

VICTORIAN CIVIL CONSTRUCTION INDUSTRY

BEST PRACTICE GUIDE FOR TENDERING AND CONTRACT MANAGEMENT



Institute of
Public Works
Engineering
Australia



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FOREWORD

Victoria's civil construction and maintenance industry has a significant impact on the State's economy, on the provision of jobs, and on the development of vital infrastructure and commercial, civic and residential assets for all Victorians.

The civil construction and maintenance industry is committed to pursuing excellence in the construction and maintenance of Victoria's infrastructure, with a focus on innovation, the environment and the community's social objectives.

Essential to meeting this commitment, is the promotion of best practice in tendering and contract management, together with the establishment of the highest ethical principles.

The *Code of Practice for the Building and Construction Industry*, revised in 1999, had laid-out a strong foundation for improving the industry's standards and competitiveness. The Code had clearly set out the minimum standards to which the Victorian Government had subscribed and, in turn, required to be upheld by those seeking government business.

This Guide has been produced with the view to further enhancing the tendering and contract management practices in local governments and by civil contractors, as well as driving further efficiency improvements in project delivery. It is a collage of the best features of the 1999 Code of Practice for the Building and Construction Industry, similar Codes from other States, and recognised processes employed by councils, water companies and VicRoads. By and large, this Guide reflects the requirements of AS 4120 Code of tendering.

This Guide establishes high and significant benchmarks for best practice tendering and contract management within the civil construction and maintenance industry. All civil contractors and local governments are therefore encouraged to apply the principles outlined in this Guide.

The adoption and compliance with this Guide will contribute to a more competitive and efficient civil construction and maintenance industry to the benefit of Victorians, local government and contractors alike.

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BEST PRACTICE GUIDE FOR TENDERING & CONTRACT MANAGEMENT

DEFINITIONS

The following are explanations of terms as they are used in this document.

Civil Construction Industry

The industry which undertakes:

- a. Preparatory site works including demolition, excavation and earthmoving for engineering and construction projects;
- b. Construction, alteration and maintenance, including excavation and earthmoving for:
 - water reticulation, sewerage, drainage and major arterial distribution networks such as transmission and pipeline projects;
 - major and minor roads, highways, railways and associated works, including bridges and drainage management, road surfacing, road foundations, tunnels, shafts, towers, parking areas and pavements;
 - dams, spillways, weirs, outfalls, tanks, reservoirs, storage areas, breakwaters, artificial harbours, marinas; and
 - sporting and recreational facilities;
- c. Quarrying, crushing and processing of road metal, gravel, screenings, stone aggregates, crushed rock and the application of plant mixed, concrete bituminous concrete, bitumen and asphalt.

Principal

Any project owner, or initiator, inviting or receiving proposals or tenders.

Consultant

A person who provides specialist advice and/or professional services.

Contractor

A person who provides building and construction works and services, and includes subcontractors and suppliers.

Industry

Defined as the Civil Construction Industry.

Intellectual property

Any patent, registered design, trademark, name or copyright and includes trade secrets, list of suppliers, customers and manufacturing methods.

Party

'Party' includes but is not limited to: Principals, contractors, subcontractors, suppliers, consultants, employees, employees.

Public construction

“Public construction” means civil construction undertaken by or on behalf of a public body and includes -

- a. design and construction practices;
- b. tendering processes;
- c. project delivery; and
- d. contract administration.

In the context of this definition, “public body” means –

- a. local government established under the *Local Government Act, 1989*;
- b. a public statutory corporation established by or under an Act for a public purpose other than a municipal council;
- c. a State business corporation within the meaning of the *State Owned Enterprises Act 1992*;
- d. a Department within the meaning of section 10 of the *Public Administration Act 2004*
- e. an office specified in section 16(1) of that Act; and
- f. a body, office or trust body:
 - i. established by or under an Act or enactment; or
 - ii. established by the Governor in Council or a Minister – and that is declared by the Minister, by notice published in the Government Gazette, to be a body or office.

Small Business Commissioner

The position of the Victorian Small Business Commissioner is a statutory body established under the *Small Business Commissioner Act 2003*, which commenced operation on 1 May 2003.

Superintendent

The Superintendent appointed under the General Conditions of Contract.

Tender

An offer in writing, which includes price, in response to an invitation to execute works, supply goods or associated services.

Tenderer

Any party submitting a tender, including contractors, subcontractors or suppliers.

1 INTRODUCTION

1.1. Guiding Principles

This Best Practice Guide (“The Guide”) describes minimum standards of acceptable practice for public infrastructure construction and maintenance. Commitment to continuous improvement and best practice performance is expected of all those involved in the industry.

The Guide encourages high ethical standards in the industry in order to achieve better procurement practices, higher productivity, high-quality construction work, better working conditions and the avoidance of malpractice, with significant benefits to the entire community.

The provisions of the Guide should be observed by all parties involved in public infrastructure construction and maintenance. The tendering and contract management processes should be structured to minimise costs for all parties including the consumer, consistent with the standards of behaviour required by this Guide.

Victoria’s civil construction and maintenance industry has a major impact on other industrial activities. Its cost competitiveness and efficiency influence the general cost of infrastructure, and even firms’ decisions on location. The industry’s best practice standards need to measure up to world best practice.

The Guide sets out specific principles and standards of behaviour that underpin best practice, and promotes a partnership approach to project/service delivery.

Although the Guide primarily addresses standard methods of procurement and delivery, it also seeks to actively encourage innovation and alternative delivery systems. The parties to this Guide recognise that high standard of performance can be achieved by encouraging innovation and co-operative practices which lead to better quality projects, lower costs over the life of infrastructure and better value for money.

Principals should encourage innovation and alternative solutions by using performance based specifications where appropriate, leading to:

- increased efficiency in design, tendering, project management and financial management;
- speedy resolution of complex design and production problems;
- less rework and a lower cost finished product; and
- improved delivery of projects in terms of higher quality outcomes, timely delivery and environmentally responsible buildings or infrastructure.

Principals should also encourage innovation by;

- allowing an appropriate period for tender response having regard to project complexity and the past experience of tenderers; and
- considering alternative approaches to delivery of projects.

Innovative approaches and delivery systems, such as joint ventures, alliance contracting, partnering, strategic alliances and the like, which are consistent with the standards of behaviour required by the Guide, should be pursued by the parties where measurable benefits are to be obtained.

This objective should form a necessary component in the evaluation of tenders.

Public bodies managing contracts should continue to use their capital investment programs to bring about positive change. They should give preference to service providers who display a commitment to and consistent application of the standards set out in this Guide. To ensure this, Principals should make compliance with the Guide a mandatory requirement in the tender.

A service provider who contracts with the client agency is responsible to the client agency for the standards of performance, behaviour and ethical conduct of all service providers down the contract chain.

This Guide equally applies to the relationship that principal contractors have with their sub-contractors.

The challenge for public body managers is to encourage members of the industry to become more competitive and responsive to the needs of Principals, and to recognise the rights of large and small participants. This challenge extends to also ensuring that procurement processes are streamlined and efficient and do not add unnecessary costs to industry. This will assist the industry to reach a performance level appropriate to its influential position in the State's economy.

1.2 Objectives

The objectives of the Guide are to:

- 1.2.1 encourage best practice within the industry in Victoria, ie:
 - promote improved efficiency, productivity and competitiveness within the Civil Construction Industry for the benefit of all parties;
 - further the Government's contribution to making the industry vibrant, efficient and internationally competitive; and
 - promote the highest standards in the industry by seeking a commitment to comply with the spirit and intent of all laws, regulations and codes that have an impact on the industry;
- 1.2.2 reduce costs and increase the value obtained from Victoria's capital assets by maximising opportunities for local industry participation on the basis of value for money;
- 1.2.3 improve the performance of all participants in the industry by:
 - setting the responsibilities and standards of behaviour expected of all parties undertaking procurement activities;
 - improving the standard of occupational health and safety across the industry;
 - recognising the importance of skills development and the maintenance of the industry workforce; and
 - encouraging professional development and industry training and foster growth in the level of training and skill development;

- 1.2.4 promote goodwill in the industry and minimise disputes through the observance of statutory and contractual requirements and obligations of employment;
- 1.2.5 improve the industry's quality of contract administration and tendering practices; and
- 1.2.6 support the principles of sustainable development.

In achieving these objectives, the public bodies:

- a. have set the responsibilities and standards of behaviour expected of the parties undertaking procurement activities as outlined in the Guide;
- b. will generally award contracts to those contractors and consultants that meet the requirements outlined in the Guide; and
- c. call on other industry stakeholders, such as employer associations, industry associations and unions to support and uphold this Guide.

The Guide will be reviewed from time to time to assess the adequacy of its provisions in clarifying the industry's reform objectives.

1.3 Application

1.3.1 Scope

The Guide applies to the parties that are signatories to this Guide and should be observed by such parties.

1.3.2 National Code of Practice for the Construction Industry

The National Code of Practice for the Construction Industry has been endorsed by the Victorian Government for Commonwealth Government funded projects.

1.4 Guide Responsibilities

Principals, tenderers, contractors and consultants:

Should comply with the Guide

Public Bodies:

Should implement the Guide, monitor and report on compliance

Industry associations:

Should:

- support the implementation of the Guide
- encourage their members to comply with the Guide
- develop and use rules to deal with breaches of the Guide

1.5 Standards of Behaviour

All parties will behave in accordance with the following standards at all times:

| | |
|---------------------------------|--|
| Honesty and fairness | Parties will conduct all procurement and business relationships with honesty and fairness and avoid any practice which gives one party an improper advantage over another. |
| Accountability and transparency | The process for awarding contracts will be open, clear and defensible and all parties must not engage in collusion, hidden commissions and other anti-competitive behaviour. |
| No conflict of interest | A party with a conflict of interest will declare and address that interest as soon as the conflict is known to that party. |
| Rule of law | Parties will comply with all legal obligations. |
| No anti-competitive practices | Parties shall not engage in practices that are anti-competitive. |
| Intention to proceed | Parties should not seek or submit tenders without a firm intention and capacity to proceed with a contract. |
| Co-operation | Parties will maintain business relationships based on open and effective communication, respect and trust, and adopt a non-adversarial approach to dispute resolution. |

1.6 Pursuit of Best Practice

The parties should aim to achieve best practice in relation to:

- a. quality in all aspects of service and service delivery;
- b. ethical business practices;
- c. management of procurement risk, including credit management;
- d. tendering and contract management;
- e. achieving project requirements and supply chain management;
- f. planning and management of human, physical and financial resources;
- g. environmental management;
- h. cooperative relationship and non-adversarial dispute resolution;
- i. application of professional and technical expertise;
- j. innovation in design, construction, service provision, processes and use of technology;

- k. value for money;
- l. training and skills development;
- m. research and development;
- n. occupational health and safety and workplace injury management;
- o. industrial relations;
- p. equal opportunity;
- q. establishment and maintenance of clear and effective communication channels;
- r. clear processes for decision making;
- s. clearly defined contractual obligations of both parties; and
- t. compliance with all relevant Acts, Regulations, Standards and Codes;

2. INITIATING PROJECTS

This section sets out the key obligations of public bodies in initiating projects. Public bodies have a responsibility to pursue best endeavours in effective planning and documentation for projects.

2.1 Planning Initiation

Principals should:

- a. clearly define the project so that tenderers can appropriately determine their costs;
- b. adequately research their market, service and business needs;
- c. clearly define the brief in physical, financial and functional terms, including service needs and objectives;
- d. allow sufficient time for project definition, design and documentation;
- e. involve potential users, maintainers and constructors in determining design;
- f. attempt to identify potential construction difficulties and make due allowance for them in determining the construction period;
- g. determine and clearly convey the project time and cost objectives (if appropriate) and quality standards to be met;
- h. undertake robust project feasibility evaluation;
- i. select the procurement strategy best suited to their needs;
- j. identify a clear project implementation and procurement strategy including clear project stages with defined outcomes and timings (An overall project programme needs to be established and appropriate allowances included for tendering, tender assessment and final award. Construction periods need to be realistically established);
- k. identify the project and contract management resources required for the project (Long lead time supply items and or specialised resources need to be identified early and managed appropriately);
- l. adequately identify and obtain the financial resources required to complete the project (Preliminary cost estimates need to be carried out with sufficient accuracy to ensure funding is available within allocated budgets and appropriate contingency allowances should be allocated for the Principal's control);

- m. ensure that the design is such that construction costs resulting from compliance with all relevant safety and environmental requirements are minimised;
- n. commence effective construction planning during design; and
- o. recognise that the impact of change on the project is less costly and more effective before construction has commenced.

2.2 Managing Initiation

Principals should:

- a. utilise best practice in the project initiation phases;
- b. apply the necessary management skills;
- c. establish clear procedures and communication channels;
- d. use team processes involving relevant stakeholders;
- e. maintain continuity in the key elements of the project team;
- f. recognise the value of human resources;
- g. use technology effectively;
- h. identify constraints;
- i. identify and fairly and clearly allocate each major project risk to the party best able to manage, or otherwise prepared to bear, that particular risk (The allocation of risk between the parties should be closely defined. It is good practice to quantify the costs of risk allocation so that both parties are aware of the impact of acceptance of particular risks);
- j. refrain from seeking free services; and
- k. be transparent and even handed with those expressing an interest in the project.

3 SELECTION OF CONTRACTORS

3.1 Application

This section applies to all processes used on public construction relating to tendering by head contractors, subcontractors and suppliers, and when consultants act as the superintendent, agent or representative of the Principal.

3.2 Indicative Processes

The indicative processes connected with the procurement and delivery of projects are set out in the Contracts Work Flow at Appendix A.

3.3 General Principles

All parties should:

- a. be prepared to attest to their probity in all issues related to selection and engagement by statutory declaration;
- b. have regard to the cost of tendering and seek to constrain such cost;
- c. preserve confidential information as confidential and ensure that such information is not disclosed to other tenderers ie. don't disclose in any circumstance;
- d. respect the intellectual property rights of all parties and not use intellectual property submitted with a tender to obtain prices from, or negotiate with, other tenderers for like or similar scope; and

- e. ensure that the details of any tender, including the amount or break-up of any tender price, are not disclosed to third parties prior to the tender being awarded.

3.4 Pre-qualification

Pre-qualification of contractors should be considered where a competitive market exists e.g. at least 6 potential tenderers.

3.5 Obligations of Principals

Principals should:

- a. refrain from discriminating against tenderers who have previously declined an invitation to tender;
- b. inform all invited tenderers of the process by which tenders will be considered;
- c. inform all invited tenderers of the number of tenderers being invited to tender under the selective tender process where that number exceeds three;
- d. use the same conditions of invitation, selection and engagement for all tenderers on a particular job;
- e. use selection and engagement processes which are:
 - i. auditable, transparent and accountable; and
 - ii. streamlined and efficient to minimise costs of tender preparation;
- f. consider insurance coverage commensurate with the level of risk involved with each project;
- g. provide documentation which clearly and adequately specifies the Principal's requirements to enable tenderers to tender;
- h. refrain from seeking tenders without a firm intention to proceed;
- i. use terms and conditions of tendering, selection and engagement which are standard in the industry;
- j. recognise that tenderers retain their intellectual property rights unless otherwise indicated in the tender documents or contract;
- k. refrain from simply accepting the lowest price tender without consideration of the contractor's capability to deliver upon the specification; and
- l. be prepared to offer a reasonable level of reimbursement to tenderers in relation to the cost of preparing tenders for substantial design and construct projects.

3.6 Obligations of Contractors

Contractors should:

- a. refrain from submitting tenders without a firm intention to proceed;
- b. refrain from responding if unable to provide the goods or services required;
- c. immediately advise the Principal if unable to tender, having accepted an invitation to do so;
- d. ensure that their tenders comply with the requirements of the tender documents;

- e. fully address all of the information requirements set out in the tender documents;
- f. advise the Principal of any information they have that may effect the project implementation;
- g. provide evidence of professional indemnity and/or other insurance where required;
- h. appoint a competent **project manager**;
- i. advise the Principal of any omission or deficiency in the tender documents immediately the tenderer becomes aware of such; and
- j. select subcontractors using the selection principles within the Guide and ensure that generally they meet the requirements of the Guide.

3.7 Conflict of Interest

Any party with a conflict of interest must declare that interest to the affected party as soon as the conflict is identified and resolve the conflict in favour of the public interest.

All parties must ensure that their performance in this area is beyond reproach.

3.8 Collusive Tendering

All parties should not engage in collusive tendering and any other anti-competitive practices, such as, but not limited to:

- a. agreement between tenderers as to who should be the successful tenderer;
- b. any meeting of tenderers to discuss tenders prior to submission of the tenders, if the Principal is not present;
- c. exchange of information between tenderers about their tenders prior to awarding of a contract or commission;
- d. agreement or exchange of information between tenderers for the payment of money or the securing of reward or benefit for unsuccessful tenderers by the successful tenderer;
- e. agreements between tenderers to fix prices or conditions of contract (this means any collaboration between tenderers on prices or conditions to be included in contracts or commissions without the consent of the Principal);
- f. submission of a cover tender or any assistance to any tenderer to submit a cover tender (that is, a tender submitted as genuine but which has been deliberately priced in order not to win the contract or commission);
- g. any agreement between tenderers prior to submission of tenders to fix the rate of payment of employer or industry association fees, where the payment of such fees is conditional upon the tenderer being awarded the contract or commission; or
- h. payment to any third party of money, fees, incentives or other concessions contingent on the success of the tender that do not relate to the provision of proper services relevant to the tender.

These provisions are not intended to prohibit proper practices or arrangements, which are aimed at providing innovative or non-standard forms of procurement and delivery, such as joint ventures, alliance partnering and the like.

3.9 Uncompetitive Behaviour

A tenderer must not engage in any uncompetitive behaviour or practice that denies legitimate business opportunities to other tenderers or participants in the tender process, including, but not limited to, the matter referred to in Section 3.8 concerning collusive tendering.

A tenderer must not:

- a. accept or provide secret commissions;
- b. enter into any improper commercial arrangements with other contractors, subcontractors, suppliers, agents or parties;
- c. seek to influence contract decisions by improper means during the tender process; or
- d. accept incentives to provide contracts or services to other contractors, subcontractors or suppliers that financially disadvantage the Principal.

3.10 Disqualification of Tenderer

Principals should not knowingly accept tenders from or award contracts to tenderers who:

- a. are bankrupt;
- b. are subject to a winding up order; or
- c. are corporate entities with persons involved directly or indirectly in the management of the entity, who are disqualified under the Corporations Law.

Principals may choose to not accept tenders from or award contracts to tenderers who have an administrator appointed.

3.11 Quality Management

As a signatory to this Guide, each party acknowledges that its commitment to Quality Management is a key element of its response to effective risk control. These risks may be regarded as any issue that may result in adverse consequences for the project in the areas of health and safety, scope, delivery time and/or financial outcome. These risks may also include product or element quality disputes, community or stakeholder concerns, environmental damage threats and may damage the reputation of both parties to the contract.

The **Project Manager** should verify to the Principal that all project risks will be adequately covered by the existence of relevant quality management systems.

Tenders should preferably be accepted from Contractors that demonstrate they have in place management systems addressing Quality, Occupational Health and Safety and Environmental Management, that reflect or are based on the relevant elements within the International Standards ISO 9000-2000, ISO 14001-2004 and AS/NZ 4801-2000, and that the tender evaluation criteria clearly demonstrates a preference for independent certification to these Standards or equivalents.

For contracts under \$50,000 in value or those contracts under \$100,000 that are deemed “low risk, non complex works” by the Principal, tenderers may be requested to undertake the works under the Principal’s Quality Management System.

Where tenderers without a Certified Management System are required to undertake works in this way, the Principal, in evaluating the tender or quote, shall apply a standard cost of applying and administering their management system across all submitted prices, in order to fairly assess the true whole of work costs.

Quality management systems used by contractors and Principals should aim to eliminate waste, re-work, duplication and non-value adding tasks on the one hand whilst achieving continuous improvement in methods, procedures, standards and efficiency on the other.

The quality standards adopted should be relevant to the final use and purpose of the project.

4 TENDERING

4.1 General Principles

Generally, the following principles will apply:

- a. Value for money – procuring goods and services at optimal cost, having regard to issues such as policy, performance standards, risk management and life cycle costs.
- b. Open and fair competition – maximising the opportunity for firms and individuals to compete for business.
- c. Accountability – allocating responsibility for compliance with policy and adoption of best practice.
- d. Risk Management – adopting management strategies to minimise risk in tendering and contract management. Generally, risk should be managed by the party best able to manage the specific risk.
- e. Probity and transparency – ensuring fairness, impartiality, consistency and transparency in all stages of the tendering phase.
- f. Local Industry Participation – using local suppliers whenever and wherever they offer best value for money.
- g. Minimisation of tendering costs – ensuring that consideration is given to the costs of tendering on the part of both Principals and contractors alike.

4.2 Tender Methods and Process

Principals should select a tender method and process that suits the procurement, its level of risk, is timely, avoids creating unnecessary costs for tenderers and safeguards the security and confidentiality of all tenderers.

Subject to legislative requirements, the Tender may be let by various procedures of which the most commonly used are: Open Tenders, Selected Tenders and Pre-registered (Selective) Tenders.

- **Open Tendering** requires the Principal to advertise the “Invitation to Tender” in a relevant newspaper, provide pertinent project details, invite the public to tender and inform prospective tenderers of the closing place, date and deadline of tender submission.
- **Selected Tendering** follows the same general procedure as Open Tendering with the exception that only those tendering organisations that have shown prior competence in similar projects may tender the project. Alternatively, the tendering organisation may acquire this status by submission and acceptance by the Principal of information relating the organisation’s ability to execute similar projects. Such information would be furnished and accepted prior to the Principal inviting a tender. A register is maintained by the Principal and regularly reviewed. Organisations are invited to tender as work is required after reference to this register.
- **Pre-registered (Selective) Tendering** is a two-stage process involving an advertised invitation to respond to an Expression of Interest from interested tenderers in lieu of an invite to tender.

The Principal will use an “expression of interest” process before it invites tenders. The Principal will advertise publicly the purpose and nature of the contract or project and the date by which it will invite tenders. The aim at the expression of interest stage is not to elicit tenders, but rather to assess the capacity of the respondents to undertake the work or project, and to refine the specifications. The Principal will make the evaluation criteria for registration available to all respondents and such criteria should include:

- a. financial capacity;
- b. organisational capacity;
- c. performance capability as evidenced by references;
- d. resource availability;
- e. occupational health and safety management;
- f. environmental management;
- g. quality management;
- h. project management;
- i. relevant experience; and
- j. compliance with this Guide.

The Principal may invite tenders from some, or none of the registrants, by the advertised date. If the Principal does not invite tenders by that date, it will write to all registrants advising when tenders are to be invited. Respondents who are not invited to tender will be advised in writing. The Principal will use this list of registrants to invite tenders for the advertised contract or project only.

Conditions of tendering shall be the same for each tenderer on any particular tender process.

All requirements, including the criteria for tender evaluation, shall be clearly stated in the conditions of tendering.

The period allowed for tender response should be commensurate with the complexity and value of the contract, but preferably not less than 21 days, except in a situation deemed by the Principal to be an emergency.

4.3 Tender Documentation

Tender documents are the written details of the goods and services required and should include a copy of the proposed contract between the Principal and the contractor. For civil engineering works, there will be copies of plans, drawings and specifications and where appropriate, a Bill of Quantities. The contract plans, drawings, specifications, Bill of Quantities and/or Schedule of Rates and Prices, letters of agreement will form the basis of the contract between the Principal and the contractor.

Tender documents should specify the Principal's requirements clearly and indicate the criteria for evaluation, including the weighting given to each evaluation criteria. All parties should have regard to the costs of tendering to the industry and the community at large, and avoid calling repeated rounds of tendering.

The tender documentation should specify the timelines for the acceptance of tenders and notification of the successful tenderer. Where these timelines are to be altered, the tenderers should be notified accordingly. If there are to be significant delays then tenderers are to be given the opportunity to vary their tender.

Tender documents should clearly specify what constitutes a complying tender.

Tenderers may be encouraged to offer alternative, better value for money tenders. However, where that avenue is available, it should be made explicitly so. Principals should specify the conditions under which alternative tenders will be considered and ensure that such tenders can be compared with a complying tender. These conditions shall not remove the obligation to comply with the Guide nor to submit a complying tender.

Where a tenderer offers an alternative, a tender for that alternative should not be sought from other tenderers. Principals should not breach confidentiality by using information contained in alternative tenders as the basis for calling subsequent tenders.

Principals seeking innovative proposals should specify performance objectives for any alternative proposal and determine selection evaluation criteria.

The number of tenderers invited to tender, under a selective tendering process, should generally be between three and six. The number of tenderers invited should be disclosed to tenderers.

The following information should be provided in any invitation to tender:

- a. name (including ACN and ABN) and registered office of the principal, architect, quantity surveyor and other major consultants;
- b. the proposed contractual obligations of the parties, ie, type of contract and any special conditions being contemplated;

- c. full details of work for which the tender is called, ie:
 - location of site; and
 - general description of work and some indication of size, including specific requirements;
- d. a Bill of Quantities, if appropriate (Where quantities are provided by the Principal they shall be measured in accordance with the current edition of the Australian Standard Method of Measurement of Building Works);
- e. the specific time for construction;
- f. all known information that may affect the risks of the project;
- g. any supporting information required from tenderers;
- h. the person to provide additional information on behalf of the Principal;
- i. sufficient detail to avoid undue design and documentation work prior to the selection of a tender, unless the Principal offers to pay;
- j. the method and time of lodgement and, in the case of public opening of tenders, details as to the time and place of public opening;
- k. what provision is made for rise and fall in prices,
- l. whether allowance has been made to address significant movements in costs of consumerables and materials due to global factors;
- m. how provision is made for inclement weather;
- n. how liquidated damages and latent conditions are to be applied;
- o. industry standard conditions of tendering, with special conditions only where necessary;
- p. any special conditions or obligations under the contract that are not part of the standard conditions;
- q. guidance to tenderers on the selection evaluation process;
- r. indicative timelines for the evaluation and acceptance of the tender;
- s. advice as to whether tenderers will be reimbursed for the reasonable cost of preparing tenders for substantial design and construct projects; and
- t. Any test results associated with the project.

4.4 Calling Tenders

Parties should not seek tenders without a firm intention to proceed or before ensuring sufficient finance to carry out the work has been secured. Where there have been delays in inviting tenders, the project should be re-costed prior to inviting tenders.

All tender documentation should be available by the party calling for tenders at the time of inviting tenders.

Principals should also ensure that competent **project managers** and support staff are available to manage the procurement process and subsequent contract administration. A competent representative with project knowledge should be available to answer queries in regard to the contract during the tender period.

Sufficient time as outlined in Section 4.14 should be allowed between issuing the tender documents and the close of tenders to enable tenderers to make site visits and undertake any other work necessary to tender. Principals should make the site reasonably available to tenderers, and advise tenderers of “known hazards” which may affect contractors’ pricing, ability to complete the works, or expose them to legislative risk.

The parties to this Guide subscribe to the principle that any charging for the production and distribution of tender documents should be only applied to discourage non-genuine tenderers and to encourage the electronic dissemination of tender information.

Generally:

- a. Conditions of tendering must be the same and be fair and reasonable for each tenderer on any particular project.
- b. Unless otherwise specifically required, “General Conditions of Contract” that are standard in the industry or relevant industry sector should be used. Special conditions should only be used when specific site and project requirements make the “general conditions” unworkable. One sided contract conditions should be avoided in recognition of the partnership approach. Tenderers should read the Annexure to the Conditions of Tendering, which will outline any special requirements relating to the particular tender.
- c. “General Conditions of Contract” and any special conditions should observe the principle that the party best able to control a risk should bear that risk.
- d. The Principal should allow a range of project security payment options that on the one hand provide adequate project security and on the other allow greater competition and project efficiency.
- e. If the principal decides not to accept any tender and to re-advertise tenders, the original tenderers shall be advised of the reasons for the recalling and as a general principle, invited to submit a new tender, where appropriate. In addition, consideration should be given to reimbursing a portion of the original tenderer’s tender costs which will be in the order of 1% of the estimated project cost. This provision will also apply when a principal decides not to proceed with the works for any reason after submission of tenders.
- f. During tender evaluation, principals should not seek to trade off different tenderers’ prices against others in an attempt to obtain lower prices.
- g. If no tender is acceptable, negotiations for an amended tender may be conducted in accordance with Section 5.3.
- h. Reasonable consideration should be given to the reimbursement of a portion of tender costs where significant external advice or consultant’s costs are required to be expended by tenderers to satisfy tender requirements.
- i. Tenderers retain their right to intellectual property unless it is purchased by the principal.

- j. In addition to the provisions set out above, the ethics and procedures defined in the Australian Standard Code of Tendering AS 4120 will also apply. The provisions of this Guide shall prevail to the extent of any inconsistency.

4.5 Permits and Approvals

The Principal should use its best endeavours to obtain all necessary permits and approvals for permanent works prior to inviting tenders to ensure that they are available before a contract is executed and work commencing.

Tender documentation should specify the timelines for permits and approvals to be obtained.

4.6 Submission of Tenders

It is the tenderers responsibility to submit a tender in accordance with the conditions of tendering and in a legible and uncorrupted form, particularly in the case of electronic tendering.

4.7 Confidentiality

Information provided by tenderers to Principals in the course of, and following, the submission of tenders must be treated as confidential, except for that information required to be notified to unsuccessful tenderers. Principals shall not disclose tender information received from a tenderer that is intellectual property, proprietary, commercial in confidence or otherwise confidential.

Intellectual Property is important in the competitive advantage of a business and should be guarded carefully. Principals should be wary of tenders that disclose private or commercially sensitive information.

In cases of design or design and construct contracts, the intellectual property belongs to the Principal once it is paid for.

4.8 Clarification of Tenders

If information received in a tender is open to interpretation or is not clear, then clarification should be requested from the tenderer where this is material to identifying the successful tender. The clarification procedure should be managed in such a way so as not to give the tenderer an unfair advantage over other tenderers by allowing the tenderer to revise or enhance its original tender.

If the principal considers that there may be an error in any tender that cannot be corrected without unfairly changing the competitiveness of the bid, the tenderer should be given an opportunity to check the tender and either confirm the tender without amendment or withdraw the tender.

4.9 Pre Tender Briefing

Generally, a pre-tender briefing should be held by the principal unless the project is considered to be of routine nature, low risk and devoid of complexity or community sensitivity.

Prospective tenderers are expected to attend the pre-tender briefing when it is convened. The Principal reserves the right to require attendance at a pre-tender briefing as a condition of tendering.

The pre-tendering briefing should address the following:

- Scope of project
- Any particular requirements of contractors that may have been difficult to specify
- Particular risks
- Details of complex matters
- Requirements of contractors to address community sensitivities
- Any other matters that will contribute to the efficient delivery of the project.

4.10 Tender Enquiries

Access to accurate and up to date information is crucial to completing a satisfactory tender response. Principals should ensure that such information is at hand and easily accessible by tenderers.

Principals should nominate a person with knowledge of the work to respond to all inquiries from tenderers. These inquiries must be recorded, noting the time and date, the tenderer and the issue discussed.

Information given to one particular tenderer by the Principal must also be given promptly, in writing, to all other tenderers.

4.11 Amendments to tender documents

Principals have an obligation to issue complete tender documents and avoid amendments to such documents. Where amendments are required, they should be provided as an addendum to all tenderers. Consideration should be given to extending the tender period when an addendum is issued.

Tenderers should be required to confirm in writing the receipt of addendums and confirm that the tender allows for the same.

Design changes and/or addenda should not be introduced in the last week of the tender period. Should there be a need to make changes to the tender documents in the last week before the close of tenders, then a reasonable extension to the closing date of tenders should be made.

A Principal should promptly inform all tenderers of any errors, omissions, ambiguities or discrepancies identified in the tender documents.

Immediately when a tenderer becomes aware of an error, omission, ambiguity or discrepancy in the tender documents, they should advise the Principal accordingly.

4.12 Submitting tenders

Tenderers should only submit tenders if they genuinely believe they have the competence and capacity to undertake the work being offered.

In the case of invited tenders, a tenderer may decline to tender, and should promptly inform the Principal.

The Principal may require tenderers to attest as to whether they have entered into any contracts or agreements with other tenderers.

The electronic lodgement of tenders in accordance with the Electronic Transactions (Victorian) Act 2000 is encouraged in the interest of achieving increased efficiencies in the submission and management of tenders.

4.13 Formulation of tender

To ensure that a tender is complete and reflects a full understanding of the documents and the work required, tenderers should examine the documents and the site on which the work is to be constructed, and, if in doubt, seek clarification from the Principal.

No tenderer may seek, or expect to be given, information not available to all other tenderers. A tenderer should accept that additional information provided on request to them will also be provided to other tenderers.

A tenderer should inform the Principal of any errors, omissions, ambiguities or discrepancies identified in the tender documents.

4.14 Closing of tenders

The method and time for the lodgement of tenders should be stated in the tender documents.

Principals should make the names of all those who lodge tenders available upon request but only after the closing of tenders.

The following is recommended practice for the closing of tenders:

- not before 2 p.m.;
- not on a Monday or a day following a public holiday;
- minimum tender period of 21 days, which should be extended if the tendering period spans a major public holiday period (eg. Christmas/New Year, Easter, etc); and
- at least one week after a recognised industry holiday period, not being a public holiday or RDO.

4.15 Receipt of tenders

Principals should make arrangements to safeguard the security and confidentiality of all tenders. Information provided in a tender by a tenderer must not be disclosed to another tenderer at any stage during the tender process or after it has concluded, except for the price of the winning tender, which may only be disclosed at the conclusion of the evaluation process.

Tenders should be publicly opened and the names of tenderers should be verbally disclosed.

The tender-opening process should be auditable, transparent and accountable.

As soon as practicable after the opening of tenders, tenderers should be advised when their tenders are no longer under active consideration.

Late tenders will not be accepted. When a late tender is received, the time and date of receipt must be recorded on the document.

5 EVALUATION

5.1 Evaluation Criteria

Evaluation criteria should be specified in the tender documents.

In addition to prices tendered, evaluation criteria should contain the critical factors to be used in the evaluation of tenders. These factors typically include, but are not limited to:

- a. Whole of life costs, including costs of disposal
- b. Ability to meet the requirements of this Guide
- c. Innovation offered
- d. Delivery times offered
- e. Quality offered
- f. Previous performance of tenderer
- g. Experience of tenderer and personnel proposed
- h. Capability of tenderer, including technical, management, human resource, organisational and financial capability and capacity
- i. Tenderer's occupational health and safety management practices and performance
- j. Tenderer's workplace and industrial relations management practices and performance
- k. Tenderer's environmental management practices and performance
- l. Tenderer's community relations practices and performance
- m. Value adding components such as economic, social and environmental development initiatives, if appropriate, and relevant to the procurement and conformity with tender requirements
- n. Skills acquisition and retention, and knowledge management.

The qualitative evaluation criteria should be consistent with the proposed contract requirements and aim to identify the tenderer offering the best value for money. The proportional weighting of the evaluation criteria should be included in the tender documents.

The evaluation criteria should contain sufficient detail to enable the tenderers to understand clearly the basis on which their tender will be evaluated. These criteria should also be considered in the context of the Contract Performance Report review process (see section 6.5).

5.2 Evaluation of Tenders

Evaluation of tenders should be based on the conditions of tendering and evaluation criteria specified therein. The evaluation criteria should be determined prior to issuing the tender documents and should include the weighting, or priority given to each criterion.

Any tender that does not adequately comply with the conditions of tendering should be rejected.

Tenders should be evaluated by people with the necessary skills and knowledge and who are free of conflicts of interest that might undermine the fairness of the process. In the case of an in-house bid being submitted, the tenders are to be assessed by a panel comprising at least one independent panel member.

Alternative proposals offering innovation or greater efficiency are encouraged but should only be considered if submitted as part of a complying tender. The alternative proposal should be assessed against the performance criteria specified in the request for tender.

Where a tenderer offers an alternative, a comparable price for the alternative must not be obtained from other tenderers, nor may the alternative be used as the basis for the re-calling of tenders.

The most advantageous tender should be accepted as determined by the application of the evaluation criteria. In conducting the evaluation, the Principal should be assured that safety and environmental standards can be met.

The evaluation of tenders should be undertaken in 7 stages, ie:

Stage 1 – Undertake cursory review of the tender submissions to ensure that they are generally complete, conforming and are accurately prepared.

Stage 2 – Rank the tenders received in order of priority having regard to qualitative assessment against the specified evaluation criteria.

Stage 3 – Rank the tenders received in order of priority having regard to the tender price, appropriately adjusted to reflect compliance with the specification and elimination of errors and miscalculations.

Stage 4 – Select the 2 or 3 tenders which provide the best value for money having regard to the outcomes of Steps 1 to 3, above.

Stage 5 – In relation to each of the tenders selected during Stage 4, determine the total project costs, having regard to all related matters, including the level of in-house resources required to supervise each of the tenderers.

Stage 6 – Select the tender which provides best overall value to the Principal.

Stage 7 – Before finalising evaluation report and recommending a tender for acceptance, confirm with the preferred tenderer their ability to deliver the project.

5.3 Negotiation

If after a competitive tendering process, none of the tenders are acceptable either due to the level of non-conformance or because they do not represent sufficient value for money, negotiations may be conducted with the tenderer that submitted the most acceptable tender based on the evaluation criteria.

The purpose of the negotiations should be made clear to all participants prior to the commencement of negotiations. The aim is to achieve a tender that is mutually acceptable.

Principals should exhaust negotiations with the tenderer that submitted the most acceptable tender before negotiating with the next most acceptable tenderer, unless time constraints or the closeness of the tenders dictate otherwise. Negotiations should be exhausted prior to considering re-tendering.

If negotiations are likely to lead to a significant change in the scope of the project, the revised project should be retendered and consideration should be given to reimbursing the original tenderers in accordance with sub-clause e. of Section 4.4.

If a Principal does not accept any of the tenders submitted, the tenderers shall be advised of the reasons. If fresh tenders are to be called, Principals may add other tenderers to an original list of invited tenderers.

If the Principal desires to introduce new conditions or make amendments to the contract at the time of acceptance of a tender, the tenderer should be provided with the opportunity to amend their tender price to accommodate the proposed variations.

5.4 Prohibition of 'Bid Shopping'

Principals should not use tender negotiations as an opportunity to trade-off one tenderer's prices against other tenderers' prices in order to obtain lower prices. This practice, known as 'bid shopping', is prohibited.

5.5 Outcomes of Tenders

5.5.1 Notification of result

Principals should notify unsuccessful tenderers in writing, preferably advising:

- a. the name of the successful tenderer;
- b. the awarded tender price;
- c. if it was the lowest price; and
- d. if it was not the lowest price, the reason why the tender was awarded.

Information relating to unsuccessful tenders will remain confidential, unless otherwise specified in the conditions of tendering, agreed by the tenderers or required by law.

5.5.2 Debriefings

Principal should advise unsuccessful tenderers that they are entitled to a debriefing.

Debriefings should explain how their tender performed against the evaluation criteria, rather than against the successful tender, with the objective of assisting them to improve future tenders.

6. CONTRACT MANAGEMENT

6.1 General

Parties involved in executing contracts should:

- a. ensure that a recognised quality assurance process is used for all aspects of contract management;
- b. cooperate with other parties in the administration of contracts to enable them to fulfil their contractual obligations;
- c. employ quality management principles without excessive use of audits and with a focus on avoiding waste, rework and duplication;
- d. protect 'commercial-in-confidence' information;
- e. appoint employees or staff with an appropriate level of competence and authority to administer contracts;
- f. respond promptly to reasonable requests for advice and information;
- g. submit accurate and fair progress claims;
- h. deal with contractual claims strictly in accordance with the terms of the contract;
- i. process and pay contractual entitlements in a timely manner and strictly in accordance with the timelines set out in the contract;
- j. cooperate to minimise problems, claims or disputes; and
- k. adopt a cooperative approach to dispute resolution so that adversarial action is minimised and legal proceedings initiated only as a last resort;
- l. execute the contract in a timely manner in accordance with the specified timelines; and
- m. provide full and open detail costing of any variations to the contract.

6.2 Role of Superintendent

The Principal should ensure that at all times there is a Superintendent who is experienced and competent in contract management and that, in the exercise of the functions of the Superintendent under the Contract, the Superintendent will:

- a. act honestly and fairly;
- b. act in accordance with the contract and ensure the contract is implemented;
- c. exercise the highest degree of people resource management skills;
- d. act within the time prescribed under the contract or where no time is prescribed, within a reasonable time; and
- e. arrive at a reasonable measure or value of work, quantities or time.

The Superintendent should be as close as possible to the project so as to ensure decisions required are made in a timely manner in accordance with the contract and in the interest of site safety.

Meetings held between the Superintendent and Contractor should be minuted and the minutes made available to the participating parties within 3 working days or as agreed by the parties.

The Principal should ensure that the person appointed as Superintendent has the appropriate levels of internal delegations to properly exercise their duties under the contract and make adequate provision to cover the Superintendent during periods of leave and other absences.

If pursuant to a provision of the contract enabling the Superintendent to give directions, the Contractor will comply with those directions.

The Superintendent should ensure that there are open and clear two-way communication channels with the contractor, so that the contract is carried out in a cooperative manner and decisions required under the contract are timely and clearly understood.

6.3 Variations

The Contractor should not vary the work under the Contract, except as directed by the Superintendent or approved in writing by the Superintendent.

The Contractor is bound to execute a variation which is within the general scope of the Contract.

The Contractor should not be required to execute a variation directed after practical completion unless the variation is in respect of rectification work for any defect or omission identified by the Superintendent.

The Principal should reimburse the Contractor for the reasonable costs of complying with the variation other than where such work is to rectify defects or omissions by the contractor.

6.4 Directions of Work

Confirmation of directions to undertake work made by the Superintendent should be given in writing, within one business day.

6.5 Contract Performance Report

During the execution of and upon finalisation of the Contract the Superintendent, the Principal and the Contractor should meet and undertake a joint review of the Contractor's and the Superintendent's performance under the contract. The review will generally cover the following:

- a. Administration of contract
 - i. Contract meeting minutes
 - ii. Correspondence between superintendent and contractor
 - iii. Timely responses to correspondence between the parties
 - iv. Timeliness of any required approvals
- b. Contract Documents

- i. Clarity and adequacy of scope
 - ii. Design detailed sufficiently
 - iii. Inclusion of relevant standard specification sections
 - iv. Adequately detailed contract specific sections
- c. Delivery of Contract
 - i. Completion time
 - ii. Conformance management
 - iii. OH&S issues
 - iv. Traffic management
 - v. Quality of work
 - vi. Stakeholder relations management
 - vii. Knowledge transfer between parties
- d. Audit and Surveillance
 - i. Audit reports
 - ii. Surveillance
- e. Progress certificates and payments
 - i. Was assessment of claims fair and reasonable?
 - ii. Were payments made within time stated in the contract?
- f. Claims management
 - i. Were claims processed in a timely manner and in accordance with the contract?
 - ii. Were the assessments of claims fair and reasonable?
- g. Finalise the contract
 - i. Identification/agreement on defects/omissions
 - ii. Issue certificates/payments in a timely manner

7 PAYMENTS

All payments duly authorised by the Superintendent and payable to the Contractor, including those for variations, should be made strictly in accordance with the provisions of the contract.

Where the contract is silent on the method and timing of payments, the provisions of the *Building and Construction Industry Security of Payment Act 2002* (as amended) will apply.

Principals should take all reasonable steps to ensure that principal contractors meet their payment obligations to their subcontractors in a timely manner.

8 DISPUTE RESOLUTION

Parties to contracts should use every endeavour to resolve disputes. Contracts should be written in clear and concise language to avoid, as far as possible, the potential for dispute.

Contracts should be clear as to how to resolve conflicts arising under the contract in a way which minimises the costs to Principals and Contractors. Every endeavour should be made in the first instance to mediate issues and disputes.

Where disputes cannot otherwise be resolved, consideration should be given to using the services of the Small Business Commissioner, whose role in resolving

disputes between government agencies and business, is established under the *Small Business Commissioner Act 2003*.

9 COMPLIANCE

The Guide provides a benchmark for the industry, and applies to civil construction work that is managed or fully/partly funded by the public bodies. The provisions of the Guide should be observed by the parties involved in such work.

There is an expectation that the industry associations that are party to this Guide will make every endeavour that is reasonably possible to ensure members comply with this Guide.

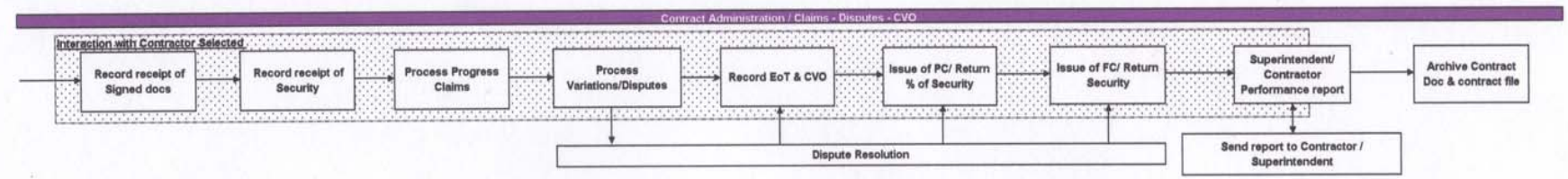
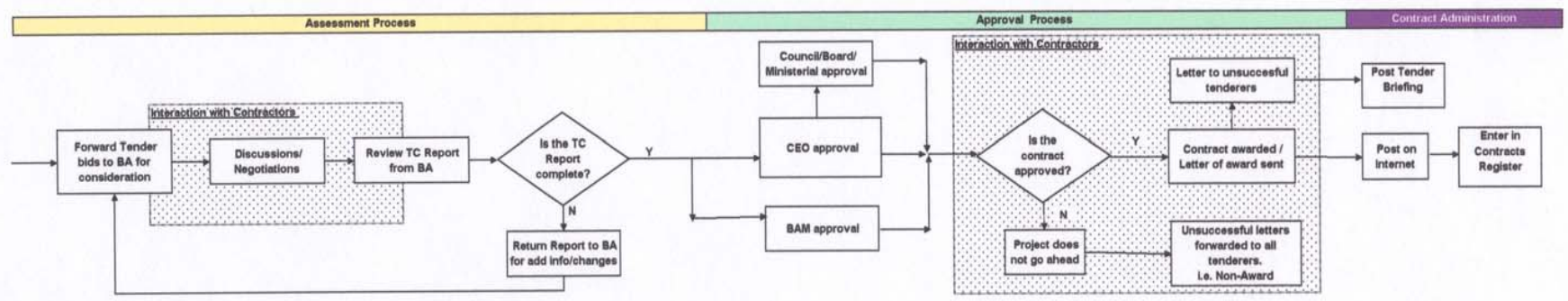
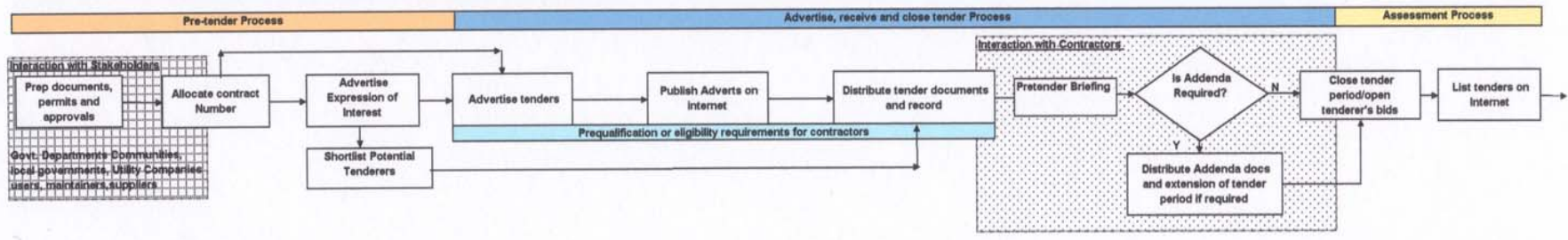
The Principal is encouraged to include a statement in the preamble of their tender evaluation reports to the effect that compliance with the requirements of the Guide has been met.

APPENDIX A

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Contracts Work Flow

APPENDIX A Contracts Work flow



BA: Business Area BAM: Business Area Manager TC: Tender Consideration CEO: Chief Executive Officer EoT: Extension of Time CVO: Contract Variation Order PC: Practical Completion FC: Final Certificate