any subcontractors to deliver the required goods or services. These activities often require professional legal and financial input and advice.
- 7.126 The issues that need to be addressed, or the actions to be carried out, by the public entity during the due diligence process include:
- assessment of the participant's ability to deliver the goods or services for the price tendered or proposed;<sup>6</sup>
  - credit and reference checks;
  - site visits to check the adequacy and condition of infrastructure, equipment, and resources that will be used;
  - examination of work or product samples; and
  - consideration that there is no fraud and corruption involved.
- 7.127 A public entity should keep a record of the due diligence it has carried out, and the results.

## Awarding the contract

### Post-evaluation negotiations

- 7.128 Post-evaluation negotiation is an effective risk management tool. From the public entity's perspective, the primary objective of the negotiations should be to:
- test the understandings and underlying assumptions that have influenced a participant in preparing the costs; and
  - achieve a reduction in costs, where appropriate.

### Expectations

- 7.129 We expect that, during post-evaluation negotiations, a public entity will ensure that:
- it conducts all negotiations ethically, and does not use its position in a manner that might be considered unfair;

<sup>5</sup> The public entity may need to seek guarantees if the participant has limited assets or cash flows.

<sup>6</sup> This is particularly important where a participant submits a comparatively low price.



- it does not focus solely on reducing bottom-line costs;
- it does not potentially disadvantage other participants by negotiating an agreement that is materially different in scope from what was described in the tender or proposal documents; and
- the negotiated agreement is sustainable and does not inappropriately compromise quality.

7.130 As a general rule, a public entity will negotiate first with the highest ranked participant. If the outcome is unsatisfactory, it will then negotiate with the next highest ranked participant, and so on down the list until a satisfactory outcome is achieved.

7.131 Concurrent negotiations may be required in limited circumstances. Concurrent negotiations must be approached with care to ensure that they remain fair. Playing one participant off against another (that is, a “Dutch auction”) should be avoided. The public entity should:

- prepare a negotiation plan for each negotiation;
- advise the participants that concurrent negotiations are being carried out; and
- hold separate negotiations with the preferred participants.

7.132 The final outcome of the negotiations should be recorded in writing, and included in the contract.

#### **Guidance**

7.133 A public entity should include guidance in its relevant policies and procedures on the circumstances where post-evaluation negotiations should be conducted.

7.134 If negotiations are to be conducted, the public entity should prepare a negotiation plan. The tender or proposal documents should advise participants of the possibility of post-evaluation negotiations and may identify the parts of the tender or proposal that may be negotiated.

7.135 The guidance should include advice on selecting the negotiation team and assigning roles and tasks (for example, a leader to drive the negotiation and make the proposals and an analyst to record the agreements and track the numbers). The skills and expertise of the negotiation team should be in line with the value, risk, and complexity of the procurement. The contract manager (providing any conflicts of interest are appropriately managed) should be a member of the team, as negotiations could raise issues that will remain relevant during the life of the contract.

7.136 By the end of negotiations, each party should have the same expectations about its obligations and how the contract will operate. The parties should agree on

all substantive issues that might have an effect on price and monitoring of the successful participant's performance, before the contract is signed.

## Approving the preferred participant and awarding the contract

### Expectations

- 7.137 We expect a public entity to provide a clear recommendation on who the preferred participant is to the authority approving the award of the contract. It should provide enough information to allow the approving authority to understand the evaluation process and the rationale for the recommendation.
- 7.138 The recommendation of the preferred participant should reflect the outcome of the evaluation process.
- 7.139 If the approving authority rejects the recommendation, they should:
- clearly document the reason for not accepting the recommendation; and
  - ensure that the reason is legitimate (this would usually be the result of an unforeseen event that was not identifiable earlier in the process).
- 7.140 The successful participant will be formally notified and the contract signed.

### Guidance

- 7.141 A public entity's policies and procedures should clearly set out who is responsible for approving different types and levels of procurement.
- 7.142 Responsibilities may be allocated in a variety of ways – for example, by budget area, delegation, the value or strategic importance of the procurement, Cabinet circulars, or a combination of these.
- 7.143 The amount of detail given to the approving authority should be in line with the value and risk associated with the procurement. The approving authority should be able to make an informed judgement on the adequacy of the tender or proposal process and the validity of the tender or proposal selection.

## Notifying and debriefing unsuccessful participants

### Expectations

- 7.144 We expect a public entity to formally notify the unsuccessful participants in writing of the outcome and offer them a debriefing.
- 7.145 A public entity may also offer a debriefing to the successful participant.
- 7.146 We expect government departments, who are subject to the *Mandatory Rules for Procurement by Departments*, to be aware of the requirements to report contract award details on GETS.

**Guidance**

- 7.147 A public entity should include guidance in its relevant policies and procedures on the form and content of the debriefings. Care should be taken during the debriefing process not to disclose commercially sensitive information that relates to other tenders or proposals.
- 7.148 The offer of a debriefing should set out its scope and likely format and should make it clear that the process will not be used to change the decision or reopen the process. Participants should be informed that only their own tender or proposal will be discussed. The sensitivity of any information likely to be communicated (for example, the identity of the selected participants) needs to be carefully assessed before the meeting.
- 7.149 A debriefing should be delegated only to staff who have the necessary experience and sensitivity to carry it out successfully. The debriefing should include a balanced view of the strengths and weaknesses of the tender or proposal against the evaluation criteria and how the participant can improve, rather than being just a comparison of the participant's strengths or weaknesses relative to the other participants.



## Part 8

### Managing the contract

- 8.1 Contracts can be arranged in a variety of ways. For example, they may be negotiated between the public entity and the provider as part of a relational contractual situation, negotiated with a preferred supplier as part of a selective procurement, or the result of a competitive tender or proposal process.
- 8.2 Regardless of how the contract or agreement is arranged and whether it is a conventional or relational contract, a public entity is responsible for the ongoing management of:
- the contract; and
  - the relationship with the supplier of the goods or services.
- 8.3 A public entity needs to monitor and manage the supplier's performance to assess whether the public entity is receiving value for money. It should determine the extent of the managing and monitoring based on risk management and cost-benefit assessments.
- 8.4 Monitoring and managing supplier performance should be a priority when the value and the risks associated with the procurement are high.

#### The transition to a new supplier

##### Expectations

- 8.5 We expect a public entity to prepare a transition plan when service delivery could be affected by the transition from one agreement or contract to the next.
- 8.6 In relatively routine, straightforward procurements, transition arrangements may be covered in the contract management plan. More complex procurements will require a detailed transition plan and may require advanced change management skills.

##### Guidance

- 8.7 A public entity should consider including guidance in its relevant policies and procedures on when a transition plan may be needed. The need for a transition plan should be considered at the procurement planning phase, because it may have an effect on the timing of the procurement.
- 8.8 The public entity should also include guidance in its policies and procedures on what the transition plan should cover. The amount of detail needed in the plan will depend on the goods or services being procured, and the plan should be proportionate to the scale, complexity, and risk of the transition. For example, a relatively minor, routine contract may not require any transition plan, or may require only a statement that outlines the adequacy of existing procurement

procedures. However, a contract involving the outsourcing of significant aspects of an entity's activities may require a detailed transition plan.

- 8.9 For more complex procurements, the plan may need to address:
- a timeline of activities and events;
  - reports on progress;
  - additional resource requirements;
  - important roles and responsibilities;
  - training requirements;
  - communications requirements (for example, communications plans), including any reporting structure that the public entity may need;
  - risk and risk management;
  - matters connected with the entity's fixed assets;
  - matters to address any effects on customers;
  - any transitional arrangements that may need to be negotiated with the incoming or outgoing supplier;
  - managing the outgoing supplier's performance through to the conclusion of their contract; and
  - situations where a contract is terminated before its natural end date and how to deal with the implications of early termination.
- 8.10 For fixed assets, the plan should address:
- the effect of the contract on land, facilities, equipment, or machinery; and
  - identifying and assigning responsibilities such as ownership, insurance, access, usage, and transfer.
- 8.11 For the effects on customers, the plan should address:
- the need for a customer communication strategy;
  - consultation to identify any customer needs during the transition period; and
  - notification of any interim arrangements, or changes to staff and service delivery schedules.
- 8.12 A public entity should also be aware of incumbent supplier issues – for example, issues relating to confidentiality, bias or impartiality, and access to information – and have a strategy to deal with these issues.

## Types of contract management

### Conventional contract management

- 8.13 To achieve good contract performance, public entities should ensure that the terms of the contract are adhered to, and that all parties to the contract understand their respective obligations.<sup>1</sup>

#### Expectations

- 8.14 We expect a public entity to ensure that the terms of the contract are adhered to during the contract by regularly monitoring that the goods or services are delivered:
- on time;
  - at the agreed cost; and
  - to the required quality.
- 8.15 We also expect a public entity to maintain records of the monitoring and contract management that they have carried out.
- 8.16 Planning for the management of the contract should start at the procurement planning phase and continue through the evaluation and the contract negotiation.
- 8.17 A contract management plan should be prepared. The contents of the plan will depend on the value and risk associated with the goods or services procured.
- 8.18 The contract management plan will be a living document that is updated throughout the life of the contract.

#### Guidance

- 8.19 A public entity should include guidance in its relevant policies and procedures on how the delivery of goods or services will be managed.
- 8.20 Managing the delivery of goods or services is about ensuring that what has been agreed is delivered, to the appropriate quality standards. It is about assessing and managing the performance of the supplier to ensure value for money. Procedures may include:
- assessing whether the goods or services are delivered to the agreed levels or volumes;
  - assessing the quality of the goods or services – a measurement tool should be created that will allow the quality to be assessed, even in areas where it is hard to quantify;

<sup>1</sup> For an example of guidance material on contract management, see Partnerships Victoria, Australia (June 2005), *Contract Management Guide*, [www.partnerships.vic.gov.au](http://www.partnerships.vic.gov.au).

- agreeing, before the contract starts, a baseline from which improvements in the goods or services can be measured (for example, benchmarking, or comparing performance across different organisations and providers, is another useful way to gauge improvements or pricing levels); and
  - ensuring that any other additional requirements under the contract have been fulfilled by the supplier (for example, reporting).
- 8.21 A public entity's relevant policies and procedures should also say how risks will be managed. Fulfilling the contract may be endangered by several kinds of risk – some in the supplier's control, and some outside it. To manage a contract, it is vital to identify and avoid or minimise the risks to the contract. This includes controlling those risks that are carried by the supplier under the contract.
- 8.22 Business continuity planning and contingency planning are an important part of managing risk. They help prepare the public entity for the situation where the supplier cannot deliver. A contingency plan proportionate to the scale, complexity, and risk of the contract should be prepared before the contract takes effect. For low value or low risk services, this may not be necessary. The plan may simply recognise that some delay could occur in restoring services, or dealing with problems, should the contract fail.
- 8.23 The management of relationships will vary, depending on the contract. Where appropriate, a public entity should ensure that:
- both parties understand and agree on an appropriate type of relationship model for each particular contract;
  - the contract's management structures support good relationships between the parties, and that staff at all levels show their commitment to it;
  - the flow of information and communications are established at the start of a contract, and maintained through its life – the three primary levels of communication in a contractual arrangement are operational (end users and technical support staff), business (contract manager and relationship manager on both sides), and strategic (senior management and board of directors); and
  - procedures for raising issues and handling problems are set up, so that any issues or problems are dealt with as early as possible and at the appropriate level in the public entity.
- 8.24 How the contract will be administered should also be included in a public entity's policies and procedures. Procedures should be in place for managing activities in the main contract. These procedures should be included in the contract management plan, and may include:
- contract variations, including control of any changes – the contract documentation must continue to reflect the arrangement accurately, and any



changes to it that are required by changes to services or procedures need to be carefully controlled;

- charges and cost monitoring;
- ordering and payment procedures;
- time management;
- management reporting; and
- asset management.

8.25 Clear administrative procedures will ensure that all parties to the contract understand who does what, when, and how.

8.26 The public entity's policies and procedures should include guidance on the information required in a contract management plan. Depending on the value and risk associated with the procurement, these may include:

- a summary of milestones, including any review of the contract and the lead time needed for any re-tender/proposal or renewal;
- a list of the main individuals and their responsibilities (for both the public entity and the supplier) – for example, the contract manager and the governance board;
- a schedule of risks that have been identified and that are being monitored and managed;
- the frequency and content of a supplier's reporting, and the content, frequency, and distribution of any reporting within the public entity – for example, monthly reporting to the senior management team on important service statistics;
- a schedule of meetings, and any standard agenda items;
- the processes by which some of the contractual obligations are to be achieved;
- the procedures for managing any specific activities in the contract;
- details of the process and authorities for approving variations to contracts (including delegations);
- details of any ordering procedures, such as ordering of hardware, travel services, and printing; and
- payment procedures, such as the level of detail to be provided in invoices (for example, asset numbers), and the format for any electronic invoices.

8.27 The frequency and type of meetings required to review contract performance should also be covered in public entities' policies and procedures. These may include:

- regular progress meetings that involve the supplier, the contract management team, and key staff of the public entity, to discuss performance, contract events

or milestones, changes to user demands, and proposed actions or responses to current or potential problems;

- technical meetings, as required, that involve specialist technical representatives of the contract management team and the supplier, to review technical reports and performance data and discuss technical issues; and
- longer-term reviews and audits, to consider the achievement of objectives, results against budget, user satisfaction, the extent to which value for money is being achieved and requirements are being met, and how to address any emerging need for changes.

8.28 The appointment of a contract manager, and that person's responsibilities, should also be covered in a public entity's policies and procedures. The responsibilities may include:

- translating the entity's requirements into contractual provisions;
- acting as a single point of contact for all formal and legal correspondence for the contract;
- maintaining contract performance measures;
- monitoring contract performance and reporting at an overall service or business outcome level;
- approving payment and making payments according to the contract;
- representing the public entity's interests to the supplier at contract level;
- overseeing the operation of the contract;
- negotiating remedies with the supplier and taking remedial actions;
- maintaining and developing contract specifications;
- setting up regular reporting procedures, both formal and informal, and ensuring that they are used;
- promoting an understanding of the business practices and common techniques of both parties to the contract; and
- approving deliveries and completions.

### **Contract management when contracting with non-government organisations**

8.29 The Treasury has issued *Guidelines for Contracting with Non-Government Organisations for Services Sought by the Crown*. The Treasury guidelines include a section on managing the contract and monitoring, against which a public entity can gauge its own policies and procedures.

- 8.30 The expectations for contract management for non-government organisations will depend on the type of funding arrangement that has been entered into. If the arrangement is more in the nature of a conventional contract, the arrangements will be similar to those outlined in paragraphs 8.13-8.28.

### Contract management and relational purchasing

- 8.31 Contract management of relational purchases will be similar to conventional contract management. Public entities will need to consider preparing a contract management plan for high value, high risk relational purchases and may need to appoint a contract manager. The management of risks still needs to be considered. The types of risks may well differ under a relational contract – for example, where there is no effective market, business continuity planning and contingency planning may be more important.
- 8.32 The contract management plan will need to focus on maintaining close relationships between the public entity and the supplier during the period of the contract. The nature of the goods or services procured under these contracts, as well as the intended procurement outcome, may make the normal contract deliverables more difficult to ascertain, and these deliverables may change during the term of the contract. This means that the public entity and the supplier may have to work more closely to maintain an understanding of:
- the goods or services being delivered;
  - how the quality of these goods or services will be assessed; and
  - how the cost of the goods or services will be benchmarked in the absence of an effective market process.

## Completion and contract review

### Expectations

- 8.33 We expect a public entity to remain aware of the contract's expiry date so that it can plan for future provision well before that date. This may include communicating with the current or other possible providers or a re-tender/proposal.
- 8.34 The public entity should review and evaluate the contract to assess how well the objectives have been achieved and determine where it can make any improvements.
- 8.35 Where appropriate, the public entity should carry out a formal documented contract completion<sup>2</sup> process (including debrief) when the contract expires or ends.

<sup>2</sup> Completion involves bringing the parties' relationship to an end, because the goods or services have been supplied in full.

**Guidance**

- 8.36 A public entity should include guidance in its relevant policies and procedures on the need for, and the requirements of, the review. The review should consider questions such as:
- Does this contract meet current and future needs (in terms of the goods or services provided)?
  - Does the contract represent value for money?
  - Does the supplier's performance meet current and future needs for:
    - the levels of service required?
    - contract management?
    - reporting?
  - Are new goods or services available that were not previously available?
  - If the public entity chooses to go back to the market for these services, what are the costs, risks, and benefits of this process?
  - What options are there under:
    - the contract (that is, does it provide for a renewal term)?
    - the *Mandatory Rules for Procurement by Departments*?
    - the entity's own procurement policy?
- 8.37 After completing the review, the public entity should prepare a report that includes recommendations on the lessons learned.
- 8.38 If the contract allows the term to be extended without the public entity inviting new providers or suppliers, a public entity should carefully consider the benefits and costs of extension before agreeing to it. Relevant factors may include:
- the current provider's or supplier's performance;
  - the public entity's performance in meeting its obligations;
  - constraints on intellectual property and confidentiality;
  - user satisfaction;
  - the effectiveness of the contract, and whether any improvements could be negotiated;
  - developments in the market;
  - the existing supplier's competitiveness compared with that of other suppliers; and
  - the costs associated with new service provision and the transition to a new contract.

- 8.39 Completion requirements will vary, depending on the nature of the contract and the general and special terms applicable to it. A public entity should ensure that the supplier honours all its obligations before it is released from its commitments – subject to its rights under the contract. Completion may be in stages. It may be:
- when the work is completed; or
  - when the maintenance period has finished.
- 8.40 In some circumstances, warranty commitments and obligations or insurance liabilities will continue for a period of time. Confidentiality requirements and intellectual property obligations may continue to apply after the end of the contract. A process will need to be put in place to monitor these obligations until they no longer apply.
- 8.41 The completion of a contract may involve:
- issuing a certificate of completion;
  - complying with instructions relating to bank guarantees and retention monies;
  - conducting the transition and handover to an incoming contractor;<sup>3</sup>
  - ensuring that all loaned items have been returned;
  - returning unused material; and
  - preparing and considering final reports on contract performance.
- 8.42 A public entity should consider keeping an existing specification under regular review, so that it is up to date and ready for the next tender or proposal process.
- 8.43 A new specification should reflect any:
- changes in needs, organisational structure, or operational processes;
  - effects of new technology; and
  - improvements in general processes.

<sup>3</sup> Handover may involve the revaluation and transfer of assets, intellectual property, and rights.



## Part 9

# Information technology and procurement

- 9.1 Public entities are increasingly using information technology to carry out or support aspects of their business. This means that public entities need to procure information technology. Public entities are also increasingly using information technology to procure other goods and services.
- 9.2 Given the breadth, specialist nature, and fast pace of change in this area, we have not attempted to provide a comprehensive outline of it. Instead, in this Part, we provide:
- some policies and standards public entities may need to consider when implementing e-procurement (using information technology to procure other goods and services) that are additional to the policies and procedures in these guidelines; and
  - reference to other guidance that public entities may wish to consider when procuring information technology.

### E-procurement policy and standards

- 9.3 A public entity that implements e-procurement systems should ensure that any new procedures that are established meet the same legal and policy obligations that govern all government procurement. In addition, a public entity will need to ensure that it adopts additional policies and standards covering the different procedures and risks associated with e-procurement.
- 9.4 The additional areas that will need to be covered include:
- electronic invoicing;
  - electronic records management;
  - commodity classification;
  - interoperability;
  - online security;
  - authentication controls;
  - access controls;
  - audit trails; and
  - business continuity.

### Electronic invoicing (e-invoicing)

- 9.5 E-invoicing is the transmission and storage of invoices by electronic means, without the delivery of paper documents. A public entity's relevant policies and procedures will need to cover:
- the content of the invoice;

- the means of demonstrating that the invoice is for a genuine supply;
- the means for maintaining an audit trail, including arrangements for an auditor to access information;
- the content of credit notes, including how they will enable the original invoice to be identified;
- the means for ensuring the authenticity of the origin and integrity of the invoice;
- the decision on whether self-billing will be carried out (this is an arrangement where the public entity determines the value of goods or services supplied, raises the supplier's invoice, and forwards it to the supplier, with or separate from payment) and, if so, how self-billing will be controlled;
- the means for storing electronic invoices; and
- the decision on whether digital signatures are an accepted method of authentication for e-invoices, and the controls and audit trail that will be needed.

### Electronic records management

- 9.6 Electronic records unlock content that was previously difficult to access in paper form, enable more effective sharing of information, and contribute to knowledge exchange. However, they need to be retained and maintained over the medium to long term, because the records are also an important tool for accountability.

### Commodity classification

- 9.7 Commodity classification is the assignment of a structured coding mechanism to goods or services that a public entity may wish to purchase.
- 9.8 The purpose of commodity coding is to make it easy to identify products or services that are similar in function, or related in some way, such as a mobile phone and a mobile phone cover. Coding is a tool that enables more accurate catalogue searching.

### Interoperability

- 9.9 Systems interoperability is the smooth transition of data between systems in a public entity (for example, between an e-procurement system and a finance system), and externally (for example, between a buyer's e-procurement system and a supplier's electronic system).
- 9.10 Public entities need to ensure a method of data flow that will enable interoperability.



### Online security

- 9.11 Before implementing any electronic procurement solution, public entities should assess all risks to information and services. This will determine the security levels required. With an e-procurement system, the higher the value or confidentiality of the transactions through the system, the higher the required security level.
- 9.12 The level of security a public entity chooses as being appropriate to e-procurement will affect a number of other security decisions, including:
- user identification, or verification of use by unique user identification;
  - authentication, or validation (through password or digital certificate) that the user's identification belongs to the user who presented it;
  - access control, or verification of the privileges of authenticated users;
  - integrity, or verification that data does not change at any point in the process;
  - non-repudiation, or verification of authorship and integrity of transactions – this authenticates the audit trail associated with the transaction; and
  - confidentiality, or the prevention of access by unauthorised persons.

### Authentication controls

- 9.13 Any purchasing system must support authentication of users so that individual transactions can be traced back to the relevant person. Generally, this is by user name and password.
- 9.14 Alternatively, the authentication mechanism could use network logins or other directory services, while higher security requirements may demand token-based methods such as digital certificates, smartcards, or biometric devices. The latter options are based on the common security principle of requiring “something you have” (for example, a smartcard) as well as “something you know” (such as a password or personal identification number) to achieve a much higher degree of security.
- 9.15 Further guidance can be found in *Authentication for e-government Best Practice Framework for Authentication*.<sup>1</sup>

### Access controls

- 9.16 To ensure that users have access to the functions they need to do their jobs, an e-procurement system should incorporate a “roles-based” access control mechanism. This should allow a particular role to be assigned to each user of each application, and to determine which functional areas this role incorporates.

<sup>1</sup> State Services Commission (2004), [www.e.govt.nz](http://www.e.govt.nz).

### Audit trails

- 9.17 A robust e-procurement system should incorporate a comprehensive audit trail, with a record of who did what and when at various important stages of the purchasing process. The system should also allow internal control rules to be incorporated. For example, the person who approves a requisition must be different from the requisition originator. Setting out such principles in the purchasing application can be a useful countermeasure against possible fraud.

### Business continuity

- 9.18 To protect historic data in the event of a system failure, or to allow a purchasing department to continue operating off-site in the event of a disaster, security arrangements should also include a business continuity plan. This should detail:
- precautions to prevent disasters from occurring, such as virus checking;
  - physical security in the premises where the application is held;
  - duplication of data on to multiple storage devices; and
  - procedures to follow in the event of an unrecoverable disaster – for example, procedures for retrieving off-site backups or relocating to a “warm recovery” server that contains all the public entity’s historical data.
- 9.19 It is important to test continuity plans regularly.

### Information technology procurement

- 9.20 The State Services Commission and the Treasury have issued *Guidelines for Managing and Monitoring Major IT Projects*. The guidelines cover strategic alignment, developing a business case, procurement, and project management. The guidelines are available on the State Services Commission website ([www.ssc.govt.nz](http://www.ssc.govt.nz)).
- 9.21 We published a report *Governance and Oversight of Large Information Technology Projects* in 2000.
- 9.22 In addition, the Information Technology Association of New Zealand has prepared the *Information Technology Procurement Guidelines* for organisations that are carrying out technology purchases.
- 9.23 The Industry Capability Network New Zealand has also issued a booklet series *Understanding Public Sector Procurement Processes: A Suppliers Guide to the Procurement of ICT Goods and Services* to assist suppliers of information and communications technology services in the public sector. Although the guidance is written from the supplier’s perspective, public entities may still find it helpful.

# Appendix

## Our other reports that discuss procurement

Other reports we have produced that have covered aspects of procurement practice are listed here. They illustrate the variety of specific contexts in which procurement issues have arisen.

### 2008

- *Public sector purchases, grants, and gifts: Managing funding arrangements with external parties*

### 2007

- *Controlling sensitive expenditure: Guidelines for public entities*
- *Managing conflicts of interest: Guidance for public entities*
- *Guidance for members of local authorities about the law on conflicts of interest*

### 2006

- *Principles to underpin management by public entities of funding to non-government organisations*
- *Achieving public sector outcomes with private sector partners*
- *Inquiry into certain allegations about Housing New Zealand Corporation*

### 2005

- *Electricity Commission: Contracting with service providers*
- *Inquiry into the Ministry of Health's contracting with Allen and Clarke Policy and Regulatory Specialists Limited*
- *Inquiry into certain aspects of Te Wānanga o Aotearoa*

### 2004

- *Christchurch Polytechnic Institute of Technology's management of conflicts of interest regarding the Computing Offered On-line (COOL) programme*
- *Ministry of Defence and New Zealand Defence Force: Further report on the acquisition and introduction into service of Light Armoured Vehicles*

### 2003

- *Inquiry into Public Funding of Organisations Associated with Donna Awatere Huata MP*

### 2002

- *Purchasing Primary Health Care Provided in General Practice*
- *Certain Matters Arising from Allegations of Impropriety at Transend Worldwide Limited*

**2001**

- *Ministry of Defence: Acquisition of Light Armoured Vehicles and Light Operational Vehicles*
- *Providing and Caring for School Property*
- *Good Practice for Involvement in a Major Project – Lessons from the Opuha Dam Project*

**2000**

- *Governance and Oversight of Large Information Technology Projects*





# Publications by the Auditor-General

Other publications issued by the Auditor-General recently have been:

- Public sector purchases, grants, and gifts: Managing funding arrangements with external parties
- The Accident Compensation Corporation's leadership in the implementation of the national falls prevention strategy
- Ministry of Social Development: Preventing, detecting, and investigating benefit fraud
- Guardians of New Zealand Superannuation: Governance and management of the New Zealand Superannuation Fund
- Annual Plan 2008/09 – B.28AP(08)
- Central government: Results of the 2006/07 audits – B.29[08a]
- The Auditor-General's Auditing Standards – B.28(AS)
- Responses to the Coroner's recommendations on the June 2003 Air Adventures crash
- Inland Revenue Department: Effectiveness of the Industry Partnership programme
- Audit committees in the public sector
- New Zealand Trade and Enterprise: Administration of grant programmes – follow-up audit
- Mental health services for prisoners
- New Zealand Agency for International Development: Management of overseas aid programmes
- Liquor licensing by territorial authorities

## Website

All these reports are available in HTML and PDF format on our website – [www.oag.govt.nz](http://www.oag.govt.nz). They can also be obtained in hard copy on request – [reports@oag.govt.nz](mailto:reports@oag.govt.nz).

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