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## **Draft Submission to Office of Local Government (OLG)**

### **Development of New Procurement Guidelines for Councils** *(Response to Circular No 22-40)*

**Prepared by:** Local Government Procurement (LGP) pending endorsement by Local Government  
NSW (LGNSW) Board



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## 1.0 Introduction

Thank you for the opportunity to provide comment on the development of new procurement guidelines for Councils. As a Prescribed Entity under Section 55 of the Local Government Act, Local Government Procurement (LGP) welcomes this review which aims to guide the introduction of best practice procurement across our NSW Councils.

We thank the Office of Local Government (OLG) for their recent change on allowing electronic forms of tendering and the removal of references to facsimile transmission. We find that these changes to the Local Government (General) Regulation 2005 (referenced as “Regulation”) are very practical and we welcome this change towards best practice procurement.

The OLG website<sup>1</sup> outlines that the guidelines for Councils aim to support procurement in local government sector through the following guiding principles:

- Probity
- Transparency
- Accountability
- Value for Money
- Process Efficiency
- Procurement best practice

We comment on the issues in the current guidelines, “Tendering Guidelines for NSW Local Government,” in relation to the above fundamental principles and recommend suggested approaches for the new procurement guidelines.

This Discussion Paper has been jointly considered by Local Government Procurement (LGP) and Local Government NSW (LGNSW) staff, and we believe that the propositions outlined in the paper respond well to these aims.

This submission remains in draft form until endorsed by the LGNSW Board. Any revisions made by the LGNSW Board will be forwarded to OLG.

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<sup>1</sup> Tendering Guidelines for Local Government  
(<https://www.olg.nsw.gov.au/council-circulars/09-39-tendering-guidelines-for-nsw-local-government/>)



## 2.0 Summary of Recommendations

Councils conduct over \$12bn in procurement transactions per year and these transactions are guided by procurement regulations that are aligned to the current guidelines. Since these guidelines form the basis of procurement decisions, they indirectly become a significant driver for the economy of NSW.

As with any guideline, the new guidelines need to evolve with the evolution of a profession, market and best practice.

Drawing on our experience in the sector and regular interactions with Councils of NSW, we are providing recommendations for 7 broad areas of consideration.

Our recommendations are summarised below:

- **Review Process:** The guidelines should be developed with a diverse panel of seasoned procurement practitioners, be principles based, scoped to include the full procurement lifecycle (not just tendering), and benchmarked with best practice public procurement across various jurisdictions in Australia and globally.
- **Procurement Structure and Expertise:** There is significant improvement in procurement outcomes at any Council with a formal procurement function providing oversight, advice and expertise to align with procurement best-practice. This could be supplemented with an optional/opt-in accreditation program that sets a capability benchmark in the sector and independent external advice and expertise in matters of high spend and/or risk for the Council.
- **Procurement Strategies:** We suggest guidance be provided on a wide variety of procurement strategies that can be linked to Councils' strategic plans, along with guidance for procurements under the tendering threshold. These strategies should consider social and environmental factors, risks, opportunities, innovation and unsolicited proposals. There should be some consideration for "sub-guides" for special procurement environments (eg: commodity markets) as well as standing panel arrangements such as the ones established by prescribed entities (such as LGP).
- **Strategy Execution:** The current guidance has some mandatory requirements that could be relaxed in certain situations. For example, the new guidelines should provide some flexibility to shorten the 21-day tender advertising window. We suggest that it also removes the requirement to have to reject all tenders before entering into negotiation thus allowing negotiations prior to rejecting tenders, provide guidance around commercial negotiations and complaints management, while removing limitation on contracts in the form of 'Deeds.'
- **Collaboration:** In procurement, aggregation of spend with other Public Authorities can yield better procurement outcomes; however current guidelines make it challenging. Thus, some guidance on how to align the guidelines with other



jurisdictions, 'piggybacking' on their arrangements, leveraging their pre-qualification schemes, and dealing with their aggressive grant deadlines will help the sector.

- **Prescribed Entities:** There are some unique challenges with respect to prescribed entities in the current framework. We suggest governance requirements for prescribed entities are standardised, along with protocols for changes in procurement process documentation. The requirements should allow prescribed entities to establish panels with standing offer arrangements for Councils. It should also allow prescribed entities to establish these panels for selected Councils only (as opposed to all Councils), as well as re-appoint performing suppliers to a panel in tender process and access State and Commonwealth resources to further support Councils.
- **Further Guidance on Regulation:** There are words used in the Regulation that are arguably ambiguous or open to interpretation. We suggest clear and consistent guidance on interpretation of the Regulation . In addition, we propose further guidance on publishing of commercial bids and definition of key terms.

We elaborate further on these recommendations in their appropriate sections within this submission.



### 3.0 Background

According to the Local Government 2019 report by the NSW Audit Office, Councils collectively reported an expenditure of \$12.4bn on an asset base of \$166bn. The 2018 report further outlined the range of goods and services procured by Councils. This ranges from transport and communications to corporate and support services to engineering works to professional services to waste management services to community infrastructure and services to fleet acquisition and management of utilities such as electricity and gas.

The Tendering provisions under the Local Government (General) Regulation 2021 (“Regulation”) along with the Tendering Guidelines for NSW Local Government (“guidelines”) form the basis of procurement decisions made by Councils in NSW and is a significant driver for the economy of NSW.

When these guidelines were originally drafted, they represented procurement best practice at the time; however, procurement as a profession has evolved, and public procurement best practices have also evolved, and we note that the guidelines have not evolved at the same pace.

Since these guidelines are still extensively utilised by Councils of varying sizes in both metropolitan and regional areas across a wide variety of goods and services, and differing market conditions, we have identified many instances where the guidelines could benefit from refinement.



## 4.0 Review Process

### 4.1 Development with seasoned procurement practitioners

We suggest that the OLG consider developing these guidelines with a diverse panel of seasoned procurement practitioners (including procurement practitioners experienced in sustainable procurement) who understand public procurement best practices, have operated in Councils of varying sizes in both metro and regional areas across a wide variety of goods and services, and differing market conditions. These may be procurement practitioners from Councils, prescribed procurement entities (such as LGP), and/or procurement consultants.

We are concerned that, without this expertise during the guideline development, there is a risk that the new guideline lacks practical relevance to Council practice and could cause more confusion. This could also result in additional costs as a result of less diligent processes when implemented.

LGP would be happy to provide references of suitable procurement practitioners for this review, if requested by OLG.

### 4.2 Principles-based guideline

The current guidelines are highly prescriptive in their requirements and refer to standard procurement processes. However, over the years, procurements have become increasingly complex that require a level of flexibility.

Recognising this issue, the NSW State Government in its own procurement policy, has moved towards a “principles based” policy rather than a prescriptive guideline. Thus, we recommend that OLG also move these guidelines towards a “principles based” guideline.

We have spoken with OLG in relation to the review and understand that this is a direction in which OLG is heading, and we welcome this approach. LGP is happy to support OLG with building and implementing this transformation.

### 4.3 Expand scope of guideline from tendering to full procurement lifecycle

The current guidelines are focused on tendering, and, in some cases, this results in Councils setting up a contract without managing it to achieve the best value over the life of the contract.

Thus, we suggest that the scope of this guideline is expanded from just tendering to end-to-end procurement lifecycle, which includes best practice contract management.

### 4.4 Alignment with procurement ‘best practice’

In addition, we suggest that the OLG benchmark the guidelines around best practice public procurement across various jurisdictions in Australia and globally.





The current guidelines demonstrate an intent to provide best practice procurement guidance; however, there are limited case studies and/or examples that differentiate between procurement best practice vs common practice in local government (which may not be aligned to best practice). Such case studies and/or examples will help Councils make procurement decisions aligned to best practice in complex situations, with a better appreciation for governance, probity, transparency, value for money and risk implications.

The ISO 20400 Sustainable Procurement framework is a good benchmark for best practice procurement and should be referenced in the guidelines.

In addition, many procurement consulting companies have advised on public procurement practices and can advise on what is best practice procurement with examples relevant to the local government context.

We also believe that it could be helpful for the OLG to seek endorsement for the guidelines from a peak procurement association or a private consultancy with the relevant credentials. E.g. Australian Procurement and Construction Council (APCC).



## 5.0 Procurement Structure and Expertise

### 5.1 Advocate Formal Procurement Function

Procurement expertise is varied across the local government sector, and we note that there are some Councils who have a dedicated procurement function that drives best practices while other Councils' procurement is highly decentralised.

Over the years, we have noticed that a dedicated procurement function in the local government sector is more likely to result in best practice procurement approaches and policies that adopt key public procurement principles (eg: probity, transparency, accountability, value for money, etc).

Thus, we believe that the guidelines could encourage and outline the benefits of a dedicated procurement function within Council.

To align with best practice procurement, further guidance could be added to seek expertise and advice from Council governance/audit, finance, sustainability and procurement staff in every formal tender evaluation panel – to provide relevant input, ensure compliance with best practice, and support good process where the spend and/or risk justifies the resource investment.

### 5.2 Accreditation programs to set a public procurement standard

Recognising the varied nature of procurement expertise in State Government agencies, NSW Procurement established "Procurement Accreditation Programs" to set a public procurement standard for NSW State agencies.

This program establishes minimum standards for procurement activities, managing risk, promoting delivery of outcomes towards strategic priorities, and driving continuous improvement and capability development across the sector.

Further details about the Accreditation Program for NSW State agencies are available at <https://info.buy.nsw.gov.au/buyer-guidance/get-started/accreditation>.

Overall, this program has improved procurement capability in the State Government agencies.

Thus, we suggest that an optional opt-in accreditation for a 'Council procurement function' be adopted, similar to one developed in New South Wales Government – setting a best practice standard (as described in section 4.4).

Since there would be costs for councils around accreditation, it is important for it be viewed as optional and aspirational for councils – to help take their procurement operations to the next level.

Entities with deep procurement expertise, who are also working across all Councils in NSW, such as prescribed entities (like LGP) could potentially administer this process on behalf of OLG.



### 5.3 Use of independent advice and expertise in high spend/risk situations

The varied nature of goods and services procured by local government sometimes requires deeper procurement expertise. This could be technical, probity, or legal advice.

Given the limited nature of procurement team budgets in most Councils, hiring resources with this deep expertise in-house is not feasible. Rather, the expertise should be brought in on a case-by-case basis due to spend and/or risk considerations of a procurement exercise.

We recommend that the guidelines elaborate on circumstances where there is a benefit of seeking independent advice, recognising various professional/practitioner procurement peer groups that exist, recommending their consultation for advice or use as independent reference groups for higher spend and/or risk tendering situations.

The guidance also could list a range of resources Councils could use to access expertise, for example:

- Council's Internal Audit Partner
- Council's Audit and Risk Committee
- LGP Contracts (eg: Professional Services Contract)
- Prescribed Entities (eg: LGP)
- Neighbouring Councils
- Regional Organisation of Councils (ROCs) / Joint Organisations (JOs)



## 6.0 Procurement Strategies

### 6.1 Guidance on a variety of procurement strategies

Procurement strategies should be devised for procurements of high spend (above the tendering threshold), or high-risk goods and/or services for Council. While most procurements should consist of a 'go-to-market' strategy involving a competitive bidding process, occasionally, a competitive market doesn't exist and there is only one suitable supplier. In this case, a 'direct negotiation' is more appropriate with the supplier, as it would be obvious that a competitive tender will not yield any options. This is a good example where a tender is not required – and further guidance on such scenarios would be useful.

In addition to the above 2 strategies, 'First Mover Advantage' process is used in situations that do not meet the justification for exclusive negotiations. This could be a 'Swiss Challenge' where if a supplier, who is initially unsuccessful in submitting the most attractive bid, has the option to match the winning bid and implement its proposal. It could also be 'Bid Premium' where the supplier will receive a bonus in the bid evaluation process. This typically happens when there is a supplier with a significant, differentiating advantage and thus, reflects their 'First Mover Advantage.'

Reverse auctions, as a procurement strategy, are also becoming more popular in recent times, and should be considered as a viable option alongside traditional approaches and recognised as a reasonable and appropriate form of tendering. The current tendering guidance arguably preclude use of reverse auctions. These forms of auctions are accepted in the private sector as fair and reasonable and create a competitive environment which could lead to better price outcomes for Councils and ratepayers. So, we recommend including them in the guidelines as an option to consider.

Strategies for commodity markets (such as electricity and gas) should be called out and discussed separately in the guideline due to their unique characteristics. We detail those considerations in Section 6.6.

Furthermore, there should be better guidance on what best practice tender evaluation looks like to ensure best value for money that reduces complexity in the process without compromising public procurement principles (probity, transparency, accountability, etc).

Finally, there is some merit in building a mandatory public register (similar to GIPA) of upcoming major procurement projects, extracted from Councils' Community Strategic Plan, Delivery Program and Operational Plan. This way, the supply market can understand and react to major trends and needs for the sector in the coming years. For example, many Councils embarked on significant projects as a part of the 'Fixing Country Bridges' program; however, some face challenges delivering the program because suppliers did not have capacity to assist and weren't forewarned to prepare for it.

The above outlines some of the procurement strategies that should be considered when trying to achieve an outcome. Thus, we suggest that the guidelines discuss the strategies along with various considerations for Councils.



## 6.2 Link procurement strategies to Council's Strategic Plan

Every procurement strategy and tender recommendation should be linked to strategic outcomes of the Council. These strategic outcomes are typically described in the Council's Community Strategic Plan. Linking to the Community Strategic Plan elevates the status of procurements to matters that are strategic to the Council, making the procurement function an important pillar to deliver outcomes. This will also attract high quality talent to drive procurement activities.

Stipulating this in the guidelines would help elevate the role of a formal procurement function in councils as well as ensuring that procurement is aligned to Council's strategic priorities.

## 6.3 Guidance for procurement under the Tendering Threshold

We propose that there should be some clear expectations around what is expected when a Council is purchasing beneath the \$250k tender threshold. This could include probity requirements, the use of panels and contract management etc.

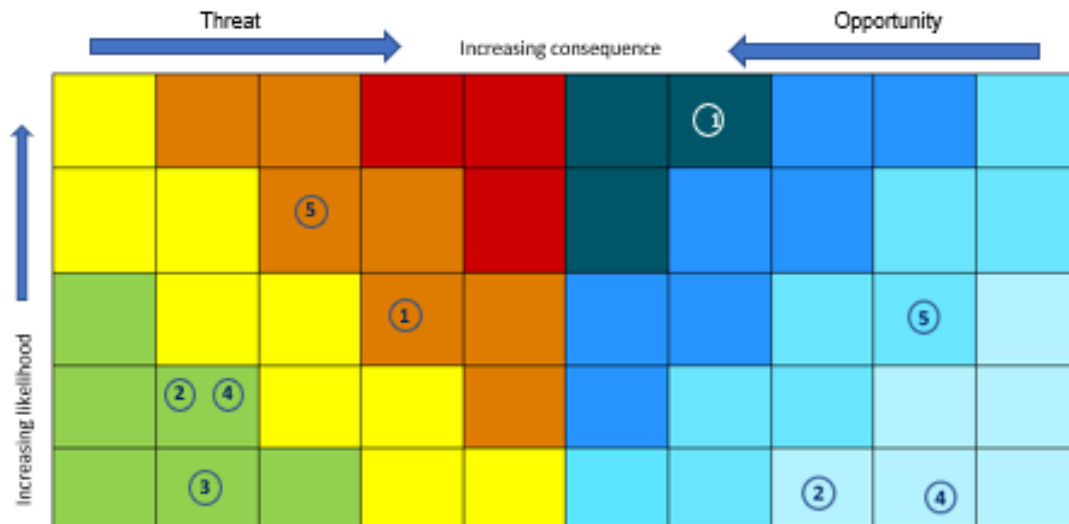
Currently, each Council has established their own procurement policy around when multiple quotes should be requested. Some Councils are mandating three written quotes for quite low purchasing amounts (eg \$5K, \$10K). This creates a lot of work for suppliers and results in Councils developing exemptions and workarounds when seeking quotes for higher spend and risk procurement activities, which, in turn, increases procurement risk.

## 6.4 Consider social and environmental factors in value and risk assessment

When evaluating tenders, value for money and risk factors are important considerations. Sections 1.5 and 2.3 of the current guidelines discuss value for money and risk management respectively. Social and environmental factors typically have a considerable impact on 'value for money', particularly for local Councils wanting to improve their local economy and environment. We believe that some commentary on how to address social and environmental factors within a 'value for money' assessment would benefit Councils.

## 6.5 Use 'positive risks' in risk management

Risk management practices have adopted the concept of 'positive risks'; that is, opportunities should be considered along with the risks when tendering for goods and services. The below diagram outlines this framework.



We believe that it is important to adopt this framework to procurement strategies, and this should be highlighted in the guidelines.

### 6.6 Add best practice guidelines for commodity markets

Some markets have changed considerably since the initial guidelines were published. These are generally commodity markets that have opened, or been deregulated; examples include fuel, electricity, gas, Foreign Exchange, etc.

Commodity markets are volatile in nature with prices constantly changing and are often traded through the ASX or other such mechanisms. When a tender occurs, the suppliers are often only able to only offers bids for 24 to 48 hours.

Current guidelines, which are chiefly centred around goods and services procurement, does not allow for the efficient procurement of these services as the tender process does not react quickly enough to capture advantageous market movements.

Only fixed price bids are currently allowed, which forces both suppliers and buyers to make a call on where the market is heading to lock in a price. This can come at a severe disadvantage to one party or the other if the actual price is highly divergent of the forecast. In such a scenario, depending on the risk appetite and capability of the Council, it would be worth considering spot pricing and derivatives based contracts as risk could be more appropriately be managed.

Please note that there is a Ministerial Investment Order that limits councils to very conservative investment policies and procurement of commodities is viewed as an investment. However, we believe that procurement of commodities is not investment; rather, it is a special type of procurement, which should have a specific guidelines that detail these options and risks, such that a council can take an informed decision.



In addition, in these markets, aggregation can drive a significant source of value. Market forecasts, changing regulatory environment, national and international situations can have a direct impact of future prices and deep industry expertise is required to be across all these market dynamics.

Centralising the procurement and management of commodity markets may prove to be a more cost-effective method that delivers the best value for money for Councils. We believe that the guidelines should describe best practice methods of managing procurements in commodity markets balancing risk, governance, value for money while responding quickly to market changes, given that Councils and ROCs/JOs are individual legal entities.

### 6.7 Address innovative, unsolicited proposals and social procurement

The current supply markets are changing at a very rapid pace as our operating environment becomes more volatile, uncertain, complex, and ambiguous (VUCA). In such an environment, non-traditional procurement approaches are necessary to consider innovative solutions. These may come in the form of unsolicited proposals or may be to resolve many social procurement challenges we face.

Current guidelines are silent on innovative procurement solutions, unsolicited proposals or even social procurement. Over the years, compared with other jurisdictions, we have witnessed limited appetite for innovation, unsolicited proposals and social procurement in local government, and there are significant inconsistencies throughout the sector in its implementation.

We believe that best practices and guidance around innovative projects, unsolicited bids and social procurement will be a significant help to Council staff and the market players. This addition would lead to significant improvement to process consistency, governance, guidance, and ultimately improved outcomes for Councils.

The guidance may include (but not limited to):

- appropriate processes when dealing with proposals or concepts that can't accurately be costed and/or may need to go through a developmental stage that involves risk to Council without guarantee of financial return or success;
- approaches that could be used for proof of concept;
- determining criteria to establish preliminary suitability or unsuitability of a proposal;
- recognition of social and environmental outcomes as valid qualitative assessment criteria;
- the basis for establishing preferential conditions of engagement with Indigenous business, disability sector, SMEs and regional business;
- determining reasonable levels of mandatory insurance stipulated by Councils upon tenderers;
- benchmark levels for encouragement of Indigenous employment participation;
- establishment of a suitable panel to evaluate and/or consider unsolicited proposals;
- appropriate process and requirements for negotiation during multi-stage tender processes;
- principles for applying disaggregation of a project or program of works in order to encourage SMEs and/or local/regional suppliers;



- how regional Councils should best maintain integrity of process, given they operate in smaller communities where family and business ties may be difficult to avoid;
- when direct engagement of Indigenous businesses, social enterprises and Australian disability enterprises are recommended;
- use of best and final offers in a multi-stage process;
- alliance partnership arrangements;
- disclosure to the market in the event open competition is deemed necessary;
- treatment of intellectual property;
- provide risk guidance when considering use of non-traditional approaches to procurement (this is needed when adopting disruptive technologies such as reverse auctions; spot pricing and derivatives for electricity contracts; etc);
- management of modern slavery risk and responding to legislative requirements (i.e. taking reasonable steps to ensure the goods they procure are not the product of modern slavery)

It will help Councils if the guidelines specifically add a section that provides guidance to some of the above along with risk considerations and where to find expertise. It will be especially helpful for councils to get clearer and more specific guidance on local preference and in particular how councils can encourage procurement from Aboriginal-owned businesses. Please note that LGNSW has previously written to the Minister for Local Government seeking more guidance on Aboriginal procurement to be added to the guidelines.

In collaboration with key Councils, and support from World Commerce and Contracting, LGP published the attached White Paper (Challenges of Innovative Projects and/or Preferential Treatment Under the Tendering Process in NSW Local Government) which further discusses these issues and recommendations for addressing those issues. This paper was forwarded to OLG with our last submission and is publicly available online at <https://lgp.org.au/wp-content/uploads/2021/10/Whitepaper-Innovative-Tendering-Final.pdf>.

## 6.8 Provide sub-guides for category specific best practice procurement

In procurement, a common set of goods and services, typically have similar characteristics and can be grouped together as categories. Each category of supply has its market nuances and best practice processes that enable optimal outcomes.

We suggest that the best practice processes for unique categories be documented as sub-guides attached to the guideline. These could be sub-guides for financial services, utilities (eg: gas and electricity with considerations detailed in section 6.6), software licences, property licences, fleet, waste management, etc. Best practice processes in these sub-guides should include details of economic, social and environmental risks and opportunities specific to the category.

One or more sub-guides could be added or updated at any time without disrupting the integrity of the whole guideline. This would considerably uplift the capability of the sector for running procurement processes on a per category basis.





These sub-guides could be further supplemented with best practice RFT templates, that are generic and specific to a category, as currently some Councils' RFT templates are unnecessarily complex. Best practice RFT templates make it easier for potential suppliers to respond and for evaluators to assess, leading to better procurement outcomes.



## 7.0 Strategy Execution

### 7.1 Shorten tender advertisement requirement of 21 days in certain cases

In some markets, the primary evaluation criteria will be price, and, in some instances, market pricing can fluctuate widely on a day-to-day basis. In this situation, we need to have the ability to react quickly when market pricing is adversely changing.

The current requirement to advertise for 21 days discourages the option to go to market at short notice, and seeking relevant internal approvals may unnecessarily delay a process, reducing opportunity for Councils to obtain the best competitive offers.

Thus, we recommend that the guideline remove the requirement of 21 days tender advertising in certain markets e.g., commodities, electricity and finance, and certain situations where advertising for 21 days will not be practical to get the best procurement outcome. We suggest this be done by exception with appropriate justification and approval from the GM or CEO of the organisation.

### 7.2 Allow negotiations prior to rejecting tenders

Outcomes of some competitive tender processes, especially the ones run by prescribed entities (such as LGP), often result in establishing panel arrangements with multiple parties being appointed to the panel.

The current guidelines require rejecting of all tenderers prior to negotiation. Specifically, the guidelines (in section 3.19) state:

If, after the tendering process none of the tenders are accepted, the Council may, under clause 178 of the *Regulation*, decide by resolution to enter into direct negotiations with any person or persons with the intention to enter a contract.

This creates a contentious scenario as there may be no need to negotiate with all tenderers who have applied for a panel. In panel situations, strict application of the Regulation would prevent acceptance of multiple tenders if just one tender required negotiation.

For probity reasons, if all the panel members were appointed and able to transact at the same time, then practically, we are withholding the appointment of a tenderer to the panel, while negotiations are ongoing with other potential panel members.

Additionally, the provision to allow Council to negotiate with “any person or persons” regardless of whether they submitted a tender or not leaves the process open for the possibility of favouritism or even corruption.

Thus, we recommend that the guidelines allow negotiation on contract conditions with tenderers prior to rejecting a tender (by Council Resolution), and Council decides on an outcome (by resolution) only after all the negotiations are complete, as per their delegations. (This would mirror NSW State Government process.) We further recommend that Councils are informed of the risks of negotiating with a person or persons that have not submitted a



request for tender, such that a well-considered decision is made that does not promote favouritism or corruption.

### 7.3 Provide guidance on commercial negotiations

Current guidelines are silent on commercial procurement best practices to drive value for money outcomes such as Best and Final Offer (BAFO). Rather, under the “Tender Negotiations” section, the Guidelines (in Section 3.19) state:

*“As a general rule direct negotiations should be avoided due to the risks associated with the process.”*

*“Councils should not use such tender negotiations as an opportunity to trade-off one tenderer’s prices against other tenders’ prices in order to obtain lower prices.”*

While we agree that where possible all procurement at Councils should be market tested, and trade-off between tenderers isn’t good procurement practice, Councils interpret these clauses to mean that they cannot conduct any commercial pricing negotiations.

Best practice procurement dictates that the first price provided by a tenderer in a tender process can be improved through commercial pricing negotiations, led by a suitably qualified negotiator or negotiation team.

Since Councils always have limited budgets, and increasing community expectations, such practice will improve value for money outcomes for the community. It will also help to ensure a more efficient procurement process because Councils will be able to negotiate on price and deliverables to bring a project within budget without having to run a new Request for Tender process. This will ultimately result in works being delivered within communities more quickly.

Thus, we recommend that these best practices for commercial pricing negotiations (including but not limited to BAFO rounds) be outlined in the guidelines along with examples.

It may be worth highlighting what is a “suitably qualified negotiator or negotiation team,” and allowing prescribed entities to negotiate commercial pricing on behalf of Councils, where they don’t have a suitably qualified negotiator or negotiating team.

### 7.4 Remove limitation on contracts in the form of ‘Deeds’

We propose that prescribed entities are not limited to only establishing ‘deeds’ and be permitted to have commercial flexibility to utilise contractual arrangements other than Deeds.

This would remove the restrictive form of ‘deeds,’ which legally must be executed physically. LGP proposes to use forms of contracts that are market appropriate and may best fit for the situation. This would include the use of ‘standing offers’ or to adopt any form of commercial agreement that would be the most suited. This could also include for instance ‘piggybacking’ onto State Government arrangements.



The use of Deeds limits efficient procurement and contracting and creates difficulties when a prescribed entity (such as LGP) seeks to find synergy with other State procurement entities which may not be using 'deeds'.

Deeds are arguably an outdated form of contract and the process for execution is not efficient in line with commercial technological developments, e.g. electronic signature via systems such as DocuSign. This change would also be aligned with recent changes to support electronic tendering processes.

### 7.5 Guidance on complaint management and litigation considerations

There are many situations where procurement goes “wrong,” and this is where Councils need to rely on a complaint management process. However, there is not a formal framework for Councils to deal with complaints and guidance on how such a policy should be formulated.

We suggest that, in addition to policy advice, the Guidelines should discuss the consequences around complaints. For example, in which cases can a tenderer sue the Council? In which court? What would be the potential solutions for the principal or Council to achieve a fair outcome?



## 8.0 Collaboration

### 8.1 Alignment with State and Commonwealth procurement guidelines

In 2006, the Office of Local Govt released a circular 06/07 (Doc ID A39172) encouraging Councils to ensure their purchasing activities were guided by several things including NSW Procurement Policy Frameworks and Guidelines and Commonwealth procurement guidelines.

However, we note that current local government process requirements do not mirror some key NSW State Government processes nor those of other tiers of government. For example, not all arrangements are advised in the open market for 21 days, as this is not a requirement in those jurisdictions. Can Councils still utilise these arrangements?

These aspects of tendering are not adequately dealt with under the current guidelines.

We suggest that Councils be able to rely upon State or Commonwealth guidelines when the guidelines for local government do not deal with a given matter. Governance could still be confirmed by auditing process against those other than State or Commonwealth guidelines, as may be appropriate.

In addition, we suggest prescribed entities (such as LGP) be allowed to adopt the processes of NSW State Government or other tiers of government when collaborating with these entities, where such process would lead to process efficiency and/or better commercial outcomes for Councils.

### 8.2 Allow Council 'Piggy Backing' other government arrangements

NSW State Government and Commonwealth Government procurement arrangements have (existing or future) piggy backing clauses that allow Council to jointly purchase with multiple tiers of government, ROCs, JOs (Joints Organisations) or other Councils.

However, the guidelines are currently silent on how piggy backing needs to be managed by Council. When the other tiers of government have not followed the requirements of local government in NSW, currently, the Councils believe that they cannot piggyback.

The reality is that piggy backing has its risks, as the 'best practice' arrangements put in place for the Commonwealth and State Government may not translate well for the requirements of local government.

Thus, we suggest that prescribed entities (such as LGP) be allowed to review those arrangements and adopt it for the needs of NSW Local Government on a holistic basis when collaborating with these entities, where it is necessary to manage risk.

For example, the NSW State Government has a waste management contract; however, the State Government spends \$50m in mostly corporate based waste. Councils manage \$2B of spend in waste, which is primarily residential waste and is a critical part of Council operations. Requirements from the State Government waste contract will not translate well for the Council; however, aspects around corporate waste could be very beneficial to



Councils. In this case, a prescribed entity (such as LGP) could look into requirements for Councils, pick up 'best practice' arrangements from State and Commonwealth arrangements and build it into a holistic waste management arrangement that is fit for purpose for Councils.

### 8.3 Guidance on leveraging Commonwealth and State pre-qualification schemes

Currently, the guidelines are silent on pre-qualification schemes from Commonwealth and State Government. Although we understand that the Regulations allow for the use of Schemes, it can be argued that the schemes are not setup to be in the open market for 21 days; there is no open or closing date for a tender. Thus, it does not comply with the requirements of local government. As a result, due to the risk, many Councils refrain from using schemes.

The reality is that for most schemes, there is only two checks: (1) is the ABN registered? (2) There are basic checks around reference (eg: are they provided?). Suppliers are mostly "trusted" to have the capability in the areas that they nominate.

Many Councils trust the due diligence on suppliers would be comparable to the due diligence on the currently compliant panel contracts for local government (eg: LGP contracts).

In this scenario, a prescribed entity (such as LGP) could leverage information and supplier from pre-qualification schemes, investigate requirements for Councils, and build additional diligence expected on the suppliers, offering Councils arrangements that are fit for purpose for Councils. This could reduce risks for Councils and provide them the benefits of these schemes.

### 8.4 Guidance on dealing with aggressive grant deadlines

Councils are highly dependent on grants from the State and Commonwealth Government. However, the majority of the grants' conditions fail to allow enough time for Councils to run tender processes and obtain market bids. Although offered, it becomes exceedingly difficult for Councils to use those grants due to the requirements of the Regulation and the guidelines.

Thus, some advice in the guideline on dealing with State and Commonwealth grants when they fail to provide sufficient time would greatly assist Councils.



## 9.0 Prescribed Entities

### 9.1 Standardise governance requirements for prescribed entities

LGP has been operating as a prescribed entity for the last 17 years, and has been servicing Councils, ROCs and JOs over this time. During this time, there have been some issues around the guidelines and Regulation that are pertinent to the prescribed entities.

Currently, there are 2 prescribed entities that can operate in NSW: Procurement Australia and Local Government Procurement (LGP).

On the Procurement Australia website, it states that: “*Procurement Australia operates under the Commonwealth Government’s accountability and governance frameworks.*” (<https://paltd.com.au/solutions/public-infrastructure/>)

On the other hand, LGP complies with the NSW Office of Local Government, “*Tendering Guidelines for New South Wales Local Government.*”

So, it appears that the two entities operate under differing governance requirements. Our understanding is that the New South Wales requirements are significantly stricter.

Thus, to allow prescribed entities to provide a similar service, it is proposed that prescribed entities such as Procurement Australia, Local Government Procurement and any other local government prescribed entities operate under common governance and process requirement.

### 9.2 Protocol for changes to procurement process documentation

Currently, any changes to procurement process documentation for prescribed entities under s55 of Local Government Act require an OLG review and approval. This takes a lot of time and effort, which delays innovation and realisation of benefits for Councils.

We suggest that prescribed entities should be permitted to amend and adapt procurement process documents to meet the ever-changing commercial practices of the free market, as and when required without needing pre-approval of the OLG.

Allowing prescribed entities to update process documentation whenever required would keep processes efficient and agile. Revised documents could be submitted to OLG annually, as a part of its annual review process.

### 9.3 Allow establishment of contractor panels for selected Councils

Currently, it is expected that a prescribed entity needs to establish a contract for all Councils all the time. However, from time to time, we find unique needs in a region that requires a unique contract.



Thus, we propose that a prescribed entity is allowed to establish contracts for anyone, or a number of Councils in New South Wales without the Council/s having to formally delegate per s377.

This amendment is proposed to enable a prescribed entity to offer a more tailored service to Councils, ROCs and JOs. This can be especially true when:

- Not all tenderers can supply to or carry out work, in all regions of NSW;
- Not all NSW Councils have common needs;
- There is the necessity for a council to formally delegate to a prescribed entity is sensible as an operational matter within the General Manager's role.
- Councils need external expertise to obtain a procurement outcome without having the budget available to pay for expensive external consultants

#### 9.4 Allow prescribed entity to re-appoint performing contractors to a panel in a tender process

The current guidelines require prescribed entities to run a full tender process when refreshing tender panels. This is highly resource intensive, and unnecessary when the tender refresh would only add additional panel members (especially new local entrants in the market). Many times performing panel members also apply and need to be evaluated.

Some panels may only warrant reviewing evidence of appropriate licences, sound financial situation and referees, with market pricing to be determined by final Council specification later.

In summary we recommend that for certain tasks, such as adding new panel suppliers, the requirement to run a full tender process for all panel members is made more flexible.

#### 9.5 Allow prescribed entity to access State and Commonwealth Government resources offered to Councils

There are many resources available to Councils from the NSW State Government and Commonwealth Government; however, the Councils who require it the most (typically smaller rural and regional Councils) are not able to benefit from it as they don't have the capacity or capability in their resources to access those resources and deploy them for their Council's needs.

As a prescribed entity, LGP has tried to access these resources to help package them for Councils and tailor them to the needs of Councils. However, in most cases, both the Commonwealth and the State Government don't provide access as LGP is not a State or a Commonwealth agency or a Council, even though LGP operates for the benefit of Councils.

We believe that prescribed entities should be able to access these resources for the benefit of Councils, and the guidelines/regulation could add some guidance to facilitate this process.





## 10.0 Further Guidance on the Regulation

### 10.1 Provide a process for getting legal advice from OLG

Currently, there is a lot of ambiguity in the current Regulation, making it very open to interpretation. Some Councils take a broad interpretation that may increase risk, while most Councils take a risk averse interpretation that limits opportunities. Many times, Councils seek legal advice on the interpretation of the Regulation; this has created a parallel economy for legal services.

If there was a way of obtaining clear and consistent guidance on the interpretation of the Regulation from OLG quickly and efficiently, it could allow Councils to properly balance compliance and risk while achieving procurement outcomes.

### 10.2 Further guidance on requirements of publishing all commercial bids

There is a requirement in the Regulation for Councils to publish the “price that appears to be tendered.” While we understand the intent of this requirement, its application causes confusion.

There are many cases where a panel is being implemented or simply a set of rate cards are requested for ongoing ad-hoc services, or even an innovative solution is requested. In these cases, publishing a rate card may not make sense as it would be dependent on the scope of goods and services which could be very fluid from one supplier to another. In these cases, it is sometimes very hard to determine the “price that appears to be tendered” without considering the whole bid.

Thus, we suggest the guidelines provide clarification on what needs to be disclosed at the time of opening of a tender if the tender was for a schedule of rates or it is not possible to determine the “price that appears to be tendered.”

### 10.3 Further guidance on definitions of key terms

There are many terms in the Regulation that creates confusion and ambiguity. We suggest that the guidance documents provide additional commentary on these terms to reduce confusion.

Some of these terms include (but are not limited to):

- Extenuating circumstances or emergency cases (where no tender is required)
- Expression of Interest
- Instalment contact
- Public Authority (Council only or State/Commonwealth agencies?)
- 21 days (calendar or business days)
- Variation (how can a Council determine what is a “substantial change” to the original tender?)
- Council (Council Staff or Elected Council)
- “Tender accepted” vs “contract formed”



Due to the above, there is also confusion around who needs to abide by the guidelines. While it's clear that Councils need to abide by the guidelines, it is not clear to what extent supporting entities such as Regional Organisation of Councils (ROCs), Joint Organisations (JOs) and even prescribed entities need to abide by these guidelines.

## 11.0 About LGP

Local Government Procurement (LGP), established in 2006, is a not-for-profit organisation focused on providing services and expertise to support and improve procurement capability and efficiencies for the local government sector.

Our practical knowledge has come from the diverse industries and projects we've worked with to drive ongoing progress of local government communities. We do this through targeted contracts, training and consulting, guiding local government towards sustainable and high-value procurement solutions.

Our customers include all NSW Councils, ACT Government, Regional Organisation of Councils (ROCs), Joint Organisations (JOs), non-NSW Councils, not-for-profit organisations, universities, State government agencies and departments.

LGP's purpose and vision are;

- Our purpose is to create and drive value for local communities.
- Our vision is to be an innovative leader, expert and champion delivering high-value procurement solutions, education, and consulting services.

We are happy to share our 17 years of experience and expertise in the local government sector to support OLG in this review of guidelines and subsequent review of Regulation. Our unique experience and expertise will help build a best practice framework that enables optimal procurement outcomes for the local government sector.