



Major Project Procurement Guide

Developed by Brosnan, with input from MOD Finance and Grimshaw & Co., this guide to contractor procurement relates specifically to property with a focus on common property managed by a Body Corporate or Strata.

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Introduction

This guide is an overview of best practices and identifies some potential pitfalls that can arise during maintenance or building remediation.

Discussing and understanding the steps needed before procurement can begin, along with employing the right methodology or mix of methodologies, is key to successfully completing a procurement process.

This outlines the use of Tendering and Early Contractor Involvement (ECI), when to use which, when to combine them, and how and when they can be combined.

This guide primarily focuses on contractor procurement for maintenance and remediation of building defects. However, the principles can be equally applied to other procurement requirements.

Understanding Procurement

Tendering

The goals of a tender are to:

- Procure goods or services efficiently.
- Ensure the best value for money.
- Encourage transparency and equal opportunity for all bidders.
- Provide solutions to problems.

Tendering can take different forms, including open, selective, and negotiated. Each has its own strengths and weaknesses. It is crucial to give this focused consideration specific to the problem you are seeking to resolve.

For this guide, *traditional procurement*, is procurement in which a specific project is offered to multiple contractors, be those on a selected list or an open release. Contractor responses include a detailed methodology and cost estimates, with the ultimate selection of contractor being based on these responses.

Early Contract Involvement (ECI)

ECI is a tendering methodology that appoints a contractor to the task earlier in the process than traditional procurement. While ECI is categorised as a negotiated form of tendering, this guide does not consider that categorisation necessarily accurate.

ECI offers some advantages over traditional tendering, including:

- **Enhanced Collaboration:** Facilitates early input from contractors, enabling a stronger partnership between the client, designer, and contractor from the outset.
- **Improved Design Efficiency:** The contractor's practical construction experience is incorporated to refine and optimise the design, reducing costly design changes later.
- **Risk Management:** Identifies and mitigates project risks earlier, sharing responsibility and fostering more proactive problem-solving.
- **Cost Certainty:** Enables more accurate cost forecasting by involving the contractor in estimating and planning during the pre-construction phase.
- **Faster Project Delivery:** Streamlines the transition from design to construction, minimising delays and overlaps in planning stages.
- **Innovation:** Leverages the contractor's expertise to introduce innovative construction techniques or materials that improve efficiency or sustainability.
- **Reduced Disputes:** Promotes a collaborative atmosphere, reducing the likelihood of disputes during the construction phase.

Preparation

Identifying the Need

Crucial to the eventual success of the procurement is identifying the need or scope of the project. If not

properly managed, this is where things can begin to go wrong.

In this context, the *need*, or problem, of the project is the reason for seeking a contractor. Consider the following example scenarios.

Scenario 1

A Body Corporate requires a new bicycle shed to be constructed. The space for the shed is available and without impediments, such as consenting requirements or ground remediation.

Scenario 2

Due to obsolescence, a Body Corporate is required to update the fire alarm system. The system integrates with the access control, elevator, and sprinkler systems. Different maintenance contracts are already in place for each of these systems.

Scenario 3

A leak has been identified and investigated. The leak is confirmed as systemic throughout the building, affecting both unit property and common property. Remedial work is required to rectify the leak and the damage it has caused.

Each problem – or need – requires a tailored approach to procurement.

In **scenario 1**, the scope is clear, fixed, and readily definable. Several companies could complete this task to the same level with very low dependencies on third parties. Either an open or selective tender process would work well.

In **scenario 2**, the scope is reasonably clear, but it is expected that integrating a new system with existing systems will result in some issues. In this case, a selective tender is more appropriate to ensure only suitably qualified and experienced contractors tender for the work. The selective list should contain only contractors with a successful track record of working with your incumbent maintenance providers on the existing systems.

In **scenario 3**, even after the investigation, the scope is far from clear. Whilst the root cause may have been identified, the extent of the damage throughout the building will remain uncertain and may only be fully discovered after all relevant building elements are removed, such as cladding or wall and ceiling linings, revealing the hidden affected building elements. It is virtually impossible to achieve full discovery in the investigation stage. Additionally, once the building is opened up more extensively, additional defects may be identified, such as inadequate passive fire protection or seismic

protections or allowances. In some instances, legislation will require the Body Corporate to repair the additional defects. In this scenario, the Body Corporate would benefit from an ongoing partnership with the contractor to ensure a high level of coordination through investigation, design, and programming to mitigate delays.

If a traditional tender process were applied to scenario 3, bidding contractors would base their price on the scope provided. They would exclude or modify requirements or conditions from their price, creating caveats that would increase the price based on additional works discovered throughout the project. The initial price and final price would likely be different, with the final price potentially being much higher.

If scenario 3 was approached with an ECI contract, more of the design risk could be allocated to the contractor, as they would have been involved in developing the scope rather than responding to a set scope provided to them. The net result is that their final price would be closer to the initial price.

Traditional tendering may drive lower initial prices, but when tasks are complex, and scope is uncertain, the final cost often looks very different from the first quote.

The decisions made by a Body Corporate or property owner can significantly impact project costs and timelines. Where the body corporate has acquired knowledge of building defects in the complex, and regardless of whether the defects are visible or have otherwise manifested themselves, the Unit Titles legislation requires the body corporate to take appropriate steps.

It is common for Body Corporates to limit the tender scope to only known defects. However, once work begins, additional, yet often suspected, issues typically emerge, expanding the project's scope, timeline, and cost. This restricted initial scope can lead to an inappropriate procurement or tendering approach, resulting in a contractor who is ill-equipped to handle the growing complexities.

As costs rise, Body Corporates often find themselves underfunded, triggering a cycle of delays, escalating expenses, and financial strain on the project.

Budgeting and Approvals

For budgeting and approvals, there are several factors to consider.

Budgets should be based on the full scope, not a best-case scenario. This is especially important when some items may only be discovered during the project.

For larger or more complex projects, it is crucial to have a decision-making mechanism that allows for quick, authoritative approvals. Once a project begins, delays caused by waiting for committee decisions or approvals via AGM/EGM can be costly. Consideration should be given to Section 74 of the Unit Titles Act to streamline this process.

Budgets should account for more than just the cost of works. They must also include consequential expenses such as vacating and reoccupation costs, storage, temporary accommodation, and other project-related logistics.

Choosing Tender Methodology

When developing tender documents, it is crucial to ensure the procurement method aligns with the project type, particularly whether the scope is fully defined.

Fully defined scope: If the scope is well-defined, either an open or selective tender process can be used. Selective tendering is preferred for specialised tasks.

Undefined or Evolving Scope: When the scope cannot be fully identified, a fixed tender price or estimate is unreliable. In these cases, an ECI approach is more suitable.

ECI does not have to be purely negotiated and can still involve competitive tendering through an open or selective list of contractors. The tender can be based on a defined portion of the project, for example, façade work, or a **strawman project**. A strawman project is a preliminary, incomplete draft used to facilitate discussion and refine the project plan. While this may not provide a final price, it allows Body Corporates to assess contractors based on methodologies, schedule of rates, compatibility, and track record.

Stage gates (predefined decision points) can be incorporated into the contract to balance competitive tendering with the flexibility of a negotiated process. For example, an ECI contract might progress through investigation and design before reaching a stage gate for construction approval. This approach improves cost accuracy by allowing for adjustments before full commitment, reducing the risk of an unrealistic initial estimate filled with caveats.

The diagram below illustrates the best practice route through remediation, outlining the key steps involved. These steps are also likely to serve as stage gates for reviews and decision-making.



Symptoms

The journey typically begins with visible symptoms, such as damp walls or dripping water, though other common building defects can also be indicators. It's important to remember that what you see is usually a symptom, not the underlying cause.

Initial Investigation

The initial investigation may reveal the root cause, such as a cracked roof tile or a blocked gutter. If so, the issue can often be resolved inexpensively. However, if the cause remains unclear, further investigation is necessary. In such cases, engaging a specialist building contractor or professional surveyor may be required. Persisting until the root cause is identified is essential.

Disclosure

For Body Corporates, once a professional has been brought in, the disclosure requirements of the Unit Titles Act comes into play. Any findings from the investigation must be disclosed to potential purchasers and the Body Corporate.

Build Your Team

To address building remediation issues, especially large or complex ones, a team of professionals is essential. Forming this team early in the process is best practice, as their combined expertise can effectively tackle the problem. Appointing specialists and experts later in the project may lead to delays or missed cost-saving opportunities due to their late involvement. It is advisable to include a client-side project manager or Professional Quantity Surveyor (PQS) to represent the Body Corporate and/or building owners. Additionally, a lawyer should be involved from this stage (if not earlier) to advise on relevant issues, including limitation periods and the steps required to gather evidence for potential litigation.

This is also the stage where the staged ECI contractor can be appointed or tendered.

Due Diligence

Once the team is appointed, it is crucial to complete the Due Diligence phase thoroughly. This ensures all team members understand the property's full history and the events leading to their appointment. With this knowledge, team members can contribute to scoping the full investigation, ensuring each specialist area is examined to avoid unnecessary surprises and reduce investigation costs. Consulting everyone spreads the risk from the Body Corporate.

Full Investigation

Often, the initial investigation is the only one conducted. A full investigation allows for a systematic approach to identifying all building defects. These defects will need remediation or planning around

during the project. Identifying them early prevents delays and cost increases later. The additional cost of assembling the team and conducting a thorough investigation is minor compared to the expenses and delays caused by discovering defects during construction. Many commonly discovered defects, such as seismic and passive fire issues, cannot be bypassed and will require council-mandated rectification. Even if the Body Corporate limits the initial scope, these defects will eventually need to be addressed.

Project Management

Project Management can be integrated into various stages of the process. This includes using Section 74 of the Unit Titles Act to appoint an administrator who acts on behalf of the Body Corporate to approve payments and project progress. This approach speeds up the process, reduces costs, and ensures that the best interests of the Body Corporate are prioritised over individual or committee preferences. It is important to note that the time commitment for this role during a major project can be substantial and beyond the capacity of most Body Corporate Committees.

Design

Once all areas have been investigated, the design phase can commence. It is common for the design to be sufficient for council consents but may require additional work and enhancements before construction. With the ECI approach and the contractor already part of the team, coordination and consideration of buildability can occur in one stage, saving time and costs later.

Funding

With the design complete, the project cost can be more accurately forecasted, allowing for funding to be sought. In a traditional tender process, the bid price and final project cost can differ significantly, leading to reluctance from lenders. Securing funding enables the project to start immediately, preventing cost escalations in labour and materials that typically occur if a Body Corporate raises levies over time or chooses to litigate before construction. Funding is particularly important as the diverse nature of Body Corporates means that some members may not be able to afford the levies or borrow against their property until it is remediated. Funding allows owners to repay the loan over time, smoothing out the cash flow impact of the project.

Construction

With the design completed and finance in place, the remediation phase can commence. Under the traditional procurement method, this is the first time the main contractor would be appointed and come to the site without the knowledge and history gained during the ECI stages. This means any opportunity

for them to share lessons learned from similar projects is largely lost. The fixed price they are held to can lead to a hard-line approach to contract or cutting corners to fit the budget, which does not create the best conditions for a successful project.

Asset Management

It is best practice to commence asset property management upon project completion to prevent issues from reoccurring. The operation and maintenance manual, along with all investigation and due diligence work, should be available to allow the Body Corporate to appoint a company to manage the asset. It is particularly important to compile warranties on new materials and products used during construction so that warranty conditions can be followed, and their value is not lost.

Litigation

In some cases, it may not be viable to wait until the investigation phase is completed before commencing court proceedings, as claims must be filed within applicable limitation periods (including no later than 10 years from the date of the defective construction work). If a claim proceeds to mediation, negotiated settlement, or trial before the full scope of the repair project is understood and clearly defined, there is a significant risk that any settlement figure or damages awarded might be considerably lower than the actual repair cost incurred by the Body Corporate/owners. Therefore, it is always preferable to complete the investigation phase before preparing evidence for trial. Depending on the Body Corporate's/owners' financial situation, it may also be an option to undertake some or all of the remedial work before preparing evidence. This allows the repair cost and resulting claim to be quantified more accurately.

A Body Corporate should engage lawyers as early as possible to advise on applicable limitation deadlines and provide initial advice regarding the merits of a claim against parties responsible for the building defects. This enables the Body Corporate to make informed decisions about what can realistically be achieved in relation to the remedial project before progressing any claim to an advanced stage.