
Local Government (General) Regulation 2021

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Part 7

Part 7 Tendering

Division 1 Preliminary

163 Application of Part

- (1) This Part applies to all contracts for which a council is required by section 55 of the Act to invite tenders.

Note. This Part does not apply to other kinds of contracts. However, a council may apply provisions of this Part (with any necessary alterations) to other kinds of contracts if it wishes to do so.

- (1A) The following persons are prescribed for the purposes of section 55(3)(a) of the Act—

- (a) The Trustee for LGP (LGA NSW) Trust & the Trustee for LGP (SA NSW) Trust, trading as Local Government Procurement Partnership (ABN 34 578 553 267),
- (b) Procurement Australasia Ltd (ABN 45 058 335 363).

- (1B) To avoid doubt, a reference to a person prescribed by subsection (1A) includes any duly appointed agent of that person.

164 Definitions

In this Part—

appropriate person, in relation to a tender submitted to a council, means a person designated by the general manager to receive or deal with tenders submitted to the council and, if a person is not designated, means the general manager.

electronic means includes electronic communication within the meaning of the *Electronic Transactions Act 2000*.

formal tender document means a standard form document issued by a council for completion by tenderers in connection with the submission of tenders to the council.

goods includes materials.

instalment contract means a contract requiring the payment of instalments by or to a council over a period of 2 or more years.

public authority includes a council.

tender means a tender submitted or proposed to be submitted to a council in accordance with this Part.

Note. Part 2 of the *Electronic Transactions Act 2000* facilitates the use of electronic communication as a means of effecting certain transactions, such as contracts.

165 Requirements for contracts to which this Part applies

- (1) A council may enter into a contract to which this Part applies only in accordance with the provisions of this Part.
- (2) A contract to which this Part applies, and any variation or discharge of the contract, must be in writing and must be executed by or on behalf of the council.

Division 2 Prerequisites for tendering

166 Council to decide whether tenders are to be by open tendering or selective tendering

Whenever a council is required by section 55 of the Act to invite tenders before entering into a contract, the council must decide which of the following tendering methods is to be used—

- (a) the open tendering method by which tenders for the proposed contract are invited by public advertisement,
- (b) the selective tendering method by which invitations to tender for a particular proposed contract are made following a public advertisement asking for expressions of interest,
- (c) the selective tendering method by which recognised contractors selected from a list prepared or adopted by the council are invited to tender for proposed contracts of a particular kind.

167 Open tendering

- (1) A council that decides to use the open tendering method for a proposed contract must publish an advertisement inviting tenders for the proposed contract—
 - (a) on the website of the council, and
 - (b) in any other manner that the council considers necessary to bring it to the attention of persons who may be interested in tendering for the proposed contract.
- (2) The advertisement must—
 - (a) express the purpose of the proposed contract, and
 - (b) give details of where and when tender documents relating to the proposed contract can be obtained and the purchase price of those documents, and
 - (c) specify the name of a person to whom requests for information concerning the proposed contract may be addressed and how the person can be contacted, and
 - (d) invite any person willing to fulfil the requirements of the proposed contract to submit a tender to the council by the deadline specified in the advertisement.

The deadline must be a specified time on a date that is at least 21 days after the date of publication or first publication of the advertisement.

- (3) The tender documents relating to the proposed contract must comply with section 170.

168 Selective tendering method by which invitations to tender for proposed contract are made following public advertisement asking for expressions of interest

- (1) A council that decides to allocate a particular proposed contract using the selective tendering method referred to in section 166(b) must publish an advertisement inviting applications from persons interested in tendering for the proposed contract—
 - (a) on the website of the council, and
 - (b) in any other manner that the council considers necessary to bring it to the attention of persons who may be interested in tendering for the proposed contract.

- (2) Every such advertisement must include—
 - (a) a brief description of the work, goods, facilities, services or property concerned, and
 - (b) the name of a person to whom requests for information concerning the proposed contract may be addressed and how the person can be contacted, and
 - (c) the deadline for submitting applications.

The deadline must be a specified time on a date that is at least 21 days after the date of publication or first publication of the advertisement.

- (3) A council must consider all applications made in response to such an advertisement and, in so doing, must take into account—
 - (a) the experience of the applicants in fulfilling the requirements of similar contracts, and
 - (b) the capacity of the applicants to fulfil the requirements of the proposed contract.
- (4) After considering the applications, the council may either—
 - (a) send invitations in writing to all applicants, or such of them as the council thinks will be able to fulfil the requirements of the proposed contract, to tender for the proposed contract, or
 - (b) decline to invite tenders from any of the applicants.
- (5) In inviting tenders from applicants, the council must—
 - (a) invite them to submit tenders to the council by the deadline specified in the invitations, and
 - (b) give details of where and when tender documents relating to the proposed contract can be obtained and the purchase price of those documents.

The deadline must be a specified time on a date that is at least 21 days after the date of the invitation.

- (6) The tender documents relating to the proposed contract must comply with section 170.

169 Selective tendering method by which recognised contractors listed by council are invited to tender for particular kinds of proposed contracts

- (1) A council that decides to prepare a list of suitable tenderers for the allocation of proposed contracts of a specified kind using the selective tendering method referred to in section 166(c)

must publish an advertisement inviting applications from persons interested in tendering for proposed contracts of that kind—

- (a) on the website of the council, and
 - (b) in any other manner that the council considers necessary to bring it to the attention of persons who may be interested in tendering for the proposed contract.
- (2) Every such advertisement must include—
- (a) a brief description of the kind of work, goods, facilities, services or property concerned, and
 - (b) the name of a person to whom requests for information concerning the proposed contracts may be addressed and how the person can be contacted, and
 - (c) the deadline for submitting applications.
- (3) A council must consider all applications made in response to such an advertisement and, in so doing, take into account the experience of the applicants in fulfilling the requirements of, and their capacity to undertake, similar contracts.
- (4) After considering an application under this section, the council may either—
- (a) list the applicant as a recognised contractor for some or all of the kinds of work, goods, facilities, services or property specified in the application, or
 - (b) reject the application in whole or part.
- (5) In seeking tenders for a particular proposed contract, a council may invite some or all of the recognised contractors listed by it under this section to tender for that contract and may do so on the basis of—
- (a) their capacity to fulfil the requirements of that contract, and
 - (b) the number of occasions on which each contractor has previously been invited to tender for similar proposed contracts.
- (6) In inviting tenders for a proposed contract from recognised contractors listed by the council under this section, the council must—
- (a) invite them to submit tenders to the council by the deadline specified in the invitations, and
 - (b) give details of where and when tender documents relating to the proposed contract can be obtained and the purchase price of those documents.
- The deadline must be a specified time on a date that is at least 21 days after the date of the invitation.
- (7) The tender documents relating to the proposed contract must comply with section 170.
- (8) As an alternative to listing persons as recognised contractors in accordance with subsections (1)–(4), a council may adopt a list of contractors prepared by another public authority, but only if the list was prepared by the authority following the publication of an advertisement similar to that provided for under subsection (1).

- (9) If a council adopts such a list, the persons whose names appear on the list are taken to be recognised contractors for the kinds of work, goods, facilities, services or property specified in the list.
- (10) A person who is a contractor recognised by a council ceases to be so recognised if the person informs the council in writing that the person no longer wishes to be listed as a recognised contractor for the purposes of this section.
- (11) Nothing in this section requires a council to take the action referred to in subsection (1) on each occasion that it decides to invite tenders under this section.

170 Tender documents

- (1) The tender documents relating to a proposed contract must—
 - (a) give details of the work to be carried out, the goods or facilities to be provided, the services to be performed or the property to be disposed of and, if the proposed contract is an instalment contract—
 - (i) give details of the instalments to be paid by or to the council, and
 - (ii) specify the period over which the instalments are to be paid, and
 - (iii) specify the intervals between payment of the instalments, and
 - (b) specify the criteria on which the assessment of tenders will be based, and
 - (c) specify the name of a person to whom requests for information concerning the proposed contract may be addressed and how the person can be contacted, and
 - (d) indicate whether formal tender documents must be submitted in relation to the tender and, if so, how they may be obtained, and
 - (e) if the proposed contract is for the performance of domestic or other waste management services of the same kind as those performed under a contract in force immediately before the tenders are invited (an *existing contract*)—specify the information which must be submitted about the continuity of employment of workers employed or engaged by the contractor under the existing contract to perform the domestic or other waste management services (the *existing workers*).
- (1A) Without limiting subsection (1)(e), information that must be submitted is—
 - (a) a statement as to whether or not the proposed contractor intends to offer the existing workers employment or engagement with the contractor if the tender is accepted, and
 - (b) if employment or engagement is offered—relevant details of the terms and conditions of employment or engagement that will be offered (including details of remuneration, preservation of accrued or accruing leave and other entitlements, hours of work, working conditions and rights to negotiate working conditions under the *Industrial Relations Act 1996*, the conduct of training with respect to industrial rights and occupational health and safety, duration of the employment or engagement and rights with respect to trade union membership).

(2) If a council amends tender documents after they have been issued to persons, it must take all reasonably practicable steps to inform those persons of the amendments.

(4) In this section—

domestic or other waste management services means the storage, treatment, processing, collecting, removal, disposal, destruction, sorting or recycling of domestic waste and other waste.

171 Shortened tender period

(1) A council that believes there are exceptional circumstances rendering inappropriate a deadline that would, but for this section, be required to be specified in an advertisement under section 167, 168 or 169 or an invitation under section 168(4) or 169(6) may decide on an earlier deadline. However, the earlier deadline must be a specified time on a date that is at least 7 days after—

(a) the date of the publication or first publication of the advertisement, or

(b) the date of the invitation.

(2) A council must keep a record of—

(a) the circumstances requiring an earlier deadline to be specified in such an advertisement or invitation, and

(b) the name of the staff member who made the decision to change the deadline (if not made by the council).

172 Extended tender period

(1) If, having specified or included a deadline in an advertisement under section 167, 168 or 169 or an invitation under section 168(4) or 169(6), a council becomes aware of circumstances that show that the deadline may not allow enough time for meaningful tenders or applications to be submitted, it may extend the deadline by specifying a later deadline.

(2) If, at the time of extending the deadline, the council has issued invitations to persons under section 168(4) or 169(6) or has issued tender documents to persons, it must take all reasonably practicable steps to inform those persons of the later deadline.

(3) A council must keep a record of—

(a) the circumstances requiring a later deadline to be specified in an advertisement or invitation, and

(b) the name of the staff member who made the decision to change the deadline (if not made by the council).

Division 3 Submission and opening of tenders

173 Submission of tenders

(1) A tender must be submitted in writing, by facsimile transmission or (subject to subsection (2)) by electronic means.

- (2) A tender may not be submitted by electronic means—
 - (a) if guidelines are in force under section 23A of the Act with respect to the transmission of tenders by electronic means—unless its submission by electronic means is authorised by, and effected in accordance with, those guidelines, and
 - (b) in any other case—unless its submission by electronic means is effected by a secure mechanism (such as an encryption-based technology) that ensures that it cannot subsequently be altered.
- (3) Unless sent by facsimile transmission or electronic means, a tender must be sent or delivered in a sealed envelope.
- (4) If a tender is sent by facsimile transmission or electronic means (other than the means referred to in subsection (2)(b)), it must be printed out on receipt, and an appropriate person must place the tender in a sealed envelope immediately after it is printed out.

174 Custody of tenders after receipt

- (1) A council must—
 - (a) provide a secure tender box, and
 - (b) ensure that—
 - (i) all tenders (except the tenders received by electronic means that have not been printed out, but including those received by facsimile transmission) submitted to it for a proposed contract are kept in the tender box, and
 - (ii) the tender box, when containing tenders, is kept in a safe and secure place, until the envelopes containing the tenders are opened in accordance with section 175.
- (2) A council must ensure that, whenever the council's office is open for business, its tender box is kept in a place that allows tenderers who wish to do so to deposit their tenders personally.
- (3) Tenders received by electronic means as referred to in section 173(2)(b) must be stored on an information system (within the meaning of the *Electronic Transactions Act 2000*) in such a manner (whether by means of password protection or otherwise) that they are accessible only to an appropriate person.

175 Opening of tenders

- (1) At the time specified for the close of tenders, the appropriate person must open the tenders in the presence of—
 - (a) at least 2 persons designated by the general manager for the purpose, and
 - (b) such tenderers and members of the public as wish to attend the opening.
- (2) A member of the public who attends the opening of tenders for a proposed contract is entitled, on request, to be informed as to whether the council has received a particular tender and the number of tenders received.

- (3) As soon as practicable after the tenders for a proposed contract have been opened, the appropriate person—
 - (a) must record the names of the tenderers and the amounts that appear to have been tendered for the contract, and
 - (b) must prepare a tender list specifying the names of the tenderers in alphabetical order.
- (4) Immediately after preparing a tender list, the appropriate person must display the list in a place where it can be readily seen by members of the public. That person may add to the list such information as he or she considers appropriate.

176 Tenders may be varied in certain circumstances

- (1) At any time before a council accepts any of the tenders that it has received for a proposed contract, a person who has submitted a tender may, subject to subsection (2), vary the tender—
 - (a) by providing the council with further information by way of explanation or clarification, or
 - (b) by correcting a mistake or anomaly.
- (2) Such a variation may be made either—
 - (a) at the request of the council, or
 - (b) with the consent of the council at the request of the tenderer, but only if, in the circumstances, it appears to the council reasonable to allow the tenderer to provide the information or correct the mistake or anomaly.
- (3) If a tender is varied in accordance with this section, the council must provide all other tenderers whose tenders have the same or similar characteristics as that tender with the opportunity of varying their tenders in a similar way.
- (4) A council must not consider a variation of a tender made under this section if the variation would substantially alter the original tender.
- (5) A council must keep a record of—
 - (a) the circumstances requiring the variation of a tender, and
 - (b) the name of the staff member handling the matter.

Division 4 Determination of successful tenderer

177 Consideration of tenders

- (1) As soon as practicable after the tenders for a proposed contract have been opened, the council must assess the tenders.
- (2) A council must not consider a tender that is not submitted to the council by the deadline for the closing of tenders. This subsection is subject to subsections (4) and (5).
- (3) A council must consider a tender transmitted to it by facsimile machine or electronic means, but only if—

- (a) in the case of transmission by electronic means, that means of transmission was specified in the relevant tender documents, and
 - (b) the transmission was received before the deadline for the closing of tenders, and
 - (c) the tender is complete.
- (4) However, if a council has specified in the relevant tender documents issued by the council that a tender will not be considered unless formal tender documents are submitted to the council, then (despite subsection (3)), the council is not obliged to consider a tender transmitted to it in accordance with that subsection (being a tender that does not include formal tender documents) unless—
- (a) the tenderer is able to satisfy the council that formal tender documents and all other requisite essential information were posted or lodged at a Post Office or other recognised delivery agency before the deadline for the closing of tenders, and
 - (b) the council actually receives those documents within such period as it decides to be reasonable in the circumstances.
- (5) A council must also consider a tender received within such period after the deadline for the closing of tenders as it decides to be reasonable in the circumstances if the tenderer satisfies the council that the tender documents and all other requisite essential information were posted or lodged at a Post Office or other recognised delivery agency in sufficient time to enable the documents to have been received by the council in the ordinary course of business before that deadline.

178 Acceptance of tenders

- (1) After considering the tenders submitted for a proposed contract, the council must either—
- (a) accept the tender that, having regard to all the circumstances, appears to it to be the most advantageous, or
 - (b) decline to accept any of the tenders.
- (1A) Without limiting subsection (1), in considering the tenders submitted for a proposed contract for the performance of domestic or other waste management services, the council must take into account whether or not existing workers (within the meaning of section 170) will be offered employment or engagement on terms and conditions comparable to those applicable to the workers immediately before the tender was submitted.
- (2) A council must ensure that every contract it enters into as a result of a tender accepted by the council is with the successful tenderer and in accordance with the tender (modified by any variation under section 176). However, if the successful tender was made by the council (as provided for in section 55(2A) of the Act), the council is not required to enter into any contract in order to carry out the requirements of the proposed contract.
- (3) A council that decides not to accept any of the tenders for a proposed contract or receives no tenders for the proposed contract must, by resolution, do one of the following—
- (a) postpone or cancel the proposal for the contract,

- (b) invite, in accordance with section 167, 168 or 169, fresh tenders based on the same or different details,
 - (c) invite, in accordance with section 168, fresh applications from persons interested in tendering for the proposed contract,
 - (d) invite, in accordance with section 169, fresh applications from persons interested in tendering for contracts of the same kind as the proposed contract,
 - (e) enter into negotiations with any person (whether or not the person was a tenderer) with a view to entering into a contract in relation to the subject matter of the tender,
 - (f) carry out the requirements of the proposed contract itself.
- (4) If a council resolves to enter into negotiations as referred to in subsection (3)(e), the resolution must state the following—
- (a) the council's reasons for declining to invite fresh tenders or applications as referred to in subsection (3)(b)–(d),
 - (b) the council's reasons for determining to enter into negotiations with the person or persons referred to in subsection (3)(e).

179 Notification of acceptance of successful tender

As soon as practicable after entering into a contract in accordance with section 178 or deciding not to accept any of the tenders for a proposed contract, a council must—

- (a) send to all tenderers whose tenders were not accepted notices to the effect that their tenders were unsuccessful or, as the case may be, that none of the tenders for the proposed contract was accepted, and
- (b) display in a conspicuous place that is accessible to members of the public a notice specifying the name of the tenderer whose tender was accepted and the amount of the successful tender or, if none of the tenders was accepted, a notice to that effect.