



Review of Tendering Regulation
Office of Local Government
Council Governance Team

By email: olg@olg.nsw.gov.au

Submission to Review of Tendering Regulation

Dear Sir/Madam

Thank you for the opportunity to make a submission to the Office of Local Government's *Local Government Tendering Regulation Review* which examines the tendering provisions of the Local Government (General) Regulation 2005 (the Regulation).

The NSW Small Business Commissioner (the Commission) is an independent statutory office of the NSW Government. It provides strategic advice, advocacy and affordable dispute resolution services across NSW.

The Commission's role includes:

- encouraging government agencies and larger businesses to enter productive working relationships with small businesses
- facilitating and encouraging the fair treatment of small businesses
- promoting a fair operating environment in which small businesses can flourish.

Local communities and economies can benefit when local small businesses tender for and win local council business. More competitive tenders also can provide benefits to councils through savings resulting from more competitive tenders.

The Commission supports each of the proposed changes to the Regulation. Specific feedback is provided in the Submission Form enclosed at **Attachment A**.

Feedback from recent tendering consultation

The Commission recently undertook a survey to obtain feedback on small business experiences when supplying to government. Findings from this survey may offer insights on how councils, and associated regulatory frameworks, can improve the experiences of small businesses. Feedback relevant to improving small business experiences included:

- **Finding opportunities:** Many small businesses had difficulty finding opportunities to tender and knowing how to tender when they do.
- **Pre-qualification:** Some pre-qualification/supplier list registration processes and requirements can be onerous, costly, time consuming, and in some cases, unreasonable or unnecessary. For example, requiring particular types of insurance or insurance levels just to be on a supplier list can impose material costs for small business in circumstances where pre-qualification does not guarantee work.

- **Complex tender processes:** Some tender processes can be complicated and time consuming. In some cases businesses indicated information had to be provided multiple times (for example when it was already provided when registering on supplier lists or pre-qualification schemes).
- **Contracts:** In many cases, standard contracts are too long and complex for small businesses and have unfair/problematic clauses. It would provide economic benefits and efficiency savings to councils and small businesses if standard local Government tendering contract templates were developed and adopted for key procurement types up to \$1 million, which are short form, in plain English and easy to understand.
- **Council insurer requirements:** Some councils' insurers insist on particular and potentially unfair warranty clauses in council procurement contracts that transfer risk inappropriately onto small business suppliers. Such clauses can also void the small business' insurance cover or leave them uncovered/exposed for the particular contract. Some small businesses are reluctant to take on opportunities due to these insurance issues. Others sign contracts either unaware of these issues or hoping nothing goes wrong.
- **Insurance requirements as a condition of supply:** In some tenders, insurance requirements are excessive compared to the value of the work to be undertaken and the associated risk, or unnecessary types of insurance cover are required. Adopting a risk-based approach rather than stipulating high or maximum levels will assist small businesses.
- **Feedback:** Businesses value feedback to inform future decisions and tenders. A formal mechanism requiring feedback to be provided to all tenderers is important. It increases tender transparency and assists tenderers in knowing areas they can enhance for any future opportunities.
- **Faster payments:** Many small businesses are cash flow poor. Having streamlined invoicing processes, a central point for lodging invoices and paying correctly rendered invoices within a short time can greatly assist.

Additional resources

The Office of Local Government may also be interested in the following resources prepared by the Commission to assist councils and small businesses in relation to tendering:

- **Local Procurement Toolkit:** for Councils provides a range of resources, guides and templates to assist councils to do more work with their local small businesses: www.smallbusiness.nsw.gov.au/resources/local-procurement-toolkit
- **Doing Business with your local Council: A guide for small business owners** www.smallbusiness.nsw.gov.au/resources/doing-business-local-councils
- **Selling to the NSW Government: A Guide for Small Business** www.smallbusiness.nsw.gov.au/resources/selling-nsw-government-guide-small-business-august-2021
- **Free TAFE online learning modules on Selling to NSW Government:** www.smallbusiness.nsw.gov.au/small-business-guide-selling-to-nsw-government



Small
Business
Commissioner

Thank you again for the opportunity to make a submission. If you require further information, please contact Megan Bennett at either megan.bennett@smallbusiness.nsw.gov.au or (02) 9372 8767.

Yours sincerely

Chris Lamont
Commissioner
NSW Small Business Commission
20 October 2021

Attachment A: Submission Form

SUBMISSION FORM

Please use this form if sending by email or post. Submissions can also be made online.

Please select all organisations relevant to you. This assists in determining if there are suggestions or concerns common to a particular sector or local government area.

ORGANISATION	PLEASE TICK ALL APPLICABLE
Council - Metropolitan	
Council - Metropolitan Fringe	
Council - Regional	
Council - Rural	
Council - Large Rural	
Council employee	
Councillor	
Business / Contractor to council	
Member of public	
Other – please specify	<input checked="" type="checkbox"/> NSW Small Business Commissioner

Response to identified areas

1: Do you support the following amendments to remove barriers to the use of electronic technology in tendering and to improve efficiency?	
Q1.1	Definitions
Proposed amendment	Include definition of “document” in clause 164 that includes information provided by electronic means.
Effect of amendment	Clarifies that tender documents can be provided and submitted in an electronic form as well as a physical form.
Your response	Support
Q1.2	Definitions
Proposed amendment	Amend definition of “formal tender document” to make it clear that formal tender documents may be provided and submitted in an electronic form.
Effect of amendment	Clarifies that formal tender documents can be provided and submitted in an electronic form as well as a physical form.
Your response	Support
Q1.3	Removal of references to redundant technology
Proposed amendment	Remove references to “facsimile transmissions” from clauses 173, 174 and 177
Effect of amendments	Allows tenders to be submitted in either physical or electronic form, without being prescriptive of the technology used.
Your response	Support
Q1.4	cl. 167 – 169 Advertising of tenders
Proposed amendment	Provide that advertisements must specify the method by which applications (in the case of selective tendering) and tenders are to be submitted (ie by electronic or physical means or both).

Effect of amendment	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Your response	Support
Q1.5	cl. 168 – 169 Selective tendering
Proposed amendment	Provide that when inviting tenders using selective tendering, the invitation must specify the method by which tenders are to be submitted (ie by electronic or physical means or both).
Effect of amendment	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Your response	Support
Q1.6	cl 170 Tender documents
Proposed amendment	Provide that tender documents must specify the method by which tenders are to be submitted (ie by electronic or physical means or both).
Effect of amendment	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Your response	Support
Q.1.7	cl.173 Submission of tenders
Proposed amendment	Provide that tender documents must be submitted using the method specified in the advertisement (or invitation in the case of selective tendering) and tender documents (ie by electronic or physical means or both).
Effect of amendments	Allows councils the flexibility to determine how tenders are to be submitted (ie by electronic or physical means or both).
Your response	Support Comment: some small business operators are not computer literate. There are also some parts of the NSW with connectivity challenges. Consideration should be given when determining if a tender is to be solely via electronic means, particularly for low value tenders, as to whether this will preclude some potentially competitive local suppliers from tendering for the opportunity. The opportunity to submit by both physical and electronic means should be considered in such cases.
Q.1.8	cl.173(2) Submission of tenders
Proposed amendment	Delete subclause (2)(a) which limits the submission of tenders by electronic means to circumstances authorised by guidelines issued under section 23A. It is proposed to retain subclause (2)(b) which requires submissions of tenders by electronic means to be effected by a secure mechanism (such as an encryption-based technology) that ensures they cannot subsequently be altered.
Effect of amendment	Removes impediments to tenders being submitted by electronic means while retaining the requirement for information provided in tender documents to be stored securely.
Your response	Support
Q1.9	cl. 174(1) – (2) Custody of physical tenders after receipt
Proposed amendment	Clarify that clause 174 does not apply where a council has specified that tenders are to be submitted by electronic means only.
Effect of amendment	Requires tenders to be kept in a tender box only where a council has specified that they may be submitted in a physical form. Where tenders are submitted electronically, they are to be securely stored electronically (see below).
Your response	Support
Q1.10	cl. 174(3) Custody of tenders submitted by electronic means after receipt

Proposed amendment	Make clause 174(3) a standalone provision that will apply to the custody of tenders received by electronic means.
Effect of amendment	This is consequential to the amendment proposed under Q1.9. It will allow councils not to use a tender box in circumstances where they have specified that tenders are to be submitted by electronic means only.
Your response	Support
Q1.11	cl.175(1) – (2) Opening of tenders
Proposed amendment	Clarify that clause 175(1) – (2) does not apply where a council has specified that tenders are to be submitted by electronic means only.
Effect of amendment	This will mean that councils are not required to formally open tenders in the presence of the public where they specify that tenders are to be received by electronic means only. The requirement for tenders to be opened in the presence of the public operates as an important probity safeguard for tenders that have been posted in or physically deposited in the tender box. Where tenders are submitted in an electronic form, they are more readily auditable, and this safeguard serves no real purpose.
Your response	Support Comment: It needs to be ensured that suitable comparable governance protections are in place in respect to tenders submitted via electronic means only, to ensure that all tenders are received and considered and that there is transparency.
Q1.12	cl.175(1) Opening of tenders
Proposed amendment	Allow persons to attend the opening of tenders in person or online via audio-visual link.
Effect of amendment	Enhances transparency and accessibility by allowing interested person to attend the opening of tenders in person or online via audio-visual link.
Your response	Support
Q1.13	cl.175(3) – (4) Opening of tenders
Proposed amendment	Make subclauses (3) and (4) of clause 175 a separate clause and amend subclause (4) to require the tender list to be published on the council's website
Effect of amendment	This is consequential to the amendment proposed under Q1.12. It will ensure that the requirement to prepare a tender list will apply to all tenders regardless of how they are received and enhance transparency and accessibility of information published in the tender list by requiring it to be published on the council's website.
Your response	Support
Q1.14	cl. 177 Consideration of tenders
Proposed amendment	Amend clause 177(2) to provide that a council must not consider a tender that is not submitted to the council using the method specified in the advertisement (or invitation in the case of selective tendering) and tender documents (ie by electronic or physical means or both) by the deadline for the closing of tenders. This will be subject to subclauses (3) – (5).
Effect of amendment	This is consequential to other proposed amendments and will allow councils enforce the use of the method of submitting tenders specified in advertisements, invitations, and tender documents. Subclause (3) – (5) will continue to apply.
Your response	Support

Q1.15	cl. 179 Notification of acceptance of successful tender
Proposed amendment	Amend clause 179 to require councils to publish a notice specifying the name of the tenderer whose tender was accepted and the amount of the successful tender or a notice that none of the tenders was accepted on the council's website.
Effect of amendment	Ensure greater transparency and accountability for decisions in relation to tendering by requiring information about the acceptance of tenders to be published on the council's website.
Your response	Support

2: Do you support amendments to allow councils to delegate decisions not to accept tenders other than in the circumstances contemplated under clause 178(3)(e)?

Q2.1	cl. 178 Acceptance of tenders
Proposed amendment	Amend clause 178(3) to remove the requirement for decisions referred to in that clause to be made by resolution. Decisions not to accept tenders and to enter into negotiations will continue to be made by a resolution of the council that also states the council's reasons for declining to invite fresh tenders or applications and the council's reasons for determining to enter into negotiations.
Effect of amendment	Decisions referred to under clause 178(3) other than to reject all tenders and to enter into negotiations may be made under delegation where a council makes such delegations.
Your response	Support