Local Government (General) Regulation 2021

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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 submission to a council, means a person designated by the general manager to receive or deal with tender submissions to the council and, if a person is not designated, means the general manager.

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

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

formal tender document means a document—

(a) in the form approved by the council, and

(b) for completion by tenderers in connection with the submission of a tender 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 proposal document means a document prepared by a council which sets out the work to be carried out under a tender.

tender submission means documents submitted by a tenderer to a council for consideration in relation to an invitation to tender.

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 making a tender submission 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 proposal 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 tender before the deadline specified in the advertisement, and

(e) state the way a tender submission must be submitted.

(2A) 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 proposal 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 making a tender submission 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 making a tender submission 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, and

(d) state the way an application must be made.

(2A) 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 tender before the deadline specified in the invitations, and

(b) give details of where and when tender proposal documents relating to the proposed contract can be obtained and the purchase price of those documents, and

(c) state the way a tender submission must be submitted.

(5A) 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 proposal 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 making a tender submission 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 making a tender submission 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, and

(d) the way an application must be made.

(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 tender before the deadline specified in the invitations, and

(b) give details of where and when tender proposal documents relating to the proposed contract can be obtained and the purchase price of those documents, and

(c) state the way a tender submission must be submitted.

(6A) 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 proposal 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 proposal documents

(1) The tender proposal 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, specify—

(i) details of the individual employees who currently provide the service, and

(ii) the terms on which the individuals are employed.

(1A) (Repealed)

(2) The information under subsection (1)(e) must be included in a way that protects the privacy of the individuals by—

(a) removing identifying information, or

(b) aggregating data from multiple individuals.

(3) The information under subsection (1)(e) is not required to be included if the council cannot reasonably obtain access to the information.

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

170A Prescribed expenditure to assist council with natural disaster response

(1) For the Act, section 55(3)(n)(i), the amount of $500,000 is prescribed, but only for a contract that—

(a) is primarily for the purpose of response to or recovery from a declared natural disaster, and

(b) is entered into within 12 months after the date on which the natural disaster is declared.

(2) In this section—

declared natural disaster means a natural disaster that has been declared in relation to the area of a council by either—

(a) a Natural Disaster Declaration for the purposes of the Natural Disaster Relief and Recovery Arrangements jointly administered by the Commonwealth and the States and Territories, or

(b) a declaration under the *State Emergency and Rescue Management Act 1989*, section 33.

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 proposal 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 Tender submissions

173 Submission of tenders

(1) A tender submission must be submitted in writing, including, subject to subsection (2), by electronic means.

(2) A tender submission may not be submitted by electronic means unless the submission by electronic means is effected by a secure mechanism, including an encryption-based technology, that ensures the tender submission cannot subsequently be altered.

(3) Unless sent by electronic means, a tender submission must be sent or delivered in a sealed envelope.

(4) A tender submission for the performance of domestic or other waste management services must be accompanied by an undertaking made by the tenderer if the tender

proposal document contains the information required by section 170(1)(e).

(5) In the undertaking, the tenderer must undertake to ensure—

(a) the individuals will be offered employment to continue to provide the service, and

(b) for an individual who accepts the offer of employment—

(i) the employment will be on at least the same terms as the individual's current employment, and

(ii) the employment will be taken to be a continuation of the individual's current employment with no loss of entitlements, and

(iii) the tenderer will pay the annual increase in the individual's base rate pay in accordance with—

(A) the applicable industrial instrument, or

(B) if there is no applicable instrument—the Local Government (State) Award.

(6) An individual, to which an undertaking relates, may take action to enforce the undertaking as if the undertaking were a contract between the tenderer and the individual.

(7) Subsection (6) does not prevent or limit the action the council may take to enforce the undertaking.

174 Custody of tender submissions after receipt

(1) For tender submissions received other than by electronic means, a council must—

(a) provide a secure tender submission box, and

(b) ensure that tender submissions are kept securely in the tender submission box until they are formally received under section 175.

(2) The council must ensure that, when the council's office is open for business, the council's tender submission box is kept in a place that allows tenderers to deposit tender submissions in the box in person.

(3) A tender submission received by electronic means as referred to in section 173(2) must be stored on an information system, within the meaning of the *Electronic Transactions Act 2000*, in a way, whether by means of password protection or otherwise, that the tender submission is accessible only to an appropriate person.

(4) The council must ensure that a submitted tender submission is not read, opened or reviewed before the tender submission is formally received under section 175.

175 Formal receipt and opening of tender submissions

(1) The council must specify a time after the deadline for submitting tender submissions to formally receive the submitted tender submissions.

(2) The tender submissions must be formally received by 2 persons nominated by the general manager by reading the tender submissions to the extent necessary to identify—

(a) the name of the tenderer, and

(b) the amount that appears to be tendered.

(3) One of the persons nominated must record the names of tenderers and the amounts that appear to be tendered.

(4) The other person nominated must verify the information being recorded.

(5) The council must, as soon as practicable after the information recorded is verified, publish the names of the tenderers on the council's website.

(6) The council may publish additional information that the nominated persons consider appropriate on the council's website in conjunction with the information published under subsection (5).

176 Tender submissions may be varied in certain circumstances

(1) At any time before a council accepts any of the tender submissions that it has received for a proposed contract, a person who has submitted a tender submission may, subject to subsection (2), vary the tender submission—

(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 submission is varied in accordance with this section, the council must provide all other tenderers whose tender submissions have the same or similar characteristics as that tender submission with the opportunity of varying their tender submissions in a similar way.

(4) A council must not consider a variation of a tender submission made under this section if the variation would substantially alter the original tender submission.

(5) A council must keep a record of—

(a) the circumstances requiring the variation of a tender submission, and

(b) the name of the staff member handling the matter.

Division 4 Determination of successful tenderer

177 Consideration of tender submissions

(1) As soon as practicable after the tender submissions for a proposed contract have been formally received under section 175, the council must assess the tender submissions.

(2) The council may only consider a tender submission—

(a) submitted to the council before the deadline specified in the invitation to tender, and

(b) submitted in the way specified in the tender proposal document, and

(c) that otherwise complies with this part.

(3) If the council receives a tender submission before the deadline specified in the invitation to tender in a way that is not specified in the tender proposal document, the council must take reasonable steps to inform the tenderer of the way in which a tender submission must be submitted.

(4) The council must consider a tender submission submitted within a period after the deadline specified in the invitation to tender that the council decides to be reasonable in the circumstances if the tenderer satisfies the council that—

(a) the tender submission was posted, lodged or otherwise sent, in a way specified in the tender proposal document, before the deadline, and

(b) in the ordinary course of business, posting, lodging or sending in that way would ensure the submission would have been received by the council before the deadline.

(5) (Repealed)

178 Acceptance of tender submissions

(1) After considering the tender submissions for a proposed contract, the council must either—

(a) accept the tender submission that, having regard to all the circumstances,

appears to it to be the most advantageous, or

(b) decline to accept any of the tender submissions.

(1A) A council must not accept a tender submission for a proposed contract if the tender submission is accompanied by an undertaking referred to in section 173, unless—

(a) the council has consulted with each relevant registered organisation, and

(b) each registered organisation is satisfied that appropriate industrial arrangements will be in place to ensure compliance with the undertaking during the life of the contract.

(2) A council must ensure that every contract it enters into as a result of a tender submission 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 submission 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 tender submissions for a proposed contract or receives no tender submissions for the proposed contract must 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 tender submissions based on the same or different details,

(c) invite, in accordance with section 168, fresh applications from persons interested in making a tender submission for the proposed contract,

(d) invite, in accordance with section 169, fresh applications from persons interested in making a tender submission for contracts of the same kind as the proposed contract,

(e) by resolution of the council, 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 tender submissions 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).

(5) In this section—

registered organisation means—

(a) an organisation within the meaning of the *Fair Work (Registered Organisations) Act 2009* of the Commonwealth, or

(b) an industrial organisation of employees within the meaning of the *Industrial Relations Act 1996*.

179 Notification of acceptance of successful tender submission

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

(a) send to all tenderers whose tender submissions were not accepted notices to the effect that their tender submissions were unsuccessful or, as the case may be, that none of the tender submissions for the proposed contract were accepted, and

(b) publish on a publicly accessible website maintained by the council a notice specifying the name of the tenderer whose tender submission was accepted and the amount of the successful tender submission or, if none of the tender submissions were accepted, a notice to that effect.