

Procurement Guidelines 2019





Record of Amendments

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Procurement Guidelines

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Part A: Overview

1. Procurement Framework

Council's current approach to procurement consists of three main documents (together, the Procurement Framework):

The Procurement Policy. This document sets out the core principles and objectives governing Council procurement spending, and sets out the applicable financial thresholds.

The Procurement Guidelines. This document sets out and provides guidance on the matters to be considered in the procurement process and the factors to be taken into account in selecting the procurement method.

The Procurement Rules. This document sets out the procurement methods and processes to be used and complied with. This is a "how-to" document.

The Procurement Framework is to be considered and applied whenever Council is procuring works, goods or services.

By way of context, the term 'procurement' covers all aspects of acquiring and delivering goods, services and works (both refurbishment and new construction). It starts with identifying the need and finishes with either the conclusion of a service contract or the end of the useful life and disposal of the asset. Procurement also includes the contract and relationship management with chosen suppliers. Collectively, this is what is referred to as the procurement lifecycle.

The Procurement Framework has been prepared with reference to:

- the Ministry of Business, Innovation and Employment's Government Procurement Rules (4th Edition); and
- the Office of the Auditor-General "Procurement guidance for public entities",

both of which are updated from time to time.

2. The legislative context

The main legislative guidance for procurement by local authorities is the Local Government Act 2002 (LGA) amended in 2012. The principles outlined in the LGA which are most relevant to Council's procurement activities are as provided in section 14. Section 14 of the LGA states that:

In performing its role, a local authority must act in accordance with the following principles:

- (a) a local authority should —
 - i. conduct its business in an open, transparent, and democratically accountable manner; and
 - ii. give effect to its identified priorities and desired outcomes in an efficient and effective manner:
- (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
- (c) when making a decision, a local authority should take account of—
 - i. the diversity of the community, and the community's interests, within its district or region; and
 - ii. the interests of future as well as current communities; and
 - iii. the likely impact of any decision on each aspect of well-being referred to in section 10:

- (d) a local authority should provide opportunities for Māori to contribute to its decision-making processes;
- (e) a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes; and
- (f) a local authority should undertake any commercial transactions in accordance with sound business practices; and
- (fa) a local authority should periodically—
 - i. assess the expected returns to the authority from investing in, or undertaking, a commercial activity; and
 - ii. satisfy itself that the expected returns are likely to outweigh the risks inherent in the investment or activity; and
- (g) a local authority should ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets; and
- (h) in taking a sustainable development approach, a local authority should take into account—
 - i. the social, economic, and cultural well-being of people and communities; and
 - ii. the need to maintain and enhance the quality of the environment; and
 - iii. the reasonably foreseeable needs of future generations.

Council's Procurement Guidelines reflect these principles as they relate to Council's procurement activity. In particular, the above principles reflect Council's focus on achieving regional value through its procurement.

3. Financial thresholds

These Procurement Guidelines are intended to provide guidance for all staff (and others) who have delegated authority for procurement. It also applies to the considerations by Council, in its governance role, for funding, procurement and purchasing decisions.

No person shall enter into a contract or funding arrangement (including purchasing of goods and services) on behalf of Council unless they have specific delegation to do so. Council requires that all procurement of works, goods or services valued **over \$100,000** (GST exclusive) will be subject to a competitive procurement process and the type of process (for example, seeking quotations or using a tender or proposal process), will take into account the specific type, size, complexity, and level of risk of the procurement. This value threshold is still subject to an individual's delegated authority, meaning procurement decisions may need to be escalated to an individual with higher delegated authority even if the contract value is less than \$100,000 (GST exclusive).

It is noted that in the area of roading and transport procurement where there is New Zealand Transport Agency (NZTA) assisted funding, then Council will be guided by the NZTA Procurement Manual, both for physical works and professional services. Council staff should also be aware of any other funding arrangements which may affect the particular procurement in question.

4. Contract value

As noted, Council requires that all procurement of works, goods or services valued **over \$100,000** will be subject to a competitive procurement process and the type of process (for example, seeking quotations or using a tender or proposal process), will take into account the level of risk and the type of works, goods or services to be procured.

For clarification the value of \$100,000 relates to the total cost of the procurement for the works, goods or services. It is not intended that purchases of portions or stages of work under \$100,000 can be carried out to avoid the competitive process. For example, it is not acceptable to create two contracts of, say, \$50,000 each for effectively the one purchase without using a competitive procurement process.

However this may be appropriate where there are two (or more) discrete components of the works, goods or services. For example, the supply of materials separate from the delivery of the works. In these cases the purchases should not be from the same supplier without using a competitive procurement process.

Part B: Procurement methods and planning

1. Background

The preferred procurement method and process will depend on the best option to obtain regional value, as described in Council's Procurement Policy. It will depend on the complexity as well as the risk of the cost of performance and delivery.

In general terms a contract exists where there is an offer (by those offering to supply the works, goods or services) and an acceptance of that offer by Council.

This can be as simple as the purchase of a pen and as complex as the delivery of a wastewater treatment plant. Both transactions are contracts, but the value and risks are quite different. Accordingly the form of contract, the terms, the documentation and the methods used in the procurement may be significantly different.

There are a number of accepted procurement methods available, but all need to take into account the principles of Council's Procurement Policy:

- Accountability
- Openness
- Lawfulness
- Fairness
- Integrity
- Sustainability.

Council also needs to take into account Council's procurement objectives, which are set out in the Procurement Policy.

In determining the most appropriate procurement method it is necessary to assess the value and risk of the purchase having regard to the nature of the works goods or services to be procured.

Figure 1 in **Appendix 2** provides a matrix of the risk and value of purchases.

For **low value, low risk** purchases, the contract may be as simple as completing a purchase order or requesting goods and services with a procurement card.

For **medium value, low risk purchases**, a short form contract may be required.

For **higher value and higher risk** purchases, a more detailed contract will be required that reflects the risk and nature of the goods and services being procured.

For higher value and higher risk purchases it is expected the contract terms need to be appropriate and reflect:

- the nature of the works, goods or services and any anticipated uncertainties in the supplier's ability to perform its contractual obligations; and
- the extent of any risk that the supplier will be required to assume.

2. Risk considerations

When considering what procurement method to use for a specific procurement, Council should consider the following:

- Will new intellectual property be created?
- Does the procurement have the potential to have an adverse effect on the environment?
- Does the procurement involve hazardous substances e.g. gas?
- Are there any particular health and safety risks e.g. works being carried out in public spaces, at height, works being performed after a natural disaster?
- Does the procurement involve use of heritage sites or iwi assets?

3. Types of procurement methods

There are many types of procurement methods. These generally fall into two categories – Direct or Competitive processes (or a combination). The types of procurement may include:

- simple purchase by way of works or purchase orders
- simple purchase by way of petty cash
- procurement cards (e.g. petrol purchases)
- transactions with established suppliers (e.g. professional services)
- individual item purchases under a supply agreement (e.g. stationery)
- purchases from pre-selected suppliers (e.g. contractor pre-qualification)
- purchases following quotations from selected suppliers
- closed tenders from pre-determined suppliers
- open tenders
- staged tenders (open or closed)
- procurement following Registrations of Interest (ROI)
- procurement following Requests for Proposals (RFP).

Variations to these methods can include:

- design and build
- design, build and operate
- alliancing
- public private partnerships.

Appendix 1 – Contract Types describes some of these contract types in more detail.

Some procurement options may be through a joint arrangement with other agencies. An example is the shared service arrangement with BOPLASS for some goods and services – e.g. insurance, stationery. While there may be a combined approach with other agencies, it is important to note that the actual contract still remains with Council and the supplier.

All purchases are contracts, regardless of the procurement method used, and therefore the processes and appropriate documentation need to be in place.

The procurement method and contract needs to reflect the relationship that Council wishes to establish with the supplier. Whether it is a simple purchase of a low value, low risk item or a high value, high risk purchase, or a desire for value and innovation. For example, as well as the more traditional “arm’s length” contracts, partnering or alliances are increasingly being used.

4. Procurement planning

The scope of the works, goods or services which Council seeks to procure should be clearly understood before procuring them.

Individual procurement plans should usually be considered for higher value and higher risk procurement (refer **Figure 1** in **Appendix 2**). Procurement planning is necessary to identify:

- the best way to approach the procurement of goods or services (through information gathering and analysis);
- risks associated with the procurement of goods or services early so that they can be managed; and
- ways of achieving the objectives defined for the procurement, in line with Council's Procurement Policy.

A procurement plan should bring together the previous analysis and requirements in the planning process. The content and size of the procurement plan will vary depending on the value and risk of the procurement, and the size and resources of Council.

The amount of detail in the plan will depend on the value and associated risk of the procurement. The content should include (at a minimum):

- key project information
- a sourcing plan
- the procurement method and why chosen
- any exclusions or exemptions and rationale for it
- contract information
- the budget (including for procurement)
- risks and probity
- a timetable.

As part of the procurement planning process, a specification should be prepared which contains a clear, concise, logical and accurate description of the works, goods or services being procured. This will help potential suppliers and those who will be involved in making the procurement decision. If Council is using a competitive proposal process and is open to innovation, the specification may focus on the outputs and outcomes rather than the process to be followed to deliver the outputs or outcomes.

Part C: Selection of procurement methods

1. Background

Part C sets out the different types of procurement methods available and provides some guidance on how to choose the most appropriate procurement method for the procurement project in question.

Selecting the type and/or form of contract will depend on the value and complexity of the purchase as well as the nature of the works, goods or services being funded or procured. It will also depend upon the uncertainties that may be involved in contract performance and the extent to which the Council or the supplier is to assume the risk of the cost of performance of the contract. Contracts differ in the degree of responsibility assumed by the supplier.

When choosing the appropriate procurement method it is noted that some methods are governed by legislation. For example, the Land Transport Management Act 2003 requires certain procedures to be used for approved activities relating to transport.

Where there is no statutory requirement to use a particular method, Council needs to decide the procurement method it will use. To ensure that the benefits of the method outweigh the costs, it is expected that Council, when selecting the procurement method, will consider:

- the need, wherever possible, to promote open and effective competition throughout the procurement process
- the value of and risk associated with the procurement.

Contract requirements

- Council's procurement contracts should:
 - be comprehensive enough to meet the objectives of the procurement
 - reflect the full specification of the works, goods or services
 - be consistent with the conditions specified for the procurement process
 - define and protect the rights and obligations of all parties
 - be consistent with Council's statutory functions, duties and powers
 - be fair to both parties and pass the "sense test" or "reality check" particularly where clauses cover limitations or exclusions of liability, indemnities, warranties and intellectual property.

2. Direct or selective procurement

Open competitive processes, for example inviting quotes, tenders or proposals from more than one supplier will not be applicable for all procurement by Council. In some instances, Council may procure directly from a supplier. In deciding to take this approach, Council will need to consider the value and risk of the purchase as well as the outcome that it intends from the procurement. In general, direct procurement should only be used for low value, low risk goods or services. (Refer **Figure 1** in **Appendix 2**) and comply with Council's requirement for competitive procurement for goods and services valued greater than \$100,000.

Council will consider purchasing directly from a supplier where:

- the value of the goods or services is very low
- the purchase of these goods or services is on an as-required basis
- it is not practical to aggregate separate orders for the goods or services
- the cost of seeking quotes or tenders would be out of proportion to the value of the benefits likely to be obtained or impractical in the circumstances.

There are other circumstances where Council would be justified in procuring from a selected supplier. Examples include where:

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

Each decision to make a direct or selective procurement should be taken systematically by staff who have the necessary knowledge and experience of the procurement environment. When using direct or selective procurement, the decisions need to be supported by proper documentation. This should include demonstrating and recording:

- the reason for using direct or selective procurement
- why a particular supplier was identified
- confirm the supplier's capability to deliver the goods or services
- the supplier's performance against established criteria
- how the rates are reasonable and consistent with the market rates for items of a similar nature
- the method of payment
- the documentation to be retained for proof of procurement
- the requirements for authorising the procurement.

Where a staff member/s decides to use direct or selective procurement (rather than a competitive procurement process), this decision and the relevant justification shall be included in the Procurement Register, which is managed by Council's procurement team. The Procurement Register shall provide a record of all procurement projects where direct or selective procurement has been chosen along with the relevant Council staff member/s or team.

3. Standing arrangements

Standing arrangements are procurement arrangements where Council is able to procure directly from suppliers for an agreed period of time. These can be both direct or established through open tendering. Council can set up these standing arrangements after a competitive process, or Council may wish to take advantage of competitive processes by using other entities (for example, by joining a syndicated procurement arrangement e.g. BOPLASS).

Entering into standing arrangements is a reasonable procurement strategy for the goods or services identified in quadrant 2 of **Figure 1** in **Appendix 2** – goods or services that have high value but where the risk to the entity is low. These goods or services are generally widely used by Council. They have no special requirements, are simple to specify and have common standards. Examples of the types of goods or services that could be considered for these arrangements, depending on their value, include:

- fuel
- motor vehicles (e.g. through Government Stores Board)
- air travel
- stationery.

4. Competitive procurement process

Open tender or proposal processes are used to promote transparency and achieve public value, including value for money. Open tender or proposal processes are most appropriate for middle to high value procurements where there are a number of potential suppliers in the market. Depending on the value and risk of the procurement, competitive processes can involve:

- verbal quotations
- written quotations
- formal written tenders or proposals.

In principle, advertising an open request for tender or proposal should be the preferred method for higher value and/or higher risk procurement. It offers all interested suppliers fair and equitable opportunity, and allows a range of competing offers to be evaluated when assessing against Council's procurement objectives. However, the method should be appropriate to the market for the particular goods or services, and the circumstances of the procurement. These considerations may mean that an open call for tenders or proposals is not practicable or cost-effective, or may not produce the best procurement outcome in some circumstances.

Although closed tender or proposal processes may be appropriate in some circumstances, the preference is for Council to make limited use of this procurement method. This is because using a closed tender or proposal method does not allow equal access to all suppliers in the market, which means that a better source of supply may be missed. When Council uses a closed tender or proposal process, it should document its reason for doing so. It should also properly document why using the closed tender or proposal method is justified, and record this in the Procurement Register.

The closed tender or proposal method should not be used to limit the number of potential tenders or proposals. If Council wishes to limit the number of tenders or proposals for procurement, it should use the multi-stage method. It is expected that Council, in deciding whether to use a multi-stage open tender or proposal process, should consider:

- the value and risk associated with the procurement
- the degree to which Council is able to specify the requirement
- whether Council is looking for innovative solutions
- the cost and resources required of both Council and the potential suppliers.

Council should consider using a multi-stage open tender or proposal process only where there are multiple potential suppliers or Council is unsure about the size of the market and the likely number of interested suppliers. In other situations, Council should carefully consider whether a single-stage open tender or proposal process is more appropriate.

A closed tender or proposal may be used for example, when:

- appropriate market research has identified that the goods or services are only available from a few suppliers
- Council can demonstrate that it is not practical or cost-effective to conduct an open tender or proposal
- there is genuine limited time for the procurement process and it is not limited because of poor contract management.

Council should also identify potential suppliers, for example by:

- canvassing the market using a variety of sources of information
- making use of any past experience with any particular supplier.

When compiling a list of potential suppliers, Council should:

- take account of any applicable Council or Government policies (including Council's Procurement Framework documents)
- document the method used and keep adequate records to show that it has followed the method
- ensure that it has addressed any risks under the Commerce Act 1986 and other applicable legislation.

Guidance on the multi-stage tender or proposal method is given below including guidance on the circumstances when a multi-stage tender or proposal should be used.

A. Verbal quotations

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

Using quotations will not change the requirement for good procurement practices, and Council's procurement objectives still apply.

The value and risk of the procurement and the number of potential suppliers should determine the number of quotations sought. Generally this should be no less than three. Records of decisions, including reasons for recommending and deciding on the selection and rejection of offers, should be kept in a manner that facilitates audit and other normal processes of accountability.

If staff are only getting quotations, they need to be careful when talking to suppliers to avoid inadvertently making a verbal promise to purchase from the supplier.

B. Written quotations

The expectations are the same as those required for verbal quotations (see above).

As the value and risk of these goods or services is likely to be higher, the process and documentation should be more comprehensive, however the process and details recorded should still depend on the value and risk of the goods or services.

The value and risk of the procurement and the number of potential suppliers should determine the number of quotations sought. Generally this should be no less than three.

The process that should be followed when requesting written quotations should address the following:

- definition of the need
- a clear understanding of the goods or services to be procured
- specification
- establishing the potential sources of supply
- appropriate approval for the procurement
- seeking written quotations
- evaluation of responses
- selection of a supplier
- approval for the decision
- advising the decision – both to the successful and unsuccessful participants
- monitoring performance of the service provider.

The evaluation process should provide a fair comparison between the responses. The same evaluation method should be applied to each response. The selected quotation should provide the best regional value (as described in Council's Procurement Policy) when assessed against the evaluation criteria. When the responses have been assessed and a supplier selected, a short report should be produced outlining the findings of the evaluation process including the recommendation and reasons for the recommendation (especially if the supplier offering the lowest price is not recommended). For smaller, less complex procurement, the reasons for the selection may be noted on the relevant procurement documents (e.g. on the works order).

The recommendation to accept a quotation should be approved by a staff member with the appropriate delegation. The staff member should satisfy themselves that the best offer, as measured against the evaluation criteria, is being accepted.

C. Competitive tenders or proposals

There are a number of terms used that relate to the process of inviting tenders or proposals from the market:

- A **registration of interest (ROI)** or **expression of interest (EOI)** is generally used to request information from suppliers that may be used to identify potential suppliers before seeking tenders or proposals. Usually the information sought is high level and specific to the procurement.
- A **request for proposal (RFP)** is a formal means of seeking proposals for goods or services where Council is open to innovation on the part of a supplier – that is, where the outputs and outcomes are important, not the process the supplier follows to deliver them. The RFP therefore normally invites suppliers to make a proposal based on specifications, with scope for variety and innovation. This method is usually used to seek a solution to a problem or process, or where there is a range of options.
- A **request for tender (RFT)** is a formal means of seeking tenders to provide goods or services. It is used where Council's specification or requirements are clearly defined and there is little room for flexibility or innovation. An RFT is often based on technical, highly prescribed specifications. This method is often used in the construction industry.

In complex procurement activities where Council needs to learn more about the goods or services or the market, it may be helpful to use a multi-stage process:

- **Stage 1:** An ROI or EOI is issued to find out more about the goods or services, the market and the capability of suppliers to satisfy the procurement need.
- **Stage 2:** An RFP or RFT is issued requesting suppliers to submit an offer for goods or services or propose a solution.
- **Stage 3:** The tenders or proposals received at Stage 2 are evaluated and a contract is awarded to the preferred supplier.

In addition, Council may include another stage between Stages 2 and 3 where Council invites the most promising of the suppliers from Stage 2 to submit their final bid.

Multi-stage processes are time consuming and expensive for all parties. They should only be used for goods or services categorised as high value and high risk. In these circumstances, a multi-stage process may reduce tendering costs.

5. Closed and open tenders

The method of inviting tenders or proposals may be “open” (all possible suppliers are invited to respond) or “closed” (only some of the possible suppliers are invited to respond). A closed tender or proposal involves inviting a predetermined list of suppliers to respond without an open pre-selection or prequalification process as part of a multi-stage process.

6. Registered or qualified supplier lists

A variation on the open or closed tender or proposal process is pre-qualification using registered or qualified supplier lists. Pre-qualification is a method where Council assesses suppliers or particular goods and/or services against predetermined criteria to respond.

Council generally includes suppliers that are successful in meeting the pre-qualification criteria on a database it maintains.

Pre-qualification in itself does not form a contractual or legal relationship between Council and the pre-qualified supplier. Essentially, the supplier has simply met preliminary standard criteria and will be required to meet other evaluation and performance criteria as part of a procurement process.

Pre-qualification differs from multi-staged procurement and panel contracts in that there is no specific contract in mind when suppliers are pre-qualified. Although there is the potential for pre-qualified suppliers to win tenders or proposals over time, pre-qualified suppliers are not necessarily given any guarantee of work. Pre-qualification should not normally be used to get price information from suppliers.

The need for a pre-qualification should be considered carefully. For example, pre-qualification adds no value and is not an appropriate procurement strategy when procuring off-the-shelf goods or services where there are several sources of supply and the value is low.

The process that should be followed when compiling registered or pre-qualification lists should address the following:

- definition of the need
- a clear understanding of the goods or services to be procured
- specification
- the information that is required from potential suppliers
- the method that will be used to evaluate registered or qualified suppliers for inclusion on the list
- who will approve a supplier's inclusion on the list
- the way the list will be maintained
- the way suppliers will be notified of the results
- the documentation and records of the process and the results of the process.

For more information on using a supplier list as a competitive procurement method, see [Council's Procurement Rules](#).

7. Panel contracts

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

Panel contracts are appropriate where:

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

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

Panel contracts should be set up through a competitive process. The method of how the work will be divided between the panel members should be determined before potential suppliers are invited to participate in the competitive process. The potential suppliers should be made aware of the method, and the methods should be followed.

There needs to be provision that enables Council to review membership of the panel and remove panel members if required. The contract should specify grounds for terminating a supplier's membership of the panel.

The process that should be followed when compiling a contract panel should address the following:

- definition of the need
- a clear understanding of the goods or services to be procured
- specification
- the information that is required from potential suppliers
- what will be required of suppliers in terms of service levels, response times and other performance measures
- how Council will allocate the work to panel members, for example:
 - **Hierarchical:** One panel member receives most of the work unless they are unable to supply Council's needs or have a conflict of interest. In this case, the work is allocated to the next available panel member.
 - **Equal division of work:** This can be handled by an upper limit arrangement, where the next supplier is chosen once a specified dollar limit is reached by one supplier.
 - **Rotational basis:** Work is distributed to each panel member in turn regardless of value or time.
 - **Reliability and expertise:** Work is allocated to the panel member who is most suitable and available.
- the method that will be used to evaluate suppliers for inclusion on the panel
- how Council will engage panel members to do particular work
- circumstances that may lead to a supplier being removed from a panel
- who will approve a supplier's inclusion on the panel
- the way the panel will be maintained
- the way suppliers will be notified of the results
- the documentation and records of the process and the results of the process
- the types of method of engagement and the circumstances where each applies should also be provided: For example:
 - **Standing offer arrangements** are usually used for services as required. This is often on the basis of a tender or proposal, quotation, or other arrangement (for example, a fixed fee arrangement). Generally, the "offer" has a limited timeframe after which it would lapse and a new set of fees or arrangements would be negotiated.
 - **Period contracts** involve an individual contract with each panel member for a fixed period of time. Generally, period contracts incorporate other more complex elements than time (e.g. resources).
 - **Retainers** are generally used for professional advisory or consultancy services. The panel member is paid a prescribed fee to ensure access to defined services or to a defined amount of services, for a period when required. This is probably the least common arrangement because it involves a forward payment for services that may or may not be used.

8. Relational purchases

Relational purchase categories for procurement recognise situations where a contract may not fit the conventional market model because:

- there is not an effective or meaningful market to provide the goods or services, or
- the strategic importance of the goods or services, or of the relationship with the provider, is such that the objectives of the procurement may not be achieved through the market.

These two factors may be more often present for Council when it purchases goods or services that are essential to the delivery of Council (and implicitly non-market) services, are highly specialised, or are provided by non-commercial and public interest bodies such as non-governmental organisations.

Other factors that might suggest a relational purchase include the nature of the goods or services purchased, the duration of the relationship between the parties, the relationship between Council or external party and an end user (such as a person receiving healthcare or other social services), and the specialist nature of the goods or services.

For some external parties, there may be other policy goals that are relevant and would suggest a relational approach, such as a goal to support the development of a strong and stable non-government organisation or civil sector, or a goal to develop strategic relationships or build capacity in some part of the wider sector.

In such situations, conventional market-based systems for managing a contract may not be appropriate or particularly effective. It may be more useful to give greater weight to the relationship or strategic dimensions of the contract and to develop other systems to manage the dimensions usually managed by competitive market mechanisms.

Common examples of minor relational purchases include contracts to purchase policy or other advice from specialist advocacy or special interest representative groups, highly specialised professional advice, small and specialised research work, or the supply of minor health services or a niche product for a particular and unusual requirement.

Common examples of major relational purchases include residential care or other social support services where the funding arrangement may need to provide stability for end users over many years, major and long term research contracts, or significant professional or consultancy relationships.

9. Partnering and project alliances

There can be some overlap between major conventional contracts (where an effective market is present and used) and major relational purchases. The growing pattern of managing major contracts through more strategic arrangements, such as alliancing and public private partnerships, has a lot in common with major relational purchases, even if they are developed in the market context.

Partnering and project alliances between public and private sector organisations are gaining in popularity as an approach to procuring major infrastructure projects and related services in the public sector. Partnering refers to mutually beneficial commercial procurement relationships between public and private sector parties that involve a collaborative approach to achieving public sector outcomes.

The two main variables in a partnering arrangement are:

- the type of the relationship between the public and private sector parties
- the nature of the outcome and how it is to be achieved.

In a project alliance, the public and private sector parties (often referred to as “participants”) work together as an integrated team to deliver a specific project where their commercial interests are aligned with actual project outcomes. The team is selected on a “best-for-project” basis and is provided with incentives to achieve high performance. All members commit to working through collaboration, innovation and mutual support. This arrangement requires:

- performance obligations to be stated as collective rather than individual
- obligations, with an equitable sharing of risk and reward, and adoption of a “no blame, no dispute” culture
- governance of the project by the project alliance board (or equivalent)
- including representatives from all parties, with agreement that all decisions must be unanimous
- day-to-day management of the project by a project team that operates as a separate entity from each of the public and private sector parties involved in the alliance agreement
- a transparent and “open book” approach towards all financial matters, including cost and profit.

However there is a need to ensure that the arrangement does not result in aberrant behaviour in that the overall outcome is not achieved (e.g. a single focus may produce the specific work, but wider issues are missed or the levels of service are not met).

10. Emergency procurement

In an emergency, it may not be possible to satisfy the principle of open and effective competition throughout the procurement process. Council may therefore dispense with parts of the procurement process if it needs to react quickly to genuinely unforeseen events. The criteria for what constitutes an emergency include:

- life, property or equipment is immediately at risk
- standards of public health, welfare, or safety need to be re-established without delay, such as disaster relief.

It is noted that poor planning or lack of organisation in a procurement process does not justify using an emergency process. MBIE's quick guide to emergency procurement provides further information and guidance on what constitutes an emergency and how to respond, which Council may reference.

Part D: Management and evaluation of procurement processes

1. Background

The main objective of the procurement process is to achieve a good outcome for Council, that is selecting a supplier that has the capability to deliver the goods or services and provides the best regional value when measured against Council's procurement objectives. Tender or proposal evaluation models help in deciding which potential supplier this is.

Evaluation models are not a science but rather tools to support the evaluation team in making their decisions. Ultimately, the evaluation team is responsible for deciding which option provides the best regional value. However the chosen tender or proposal evaluation model should provide a rationale to support the evaluation team's decision. It should be decided at the procurement planning stage how the tender or proposal will be evaluated. Depending on the value and risk associated with the procurement, it may require an evaluation plan. In any case, Council should select and document an evaluation model at the procurement planning stage, and also document the reason why it chose that particular model.

The evaluation model should be set out in the procurement documents so that suppliers know how the tender or proposal will be evaluated. The evaluation criteria should be detailed enough to enable the Council to assess the relative strengths and weaknesses of each respondent.

2. Types of evaluation models

There are a number of tender evaluation models available that may be used for different circumstances. For example, the three most commonly used models are the lowest-price conforming model, the weighted-attribute model and target-price model. The **Brooks' Law model** is also used in evaluating proposals for professional services for building and roading contracts.

The **lowest price conforming** model is the most basic model, and has the strongest emphasis on price. With this model, the lowest priced tender or proposal is selected once a prerequisite level of quality is met. It is applicable where additional quality over and above a minimum threshold is not important (that is, it does not offer greater regional value).

The **weighted attribute model** is the most common model used in public sector procurement. This model seeks to balance the trade-off between price and quality, and it can be used for goods or services. Under this model, the criteria are weighted to reflect their relative importance. Each criterion in the tender or proposal is scored, and each is multiplied by the relevant weighting to give a weighted score. The weighted scores for each tender or proposal are added up to find the highest scoring tender or proposal. Some weighted-attribute models weight all the evaluation criteria, including price, while others only weight the non-price criteria. If weighting price, it is important to carry out some level of sensitivity analysis as part of the weighting process to ensure that the price weighting is appropriate. For example, if the price weighting is too high, the evaluation effectively becomes a lowest-price conforming model.

The **target-price model** is useful when it is difficult to define the scope of the work in the tender documentation or in situations where the budget that is available is the main constraint. In such instances, Council would be likely to receive a range of tenders or proposals and prices that are not easily compared, and that may exceed the available budget. The solution is for Council to make the potential suppliers aware of the available budget (the “target price”) as a guide for defining the scope of the services desired, and then inviting potential suppliers to specify what they can do for that price. The focus of the evaluation is then on the quality and quantity of the services to be provided, rather than price.

The **Brooks’ Law model** assesses proposals on the basis of technical merit. The highest ranked supplier is invited to discuss the proposal, contract, terms and fees. The terms of reference and the contractual and legal requirements are reviewed to ensure a mutual understanding. When agreement on fees is reached, the supplier is appointed. If no agreement on fees is reached, the second ranked potential supplier is invited to negotiate. The process continues until a satisfactory agreement is negotiated. A supplier, once rejected, should not be recalled for further negotiations.

3. Conducting a tender or proposal process

In conducting a tender or request for proposal process Council should seek appropriate information during the first stage, for example:

- the potential supplier’s contact details
- the potential supplier’s qualifications and experience
- in the case of services, the potential supplier’s capacity to meet the public
- entity’s specified requirements
- in the case of goods, what the potential supplier is able to provide.

Council should also specify how the evaluation panel (or tender evaluation team) will be appointed. It should also set out the process the panel will use to evaluate the tenders or proposals.

To ensure that it asks the right questions, Council should develop and agree the evaluation criteria before it invites potential suppliers to participate.

The evaluation criteria should normally consist of:

- compliance check or mandatory criteria (scored as a pass/fail or yes/no)
- non-mandatory criteria (which are normally scored on a 0–5 or 0–10 scale) that compliant tenders or proposals are fully evaluated against.

Compliance checks or mandatory criteria should, as a matter of good practice, be highlighted as part of the first stage specification to ensure that potential suppliers who are not able to meet these requirements do not waste their time submitting a response.

Council should draw up a shortlist by scoring each response against the criteria. It should also record enough information to keep a full record of the pre-qualification process, and to demonstrate that each response received due consideration.

It should also set out the process for advising shortlisted suppliers that they have been shortlisted and for notifying unsuccessful suppliers that they have not been shortlisted. Unsuccessful suppliers should be offered an opportunity to be debriefed on the reasons they were not shortlisted. The offer of a debriefing should set out the scope and likely format, and should make it clear that the process will not be used to change the selection decision or reopen the process.

Post-evaluation negotiation is an effective risk management tool. From the Council's perspective, the primary objective of the negotiations should be to:

- test the understandings and underlying assumptions that have influenced a participant in preparing the costs
- achieve a reduction in costs, where appropriate.

During post-evaluation negotiations, Council will ensure that:

- it conducts all negotiations ethically, and does not use its position in a manner that might be considered unfair.

Council may need to seek guarantees if the participant has limited assets or cash flows, particularly where a participant submits a comparatively low price.

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

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

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

By the end of negotiations, each party should have the same expectations about its obligations and how the contract will operate. The parties should agree on all substantive issues that might have an effect on price and monitoring of the successful participant's performance, before the contract is signed.

4. Approving the preferred participant and awarding the contract

A clear recommendation on who the preferred participant is must be provided to the authority (delegated staff or Council) approving the award of the contract. It should provide enough information to allow the approving authority to understand the evaluation process and the rationale for the recommendation. The amount of detail given to the approving authority should be in line with the value and risk associated with the procurement. The approving authority should be able to make an informed judgement on the adequacy of the tender or proposal process and the validity of the tender or proposal selection.

The recommendation of the preferred participant should reflect the outcome of the evaluation process.

If the approving authority rejects the recommendation, it should:

- clearly document the reason for not accepting the recommendation
- ensure that the reason is legitimate (this would usually be the result of an unforeseen event that was not identifiable earlier in the process).

The awarding of the contract may be carried out by those with delegated authority (including Committees of Council) or by Council resolution. The successful participant will be formally notified and the contract signed.

Part E: Managing contracts

Contracts can be arranged in a variety of ways. For example, they may be negotiated between Council and the provider as part of a relational contractual situation, negotiated with a preferred supplier as part of a direct or selective procurement, or the result of a competitive tender or proposal process.

Regardless of how the contract or agreement is arranged and whether it is a conventional or relational contract, Council is responsible for the ongoing management of:

- the contract
- the relationship with the supplier of the goods or services.

Council needs to monitor and manage the supplier's performance to assess whether Council is receiving value when measured against Council's procurement objectives. It should determine the extent of the managing and monitoring based on risk management and cost/benefit assessments.

Monitoring and managing supplier performance should be a priority when the value and the risks associated with the procurement are high.

Part F: Other considerations

1. Background

Throughout the procurement lifecycle, it is important that Council and all individuals involved conduct themselves and the process with integrity and observe ethical standards which apply to public entities. This Part F sets out some important considerations which Council and individuals involved in the procurement process (particularly in the tendering stage) must observe and comply with.

2. Conflicts of interest

As part of the general obligation to act fairly, Council must take care that its decision-making processes cannot be challenged on the basis of actual or potential bias and/or conflicts of interest.

For the local government sector specific rules are set out in the Local Authorities (Members' Interests) Act 1968 that will govern requirements for disclosing and managing conflicts of interest.

Complying with any relevant statutory requirements will not necessarily be enough to ensure that decision-making processes meet the more general public law requirements of fairness. Council must also take steps to ensure that no other aspect of the process could be tainted by a conflict of interest arising outside of those processes regulated by statute. For example, the statutory requirements tend to be confined to the declaration and management of conflicts of interest by members of a governing board or council. But conflict problems might also arise as a result of the interests or associations of officials, staff members or other participants in the procurement process.

The Office of the Auditor General has produced two guides on conflict of interest issues to assist public entities:

- **Managing conflicts of interest: Guidance for public entities** applies to all public entities and sets out an approach for dealing with conflict of interest issues when they arise. It includes a number of case studies.
- **Guidance for members of local authorities about the law on conflicts of interest** has been developed specifically for local authorities and other entities that are subject to the Local Authorities (Members' Interests) Act 1968.

Council staff should be aware of the potential for conflicts of interest for every staff member and adviser who is directly or indirectly involved in any aspect of the procurement process. This includes governance, management, operational staff and Council as the approving authority itself.

All staff, advisors and officials (including elected members) involved in the procurement process are required to declare any personal interest that may affect, or could be perceived to affect, their impartiality. Council will then need to decide what steps are necessary to manage the conflict, having regard to any relevant statutory requirements.

Conflicts of interest can have both legal and ethical dimensions. Under no circumstances should a procurement process allow a Council's staff to receive preferential treatment.

Gifts, hospitality or other incentives from suppliers should be subject to **Council's Code of Conduct**, which should comply with the **Standards of Integrity and Conduct** published by the State Services Commission. A copy of these standards is on the State Services Commission's website (www.ssc.govt.nz).

Concerns may arise, for example, if a person (including staff, advisors, officials and elected members) who is managing a current contract has received gifts or hospitality from the supplier, and then participates in the selection process for a new contract.

Council will maintain a register of declarations of conflicts of interest that records any conflicts of interest and how they will be managed.

3. Communication with Council

During the procurement process suppliers shall not contact any elected member, any director, staff member or advisor of Council about the procurement process, other than the nominated information contact person.

Any attempt made by a supplier to influence the outcome of the procurement process by canvassing, lobbying or otherwise seeking support of staff or elected representatives of the Council shall be considered valid grounds for the exclusion of that supplier from the procurement process.

4. Unsolicited proposals

From time to time, suppliers may approach Council with a proposal to meet a perceived need, without being asked to do so. This is called an unsolicited proposal.

For an unsolicited proposal to be considered by Council, it must:

- be unique, i.e. provide a solution to a need that is not otherwise available in the market
- provide value or significant benefit to the New Zealand public and/or Tairāwhiti region residents
- not be an advance proposal which for which a need has already been identified, for which a competitive process is planned
- has been developed independently, without Council or government assistance
- includes sufficient detail so that Council can assess whether it is worthwhile.

Unsolicited proposals are considered by Council with reference to **MBIE's Guide to Unsolicited Unique Proposals** and any relevant policy prepared by Council.

5. Confidentiality

Any information supplied by Council (either by itself or through its contractors, agents or advisors) in connection with any proposal, tender, or other procurement process, is confidential. Suppliers must not release or disclose any such information to any other person (other than their employees or advisors) without the prior written consent of Council. Any publicity in relation to a Council procurement process also requires Council's prior written consent.

Council has obligations under both the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987. The obligations under these Acts mean that Council is unable to give comprehensive assurances about the protection of sensitive information. For example, there are relevant grounds for withholding information under these Acts, such as unreasonable prejudice to the commercial position of a potential supplier, but these can be overridden if there is a greater public interest in disclosing the information.

6. Health and safety

Health and safety is an important part of any procurement, with both Council and suppliers being required to comply with certain obligations under the Health and Safety at Work Act 2015. Council uses a Local Government pre-qualification external assessor, SHE Software Limited. The SHE pre-qualification process requires suppliers and subcontractors who carry out services for Council, to apply to become pre-qualified every two years. If a supplier or subcontractor has not completed the SHE pre-qualification process or it has expired, Council may not allow the supplier or subcontractor to carry out works or services until this process has been completed or renewed (as applicable).

Reference should be made to Council's Health and Safety Policy (available on Council's website) when planning and carrying out any procurement.

7. Third party agents

Council may choose to purchase the services of a third party agent, e.g. an external procurement consultant, to advise on or manage a procurement or a part of a procurement on Council's behalf. Council must still comply with the Procurement Guidelines and other Council Procurement Framework documents, even if it chooses to engage a third party agent.

Council should not purchase services from a consultant or supplier that has a commercial interest in the contract opportunity and who could prejudice fair competition. For example, if a supplier is asked to advise on contract requirements and then bids for the contract opportunity.

An example of a third party agent currently used by Council for some services is the Bay of Plenty Local Authority Shared Services Group (BoPLASS).

APPENDIX 1

Contract Types

1. Contract Terms: General

For any procurement project, the contract terms / form of contract should be included in the procurement documents and suppliers should be required to confirm whether they would accept the proposed contract terms (or propose alternative terms).

The contract terms should comply with relevant public sector constraints, for example the contract may not be able to contain indemnities and cannot contract out of the Official Information Act 1982.

Generally, factors which Council should take into account when selecting the type of contract to use for a procurement project include:

- the nature of the works, goods or services
- the type and complexity of the procurement
- the likely administrative costs for both parties
- any likely difficulty in clearly defining the contract requirements
- how much technical or operational coordination Council will need to provide
- the intended duration of the contract
- the likely volatility of cost inputs
- the extent of risk that either party will have to assume.

Set out below are some specific examples of key contract types, along with the benefits and disadvantages of the different contract types available.

2. Alliance contract

An alliance is a long term commitment between two or more entities for the purpose of achieving clearly stated business objectives by maximising the effectiveness of each participant's skills and resources, leading to an "alliance contract".

Alliances are collaborative arrangements where parties jointly work together to deliver the outcomes of a project. They are characterised by risk sharing and a no-disputes/no-blame regime. Since alliances are typically used for high risk projects with high levels of uncertainty, alliances are rarely used for building construction.

An alliance is an agreement between two or more entities, which undertake to work co-operatively, on the basis of a sharing of project risk and reward, for achieving agreed outcomes based on principles of good faith and trust and an open-book approach towards costs.

The common features of an alliance are:

- Risk is shared between customer and supplier
- The alliance contract typically contains a 'no-disputes clause' with no liability between participants (except for wilful default)
- The customer and supplier share common goals for project success
- All transactions are of an 'open book format'
- All participants win, or all participants lose, depending on the outcomes actually achieved (incentivised cost reimbursement).

A. Benefits of alliancing

The collaborative nature of the alliances, coupled with risk sharing and a regime of 'no disputes' introduces substantial benefits when compared to conventional contracting options.

The main benefits of alliancing include:

- creation of a commercial framework which aligns the interests of all parties
- improved risk management especially with uncertain project requirements and environments
- earlier involvement in preliminary design activities providing greater visibility of project costs and improved decision making outcomes
- reductions in resources needed to administer contracts, especially contract change proposals
- improved project performance and innovation
- greater transparency in project prices.

B. Disadvantages of alliancing

Despite the potential benefits afforded by alliances and the reported successful track record in the use of such contracts, there are a number of disadvantages in the use of these contracting mechanisms compared to conventional contracts. Some of these include:

- fewer legal remedies should the project go awry
- acceptance by a Principal of risks that may be broader than the risks normally associated with a conventional contract
- less emphasis on price competition
- the need for greater involvement of management resources in the alliance
- no cap on the project schedule or cost
- an increased risk of opportunistic behaviour
- increased risk of decision making deadlocks
- potential for very large lead time to establish the alliance (especially for procurement agencies that do not regularly use alliancing)
- relatively high tendering costs
- potential for a mismatch in negotiating skills between the private sector and public participants.

C. Cost plus contract

A contract agreement wherein the purchaser agrees to pay the cost of all labour and materials plus an amount for contractor overhead and profit (usually as a percentage of the labour and material cost). The contracts may be specified as:

- Cost + Fixed Percentage Contract
- Cost + Fixed Fee Contract
- Cost + Fixed Fee with Guaranteed Maximum Price Contract
- Cost + Fixed Fee with Bonus Contract
- Cost + Fixed Fee with Guaranteed Maximum Price and Bonus Contract
- Cost + Fixed Fee with Agreement for Sharing Any Cost Savings Contract.

These types of contracts are favoured where the scope of the work is indeterminate or highly uncertain and the kinds of labour, material and equipment needed are also uncertain. Under this arrangement complete records of all time and materials spent by the contractor on the work must be maintained.

- **Cost + fixed percentage contract:** Compensation is based on a percentage of the cost.
- **Cost + fixed fee contract:** Compensation is based on a fixed sum independent of the final project cost. The customer agrees to reimburse the contractor's actual costs, regardless of amount and, in addition, pay a negotiated fee independent of the amount of the actual costs.
- **Cost + fixed fee with guaranteed maximum price contract:** Compensation is based on a fixed sum of money. The total project cost will not exceed an agreed upper limit.
- **Cost + fixed fee with bonus contract:** Compensation is based on a fixed sum of money. A bonus is given if the project finishes below budget, ahead of schedule etc.
- **Cost + fixed fee with guaranteed maximum price and bonus contract:** Compensation is based on a fixed sum of money. The total project cost will not exceed an agreed upper limit and a bonus is given if the project is finished below budget, ahead of schedule etc.
- **Cost + fixed fee with agreement for sharing any cost savings contract:** Compensation is based on a fixed sum of money. Any cost savings are shared with the buyer and the contractor.

3. Design and build contracts

Design and Build is a project delivery system in which the design and construction services are contracted by a single entity. The traditional approach for construction projects consists of the appointment of a designer on one side, and the appointment of a contractor on the other side. The design and build procurement route changes the traditional sequence of work. It provides for a single-point of responsibility in an attempt to reduce risks and overall costs. Design and build, with its single point responsibility, carries the clearest contractual remedies for the clients because the contractor will be responsible for all of the work on the project, regardless of the nature of the fault.

However, design and build may not be appropriate where the facility to be delivered is complex or specialised in that there needs to be a high level of specification by the owner. This is specifically so where there are few contractors experienced in the type of work proposed.

A. Advantages

- where appropriate design-build can save time and money for the owner.
- the construction team is motivated to work with the design team to develop a design with constructability in mind.
- provides the opportunity to achieve innovation in the delivered facility.
- in that way it is possible for the team to creatively find ways to reduce construction costs without reducing the function of the final product.
- owner can expect a reduced price due to the increased constructability of the design.
- by letting out the contract as a design-build contract, the contractor is established, and early mobilisation and construction activities are able to proceed concurrently with the design. Under a traditional contract, construction cannot begin until after the design is finished, the project is bid and awarded, and the team can mobilise.
- allows owners to avoid being placed directly between the architect/engineer and the contractor.
- places the responsibility for design errors and omissions on the design-builder, relieving the owner of major legal and managerial responsibilities.
- the burden for these costs and associated risks is transferred to the design-build team.
- the cost and schedule reduction and decreased litigation associated with design-build project delivery have been demonstrated repeatedly.

B. Disadvantages

- design-build does not make use of competitive bidding where prospective builders bid on the same design.
- criteria to select contractor is subjective and difficult to evaluate and to justify later and therefore, the design and price selected can arouse public suspicion, true or not.
- it is difficult to evaluate the more complex the proposal is.
- limits the client's involvements in the design.
- contractors can make design decisions outside their area of expertise.
- there is the inherent conflict of interest. In a standard contract the designer is responsible to the owner to review the work of the builder to be sure the products and methods meet specifications and codes.
- design flaws may go unnoticed or unmentioned when the builder is also the designer.
- the owner may be more likely to get a building that is over-designed in order to increase costs and profits for the design-builder, or built with lesser grade products to maximise profits.
- a designer—rather than a construction professional—is a better advocate for the client or project owner and/or that by representing different perspectives and remaining in their separate spheres, designers and builders ultimately create better buildings.

4. Incentive contracts

Compensation is based on the engineering and/or contracting performance according to an agreed target - budget, schedule and/or quality.

The two basic categories of incentive contracts are:

- Fixed Price Incentive Contracts; and
- Cost Reimbursement Incentive Contracts.

Fixed Price Incentive Contracts are preferred when contract costs and performance requirements are reasonably certain.

Cost Reimbursement Contracts provide the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. This type of contract specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After project performance, the fee payable to the contractor is determined in accordance with the formula.

5. Lump sum contract

With this kind of contract the engineer and/or contractor agrees to do the described and specified project for a fixed price. Also named "Fixed Fee Contract". Often used in engineering contracts.

A Fixed Fee or Lump Sum Contract is suitable if the scope and schedule of the project are sufficiently defined to allow the consulting engineer to estimate project costs.

6. Percentage of construction fee contracts

Common for engineering contracts. Compensation is based on a percentage of the construction costs.

7. Performance based contract

In a performance-based contract, the fee paid to the contractor depends (at least partly) on the business results achieved within the contracted work. This means that apart from the quality, speed, etc, of the work itself, the results of positive and negative work achievements is shared. For example, in the case of maintenance contracts, the mutual goal may be reduced mechanical equipment downtime (increased uptime). The benefits are long-term relationship and confidence building, reduced amount of contractors, mutual goals, and sharing the risks of unknown events. Overall cost reductions are mentioned from 9% to 30%.

8. Procurement cards

Using procurement cards can be an efficient way to procure low value and low risk goods and services because cardholders can purchase directly from a supplier, which reduces costs. They do not have to fill in purchase request forms that have to be processed by purchasing staff. Cardholders can order and receive items much more quickly. This reduces the need for large inventory holdings. Less time spent checking and authorising purchases improves efficiency. The price of the item is charged to the card. At the end of an agreed period, Council will receive a statement listing the purchases so that they can be verified. The card company sends a consolidated invoice to Council, which is settled in one payment.

9. Unit price contract

This kind of contract is based on estimated quantities of items included in the project and their unit prices. The final price of the project is dependent on the quantities needed to carry out the work.

In general this contract is only suitable for construction and supplier projects where the different types of items, but not their numbers, can be accurately identified in the contract documents.

It is not unusual to combine a Unit Price Contract for parts of the project with a Lump Sum Contract or other types of contracts.

10. Works or purchase order

A commercial document issued by a buyer to a seller indicating types, quantities and agreed prices for products or services the seller will provide to the buyer. Sending a purchase order to a supplier constitutes a legal offer to buy products or services. Acceptance of a purchase order by a seller usually forms a one-off contract between the buyer and seller, so no contract exists until the purchase order is accepted.

APPENDIX 2: Guidance from Auditor-General's Procurement guidance for public entities

1. Matters to be considered – Background

The Office of the Auditor-General (OAG) issued a document titled "Procurement guidance for public entities (June 2008)" (**OAG Guidelines**) which provides useful guidance on the value and risk of procurement and expands on the different methods public entities can use to approach the market and the factors they need to take into account when deciding on an appropriate method.

This Appendix 2 sets out some of the key considerations included in the OAG Guidelines (which may be updated from time to time) which Council should consider and apply when making procurement decisions.

2. Practical considerations

The OAG Guidelines offer advice when deciding how to give effect to the principles set out in the Procurement Guidelines. The OAG suggests that councils should consider a range of matters:

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

3. Overriding considerations

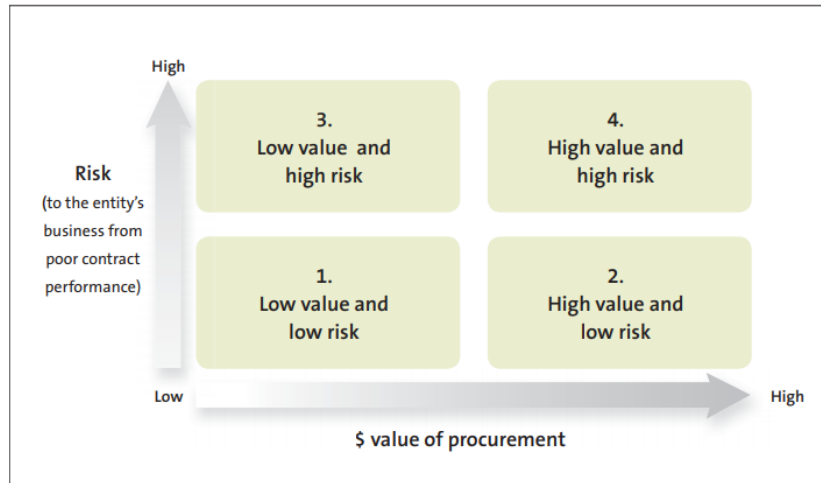
There are four main different types of purchasing/funding:

- **Minor conventional purchases:** These are works, goods or services that Council buys regularly, are of relatively low value, and are able to be bought through ordinary procurement systems. There will usually be a reasonable range of suppliers or providers to choose from so that ordinary market disciplines and competitive processes are likely to be effective as a way of managing the price and value for money.
- **Major conventional purchases:** As with the previous category, the presence of an effectively functioning market is the main factor in a major conventional contracting environment. That means that ordinary market-based procurement techniques can be expected to operate well to manage the price and value for money. Major conventional purchases are high value – possibly worth millions of dollars. Inevitably they carry higher risk to the organisation and require a different level of planning, authorisation, documentation, monitoring and general management.
- **Minor relational purchases:** For the contracts in this category, conventional market-based systems may not be appropriate or particularly effective. This is largely due to the absence of an effective or meaningful market to provide the goods or services, and the strategic importance of the goods or services, or the relationship with the provider, for Council. In these situations, it may be more useful to give greater weight to the relationship or strategic dimensions of the contract (or funding arrangement) and to develop other systems to manage the dimensions usually managed by competitive market mechanisms.
- **Major relational purchases:** The same factors identified under minor relational purchases apply here. The main difference between the previous category and this one is the value or size of the works, goods or services being purchased or funded. A larger contract will inevitably require additional attention and management throughout its whole lifecycle. There is an overlay between this category and that of major conventional purchases, through the growing use of relationship-based contracting arrangements in major projects such as infrastructure development (e.g. alliancing or partnering arrangements).

4. Risk considerations

Figure 1 below shows how the risk and value of the procurement provides a useful categorisation of works, goods and services as a means of identifying and developing different strategic responses for each category. This approach can help Council to choose an appropriate procurement strategy to address the risk and value of the works, goods or services being procured. Council may also find it useful to establish what proportion of its total expenditure on procured items is in each quadrant. Typically, quadrant 4 (high risk and high value items) can make up more than half the value of the Council's total expenditure on procured works, goods and services.

Figure 1: Analysing type of procurement to identify procurement method



5. Legal considerations

Council must be aware of, and comply with, all applicable legislation (and amendments) when it funds or procures works, goods or services. Examples of applicable legislation are:

- the Local Government Act 2002
- the Official Information Act 1982
- the Local Government Official Information and Meetings Act 1987
- the Commerce Act 1986
- the Fair Trading Act 1986
- the Public Records Act 2005
- the Local Authorities (Members' Interests) Act 1968
- the Contract and Commercial Law Act 2017
- the Land Transport Management Act 2003.

Some of Council's governing legislation will include requirements to consult on significant issues, for example, with the community or with stakeholders. Examples include the Local Government Act 2002, the New Zealand Public Health and Disability Act 2000 and the Land Transport Management Act 2003.

A procurement process may result in significant changes to the content or form of the services that Council delivers or a change of approach to the way it funds some services. If Council has statutory consultation obligations, it will need to consider the relationship between the procurement process and these obligations.

Council has public law obligations that could apply to aspects of a procurement process. Council's fundamental public law obligation is always to act fairly, reasonably in keeping within the law. This imposes a higher standard of conduct than that which may apply in the private sector. Council should always take account of the risk that its funding and procurement actions and decisions could be subject to judicial review, or a complaint to an Ombudsman, or to the Auditor-General.

The extent to which Council's procurement actions or decisions are subject to judicial review depends on several factors including the nature and the decision-making framework it operates under. The courts have shown a willingness to intervene in commercial relationships in a wide range of situations to ensure that a Council acts fairly and in keeping with its public law obligations.

6. Contractual considerations

Council should be aware of, and must comply with, the relevant law on the formation and performance of contracts. Particular legal risks may exist when procuring with a competitive tender or proposal process. At times it may be appropriate for Council to create a contractual situation during the procurement process itself (a "process" contract). However Council needs to be careful that it deliberately and not inadvertently creates any legal obligations.

In general, an invitation to submit a tender or proposal, or a request for tender or proposal, is an "invitation" not an "offer" to purchase goods or services. However a preliminary contract may sometimes exist for the tender or proposal process itself.

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

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

7. Liability considerations

When contracting for goods or services a supplier or purchaser may wish to exclude or limit its liability under the contract. It is not uncommon for suppliers to:

- propose excluding their liability for any losses that are not the direct result of their acts or omissions (for example, for indirect loss, consequential loss, loss of profits)
- limit their liability to an amount that is a specified multiple of the value of the contract.

Accepting a limitation on liability is different from giving a supplier an indemnity. In accepting a limitation on liability, Council agrees to limit the liability of a supplier to an amount specified in the contract. If the Council suffers loss through the supplier's actions or omissions in performing the contract, Council will not seek to recover more than the agreed amount and will bear any loss above that amount.

An indemnity, however, involves Council agreeing to accept the risk of loss or damage that the supplier may suffer, and to meet any costs to the supplier for that loss or damage. Councils need to be aware of statutory restrictions on giving indemnities, for example in the Public Finance Act 1989 and the Crown Entities Act 2004.

Limiting a supplier's liability in a contract has the effect of exposing Council to liability above the limit in the contract, which is therefore exposure to unrecoverable loss. This may have both direct and indirect costs to Council. However, in some areas, insisting on unlimited supplier liability may be a barrier for suppliers to participate, particularly smaller firms. It may also reduce market competition and/or increase the price.

Council should take a risk-based approach to considering whether to agree to an exclusion or limitation on liability by a supplier (this is an important aspect of achieving value for money). If Council accepts an exclusion or limitation, the contract needs to be very clear about its scope and extent. Where there is an exclusion or limitation on a supplier's liability, Council should take associated costs into account when considering that suppliers works, goods or services. Without a limitation in the contract, the supplier's liability will be determined by the general law.

Equally, Council may decide that it is appropriate, having evaluated the risks, for it to limit its own liability or to seek an indemnity.

8. Sustainability considerations

It is becoming increasingly important for Council to work and think in ways that take account of long term sustainability. Sustainability involves thinking broadly about objectives, considering long term as well as short term effects; assessing indirect as well as direct effects; considering economic, social, cultural and environmental aspects; and taking extra care when procurement causes changes that might be irreversible or uncertain (the precautionary principle). Council's Procurement Policy sets out "sustainability" as one of Council's core procurement principles and defines a number of procurement objectives which are aimed at facilitating sustainable procurement.

Sustainability is a statutory or strategic requirement for all councils. For example, the Local Government Act 2002 requires local authorities to take a sustainable development approach, by taking into account the social, economic, environmental, and cultural wellbeing of people and communities, the need to maintain and enhance the quality of the environment, and the needs of future generations.

Given the growing strategic importance of sustainability in councils, considerations of sustainability may occur throughout the entire procurement process. Examples of the types of activities that might be carried out, as part of procurement, to assist sustainability include:

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

9. Ethical considerations

Council should be ethical and act with integrity when funding or procuring goods or services.
Council should:

- act, and be seen to be acting, in a fair, open and unbiased manner
- observe ethical standards, principles and behaviour throughout the procurement process.