



New South Wales

Local Government (Tendering) Regulation 1999

under the

Local Government Act 1993

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Local Government Act 1993*.

Harry Woods MP

Minister for Local Government

Explanatory note

The object of this Regulation is to repeal and remake, with some modifications, the *Local Government (Tendering) Regulation 1993*.

The new Regulation prescribes matters necessary for the operation of section 55 of the *Local Government Act 1993* relating to the requirements for tendering by councils. The new Regulation deals with the following matters:

- (a) the procedure for inviting tenders (by open tendering or from persons who have submitted expressions of interest or applications to be listed as recognised contractors) (Part 2),
- (b) the submission and opening of tenders (Part 3),
- (c) the consideration and acceptance of tenders (Part 4).

The Regulation is made under the *Local Government Act 1993*, including section 55 and section 748 (the general regulation-making power).

The Regulation is made in connection with the staged repeal of subordinate legislation under the *Subordinate Legislation Act 1989*.

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Clause 1 Local Government (Tendering) Regulation 1999

Part 1 Preliminary

Local Government (Tendering) Regulation 1999

Part 1 Preliminary

1 Name of Regulation

This Regulation is the *Local Government (Tendering) Regulation 1999*.

2 Commencement

This Regulation commences on 1 September 1999.

3 Application of Regulation

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

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

- (2) This Regulation applies to county councils in the same way as it applies to councils.

4 Definitions

- (1) In this Regulation:

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.

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.

relevant newspapers, in relation to a council, means:

- (a) a Sydney metropolitan daily newspaper, and
- (b) either or both of the following:
 - (i) a newspaper circulating in the council's area,

- (ii) a newspaper circulating in the district 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 a council in accordance with this Regulation.

the Act means the *Local Government Act 1993*.

- (2) The explanatory note, table of contents and notes in the text of this Regulation do not form part of this Regulation.

5 Requirements for contracts to which this Regulation applies

- (1) A council 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 council.

6 Repeal

- (1) The *Local Government (Tendering) Regulation 1993* is repealed.
- (2) Any act, matter or thing that, immediately before the repeal of the *Local Government (Tendering) Regulation 1993*, had effect under that Regulation continues to have effect under this Regulation.

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Clause 7 Local Government (Tendering) Regulation 1999

Part 2 Prerequisites for tendering

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7 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.

8 Open tendering

- (1) A council that decides to use the open tendering method for a proposed contract must publish an advertisement in the relevant newspapers 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) 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 clause 11.

9 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 use the selective tendering method referred to in clause 7 (b) for allocating a particular proposed contract must publish in the relevant newspapers an advertisement inviting applications from persons 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.

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Part 2 Prerequisites for tendering

- (6) The tender documents relating to the proposed contract must comply with clause 11.

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

- (1) Before using the selective tendering method referred to in clause 7 (c) for the allocation of proposed contracts of a specified kind, a council must publish in the relevant newspapers an advertisement inviting applications from persons interested in tendering for proposed contracts of that kind so that the council may prepare a list of suitable tenderers.
- (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 clause, 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 clause 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 clause, 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 clause 11.
- (8) As an alternative to listing persons as recognised contractors in accordance with subclauses (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 subclause (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 clause.
- (11) Nothing in this clause requires a council to take the action referred to in subclause (1) on each occasion that it decides to invite tenders under this clause.

11 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

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Part 2 Prerequisites for tendering

- (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.
- (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.

12 Shortened tender period

- (1) A council that believes 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 9 or an invitation under clause 9 or 10 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).

13 Extended tender period

- (1) If, having specified or included a deadline in an advertisement under clause 8, 9 or 10 or an invitation under clause 9 or 10, 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 clause 9 or 10 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).

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Part 3 Submission and opening of tenders

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14 Submission of tenders

- (1) A tender must be in writing and must be enclosed in a sealed envelope.
- (2) However, a tender may be transmitted to a council by facsimile machine or electronic means, in which case the appropriate person must place the tender or a print-out of the tender in a sealed envelope. This subclause is subject to subclause (3) and clause 18 (3).
- (3) A tender may be transmitted to a council by electronic means only if that means of transmission is specified in the relevant tender documents.

15 Custody of tenders after receipt

- (1) A council must:
 - (a) provide a secure tender box, and
 - (b) ensure that:
 - (i) all tenders 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 clause 16.
- (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.

16 Opening of tenders

- (1) At the time specified for the close of tenders, the appropriate person must remove the envelopes containing the tenders from the council's tender box and open them 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, in apparent order of those amounts, the names of the tenderers.
- (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.

17 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 subclause (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 clause, 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 clause if the variation would substantially alter the original tender.

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Part 3 Submission and opening of tenders

- (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.

Part 4 Determination of successful tenderer

18 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 subclause is subject to subclauses (3) and (4).
- (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.

This subclause is subject to subclause (4).

- (4) If, in the relevant tender documents issued by the council, a council has specified that a tender will not be considered unless formal tender documents are submitted to the council, then despite subclause (3), the council is not obliged to consider a tender transmitted to it in accordance with that subclause 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.

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Clause 19 Local Government (Tendering) Regulation 1999

Part 4 Determination of successful tenderer

19 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.
- (2) A council must ensure that every contract it enters into as a result of a tender accepted by the council is in accordance with the tender (modified by any variation under clause 17).
- (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 clause 8, 9 or 10, fresh tenders based on the same or different details,
 - (c) invite, in accordance with clause 9, fresh applications from persons interested in tendering for the proposed contract,
 - (d) invite, in accordance with clause 10, 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,
 - (f) carry out the requirements of the proposed contract itself.
- (4) If a council resolves to enter into negotiations as referred to in subclause (3) (e), the resolution must state the reasons for declining to invite fresh tenders or applications as referred to in subclause (3) (b)–(d).

20 Notification of acceptance of successful tender

As soon as practicable after entering into a contract in accordance with clause 19 or deciding not to accept any of the tenders for a proposed contract, a council must:

- (a) send by post 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.