



Prevention Partners NSW

...a gram of prevention is worth a kilo of cure™



SSROC

SOUTHERN SYDNEY REGIONAL ORGANISATION OF COUNCILS

Submission: Procurement Guidelines Consultation

Prevention: n **1** avoidance of danger or risk, **2** to deter, reduce or mitigate. Often related to avoiding harm, **3** maintenance of status quo

Partners: n **1** allys or companions, **2** members of a group, often working towards a common goal, **3** those in a relationship of trust

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Preamble

1. On 19 December 2022, the Office of Local Government called for submissions from general managers and governance and procurement professionals in relation to the Tendering Guidelines for NSW Local Government review (**Guidelines**).

The Southern Sydney Regional Organisation of Councils (**SSROC**) assisted its council members to review the Guidelines and compile this submission with the assistance of Prevention Partners NSW. SSROC's contact details are: PO Box 176, Campsie NSW 2194; (02) 8396 3800; ssroc@ssroc.nsw.gov.au.

2. In order to meet the deadline for this submission, it has not been possible for it to be reviewed or endorsed at a meeting of SSROC. We will contact you should any issues with it arise later as a result.
3. This submission has been developed in consultation with officers of member councils, and many individuals who provided input for this submission relied upon their knowledge and experience from various councils.
4. This submission does not bother itself with minor amendments and editing issues within the Guidelines, such as referring to section 55 of the *Local Government Act 1933 (LG Act)*, rather than referencing sections 55 and 55A; nor stating that the tender threshold is \$150,000, rather than \$250,000.¹ SSROC assumes that these inconsistencies will be detected, and corrected, by the OLG.
5. The examples provided herein are not exhaustive. Further, the comments herein are not presented in any order of priority as each comment is as important as the others.

Broad comments

6. It is important to provide a version of the Guidelines that proffers flexibility and adaptability to councils for the sake of securing innovation and value for money. Councils should not be restrained and prohibited from achieving the most efficient expenditure of public funds by restrictive Guidelines and Regulation.
7. As stated above, and to reinforce its importance, while it is accepted that the Regulations and Guidelines are provided to encourage probity and good governance around dealing with tenders, they must not be so prescriptive that they prohibit flexibility and innovation. One way to manage this would be to prioritise and focus on important principles, such as:
 - a. value for money;
 - b. transparency;
 - c. confidentiality; and
 - d. fairness and impartiality.

Focussing on principles and giving examples, rather than stipulating process, would encourage councils to act ethically and diligently, while achieving flexibility and innovation.

¹ Page 9.

By prioritising those principles, so that the first principle would prevail over the second, and the second would prevail over the third, and so on, if the principles are in conflict, the guidance is clear.

8. The Guidelines need to clarify what interaction there is between NSW Government procurement guidelines and local government tendering guidelines, if any.
9. The Guidelines would be more effective with the removal of duplication. For example, any reference to matters which are properly dealt with under the Model Code of Conduct should be removed from the Guidelines so as to avoid inadvertent inconsistencies between these two important documents. Referring the Guidelines' reader to the Code of Conduct for acceptable standards of behaviour would reinforce the importance of the Code of Conduct, and focus the Guidelines readers' attention on tendering.
10. It is important that any reference to conflicts or code of conduct *do not* refer the reader to State Government documentation. Local Government conflict requirements, as laid out in the Model Code of Conduct, are legally enforceable and are different from those required at State level.
11. We recommend considering whether the Guidelines should remind councils of the contract reporting requirements as per the *Government Information (Public Access) Act 2009*, particularly considering that the *Local Government Act 1993* now has a different threshold trigger to the GIPAA.
12. Reference is made at various times throughout the *Local Government (General) Regulation 2021* to 'public authority', including at Regulation 169(8). However public authority is undefined within the Regulation. For an abundance of clarity, the Guidelines should refer the reader to the definition of public authority within the LG Act.²
13. Consider allowing acceptance of more than one contract, providing guidance on how and when this could occur. For example, when a council wishes to contract with two designers concurrently so as to result in two designs that may be chosen from, akin to a design competition. A rigid reading of the Regulation prohibits this.
14. The Guidelines should provide general managers who have delegation to deal with tenders instruction on how to best ensure transparency and due diligence in their decision-making.
15. We recommend considering providing guidance on how to best develop policies on Aboriginal Procurement Strategy, Local Preference, Sustainable Procurement; Modern Slavery; and Supply Chain Management. It would be most useful to be provided template policies that are sufficiently flexible in order to allow for a multitude of situations and exceptions.
16. The Guidelines should steer councils in relation to the appropriate use and recruitment of consultants, including restraining consultants from chairing meetings; extending contracts in a fair and ethical manner; whether to provide consultants with delegations or whether their powers and restraints should be handled via their engagement contract; ensuring that the

² 'public authority means a public authority constituted by or under an Act, a government department or a statutory body representing the Crown, and includes a person exercising any function on behalf of the authority, department or body and any person prescribed by the regulations to be a public authority.'

distinction between consultant and employee are keep clear; and avoiding the consultant from occupying voting positions. Councils should be discouraged from elevating consultants above the position of advisor. Further, councils should be guided on how to best manage consultants' conflicts and what such conflicts mean to a project.

For example, an architect who has assisted a council to design a scope and specification for a major construction discovers, after months of work, upon opening the tenders that her/his firm is contracted to one of the tenderers on other projects. This type of conflict is common, however in a market that is limited, such a conflict is mostly unavoidable because only a handful of architects and contractors have the capacity to undertake the project, meaning that regardless of which architectural company assists council in the design, the likelihood of conflict is high, if not certain. Elimination of the conflict through dismissing the architect will cause huge loss of public funds, and time blow-out, and may not result in a conflict-free arrangement.

17. The Guidelines need to have a review period instilled within it to avoid waiting a decade before revisiting its efficacy and utility. A review period of every 2 to 4 years would be satisfactory as well as review when the legislation is amended.
18. Guidance should also be provided on how to best draft council resolutions which both protect confidential information and provide transparent information to the public at large.
19. The current Guidelines variously refers to electronic submissions, yet what is meant by this broad term is unclear. Councils need guidance on the form and type of electronic communication that is acceptable in various situations.
20. It is acknowledged that, while contracts estimated at \$250,000 or more must be tendered, most local government expenditure occurs under this amount. Guidance on how these lower value contracts should be procured and managed would be useful.

Dealing with tenderers

21. The Guidelines should be clear on whether it is acceptable for a council to contact specific potential tenderers to invite them to make submissions prior to advertising the request for tender. Discussion and examples on this point would be useful. It would assist for you to guide councils on what information can and cannot be provided and in what circumstances.
22. The Guidelines should be clear on exactly what information should be made public at various stages throughout the tender process. For example, the current Guidelines state that information including *'a recommendation of the tender evaluation or assessment panel before the outcome of the tender has been determined'*³ should remain confidential; and *'Information in the [council] report should remain confidential pending council's determination.'*⁴ This implies that after the determination, the report may be made public.

Most councils' business papers include thorough reports that discuss the merits and relative worth of the tenderers and their submissions. Such detailed discussion usually reveals commercial-in-confidence of the tenderers and reveal the councils' commercial-in-

³ Page 11.

⁴ Page 53.

confidence in relation to how tender assessments are made. It would be useful to guide councils on how to handle such sensitive information.

Before tendering

23. The Guidelines should consider whether to encourage a calculated method of determining the criteria to be used for assessing tender submissions, such as paired weightings or some other well-designed methodology,⁵ rather than simply rely on rule-of-thumb. A number of councils have created their own methodology, which works for them, so flexibility in this regard would be welcome.
24. The Guidelines should provide clarity in regards to when and how the *Competition and Consumer Act 2010*, and its associated Regulation, applies to councils. Specifically, how section 2BA of that Act may be utilised by councils.

Many councils feel compelled to seek authorisation from the ACCC for joint tenders, yet no council has been denied such authorisation. It appears that the authorisations are granted to councils on the grounds that community benefit can be demonstrated. Councils need clear guidance on what threshold triggers exist in needing to seeking authorisation, or not.

The ACCC is reluctant to give advice in relation to whether authorisation is necessary or not, nor is the ACCC willing to assist councils to understand how to interpret section 2BA of its Act. Making applications to the ACCC is a time-consuming and often costly exercise, which appears unnecessary.

25. The Guidelines need to offer assistance to councils on how and when the tender panels' members' personal knowledge of tenderers may be used in the assessment of submissions. For example, if a tender panel member has knowledge of a tenderer from a previous project, perhaps in a previous council, when, how, and to what extent are they able to use that knowledge when assessing a fresh tender.
26. We all know that tenderers will only provide positive referees, reducing the utility of asking for them. Guidance on whether, and if so how, councils can seek references from outside the provided list, including utilising information that is in the public domain, would help.
27. The Guidelines should make it clear if and when a councillor may sit upon a tender evaluation panel.
28. The Guidelines should clarify what section 377(1)(i) of the LG Act means. While the intention of section 377(1)(i) is well understood, the wording of that subsection is open to interpretation.

Section 377(1)(i) states that a council resolution is needed for contracts where:

'(i) the acceptance of tenders to provide services currently provided by members of staff of the council'.

For example, a council may have an architecturally trained staff member who undertakes design work, but due to her workload, she does not have the capacity to fully design a

⁵ There is a paper explaining how paired weightings works on preventionpartnersnsw.com.

bridge. Does this example require a resolution to engage an architect to either assist the council architect or to fully undertake a project?

29. Expanding upon what ‘extenuating circumstances’⁶ and ‘emergency’⁷ mean would be helpful, including providing definitions and examples or otherwise explaining when these exemptions may be acceptably utilised.

The Guidelines must not attempt to read down the law, as interpreted by the courts, including in *Socares Support Group Inc v Cessnock City Council*,⁸ that:

- a. the onus lies with the applicant to prove that a council has improperly applied an exemption at section 55(3)(i);
 - b. it is not incumbent on a council to demonstrate that an exemption applies;
 - c. that it is sufficient for a council to be reasonably satisfied that an exemption in section 55(3)(i) applies, and that this is not an objective test;
 - d. only one of the three exemptions need be applied; and
 - e. the merits of a council's decision that an exemption at section 55(3)(i) applies is not a matter able to be considered in judicial review proceedings.⁹
30. Councils should be encouraged to undertake annual procurement plans and have the associated expenditure approved by the general manager or executive leadership team. These plans should consider what procurement the councils will undertake in the coming year and allow for measured and timely scoping and processing of procurement.

Importantly, procurement plans would need to incorporate and consider the council’s IP&R documents, specifically the Operational Plans (OP) and possibly its Delivery Program. Obviously, the timing of these plans would need to coincide effectively and efficiently.

In order to undertake these plans, all council staff should be expected to investigate the contracts that are on foot within their units to determine the related expiry and performance. This both assists in the procurement planning and acts to capture contracts that are not working as effectively as they could be, or need refreshing.

A separate element of this planning process could include a review of how contractors have performed and any follow-up of the contract itself. It would also act as a prompt for units to debrief contractors, including informing contractors that past performance may be considered in future tenders.

31. Guidance should be offered to remove statements like, ‘*no contract will have formed until the written contract is executed*’ from RFTs, as this is legally incorrect. As we know, contracts are formed upon acceptance, which in the case of local government, usually means when the resolution is communicated to the contractor.

⁶ Section 55(3)(i)

⁷ Section 55(3)(k)

⁸ [2012] NSWLEC 23; 190 LGERA 1.

⁹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 40 - 41

32. The Guidelines need to assist councils deal with opening submissions in public when they have been received electronically. Currently there are various approaches to how councils manage this, to different degrees of compliance.

Further, a more modern approach to opening tenders would not require 3 staff members, nor would it require the tendered prices to be posted publicly.¹⁰

33. The Guidelines require an expanded section on how to deal with prescribed entities. Although exempt from the tendering requirements of section 55, use of these contracts frequently exceeds the tender threshold. The Guidelines should provide greater clarity around the authorisation and approval of procurement from prescribed entities, including the use and application of contracts that prescribed entities have formed. For consistency, the Guidelines need to address the requirements for procurement via prescribed organisations and contracts.

During the tendering process

34. Without being prescriptive and restraining, procurement professionals need clear guidance on the governance and probity risks inherent in conducting one-to-one dealings with tenderers before a determination has been made, such as interviews or presentations.

Many councils feel that they better understand tenderers' submissions with a follow up interview/meeting/presentation, yet there are innate risks associated with this, such as allegations that one tenderer was treated preferentially; or that a tenderer attempts to expand upon its submission, thereby providing information after the close of tenders.

Such guidance should incorporate, or refer the professional to, the ICAC's publication, *'Direct Negotiations - guidelines for managing risks in direct negotiations'*, at a minimum.

35. The Guidelines should expand upon how to manage alternative tenders, both in terms of what to tell the market at the time of calling for tenders, and how to handle them internally. It is not sufficient for the RFT to merely state that alternative submissions will be accepted if a complying submission is received, which is common. Both council and the market should understand how the alternative submissions will be assessed.

For example, will the alternative submissions be assessed at the same time as the complying submissions, or only if the complying submissions are deemed insufficient; will the alternative submissions be assessed against the same criteria and weightings, considering that they are different to the submissions that the council called for; what will the council do if the alternative submission is for a totally different good or service, meaning that the market for the new good or service has not been tested (for example, if the RFT is for construction of a bridge as per the council's design, but an alternative tender is for a prefab bridge, the market of prefab bridges has not been tested).

36. The Guidelines should detail the role of evaluation panels, including how much autonomy the panel has in relation to its decisions and/or recommendations, and whether this results in the exclusion of all others, including directors, and the avoidance of interference.

¹⁰ Regulation 175(2) and (5).

37. The Guidelines should highlight the value of Evaluation Plans and encourage their development and use throughout the tender process. A template of such a Plan for council use would be beneficial.

Looking for innovation and flexibility for public benefit

38. Alternatives on how councils can request innovation, other than through an EOI process, would be helpful.
39. Early Contractor Involvement contracts should be explained and encouraged on certain projects by outlining the benefits, and pitfalls, of such arrangements. ECIs may need a separate and dedicated guideline for councils, considering that the current available information is drafted by and meant for State Government entities, which operate under different legislation to councils.
40. Market sounding is a useful step in many projects, however the Guidelines do not consider this. It would be useful if guidance was provided in regards to, at a minimum:
- a. when market sounding can be utilised;
 - b. how contractors are selected and invited;
 - c. what information the council is free to take away and use from the market sounding;
 - d. how much and what type of information may be provided to contractors; and
 - e. what is the role of consultants in market sounding?
41. Councils understand the necessity to avoid the impression of beating a tenderer down on price, and avoiding *'opportunity to trade-off one tenderer's prices against other tenderers' prices in order to obtain lower prices'*,¹¹ while also striving to achieve best value for money. Guidance on how a council can efficiently and ethically conduct a Best and Final Offer process, prior to any decision or resolution being made, would be useful. In order to achieve best value councils need to be provided flexibility during this stage. The Guidelines should define a BAFO process, generally and that is particularly sensitive to volatile contracts, such as utility contracts.
42. The Guidelines need to discuss how to effectively and ethically conduct a negotiation process, including who should be involved in the process and the roles that they may play (for example, that a consultant should only ever be an advisor and not be instrumental in forging a deal between a contractor and a council); the content of a Negotiation Plan; discussion of the common risks; and a reminder that the council (or the general manager if duly delegated) is the ultimate decision-maker.

In order to achieve best value, councils need to be provided flexibility during this stage. In drafting such guidance, the ICAC's *Direct negotiations - guidelines for managing risks* should be included or referenced.

¹¹ Page 56.

43. The Guidelines should be sufficiently flexible to provide guidance to councils, ROCS, JOs and prescribed entities.

Panel contractor arrangements

44. The Guideline's flexibility should include a suggested process for adding contractors to panels of contractors, including how to efficiently deal with the inherent risks, such as stating in the RFT the intention to refresh panels without needing a council resolution.

45. Generally, more guidance needs to be offered to councils related to managing panels of contractors. For example, is it acceptable to add new contractors to an existing panel; how can a council legitimately exclude a panel contractor from future work; and how frequently should panels be refreshed; when and if quotes need to be sought from panel members prior to offering work?

Having formed panels, some councils feel that the market has been tested and that contracts may be offered without seeking quotes; whereas other councils seek quotes only if the project may trigger the tender threshold; yet others again simply allocate projects directly without any quotation stage, regardless.

Please direct all communication in relation to this submission to both Cathy Dizon, cathy.dizon@ssroc.nsw.gov.au, 0468 989 206; and Monica Kelly, monica.kelly@preventionpartnersnsw.com, 0438 280 621.

Warm regards



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