

Tender Assessment

Presented by Scott Alden, Partner

Tuesday, 19 October 2021

The 2021 Procurement Seminar Series

- Planning a perfect procurement – 17 July 2021
- Probity in Procurement – 17 August 2021
- Current Issues and Updates in Procurement - 7 September 2021
- Legal Issues and Risks in Procurement – 28 September 2021
- **Tender Assessment – 19 October 2021**
- Innovations in procurement – 9 November 2021
- Managing the Procurement – 30 November 2021
- Top Ten Issues for 2021/2022 – 21 December 2021

If you have any questions in relation to our Government Procurement Webinar Series, or to register to attend a session, please email Katarina Szivek, BD Specialist on kszivek@hwle.com.au.

To view the recordings of sessions already delivered, please visit <https://hwlebsworth.com.au/recordings-government-procurement-webinar-series-2021/>

Setting the Scene

- Why do we do Tender Assessment?
- What are we trying to achieve?
- What is Value for Money?
 - A balanced judgment of a range of financial and non-financial factors including taking into account:
 - The mix of quality, cost and resources;
 - fitness for purpose;
 - total cost of ownership; and
 - risk.
- What is not Value for Money ?

VFM under the CPRs

- Achieving VFM is the core rule of the CPRs
 - as it is critical to ensuring that public resources are used in the most efficient, effective, ethical and economic manner
- This requires consideration of the financial and non-financial costs and benefits associated with procurement
 - Price is therefore not the sole determining factor when assessing VFM

VFM under NSW Gov procurement policy

Section 1: Objectives

01

Value for money

The overarching consideration for government procurement is ensuring best value for money in the procurement of goods, services, and construction.

Value for money is not necessarily the lowest price, nor the highest quality good or service. It requires a balanced assessment of a range of financial and non-financial factors, such as: quality, cost, fitness for purpose, capability, capacity, risk, total cost of ownership or other relevant factors.

References







































Type	Reference	Status	Category		Value	Plan	Source	Manage
Legislation	Public Works and Procurement Act 1912				Any			
Legislation	Government Sector Finance Act 2018				Any			
Policy	TPP18-06 NSW Government Business Case Guidelines				Risk based			
Policy	TPP17-03 NSW Government Guide to Cost Benefit Analysis				Risk based			
Guidance	Value for Money				Any			
Guidance	Market Approaches Guide				Any			
Guidance	Benefits Realisation Framework				Any			

Table 2 References: Value for money

Core Documents

- Procurement Policy
- Business Case
- Procurement Plan
- Probity Plan
- Advert
- EOI / RFT
- Tender Evaluation Plan / Methodology
- Tender Evaluation Report

CONSISTENCY IS PARAMOUNT – CRITERIA MUST MATCH SCHEDULES AND MUST BE USED IN TEP / TEM

Some Simple Rules to Procure By

1. Think About What You Want to Achieve
2. Identify What You Need To Do To Achieve It
3. Say What You Are Going to Do
4. Make Sure You Are Able To Do It
5. Do What You Said You Would

Some Preliminary Considerations

- Pre Tender Briefing?
 - Mandatory / Non-Mandatory
- Mandatory Criteria?
- Exclusionary / Protectionist / Anti-Competitive / Free Trade Agreements
- Weightings (Disclose / Don't Disclose)
- Budget (Disclose / Don't Disclose)
- Two Envelope Process?

CPRs

- CPR 4.4 (Achieving value for money). In order to achieve VFM outcome, Officials **must** be satisfied after making reasonable inquiries. Procurement should:
 - encourage competition and be non-discriminatory;
 - use *public resources* in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth;
 - facilitate accountable and transparent decision making;
 - encourage appropriate engagement with risk; and
 - commensurate with the scale and scope of business requirement.

CPRs continued

- CPR 4.5 (VFM continued). When conducting a procurement, an *official must* consider the relevant financial and non-financial costs and benefits of each *submission* including, but not limited to the:
 - quality of the goods and services;
 - fitness for purpose of the proposal;
 - *potential supplier's* relevant experience and performance history;
 - flexibility of the proposal (including innovation and adaptability over the lifecycle of the *procurement*);
 - environmental sustainability of the proposed *goods* and services (such as energy efficiency, environmental impact and the use of recycled products);
 - recognising the Australian Government's commitment to sustainable procurement practices, entities are required to consider the Australian Government's *Sustainable Procurement Guide* where there is opportunity for sustainability or use of recycled content;
 - the *Sustainable Procurement Guide* is available from the Department of Agriculture, Water and the Environment's website; and
 - whole-of-life costs.

CPRs continued

- CPR 5.1 – 5.4 – encouraging competition and non discrimination
- CPR 10.15 – 10.19 – conditions for participation
- CPR 10.28 – 10.31 – late submissions
- CPR 10.35 – 10.36 – awarding contracts – contract must be awarded to tenderer that:
 - satisfies the conditions for participation
 - is fully capable of undertaking the contract
 - will provide the best value for money, in accordance with the essential requirements and evaluation criteria specified in the approach to market and request documentation

EPPs - Procurement (Enforceable Procurement Provisions) Direction 2019

- S 3 In determining whether a procurement represents **value for money**, a government agency is to have regard to the following matters (as the government agency considers relevant to the procurement):
 - the financial and non-financial costs and benefits of making the procurement,
 - the quality and quantity of the goods or services,
 - whether the goods or services are fit for purpose,
 - the tenderer's relevant experience and performance history,
 - the environmental sustainability of the proposed goods and services (such as energy efficiency, environmental impact and use of recycled products),
 - the whole-of-life costs of the goods or services, including the following (if relevant):
 - the initial purchase price of the goods and services
 - maintenance and operating costs
 - transition-out costs
 - licensing costs
 - the cost of any additional features procured after initial procurement
 - consumable costs
 - disposal costs.

EPPs - *Procurement (Enforceable Procurement Provisions)* *Direction 2019*

- § 8 – 9 Non-discrimination and offsets prohibited
 - § 12 – basis to exclude suppliers from procurement
 - § 16 – conditions for participation
 - § 22 – awarding contracts to be based on criteria
 - government agency must award a contract to the tenderer that the government agency has determined:
 - satisfies the conditions for participation, and
 - is fully capable of undertaking the contract, and
 - will provide the best value for money (which is not limited to price), in accordance with evaluation criteria for the procurement
- (unless no tenderer satisfied the evaluation criteria or not in the public interest to award a contract).

Getting Into the Detail

- What Do We Want To Achieve?
- What Information Do We Need From Respondents to Assess What We Want to Achieve?
- What Should Be Our Criteria?
- What Should Be Our Sub-Weightings – Relativity of Importance?

Categorise Criteria

- Price / Non Price
- Non Price
 - Technical / Operational / Commercial

Subjective / Non-Price Criteria

Most criteria fall into one of three categories:

- Capacity – measures resources
- Capability – measures ability
- Price (e.g. lump sum or unit rates, Lifecycle Costing)

FOR EXAMPLE

- Previous Experience [supported by referees]
- Understanding of Requirements / Methodology
- Program
- Key Personnel
- Availability

- Management Systems - HSEQ
- [Equipment]
- [Financial Assessment]
- [Contract Compliance / Commercial Offering]

- Price

The Tender Evaluation Panel

- How many?
- Who?
- External / Internal?
- You've Gone To All This Effort... Don't Rush It!

Non Price Assessment

- Subjective evaluation (0-10 x Subweighting % = Weighted Score)
 - Adjectives
- Independent Assessment
- Committee Discussion of Independent Scores
- Consensus Reached?
 - Minority Report Noted?
- Overall Non Price Weighted Score (out of percentage weighting for non-price)
- Normalise?

Price Assessment

- Objective Assessment

$$\text{Tenderer Price Score} = \frac{\text{Lowest Assessed \$}}{\text{Tenderer \$}} \times$$

Price Weighting

[Result = Cheapest Tender Gets Maximum Price Score – all others commensurately less]

But What Is the Price?

How Are We Buying

- Fixed Price / Lump Sum
- Time and Materials
- Rates and Margins
- Incentive Based and KPIs
- No Guarantee of Volume

Even if Fixed Price

- Is it ever fixed...?
 - Lump Sum
 - Variations – Rates and Margins – How do we assess that?
- Cost of Acquisition vs Cost of Ownership
- Total Cost of Ownership / Whole of Life Cost
- WWTP \$1 to \$20
- Design / Construct / Operate – \$1 / \$10 / \$100

Whole of Life Costs Considered

ACQUISITION COSTS	OPERATING COSTS	MAINTENANCE COSTS	END-OF-LIFE COSTS
Purchase Cost	Labour	Specialist Labour	Safe Disposal
Delivery Charge	Materials	Specialist Tooling	Resale
Insurance and Taxes	Consumables	Spare and Replacement Parts	Ongoing Liabilities
Installation and Commissioning	Energy Supply and Consumption	Reduced Output with Age	Decommissioning
Training and Support	Contract and Supplier Management	Maintenance and recommended downtime	Removal for sale or scrap
Internal Costs Associated with Changing Suppliers	Transaction Costs	Servicing and Inspection Regimes	Reinstatement of Land or Buildings for Alternative Use
22	Cost of Change	Cost Associated with downtime	

Result

Non Price Weighted Score (unnormalised?) + Normalised Price
Score

= Overall Evaluation Result for Tenderer

Issues

- Easy to 'Buy The Contract'
- What then...
- How is that VFM?
- A Final Gateway / Risk Review – Is It Too Good To Be True?
- Recommendation to Delegate – Approve / Non-Approve

Sustainable Procurement

- ISO 20400 : 2017 – Sustainable Procurement
- Triple Bottom Line – Social / Environmental / Economic
- Distinguish – General Corporate vs Project Specific

What is sustainable procurement?

- ISO 20400:2017 definition
 - Sustainable procurement is “procurement that has the most positive environmental, social and economic impacts possible across the entire life cycle and that strives to minimise adverse impacts”



What is sustainable procurement?

- Gov Policy examples:
 - The CPRs specify that when assessing value for money, an official must consider the environmental sustainability of the proposed goods and services
 - Such as energy efficiency, environmental impact and use of recycled products.
 - NSW Procurement Framework
 - Sustainable procurement means spending public money efficiently, economically and ethically to deliver value for money on a whole of life basis.
 - Sustainable procurement extends the assessment of value for money beyond the sourcing process, considering benefits and risks to the organisation, the community, the economy and impacts on the environment.

Sustainable Procurement (Cont)

- Corporate Specific
 - Sustainability Charter
 - Sustainability Index
 - Third Party Certification / Accreditation

Sustainable Procurement (Cont)

- Project Specific
 - Any Environmental Externalities?
 - Any Social Differentiators?
 - How Do We Measure?
 - How Do We Value?

How can Sustainable Procurement be achieved?

- Integrate sustainability principles into all your procurement initiatives / activities
- Ethical and transparent supply chains
- Training and skills development



Source: Australia Government – Sustainable Procurement Guide, A practical guide for Commonwealth entities

Some Issues to Consider

- Presentations – How Does That Work With Criteria
- Shortlisting – What then?
- Best and Final Offer
- Directly Negotiating
- Referees / Reference Sites / Site Visits
- Deemed Referees
- How to deal with non-compliances – Value \$ / Who Values \$
- What's wrong with best proponent within budget?
- Should we exclude outliers?
- Averaging?
- Line Graphs?
- Using other Tenderer's Prices to fill in the gaps?
- Pricing Risk – Add 'Cost to Conform' Column to Departures and Qualifications Schedule

War Stories

- 95 / 5
- Mandatory Pre-Tender Briefing... or is it
- Platypus
- Change / Refine the Criteria
- Undisclosed BAFO Half Way Through...

Contact



Scott Alden, Partner

Phone: +61 2 9334 8418

Email: salden@hwle.com.au

LinkedIn:

[https://www.linkedin.com/in/
scott-alden-5884432b/](https://www.linkedin.com/in/scott-alden-5884432b/)

This seminar and accompanying documentation is not intended to be legal advice and should not be relied upon as such.

The copyright of this material is and will remain the property of
HWL Ebsworth Lawyers.



HW LEBSWORTH

LAWYERS

Adelaide | Brisbane | Canberra | Darwin | Hobart | Melbourne | Norwest | Perth | Sydney