

MODULE 5

Establishment Of A Legal Panel

5 Establishment of a Legal Panel

This module focuses on the processes involved in setting up a legal panel. It is relevant to those who are involved in the tender process for external legal services.

5.1 Objectives:

- To review informed purchaser tools used when establishing legal services panels
- To explain the importance of standard form tenders in reducing duplication
- To list the main informed purchaser considerations when formulating a request for tender for a legal services panel
- To demonstrate the importance of engaging panel firms with fee structures appropriate to the particular work
- To identify value-adds, along with their suitability to various types of legal matters
- To outline the role that service level agreements play in ensuring performance of panel firms, and how these should be encouraged at the point of procurement.

5.2 Key learning concepts:

- Procurers of goods and services for NSW Government must be aware of and operate in the NSW procurement framework
- Standard form tenders can drive significant savings for government
- Innovative informed purchaser arrangements must be encouraged at the point of procurement – it is most often too late to do so after the panel is formed
- Significant savings can be achieved by encouraging or mandating innovative fee arrangements/value-adds/competitive rates through the tender process
- Informed purchasers must be clear about service level expectations at the point of procurement.



If you have not already done so, you should review Module 3, as many of the concepts here expand on that Module.

5.3 Leading Practice In Panel Procurement

This Module provides a practical introduction to many of the informed purchasing tools, including

- How service levels can be prescribed; and
- How firms with competitive rates can be encouraged; and
- The overall informed purchaser considerations when developing a request for tender for legal services.

This Module provides a variety of practical examples, so that these can be adapted to your agency's legal service environment.

Many of the informed purchasing tools should be introduced to panel firms at the time they are engaged. Some agencies may already be utilising some or all of these tools.

5.4 Reasons to Establish a Legal Panel

Work through this module after completing the needs analysis section (Module 3.5.1)..

Many Agencies determine that it would be appropriate to establish a Legal Panel to undertake aspects of its legal work. The primary advantage of establishing a panel is to “pre qualify” firms for legal work – firms who can deliver value for money for the particular type of legal work.

The NSW Government Procurement Guidelines explained in Module 3.3 must be complied with in establishing a Panel.

There are a number of standard steps in a Tender Process:

- Needs analysis (Module 3.5.1)
- Development of Tender Requirements
- Preparation of Tender documents (Request for Tender)
- Conduct of Tender
- Selection of successful tenderers
- Contracting with successful tenderers
- Management of panel arrangement during contract period.

5.5 Tenders and Quotes

Government agencies use a range of instruments to obtain legal services. Typically, these have been developed on an agency-by-agency basis. Request for Tender (RFT) documentation is used when establishing panels and Request for Quote (RFQ) documentation may be used when approaching an existing legal services panel to provide services in relation to a particular matter or type of work (i.e. high volume work). This documentation can be standardised across government. The Legal Management Services Unit is responsible for the centralisation and standardisation of procurement documentation to reduce duplication and save valuable resources.

5.6 Standard form tenders

The development of standard form tender timings, procedures and documents drives significant savings for government and for tender respondents. This is particularly so if these matters are coordinated across government as a whole. They deliver increases in quality and value-adds (due to standardisation of requirements and responses) while still retaining flexibility for specialised requirements. Particular savings are made by having standard tender response formats across all NSW Government legal services panels.

Implementation of standard form tendering saves time for the legal industry responding to approaches to the market and for government in the evaluation of responses. Standard evaluation criteria (or groups of criteria), evaluation plans and formats for reports are also useful.

The focus for an informed purchaser is on modifying those issues that make a difference for the agency. This may include the specific content required of tender responses for that agency, the performance regime, evaluation criteria and the evaluation methodology.

5.7 Request for tender framework: informed purchaser considerations

Table 5 outlines the informed purchaser considerations for each part of the tender documentation.



Table 5: Invitation to Tender Framework and Informed Purchaser Considerations

RFT subject	General considerations	What are the considerations of an informed purchaser?
Introduction	<ul style="list-style-type: none"> • Reasoning behind tender • Historical position • What you are trying to achieve? • How you expect to run the process? • What to do about queries • Open tender process 	<ul style="list-style-type: none"> • Informed purchasers have a strategy linking the tender strategy and documentation to organisational strategy, business planning and related processes and documentation • Informed purchasers use business planning methodologies and tools and incorporate lessons learned from previous panels
Legislative, policy and probity framework and requirements	<ul style="list-style-type: none"> • Public Finance and Audit Act 1983 • Public Sector Employment and Management Act 2002 • Public Sector Employment and Management (Goods and Services) Regulation 2010 • NSW Government Procurement Policy the NSW Government Tendering Guidelines • Disclosure requirements for consultants • NSW Government Code of Practice for Procurement • And any other agency policies and requirements 	<ul style="list-style-type: none"> • Informed purchasers seek to achieve best value for money over the whole of the panel's life and design the panel to achieve outcomes, not to be tied down in process • Informed purchasers use experienced probity advisors to assist • Informed purchasers treat all tenderers fairly and equitably • Informed purchasers make the tender process appropriately transparent, appropriately documented and in compliance with the agency accreditation scheme (if implemented) • Confidential information is protected • Conflicts of interest are identified and appropriately dealt with (addressed in more details at Modules 8 and 9)
Departmental/agency information	<ul style="list-style-type: none"> • What the agency does • Information about department and/or agency and its interactions with government, other agencies, departments • Present legal work – amount, type, approximate costs • Who will instruct and how? • What type of work is likely? • Divisions of work and services (sub-panels) • Panel structure – piggy-backing, non-exclusivity 	<ul style="list-style-type: none"> • Informed purchasers provide this information in the RFT clearly, accurately and succinctly, in ways that encourage responses that are easy to evaluate and easily convertible to contract requirements • Informed purchasers consider effective and efficient ways of updating this information during the life of the panel and incorporate this into panel arrangements
Legal department	<ul style="list-style-type: none"> • Size, scale and role of legal department • Protocols for dealing with external lawyers • Reporting expected 	<ul style="list-style-type: none"> • Informed purchasers draw on their strategic planning and experience to optimise overall legal service delivery for their agency

RFT subject	General considerations	What are the considerations of an informed purchaser?
	<ul style="list-style-type: none"> • Legal department role v line areas, divisions, business groups • Future working relationships • Know-how and documentation 	<ul style="list-style-type: none"> • Informed purchasers consider ways of reducing barriers to entry and encouraging and developing alternate supply arrangements where this is economic • Informed purchasers consider the nature of the relationship that will be developed under the panel and prepare tender documentation that is consistent with this • Care is taken in developing effective draft protocols consistent with the agency's objectives, the nature of the relationship to be created, and the performance management regime • Informed purchasers develop these protocols so they are proportional to the size of the panel, the nature of the work and the size of the legal spend under the panel
Organisational approach to procurement	<ul style="list-style-type: none"> • How the organisation approaches procurement • What this means for lawyers • Reporting, measurement, management • Protocols, key performance indicators, written arrangements • How the tender will be conducted • How often the tender arrangements will be reviewed in the future 	<ul style="list-style-type: none"> • Informed purchasers understand their agency's approach to procurement and do not 'reinvent the wheel' • They modify and adapt existing processes, templates and approaches to deliver value for money outcomes with a minimum amount of process
Future arrangements under the panel	<ul style="list-style-type: none"> • What are you looking for? • How many firms? • What will they do? • What is the period of the proposals? • What are your priorities? • What else do tendering firms need to know? 	<ul style="list-style-type: none"> • Informed purchasers understand the market and how to obtain the best results from it • They utilise firms from different tiers and make use of smaller, capable, less expensive options • They consider how they may foster alternate providers • Informed purchasers provide tendering firms with all the information that they need • This information is effectively presented to the market, including, where appropriate, conducting market sounding or public pre-RFT release briefings
Legal panel and induction arrangements	<ul style="list-style-type: none"> • How will your new firm arrangements apply? • Reporting • Performance evaluation 	<ul style="list-style-type: none"> • Informed purchasers have an effective plan for operating their panel and for inducting and keeping successful tenderers informed

RFT subject	General considerations	What are the considerations of an informed purchaser?
	<ul style="list-style-type: none"> • Briefing and induction • Extras required • Operational issues and expectations 	<ul style="list-style-type: none"> • They are upfront about likely workloads under the panel • They have a clear plan for panel meeting and reporting requirements and how they will encourage optimal performance under the panel
Fees and charging arrangements	<ul style="list-style-type: none"> • What proposals do you require? • If you want hourly rates, what for? • How often are they reviewed? • What about other arrangements – fixed, capped, blended rates? • Alternative billing arrangements • When will bills be rendered and paid? Drafts first? 	<ul style="list-style-type: none"> • Informed purchasers gain better value for money by understanding the wide range of innovative charging arrangements possible and how best to implement them • They obtain superior outcomes than volume discount reductions through encouraging or mandating in the RFT other innovative fee arrangements and innovative legal service provision • Informed purchasers have standardised billing arrangements, and may provide billing software to successful tenderers • Informed purchasers define the type of fee or value-add required, so that meaningful comparisons can be made between tenderers • Informed purchasers stipulate that fees and rates information may be shared across government • If you are doing any work on hourly rates, seek a schedule against each level of qualification, e.g., newly qualified, 0-2 years, 3-5, 5-7, junior and senior partner levels
Communication and reporting	<ul style="list-style-type: none"> • Set out what you want so expectations are clear • How are instructions given? • What are the communication chains? • What sort of reporting is required? • What happens when things go wrong? • Issues escalation <ul style="list-style-type: none"> ○ ADR ○ Ending the relationship 	<ul style="list-style-type: none"> • Informed purchasers include in the RFT documentation the draft relationship protocols to be instituted with successful tenderers, including: communications chains, reporting regimes, alternative dispute resolution and issues escalation protocols • Informed purchasers include in the RFT standard service level agreements outlining minimum service level expectations of panel firms
Selection and evaluation criteria	<ul style="list-style-type: none"> • Define the selection and evaluation criteria in detail • Set out how the selection and evaluation criteria will be operated • Evaluation architecture 	<ul style="list-style-type: none"> • Informed purchasers create enhanced competition on panels and weight selection criteria to encourage new entrants and innovation • Informed purchasers supply tender documentation which

RFT subject	General considerations	What are the considerations of an informed purchaser?
	<ul style="list-style-type: none"> • Offer debriefings and feedback 	<p>provides prospective tenderers with a clear understanding of what is required. One of the ways they do this is by having carefully devised evaluation criteria and providing the weightings of these criteria, where appropriate</p> <ul style="list-style-type: none"> • Informed purchasers provide guidance as to the nature and length of the response required, as this assists tenderers in understanding the relative importance of the different criteria • Informed purchasers use debriefings and offer feedback to expand the market and develop effective competition through cultivating potential for alternate service providers
Instructions	<ul style="list-style-type: none"> • Set out in detail what you want the tendering firm to do (in response schedules, tender response requirements) • Do you want written presentations, personal meetings or a combination? • Who do you want to meet? • Do you want a full marketing performance or limited information? • How are queries to be dealt with? • Who is the contact point? 	<ul style="list-style-type: none"> • Informed purchasers make it clear for tenderers how they want the tender presented and other procedural matters to do with tender submission • They consider whether detailed workshops and other offer definition activities are appropriate

5.8 Tender Requirements

The success of a tender process is largely determined by the quality of the tender requirements. Therefore, the process of developing satisfactory tender requirements merits time being spent. Standard tender requests include:

- Scope and volume of work
- Pricing Arrangements
- Service level requirements
- Performance KPIs
- Value Adds.

5.9 Scope of Work

Careful scoping of the work is vital for a successful project. Accurate scoping involves taking comprehensive instructions from the client about both legal and business/personal expectations. Part of this should include discussing the client's expectations on costs.

Agreeing the objective is the starting point for scoping the work and ensuring that the outcome meets the client's expectations.

Discussing the following questions with the law firm clarifies scope:

- What does the client want?
- Why does the client want this?
- What is the problem to be solved?
- What does the client need (may be different from what they want)?
- What outcomes are possible?
- What outcomes are acceptable?
- Does the client have a budget or expectation about the level of cost?
- Are there deadlines?
- What is a realistic schedule?
- Who is the final decision maker at the client?

- How does the client define value?

This latter question can clarify the focus on the matter. The answer helps define what the client sees as a reasonable ROI, and can result in a change of scope, in order to meet the expected ROI.

In large, complex projects there may be separate objectives for each stage of the project or perhaps even separate objectives for different team members working on different aspects of the project.

Once the objective is identified, the next step is to create the statement of work, which sets out the objective and defines the project scope. It should set out what “done” will look like.

Just as important as setting out what work is within the scope, is detailing the exclusions (what the law firm is not going to do), and the assumptions.

The statement of work should be provided to all team members – in client department, law firm, and counsel (if involved)- so that everyone is on the same page about objectives, scope and “done”.

5.10 Pricing Arrangements

The tender must be clear as to whether the pricing arrangement requires hourly rate based proposals or also invites innovative fee arrangements. Increasingly tenders will detail a preferred innovative pricing arrangement and invite alternative responses. It should be made clear that a detailed pricing response is required – too often law firms avoid a specific response to a request for an alternative pricing arrangement by simply responding that they would be open to negotiate such an arrangement on a matter-by-matter basis.

In turn, it will be necessary for the tender to contain sufficient historical information about past costs and volumes, and about expectations regarding the conduct of work, to enable a tenderer to adequately price future work.

5.10.1 Innovative fee arrangements

Requiring tenderers to outline their innovative fee arrangements at the point of procurement is crucial to achieving savings. Providing an explicit evaluation criterion addressing innovative fee arrangements forces tenderers to improve their performance – even before they win a panel spot.

It is important to note that requiring innovative fee arrangements from tenderers, without stipulating the form of fee arrangement required, may reduce comparability between tender responses. To allow meaningful comparison between law firms, you should stipulate in the RFT the type of fee arrangements you prefer (or require).

5.10.2 Disbursements

The manner in which disbursements may be charged must be clearly stipulated in the contract with the panel firm. The RFT should require that the tendering firm explicitly state what disbursements will be charged and the rates, and this information must be incorporated into the contract with the successful tenderer. There should no mark-ups on disbursements.

There are several legal bureaus available in all capital cities to do this type of work that meet the government's security and privacy requirements. The cost savings mean that, even in regional areas, it may be more cost-effective to courier material to the closest legal bureau rather than using a law firm.

Other options are to require firms to specify the photocopying rate per page in cost estimates (with no labour component attached) or to require that photocopying be included in the overall price offered.

5.11 Service Level Requirements

Standardised service level requirements are available and include minimum service standards (KPIs) against which performance will be assessed. For particular types of work, there may be specific performance requirements relating to responsiveness, forms of reporting and the like. Consideration should be given to whether there are any particular value for money or business objectives which should be addressed through specific performance requirements.

5.12 Standard KPIs

Key performance indicators (KPIs) are provided in the tender documentation so that firms are clear in the tender preparation phase on how their performance will be measured, if successful. The standardisation of KPIs allows government to measure and benchmark firms relative to each other. The Legal Management Services Unit will be preparing standardised KPI benchmarks. Further information on KPIs and benchmarking is presented in Module 6.8.



Exercise 5

An agency has a significant claims management role. An objective is to deal with claims in a timely and cost effective manner.

Are there any specific performance requirements and/or fee arrangements that would assist in meeting this objective?

(Online answers provided at http://www.lsc.lawlink.nsw.gov.au/lsc/documents/doc/informed_purchaser_answers.doc)

5.13 Value-adds

Value-adds are additional services and benefits that add value to the tenderer's offer. They can be given a separate and specific criterion weighting in the evaluation criteria of the tender.

Some of examples of value-adds that firms offer are:

- Secondments of firm staff (without charge or at discounted rates) to the agency's legal unit
- External provider's newsletters or updates on legal reform for agency staff
- Use of or access to the firm's library or research facilities by agency staff
- CLE seminars or other professional development seminars provided by the firm, either specific to the agency, or that agency staff may attend
- Pro bono work for the agency or a related agency or unit

- Reverse secondments (where agency staff are seconded to the firm for periods, to build their skills).

To allow meaningful comparisons between law firms, you may find it useful to specify what type of value-add you are seeking in the RFT.

Whatever type of fee arrangement is used, a robust cost estimate must be prepared by the external provider. The cost estimate must be prepared on an agreed, documented scope of work and agreed price parameters (which will vary depending on the type of work). If an estimate is exceeded without prior consultation and permission, then the estimate remains the basis for charging. Further information on cost estimates is provided in Module 6.

5.14 RFT probity

It is most important that the agency complies with NSW Government probity requirements when establishing its legal panel.

The agency and its legal services providers must be aware of their responsibilities under the NSW Procurement Policy Statement and NSW Code of Practice for Procurement, as well as responsibilities under various Premier's Memoranda and Attorney General & Justice guidelines regarding the acquisition and delivery of legal services⁴. The agency must also be aware of the Independent Commission Against Corruption Guidelines, as well as other guidelines addressing direct negotiation, probity, and conflict of interest. The informed purchaser at the agency should make sure appropriate compliance monitoring is adopted and apply NSW Government probity requirements. Finally, be sure to apply agency gift and hospitality guidelines intelligently and appropriately.

5.15 'Tiering' in panels: accessing a variety of rates

Leading practice in procurement of legal services requires that the rates of the successful panel firms are appropriate to the work required to be undertaken. Generally, top tier firms charge higher rates than mid tier and boutique firms, reflecting their higher overhead costs and, sometimes, their specialised skills.

Top tier firms are most appropriate for legal cases requiring specialist expertise, breadth of service, and a depth of resource mobilisation. Otherwise, mid tier and boutique firms (with competitive rates) are often a better value for money alternative.

It is important to note that many former top tier firm partners have moved to the mid tier, or established niche firms, providing the same level of specialist expertise at more competitive rates.

Firms charging competitive rates are especially suited to high volume or routine legal matters; matters that do not require the breadth of service and large resources offered by the top tier. Regional firms are best suited for routine regional legal matters, although some regional firms may have specialist expertise. Where a regional firm is not available, it may be appropriate to consider arrangements that might be made with mid tier or top tier panel firms to provide minimum service levels in regional areas.

⁴ Visit the NSW Department of Attorney General and Justice Legal Services Coordination site at <http://www.lsc.lawlink.nsw.gov.au>

5.16 Contract with panel firms

Once the panel firms are selected, a contract will need to be entered into with the firms setting out the terms of the agreement (most of which will be incorporated into the RFT).



As we saw in Module 3, the demand, nature, scope and volume of Agency's legal work should determine the type of firms required on the agency panel.