

1993—No. 269

LOCAL GOVERNMENT ACT 1993—REGULATION

(Local Government (Tendering) Regulation 1993)

NEW SOUTH WALES



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HIS Excellency the Governor, with the advice of the Executive Council, and in pursuance of the Local Government Act 1993, has been pleased to make the Regulation set forth hereunder.

GARRY WEST, M.P.,
Minister for Local Government and Co-operatives.

PART 1—PRELIMINARY

Citation

1. This Regulation may be cited as the Local Government (Tendering) Regulation 1993.

Commencement

2. This Regulation commences on 1 July 1993.

Application of Regulation

3. (1) This Regulation applies:

- (a) to all councils and all county councils; and
- (b) to all contracts for which a council is required by section 55 of the Act to invite tenders.

(2) Clause 19 also applies to other contracts for which a council invites tenders.

Note. Subject to clause 3 (2), this Regulation does not apply to other kinds of contracts, even if a council decides to put those contracts out to tender. However, a council may apply the Regulation to other kinds of contracts if it wishes to do so. It is also intended that councils should be able to invite tenders for a series of proposed contracts relating to the same subject matter or the same kinds of subject matter.

Definitions

4. 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;

council includes a county 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;

relevant newspapers, in relation to a council, means:

(a) a Sydney metropolitan daily newspaper; and

(b) either or both of the following:

- a newspaper circulating in the council's area;
- 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, and includes a tender prepared by a council;

tenderer means a natural person who, or a partnership or body corporate that, has submitted or proposes to submit a tender to a council, and, if a council has prepared a tender, includes the council;

the Act means the Local Government Act 1993.

Requirements for contracts to which this Regulation applies

5. (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.

Notes in the text

6. Notes in the text of this Regulation are explanatory notes and do not form part of this Regulation. They are provided to assist understanding.

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

7. Whenever section 55 (1) of the Act applies to a council, 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 proposed contract are made following a public advertisement asking for expressions of interest;
- (c) the selective tendering method—by which recognised contractors listed by the council are invited to tender for particular kinds of proposed contracts.

Open tendering

8. (1) A council that decides to use the open tendering process 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) 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:

- (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, specify:
 - details of the instalments to be paid by or to the council; and
 - the period over which the instalments are to be paid; and
 - 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.

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

9. (1) A council 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) 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, take into account the experience of the applicants in fulfilling the requirements of, and their capacity to undertake, similar contracts.

(4) After considering the applications, the council may either:

- (a) send invitations in writing to all applicants, or such of them as the council thinks will be able to fulfil the requirements of the proposed contract, to tender for the proposed contract; or
- (b) decline to invite tenders from any of the applicants.

(5) In inviting tenders from applicants, the council must:

- (a) invite them to submit tenders to the council by the deadline specified in the invitations; and
- (b) give details of where and when tender documents relating to the proposed contract can be obtained and the purchase price of those documents.

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

- (6) The tender documents 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:
 - details of the instalments to be paid by or to the council; and
 - the period over which the instalments are to be paid; and
 - 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 by which recognised contractors listed by the council are invited to tender for particular kinds of proposed contracts

10. (1) A council that has decided to use the selective tendering method referred to in clause 7 (c) for allocating proposed contracts of a particular kind must publish in an advertisement in the relevant newspapers inviting applications from persons interested in tendering for proposed contracts of that kind in order that the council may make a list of suitable tenderers.

- (2) Every such advertisement must include:
- (a) 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) dates by which applications should be submitted to the council.

(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 or services 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 in a date that is at least 21 days after the date of the invitation.

(7) 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:
 - details of the instalments to be paid by or to the council; and
 - the period over which the instalments are to be paid; and
 - 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.

(8) A council may select from a list of recognised contractors listed by another public authority if the list is relevant to the proposed contract.

Shortened tender period

11. (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 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) A council 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, a council 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 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 each of those persons of the later deadline.

PART 3—PREPARATION AND CONSIDERATION OF TENDERS

Preparation of tenders

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

(2) However, a tender may be submitted by a telex or facsimile machine or other telegraphic device, in which case the appropriate person must place the tender in a sealed envelope. This subclause is subject to clause 17 (3).

Custody of tenders after receipt

14. A council must:

- (a) provide a secure tender box; and
- (b) ensure that:
 - all tenders submitted to it for a proposed contract are kept in the tender box; and
 - 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 15.

Opening of tenders

15. (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 and 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 appropriate officer of the council must:

- (a) record the amounts apparently tendered for that contract; and
- (b) prepare a precedence list specifying all tenders accepted for consideration and ranking the priority of the tenderers by reference to the amounts apparently tendered for that contract.

Tenders may be varied in certain circumstances

16. (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 in a tender.

(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.

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 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 submitted by telex, facsimile machine or other telegraphic device, but only if the council received the telex, facsimile or other telegraphic message before the deadline for the closing of tenders. 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 submitted 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.

Acceptance of tenders

18. (1) After considering the tenders submitted for a proposed contract, the council 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; 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 16).

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

(4) If a council 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 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.

PART 5—MISCELLANEOUS

Council to ensure confidentiality of tenders

20. (1) A council must take all practicable steps to ensure that:

- (a) information contained in a tender submitted to the council; and
 - (b) information contained in a document relating to such a tender,
- is not disclosed to a person without the permission of the tenderer.

- (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 requires or authorises disclosure; or
 - (c) whenever disclosure is necessary or desirable for the conduct of a meeting of a council or a committee of a council.

Note. This clause complements section 664 of the Act. That section makes it an offence, punishable by a penalty of up to 5 penalty units (\$5,000), for a person to disclose information obtained in connection with the administration or execution of the Act except where that disclosure is made in certain specified circumstances. One of the intended effects of that section is to preserve the confidentiality of tender documents submitted by tenderers.

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EXPLANATORY NOTE

The purpose of this Regulation is to supplement the provisions of Division 1 of Part 3 of Chapter 6 of the Local Government Act 1993 (Tendering) and, in particular, to specify the requirements to be followed regarding tenders for proposed contracts :

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