

1994—No. 353

ELECTRICITY ACT 1945—REGULATION

(Electricity Distributors (Contract Tendering) Regulation 1994)

NEW SOUTH WALES



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HIS Excellency the Governor, with the advice of the Executive Council, and in pursuance of the Electricity Act 1945, has been pleased to make the Regulation set forth hereunder.

Ted Pickering
Minister for Energy.

PART 1—PRELIMINARY

Citation

1. This Regulation may be cited as the Electricity Distributors (Contract Tendering) Regulation 1994.

Commencement

2. This Regulation commences on 1 August 1994.

Application of Regulation

3. (1) This Regulation applies:

- (a) to all electricity distributors; and
- (b) to all contracts for which an electricity distributor is required by section 6K of the Act to invite tenders.

(2) Clauses 20 and 21 also apply to other contracts for which an electricity distributor invites tenders.

(3) Nothing in this Regulation precludes an electricity authority from inviting tenders at any one time for a series of proposed contracts relating to the same subject matter or the same kinds of subject matter.

Note. Subject to clause 3 (2), this Regulation does not apply to other kinds of contracts even if an electricity distributor decides to put those contracts out to tender. However, an electricity distributor may apply the scheme of this Regulation to other kinds of contracts if it wishes to do so.

Definitions

4. In this Regulation:

“designated person”, in relation to a tender submitted to an electricity distributor, means a person designated by the general manager of the distributor to receive or deal with tenders submitted to the distributor and, if a person is not designated, means the general manager;

“goods” includes materials;

“instalment contract” means a contract requiring the payment of instalments by or to an electricity distributor over a period of 2 or more years;

“public authority” means a person or body established or constituted by an Act for a public purpose, and includes a council of a local government area;

“relevant newspapers”, in relation to an electricity distributor, means:

(a) a Sydney metropolitan daily newspaper; and

(b) either or both of the following:

(i) a newspaper circulating in the distributor’s distribution district;

(ii) a newspaper circulating in the places where potential tenderers are likely to be carrying on business or to be residing;

“tender” means a tender submitted or proposed to be submitted to an electricity distributor in accordance with this Regulation, and includes a tender prepared by an electricity distributor;

“tenderer” means a natural person who, or a partnership or body corporate that, has submitted or proposes to submit a tender to an electricity distributor. and, if an electricity distributor has prepared a tender, includes the distributor;

“the Act” means the Electricity Act 1945.

Requirements for contracts to which this Regulation applies

5. (1) An electricity distributor may enter into a contract to which this Regulation applies only in accordance with the provisions of this Regulation.

(2) A contract to which this Regulation applies, and any variation or discharge of the contract, must be in writing and must be executed by or on behalf of the electricity distributor concerned.

Notes in the text

6. Notes in the text of this Regulation are explanatory notes and do not form part of this Regulation.

PART 2—PREREQUISITES FOR TENDERING**Electricity distributor to decide whether tenders are to be by open tendering or selective tendering**

7. Whenever section 6K (1) of the Act applies to an electricity distributor, the distributor 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 proposed contract are made following a public advertisement asking for expressions of interest;
- (c) the selective tendering method by which recognised contractors accredited by the distributor are invited to tender for particular proposed contracts.

Open tendering

8. (1) An electricity distributor that decides to use the open tendering method for allocating a proposed contract must publish in the relevant newspapers an advertisement inviting tenders 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) invite any person willing to fulfil the requirements of the proposed contract to submit a tender to the distributor by the deadline specified in the advertisement.
- (3) The deadline referred to in subclause (2) (c) must be a specified time:
- (a) on a date that is at least 21 days after the date of publication of the advertisement; or
 - (b) if the advertisement is first published in the relevant newspapers on different dates, on a date that is at least 21 days after the later of those dates.
- (4) The tender documents relating to the 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 under the proposed contract and, if the proposed contract is an instalment contract, specify:
 - (i) details of the instalments to be paid by or to the distributor; and
 - (ii) the period over which the instalments are to be paid; and
 - (iii) 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 can be addressed and how the person can be contacted.

Selective tendering method: issue of tender invitations following public advertisement inviting expressions of interest

9. (1) An electricity distributor that decides to use the selective tendering method referred to in clause 7 (b) for allocating a proposed contract must publish in the relevant newspapers an advertisement inviting applications from persons interested in tendering for the proposed contract.

- (2) The advertisement must:
- (a) provide a brief description of the work, goods, facilities, services or property concerned; and
 - (b) 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
 - (c) specify the deadline for submitting applications.

(3) The deadline referred to in subclause (2) (c) must be a specified time:

- (a) on a date that is at least 21 days after the date of publication of the advertisement; or
- (b) if the advertisement is first published in the relevant newspapers on different dates, on a date that is at least 21 days after the later of those dates.

(4) An electricity distributor must consider all applications made in response to such an advertisement and, in so doing, must take into account the experience of the applicants in fulfilling the requirements of, and their capacity to undertake, similar contracts.

(5) After considering the applications, the electricity distributor may either:

- (a) send invitations in writing to tender for the proposed contract to all those applicants who, in its opinion, are able to fulfil the requirements of that contract; or
- (b) decline to invite tenders from any of the applicants.

(6) In inviting tenders from applicants, the electricity distributor must:

- (a) invite the applicants to submit tenders to the distributor 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.

(7) The deadline referred to in subclause (6) (a) must be a specified time on a date that is at least 21 days after the date of the invitation.

(8) The tender documents 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 under the proposed contract and, if the proposed contract is an instalment contract, specify:
 - (i) details of the instalments to be paid by or to the distributor; and
 - (ii) the period over which the instalments are to be paid; and
 - (iii) 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 may be contacted.

Selective tendering method: issue of tender invitations to accredited recognised contractors

10. (1) An electricity distributor that decides to use the selective tendering method referred to in clause 7 (c) for allocating proposed contracts of a particular kind must publish an advertisement in the relevant newspapers inviting applications from persons interested in tendering for proposed contracts of that kind.

(2) The advertisement must:

- (a) provide a brief description of the kinds of work, goods, facilities or services concerned; and
- (b) 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
- (c) specify dates by which applications should be submitted to the distributor.

(3) An electricity distributor must consider all applications made in response to such an advertisement and, in so doing, must 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 clause, an electricity distributor may either:

- (a) accredit the applicant as a recognised contractor for the kinds of work, goods, facilities or services specified in the application; or
- (b) accredit the applicant as a recognised contractor for some of the kinds of work, goods, facilities or services specified in the application and reject the application as to the remainder; or
- (c) reject the application.

(5) As an alternative to accrediting persons as recognised contractors in accordance with subclauses (1)–(4), an electricity distributor 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 subclause (1).

(6) If an electricity distributor adopts such a list, the persons whose names appear on the list are taken to be accredited by the distributor as recognised contractors for the kinds of work, goods, facilities or services specified in the list.

(7) The accreditation of a person by an electricity distributor ceases if the person informs the distributor in writing that the person no longer wishes to be accredited as a recognised contractor for the purposes of this clause.

(8) In seeking tenders for a particular proposed contract, an electricity distributor must send invitations in writing to tender to all those recognised contractors accredited by it under this clause who, in its opinion, are able to fulfil the requirements of that contract.

(9) In inviting tenders for a proposed contract from recognised contractors accredited with an electricity distributor under this clause, the distributor must:

- (a) invite the contractors to submit tenders to the distributor 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.

(10) The deadline referred to in subclause (9) (a) must be a specified time on a date that is at least 21 days after the date of the invitation.

(11) The tender documents must:

- (a) give details of the work to be carried out, the goods or facilities to be provided, the services to be performed and, if the proposed contract is an instalment contract, specify:
 - (i) details of the instalments to be paid by or to the electricity distributor; and
 - (ii) the period over which the instalments are to be paid; and
 - (iii) 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 may be contacted.

Shortened tender period

11. (1) An electricity distributor that believes that there are exceptional circumstances rendering inappropriate a deadline that would, but for this clause, be required to be specified in an advertisement under clause 8 or an invitation under clause 9 or 10 may, by resolution, 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) An electricity distributor must record in its minutes the circumstances requiring an earlier deadline to be specified in such an advertisement or invitation.

Extended tender period

12. (1) If, having specified or included a deadline in an advertisement under clause 8 or an invitation under clause 9 or 10, an electricity distributor becomes aware of circumstances that show that the deadline may not allow enough time for meaningful tenders to be submitted, it may extend the deadline by specifying a later deadline.

(2) If, at the time of extending a deadline, an electricity distributor has issued invitations to persons under clause 9 or 10 or has issued tender documents to persons, it must take all reasonably practicable steps to inform each of those persons of the later deadline.

PART 3—PREPARATION AND OPENING OF TENDERS

Preparation of tenders

13. (1) A tender must be in writing and be submitted in a sealed envelope.

(2) A tender may be submitted by a telex or facsimile machine or other telegraphic device, in which case the designated person must place the tender in a sealed envelope as soon as practicable after the electricity distributor concerned has received it.

Custody of tenders after receipt

14. An electricity distributor must:

- (a) provide a secure tender box; and
- (b) ensure that, until the envelopes containing the tenders are opened in accordance with clause 15:
 - (i) all tenders submitted to it for a proposed contract are kept in the tender box; and
 - (ii) the tender box is, when it contains tenders, kept in a safe and secure place.

Opening of tenders

15. (1) At the time specified for the close of tenders, the designated person must remove the envelopes containing the tenders from the electricity distributor's tender box and open them in the presence of:

- (a) at least 2 persons designated by the general manager of the distributor for the purpose; and
- (b) such tenderers and members of the public as wish to attend the opening.

(2) A member of the public (including a tenderer) who attends the opening of tenders for a proposed contract is entitled, on request, to be informed as to whether the electricity distributor has received a particular tender and the number of tenders received but is not entitled to receive any other information about the tenders.

(3) As soon as practicable after the opening of tenders for a proposed contract, the designated person must:

- (a) record the amounts tendered for the contract; and
- (b) prepare a list specifying all tenders accepted for consideration, the amounts recorded and such other information as the electricity distributor considers appropriate, together with such comments or remarks as the person considers to be relevant, or of assistance, to the persons assessing the tenders.

(4) As soon as practicable after preparing the list, the designated person must display, in a conspicuous place that is accessible to members of the public, a notice specifying the names and business addresses of all persons who have submitted tenders for the proposed contract. The names of those persons must be listed in alphabetical order according to their surnames or, in the case of corporations, their corporate names.

Tenders may be varied in certain circumstances

16. (1) At any time before an electricity distributor accepts any of the tenders that it has received for a proposed contract, a person who has submitted a tender may, subject to subclause (2), vary the tender:

- (a) by providing the distributor with further information by way of explanation or clarification; or
- (b) by correcting a mistake or anomaly in a tender.

(2) Such a variation may be made either:

- (a) at the request of the electricity distributor concerned; or
- (b) with the consent of that distributor at the request of the tenderer, but only if, in the circumstances, it appears to that distributor 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 clause, the electricity distributor concerned 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) An electricity distributor must not consider a tender that is varied under this clause if the variation would substantially alter the original tender.

PART 4—DETERMINATION OF SUCCESSFUL TENDERER

Consideration of tenders

17. (1) As soon as practicable after the tenders for a proposed contract have been opened, the electricity distributor concerned must assess the tenders. The assessment must be made on the basis of the details, and the criteria for assessing tenders, specified in the relevant tender documents.

(2) An electricity distributor must not consider a tender that is not submitted to it by the deadline for the closing of tenders. This subclause is subject to subclause (4).

(3) An electricity distributor must consider a tender submitted by telex, facsimile machine or other telegraphic device so long as the distributor received the telex, facsimile or other telegraphic message by the deadline for the closing of tenders and the tender contained all the information required by the relevant tender documents.

(4) An electricity distributor must consider a tender received within such period after the deadline for the closing of tenders as it decides is reasonable in the circumstances if the tenderer satisfies the distributor that the tender 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 distributor before that deadline in the ordinary course of business.

Acceptance of tenders

18. (1) After considering the tenders submitted for a proposed contract, an electricity distributor must either:

- (a) accept the tender which, having regard to all the circumstances (and in particular the assessment of the tenders carried out under clause 17), appears to it to be the most advantageous to the distributor; or
- (b) decline to accept any of the tenders.

(2) An electricity distributor must ensure that every contract that it enters into as a result of its acceptance of a tender is in accordance with the tender (as modified by any variation under clause 16).

(3) An electricity distributor that resolves not to accept any of the tenders for a proposed contract or receives no tenders for the proposed contract must do one of the following:

- (a) postpone or cancel the proposal for the contract; or
- (b) advertise in accordance with clause 8 for, or invite in accordance with clause 9 or 10, fresh tenders based on the same or different details; or
- (c) enter into negotiations with a person (whether or not the person was a tenderer) with a view to entering into the proposed contract; or
- (d) carry out the requirements of the proposed contract itself.

(4) If an electricity distributor resolves to enter into negotiations as referred to in subclause (3) (c), the resolution must state the reasons for declining to advertise for or invite fresh tenders as referred to in subclause (3) (b).

Notification of acceptance of successful tender

19. As soon as practicable after entering into a contract in accordance with clause 18 or resolving not to accept any of the tenders for a proposed contract, an electricity distributor must:

- (a) send by post, telex, facsimile transmission or other telegraphic means 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:
 - (i) a notice specifying the name of the tenderer whose tender was accepted and the amount of the successful tender; or
 - (ii) if none of the tenders was accepted, a notice to that effect.

PART 5—MISCELLANEOUS

Electricity distributor to ensure confidentiality of tenders

20. (1) An electricity distributor that fails to take all reasonable precautions to ensure that information:

- (a) contained in a tender submitted to the distributor; or

(b) contained in a document relating to such a tender, is not disclosed to a person without the permission of the tenderer is guilty of an offence.

Maximum penalty: 100 penalty units.

(2) This clause does not apply to the disclosure of information:

- (a) for the purposes of the Act or this Regulation; or
- (b) when another law otherwise requires or authorises disclosure; or
- (c) whenever disclosure is necessary or desirable for the conduct of a meeting of an electricity distributor or a committee of such a distributor.

Offence to disclose or misuse certain information

21. (1) A person must not disclose any information obtained in connection with the administration or execution of section 6K of the Act or this Regulation unless the disclosure is made:

- (a) with the consent of the person from whom the information was obtained; or
- (b) in connection with the administration or execution of that section or this Regulation; or
- (c) for the purposes of any legal proceedings arising out of that section or this Regulation or of any report of any such proceedings; or
- (d) in accordance with a requirement imposed under the Ombudsman Act 1974 or the Freedom of Information Act 1989; or
- (e) with other lawful excuse.

(2) A person must not, for the purpose of gaining either directly or indirectly a pecuniary advantage for the person, the person's spouse or de facto partner or a relative of the person, or for any other person with whom the person is associated, influence or attempt to influence a decision of an electricity distributor with respect to:

- (a) the assessment or consideration of tenders submitted to the distributor; or
- (b) the acceptance by the distributor of any particular tender so submitted.

Maximum penalty: 50 penalty units.

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EXPLANATORY NOTE

The purpose of this Regulation is to supplement the provisions of section 6K of the Electricity Act 1945 (which relates to tendering for contracts) and, in particular, to specify the requirements to be followed regarding tenders for proposed contracts to which that section applies:

- to carry out work for an electricity distributor; or
- to provide goods or materials to, or facilities for such a distributor; or
- to perform services for such a distributor; or
- to dispose of property of such a distributor; or
- requiring the payment of instalments by or to such a distributor over a period of 2 or more years.

This Regulation is made under the Electricity Act 1945, including section 6K and section 37 (the general regulation-making power).
