



Tendering Guidelines for NSW Local Government



These Guidelines are prepared by the Director General under section 23A of the *Local Government Act 1993*. Councils are required to take guidelines issued under this section into consideration before exercising any of their functions.

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Definitions

In the Tendering Guidelines for NSW Local Government the following definitions apply:

Council Official includes councillors, members of staff of council and delegates of council

The *Act* the *Local Government Act 1993*

The *Regulation* the *Local Government (General) Regulation 2005*

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Introduction

Tendering and the activities of procurement and disposal are important areas of council operations. Economic forces and technological change over the last 20-30 years have led to circumstances where organisations are spending more and more on the purchase of goods and services and the disposal of property. Local councils are no exception to this general rule.

The development of best practice in tendering is not a simple matter and may be affected by a range of factors including the scale of the organisation, the degree of commitment by senior management or the level of purchasing expertise within an organisation. While the current tendering threshold provided in the *Act* and *Regulation* is \$150,000, councils should consider whether to conduct a tender process when a lesser amount is involved to ensure that they obtain best value (see part 1.5).

Management of the tendering process is, or at least should be, an integral component of almost every aspect of the management of any organisation, including local and county councils. It should involve everybody, from councillors and managers to those responsible for on-ground delivery of services.

Purchase and disposal activities using the tendering process for local government, and other government agencies, are governed by strict considerations of probity, transparency and accountability in the expenditure of public funds for public purposes.

As part of the Division of Local Government's aim to encourage and support the spread of best practice, it has produced these Tendering Guidelines for NSW Local Government. The Guidelines aim to assist councils in applying clear policies, consistent procedures and effective risk management strategies in accordance with the *Local Government Act 1993*, the *Regulation* and other relevant legislation.

They are prepared by the Director General of the Department of Premier and Cabinet under section 23A of the *Act* and therefore must be considered by councils as part of the tendering process.

The Guidelines strengthen previous publications regarding local government procurement, namely the Code of Practice and Code of Tendering for the Construction Industry – Practice Note No. 8a (1996) and Competitive Tendering Guidelines (1997), as well as various State Government codes and guidelines regarding public procurement for the disposal and the delivery of goods and services to meet local community needs. The use of these Guidelines will reduce the risk to Local Government in any tendering undertaken and should be used within the context of the *Act* and *Regulation*.

Councils should be mindful that they must act in the interests of their residents, ratepayers and the wider community and that, when considering expenditure of public monies, they:

- Are open, transparent and accountable in their dealings.
- Ensure that their dealings promote fairness and competition, and
- Obtain best value

The Tendering Guidelines for NSW Local Government are divided into the following sections to assist councillors, council staff and business:

- Section One – Guiding Principles – sets out the overall principles that apply to the tendering process used by NSW local government.
- Section Two – Procurement Management - outlines processes necessary to effectively manage the tendering process
- Section Three - The Tendering Process – outlines the stages involved in the tendering process with reference to specific legislative requirements and recommended practices

- Section Four – Resources – provides useful publications, websites and contacts as well as a tendering checklist and list of commonly used terms in tendering, the purchase of goods and services and the disposal of property.

These Guidelines must be read in conjunction with Part 7 of the *Regulation*.

It should be noted that where a council enters into a public private partnership as defined by section 400B of the *Act*, it should refer to the Guidelines on the Procedures and Processes to be followed by Local Government in Public-Private Partnerships.

1. Guiding Principles

1.1. Overview

Tendering is a formal process for seeking offers for the supply of goods or services and the disposal of property whereby an invitation is extended and offers are made and considered, according to a set of pre-determined assessment criteria, prior to the creation of a contract for the supply of the goods or services.

The legislative requirements for tendering by NSW local and county councils are prescribed by section 55 of the *Act* and by the *Regulation*. However, other legislation is also relevant to council operations and activities involved in tendering, procurement and contracts. A legislative summary checklist is provided in Section 4 – Resources.

Where a council is unsure of its legal obligations and requirements, it should seek and be guided by its own legal advice. The Local Government Association of NSW and the Shires Association of NSW can provide legal advice to councils. The Division of Local Government, the Independent Commission Against Corruption (ICAC) and the NSW Ombudsman can provide information and assistance regarding general enquiries.

While the Guidelines address the issue of tendering by NSW Local Government above the \$150,000 threshold prescribed by the *Regulation*, councils may find them useful when undertaking procurement involving amounts below the prescribed threshold.

1.2. Standards of Behaviour and Ethical Principles

The following standards of behaviour and ethical principles are based on those developed for procurement and tendering activities by all NSW State Government agencies. Councils should adopt these standards and require their suppliers and contractors to behave in accordance with these standards at all times. These standards are consistent with the requirements for the effective and efficient operation and conduct of councils under the *Act*.

- **Honesty and fairness:** Councils must conduct all tendering, procurement and business relationships with honesty, fairness and probity at all levels. Councils must not disclose confidential or proprietary information. (Refer to 1.3 for further information regarding confidentiality).
- **Accountability and transparency:** Councils must ensure that the process for awarding contracts is open, clear, fully documented and defensible.
- **Consistency:** Councils must ensure consistency in all stages of the tendering process. For example, conditions of tendering must be the same for each tenderer on any particular tender; all requirements must be clearly specified in the tender documents and criteria for evaluation must be clearly indicated; all potential tenderers should be given the same information; and the evaluation of tenders must be based on the conditions of tendering and selection criteria as defined in the tender documents. In saying this, advice given to potential tenderers clarifying aspects of the tender need not be circulated to all tenderers.
- **No conflict of interests:** A council official with an actual or a potential conflict of interests must address that interest without delay. (Refer to 1.4 for further information regarding conflict of interests).
- **Rule of law:** Councils must comply with all legal obligations. These include the provisions of the *Act* and the *Regulation*. (Refer to Section 4 - Resources for a legislative summary checklist).

- No anti-competitive practices: Councils must not engage in practices that are anti-competitive or engage in any form of collusive practice.
- No improper advantage: Councils must not engage in practices that aim to give a potential tenderer an advantage over others, unless such advantage stems from an adopted Council procurement policy such as a local preference policy.
- Intention to proceed: Councils must not invite or submit tenders without a firm intention and capacity to proceed with a contract, including having funds available.
- Co-operation: Councils must encourage business relationships based on open and effective communication, respect and trust, and adopt a non-adversarial approach to dispute resolution.

1.3. Confidentiality

Councils must not disclose tender information received from tenderers that is intellectual property, proprietary, commercial-in-confidence or otherwise confidential, without their prior consent. In addition, council staff or councillors must not disclose information regarding the specific details of a tendering process, including a recommendation of the tender evaluation or assessment panel before the outcome of the tender has been determined.

Where a council is dealing with a tender pursuant to section 55 of the *Act* and confidential information needs to be disseminated to councillors for the purpose of deciding whether or not to accept any submitted tender, the confidential information should be issued as a separate confidential attachment to the council report with the non-confidential information included in the council business paper which is available to the public.

Section 10A of the *Act* outlines the circumstances under which a council or council committee meeting may be closed to the public. This includes information that would, if disclosed:

- Confer a commercial advantage on a person with whom the council is conducting (or proposes to conduct) business with, or
- Prejudice the commercial position of the person who supplied it, or
- Confer a commercial advantage on a competitor of the council, or
- Reveal a trade secret.

Councils are reminded that the *Act* emphasises openness and transparency in decision making and councils should consider whether any information provided in the report to the council is intellectual property, proprietary, commercial-in-confidence or otherwise confidential before considering any report in closed session.

Within the tendering process, councils must be mindful of their responsibilities under the provisions of other relevant pieces of legislation such as s.12 of the *Act*, the *Freedom of Information Act 1989* and the *Privacy and Personal Information Protection Act 1998*.

1.4. Conflict of Interests

The NSW Government established the ICAC to protect the public interest, prevent breaches of public trust and guide the conduct of public officials. ICAC investigations have identified a number of examples that highlight the need for all public agencies, including councils, to ensure that they adhere to high standards of probity in tendering.

Conflict of interests may occur when an individual could be influenced, or a reasonable and informed person would perceive that an individual could be influenced, by a personal interest when carrying out public duties. There is a

requirement that where such a conflict occurs, it will be declared, assessed and resolved in favour of the public interest.

Council officials have an obligation to disclose potential or actual conflict of interests between their public duties and their personal or private interests. The benefit or loss may be financial or non-financial. The objective of disclosing interests that are or could be in conflict with official duties is to ensure prompt consideration, comprehensive assessment and, where necessary, the implementation of alternative working arrangements or other action by the council concerned.

A conflict of interests can be of two types:

- Pecuniary – an interest that a person has in a matter because of a reasonable likelihood or expectation of appreciable financial gain or loss to the person (s442 of the *Act*). A person's pecuniary interest may arise because their spouse, de facto partner, relative, partner or employer, or company or other body of which the person or a nominee, partner or employer is a member has a pecuniary interest in a matter (s443 of the *Act*).
- Non-pecuniary – a private or personal interest the council official has that does not amount to a pecuniary interest as defined by the *Act*. For example a non-pecuniary interest could be a friendship, membership of an association, society or trade union or involvement or interest in an activity and may include an interest of a financial nature.

The *Model Code of Conduct for Local Councils in NSW* and the supporting guideline provides further information regarding conflict of interests and the requirements of the *Act* in relation to conflict of interests.

1.5. Value for Money

Value for money is a comparison of the apparent benefits in the proposed contract with the whole-of-life costs of the proposed contract or project. Consideration may have to be given to items external to the contract such as additional contract management during the course of the contract or the liability for maintenance of the facility after the contract has been completed.

Value for money is determined by considering all the factors that are relevant to the proposed contract and may include: experience, quality, reliability, timeliness, service, risk profiles and initial and ongoing costs. These are all factors that can make a significant impact on benefits and costs. Value for money does not automatically mean the 'lowest price'.

It is important that tender documents, within the Conditions of Tendering, specify the evaluation criteria that will be used to assess the costs and benefits of each submitted tender. It is also an advantage to have returnable schedules consistent with the evaluation criteria.

1.6. Local Preference Policy

Councils often have a significant role in local and regional economic development. This may include consideration of local supply issues and Aboriginal and young people's employment participation policies.

The implementation of local preference policies is not necessarily inconsistent with the principles of National Competition Policy. However, the use of local preference in the evaluation of tenders and awarding of contracts possesses inherent risks in terms of anti-competitiveness and the maintenance of defensibility, accountability and probity.

Where a council wants to consider local preference as a factor in the supply of goods and services or the disposal of property, it should develop and adopt a local preference policy. This policy should be based on sound reasoning and outline the circumstances in which the council would bring this policy into effect. For example, where an additional cost would be incurred by the council in implementing its local preference policy, the maximum amount or percentage of that additional cost should be specified and the particular circumstances in which the amount should also be acceptable to the local community.

The policy, as well as a statement indicating the basis for its use, should be provided to any potential tenderers prior to their decision to submit a tender. Such a policy should be included in the tender documents and identified in the evaluation criteria.

When reporting the result of a tender evaluation process, the application of the policy should be clearly referred to and details provided regarding any additional costs to be incurred by the council if it accepts a tender, other than the lowest tender, as a result of the implementation of the policy.

Councils should also consider seeking legal opinion regarding their proposed local preference policy to ensure the policy does not breach either the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1987* (NSW), or various international trade agreements.

1.7. Aboriginal Employment Participation

In certain circumstances tenderers will be required to indicate measures they intend to implement if awarded the contract, which are designed to lead to improved conditions in Aboriginal communities.

These measures may relate to employment of Aboriginal people, procedures to develop the business skills of Aboriginal people and the provision of economic benefits to Aboriginal communities.

The Construction Agency Coordination Committee has produced Aboriginal Participation in Construction Guidelines, which set out what is required of parties involved in construction projects for the NSW government. The website may be found at www.dpws.nsw.gov.au

2. Procurement Management

2.1. Quality Assurance

Quality assurance is a systematic process that should be bound into the tender and the subsequent contract. It is the way the quality of an end product, as expressed in the functional specifications, can be assured in terms of fitness for purpose and in meeting user requirements. Councils should consider the following:

- When preparing the specification, specify the appropriate recognised Quality Systems Standard or Policy.
- When considering tenders, treat the specified Quality Systems Standard or Policy as a deliverable under the contract like any other mandatory requirement. This can be extended to Environmental Management systems or other items considered relevant to contractors performance in the contract.
- When monitoring performance, make sure the tenderer performs to the specified Quality Systems Standard or Policy in the tender documents.
- Council may also wish to participate in a Contractor Performance Reporting system established by the Department of Commerce which records contractor and consultant performance and from which information on prior performance can be obtained.

Alternatively or in addition, councils may request that a successful tenderer meet a recognised Quality Control system that requires the successful tenderer meet specified quality standards before the service or product is accepted by council. Under such an approach, council needs to ensure that the required quality standards are clearly set out in the tender documents and contract and that the process for assessment of quality, including steps available for corrective action, is clearly defined.

2.2. Record Maintenance

Councils should have clear procedures controlling access to all documents relating to a tender. Access to tender documents will be restricted to only those persons involved in the tender process including the tender evaluation panel. The procedures should also state how access to tenders submitted by secure electronic means would be regulated.

In conducting the tendering process councils should ensure record keeping as follows:

- Maintain full records of the entire tendering process. This includes:
 - The council's decision to tender
 - A copy of the public advertisement
 - A complete copy of the tender documents provided to tenderers
 - The policy or procedure regarding the operation of the tender evaluation panel including the tender evaluation plan which includes the tender evaluation methodology, criteria and weightings and the names of staff involved
 - A copy of any variation to the tender documents which should be in the form of an addenda
 - The names of all parties who received tender documents
 - A record of all subsequent dealings with tenderers and information provided to them
 - The names of all tenders submitted and their amounts
 - Where a council submits a tender, any policy or procedure regarding the management of in-house tenders and the names of staff involved in an in-house tender
 - The policy or procedure regarding the operation of tender evaluation panels and the names of staff involved
 - A record of any amendments to the tender documents and the persons informed of those amendments (clause 170(2) of the *Regulation*)

- A record of any extension or shortening of the tender period (clauses 171 and 172 of the *Regulation*)
 - A record of any variations to tenders made in accordance with clause 176 of the *Regulation*¹
 - The tender evaluation methodology, criteria and weightings
 - The evaluation of tenders and the reasons for selecting the successful tender or not accepting any of the submitted tenders (clause 178 of the *Regulation*)
 - The notification to all tenderers of the outcome of the tendering process (clause 179 of the *Regulation*).
- Document policies, procedures and decisions regarding risk assessment and management (Refer to 2.3 for further information regarding risk management).
 - Comprehensively document all communications with potential tenderers.
 - Separately document the recommendation, review and final approval stages to ensure the process is transparent.
 - Prepare an evaluation report on each tender.
 - Prepare a final report that documents the reasons, based on the tender criteria, for selecting the successful tender or, not accepting any of the submitted tenders.
 - Ensure that documents about the tenders and the evaluation process are stored and handled securely.
 - Retain complete and comprehensive records of all tenders, evaluations and any negotiations as well as the contract itself.
 - Ensure compliance with the *State Records Act 1998*.

¹ In addition, full documentation is required where changes are made to the conditions of tender, such as extending or shortening the tender period (clauses 171 and 172 of the *Regulation*), and where variations to tenders are made in accordance with clause 176 of the *Regulation*.

2.3. Risk Management

Managing risk assists making better decisions. Councils must adopt sound risk management procedures in relation to tendering. By identifying likely risks both in the procurement of the goods and services and in the tendering process during the planning stage, steps can be taken to manage those risks to minimise the likelihood of problems occurring during the tendering process and once the tender has been awarded. All decisions regarding risk identification, assessment and management should be recorded to ensure an accountability trail. Councils may choose to develop risk registers for the works to be undertaken and the procurement. Prospective tenderers should be informed of risks that the council is aware of in respect to the works being undertaken.

The evaluation of risk management practices should be used to improve practices and further develop policies related to tendering.

A council officer should not be penalised if a risk management strategy fails, provided the officer acted reasonably, responsibly and in accordance with relevant codes. Instead, the evaluation of risk management practices should be used to improve practices and further develop policies related to tendering.

Councils should refer to the Standard for Risk Management – AS/NZS 4360:2004 or its replacement to assist their development of a systematic and comprehensive approach to risk identification, evaluation and control.

2.4. Roles and Responsibilities

Councils are bodies politic. The councillors are the governing body of the corporation and have the responsibility of directing and controlling the affairs of the council in accordance with the *Act*. The General Manager is responsible for the efficient and effective operation of the council's organisation and for ensuring the implementation of the decisions of the council without delay.

Councillors must not:

- direct council staff in their performance of a council's functions. Rather, appropriate direction should be given to the General Manager by way of a council or committee resolution.
- in any public or private forum, direct or influence, or attempt to direct or influence, any other member of the staff or a delegate of the council in the exercise of the functions of the member or delegate as per the Model Code of Conduct.
- contact a member of the staff of the council unless in accordance with procedures governing the interaction of councillors and council staff that have been authorised by the General Manager.
- contact or issue instructions to any of council's contractors or tenderers, including council's legal advisers.

The *Model Code of Conduct for Local Councils in NSW* provides further information regarding the roles, responsibilities and relationship between council officials.

Discussion

The policy framework for tendering is related to directing and controlling the affairs of the council and therefore a matter to be determined by councillors as the governing body.

The development of tendering procedures and implementation of the tendering process are operational matters and therefore should be undertaken by council staff.

It is of critical importance that the different roles and responsibilities of council officials in relation to the tendering process are clearly identified by the council and communicated to potential tenderers. In addition, to assist in building anti-

corruption capacity within the tendering process and council operations, councils should ensure that potential tenderers are informed that unethical or inappropriate behaviour will result in a tender being disqualified. Tenderers should also be informed about what to do if they suspect corrupt conduct and what action a council will take if it suspects unethical or corrupt behaviour. (Refer to 3.6 for information on inclusions in tender documents).

2.5. In-House Tenders

Section 55 (2A) of the *Act* clarifies that a council may tender for any work, service or facility for which it has invited tenders.

The following strategies should be used when tenders from council business units are involved:

- Engagement of an independent assessor, for example the Department of Commerce.
- Ensuring that potential tenderers know that in-house tenders are involved.
- Ensuring that procedures are followed closely to avoid perceptions of bias and that comprehensive records are kept.
- Ensuring that there is clear physical and operational separation between staff responsible for the tender and those tendering.
- Careful management of access to information – ensure stringent security measures are applied so that in-house tenderers do not have the opportunity to access confidential tender information.

Councils should adopt policies and procedures regarding in-house tenders that incorporate these strategies. In addition, councils should provide copies of or reference to the adopted policies and procedures to potential tenderers as part of the Conditions of Tendering. (Refer to 3.6 for information on inclusions in tender documents).

2.6. Joint Purchasing Arrangements

Joint purchasing arrangements can provide opportunities for councils to achieve efficiencies through economies of scale and other processes.

Section 355 of the *Act* provides that a function of council may, subject to certain conditions, be exercised in a number of ways. For example, a council may exercise its functions:

- jointly by the council and another council or councils, or
- by a delegate of the council, which may be a voluntary regional organisation of councils of which the council is a member.

While section 377 of the *Act* provides that a council may, by resolution, delegate certain functions to its General Manager or any other person or body (not including another employee of the council), the provision does not include “the acceptance of tenders which are required under the *Act* to be invited by the council”. As councils are unable to delegate the power to determine whether to accept those tenders required by the *Act*, councils should clearly specify which functions of the tendering process are to be delegated and to whom.

Councils could choose to engage in joint purchasing arrangements with other councils or groups of councils such as voluntary regional organisations of councils. However, the functions of deciding to tender, either generally or in regard to a specific tender, and accepting the tender should remain the function of the individual elected councils and not be delegated.

The delegation of certain functions does not divest the individual elected councils as principal bodies, of their responsibilities to ensure that accountability and probity is maintained in the tendering process.

When considering whether to enter into joint tendering arrangements, councils need to:

- Be committed to the process from the outset.
- Ensure a common understanding of the required outcomes, the joint tendering process and a shared commitment to the process.
- Undertake detailed forward planning in relation to the joint tendering process.

3. The Tendering Process

3.1. When is a tender required?

Councils must use the tendering method set out in the Regulation before entering into any of the types of contracts specified in section 55(1) of the *Act*. In addition to the types of contracts outlined in this section, councils are encouraged to use the tendering process in the following circumstances:

- Where estimated expenditure (including on-costs such as GST) is close to the tendering threshold specified in the Regulation (currently \$150,000). The calculation of estimated expenditure should be a critical element of planning and contract scoping.
- Councils should not invoice or order split to avoid tendering requirements as such activities would be contrary to the requirements of council's charter under the *Act*.
- Where the aggregated or cumulative cost of a contract conducted over more than one accounting period is likely to exceed the tendering threshold specified in the Regulation.
- Where the sale or purchase of good or services may be considered controversial, contentious or political.
- Where the sale or purchase of land may be considered controversial, contentious or political. Acknowledging that the sale or purchase of land is specifically exempt under 55(3) of the *Act*, council should still consider using the tender process in such circumstances.
- Where there is a risk that 'would be' tenders could claim that council has 'preferential' arrangements with a single supplier.

- Where there is a risk that ‘would be’ tenders could claim that they would have tendered for the work if a public tendering process had been undertaken.

By using the tendering process in circumstances other than those prescribed by section 55 of the *Act*, councils will be able to provide assurance of openness and accountability, build anti-corruption capacity and achieve the best value for money.

Section 55(3) of the *Act* outlines the types of contracts that are exempt from the tendering process. Extenuating circumstances and cases of emergency are not defined by the *Act* and should be used as an exemption to the tendering requirements only after careful consideration with the reasons clearly documented.

The decision in *Tonkin -v- Cooma Shire Council [2006] NSWCA 50* has emphasised the risk of surcharging action where the tendering provisions of the *Act* are not complied with.

3.2. Identification and Planning

It is critical to any effective tendering process that the need for the purchase of goods or services or the disposal of property is accurately identified, scoped and planned. Successful tendering requires effective planning and performance monitoring to ensure all parties’ expectations are met and value for money is achieved.

The following principles should be applied:

- Planning both the definition of the works or services to be procured and the procurement process adds value to council’s operations, programs, projects, and purchases.

- The effort expended in planning is consistent with the significance of what is planned.
- Planning ensures the works or services are fit for purpose.
- Planning ensures fairness of process.
- Planning is used to assist the budgeting process to account for the annual cost of works, goods, and services to be used in council programs.
- Planning includes background scoping and benchmarking of relevant service levels.
- Plans are reviewed and, if necessary, revised during the tendering process, without compromising that process.
- Planning for tendering includes planning of probity checks and other anti-corruption measures. This must include the establishment of a tender review or evaluation panel or the identification of the staff member responsible for evaluating tenders prior to calling tenders.

Councils need to recognise the lead time and the costs involved in the tendering process and these timeframes and costs need to be budgeted for and incorporated into council planning.

3.3. Identifying and Defining the Tender Requirements

A critical step in the tendering process is identifying and defining the requirements, which build on the identification and planning phase. Poor or inappropriate definition of requirements can result in an inappropriate purchasing or disposal strategy being employed, with the resultant waste of council resources.

3.3.1. Functional Requirements

Functional requirements identify what objectives and outcomes will be met or supported by the tender, but do not prescribe a specific technology or item of equipment.

3.3.2. User Requirements

User requirements define the need for the tender from the perspective of the end user, indicating how they will use the product or service. They often include statements of performance for particular functions, and may specify technology or equipment where there is a particular requirement. Councils should only specify a user requirement is mandatory when it is necessary to council's needs.

More refined requirement definitions may be achieved by developing user requirements that support, or are an alternative to, the functional specification.

3.3.3. Types of Specifications

There are three main types of specifications:

- **Functional Specifications.** These define the function or duty performed by the procurement, for example, sewage treatment works, job design consultancy or road maintenance.
- **Performance Specifications.** These define the performance required, for example, a device to carry ten tonnes of bulk coal over sealed roads for a maximum distance of 300 km in six hours.
- **Technical Specifications.** These define the item's technical and physical characteristics, including physical dimensions, power input and output, number of items, their location and purpose and the materials used.

Unless the specific tender demands detailed technical specifications, performance and functional specifications should be used. This is because non-technical specifications may:

- Encourage alternative and innovative solutions
- Discourage bias
- Minimise resources and effort to prepare the specification
- Minimise the impact of marketing pressure by suppliers
- Focus on results, not input or technical characteristics
- Encourage improved environmental performance, products or solutions.

However, there is a risk with functional and a performance specification that councils may not achieve what is required in terms of technical outcomes, including durability requirements.

Tenderers may be encouraged to offer alternative tenders that do not fully meet the prescriptive conditions of tendering but provide innovative solutions and better value for money. Councils must specify the circumstances in which alternative tenders will be considered. Where a tenderer offers an alternative, a tender for that alternative should not be sought from other tenderers. Councils should not breach confidentiality by using information contained in alternative tenders as the basis for calling subsequent tenders.

Alternative tenders should not be accepted from tenderers that have not submitted a complying tender.

Where a council does not have the technical knowledge available within the organisation, council should consider engaging a consultant to assist in developing the specification or write a brief focusing on the outcomes, user requirements and functional requirements to allow potential tenderers to respond to the need in their own way. Councils should ensure, when retaining

consultants, they are excluded from direct or indirect participation in any subsequent tender relating to the original matter.

3.4. Developing the Evaluation Criteria

It is essential that the evaluation methodology and criteria be established at the time specifications are prepared so that they can be included in the tender documents and, ideally, a tender evaluation plan can be completed before the request for tenders.

Ideally, evaluation criteria weightings should be established at the same time as the evaluation methodology and criteria.

In addition to fees, prices or charges tendered, evaluation criteria should contain the factors critical to council being able to make appropriate decisions on matter arising from the tendering process.

These factors may include, but are not limited to:

- Whole-of-life costs, including capital, operational and disposal costs
- Innovation offered
- Delivery times offered
- Quality offered
- Previous performance of tenderer
- Experience of tenderer and their personnel
- Capability of tenderer, including technical, management, staff, organisational and financial capability and capacity
- Tenderer's occupational health and safety management practices and performance
- Tenderer's workplace and industrial relations management practices and performance

- Tenderer's environmental management practices and performance
- Tenderer's community relations practices and performance
- Value adding components such as economic, social and environmental development initiatives, if appropriate and relevant to the procurement
- Conformity of tender with requirements.

The evaluation criteria should be consistent with the proposed contract requirements and aim to identify the tenderer offering the best value for money.

Evaluation criteria should be included in the tender documents, although councils should consider whether to indicate the weighting for each criterion. While advice regarding weightings is more transparent, such advice may influence a potential tenderer's response. The weighting of the evaluation criteria and the evaluation methodology should be determined prior to calling of tenders and must not be determined later than close of tenders.

3.5. Selecting the Tendering Method

Clause 166 of the *Regulation* identifies the types of tendering methods that councils can use. Council must decide whether it is going to use an open or selective tendering process.

Open tendering is undertaken through public advertisements inviting interested persons to submit a tender.

Selective tendering can be undertaken by either advertising an expression of interest and then inviting tenders from suitable respondents or by inviting tenders from a pre-prepared list of recognised contractors.

Discussion

The selected process should always be applied in a framework of probity and fair dealing to potential tenderers, while promoting open and effective competition.

The process of selecting the most appropriate tendering method should involve consideration of:

- The advantages and disadvantages of each approach in the context of the proposed procurement; and
- The capabilities of the market.

Council should select the tendering method that:

- Has the greatest likelihood of achieving the best value for money
- Meets its needs
- Is appropriate for the level of risk
- Is timely
- Avoids creating unnecessary costs for it and/or tenderers; and
- Safeguards the security and confidentiality of all tenders.

Councils should document the reasons for the selection of a particular tendering method.

3.5.1. Open Tenders

Open tenders are invited by advertising in “relevant newspapers” - defined in clause 164 of the *Regulation*.

Clause 167 specifies the minimum requirements for the advertisement being:

- The purpose of the proposed contract
- Details of where and when tender documents can be obtained
- The purchase price of the tender documents

- A contact name and details, for information concerning the proposed contract
- An invitation to anyone willing to meet the requirements of the proposed contract to submit a tender by the deadline; and
- The deadline for submission of tenders, which must be at least 21 days after the date of the first publication of the advertisement.

Discussion

Open tenders are usually used for:

- The supply of goods and services
- Property purchase or disposal
- Minor building works.

They may also be used where it is inefficient to establish recognised contractor lists through selective tender.

3.5.2. Selective Tenders

Section 55(4) of the *Act* and clauses 168 and 169 of the *Regulation* outline the provisions for two types of selective tendering:

- Those invited by expressions of interest through public advertisement
- Those invited from a council's list of recognised contractors, which has been prepared following public advertisement.

Selective tender lists of recognised contractors are often established where:

- There is a continuing workload in a particular category of work
- This workload justifies the cost of setting up and maintaining the list

- In some cases, where innovative solutions are sought.

Overall management of the selective tender list system should be designed to give a fair distribution of opportunities to all recognised contractors over time. However, the contractor's past performance is a prime consideration. Other factors that may be taken into account include the location of the work, special requirements of the work, skill level of the contractor and commitments of the contractor.

3.5.2.1. Invitation to tender after asking for Expressions of Interest (EOI)

By advertising in relevant newspapers, councils can call for expressions of interest from suitably qualified contractors interested in tendering for a particular contract. The advertisement must include a brief description of the proposed contract, name and contact details of the person who will answer requests for information and the deadline for submitting EOIs. The deadline must be at least 21 days after the date of publication of the advertisement.

The council must consider all EOIs made in response to the advertisement and must take into account the experience of the applicants in fulfilling the requirements of similar contracts and the capacity of the applicants to fulfil the requirements of the proposed contract.

After considering the applications, councils may invite tenders from all applicants; only those applicants council considers can meet the proposed contracts requirements; or decline to invite tenders from any applicants.

Where a council invites tenders from applicants it must give a deadline of at least 21 days from the date of the invitation for submission of the tender and give details of where and when tender documents can be obtained and the price of the tender documents.

Discussion

EOI can have a number of benefits especially when a council is considering tendering for major works.

Persons responding to a tender can invest significant sums in preparing a tender that will ultimately reflect in higher prices for major capital works projects.

EOI work as a first elimination process allowing council to eliminate respondents who do not have the technical or financial capacity to undertake the proposed contract.

Running an EOI can also assist council as it prepares the tender specifications and allows for innovative concepts and new technologies to be considered prior to issuing an invitation to tender.

3.5.2.2. Invitation to tender to recognised contractors on council's list

Clause 169 of the *Regulation* allows a council to establish a list of contractors who are interested in tendering for proposed contracts of a specified kind.

Where a council wishes to prepare such a list it must, by advertising in relevant newspapers, invite applications from people interested in tendering for contracts of that kind.

The advertisement must include a brief description of the proposed contract, a name and contact details of the person who will answer requests for information and the deadline for submitting applications.

Council must consider all EOI made in response to the advertisement taking into account the applicant's experience in meeting the requirements of and the capacity to undertake similar contracts.

After consideration of an application, a council may either list the applicant as a recognised contractor or reject the application in whole or in part.

A council may also adopt a list of contractors prepared by another public authority such as the Department of Commerce, provided the authority prepared the list following the publication of a similar advertisement. The names on the adopted list are taken to be recognised contractors.

A council may invite some or all of the recognised contractors to tender for a proposed contract on the basis of their capacity to fulfil the requirements of that contract and the number of occasions that the contractor has been invited to tender for similar proposed contracts.

When inviting tenders from recognised contractors, the council must specify the deadline for submission, being at least 21 days after the date of the invitation and must give details of when and where tender documents can be obtained and the price of the tender documents.

Discussion

Selective tender lists of recognised contractors are often established where:

- there is a continuing workload in a particular category of work and this workload justifies the cost of setting up and maintaining the list; or
- in some cases, where innovative solutions are sought.

Overall management of the selective tender list system should be designed to give a fair distribution of opportunities to all recognised contractors over time. However, the contractor's past performance is a prime consideration. Other

factors that may be taken into account include the location of the work, special requirements of the work, skill level of the contractor and commitments of the contractor.

3.6. Developing the Tender Documents

Tender documents may also be referred to as an invitation to or a request for tender. The Tender Documents need to consist of:

- Conditions of Tendering
- General conditions of Contract
- Plans and specifications or a description of the services being sought

Clause 170 of the *Regulation* outlines the information that must be included in the tender documents. Sufficient detail should be included in the tender documents to:

- Give a clear understanding of what is being procured;
- Give a clear understanding of the proposed procurement, what is expected of tenderers, the type of decision that will flow from assessment of tenders and the basis of that decision;
- Give a name and contact details of the person to whom questions about the proposed contract may be directed;
- Specify the criteria which will be used to assess the tenders;
- Elicit all information necessary to make that decision;
- Indicate whether there are formal tender documents that must be submitted and information as to how they may be obtained; and
- Provide the information required by clause 170(1)(e) of the *Regulation* for waste management contracts.

Councils must ensure they comply with the stated procedures in clause 170 of the *Regulation*, including the requirement to take all reasonable and practicable steps to inform all affected persons of any changes to the tender documents after they have been issued. This means councils must keep a record of all enquiries from potential tenderers.

Councils are reminded that section 23A of the *Act* provides that a council must take any relevant guidelines issued under this section into consideration before exercising any of its functions. Accordingly, councils must ensure their tendering procedures do not conflict with these guidelines.

Discussion

Tender documents consist of the conditions of tendering, the General Conditions of Contract and the plans and or specifications which should be the same for each tenderer for any particular tendering process.

Councils should develop standard conditions of tender that reflect these Guidelines and include these in all tender documents. Council must choose the General Conditions of Contract relevant to the type of works or services to be procured.

Tender documents should include the following:

Within the Conditions of Tendering

- A summary sheet of critical instructions, such as the closing date, lodgement requirements and how to make inquiries
- An outline of any policies that apply to the procurement, such as local content, environmental considerations and relevant quality systems standards or policies required of the contractor and or relevant to the tender

- An overview of the purpose of the procurement and the proposed schedule for the purchasing or disposal process
- Conditions for the submission of tenders
- Evaluation process and the criteria for evaluation of tenders
- Details of information sought from tenderers, divided into separate schedules for specific requirements
- Detailed statement of requirements, including specifications, plans and drawings as appropriate
- Proposed terms and conditions of contract
- A statement that no binding contract exists until the successful tender is accepted
- Copies of or reference to other documents relevant to the procurement, such as policies and procedures in regard to in-house tenders, if applicable
- A statement that unethical or inappropriate conduct, such as approaching councillors or council officers or intimidating behaviour, will result in a tender being disqualified
- Information regarding what tenderers should do if they suspect corrupt conduct and what action the council will take if it suspects that tenderers are acting unethically or corruptly. This assists to build anti-corruption capacity within the tendering process and council operations
- A statement indicating how copies of the council's adopted procedures regarding how the council will communicate with potential tenderers and respond to tenderer initiated contact

Within the General Conditions of Contract

- Proposed terms and conditions of contract

Within the specification

- A copy of the council's statement of business ethics and code of conduct
- Detailed statement of requirements, including specifications, plans and drawings as appropriate
- The requirement that tenderers comply with relevant codes and standards applicable to the tender request
- The information required by clause 170(1)(e) of the *Regulation* for waste management contracts.

Councils may consider whether it should retain the copyright in or the intellectual property of any tender accepted by the council.

3.7. Shortened Tender Period

Clause 171 allows a council to specify a deadline less than the required 21 days, when advertising a tender, or when calling for expressions of interest; if it believes there are exceptional circumstances which make an earlier deadline more appropriate.

Where a council decides to use a shorter period, the deadline must be at least 7 days after the date of first publication of the advertisement or the date of the invitation.

The council must keep a record of the circumstances that led to its decision to adopt a shorter tender period, indicating the name of the council officer who made the decision, if not made by the elected council.

3.8. Extending the Tender Period

Clause 172 allows a council to extend a deadline included in an advertisement or invitation in circumstances where it is shown that the deadline would not allow enough time for potential respondents to prepare and submit meaningful tenders or applications.

Council is required to take all reasonable steps to advise persons who have received tender documents or invitations of the extension to the deadline.

The council must keep a record of the circumstances that led to the decision to extend the tender period, indicating the name of the council officer who made the decision, if not made by the elected council.

3.9. Communication with Tenderers

All communications with potential tenderers should be conducted within strict probity and risk management frameworks to ensure accountability and transparency.

Councillors and staff are reminded of the key principles of the Code of Conduct, including:

- Integrity
- Leadership
- Impartiality
- Accountability
- Openness
- Honesty

Records should be kept of all communications with all tenderers. Councils should ensure that:

- A register of all requests for tender documents and a register of all requests for information regarding the tender and requests for clarification are maintained.
- Communication with potential tenderers is only undertaken by the contact person who must be listed in the public advertisement of the tender and the tender documents under clauses 167, 168, 169 and 170 of the *Regulation*.
- Unless impractical, all communication to tenderers be provided in writing and simultaneously to all tenderers in respect of a question asked of the tender. A copy of the question, but not details of the source of the question, should be circulated with the answer.
- Information or clarification provided to potential tenderers is consistent and documented. Where the information is not readily or immediately available, the contact person obtains the relevant information and then follows up the request.
- Response to queries about a specific tenderer's innovative solution should not be communicated to any other tenderer.
- Any amendment to the tender documents and the steps taken to inform all potential tenderers of the amendments, as per clause 170 of the *Regulation*, are documented.
- Responses to tender enquiries should reference the relevant clause in the tender documents or if there is no clause relevant to the query, provide the response as an addendum to the tender documents.
- Information or clarification provided to potential tenderers is consistent and documented.
- Where briefings or site visits are offered by the council in regard to a particular tender, an attendance register and minutes or notes of the

proceedings, including questions asked and answers provided is maintained and forwarded to all attendees following the briefing or site visit.

- During briefings or site visits, council officials should avoid one to one communication. Requests for information by one potential tenderer should be repeated and the response provided to all in attendance.

Refer 3.13 for information regarding communication with tenderers after the close of tenders.

3.10. Submission of Tenders

Tenders must be submitted in accordance with clause 173 of the *Regulation*.

Tenders must be submitted in writing and may be posted or delivered in a sealed envelope; sent by facsimile transmission; or sent by electronic means in accordance with clause 173(2).

Submission of a tender by electronic means can be done in two circumstances:

- In accordance with any guidelines in force under section 23A of the *Act* (clause 173(2)(a)); or
- If no such guidelines exist, the tender must be submitted by secure electronic means (clause 172(2)(b)).

Tenders submitted by facsimile or non-secure electronic means must be printed out on receipt, and immediately be placed in an envelope and placed in the tender box by an appropriate person.

Discussion

It is the tenderer's responsibility to submit a tender in accordance with the conditions of tender, in a legible form and, in the case of electronic submission, in an uncorrupted format and by secure means.

Councils should include information about the method of submitting of tenders including the use of electronic means, if applicable, in the tender documents.

Councils should note that the requirement to print out faxed or non-secure electronic tender submissions will require procedures to ensure that confidentiality of the tender is maintained. Procedures will also be needed to ensure that the entire tender (as submitted) is reproduced.

Councils are advised to avoid facsimile transmissions or non-secure electronic submission of tenders, and opt for hard copy submissions or secure electronic submissions.

E-Tendering

E-tendering is a term used to identify systems that incorporate electronic submission, custody and opening of tenders. The system operates within a secure electronic environment where each system component is configured in a manner to ensure the integrity of tenders and to prevent tampering.

Councils that choose to employ an e-tendering method are responsible for ensuring that the system used provides a high level of security in the electronic environment, in each of the system components and at each stage of the tendering process.

The use of suitable access controls and system monitoring, such as user registration, password protection, data encryption, log retention and log

monitoring to ensure authorised access, are examples of the various mechanisms and processes that will need to be used to ensure the system is secure. The system should operate within an appropriate policy and security management framework that incorporates threat and risk assessments, regular review and audit. Guidance on best practice systems can be found in AS/NZ 7799.2:2003 – Information Security Management.

3.11. Custody of Tenders

Clause 174 of the *Regulation* requires that councils provide a secure tender box, and all tenders, other than those received by electronic means that have not been printed out, are kept in the tender box.

The tender box must be available during council's hours of business to allow personal delivery of tenders.

Tenders received by secure electronic means must be stored on an information system, accessible only to the appropriate person.

3.12. Opening of Tenders

Clause 175 of the *Regulation* outlines the requirements for the opening of tenders.

Councils must allow tenderers and members of the public to be present at the opening of both the physical and e-tender boxes, if they so wish. Members of the public are able to request whether a particular tender has been received and the number of tenders received.

Under clause 175 of the *Regulation* a council's appropriate person must, as soon as practicable after opening the tenders, record the names and amounts that have been submitted, prepare a list of the names of the tenderers in alphabetical

order and display the list of names where it can be readily seen by members of the public.

3.13. Communication with Tenderers after Close of Tender

The following protocol should apply to contact between the tenderers and tender evaluators, and other council officials, after the tender closes and prior to announcement of the successful tender:

- Councils should have clear procedures regarding how to respond to tenderer contact, which should be included in the tender documents, and should document all instances of tenderer initiated contact
- Tenderer initiated contact should not be allowed except for the notification of a mistake or anomaly. Councils should have clear procedures regarding how to respond to tenderer contact, which should be included in the Conditions of Tender, and should document all instances of tenderer initiated contact.
- Council initiated contact should be only for the purpose of clarification. The decision to contact a tenderer should be made by all the tender evaluators. Again, clear procedures and documentation are required.
- Where the tender review or evaluation panel decide to request clarification from a tenderer, all tenderers are to be given the opportunity to provide clarification on that aspect of the tender if necessary.
- Clarification can only be sought if information received in a tender is open to interpretation or is not clear and where this information is necessary to properly evaluate tenders.
- Council initiated contact does not result in any tenderer gaining an unfair advantage over other tenderers, for example the tenderer is not allowed to revise or enhance the original tender.
- All contact must be well documented and records maintained.

3.14. Variations to Tenders

Clause 176 of the *Regulation* outlines the circumstances in which a tender may be varied after the council has received it, but before the council accepts a tender. These circumstances permit an explanation or clarification, or correction of mistakes or anomalies.

Such a variation to a tender may be made:

- At the request of the council, or
- At the request of the tender and with the consent of the council where the council considers it is reasonable for the tenderer to provide the information or correct the mistake or anomaly.

Council must provide all other tenderers whose tenders have the same or similar characteristics the opportunity to vary their tenders. However, a council must not consider a variation to any tender that substantially alters the original tender.

Councils must keep a record of the circumstances requiring the variation of a tender and the name of the staff member handling the matter.

Where a tenderer submits a tender with qualifications or departures, the qualifications and departures can be considered as anomalies and treated in accordance with Clause 176 of the *Regulation*. In the alternate, if the qualifications and departures would alter the value of the tender to council that alteration can be assessed and the tendered price adjusted for the purposes of comparison of tenders. Typically the tender will be assessed on its conformance. If considered non-conforming the tenderer may be asked to withdraw the qualification or departure. If not withdrawn the tender may be treated as non-conforming. In the alternate if the qualification or departure is withdrawn the tender would be considered further.

Thereafter, in the consideration of the tender, the value or cost to council of the qualification or departure would be assessed and an adjusted tendered price determined for the comparison of tenders.

Discussion

All contact with tenderers should be well documented and records maintained.

In adjusting tender prices for the purposes of comparison what is required is council value the departure and add or subtract that value of that departure to the tendered price. For example if the tendered price was \$200,000 and the tender contained a departure such as “this does not include the provision of door handles” the tendered price could be adjusted by the cost of installing the handles after the contract is completed so that tenders are compared like for like.

When let the contract would be for the tendered price with council knowing it will be required to expend further funds to have the works comply with the requirements detailed in the tender documents.

3.15. Consideration of Tenders

Tenders should be considered in accordance with clause 177 and, if appropriate, clause 178(1A) if a waste management contract.

Council should assess the tenders as soon as practicable after they have been opened.

Tenders submitted by facsimile machine or electronic means, must be considered by council only if the transmission was received before the closing deadline, the tender is complete and where the tender is submitted by electronic means, the tender documents specified that electronic means could be used.

Council must not consider a tender that is not submitted to council by the deadline for the closing of tenders, unless it is determined that the tender can be considered as a “late tender”.

Discussion

Tenderers should be required to demonstrate in their submission that they have the necessary skills, resources, experience, and financial capacity to carry out the work and that their tender meets the requirements of the request for tender.

Evaluation or consideration of tenders must be based on the conditions of tendering and the evaluation criteria provided in Conditions of Tendering of the tender and, as appropriate, clause 178(1A) of the *Regulation* if a waste management contract. (Refer 3.6 for further information on tender documents).

Tenders should be evaluated by people with the necessary skills and knowledge, and who are free of any conflict of interests that might undermine the fairness of the process.

Any tender that does not comply with the mandatory or obligatory conditions of tendering may be passed over. In this respect council may designate criteria as mandatory or essential and state that any tenderer who fundamentally fails to meet such a criteria will be disqualified.

Councils should not consider tenders that are incomplete or not received by the deadline. (Refer 3.15.1. for further information regarding late tenders)

Councils should form a tendering review or evaluation panel for each tendering process, which may include an independent member. The role of the tender panel should include:

- Preparing an evaluation methodology statement that explains the various aspects of the evaluation criteria, their weightings and the method for consolidation of the overall evaluation score, typically in the form of a tender evaluation plan.
- Conducting the review and assessment of tenders.
- Preparing an analysis of the tenderer's performance against the criteria.
- Preparing a detailed and accessible financial analysis of the tenders and comparison on the basis of unit price, service price, annual cost, total cost or other appropriate measures depending on the nature of the tender.
- Formulating a recommendation to Council to award a contract to a successful tenderer or to not award the contract to any of the tenderers.
- Ensuring that appropriate contract documents are prepared and kept with Council's legal documents.
- Ensuring there is a proper complaints handling process established.
- Maintaining minutes of tender evaluation panel meetings and documenting decisions.

All members of the panel should be suitably qualified and experienced. They should ensure fairness and probity when planning and conducting the evaluation of the tender. Some techniques to ensure this are:

- Have a code of conduct for tender evaluation members. (The NSW Department of Commerce's Procurement Help Desk can assist if required – phone 02 9372 8600 or e-mail gpshep@commerce.nsw.gov.au).
- Have a separate team with no involvement in the procurement establish evaluation criteria weightings.

- Using a two envelope tendering system where price and non-price items are submitted in separate sealed envelopes and assessed separately.
- Have separate teams for cost analysis and technical evaluation so that establishing a technical merit score is not influenced by prior knowledge of the cost.
- Have staff not involved in the evaluation communicate with tenderers. This minimises the opportunity for any direct contact between evaluators and tenderers.
- Fully document the evaluation methodology, criteria and weightings before calling for tenders.

3.15.1. Consideration of Late Tenders

Clauses 177(4) & (5) provide limited exceptions where a council must consider late tenders.

Under clause 177(4), where a council has specified in its tender documents that any tender submitted must include formal tender documents, the council does not have to consider a tender that does not include formal tender documents unless:

- The tenderer can satisfy the council that the formal tender documents and all necessary information were lodged at a recognised delivery agency prior to the deadline for the closing of tenders; and
- The council receives those documents within a period it decides is reasonable in the circumstances.

Under clause 177(5), a council must consider a tender received within a reasonable period after the close of tenders where the tenderer can satisfy the council that the tender documents and all necessary information were lodged at a recognised delivery agency in sufficient time to enable the documents to have

been received by the council, in the ordinary course of business, before the closing deadline.

Discussion

Any decision to consider a late tender should be well documented including the circumstances which gave rise to the tender being late and the rationale for the consideration.

3.16. Report to Council of Tender Evaluation

Following the review of tenders by the evaluation panel, a report to council must be prepared, to allow council to make the decision whether to accept a tender, or not accept any of the tenders under clause 178 of the *Regulation*. The report to council should be provided in a timely manner to ensure sufficient time for informed decision-making by councillors. Where it is necessary for a late matter to be submitted to council, the report should include the reasons for the late submission.

The report should include all information necessary to allow council to make an informed decision and should include:

- Background information relating to the invitation to tender including;
 - Where applicable, the expiry date of the previous contract, the name of the previous contractor, a summary of the performance review of the previous contractor, and whether a review of the nature and terms of the contract was conducted prior to the tender and the results of such a review
 - Details of the sequence of events for the tendering process
 - Details of any change to the conditions of tender or advertising period, why the changes occurred and who authorised the changes

- Details of the evaluation criteria, the relative weightings in the tender evaluation plan.
- Full details of all tenders received:
 - For non-complying or alternate tenders, a detailed analysis of the non-compliance should be included and the reasons for council to consider this appropriate or otherwise
- Detailed and accessible financial analysis of the tenders providing a comparison of all options on the basis of unit price, service price, annual cost, total cost or other appropriate measures depending on the nature of the tender:
 - Providing copies of tenderer's schedules does not constitute a financial analysis
- Details of the evaluation and the analysis of tenders against the criteria, including a summary of the experience of each tenderer in relation to the nature of the tender.
- Details of any post-tender contact and the reasons for or results of that contact, such as contact for the purpose of clarification and the outcome of this clarification.
- Summary of the tender considered most suitable in the circumstances, including the rationale for the conclusions or the rationale for considering none of the tenders suitable.
- A recommendation for the acceptance of a tender including, if applicable, any conditions or requirements associated with the acceptance or proposals to vary the contract conditions as a result of the tendering process or errors in documentation, or a recommendation not to accept any of the tenders.

Information in the report should remain confidential pending council's determination.

In accordance with clause 179 of the *Regulation*, councils must make information on the outcome of the tendering process publicly available by displaying the name and amount of the successful tender or a notice stating that none of the tenders were accepted.

While there is no statutory requirement that contracts that are not otherwise captured by the tendering requirements of section 55 of the Act be reported to council, it is considered to be good practice for such contracts to be reported to council as part of the quarterly budget review process prescribed under clause 203 of the Local Government (General) Regulation 2005. It is also expected that councils will develop procurement procedures for contracts that are not otherwise captured under section 55 of the Act. This is monitored by the Division of Local Government as part of its Promoting Better Practice Review Program.

3.17. Acceptance or Rejection of Tenders

A decision to accept a tender can only be made by resolution of council as section 377 of the *Act* does not permit delegation of this task.

Council acceptance of tenders must be undertaken in accordance with clause 178 of the *Regulation*.

For transparency, it is suggested that the minutes record the names of the councillors who supported the decision and the names of any councillors who opposed (or are taken to have opposed) the decision.

A council should either accept the tender that appears most advantageous in the circumstances or decline to accept any of the tenders. Council may only consider relevant factors to the tender when making its decision; otherwise it will expose itself and the councillors to legal challenge.

Council must ensure that the contracts entered into as a result of accepting a tender are with the successful tenderer and the terms are in accordance with the submitted tender.

Clause 178(3) of the *Regulation* gives a council six options where it either accepts none of the submitted tenders or receives no tenders. The options are:

- Postpone or cancel the proposal for the contract.
- Invite fresh tenders, either open or selective, based on the same or different details.
- Invite fresh applications by public advertisement (clause 168) from persons interested in tendering for the proposed contract.
- Invite fresh applications from recognised contractors listed by council (clause 169) interested in tendering for contracts of the same kind as the proposed contract.
- Enter into direct negotiations with any person with a view to entering into a contract in relation to the subject matter of the tender.
- Carry out the requirements of the proposed contract itself.

Where the council resolves to enter into direct negotiations the resolution must state the council's reason for declining to invite fresh tenders or applications and the reason for determining to enter into negotiations.

3.18. Notifying the Outcome of the Tender

Council must notify unsuccessful tenderers either that their tender was unsuccessful or that no tender was accepted as soon as practicable after:

- Entering into a contract with the accepted tenderer; or
- Deciding not to accept any of the tenders.

Council must make information on the outcome of the tendering process publicly available by displaying, in a conspicuous place, the name and amount of the successful tender or a notice stating that none of the tenders were accepted.

Discussion

Information relating to unsuccessful tenders remains confidential, unless otherwise specified in the conditions of tendering, agreed by the tenderer, or required by legislation. Councils should consider adopting the advice in Premier's Memorandum 2007-1 *Public Disclosure of Information arising from NSW Government Tenders and Contracts*, which outlines the minimum information that should be disclosed and gives guidance on what should remain confidential. The Memorandum can be found on the Department of Premier and Cabinet's website at www.dpc.nsw.gov.au .

3.19. Tender Negotiation

As a general rule direct negotiations should be avoided due to the risks associated with the process.

If, after the tendering process none of the tenders are accepted, the council may, under clause 178 of the *Regulation*, decide by resolution to enter into direct negotiations with any person or persons with the intention to enter a contract. The resolution of council must state the reasons for declining to advertise and invite fresh tenders.

Councils should not use such tender negotiations as an opportunity to trade-off one tenderer's prices against other tenderers' prices in order to obtain lower prices.

When the decision to undertake direct negotiation with one supplier, buyer or proponent has been made, councils should demonstrate commitment to a fair and accountable process by ensuring the following:

- Council officials conducting the negotiations have high level skills, training and experience in commercial negotiations.
- A team approach is taken to the negotiations, led by a suitably qualified experienced senior person and consideration is given to including an independent observer or probity auditor.
- The negotiation process is adequately resourced.
- Preparation of a negotiation plan and strategy includes aims, objectives, constraints and agreed minimum bargaining positions.
- Council officials conducting the negotiations do not have a conflict of interests.
- A formal communication protocol is adopted and agreed by both parties, which covers regular meetings, written exchanges, document exchanges, dealing with urgent matters, 'critical' issues meetings, recording of meetings and the roles and responsibilities of all team members.
- Expert technical and legal advisers are involved at the appropriate times.
- Council's General Manager is informed of progress as appropriate
- Appropriate confidentiality is maintained.
- Following completion of the negotiations, an evaluation is conducted to assess whether the aims of the negotiations were achieved.
- Comprehensive documentation of the planning, process and results of the negotiations is maintained.

The ICAC publication "*Direct Negotiations with Proponents – When, Why and How*" is a useful resource for public agencies, including local councils.

3.20. Debriefing of Tenderers

At the conclusion of the tender process, council may choose to debrief unsuccessful tenderers on request. Debriefings should focus on assisting tenderers to improve future tenders and explain how the tender performed against the evaluation criteria.

3.21. Develop the Contract

Where a council has resolved to accept a tender, the council then enters into a contract in accordance with clause 165 of the *Regulation*. The contract, and any variation or discharge of the contract, must be in writing and executed by or on behalf of the council.

Clause 178 of the *Regulation* states a contract entered into as a result of the tendering process must be in accordance with the tender, so the General Conditions of Contract and plans and or specifications, and any post tender correspondence to clarify mistakes or anomalies form the basis of the contract conditions.

In managing contracts councils should:

- Ensure that appropriate contract documents are prepared and kept with Council's legal documents.
- Ensure proper processes are followed for the approval of variations to the contract.
- Monitor and document contract performance.
- Ensure there is a proper complaints handling and disputes resolution process established in accordance with the General Conditions of Contract.

On completion of the contract subject to tender, a brief report should be provided, which includes details of performance and variations to ensure there is an ongoing formal record of any performance issues related to that contractor. This information can be used in future tender evaluations where previous performance should be a consideration.

Further, the performance can be reported through the Department of Commerce and entered into the NSW Government Contractor Performance Reporting system so the report is available to others in future tender evaluations.

3.22. Prescribed Organisations

Councils are reminded that certain organisations are recognised accredited providers by the State Contracts Control Board and the Commonwealth Department of Administrative Services. Further, Local Government Procurement Partnership is a prescribed provider pursuant to clause 163 of the *Regulation*. Additional bodies may be prescribed.

Councils should consider dealing with these providers, as an alternative, when considering the acquisition of goods and services.

4. Resources

4.1. Tendering Checklist

Contract:		
Contract Sum:		
1. Evidence council selected open or selective tendering methods (clause 166), together with reasons, recorded on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
2. Copy advertisement for tenders is on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
3. Copy of any other invitation to bid is on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
4. Copy of all documents provided to tenders on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
5. Documents provided to tenderers include:		
❖ Details of work, facilities or services	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Compliance with <i>Regulation</i> cl.170(1)(e) (if appropriate)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Closing date and tender lodgement requirements	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Outline of policies applicable to the procurement	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Evaluation criteria and methodology	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Specify contact person	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Whether formal tender documents are required and how to obtain them	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Information on obtaining copies of relevant council policies		
❖ Proposed terms and conditions of contract	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Specify criteria on which tenders will be assessed	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Council's Statement of Business Ethics	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Council's Code of Conduct	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ A statement that unethical or inappropriate conduct will result in the tender being disqualified	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Advice to tenderers of steps to take if they suspect corrupt and the action the council will take if it suspects corrupt conduct	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Include information on interaction between council and tenderers including prohibition on contacting councillors	Yes <input type="checkbox"/>	No <input type="checkbox"/>
6. Record of all requests for tender documents on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
7. Record of staff involved in preparing and issuing tender	Yes <input type="checkbox"/>	No <input type="checkbox"/>

documents on file?		
8. Declaration of conflicts of interest for all staff involved on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
9. Written records of all communications between tenderers and council staff on file (including records of advertising, attendance and information provided at any briefing sessions)?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
10. Full documentation of any changes made to tender specifications (including who made the change and why)?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
11. Evidence any changes to tendering specifications communicated to all tenderers or potential tenderers and that no tenderer or potential tenderer was disadvantaged on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
12. Records of any variation to closing date (including reasons and identity of who made the decision)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
13. Evidence council took all reasonable steps to inform tenderers or potential tenderers of the later closing date?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
14. All tenders date and time stamped?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
15. Records of tender opening carried out in accordance with clause 175 of the <i>Regulation</i> (two persons also present/members of public able to attend)?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
16. Records of receipt for facsimile and electronic delivery with tenders submitted by fax or electronically?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
17. Documentation recording the acceptance of any late tenders, including when received and why accepted?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
18. Documented tender assessment criteria on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
19. Documented tender list in alphabetical order of amounts prepared and displayed at council as per clause 175 of the <i>Tendering Regulation</i>	Yes <input type="checkbox"/>	No <input type="checkbox"/>
<i>Tender assessment documents</i>		
20. Details of any non-complying tenders and why they were assessed as non-complying?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
21. Documented tender assessment matrix completed for every member of assessment panel?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
22. Tender assessment panel members identified and include declaration of conflicts of interest?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
23. Records kept of all communication between potential tenderers and panel members on file?	Yes <input type="checkbox"/>	No <input type="checkbox"/>

24. Records of any variations to tenders under clause 176 including reasons why tender(s) varied and evidence all other tenders of same or similar characteristics were given the same opportunity?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
25. Recommendation for preferred tenderer is in line with assessment documents?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
26. Report to council on the tender includes:		
❖ Background information on the calling of tenders including history of decision to go to tender	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Background information on the performance of the previous contractor, if any	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Advice on whether, for continuing contracts, the terms of the terms of the contract have been reviewed	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ A summary of the tender process	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Details of tenders received and details of any non-complying tenders	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Financial analysis of the comparative tenders based on unit price/service price/annual cost/total contract cost	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Details of assessment criteria used together with weightings	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Details of post-tender communication with tenderers	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Compliance with <i>Regulation</i> cl.178(1A) (if appropriate)	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ Conclusion and recommendation based on analysis of assessment criteria results	Yes <input type="checkbox"/>	No <input type="checkbox"/>
❖ If recommendation is not to accept any tender, the reasons for that recommendation	Yes <input type="checkbox"/>	No <input type="checkbox"/>
27. Evidence contract entered by council is in accordance with the tender?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
28. Where council enters into negotiations with one or more unsuccessful tenderers, council resolution includes reasons for that decision, including the choice of tenders with whom it negotiates?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
29. Evidence council advised all tenderers of outcome of process and copy of notice displayed at council advising of outcome (clause 179 of the <i>Regulation</i>)?	Yes <input type="checkbox"/>	No <input type="checkbox"/>

4.2. Legislative Summary Checklist

A New Tax System (Goods and Services Tax) Act 1999 (Cth)

Electronic Transaction Act 2000 (Cth)

Freedom of Information Act 1989

Local Government Act 1993

Local Government (General) Regulation 2005 (as amended)

Occupational Health and Safety Act 2000

Personal Information Protection Act 2004 (Cth)

Privacy and Personal Information Protection Act 1998

State Records Act 1998

Trade Practices Act 1974 (Cth)

4.3. Recommended Reading

4.3.1. NSW Government Guidelines

NSW Government Code of Practice for Procurement, Jan 2005.

NSW Government Procurement and the Australia United States Free Trade Agreement, Department of Commerce, Jan 2005.

NSW Government Procurement Guidelines – Electronic Procurement Implementation Strategy Guidelines, Department of Commerce, 2002.

NSW Government Procurement Guidelines – Managing Delegation in Electronic Procurement, Department of Commerce, 2002.

NSW Government Procurement Planning Guidelines, Department of Commerce, June 2005.

NSW Government Tendering Guidelines, Department of Commerce, Nov 2005.

4.3.2. Probity issues

Direct negotiations in procurement and disposals: dealing directly with proponents, Independent Commission Against Corruption, 1997.

Managing Risk: Reducing corruption risks in local government - Checklist, Independent Commission Against Corruption, 2001.

Managing Risk: Reducing corruption risks in local government - Guidelines: Taking the con out of contracting, Independent Commission Against Corruption, 2001.

Taking the con out of contracting: issues for local government procurement and contract administration - Discussion Paper, Independent Commission Against Corruption, 2001.

Taking the whiff out of waste: Guidelines for managing corruption risks in the waste sector, Independent Commission Against Corruption, 2002.

4.3.3. Waste and Recycling

Alternative Waste Treatment Technologies Assessment Handbook, Department of Environment and Conservation, 2005.

Code of Practice for the Collection of Domestic Waste, WorkCover, July 2005.

Model Waste and Recycling Collection Contract, Department of Environment and Conservation, 2005-12-05.

Waste and Resource Recovery Service Development Timeline, Department of Environment and Conservation, 2005.

4.3.4. Other

The Application of the Trade Practices Act 1974 to Government, Australian Competition and Consumer Commission, Dec 2005.

Aboriginal Participation in the Construction Industry, Department of Aboriginal Affairs (currently under review).

LGMA – Tendering Toolkit

4.4. Commonly Used Terms in Tendering and Procurement

Bid shopping: The practice of trading off one tenderer's prices against another's in order to obtain lower prices.

Client: Party calling for tenders and/or awarding a contract

Construction: All organised activities concerned with demolition, building, landscaping, maintenance, civil engineering, process engineering, mining and heavy engineering.

Employee: Person whose employment is governed by a contract of service, or a person deemed to be an employee under Australian or NSW industrial law.

Employer: Entity that employs a person or persons under a contract of service or a person deemed to be an employer under Australian or NSW industrial law.

Fair: Being unbiased, reasonable and even-handed. Being fair does not mean satisfying everyone or not reasonably pursuing one's legitimate interests. A fair decision may still adversely affect parties.

Infrastructure: Fixed assets that support economic and social development in a fundamental way.

Instalment contract: A contract under which the balance of the purchase price is payable by separate fixed amounts at successive fixed periods.

Intellectual property: Inventions, original designs, and practical applications of good ideas protected by law through copyright, patents, registered designs, circuit layout rights and trademarks. Also includes trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by law and through additional contractual obligations, such as confidentiality agreements, contracts and conditions of tendering.

Monitor: Regularly collect information to review performance against specified criteria.

Party: Client, tenderer or service provider. An entity's role in a procurement will determine whether it is a client, tenderer or service provider for that procurement.

Procurement: All activities involved in acquiring goods or services either outright or by lease (including disposal and lease termination). Includes acquiring consumables, capital equipment, real property, infrastructure, and services under consultancies, professional services, facilities management and construction.

Service provider: Includes contractors, subcontractors, suppliers and consultants that contract to provide goods or services.

Tender: Includes a price, bid, offer, quotation, consultant proposal or expression of interest lodged in response to an invitation or request for tender.

Tenderer: Entity submitting a tender.

Value for money: The benefits, compared to whole-of-life costs.