



**TENDERING PROCESS
IN NSW LOCAL
GOVERNMENT**

**CHALLENGES OF
INNOVATIVE PROJECTS
AND/OR PREFERENTIAL
TREATMENT UNDER THE
TENDERING PROCESS IN
NSW LOCAL GOVERNMENT**

Modern commerce and modern communities expect innovation from government, but it must come with sound governance. Current local government tendering legislation supports sound governance but hampers innovation.

Contents

Executive summary	4
Introduction	6
Importance of this white paper	7
Innovative projects, preferential treatment and appropriate process	7
Structure of Tendering in NSW Local Government	8
Challenges from a stakeholder perspective	10
Comparison with NSW State and Commonwealth Processes	13
Competition	15
Methodologies	15
Strategic outcomes	17
Indigenous engagement	17
Small & Medium Enterprises (SMEs) and regional procurement	18
Unsolicited proposals	20
Observations on comparison of NSW and Commonwealth Processes	21
Ability to rely on alternate procurement process	21
Comparison with other States	21
Probity and governance issues	25
General discussion	26
Options	28
Conclusion	28
Recommendations of the panel	28
General recommendations	28
Innovative projects recommendations	30
Unsolicited bid recommendations	30
Social procurement recommendations	30
References	32
Legislation	32
List of Appendices	33
Appendix 1: Definitions - Swiss Challenge and Bid Premium process	33

Executive summary

In New South Wales, local government tendering faces a significant challenge: while current legislation prioritises strict governance, it concurrently inhibits **potential new sources of ratepayer ‘value for money’** increasingly offered via innovative solutions and/or unsolicited proposals.

Process efficiency and effectiveness could be significantly improved by:

- updated legislation and guidance documents;
- standardised approaches and best practice;
- effective consideration of innovative ideas.

Innovative projects bring new processes, materials, goods or services not previously available. But innovative solutions – often submitted via unsolicited proposals or non-conforming tenders – create challenges for fair assessment.

A review of Commonwealth and various State Government **approaches to unsolicited proposals** recognises the need for assessment: firstly, to confirm uniqueness of the proposal; and secondly, to provide opportunities for further consideration or selectively market.

Then **negotiation of contract conditions** needs appropriate probity and governance standards, plus clear delineation of roles and responsibilities for proponents, evaluators and officials.

Whilst **intellectual property** needs to be respected, proponents: must accept the counter need to disclose information publicly; and also accept specific conditions of participation in the process – so all parties are fully informed about risks and potential costs.

Establishing a local government sector peer group to form a **steering committee to advise on procurement direction** could provide both a review forum for procurement policies and high-level advice to councils on the evaluation process.

Our **key recommendations** include:

- the NSW Auditor General’s report (December 2020) into a review of 6 councils’ procurement practices be adopted;
- the current *Local Government (General) Regulation* be simplified and principles-based guidelines adopted – parallel, or similar to, those of the NSW Government;
- representatives from council governance/audit, finance and procurement staff be included in every tender evaluation panel;
- a process of accreditation for a ‘council procurement function’ be adopted, similar to that developed in New South Wales Government – setting a best practice standard.

Innovative project guidelines should establish advice on:

- proposals that cannot be accurately costed and/or may need to go through a developmental stage;
- processes for proof of concept, multi-stage tender, alliance partnership arrangements and intellectual property.

Unsolicited bids be allowed, provided:

- a formal process is established prior to evaluation;
- guidelines establish advice on: governance, suitable panels, criteria, disclosure to the market and intellectual property.

Social procurement preferences be allowed, provided:

- they are in accordance with a formal policy approved by Council in a public forum and prior to request for tender;
- guidelines establish advice on: social procurement definition, qualitative assessment criteria, preferential conditions, mandatory insurance, process integrity, Indigenous non-price evaluation criterion and disaggregation to encourage small and medium enterprises (SMEs).

Introduction

This white paper seeks to encourage open discussion and feedback on requirements for local government tendering in New South Wales – with the aim of **influencing positive change**. It will be of interest to many in the commercial markets, whether suppliers of materials, goods and services, professional consultants and advisers, public servants, members of Parliament or procurement practitioners.

This paper evolved from the work of an independent working party of local government procurement professionals in 2020. It convened initially to recommend changes to the drafting of tendering provisions within the New South Wales *Local Government Act 1993*¹, *Local Government (General) Regulation 2005*² and the *Tendering Guidelines for New South Wales Local Government 2009*³. This resulted in specific recommendations submitted to the New South Wales Office of Local Government (OLG). This new discussion represents a separate and more detailed input to the tendering process.

Members of the working party are:

- Lana Axford – Supply Coordinator
- Nicole Greenwood – Senior Coordinator Sustainable Resources, Blacktown City Council
- Jacqueline Hiddlestone – IT Innovation Program Manager, Canterbury Bankstown Council
- Emma Murray – CRG Chair/Director Corporate Services, Local Government Procurement
- Lachlan Reedman – Contracts Manager
- Ben Rodwell – Senior Coordinator Procurement & Contracts
- Phill Scott – Chief Procurement Officer, Local Government Procurement
- Matthew Sykes – Chief Financial Officer, Nambucca Valley Council
- Kristie Ward – Manager Procurement & Fleet, Mid-Western Regional Council

¹ *Local Government Act 1993* <<https://legislation.nsw.gov.au/view/html/inforce/current/act-1993-030#sec.1>>.

² *Local Government (General) Regulation 2005* <<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0487>>.

³ Office of Local Government, *Tendering Guidelines for NSW Local Government*, <<https://www.olg.nsw.gov.au/wp-content/uploads/Tendering-Guidelines-for-NSW-Local-Government-2009.pdf>>.

This white paper is supported by:



Importance of this white paper

Procurement legislation and processes vary across three tiers of government in Australia. Within New South Wales, the State Government determines tendering requirements for public servants and those within local government. Whilst both tiers are required to follow similar principles, practices can be quite different e.g.: negotiation of tenders and consideration of unsolicited proposals. The **different approaches lead to anomalies**, particularly when State wishes to establish supply arrangements for itself as well as local government. It also leads to frustration from tenderers required to use differing software and respond to varying formats of tender requirement.

Of prime importance is the need for council ratepayers to see **value for money from tender processes**. The balance of outcome vs governance is paramount; but process efficiency and effectiveness could be significantly improved by updated legislation and guidance documents. Standardised approaches and best practice are important matters needing consideration and discussion to achieve appropriate outcomes for efforts. Processes that are themselves innovative or allow effective consideration of innovative ideas will be valuable to the sector.

Innovative projects, preferential treatment and appropriate process

To innovate is defined as “to bring in something new” or “make changes in anything established”.⁴ Innovation brings new processes, materials, goods or services not previously available. Innovative solutions are regularly submitted by market players, often via an unsolicited proposal or non-conforming tender; this creates **challenges for both fair assessment** and procedural fairness to other tenderers. Definitions for an unsolicited proposal vary but have some commonality.

“An **Unsolicited Proposal** is an approach to Government from a Proponent with a proposal to deal directly with the Government over a commercial proposition, where the Government has not requested the proposal. This may include proposals to build and/or finance infrastructure, provide goods or services, or undertake a major commercial transaction.”⁵

“An unsolicited proposal is a unique or innovative method, concept, approach or idea submitted to a public authority from a private entity (either for profit or not-for-profit), not in response to a formal request and not readily available in the marketplace. An

⁴ Macquarie Concise Dictionary

⁵ NSW Government, *Unsolicited Proposals Guide for Submission and Assessment*, <https://www.nsw.gov.au/sites/default/files/2020-05/Unsolicited_Proposals_Guide.pdf>.

unsolicited proposal is not a market approach as such, but is an alternative sourcing strategy to a market approach.

“An unsolicited proposal is submitted without formally being requested by the government. The nature of the proposal can address a wide range of areas including the procurement of goods and services.”⁶

Similarly, the Western Australian Government describes an unsolicited proposal as one from the private sector to government to:⁷

- build and/or finance infrastructure;
- provide goods or services;
- purchase a government owned asset;
- where government has not requested the proposal.

Preferential treatment of a party is most commonly inferred in the case of social procurement and when preference is a policy direction e.g. dealing with Indigenous businesses, small business and regional or local business. The Western Australian Government brings the latter together under social procurement, defined as encompassing “All social, economic and environmental benefits enabled through government procurement that lead to the achievement of the identified Community Outcomes.”⁸ Interestingly government makes the comment “Officers do not need to define exactly how they expect suppliers to achieve the desired Community Outcome. Officers may achieve the best outcome by allowing respondents to propose a solution enabling innovative and alternative offers.”⁹

The working group did not set out to make uniquely innovative recommendations. Rather, the recommendations were always to be a series of proposals to update legislated process, policy or guidance documents while mindful of **efficiency, effectiveness and good governance**.

Structure of Tendering in NSW Local Government

In New South Wales “The Office of Local Government is the NSW Government agency responsible for strengthening the sustainability, performance, integrity, transparency and accountability of the local government sector”.

The OLG has a policy, legislative, investigative and program focus in regulating the State’s 128 local councils. The agency works collaboratively to support councils to deliver for their local communities. OLG, part of the Department of Planning, Industry

⁶ Government of South Australia, Unsolicited Proposals Schedule, <https://www.treasury.sa.gov.au/__data/assets/pdf_file/0006/36816/Guidelines-for-Assessment-of-Unsolicited-Proposals-September-2018.pdf>.

⁷ Government of Western Australia, *Market-led Proposals Policy*, <<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Policy-January-2020.pdf>>.

⁸ Government of Western Australia, *The Western Australian Social Procurement Framework*, <<https://www.wa.gov.au/sites/default/files/2021-06/Social%20Procurement%20Framework%202020--16-6-21.pdf>>.

⁹ Ibid, p8.

and Environment, is the key adviser to the NSW Government on local government matters.¹⁰

The relevant legislative environment includes the *Local Government Act 1993* (predominantly Section 55 Tendering)¹¹, the *Local Government (General) Regulation 2005*¹² and the *Tendering Guidelines for NSW Local Government* (NSW Dept of Premier and Cabinet, Division of Local Government Oct 2009).¹³ The legislation is enacted by the Parliament of New South Wales.

A very simplistic overview of **key tendering requirements** is:

- A council must seek tenders for any contract exceeding \$250,000 (excluding GST).
- Alternate \$ milestones apply in limited circumstances.
- Exemptions to tendering apply if a council is using certain NSW State Government (NSW Supply) arrangements or those established by a prescribed agency (Local Government Procurement Partnership or MAPS Group Ltd trading as Procurement Australia).
- Tenders must be advertised for a minimum 21 days.
- Tenders may be requested via an open process or selective process (if preceded by an expression of interest).
- Tenders must be lodged in a tender box or by facsimile.
- Late tenders may be considered only in limited circumstances and the tenderer satisfying certain requirements.
- The evaluation of tenders is a staff function.
- The acceptance of tenders falls to the councillors, as the governing body of the corporation (a council is a body politic).
- Clarification of a tender may take place during evaluation.
- Negotiation can take place, but only after rejection of all tenders.
- Occasional sentences referring to the use of innovation or innovative proposals appear in the tendering guidelines, but there is no section elaborating policy on this area.
- Local Preference Policy and Aboriginal Employment Participation are specifically referred to in the tendering guidelines.
- Joint purchasing arrangements (meaning with other councils or via voluntary regional organisation (ROC) or Joint Organisation (JO)) are permitted.

Each council tends to operate independently. However **regional inter-action** may take place through ROCs and JOs at councillor level and in professional groups (at staff level, often associated through a ROC). Southern Sydney and Western Sydney Regional Organisations of Councils both established active procurement professional

¹⁰ Office of Local Government, <<https://www.olg.nsw.gov.au/>>.

¹¹ *Local Government Act 1993*, s 55, <<https://legislation.nsw.gov.au/view/html/inforce/current/act-1993-030#sec.1>>.

¹² *Local Government (General) Regulation 2005* <<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0487>>.

¹³ Office of Local Government, *Tendering Guidelines for NSW Local Government*, <<https://www.olg.nsw.gov.au/wp-content/uploads/Tendering-Guidelines-for-NSW-Local-Government-2009.pdf>>.

groups in the early 1990s which have continued to joint tender. Other ROCs have followed. The establishment of ROCs was independent of government and so the legal structure of the ROCs varies; some are limited companies and others simply associations. JOs on the other hand, were established by government along the lines of a county council.

The representative body of councils is Local Government New South Wales (LGNSW). LGNSW provides advocacy, representation and support and helps member councils deliver improved services and better outcomes to their local communities. Its Board is elected from councillors in the member councils. It is not prescribed in any legislation.

Challenges from a stakeholder perspective

In its simplest term, “innovation” is using new or novel ideas and approaches to solve existing problems. Innovation also means being creative. Often when seeking innovation, the buyer doesn’t specifically know what they are seeking. Proof of concept might be difficult to achieve and legislated process may be restrictive.

Innovative projects are increasingly common as technology advances. The table below describes how these projects might arise, with examples.

- ‘General’: how a project may come to council attention.
- ‘Processes’: procedural matters that will either assist achieving an innovative outcome or may be innovative in their own right.
- ‘Specific’: types of project that might be proposed.

General – how a project might come to notice

Unsolicited proposals

Alternate tender proposals

Design competitions (architecture, sculpture & artwork)

Projects described by use of a functional specification rather than a technical or performance specification e.g. a concept design

A Request for Information is made to market as a result of a need to solve a problem e.g. reduce costs, improve customer services, increase process efficiency

Processes – of an innovative nature

Staged tendering (the specification or statement of work evolves further with each stage)

Processes requiring negotiation (either anticipated prior to approaching market or as a result of approaching market)

Processes needing collaboration/partnering between various parties to make the project work e.g. electric vehicle charging stations across NSW

Processes involving reverse auctions

Specific – examples of innovative projects or services

Innovative construction solutions – these projects often need proof of concept

Specific – examples of innovative projects or services

Energy services – electricity and gas supply agreements, e.g. Power Purchase Agreements (PPAs), solar panel installations, projects to reduce energy consumption or energy bills (e.g. upgrading or replacement of lighting and fittings)

Electric and hydrogen vehicles and related infrastructure

Smart cities projects

Wireless traffic sensing

Connected and autonomous vehicles

Intelligent traffic management, traffic light coordination

Pedestrian management

Mobile apps e.g. for parking, passengers and transport operators

Software design

Artificial intelligence

Predictive analytics

Transport modelling

HVAC as a service

Lighting as a service

In considering innovative projects, some **common procedural challenges** arise for councils. They include:

- **Setting a budget or project estimate:** dealing with something yet to be technically specified or scoped and with few known comparisons is difficult to cost.
- **No planned budget:** unsolicited proposals may be in the community interest but also need council funding.
- **Intellectual property:** how to treat the owner fairly whilst ensuring appropriate opportunity for competitive bids.
- **Tender time frames:** what is appropriate given the market situation (Significant projects need time for design of proposals; staged processes seeking responses can be time consuming).
- **Negotiations:** unsolicited proposals invariably include the originator's proposed terms of contract. There will be considerable distance between them and preferred wording and risk position for a Council.
- **Probity and governance:** how to maintain a process that gives confidence to the public, to proponents and auditors, yet still remains practical and efficient.
- **Proof of concept:** innovative projects usually have little or no evidence of prior success. Evaluation via a staged approach may still incur considerable cost without success.
- **Assessment criteria:** valid or informative criteria may be difficult to establish at an early evaluation stage and may need to change as the project is better defined.
- **Pricing/Financial offer:** how to ensure confidence that the offer is reasonable when there is no history nor comparison with similar projects.
- **Outcomes:** achieving an outcome judged fair and reasonable for all stakeholders.

- **Contract variations:** inevitably variations will be required and allocation of associated risk at time of contract establishment may be contentious; agreement upon cost of actual variations may be problematic.

Tiers of government which have developed policy for considering innovative proposals have usually also specified likely exclusions for consideration. For instance, the Western Australian Government in *Market-led Proposals - Supplementary Guidelines* indicates the following types of proposals are unlikely to progress: ¹⁴

- Proposals for **significant extensions/variations** to existing contracts/leases, or the next stage of a staged project on the basis the contractor is already “on-site” but cannot demonstrate an unassailable advantage.
- Proposals seeking to **develop land that is not owned by government or the proponent.**
- Proposals **inconsistent with existing laws** (for example, proposals over land which is an A class reserve).
- Proposals that **do not contain a commercial proposition** for government.
- Proposals that identify the **proponent’s skills or workforce capability as the only justification** for direct negotiation.
- A proponent with personnel **holding superior expertise or experience** in a particular field is not sufficient for the Government to justify bypassing an open tender, unless the claimed skills cannot be procured elsewhere in the market.
- Proposals to provide **widely available goods or services** to government.
- Proposals **seeking only to change government policy** where there is no associated project.
- Proposals for **projects where the tender process has formally commenced**, whether published or not.
- Proposals that **lack structure** and sufficient supporting evidence.
- Proposals **seeking to stop or suspend another government process** (for example, compulsory acquisition).
- Proposals **seeking an exclusive mandate, or exclusive rights** over a government asset, for a period of time so the proponent can develop a feasibility study.

Implementing a policy of preferential treatment – whether for one project or as a matter of standard policy – also presents challenges. Common areas singled out for preferential treatment are shown in the table below.

Areas accorded preferential treatment
Indigenous business activities
Disability enterprises/social procurement sector activities
Small and medium size enterprises (SMEs)
Regional business (local preference)

¹⁴ Government of Western Australia, *Market-led Proposals Supplementary Guidelines*, <<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Supplementary-Guidelines-January-2020.pdf>>.

Whilst the Commonwealth and NSW State Governments have committed to various forms of support for these areas, there is no such obligation on NSW Local Government. In fact, Australia's international free trade agreements (FTAs) present no explicit obligation on local government.

When engaging in **preferential treatment**, some common challenges arise for councils. They include:

- **Fairness:** to individuals, corporates and industries.
- **Preference levels:** determining appropriate levels.
- **Conflicts of interest:** particularly when preferencing regional business.
- **Omission:** intentional or inadvertent omission of certain parties.
- **Restrictive trade practices:** aggrieved parties may challenge a process.
- **Establishing benefit:** calculation of true \$ value (savings or costs), community, region or industry benefit.

Comparison with NSW State and Commonwealth Processes

Each tier of government has chosen to prepare procurement related policies, procedures, and guidelines in an independent fashion and at different times. Consequently, the level of information on any topic varies considerably.

The table on the following page provides a glimpse of topics relevant to this white paper and a comparison of New South Wales Government documents versus those of the Commonwealth. Of particular relevance to the working party are approaches allowed under each key topic. The text following the table summarises the approach of Commonwealth, New South Wales Government and then New South Wales Local Government.

Comparison of related policies & guidelines references

Topic	Commonwealth Procurement Rules (CPRs) Last update December 2020	NSW Govt buy.nsw Regularly updated	NSW Local Govt Tendering Guidelines Last update October 2009
Competition	Div 1 s4 Value for Money; Div 1 s5 Encouraging Competition	buy.nsw website guidance - Fair & open competition	s1.5 Value for Money; s3.9 Communications with Tenderers
Methodologies	Div 1 s9 Procurement Method; Div 2 s10 Conditions for Limited Tender; Appendix A Exemptions	buy.nsw website - Market approaches guide	S2.6 Joint Purchasing Arrangements; s3.3.3 Types of Specifications (alternate & innovative solutions); s3.5 Selecting the Tendering Method; s3.4 Developing the Evaluation Criteria; s3.5.2 Selective Tenders option
Strategic outcomes		buy.nsw website - Benefits Realisation Management Framework	s2.6 Joint Purchasing Arrangements; s3.3.3 Types of Specifications
Indigenous engagement	Appendix A: Exemptions	buy.nsw website - Aboriginal Procurement Policy	1.7 Aboriginal Employment Participation
Small & medium enterprises	Div 1 s5 Encouraging Competition; Appendix A: Exemptions	buy.nsw website - Small and Medium Enterprises and Regional Procurement Policy	s1.6 Local Preference Policy; s2.6 Joint Purchasing Arrangements
Regional procurement		buy.nsw website - Small and Medium Enterprises and Regional Procurement Policy	s1.6 Local Preference Policy; s2.6 Joint Purchasing Arrangements
Unsolicited proposals		C2017-05 Unsolicited Proposals; buy.nsw website-market approaches guide; Guide for submission and assessment of unsolicited proposals	

Competition

The Commonwealth addresses coordinated procurement, cooperative procurement and encouraging competition. Value for money is emphasised and the fact “Participation in *procurement* imposes costs on *relevant entities* and *potential suppliers*. Those **costs should be considered when designing a process** that is commensurate with the scale, scope and risk of the proposed *procurement*.” (Commonwealth Procurement Rules (CPRs) section 5 Encouraging Competition).

New South Wales Government deals with this via its procurement policy framework (refer buy.nsw website). The guidance is largely principle based, emphasising process efficiency, simpler processes and promoting competition.

At local government level, the *Tendering Guidelines for NSW Local Government*¹⁵ deals with **guiding principles** in section one, setting out overall principles including honesty and fairness, accountability and transparency, consistency, no conflicts of interest, rule of law, no improper advantage, intention to proceed, and co-operation. Value for money and local preference policy are discrete sections. Under the heading Communications with Tenderers (s3.9), guidance states “Response to queries about a specific tenderer’s innovative solution should not be communicated to any other tenderer.”

Tender Negotiation (s3.19) notes the need for “...councils to demonstrate commitment to a fair and accountable process...” and provides a series of relevant points on process.

Methodologies

All tiers allow the common approaches of open, limited or selective tendering. Multi-stage procurements are a subset of these. In the case of the Commonwealth, limited tender is an option that allows some flexibility.

Conditions for **limited tendering** include:

- 10.3 (a) ii. no submissions that met the minimum content and format requirements for submission as stated in the request documentation were received, or
- 10.3 (a) iii. no tenderers satisfied the conditions for participation,
- 10.3 (b) when, for reasons of extreme urgency,
- 10.3 (c) for procurements made under exceptionally advantageous conditions that arise only in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership, and which are not routine procurement from regular suppliers; or
- 10.3 (d) when the goods and services can be supplied only by a particular business and there is no reasonable alternative or substitute for one of the following reasons:
 - iii. due to an absence of competition or technical reasons,

¹⁵ Office of Local Government, *Tendering Guidelines for NSW Local Government*, <<https://www.olg.nsw.gov.au/wp-content/uploads/Tendering-Guidelines-for-NSW-Local-Government-2009.pdf>>.

10.3 (g) when a relevant entity procures a prototype or a first good or service that is intended for limited trial or that is developed at the relevant entity's request in the course of, and for, a particular contract for research, experiment, study, or original development; or

10.3 (h) in the case of a contract awarded to the winner of a design contest,

10.5 an official must prepare and appropriately file within the relevant entity's records management system a written report that includes:

- a. the value and type of goods and services procured;
- b. a statement indicating the circumstances and conditions that justified the use of limited tender; and
- c. a record demonstrating how the procurement represented value for money in the circumstances.

The New South Wales buy.gov website Market Approaches Guide notes considerations such as value for money and the impact on competition of different approaches (both short and long term). It goes on to consider the procurement policy framework and methods to approach the market, including request for tender (open, multi-stage or limited/selective), request for information, request for quote, expression of interest, complex market engagement methods including direct negotiation and strategic commissioning. It points out “An RFP process can be an effective way of **tapping into new and potentially innovative approaches and solutions**”.

Sections are included that comment on ‘Best and final offers’ and ‘Direct negotiation’. Additionally, there is a section on ‘Non-traditional approaches to procurement’ which states “Adopting procurement processes that are open to, and encourage, innovation, gives the market the opportunity to offer solutions that may be more productive, a better fit for government needs and, in some cases, more cost and resource efficient.” Under ‘Strategic commissioning’ the point is made that “Strategic commissioning can also facilitate the introduction of outcomes-based contracts (rather than output-based contracts) that will allow agencies to simplify the tendering process, since they will focus on the outcome of the contract instead of the process.”

The **local government tendering guidelines** provide for joint purchasing arrangements to enable councils “to achieve efficiencies through economies of scale and other processes.” (s2.6). Encouraging alternate or innovative solutions is mentioned simply as an outcome of using performance or functional specifications. (s3.3.3) The section goes on to make the point:

“Tenderers may be encouraged to offer **alternative tenders** that do not fully meet the prescriptive conditions of tendering but provide innovative solutions and better value for money. Councils must specify the circumstances in which alternative tenders will be considered. Where a tenderer offers an alternative, a tender for that alternative should not be sought from other tenderers. Councils should not breach confidentiality by using information contained in alternative tenders as the basis for calling subsequent tenders.”

“Alternative tenders should not be accepted from tenderers that have not submitted a complying tender.”

The local government tendering guidelines offer further insight under the heading 'Developing the Evaluation Criteria' (s3.4). It makes the point "**evaluation criteria** should contain the factors critical to council being about to make appropriate decisions on matters arising from the tendering process. These factors may include, but are not limited toInnovation offered.... Value adding components such as economic, social and environmental development initiatives, if appropriate and relevant to the procurement.....conformity with tender requirements."

S3.5.2 further points out under the '**Selective Tenders**' option: "Selective tender lists of recognised contractors are often established:In some cases, where innovative solutions are sought." Under the heading Discussion (s3.5.2.1), it explains "Running an EOI can assist council as it prepares the tender specifications and allows for innovative concepts and new technologies to be considered prior to issuing an invitation to tender."

An apparent opportunity to keep processes more efficient is allowed when s3.5.2.2 states "A council may also adopt a list of contractors prepared by another public authority such as the Department of Commerce, provided the authority prepared the list following the publication of a similar advertisement." Under the heading Discussion, it again points out "Selective tender lists of recognised contractors are often established:in some cases, where innovative solutions are sought."

Strategic outcomes

The Commonwealth CPRs provide no specific guidance in this area.

New South Wales State Government has reference to a '**Benefits Realisation Management Framework**'. The Framework informs investment decisions and establishes plans to realise intended benefits. Benefits realisation measures whether a program or project realises identified or intended benefits outlined in the original business case. As an alternative, one could use program evaluation, which is more suited to projects with outcomes not easily measured or that lack definition.

At local government level, minimal commentary is made. Under '**Joint Purchasing Arrangements**' (s2.6), local government tendering guidelines state: "Ensure a common understanding of the required outcomes, the joint tendering process and a shared commitment to the process." They advise under 'Functional Requirements' (s3.3.1) that "Functional requirements identify what objectives and outcomes will be met or supported by the tender, but do not prescribe a specific technology or item of equipment." 'Types of Specifications' (s3.3.3) adds "Where a council does not have the technical knowledge available within the organisation, council should consider engaging a consultant to assist in developing the specification or write a brief focusing on the outcomes, user requirements and functional requirements to allow potential tenderers to respond to the need in their own way."

Indigenous engagement

Appendix A to the Commonwealth CPRs clarifies allowed 'Exemptions' to the requirement to tender. Procurement of goods and services from an SME with at least 50% Indigenous ownership qualifies for exemption.

The Buy.nsw provides reference to the ‘**Aboriginal Procurement Policy**’ (the 2021 document merges the previous Aboriginal Procurement Policy and Aboriginal Participation in Construction Policy). The policy objectives are to support employment opportunities and sustainable growth of Aboriginal businesses by driving demand via government procurement of goods, services, and construction. Targets for 31 December 2021 are 1% of assessable spend, 3% of total goods and services contracts and 3,000 full-time equivalent employee (FTE) employment opportunities supported (higher value individual contracts require higher percentages). It is stated that “Agencies should, whenever feasible:

”apply an Aboriginal participation non-price evaluation criterion, so the response may also be evaluated on its social commitments.” Where procurements are valued below \$7.5 million, “Agencies should whenever feasible give first consideration to Aboriginal businesses.....” and “Agencies may negotiate directly with an Aboriginal business for all procurements up to \$250,000 even if there is a mandated prequalification scheme or panel in place”.

Local government tendering guidelines mention ‘Aboriginal Employment Participation’ (s1.7). However, it gives no added flexibility to streamline process; rather it stipulates what tenderers must indicate in a tender submission.

S1.7 comments that “In certain circumstances tenderers will be required to indicate measures they intend to implement if awarded the contract, which are designed to lead to improved conditions in Aboriginal communities.”

These measures may relate to employment of Aboriginal people, procedures to develop business skills of Aboriginal people and provision of economic benefits to Aboriginal communities.

The Construction Agency Coordination Committee has produced Aboriginal Participation in Construction Guidelines, which set out requirements for parties involved in construction projects for the NSW government. The website is found at www.dpws.nsw.gov.au.

Small & Medium Enterprises (SMEs) and regional procurement

The Commonwealth offers no procedural benefit to SMEs but does make the point “The Australian Government is committed to non-corporate Commonwealth entities sourcing at least 10 per cent of procurement by value from SMEs. In addition, the Government has a target of non-corporate Commonwealth entities procuring 35 per cent of contracts by volume, with a value of up to \$20 million, from SMEs” (Div 1 s5.6-5.7). The CPRs make no reference to regional procurement matters.

At State government level, there are strong steps to deal with **SMEs and regional procurement**. The buy.nsw website states “Where a government agency is permitted to directly purchase goods and/or services from a supplier, or directly negotiate with a supplier to provide goods and/or services, the agency must first consider purchasing from a regional supplier for procurement in a regional area. If the procurement is not in a regional area, then the agency must first consider purchasing from an SME... For all procurements valued above \$3 million, agencies must include a non-price evaluation criteria of at least 15 per cent, which considers how potential suppliers will

support the government's economic, ethical, environmental and social priorities of which a minimum of 10% must be allocated to SME participation consistent with relevant exemptions in IPAs4..... The SME and sustainability criteria must be applied to all government procurement arrangements where the total cost is estimated to be more than \$3 million."

The website elaborates on a '**Procurement innovation** stream' stating "The Innovation Stream allows procurement-accredited agencies to directly engage an SME on short term contracts valued up to \$1 million and to do proof-of-concept testing or outcomes-based trials. The test or trial should be designed to demonstrate the feasibility of a good and/or service to solve a specific problem or improve government service delivery." Purchasing exemptions are also considered, stating "The small business exemption allows agencies to purchase goods or services valued up to \$50,000 directly from a small business, even where those goods or services are available on a whole-of-government arrangement."

State Government is also seeking to standardise contracts for **low-risk engagements**, in particular dealing with minimum levels of public liability and professional indemnity insurances. "Agencies must first consider purchasing from a regional supplier for procurement in a regional area, whenever direct procurement is permitted, up to a value of \$250,000. If the procurement is not in a regional area, then the agency must first consider purchasing from an SME..... For procurements over \$3 million over the life of the arrangement, including single supplier standing offers, agencies must include a minimum 15% of the non-price evaluation criteria which considers how the government's economic, ethical, environmental and social priorities will be supported, of which at least 10% (that is, two-thirds of the 15% weighting) must be allocated to SME participation consistent with relevant exemptions in FTAs. Agencies are encouraged to consider local businesses and primary producers when buying fresh produce. This initiative applies to all direct procurements, including from prequalification schemes and panels, up to a maximum value of \$250,000."

However, the overarching requirement remains for State Government procurement activities to achieve value for money.

Local government tendering guidelines provide some relevant comment (s1.6 'Local Preference Policy'), where "Councils often have a significant role in local and regional economic development. This may include consideration of **local supply issues** and Aboriginal and young people's employment participation policies. The implementation of local preference policies is not necessarily inconsistent with the principles of National Competition Policy. However, the use of local preference in the evaluation of tenders and awarding of contracts possesses inherent risks in terms of anti-competitiveness and the maintenance of defensibility, accountability and probity."

'Joint Purchasing Arrangements' (s2.6) comments "Councils could choose to engage in joint purchasing arrangements with other councils or groups of councils such as voluntary regional organisations of councils. However, the functions of deciding to tender, either generally or in regard to a specific tender, and accepting the tender should remain the function of the individual elected councils and not be delegated."

“The delegation of certain functions does not divest the individual elected councils as principal bodies, of their responsibilities to ensure that accountability and probity is maintained in the tendering process.”

Sometimes the question arises regarding requirements to purchase ‘Australian made’ within the NSW local government sector. A council’s commitment to purchase locally made products would fall under its ‘Community Strategic Plan’ and any objectives/ goals/policies that sit beneath it. Under the NSW *Local Government Act* and the Integrated Planning and Reporting Guidelines there is the statutory obligation to address social, environmental, economic and civic leadership objectives. It is up to each individual council to determine if **‘Australian made’ and local sourcing** are priorities and include these in its procurement activity. Interactions with councils have shown local sourcing is definitely a priority for many NSW councils, but how they approach and measure it is an individual assessment and not a regulatory or statutory requirement.

Unsolicited proposals

The CPRs make no reference to unsolicited proposals.

The NSW Government describes unsolicited proposals as a “transparent and streamlined approach that facilitates the NSW Government and private sector to work together to develop and deliver innovative ideas”. Its guide for submission and assessment of unsolicited proposals.¹⁶ The guide describes proposals that will generally not qualify. The guide has been updated to reflect recommendations made by the Audit Office of NSW. A four-stage process of evaluation is described with the final stage “negotiation of final binding offer”. Department of Premier and Cabinet Circular *C2017-05-Unsolicited Proposals* points out “The Unsolicited Proposals framework is based upon the ‘uniqueness’ criterion... i.e. what is unique about the proposal and the proponent that Government would not undertake a competitive process?”¹⁷

The **four-stage assessment process** has been developed to guide evaluation of proposals:

- Pre-Submission Concept Review;
- Stage 1:
 - a. Initial Submission and Preliminary Assessment
 - b. Strategic Assessment of the Initial Submission;
- Stage 2: Detailed Proposal;
- Stage 3: Negotiation of Final Binding Offer.

Evaluation criteria at the pre-submission stage include uniqueness, value for money, whole-of-government impact, return on investment, capability and capacity, affordability and risk allocation.

¹⁶ NSW Government, *Unsolicited Proposals Guide for Submission and Assessment*, <https://www.nsw.gov.au/sites/default/files/2020-05/Unsolicited_Proposals_Guide.pdf>.

¹⁷ Government of South Australia, PC 038 Unsolicited Proposals, <https://www.dpc.sa.gov.au/__data/assets/pdf_file/0019/20872/PC038-Unsolicited-Proposals.pdf>.

At the local government level, no commentary is provided for unsolicited proposals. The closest pointers are occasional sentences referring to use of innovation or innovative proposals.

Observations on comparison of NSW and Commonwealth Processes

Clearly the Commonwealth Government and more so NSW State Government consider most of these policy areas important. Appropriate guidance has been prepared to ensure sound governance. Those documents can be used as source material to stimulate ideas for a similar framework to assist the local government sector.

Ability to rely on alternate procurement process

In January 2006, the then Department of Local Government released a circular titled *Procurement in NSW Local Councils* (DLG Circular to Councils No. 06/07 25/01/2006). It was released prior to the issue of still current local government tendering guidelines (2009) but remains relevant in terms of guidance. The circular states “To assist better practice in the expenditure of public funds for public purposes, councils are encouraged to ensure that their purchasing and disposal activities are guided by the following key considerations:

- *Legal obligations* – These include the provisions of the *Local Government Act 1993* and the *Local Government (General) Regulation 2005*.
- *Policy Frameworks and guideline documents* – These include the NSW Government Procurement Policy and Framework, the NSW Government Procurement Policy and Guidelines Paper, NSW Government Code of Practice for Procurement and the NSW Government Tendering Guidelines, which are available from the NSW Department of Commerce website at <http://www.dps.nsw.gov.au/Government+Procurement>. Commonwealth Procurement Guidelines are available from the Department of Finance and Administration website at http://www.finance.gov.au/ctc/commonwealth_procurement_guide.html”.

Some of the above reference materials have now been superseded by other formats. However, the intention of the circular remains clear i.e. that councils should take some guidance from other relevant best practice reference.

Comparison with other States

The scope of the above comparison was limited to Commonwealth, NSW State and NSW local government. During the research, it became known South Australian and Northern Territory Governments had relevant policies covering unsolicited proposals

¹⁸ ¹⁹ ²⁰ (The Western Australian Government has a Market-led Proposals Policy which addresses unsolicited bids, ²¹ ²² Social procurement is explained the Western Australian Social Procurement Framework. ²³

Policies and procedures in the remaining states and territories were not investigated. The level of information already obtained was deemed sufficient for seeking reasonable comparisons.

The *PC 038 Unsolicited Proposals* policy (SA Govt) allows proposals to be lodged and initially assessed by an unsolicited proposals committee. The process will involve three steps:

1. Application and investigations;
2. Exclusive negotiations and business case; and
3. Contract negotiations.

Five assessment criteria will be applied:

- Community need/government priority;
- Uniqueness of the proposal;
- No competing proposals;
- Value for money; and
- Capacity and capability of the proponent.

Where the government assesses a proposal does not meet criteria under the government guideline at any stage of the process, it reserves the right to go to market, end the proposal consideration process or withdraw from exclusive negotiations. If the government does go to market, the supplier will be given the opportunity to participate in any subsequent procurement process. The government will respect any intellectual property owned by the supplier. Stage 3: Contract Negotiation allows the public authority and supplier to negotiate final legal and commercial terms.

Under the *Market Led Proposals Policy*, (MLPP) (NT Govt), "Cabinet is informed of the progress and gives approval (or otherwise) for a second step involving negotiations

¹⁸ Government of South Australia, PC 038 Unsolicited Proposals, <https://www.dpc.sa.gov.au/__data/assets/pdf_file/0019/20872/PC038-Unsolicited-Proposals.pdf>.

¹⁹ Government of South Australia, *Unsolicited Proposals Schedule*, <https://www.treasury.sa.gov.au/__data/assets/pdf_file/0006/36816/Guidelines-for-Assessment-of-Unsolicited-Proposals-September-2018.pdf>.

²⁰ Northern Territory Government, *Market Led Proposals Policy*, <<https://cmc.nt.gov.au/supporting-government/strategies-and-plans/market-led-proposals-policy>>.

²¹ Government of Western Australia, *Market-led Proposals Policy*, <<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Policy-January-2020.pdf>>.

²² Government of Western Australia, *Market-led Proposals Supplementary Guidelines*, <<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Supplementary-Guidelines-January-2020.pdf>>.

²³ Government of Western Australia, *The Western Australian Social Procurement Framework*, <<https://www.wa.gov.au/sites/default/files/2021-06/Social%20Procurement%20Framework%202020--16-6-21.pdf>>.

and business case. Proposals not recommended for the second stage may form the basis of a competitive bidding process or standard procurement process.”

For the purposes of this MLPP, a Proposal:

1. requires a financial or non-financial contribution from the NT Government (such as provision of land or access to NT Government assets, the granting of a concession or waiver of a right or the provision of resources and expertise by the NT Government);
2. is not in response to or pre-empting a NT Government request for proposal, expression of interest or other NT Government procurement action.

The Market-led Proposals Policy is aimed at proposals that exceed \$10 million in value. Smaller proposals will also be considered under this policy at the discretion of the NT Government.

The application process involves three stages:

- Pre-submission Meeting;
- Stage 1: Initial Proposal;
- Stage 2: Detailed Proposal; and
- Stage 3: Negotiations.

The NT Government may consider undertaking a modified competitive process where it has been determined the Proposal has sufficient merit and meets the assessment criteria, but the Proposal should be tested through a competitive market process.

A standard competitive process is appropriate for projects where it has been determined that the Proposal “has sufficient merit but there are a range of other parties readily available that could deliver similar outcomes and with comparable value for the Northern Territory.”

Initial assessment should entail:

- Net public benefit;
- Project feasibility;
- Allocation of risk;
- Capability and capacity (exclusive process); and
- Execution certainty (exclusive process).

If the Proposal proceeds for an exclusive process, the NT Government and Proponent will enter negotiations to agree upon contractual arrangements.

The Western Australian approach recognises the \$ value of the project and whether one or more agencies are involved or impacted, are contributing factors to adoption of a policy approach. A Market-led Proposal (MLP) is considered “a proposal from the private sector to government to build and/or finance infrastructure; provide goods or services; or to purchase a government owned asset, where government has not requested the proposal (for example, through a competitive procurement or expression of interest process, etc).

“MLPs always include a commercial proposition for government such as accessing government land, assets, information or networks; developing public infrastructure; or providing a good or service on behalf of government. The focus of this policy is on proposals which justify direct negotiation.”

Types of proposals that will generally not be considered under the MLP Policy include those that:

- are dealt with by an existing government process that is underway;
- seek to obtain industry assistance and other grants currently available and considered through existing programs;
- relate to a project or program that government has already decided and/or announced will be released to the market;
- are not required to be subjected to a competitive procurement process;
- have a total estimated value below the threshold that would require a competitive procurement process (as specified in Western Australian Government policy and/or legislation);
- do not meet the Government’s current priorities; or
- proposals that lack structure and sufficient supporting information.

This MLP Policy is not intended to capture proposals for private sector projects which do not have a substantial element of public value, where government’s role would primarily be facilitation of that project rather than a recipient of benefit on behalf of the public.

For MLPs centrally-led, Cabinet approval is required at each stage of the evaluation process, on the recommendation of the MLP Steering Committee.

For agency-led proposals, the requirement for Cabinet and/or ministerial approval will depend on internal governance arrangements and legislative requirements of the agency (which may vary depending on the value of the proposal).

While all reasonable steps will be taken to protect intellectual property of the proponent, the proponent should be mindful that it participates in the MLP process set out in this policy at its own risk.

Proponents are advised to exercise a high degree of discretion in disclosing any information publicly throughout the process of developing a proposal and, particularly, once a proposal is lodged.

Stage 1: Concept Evaluation – The proponent is encouraged to complete online self-assessment and attend a compulsory pre-submission meeting with the MLP Secretariat before lodging a concept proposal. Only proposals considered to be within the scope of the MLP Policy, align with government priorities, demonstrate a reasonable prospect of meeting the evaluation criteria and are not market standard will be invited to Stage 2.

Stage 2: Business case evaluation – If invited to Stage 2, proponents develop their proposal into a detailed business case, in consultation with the Lead Agency, for evaluation by government. A First Mover Advantage process (Swiss Challenge/Bid Premium) may be required if the proponent does not meet the justification for exclusive negotiation characteristics in Stage 1.

Stage 3: Negotiation of Final Binding Offer – If invited to Stage 3, outstanding issues are negotiated with a view to entering a binding agreement should government accept the offer.

Evaluation criteria will include:

- Strategic alignment;
- Public interest;
- Value for money;
- Feasible and capable of being delivered; and
- Risk (any financial, reputational or security risks to government).

The Western Australian Government has also created a social procurement framework²⁴ that sets guidance for engagement of Aboriginal business, increased regional and disability employment, increased opportunity for small and medium businesses and disability enterprises. It covers gender equality, multiculturalism and sustainability (outside the ambit of this white paper).

Western Australia's Procurement Rules require all State agencies to directly engage a registered Aboriginal business or Australian Disability Enterprise (ADE) up to any value, provided appropriate value for money. "A consideration of between 5 to 10 per cent is considered normal practice for social procurement qualitative criteria" (*The Western Australian Social Procurement Framework Practice Guide*, Department of Finance, May 2021). It recommends assessing appropriate weighting on a case-by-case basis and ensuring it is proportionate to other relevant factors.

Probity and governance issues

Existing actions taken by various governments largely apply to their relevant agencies and government trading enterprises (GTEs) within existing statutory frameworks – to ensure a cohesive system that provides **confidence to the public and commercial sectors**. Also important is the need to ensure unsolicited proposals are lodged at the provider's own risk, cost and expense. Protection of intellectual property usually cannot be guaranteed. The public will expect there is a process for disclosure of unsolicited proposals together with the identity of the originator. Terms and conditions for lodgement, rights of the government agency to approach the open market if deemed necessary or appropriate or to decline to consider a proposal are also necessary. Processes for dealing with negotiations need to be clear with appropriately skilled staff involved.

²⁴ Government of Western Australia, *The Western Australian Social Procurement Framework*, <<https://www.wa.gov.au/sites/default/files/2021-06/Social%20Procurement%20Framework%202020--16-6-21.pdf>>.

The Western Australian policy notes the need to record lessons learned. A First Mover Advantage process (Swiss Challenge/Bid Premium) (Appendix 1) is used in situations that do not meet the justification for exclusive negotiation. There is also a requirement for publishing government priorities, exclusions and problem statements.

Understanding probity and establishing good governance are critical to ensure faith in process and outcome, particularly where negotiations may be involved. Important ingredients in this are staff training and experience and the availability of support, either in the form of reference materials or sector experts (e.g. lawyers, probity advisers and auditors). Whilst most greater Sydney councils and larger regional councils have dedicated procurement staff and an in-house auditor, smaller regional councils may not. Even at the joint organisation (JO) or regional organisation level (ROC), there may be few procurement-qualified staff employed.

This presents another opportunity to support the work of councils. The sector does have a 'quorum' of skilled procurement staff, ranging from certificate level (TAFE) to diploma and degree qualified (this equates to a skill level suitable for transactional purchasing through to strategic procurement). Further professional recognition in the form of professional association accreditations have also been awarded to some staff. This pool of knowledge could be resourced to support organisations lacking financial capacity to engage suitable full-time staff. There is potential for accredited staff to be contracted out to other councils for specific projects or specific periods. Additionally, establishing a local government sector peer group to form a **steering committee to advise on procurement direction** could provide both a review forum for procurement policies and high-level advice to councils to inform on the evaluation process.

Of continuing importance is government policy and public interest, regardless of whether the matter is an unsolicited proposal or a preference policy. Such evaluation should be determined by appropriately skilled and informed persons. **Appointment of a probity adviser** to support the integrity of the process is recommended in most instances. The process should not be used to deliberately bypass standard council approval steps or processes related to planning, environmental or other regulation.

General discussion

Given the last comprehensive update of tendering was the release of *Tendering Guidelines for NSW Local Government* in 2009, a review is due. The **opportunity to improve current challenges**, whether related to innovative, alternate and unsolicited proposals, or the establishment of sector preference policies **should be taken**.

When it comes to innovative proposals, councils may not have the expertise to properly assess the technical or commercial merits. Procurement expertise may be lacking, as many councils see the role as purely transactional and fail to understand the strategic function.

The business sector likewise is challenged. There is little information to indicate either a consistent approach to how councils deal with innovative or unsolicited proposals or how preferential policies should or are established. The process for appealing a council decision, if known, is considered daunting and bureaucratic. Similarly, to smaller councils, small business often lacks experienced procurement staff or bid managers and is not in a position to informatively deal with councils. Larger corporates

often have their own legal counsel and experienced business managers, who understand the legal framework and organisational framework of the council. Those organisations familiar with NSW State Government and Commonwealth Government processes may expect (wrongly), that similar processes apply in local government.

An alternate philosophy is in place at the NSW State Government level. The preface to its *Unsolicited Proposals Guide for Submission and Assessment* (Guide) states it was written “in order to encourage the best ideas and solutions from the non-Government sector, and a greater level of non-Government sector investment and participation in projects.

“The Guide outlines a transparent and streamlined process to facilitate the NSW Government and non-Government sectors working together to develop and deliver innovative ideas, services and new infrastructure. Its key objective is to provide consistency and certainty to non-Government sector participants seeking to deal directly with the Government. The Guide sets out how unsolicited proposals will be assessed within a transparent framework. The key criteria are uniqueness, value for money and strategic fit with Government objectives.”

It would appear logical that establishment of a principles-based framework for local government is needed and of value. It would enable more flexibility in process and, if drafted well, would be informative. However due to the significant difference in procurement skills across councils, such a framework would still need to provide strong governance for dealing with innovative, alternate and unsolicited proposals as well as establishment of sector preference policies.

A positive outcome would be public and business awareness of best practice and establishment of a **benchmark for councils to follow**. A more appropriate and consistent approach to lodgements and evaluations could be expected. Better value for ratepayers is a reasonable expectation. Relevant to this is the NSW Auditor General’s report (December 2020) into a review of 6 councils’ procurement practices. The report made a series of recommendations to each of the 6 councils, but equally importantly, requires that “By June 2022, the Department of Planning, Industry and Environment should:

- publish comprehensive and updated guidance on effective procurement practices – including electronic tender submissions and procurements below the tender threshold; and
- review and update the *Local Government (General) Regulation 2005* to reflect the increasing use of electronic tender submissions rather than paper copies.” (<https://www.audit.nsw.gov.au/our-work/reports/procurement-management-in-local-government>).

This provides an excellent opportunity to confirm guidance to the sector and ensure a much **broader level of best practice leadership** in the procurement function.

The other opportunity for improved guidance is through resource sharing of skilled procurement staff. Potentially, accredited staff could be made available (at an hourly fee) to support smaller councils, Joint Organisations and Regional Organisations of Councils unable to fund similar positions.

Options

If a **principles-based framework** were to be established, there are several options worthy of consideration. These include:

- Re-drafting legislation (s55 of the *Local Government Act (1993)* and the *Local Government (General) Regulation 2005*).
- Re-draft the *Tendering Guidelines for NSW Local Government*.
- Release a policy guidance document as an adjunct to the above.
- Release a detailed circular from the Office of Local Government providing guidance and referencing related NSW Government documents.
- Incorporate best practice guidance into a new and broader framework for procurement in the local government sector.

Ideally a completely fresh start may be the best option; however, that is often not feasible given government's resource limitations. Presumably some combination of the above options could take place and provide a framework that moves forward with both consistency and sound process. This paper is not commenting further on which of the above might be preferred – other than via recommendations at the end.

Conclusion

Unsolicited proposals, alternate tenders and applying market preferences can be problematic. Whilst most state and Commonwealth governments have sought to provide good guidance within their jurisdictions, more is needed for the NSW local government sector.

Tiers of government that have allowed an alternate process for **unsolicited proposals** have recognised the need for **assessment**: firstly, to confirm the uniqueness of the proposal; and secondly, to provide an opportunity to go back and reopen or selectively market (or do nothing) should it be determined that alternates may exist. **Negotiation** of contract conditions is also recognised as a likely need. Appropriate probity and governance standards, as part of process, are necessary with clear delineation of roles and responsibilities of the proponent, evaluators and officials tasked with outcome determination. Appropriately skilled and/or independent evaluators are an inherent need to ensure sound process and outcome.

Whilst **intellectual property** needs to be respected, a proponent needs to be informed of and accept the counter need of government to disclose certain levels of information in the public arena. A proponent also needs to be provided with and accept specific conditions of participation for the process, so all parties are fully informed about risks and potential costs that may occur as the process evolves.

Recommendations of the panel

General recommendations

1. That recommendations of the **NSW Auditor General's report** (December 2020) into a review of 6 councils' procurement practices (Department of Planning, Industry and Environment) **be adopted** i.e.
 - 1.1. publish comprehensive and updated guidance on effective procurement practices – including electronic tender submissions and procurements below the tender threshold,

- 1.2. review and update the *Local Government (General) Regulation 2005* to reflect the increasing use of electronic tender submissions rather than paper copies.
2. That the current *Local Government (General) Regulation* be simplified and a principles-based set of guidelines be adopted to support it.
3. That guidelines be based on the current *Tendering Guidelines for NSW Local Government* – but reformatted to a series of individual sub-guides, each numbered, enabling easy updating, deletion or addition of any one or more sub-guides at any time without disrupting the integrity of the whole.
4. That guidelines include a statement clarifying the extent to which councils may adopt processes of State and Commonwealth Government e.g. a statement that updates the intent of DLG Circular to Councils No. 06/07 25/01/2006 and incorporates it into the guidelines.
5. That best practice principles be supported by inclusion of relevant case studies showing benefits and/or risks.
6. That consideration be given to adopting principles and processes parallel, or similar to, those of NSW State Government.
7. That a representative from council governance/audit, finance and procurement staff be included in every formal tender evaluation panel – to provide relevant input and support good process.
8. That the expectation for and benefits of, a dedicated procurement function within council be elaborated and endorsed.
9. That a process of accreditation for a council procurement function be adopted similar to that developed in New South Wales Government – thus setting a best practice standard.
10. That guidelines:
 - 10.1. elaborate circumstances that indicate the benefit of a council seeking independent procurement, technical, probity or legal advice;
 - 10.2. recognise various professional/practitioner procurement peer groups that exist, and recommend their consultation for advice or use as independent reference groups for higher risk tendering situations;
 - 10.3. provide detailed commentary on applicable process for innovative projects, unsolicited bids and social procurement;
 - 10.4. advise on the use of electronic tendering, 'First Mover Advantage' process and 'Swiss Challenge/Bid Premium';
 - 10.5. 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);
 - 10.6. advise when sole sourcing might be deemed appropriate in the absence of an open market approach (this is needed when seeking, for example, ERP system licence renewals or upgrades where market testing is arguably a nonsense);
 - 10.7. allow piggy backing arrangements (existing or future) or joint purchasing with multiple tiers of government, ROCs, JOs or other councils;

- 10.8. allow negotiation on contract conditions (excluding price) with tenderers prior to rejection of a tender, with the aim of ascertaining what final contract terms could be finalised so full and final evaluation can be efficiently carried out;
- 10.9. emphasise tender recommendations should be linked to strategic outcomes of the council, region or State;
- 10.10. advise on dealing with State and Commonwealth grants that fail to allow enough time for councils to run tender processes and obtain market bids.

Innovative projects recommendations

11. That **guidelines establish advice** on:

- 11.1. principles of appropriate process 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;
- 11.2. approaches that could be used for proof of concept;
- 11.3. appropriate process and requirements for negotiation during multi-stage tender processes;
- 11.4. use of best and final offers in a multi-stage process;
- 11.5. alliance partnership arrangements;
- 11.6. treatment of intellectual property.

Unsolicited bid recommendations

12. That **unsolicited bids be allowed**, provided a formal written process is established prior to any evaluation taking place.

13. That **guidelines establish advice** on:

- 13.1. Appropriate process and governance;
- 13.2. Determining criteria to establish preliminary suitability or unsuitability of a proposal;
- 13.3. Establishment of a suitable panel to consider unsolicited proposals;
- 13.4. Evaluation in the event a proposal passes preliminary consideration criteria
- 13.5. Disclosure to the market in the event open competition is deemed necessary;
- 13.6. Treatment of intellectual property.

Social procurement recommendations

14. That preferences be allowed, provided they are in accordance with a formal policy approved by the Council in public forum and prior to the request for tender taking place.

15. That **guidelines establish advice** on:

- 15.1. social procurement definition, benefits and risks;
- 15.2. recognition of social outcomes as valid qualitative assessment criteria;
- 15.3. the basis for establishing preferential conditions of engagement with Indigenous business, disability sector, SMEs and regional business;
- 15.4. determining reasonable levels of mandatory insurance stipulated by councils upon tenderers;
- 15.5. benchmark levels for encouragement of Indigenous employment participation;

- 15.6. 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;
- 15.7. when direct engagement of Indigenous businesses and Australian disability enterprises are recommended;
- 15.8. applying an Indigenous participation non-price evaluation criterion, so a tender may be evaluated on its social commitments;
- 15.9. principles for applying disaggregation of a project or program of works in order to encourage SMEs;
- 15.10. when appropriate to release an early tender advice to the market.

References

Government of South Australia, *PC 038 Unsolicited Proposals*, Premier & Cabinet Circular, September 2018

https://www.dpc.sa.gov.au/data/assets/pdf_file/0019/20872/PC038-Unsolicited-Proposals.pdf

Government of South Australia, *Unsolicited Proposals Schedule*, Department of Treasury and Finance, July 2021

https://www.treasury.sa.gov.au/data/assets/pdf_file/0006/36816/Guidelines-for-Assessment-of-Unsolicited-Proposals-September-2018.pdf

Government of Western Australia, *Market-led Proposals Policy*, Department of Finance, January 2020

<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Policy-January-2020.pdf>

Government of Western Australia, *Market-led Proposals Supplementary Guidelines*, Department of Finance, January 2020

<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Supplementary-Guidelines-January-2020.pdf>

Government of Western Australia, *The Western Australian Social Procurement Framework*, Department of Finance, April 2021

<https://www.wa.gov.au/sites/default/files/2021-06/Social%20Procurement%20Framework%202020--16-6-21.pdf>

Northern Territory Government, *Market Led Proposals Policy v1*, Department of the Chief Minister and Cabinet, February 2018

<https://cmc.nt.gov.au/supporting-government/strategies-and-plans/market-led-proposals-policy>

NSW Government, *Unsolicited Proposals Guide for Submission and Assessment*, August 2017

https://www.nsw.gov.au/sites/default/files/2020-05/Unsolicited_Proposals_Guide.pdf

Office of Local Government, *Tendering Guidelines for NSW Local Government*, October 2009

<https://www.olg.nsw.gov.au/wp-content/uploads/Tendering-Guidelines-for-NSW-Local-Government-2009.pdf>

Legislation

Local Government Act 1993,

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1993-030>

Local Government (General) Regulation 2005,

<https://legislation.nsw.gov.au/view/html/inforce/current/sl-2005-0487>

List of Appendices

Appendix 1: Definitions - Swiss Challenge and Bid Premium process ²⁵

1. Swiss Challenge – the Government will undertake a competitive tender process and if the proponent is initially unsuccessful in submitting the most attractive bid, it has the option to match the winning bid and implement its proposal, should it be successfully negotiated in Stage 3. The Government recognises that bidders other than the proponent are only likely to participate in a Swiss Challenge if they believe that they have a significant, differentiating advantage over the Proponent; or
2. Bid Premium – the Government will undertake an otherwise competitive tender process but the proponent will receive a bonus bid evaluation. Typically, the bonus is the addition of a premium to the technical offer. This premium will be set between 10 and 20 percentage points, with the final size of the premium within this range to be determined by the MLP Steering Committee, or a discount to its financial offer. This premium reflects the ‘first mover’ advantage of the proponent.

²⁵ Government of Western Australia, *Market-led Proposals Policy*, <<https://www.wa.gov.au/sites/default/files/2020-03/Market-led-Proposals-Policy-January-2020.pdf>>.