PURPOSE

This document summarises:

* the classification of different types of procurement, and
* definitions of terms commonly used in procurement

The classification of the procurement type affects the procurement processes used and the approvals required. There may be subtle differences when classifications are determined for reporting or legal purposes.

For approvals and authorisations, refer to PR100 “Authorisations Summary” or [DP001 (eGADs)](http://dptibusobjvp01/egads/).

DEFINITIONS

# 1 PROCUREMENT CLASSIFICATION

# 1.1 GOODS, SERVICES OR CONSTRUCTION WORK?

At the highest level, all Government procurement is classified into construction, goods or services contracts.

"Goods” mean any movable property and any object attached to or forming part of land that is capable of being severed for the purposes of acquisition or disposal.

"Construction Work” means the construction of any building or structure or any repairs or improvements or other physical changes to any building, structure or land (and includes goods & services in conjunction with Construction Work).

“Services” refers to procurement not included in the above definitions.

[Parliamentary Committees Act](https://www.legislation.sa.gov.au/LZ/C/A/PARLIAMENTARY%20COMMITTEES%20ACT%201991.aspx)

[State Procurement Act](https://www.legislation.sa.gov.au/LZ/C/A/State%20Procurement%20Act%202004.aspx)

**1.2** **SERVICE CONTRACTS**

| **Contract / Consultant Type** | **1 Consultancies** | **2 Contract for Labour Services** | **3 Contract for Services - General** |
| --- | --- | --- | --- |
| **Exercise of Control** | No direction is provided from DPTI as to the way the work is performed. | DPTI provides direction to the contractor and controls how tasks will be performed. | No direction is provided from DPTI as to the way the work is performed. |
| **Examples** | Providing advice on Public/Private Partnerships and Private Sector Funding.Review & advice on Major organisational restructures. Investigation and advice regarding business process re-engineering. | Temporary staff agencies providing an administrative staff, IT staff, maintenance workers, etc for fixed periods.Self employed engineer providing short term professional services under the direction of a DPTI Manager. | Cleaning ServicesProfessional ServicesProperty ManagementSecurity ServicesWindow Cleaning ServicesPlant Hire ContractRecords Management ServicesFerry OperationsTelecommunications ServicesPhotographic Licences  |

# 1.2.1 Consultancies

To be classified as a consultancy, all of the following criteria must be met[[1]](#footnote-1):

* the company or entity must be engaged for a specified period to carry out a task that requires specialist skills and knowledge ***not available*** in DPTI;
* ***DPTI will not direct*** the consultancy in the way the task is performed; and
* the engagement of a person under normal circumstances is not a feasible alternative.

Refer to PR101 for requirements on consultancy contract disclosure and report any contract requiring disclosure to the Contract Formation group in Procurement & Contracting.

Note that this definition is only used for the purposes of reporting within government, looking at the nature of services being provided (i.e. a service provider calling themselves a consultant are not necessarily a consultancy for the purposes of these definitions). Similarly, Australian Standard 4122, General Conditions of Contract for Consultancies, is unlikely to be used for the type of contract considered to be a consultancy under the above definition. General Conditions of Contract for Services will normally be used in these instances.

# 1.2.2 Contract for Labour Services

DPTI provides direction to the contractor and controls how tasks are performed. DPTI must ensure that these contracts are “Contracts for Services”, and do not inadvertently create a Contract of Employment[[2]](#footnote-2). It is important that both parties understand the nature of the contract, because it will affect responsibility for issues such WHS, industrial relations (e.g. leave entitlement) and liability towards third parties.

# Responsibility for WHS

The [Work Health and Safety Act 2012 (SA)](http://www.legislation.sa.gov.au/LZ/C/A/WORK%20HEALTH%20AND%20SAFETY%20ACT%202012.aspx)will take precedence over any contract wording or management practice. The Act will deem DPTI to be responsible for WHS if it controls the methods of work or the workplace.

***If either of the above applies, DPTI WHS Policies & Procedures must be followed. This would usually apply to temporary staff / labour hire.***

Where DPTI controls the workplace, DPTI must ensure that all hazards are controlled before the contractor enters the worksite and any potential hazards are brought to the contractor’s attention. Note that this may apply to contracts other than temporary staff / labour hire; for example where a plumber enters the premises to fix a leaking pipe.

Responsibility for Industrial Relations Matters or Liability toward Third Parties

A number of matters will need to be considered to determine whether it is a Contract for Services or a Contract of Employment.

If the contract is intended to be a Contract for Services, the contract should specify outcomes in performance terms without mention of how this is to be achieved. If the intention is to hire temporary staff, the relevant procedures in the DPTI Human Resources Manuals will apply.

This is legally a very complex area and the issue has been examined by the High Court of Australia on a number of occasions. A court will consider more than just what the contract calls the “relationship”; i.e. simply calling it a Contract for Services will not alone make it one[[3]](#footnote-3).

Workplace Services use the following criteria to determine whether an employer – employee relationship exists:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Criterion | ‘Employee’ (contract of service) | ‘Contractor’ (contract for services) |
| 1 | Is the worker paid a wage or salary? | Yes | No |
| 2 | Is the work performed at the employer’s place of business & not away from it? | Yes | No |
| 3 | Does the worker work regular and/or defined hours? | Yes | No |
| 4 | Is the worker engaged to produce a certain result, the completion of which will terminate their relationship with the employer? | No | Yes |
| 5 | Does the worker provide their own plant or equipment as a means of accomplishing his work? | No | Yes |
| 6 | Does the worker have the right to subcontract or delegate his work? | No | Yes |
| 7 | Is the worker subject to, or does the employer reserve the right to subject the worker to detailed and direct control?*All other things being equal, a positive answer to question 7 (control test) indicates an employer – employee relationship (i.e. contract of service)*  | Yes | No |

##### Note that for taxation purposes, a different set of criteria will apply. These are set by the Australian Taxation Office.

# 1.2.3 Contracts for Services - General

These are defined as service contracts, which are not labour hire or consultancies.

These contracts are typically for the provision of services for the general ongoing operation of DPTI. Examples include: cleaning services, professional services for planning and design of transport infrastructure, property management, security services, and window cleaning services, plant hire contract and operation of ferries.

The following is a summary of the different types of services contracts used by DPTI:

**1.3 GOODS AND SERVICES “IN CONJUNCTION WITH CONSTRUCTION WORK”**

For complete definitions, refer to the [*State Procurement Regulations 2005*](http://www.legislation.sa.gov.au/LZ/C/R/STATE%20PROCUREMENT%20REGULATIONS%202005.aspx) and [*Building Work Contractors Act 1995*](http://www.legislation.sa.gov.au/LZ/C/A/BUILDING%20WORK%20CONTRACTORS%20ACT%201995.aspx)*.*

In accordance with the Regulations under the *State Procurement Act 2004* (SA), a “Prescribed Construction Project” valued at more than $150,000 (excluding GST) is excludedfrom “Procurement Operations” under the Act.

A Prescribed Construction Project is a project that primarily involves the procurement of construction work and encompasses[[4]](#footnote-4):

(i) the acquisition and installation of fixtures, plant, equipment, appliances and fittings in conjunction with **construction work**; and

(ii) the acquisition of survey, planning, design and other services in conjunction with **construction work**; but does not encompass the acquisition of goods and services for the ongoing maintenance of a **building** or **structure**.

Therefore, goods and services purchased in accordance with the above are not subject to *State Procurement Act*. These are commonly referred to as “goods & services in conjunction with construction”.

Notes:

**Construction work**4means:

(a) **building work** *(ie the whole or part of the work of constructing, erecting, underpinning, altering,* ***repairing****, improving, adding to or demolishing a* ***building***[[5]](#footnote-5));or

(b) the whole or part of the work of excavating or filling of **land** not constituting building work*.*

**“Building”** includes a structure and part of a building or structure[[6]](#footnote-6).

**“Structure”** includes a bridge, road, drainage works, pavement and roadside furniture (eg signs and safety barriers).

**“Land”** includes land under water[[7]](#footnote-7).

Further definitions of “construction work” are contained in the [*Construction Industry Training Fund Act 1993*](http://www.legislation.sa.gov.au/LZ/C/A/CONSTRUCTION%20INDUSTRY%20TRAINING%20FUND%20ACT%201993.aspx)

To test whether the procurement is classed as goods & services in conjunction with construction work, consider the following question:

*If the construction was not to take place or was not under consideration, would the procurement still proceed?*

 If the answer is yes, the procurement is ordinary goods and services.

**1.4 MAINTENANCE OR CONSTRUCTION**

This distinction affects whether the procurement is excluded from the [*State Procurement Act*](https://www.legislation.sa.gov.au/LZ/C/A/STATE%20PROCUREMENT%20ACT%202004.aspx)*.*

“**Repairing**” is included in the definition of construction work. Although the meaning of the word **“repairing”**is not defined in the *State Procurement Act*, it has been given close consideration in many Federal tax cases. The following definition is from the Australian Taxation Office[[8]](#footnote-8)

* *The word 'repairs' has its ordinary meaning. It ordinarily means the remedying or making good of defects in, damage to, or deterioration of, property to be repaired (being defects, damage or deterioration in a mechanical and physical sense) and contemplates the continued existence of the property.*
* *Work done to prevent or anticipate defects, damage or deterioration (in a mechanical or physical sense) in property is not in itself a 'repair' unless it is done in conjunction with remedying or making good defects in, damage to, or deterioration of, the property.*
* *Repair for the most part is occasional and partial. It involves restoration of the efficiency of function of the property being repaired without changing its character and may include restoration to its former appearance, form, state or condition. A repair merely replaces a part of something or corrects something that is already there and has become worn out or dilapidated. Works can fairly be described as 'repairs' if they are done to make good damage or deterioration that has occurred by ordinary wear and tear, by accidental or deliberate damage or by the operation of natural causes (whether expected or unexpected) during the passage of time.*

In summary, “repairing” constitutes the restoration of an item to its previous condition without changing its character. It is therefore excluded from the *State Procurement Act* if over $150,000.

**“Maintenance”**is work of a preventative nature that avoids the need for later repair.

# 2 PROCUREMENT DEFINITIONS

For a comprehensive set of definitions, refer to the State Procurement Board [Glossary of Procurement Terms](http://www.spb.sa.gov.au/sites/default/files/Procurement%20Glossary%20v3.0%20September%202016_0.pdf).

1. Multi-stage Tendering – Any approach to tendering where there are one or more stages that companies must satisfy before being permitted to submit a tender. Points (b) to (d) below relate to the first stage of Multi Stage Tendering.
2. Prequalification - Preselection of potential tenderers who will subsequently be eligible to tender for contracts in a specific category for a fixed period. Also referred to as a
“Multi-Use List”)
3. Expression of Interest (EoI) –The process of inviting companies or consortia (Registrants) to register their interested in a future contract and may also be referred to as pre-registration. An EoI is the first stage of a multistage process, does not contain price information and is used to create a shortlist. It may be followed by a Request for Tender or Request for Proposal.
4. Request for Information (RfI) (or Market Sounding) – An invitation to companies or consortia to submit information about their capability, products and to provide suggestions about possible contract structure or approaches. These are not formally assessed and are part of the external market place review.
5. Request for Proposal (RfP) – An invitation for companies or consortia (Proponents) to submit an offer with scope for alternative approaches, innovation and varying performance levels. It may be used in either multi stage or a single stage processes.
6. Request for Tender (RfT) – An invitation for companies or consortia (Tenderers) to submit a tender in response to a DPTI specification that specifies the level of performance or output required (c/f RfP). It may be used in an open tender (ie publicly advertised), selective tendering, with prequalification or as a second stage procurement after respondents have been shortlisted through an EoI process.
7. Secondary Procurement - A secondary procurement process is one undertaken by a public authority to select a supplier from a *Panel Contract*, for a particular procurement need.
8. Selective Tendering – Where a limited number of companies are invited to submit a bid in lieu of a full public tender call. It is mainly used for low value purchases, unless preceded by an Expression of Interest.
9. Seeking a Single Offer *-* a procurement process where an offer has been obtained from, or negotiated with, a single supplier (referred to as “Limited Tendering” in the US Free Trade Agreement).
10. Panel Contract – a system where contracts are set up in advance with multiple suppliers for repeated low value purchases that will take place over a long time frame.
11. Acquisition Plan – a plan which outlines the procurement process and summarises the key issues. The plan must be approved before tendering commences.
1. Dept Premier and Cabinet Circular PC027 “[Disclosure of Government Contracts](http://dpc.sa.gov.au/premier-and-cabinet-circulars)” and DTF Accounting Policy Frameworks II General Purpose Financial Reporting Framework [↑](#footnote-ref-1)
2. In a legal context, these are referred to as a “Contract *of Service*” [↑](#footnote-ref-2)
3. Further discussion on this issue can be found in *Hollis v Vabu Pty Ltd [2001]* High Court of Australia [↑](#footnote-ref-3)
4. Section 5 (2) of the [*State Procurement Regulations 2005*](http://www.legislation.sa.gov.au/LZ/C/R/STATE%20PROCUREMENT%20REGULATIONS%202005.aspx) [↑](#footnote-ref-4)
5. Section 3 (1) of the [*Building Work Contractors Act 1995*](http://www.legislation.sa.gov.au/LZ/C/A/BUILDING%20WORK%20CONTRACTORS%20ACT%201995.aspx) [↑](#footnote-ref-5)
6. Section 3 (1) of the [*Building Work Contractors Act 1995*](http://www.legislation.sa.gov.au/LZ/C/A/BUILDING%20WORK%20CONTRACTORS%20ACT%201995.aspx) [↑](#footnote-ref-6)
7. ##  Section 3 of the [*Parliamentary Committees Act 1991*](http://www.legislation.sa.gov.au/LZ/C/A/PARLIAMENTARY%20COMMITTEES%20ACT%201991.aspx)

 [↑](#footnote-ref-7)
8. ATO Taxation Ruling 97/23 [↑](#footnote-ref-8)