



**Government
of South Australia**

State Procurement
Board

www.spb.sa.gov.au

Market Approaches and Contracts Guideline

Version	3.1
Date Issued	February 2020
Review Date	February 2021
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Overview

This guideline provides advice on market approaches when procuring goods and services and sets out requirements for using standard market approach and contract templates.

This guideline outlines:

- the various types of market approaches
- when to use a particular market approach strategy
- when to adopt the standard market approach and standard contract templates
- the structure and content of standard market approach documentation
- the process for unsolicited proposals.

The benefits of utilising standard market approach and contract templates include:

- consistency in the contractual approach to the procurement of goods and services
- simplified and expedited procurement processes for both government and suppliers
- reduced need for legal advice on standard contract templates for both government and suppliers, reducing red-tape and costs for both parties.

General Principles

The Object of the *State Procurement Act 2004* (Act) is to advance government priorities and objectives by a system of procurement for public authorities directed towards:

- a) obtaining value in the expenditure of public money
- b) providing for ethical and fair treatment of participants
- c) ensuring probity, accountability and transparency in procurement operations.

The development of a market approach strategy and the use of standard market approach and contract templates support these objectives by improving the efficiency of government procurement processes.

The *South Australian Funding Policy for the Not-For-Profit Sector* identifies best practice principles for government and Not-For-Profit (NFP) funding relationships across eight categories:

- Robust planning and design
- Collaboration and partnership
- Proportionality
- An outcomes orientation
- Achieving value with relevant money
- Governance and accountability
- Probity and transparency
- Community development principles.

These best practice principles have been incorporated into this policy where relevant.

Scope

This guideline applies to public authorities as defined in the Act and to market approaches for procurements valued at greater than \$550,000 (GST Inclusive).

Market approach requirements for simple procurements (valued up to and including \$550,000 (GST Inclusive) are set out in the *Simple Procurement Policy*.

There are additional specific requirements when undertaking procurements with the NFP sector which apply for procurements where NFP organisations form the primary supplier base. These requirements are identified in this policy through the use of a shaded text box.

Definition of a Not-For-Profit (NFP) organisation

A not-for-profit organisation is an organisation that is operating for its purpose and not for the profit or gain (either direct or indirect) of its individual members.

NFP organisations fall within two broad categories:

- charities, and
- other NFP organisations that are not charities, for example: most sporting and recreational clubs, community service organisations, professional and business associations and social organisations.

Charities must register with the Australian Charities and Not-for-profits Commission (ACNC).

(Refer <https://www.ato.gov.au/Non-profit/Getting-started/Starting-an-NFP/>)

Types of Market Approaches

Public authorities need to determine the most appropriate market approach strategy based on their business need and up to date knowledge of the market for the goods and services.

A market approach strategy can be undertaken as either a single stage or multi stage process.

A single stage process allows a contract to be awarded at the conclusion and is often used when the market is stable and competitive, and the requirements can be clearly specified.

A multi-stage approach (usually an Expression of Interest (EOI) is best utilised in the following situations:

- lack of clarity about requirements: there is a high level understanding of the business need; however detailed requirements are not yet fully understood and additional information is required to make further procurement decisions
- limited understanding of supply market: there is a lack of knowledge of the general level of interest and capability in the market to satisfy the requirement
- shortlisting to reduce costs to suppliers and public authority: there are a large number of suppliers or the requirements are complex, and shortlisting reduces the costs of the procurement process by decreasing the number of responses to be considered, and limiting the information that suppliers need to respond to (compared with responding to a detailed specification); suppliers can express their interest in a nonbinding manner and may withdraw their application before incurring additional expenses associated with the next stage of the procurement process
- security issues: suppliers need to be qualified for security reasons prior to providing detailed information
- innovation is sought: the process needs some flexibility to seek and assess innovative proposals, where further stages of the process will facilitate additional scoping of the potential procurement solution.

Market approaches may be:

- Open – invitations to supply are open to all interested suppliers
- Single – only one supplier is invited to supply
- Limited – a limited number of suppliers (but greater than one) are invited to supply

Open market approaches are publicly advertised invitations for suppliers to submit offers to supply goods and services and are suitable where:

- there are many suppliers able to offer competitive solutions and the complexity of the requirement is not at the level where a multi stage approach would be warranted
- the supply market is subject to continuous change
- the procurement is subject to a high level of market interest and a selective approach would involve a high degree of risk.

Single and limited market approaches may be appropriate where:

- a limited number of suppliers exist, verified through extensive market research
- there is a prequalified list of suppliers who have met required criteria (also called a multi-use list)
- a shortlist of suppliers has been determined through an EOI process
- suppliers are licensed or meet legislated standards required to deliver the requirements.

Single and limited market approaches:

- need to maintain the integrity of the process and are not to be chosen to avoid competition
- are only appropriate in extenuating circumstances as documented in the *Acquisition Planning Policy - Reasons for Limiting the Number of Suppliers*

Types of market approaches include:

- issuing an Invitation to Supply
- issuing an Invitation for Expressions of Interest
- undertaking a Direct Negotiation
- undertaking Competitive Dialogue
- undertaking a Reverse Auction.

This guideline also discusses unsolicited proposals, which are not a market approach as such, but an alternative sourcing strategy to a market approach.

An **Invitation to Supply (ITS)** is usually an open, publicly advertised invitation that:

- invites suppliers to offer, at their best price, goods and services to meet a particular requirement
- can be applied flexibly to procure goods and services where the specification can be clearly defined (i.e. technical specifications) and specifies exactly the goods and services required (known as Request for Tender) or
- can be applied where there is a need for the specification to allow variety and innovation in responses (i.e. specification is performance or function based) and a supplier can propose alternative solutions to the achieve the procurement objectives (also known as Request for Proposal).

Invitations for Expressions of Interest¹ (EOI):

- is usually the first stage in a multi stage market approach usually through an open, publicly advertised invitation
- outlines a general intention to acquire goods and services and invites suppliers to express their interest in being considered to meet the requirement.

An EOI usually results in a shortlist of suppliers to participate in a future market approach (for example an ITS issued to the selected suppliers). In some cases, the second stage of the procurement may not proceed, for example when no suitable solution to the requirement is available.

Potential suppliers are not required to provide prices and a contract is not usually formed at the EOI stage.

Direct Negotiation is undertaken by directly approaching and negotiating with one or more suppliers and is usually undertaken when comprehensive market research indicates a limited supply market.

Direct negotiation need to be compliant with the South Australian Government's free trade obligations. Direct negotiations also carry a higher potential risk in relation to ethical practices or conflict of interest (actual or perceived).

Competitive dialogue is a limited procurement approach that enables the public authority to enter into detailed discussions once market and supplier capability have been determined. It differs from more traditional approaches as the specifications are developed and refined with each supplier during the procurement process.

Competitive dialogue:

- can reduce the time to complete large-scale complex procurements by enabling the buyer to enter into detailed discussions once capability has been determined
- is useful in finding solutions when the public authority is dealing with an immature market and/or is unclear on the best way to meet a particular business need.

The competitive dialogue process gives public authorities the opportunity to work interactively with the supply market to better understand the market's capability and cost drivers. At the same time, the supplier's participation costs are minimised as suppliers do not spend resources on producing proposals that do not meet the public authority's needs.

The process involves each potential supplier submitting, and through dialogue, improving a solution (technical/financial/legal) to meet the public authority's objectives. The dialogue with each supplier is aimed at focusing its response on the business need and maximising the potential value of the supplier's solution. The supplier then presents a formal proposal for evaluation.

For example, a public authority may have a complex service contract with a supplier. Service level improvements are difficult to secure and every time the market is retested there is limited response. Competitive dialogue could be employed in such a situation to engage interested

¹ An EOI is sometimes referred to as a registration of interest or invitation to demonstrate capability.

suppliers individually (perhaps via an EOI) on how their particular service approach can meet the business need. Through the stages of dialogue, each supplier's proposal is developed to be the best value it can offer against the business objectives, and the proposal is then formalised to facilitate evaluation against a predetermined methodology.

A **reverse auction** is a type of auction in which several suppliers compete (on a price basis only) for the right to provide a good or service, with the bid price typically decreasing over the course of the bidding process. The bid price for each supplier is then inserted into the normal procurement process and all suppliers considered on a value for money basis.

Reverse auctions utilise technology to achieve a lower price than may be the case through a standard, once-only bidding process. The use of the internet enables an alternative means of establishing a price for the goods and services and allows suppliers to bid in a real time environment. Suppliers have multiple opportunities to offer a price.

Reverse auctions can reduce the procurement efforts and transaction costs for both buyer and supplier. Reverse auctions are also transparent and fair as all suppliers have knowledge of the leading bid at any point in time during the process.

Reverse auctions:

- are applicable to the procurement of goods with little or no value-added or service components
- where the market is competitive and price is a key selection criterion
- may be used as part of a multi-stage procurement process or as a means of obtaining quotes from suppliers from an established panel or common use contract
- require the usual procurement planning requirements (e.g. development of specifications, evaluation plan)
- establish the price elements for the procurement, with the other qualitative elements still required.

Reverse auctions generally involve the buyer seeking bids from suppliers by outlining its requirement (including goods description, delivery and warranty specifications, and terms and conditions of supply); the buyer also notifies suppliers of the starting price, date, time and duration of the reverse auction.

During the reverse auction, suppliers see the current best bid and make lower bids if they wish. At the close of the reverse auction, each supplier's offering is then considered against its qualitative bid (which addresses the non-price requirements of the procurement) to arrive at a value for money comparison of all suppliers. Where qualitative factors are used to differentiate between suppliers, the lowest price is not always the winning bid.

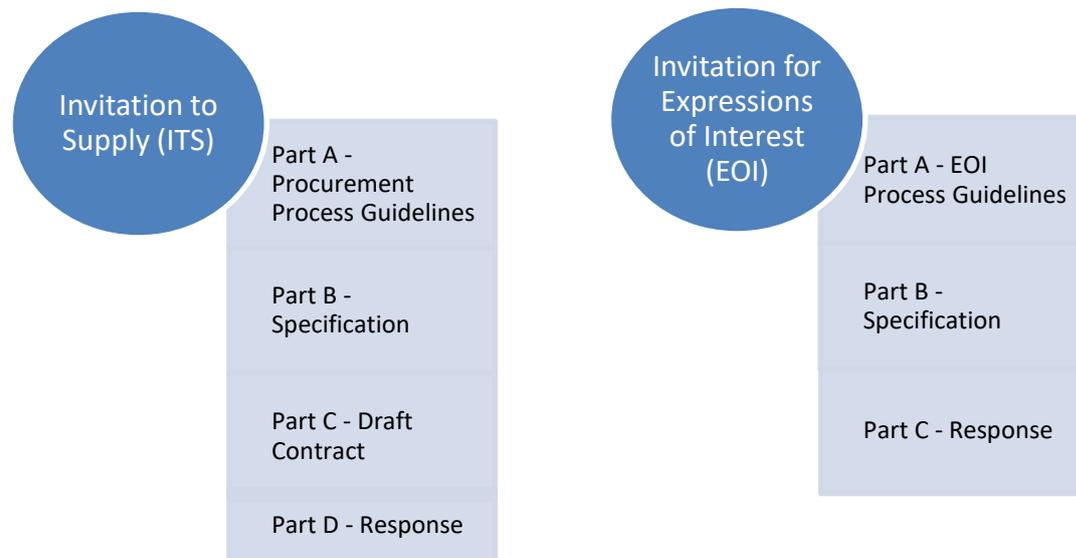
Standard Market Approach and Contract Documentation

Standard market approach documentation include:

- Invitation to Supply
- Invitation for Expressions of Interest

For other types of market approaches, the standard documents can be used to the extent that they are capable of being applied.

The standard market approach and contract documentation framework is set out below.



The standard market approach and contract documentation are to be adopted for all goods and services procurements in line with this guideline unless exempted.

Exempted procurements where fit-for-purpose invitation or contract terms and conditions may be required include:

- multi-agency arrangement – when a contract is established that allows access by more than one agency
- Information Communications Technology procurements
- construction contracts
- principal contractor controlled contracts – where a supplier is contracted to manage several procurements of goods and services on behalf of the principal
- contracting with universities or the CSIRO for the provision of educational services, technical and academic research
- joint ventures/partnerships – where the joint venturers/partners share the costs, risks and benefits
- Public Private Partnerships – usually used in the development of public sector infrastructure assets.

The ***User Guide: Market Approach Templates*** provides further information on how to select a procurement strategy and how to use the ITS and EOI.

Part A Procurement Process Guidelines (ITS) and EOI Process Guidelines (EOI)

Part A details the instructions to potential suppliers and the rules that govern the way that invitations will be conducted. Part A **must** be used for all procurements, except where fit-for-purpose invitation or contract terms and conditions are appropriate.

Part B Specification (ITS) and (EOI)

A specification is the statement of requirements to be procured from suppliers which clearly and accurately describes the goods and services and is the basis of the offers that are received from suppliers. Once a contract has been awarded, the specification is a key document for the management of the supplier to ensure they deliver what has been specified.

A specification needs to clearly describe:

- **what** the supplier is required to do including:
 - quantities required
 - technical details that will meet the specific needs
 - performance standards that the resulting supply of goods and services will need to address.
- **when** the supplier is required to do it
- **why** the supplier is required to do it.

A logically constructed and well written specification assists suppliers to respond effectively and develop a suitable solution and cost/fee.

There are three types of specifications:

Specification types	Description
Functional	The proposed function or role of the goods and services required to achieve the desired outcome is outlined. A desired result is defined that may describe the general form of the goods and services required. The focus is on what is to be achieved rather than the method of achieving it.
Performance	The required performance characteristics of the goods and services are defined with a focus on what is to be achieved not the method of achieving the outcome/result.
Technical	The technical and physical aspects of the goods and services are detailed, such as dimensions, colour, exterior finish, design specifics, physical properties, processes and operational requirements.

Functional and performance (i.e. outcome based) specifications are encouraged over technical specifications as they allow suppliers to offer innovative and technologically advanced solutions that can improve value for money outcomes. Technical specifications that are too prescriptive can limit innovative solutions from suppliers.

In some cases a requirement needs to be defined technically, such as where there are interface/compatibility requirements or where the supplier is required to hold an industry license. Technical specifications need to avoid referring to or requiring a particular trademark, patent, copyright, design, type, specific origin, producer or supplier, unless there is no other way of describing the requirements. Such specifications ought to allow "equivalent" solutions to be offered where appropriate.

A specification is not to include process rules, conditions of contract, questions or response schedules for the supplier to complete. This is the function of the procurement process guidelines and response schedules.

The Board has developed a specification template which can be used. The Board's **User Guide: Developing Specifications** provides an optional format for a specification and suggested content.

Part C Contract Terms and Conditions (ITS)

The Board has two standard agreements that can be used:

- Standard Goods and Services Agreement
- Standard Not-for-Profit Funded Services Agreement

Public authorities **must** use the *Standard Goods and Services Agreement* for all low to medium risk, non-complex (i.e. standard) goods and services government procurements, including procurements of consultancy services and for panel contracts.

Public authorities **must** use the *Standard NFP Funded Services Agreement* for all low to medium risk, non-complex service procurements with the NFP sector where up-front block funding is provided to NFP organisations. Where payment is based on price schedules and is paid in arrears, the *Standard Goods and Services Agreement* **must** be used.

The Standard NFP Funded Services Agreement consists of:

- Standard Not for Profit Funded Services Agreement Template
- Special Conditions Clause Bank
- Execution Block Bank.

The ***User Guide: Standard Not for Profit Funded Services Agreements*** provides information on the agreement and how to use it.

Special conditions from the *Special Conditions Clause Bank* can be added to the *Standard Funded Services Agreement* for a particular procurement. A series of yes or no questions in the Special Conditions Clause Bank provide guidance on when a special condition is required.

The *Standard Goods and Services Agreement* consists of:

- Standard Goods and Services Agreement Template
- Special Conditions Clause Bank
- Execution Block Bank

Special conditions from the *Special Conditions Clause Bank* can be added to the *Standard Goods and Services Agreement* for a particular procurement. A series of yes or no questions in the *Special Conditions Clause Bank* provide guidance on when a special condition is required.

Not all contract terms that may be required are in the *Special Conditions Clause Bank*. Public authorities need to contact their procurement staff or the Crown Solicitor's Office (CSO) if additional contract terms are required.

Contract terms and conditions are not included in an EOI.

The Board's ***User Guide: Standard Goods and Services Agreement*** provides information on the contract and how to use it.

Contract Documents Post-Negotiation

The *Standard Goods and Services Agreement* and the *Standard NFP Funded Services Agreements* have been developed by the CSO as fair contracts to both suppliers and public authorities. The objective of these contracts is to minimise negotiations and the time taken to finalise contracts and to promote consistent clauses across government making it simpler for suppliers who deal with several public authorities.

The *Standard Goods and Services Agreement* and the *Standard NFP Funded Services Agreement* are not to be amended unless there is a compelling reason.

Legal advice **must** be sought from the CSO prior to changing the terms and conditions.
Part D Response Schedule (ITS)/Part C Response Schedule (EOI)

The response schedule is the key document to enable suppliers to respond to the requirements set out in the Invitation. Sufficient information needs to be requested to enable an appropriate evaluation of the response.

Key areas for consideration in developing response schedules include:

- supplier information
- prior experience and references
- capacity and capabilities (key staff, quality systems, organisational details)
- supply approach (methodology, customer service, work plan)
- subcontractor information
- industry participation policy information
- innovation and value for money
- compliance with contract, specification
- financial viability
- conflicts of interest related to the supplier
- pricing information

The Board has developed response schedule templates (ITS and EOI) which provide an optional format for response schedules and suggested content.

While there may be circumstances in which these templates are not suitable for a particular procurement, public authorities **must** in every case apply all response questions set out in 'Section A: General Response Requirements' of the response schedule template.

The Board's ***User Guide: Market Approach Templates*** provides information on the use of response schedules under an ITS or EOI.

Developing response schedules: NFP Sector

Additional key areas for consideration in developing response schedules with the NFP Sector include:

- community outcome, desired impact or change being sought in the procurement
- the potential for the procurement to improve social, cultural and/or economic outcomes for South Australia
- a community development approach which builds resilience in the community and the capacity to respond to change and crisis and empowers individuals in the process of development and service delivery
- the supplier's capacity to undertake the procurement through a fee-for-service arrangement (to be used wherever possible) compared to the suitability of up-front block funding (which may assist to create capacity to meet expected service demands).

6. Unsolicited Proposals

An unsolicited proposal is a unique or innovative method, concept, approach or idea submitted to a public authority from a private entity, not in response to a formal request and not readily

available in the marketplace. An unsolicited proposal is not a market approach as such, but is an alternative sourcing strategy to a market approach.

An unsolicited proposal is submitted without formally being requested by the Government. The nature of the proposal can address a wide range of areas including the procurement of goods and services.

The *Guidelines for Assessment of Unsolicited Proposals* (government guideline) provides a framework and process for the assessment of unsolicited proposals and is supported by the Department of Premier and Cabinet Circular 'Unsolicited Proposals' (PC038). The government guideline encourages the private sector to bring innovative ideas to Government while maintaining value for money and probity.

The minimum financial threshold for goods and services unsolicited proposal for consideration under the government guideline is \$1.1 million (GST inclusive). Proposals under this threshold are to be handled directly by public authorities utilising the procurement framework as the State Coordinator General does not need to be involved. However, this threshold does not preclude a proponent making an application directly to the State Coordinator-General who can then elect to review the proposal.

The public authority may choose to consider proposals valued at less than the government guideline threshold by using the unsolicited proposals process outlined in the *Attachment* that is consistent with the government guideline and addresses relevant issues through the development of an acquisition plan.

If a public authority has initial contact with a proponent on an unsolicited proposal above the threshold, they are to encourage proponents to contact the Office of the State Coordinator-General for a pre-lodgement meeting prior to lodging the submission.

Where the Government assesses that a proposal does not meet the criteria under the government guideline at any stage of the process, it reserves the right to go to market, end the proposal consideration process or withdraw from exclusive negotiations. If the Government does go to market, the proponent will be given the opportunity to participate in any subsequent procurement process. The Government will respect any intellectual property owned by the proponent.

Proposals that are not accepted by the Unsolicited Proposals Steering Committee, the Assessment Panel or by Cabinet, may form the basis of a competitive bidding process or be referred to a relevant public authority for further consideration.

7. Templates

Invitation to Supply – Part A – Procurement Process Guidelines
Invitation to Supply – Part B – Specification (optional)
Invitation to Supply – Part C – Standard Goods and Services Agreement
Invitation to Supply – Part C – Standard NFP Funded Services Agreement
Invitation to Supply – Part D – Response Schedule (optional)
Expression of Interest – Part A – EOI Process Guidelines
Expression of Interest – Part B – Specification (optional)
Expression of Interest – Part C – Response Schedule (optional)



8. User Guides

User Guide: Market Approach Templates
User Guide: Developing Specifications
User Guide: Standard Goods and Services Agreement
User Guide: Standard Not for Profit Funded Services Agreements

9. Further Information

State Procurement Board Secretariat
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www.spb.sa.gov.au

Attachment: Unsolicited Proposals Process

The following process is to be used by public authorities when considering unsolicited proposals valued at below the threshold (\$1.1 million GST inclusive) for goods and services.

Stage 1 Initial Proposal

The initial proposal stage enables the public authority to form a preliminary view as to whether to further consider the unsolicited proposal in accordance with the following criteria:

- there are no competing proposals under consideration by the Government or other public authorities
- the proposal promotes economic, social and/or environmental outcomes for South Australia and is consistent with the Government's/public authority's strategic priorities
- the proposal is unique and could not be delivered by any other party within acceptable timeframes
- the proposal represents value for money when the proponent is seeking any form of financial contribution or risk sharing from the government
- the proponent has the skills and experience required to deliver the project as specified in the proposal.

Only proposals that meet the initial proposal criteria and are approved by the principal officer can move to the next stage. The proponent will be advised in writing of the outcome.

Stage 2 Detailed Proposal

The detailed proposal stage involves further consideration of the feasibility of the proposal, with the details outlined in an acquisition plan in cooperation with the proponent (who may be required to provide additional information) and relevant stakeholders (for example, business managers, procurement experts, technical experts).

The acquisition plan will address and outline:

- the nature and terms of the arrangement, including timeframes and the nature of any exclusivity arrangements
- how it will be delivered and whether it represents value for money
- the costs and risks to government/public authority and the benefits to South Australians
- whether the proposal is technically and financially feasible.

No commitment is to be made at any stage of the process and the proponent is to be kept informed on the progress of their proposal at each step. Only acquisition plans that are approved by the principal officer can move to the final stage. The proponent will be advised in writing of the outcome.

Stage 3 Contract Negotiations

The contract negotiation stage allows the public authority and the proponent to negotiate final legal and commercial terms and then prepare and execute the formal project documentation. The final purchase recommendation will be approved by the principal officer and a contract finalised before implementation. The proponent will be advised in writing of the outcome.