

Local Government Tendering Regulation Review

Discussion Paper
September 2021



ACCESS TO SERVICES

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BACKGROUND

Councils are responsible for procuring a wide range of goods and services. Tendering is the formal process of seeking offers for the supply of goods or services to meet an identified need or for the disposal of property.

As part of the tendering process, a council will seek submissions from tenderers, which are then considered according to a set of pre-determined assessment criteria. If a tender is accepted, a contract is entered into for the supply of the goods or services.

Statutory requirements for tendering by NSW local and county councils and joint organisations are prescribed by section 55 the *Local Government Act 1993* (Act) and Part 7 of the *Local Government (General) Regulation 2021* (Regulation). The Act sets set out the broad legal framework that applies to local government tendering and the Regulation prescribes how tendering is to be undertaken.

OBJECTIVE

The Regulation will support efficient and effective tendering practices by councils and joint organisations that demonstrate integrity and probity, allow fair and open competition between suppliers and support councils and joint organisations to deliver services and infrastructure to their community that achieve value for money.

LEGISLATIVE CONTEXT

The tendering provisions of the Act and Regulation require councils and joint organisations to test the market before they spend public money on goods and services. The tendering provisions aim to ensure probity, accountability, impartiality, confidentiality, transparency and risk management and to ultimately support community confidence in purchasing by councils and joint organisations.

The tendering provisions of the Regulation prescribe requirements for:

- tendering methodology
- the submission and opening of tenders, and
- the determination of successful tenders.

Councils and joint organisations can adopt their own policies and procedures for procurement and tendering. However, the procurement and tendering practices of councils and joint organisations must comply with the following:

- *Local Government Act 1993*
- *Local Government (General) Regulation 2021*
- *Tendering Guidelines for NSW Local Government 2009*
- *Model Code of Conduct for Local Councils in NSW 2020*
- *Government Information (Public Access) Act 2009 (GIPA Act)*
- *State Records Act 1998*

Tendering Guidelines have been issued under section 23A of the Act and help councils to understand their obligations and develop and maintain best-practice approaches to tendering.

The Model Code of Conduct sets the minimum standards of conduct for council officials in the exercise of all their functions, including tender processes. It is prescribed by regulation to assist council officials to:

- understand and comply with the standards of conduct that are expected of them, such as ethical behaviour and not misusing their position for private benefit
- fulfil their statutory duty to act honestly and exercise a reasonable degree of care and diligence
- act in a way that enhances public confidence in local government.

The GIPA Act requires councils to publish a contract register containing mandatory information for contracts over a prescribed amount.

Under the State Records Act, councils must establish and maintain a records management program that complies with standards and codes of best practice.

General guidance is also available in the *NSW Government Procurement Policy Framework 2019* and in Independent Commission Against Corruption (ICAC) publications.

While each council may adopt procurement policies and procedures that reflect their particular operating environment, as noted in the NSW Auditor-General's Report, *Performance Audit - Procurement Management in Local Government 2020*, the general principles of effective procurement management (such as transparency and accountability) and risk-mitigating practices (such as segregation of duties and the provision of training) are relevant to all councils.¹

In recent years, the Government has introduced several reforms to enhance

¹ NSW Auditor-General's Report, *Performance Audit - Procurement Management in Local Government 2020*

efficiencies and increase flexibility for councils in procurement and tendering.

- The tendering threshold, below which councils do not have to undertake a competitive tendering process, was increased from \$150,000 to \$250,000 in 2019.
- Councils can now delegate to staff and others the acceptance of tenders other than for contracts outsourcing services currently provided by council staff.
- Councils can now procure the services of pre-qualified disability employment organisations approved under the *Public Works and Procurement Act 1912*, without having to go to tender.
- Councils are no longer required to advertise tenders in newspapers but must instead advertise them on their websites and use such other advertising method the council considers will best bring the tender to the notice of potential contractors.
- The establishment of joint organisations provide councils with increased opportunities to collaborate with other councils in their procurement.

PRINCIPLES OF TENDERING

The principles that should inform all tendering processes are:

- value for money
- fair and open competition
- probity, integrity and transparency
- accountability
- risk management.

Tendering is not just about securing the lowest price. Value for money considers a range of financial and non-financial factors such as quality, cost, capability, capacity and risk. A 2015 report by Deloitte Access Economics² describes determining the optimal value for money as a balancing act, trading off factors in order to select the supplier that best meets the identified requirements.

Fair and open competition relies on probity and integrity. It builds trust between councils and suppliers and the community. The *NSW Government Procurement Policy Framework*³ describes how transparent, competitive processes drive fair and ethical behaviour, safeguard probity and foster healthy working relationships. In addition, competition can drive cost savings, increase quality and innovation and support market sustainability.

Ensuring the integrity of procurement through probity, accountability and transparency is also critical to minimising the potential for misuse of public funds.

The Deloitte report estimated that the total price impact of poor procurement practices is around 5.4% of the total income received by professional services firms in public infrastructure projects.

² Deloitte Access Economics for Consult Australia *Economic benefits of better procurement practices*

³ NSW Government Procurement Policy Framework

RISK MANAGEMENT

The accountability and transparency mechanisms prescribed under the Regulation are designed to support a robust risk management framework, where risks can be identified and appropriately managed.

Tendering, and procurement generally, is recognised globally as an area of high-risk for potential corruption. The Organisation for Economic Co-operation and Development, more commonly known as the OECD, notes that in addition to the volume of transactions and the financial interests at stake, corruption risks are exacerbated in government contexts by the complexity of the process, the close interaction between public officials and businesses, and the multitude of stakeholders.⁴

The Government has been working with local councils to strengthen business systems and procurement practices and to build internal audit programs. By March 2022 all councils will be required to have an Audit, Risk and Improvement Committee (ARIC). The role of ARICs in the assessment and review of risk management, control and governance processes will add another layer of risk-mitigation and will help to instil stakeholder and community confidence in councils' procurement and tendering practices.

The Audit Office reports that as of 30 June 2019, 111 NSW councils had already established an ARIC⁵, demonstrating strong support by the local government sector for robust governance and financial management.

⁴ OECD - Preventing corruption in public procurement

⁵ NSW Auditor-General's Report to Parliament Report on Local Government

REPORTS & INVESTIGATIONS

NSW Audit Office Report 2020

In December 2020 the Auditor-General for New South Wales released a report examining procurement management in local government⁶.

The audit assessed the effectiveness of procurement management practices in six councils. The audit found that all six councils had procurement management policies that were generally consistent with the legislative requirements. However, it identified six common gaps in the application of the policies that expose risks to councils' ability to demonstrate their procurements are justified, well managed, delivering to expectations, and achieving value for money.

In addition, the Auditor-General recommended that the Department of Planning, Industry and Environment:

1. update the Regulation to reflect the increasing use of electronic tender submissions rather than paper copies
2. publish comprehensive and updated guidance on effective procurement practices – including electronic tender submissions and procurements below the tender threshold.

Recommendation 1 is being addressed as part of this review of the Regulation.

Recommendation 2 will be addressed as part of the comprehensive review of the current Guidelines, which will be undertaken following the Regulation review.

⁶ NSW Auditor-General's Report, *Performance Audit - Procurement Management in Local Government 2020*

Independent Commission Against Corruption (ICAC)

Procurement and contract management in the public sector at both state and local government levels, are areas regularly investigated by ICAC.

Since 2012, ICAC has published over ten investigations relating to corruption risks arising from procurement activities.

ICAC advises that procurement functions carry high risks for corruption given they involve discretionary decision-making combined with the transfer of large amounts of public funds into private hands. It also notes that corruption is not limited to high dollar amounts, and that because low-value items are routinely purchased, discrepancies may be easily overlooked⁷.

A survey conducted by the ICAC found that both suppliers and public authorities are particularly concerned with direct negotiations and non-tendered quotations.⁸

REVIEW PROCESS

Scope

The focus of this review is the current tendering provisions of the Regulation. There are currently no plans to fundamentally change the broader statutory framework governing local government procurement. However, feedback on the broader statutory framework will be considered to identify any need or opportunities for future reform.

The Government is committed to limiting the regulatory burden on councils. All recommendations and their potential outcomes will be reviewed in this light.

How to read this paper

Part 1 – Identifies proposed amendments to the Regulation in two areas: technology, and the acceptance of tenders.

Part 2 – An open discussion section which allows for comment on any aspect of tendering in the Regulation. Suggestions should consider the principles of tendering and the financial and corruption risks as outlined above.

Part 3 – This section has information on how to make a submission, a link to an online submission form and one that can be emailed or posted.

Considerations

In preparing this discussion paper, recommendations of various reviews and inquiries conducted by the NSW Audit Office (NSWAO) and ICAC and the procurement frameworks of other jurisdictions have been considered.

In addition, Local Government Procurement NSW and its reference group, comprising of

⁷ ICAC Corruption prevention advice – Procurement

⁸ ICAC Corruption in NSW Government Procurement: Suppliers perceptions of corruption

council procurement practitioners have provided valuable advice on the application of the Regulation and areas that may warrant amendment.

Next steps

Following the review and assessment of responses to the discussion paper, the Minister's approval will be sought for amendments to the Regulation. Once Regulation amendments have been made, OLG will notify councils by Circular of the new requirements.

A comprehensive review of the Guidelines will be undertaken following the approval of any amendments to the Regulation. This will be a significant project and further consultation will be undertaken with the sector as part of the review process.

PART 1: REVIEW OF IDENTIFIED AREAS

1. Technology

The tendering provisions in the Regulation currently refer to outdated technologies, processes and applications that do not reflect current tendering practices. With technology constantly evolving and offering new opportunities for efficiency in council tendering, the prescription of tendering needs to be sufficiently flexible and technology-neutral to accommodate these and future developments.

The NSWAO 2020 report recommended that the Regulation be updated to remove references to outdated technology. This recommendation is supported and is addressed by the amendments to the Regulation proposed below. The proposed amendments aim to accommodate evolving technologies.

It is proposed to remove references to outdated technologies and to allow councils the flexibility to provide and receive information associated with tender processes by electronic means. The term “electronic means” is currently defined in the Regulation as including electronic communication within the meaning of the *Electronic Transactions Act 2000*. Under the Electronic Transactions Act, electronic communication means:

- (a) a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both, or
- (b) a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system.

QUESTION 1: Do you support the following amendments to remove barriers to the use of electronic technology in tendering and to improve efficiency?	
Q1.1	Definitions
Proposed amendment	Include definition of “document” in clause 164 that includes information provided by electronic means.
Effect of amendment	Clarifies that tender documents can be provided and submitted in an electronic form as well as a physical form.
Q1.2	Definitions
Proposed amendment	Amend definition of “formal tender document” to make it clear that formal tender documents may be provided and submitted in an electronic form.
Effect of amendment	Clarifies that formal tender documents can be provided and submitted in an electronic form as well as a physical form.
Q1.3	Removal of references to redundant technology
Proposed amendment	Remove references to “facsimile transmissions” from clauses 173, 174 and 177
Effect of amendments	Allows tenders to be submitted in either physical or electronic form, without being prescriptive of the technology used.

Q1.4	cl. 167 – 169 Advertising of tenders
Proposed amendment	Provide that advertisements must specify the method by which applications (in the case of selective tendering) and tenders are to be submitted (ie by electronic or physical means or both).
Effect of amendment	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Q1.5	cl. 168 – 169 Selective tendering
Proposed amendment	Provide that when inviting tenders using selective tendering, the invitation must specify the method by which tenders are to be submitted (ie by electronic or physical means or both).
Effect of amendment	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Q1.6	cl 170 Tender documents
Proposed amendment	Provide that tender documents must specify the method by which tenders are to be submitted (ie by electronic or physical means or both).
Effect of amendment	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Q.1.7	cl.173 Submission of tenders
Proposed amendment	Provide that tender documents must be submitted using the method specified in the advertisement (or invitation in the case of selective tendering) and tender documents (ie by electronic or physical means or both).
Effect of amendments	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Q.1.8	cl.173(2) Submission of tenders
Proposed amendment	Delete subclause (2)(a) which limits the submission of tenders by electronic means to circumstances authorised by guidelines issued under section 23A. It is proposed to retain subclause (2)(b) which requires submissions of tenders by electronic means to be effected by a secure mechanism (such as an encryption-based technology) that ensures they cannot subsequently be altered.
Effect of amendment	Removes impediments to tenders being submitted by electronic means while retaining the requirement for information provided in tender documents to be stored securely.
Q1.9	cl. 174(1) – (2) Custody of physical tenders after receipt
Proposed amendment	Clarify that clause 174 does not apply where a council has specified that tenders are to be submitted by electronic means only.
Effect of amendment	Requires tenders to be kept in a tender box only where a council has specified that they may be submitted in a physical form. Where tenders are

	submitted electronically, they are to be securely stored electronically (see below).
Q1.10	cl. 174(3) Custody of tenders submitted by electronic means after receipt
Proposed amendment	Make clause 174(3) a standalone provision that will apply to the custody of tenders received by electronic means.
Effect of amendment	This is consequential to the amendment proposed under Q1.9. It will allow councils not to use a tender box in circumstances where they have specified that tenders are to be submitted by electronic means only.
Q1.11	cl.175(1) – (2) Opening of tenders
Proposed amendment	Clarify that clause 175(1) – (2) does not apply where a council has specified that tenders are to be submitted by electronic means only.
Effect of amendment	<p>This will mean that councils are not required to formally open tenders in the presence of the public where they specify that tenders are to be received by electronic means only.</p> <p>The requirement for tenders to be opened in the presence of the public operates as an important probity safeguard for tenders that have been posted in or physically deposited in the tender box. Where tenders are submitted in an electronic form, they are more readily auditable, and the requirement to physically open tenders in the presence of the public serves no real purpose.</p>
Q1.12	cl.175(1) Opening of tenders
Proposed amendment	Allow persons to attend the opening of tenders in person or online via audio-visual link.
Effect of amendment	Enhances transparency and accessibility by allowing interested person to attend the opening of tenders in person or online via audio-visual link.
Q1.13	cl.175(3) – (4) Opening of tenders
Proposed amendment	Make subclauses (3) and (4) of clause 175 a separate clause and amend subclause (4) to require the tender list to be published on the council's website.
Effect of amendment	This is consequential to the amendment proposed under Q1.12. It will ensure that the requirement to prepare a tender list will apply to all tenders regardless of how they are received. It will also enhance transparency and accessibility of information published in the tender list by requiring it to be published on the council's website.

Q1.14	cl. 177 Consideration of tenders
Proposed amendment	Amend clause 177(2) to provide that a council must not consider a tender that is not submitted to the council using the method specified in the advertisement (or invitation in the case of selective tendering) and tender documents (ie by electronic or physical means or both) by the deadline for the closing of tenders. This will be subject to subclauses (3) – (5).
Effect of amendment	This is consequential to other proposed amendments and will allow councils enforce the use of the method of submitting tenders specified in advertisements, invitations, and tender documents. Subclause (3) – (5) will continue to apply.
Q1.15	cl. 179 Notification of acceptance of successful tender
Proposed amendment	Amend clause 179 to require councils to publish a notice specifying the name of the tenderer whose tender was accepted and the amount of the successful tender or a notice that none of the tenders was accepted on the council's website.
Effect of amendment	Ensure greater transparency and accountability for decisions in relation to tendering by requiring information about the acceptance of tenders to be published on the council's website.

2. Acceptance of tenders

The Act was amended in 2016 to remove the restriction on councils' ability to delegate the acceptance of tenders. Subject to their having the relevant delegations, council staff and others may now accept tenders on behalf of a council other than where they involve the outsourcing of services currently performed by council staff. Decisions to accept tenders for services currently performed by council staff must continue to be accepted by a resolution of the governing body of the council.

The Regulation continues to restrict the ability of councils to delegate decisions not to accept tenders. Under clause 178(3), decisions not to accept tenders and to do any of the following must be made by a resolution of the governing body of the council:

- postpone or cancel the proposal for the contract,
- invite fresh tenders based on the same or different details,
- invite, fresh applications from persons interested in tendering for the proposed contract using the selective tendering method by which invitations to tender for the proposed contract are made following public advertisement asking for expressions of interest,
- invite fresh applications from persons interested in tendering for contracts of the same kind as the proposed contract, using the selective tendering method by which recognised contractors listed by the council are invited to tender for the proposed contract,
- 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, and
- carry out the requirements of the proposed contract itself.

If a council resolves to enter into negotiations, its resolution must state:

- the council's reasons for declining to invite fresh tenders or applications, and
- the council's reasons for determining to enter into negotiations.

There is no compelling policy reason to continue to restrict councils from delegating most of the decisions referred to in clause 178(3). However, safeguards need to be preserved where councils decide to enter into negotiations to ensure there is appropriate oversight, transparency and accountability for such decisions. For this reason, it is proposed to retain the requirement for decisions not to accept tenders and to enter into negotiations to be made by a resolution of the council. Such resolutions will continue to be required to state the council's reasons for declining to invite fresh tenders or applications and the council's reasons for determining to enter into negotiations.

QUESTION 2: Do you support amendments to allow councils to delegate decisions not to accept tenders other than in the circumstances contemplated under clause 178(3)(e)?	
Q2.1	cl. 178 Acceptance of tenders
Proposed amendment	Amend clause 178(3) to remove the requirement for decisions referred to in that clause to be made by resolution. Decisions not to accept tenders and to enter into negotiations will continue to be required to be made by a resolution of the council that also states the council's reasons for declining to invite fresh tenders or applications and the council's reasons for determining to enter into negotiations.
Effect of amendment	Decisions referred to under clause 178(3) other than to reject all tenders and to enter into negotiations may be made under delegation where a council makes such delegations.

PART 2: DISCUSSION

Open comment

The tendering provisions of the Act and Regulation are designed to ensure councils utilise a procurement methodology that:

- achieves best value for money
- appropriately tests the market
- promotes competitive processes that are fair, equitable and accessible, and
- ensures appropriate standards of probity and transparency.

You are invited to suggest other amendments that will support these outcomes or that may improve the efficiency of tendering processes that is consistent with these outcomes.

PART 3: SUBMISSIONS

Have your say

Responses can be made using the online webform or by submitting your comments by email or post. A submission form template is available on the OLG website to assist you in making written comments.

Online: An online webform is available at www.olg.nsw.gov.au

By email: Email submission template, available at www.olg.nsw.gov.au, to olg@olg.nsw.gov.au Attention: Governance Team – Review of Tendering Regulation

By post: Submission template is available at www.olg.nsw.gov.au
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Department of Planning, Industry and Environment
Office of Local Government
Locked Bag 3015
NOWRA NSW 2541

Closing date

15 October 2021

Privacy Notice

When you give us your feedback, OLG will be collecting some personal information about you, in particular:

- your name
- your email address
- the name of your organisation (if provided)
- any personal information you decide to put in the additional comments fields.

All feedback received through this consultation process may be made **publicly available**. Please do not include any personal information in your feedback that you do not want published.

As part of the consultation process, we may need to share your information with people outside OLG, including other public authorities and government agencies. We may also use your email contact details to send you notifications about further feedback opportunities or the outcome of the consultation.

You should also be aware there may be circumstances when OLG is required by law to release information (for example, in accordance with the requirements of the *Government Information (Public Access) Act 2009*). There is also a privacy policy located on OLG's website that explains how some data is automatically collected (such as your internet protocol (IP) address) whenever you visit OLG's website. The link to that policy is <http://www.olg.nsw.gov.au/privacy>

RESOURCES

Deloitte Access Economics for Consult Australia

Economic benefits of better procurement practices

<https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-the-procurement-balancing-act-170215.pdf> (with permission of Consult Australia)

ICAC

Corruption prevention advice – Procurement

<https://www.icac.nsw.gov.au/prevention/corruption-prevention-advice-topics/procurementICAC>

Corruption in NSW Government Procurement: Suppliers perceptions of corruption

<https://www.icac.nsw.gov.au/CustomSearchPage.aspx?ModuleID=734&keywords=corruption%20risks%20&multiSite=False>

Corruption prevention in procurement workshops

www.icac.nsw.gov.au/education-and-events/workshops/corruption-prevention-in-procurement

Guidelines for managing risks in direct negotiations, May 2006,

[*Guidelines for managing risks in direct negotiations*](#),

Information communication technology systems

<https://www.icac.nsw.gov.au/prevention/corruption-prevention-advice-topics/information-communication-technology-systems>

NSW Auditor-General

Performance Audit-Procurement Management in Local Government 2020

<https://www.audit.nsw.gov.au/our-work/reports/procurement-management-in-local-government>

Report on Local Government 2019

<https://www.audit.nsw.gov.au/sites/default/files/documents/FINAL%20WEB%20-%20Report%20on%20Local%20Government%202019.pdf>

Report on Local Government 2018

<https://www.audit.nsw.gov.au/sites/default/files/pdf-downloads/Report%20on%20Local%20Government%202018%20-%20Final%20Report.pdf>

NSW Procurement

Buyer guidance

<https://buy.nsw.gov.au/buyer-guidance/source/notify-and-brief-the-market/run-tender-process>

Office of Local Government

Tendering Guidelines

<https://www.olg.nsw.gov.au/wp-content/uploads/Tendering-Guidelines-for-NSW-Local-Government.pdf>

Model Code of Conduct for Local Councils in NSW. November 2015

<http://www.olg.nsw.gov.au/strengthening-local-government/conduct-and-governance/model-code-of-conduct>

Organisation for Economic Co-operation and Development (OECD)

Preventing corruption in public procurement

<http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf>

Legislation

Local Government Act 1993

<https://www.legislation.nsw.gov.au/#/view/act/1993/30>

Local Government (General) Regulation 2021

<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2021-0460#pt.7>

Electronic Transactions Act 2000

<https://www.legislation.nsw.gov.au/view/whole/html/inforce/current/act-2000-008>

Government Information (Public Access) Act 2009 (GIPA Act)

<https://www.legislation.nsw.gov.au/view/html/inforce/current/act-2009-052#pt.3-div.5>

State Records Act 1998

<https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1998-017#sec.12>

