



**Burwood**<sup>Inc.1874</sup>

Burwood . Burwood Heights . Croydon . Croydon Park . Enfield . Strathfield

## **TENDER POLICY**

PO Box 240, BURWOOD NSW 1805  
2 Conder Street BURWOOD NSW 2134  
Phone: 9911-9911 Fax: 9911-9900

[Email: Council@burwood.nsw.gov.au](mailto:Council@burwood.nsw.gov.au)

[Website: www.burwood.nsw.gov.au](http://www.burwood.nsw.gov.au)

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## 1. Purpose

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To ensure that all Tender processes are conducted in accordance with the relevant legislation and that any Tender undertaken by Council withstands the highest level of transparency, accountability and probity.

## 2. Scope

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Applies to Council Officers who are required to Call for Tenders for the supply of goods and/or services.

## 3. Definitions

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**Tenderer** – entity submitting a tender.

**Tender** – includes a price, bid offer, quotation, consultant proposal or expression of interest lodged in response to an invitation or request for tender.

**Tender Panel** - a minimum of four members. The Tender Panel is to comprise the following members:

- Tender Panel Convenor (a Council Officer of at least Manager status) who would normally call Tender Panel Meetings, ensure meetings are documented, ensure documentation complies with the relevant legislation and Council's Tender procedures.
- Further two Council Officers who have technical expertise in the area of the tender and who understand the technical requirements of the tender and can offer guidance in this area.
- The Procurement Officer or Alternate (Internal Ombudsman) to ensure the accountability, transparency and probity requirements of the *Local Government Act 1993* and the *Local Government (General) Regulation 2005*. This member will not be responsible for the Tender only probity matters.

## 4. Accredited Organisations

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Where a contract exists with a prescribed organisation or NSW and Federal Contracts Council will use those contracts without the need to tender in accordance with Section 55(3) of the Act and Clause 163(1A) of the Regulation.

### Prescribed Organisations Section 55(3) (a) of the Act

The Prescribed Organisations are as follows:

- Local Government Procurement (LGP) <http://www.lgp.org.au>
- Procurement Australia (PA) <http://www.procurementaustralia.com.au>

### NSW Government and Federal Government Contracts Section 55(3) (g) of the Act

These organisations are as follows:

- NSW Procurement Board <https://www.procurepoint.nsw.gov.au> or <https://buys.nsw.gov.au>
- Commonwealth Contracts

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## Southern Sydney Regional Organisation of Councils

Council must accept by resolution Tenders that it has participated in with SSROC in accordance with Section 55 of the Act.

Where the expenditure is \$250,000 or over Council is required to invite tenders for a contract from a list the list of Recognised Contractors through a Selective Tender in accordance with Clause 169 of the Regulation.

In seeking tenders for a particular proposed contract an invitation can be extended to some or all of the recognised contractors but not less than three.

### 5. What is Tendering?

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Tendering is a formal process for seeking offers for the supply of goods or services and the disposal of property whereby an invitation is extended and offers are made and considered, according to a set of pre-determined assessment criteria, prior to the creation of a contract for the supply of the goods or services.

The legislative requirements for tendering by NSW local government are prescribed by Section 55 of the *Local Government Act 1993* (the Act) and by the *Local Government Regulation 2005* (the Regulation). However, other legislation is also relevant to Council's operations and activities involved in tendering, procurement and contracts.

This Policy addresses tendering by Local Government for \$250,000 or above threshold prescribed by the Regulation.

### 6. What is Council's Obligation to Tender?

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The Act presents a broad range of classes of contract for which Councils are required to seek tenders. Section 55(1) of the Act provides that Council is required to invite tenders before entering into any of the following contracts:

- a. a contract to carry out work that legislation directs or authorises a Council to carry out
- b. a contract to carry out work that the Council has undertaken to carry out for some other person or body under another contract
- c. a contract to perform a service or to provide facilities that legislation directs or authorises a Council to perform or provide
- d. a contract to perform a service or to provide facilities that, under some other contract, the Council has undertaken to perform or provide for some other body
- e. a contract for the provision of goods or materials to the Council (whether by sale, lease or otherwise)
- f. a contract for the provision of services to the Council (other than a contract for the provision of banking, borrowing or investment services)
- g. a contract for the disposal of a Council's property
- h. a contract requiring the payment of instalments by or to the Council over a period of 2 or more years
- i. any other contract, or any contract of a class, prescribed by the regulations

Council is able to tender for any work, service or facility for which it has invited tenders.

In relation to the disposal of property, it is important to note that property, as provided by the *Interpretation Act 1987*, consists of any legal or equitable estate or interest in real or personal property of any description. It follows that most activities or obligations undertaken or satisfied by a Council by way of contracts come within the requirement to tender.

However, the Act does allow for exceptions to the requirement to invite tenders. The exceptions are specified on Section 55(3) as amended of the Act and include: This section does not apply to the following contracts:

- a. subject to the regulations, a contract for the purchase of goods, materials or services specified by a person prescribed by the regulations made with another person so specified, during a period so specified and at a rate not exceeding the rate so specified
- b. a contract entered into by a Council with the Crown (whether in right of the Commonwealth, New South Wales or any other State or a Territory), a Minister of the Crown or a statutory body representing the Crown
- c. a contract entered into by a Council with another Council
- d. a contract for the purchase or sale by a Council of land
- e. a contract for the leasing or licensing of land by the Council, other than the leasing or licensing of community land for a term exceeding 5 years to a body that is not a non-profit organisation (see section 46A)
- f. a contract for purchase or sale by a Council at public auction
- g. a contract for the purchase of goods, materials or services specified by the NSW Procurement Board or the Department of Administrative Services of the Commonwealth, made with a person so specified, during a period so specified and at a rate not exceeding the rate so specified
- h. a contract for the employment of a person as an employee of the Council
- i. a contract where, because of extenuating circumstances, remoteness of locality or the unavailability of competitive or reliable tenderers, a Council decides by resolution (which states the reasons for the decision) that a satisfactory result would not be achieved by inviting tenders
- j. contract for which, because of provisions made by or under another Act, a Council is exempt from the requirement to invite a tender
- k. a contract made in a case of emergency
- l. a contract to enter into a public-private partnership
- m. if a Council has entered into a public-private partnership a contract entered into by the Council for the purposes of carrying out a project under the public-private partnership (but only to the extent that the contract is part of the project that has been assessed or reviewed under Part 6 of Chapter 12)
- n. a contract involving an estimated expenditure or receipt of an amount of less than \$100,000 or such other amount as may be prescribed by the regulations
- o. a contract that is an environmental upgrade agreement (within the meaning of Part 2A)
- p. a contract or arrangement between a Council and the Electoral Commissioner for the Electoral Commissioner to administer the Council's elections, Council polls and constitutional referendums

In order to rely on the extenuating circumstances exception (under Section 55 of the Act):

- a. there must be a resolution of Council
- b. the resolution must state the reason for the Council's decision
- c. the resolution must state that a satisfactory result would not be achieved by inviting tenders

In addition, the resolution must be passed in good faith and not merely be an attempt to avoid the public tender requirements of Section 55(1) of the Act. Before deciding to rely upon Section 55(3), Council should consider:

- whether all available and appropriate competitive measures have been considered
- whether all probity concerns have been addressed, (i.e. potential conflicts of interest, circumstances that might give rise to allegations of unwarranted preferential treatment etc)
- does the decision provide the best value outcome for Council (not merely price or cost factors)

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## 7. Recognised Contractors

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Any list(s) of 'recognised contractors' shall be market tested at least every three years to increase competition and reduce opportunities for Council to be captured by a reduced and ultimately more expensive market.

## 8. Probity Auditor

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The General Manager shall decide if a Probity Auditor is required when the decision to call tenders is made.

## 9. Confidentiality

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All Tender Panel Members are required to complete a Confidentiality Undertaking Declaration.

## 10. Conflicts of Interest

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A Council Official with an actual or a potential conflict of interest must address that interest without delay.

## 11. Risk Management

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Managing risk assists making better decisions. Council has adopted sound risk management procedures in relation to tendering. By identifying likely risks both in the procurement of the goods and services and in the tendering process during the planning stage, steps can be taken to manage those risks to minimise the likelihood of problems occurring. All decisions regarding risk identification, analysis and treatment should be recorded to ensure an accountability trail.

Prospective tenderers should be informed of risks that Council is aware of in respect to the works being undertaken.

Council should refer to the Risk Management Standard – AS/NZS ISO31000:2009, Council's Risk Management Strategy and/or Council's Risk Register to assist in the ongoing development of a systematic and comprehensive approach to risk identification, analysis, evaluation and treatment.

## 12. Insurance

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The insurance of the Principal Contractor must fully indemnify Burwood Council for any negligent act, error or omission that results in any claim, injury, loss, or damage caused by the Principal Contractor or any other party engaged by or used by the Principal Contractor in any capacity.

With the exception of Workers Compensation Insurance, all insurances must name Burwood Council as an indemnified party for all actions, suits, claims, and costs that are incurred by Burwood Council including any and all legal and investigation costs and clearly states as follows:

***“The insurer accepts the term insured as applying to each of the parties comprising the insured as if a separate policy of insurance had been issued to each of them.”***

The Public/Product Liability and Professional Indemnity cover must include a Waiver of Subrogation and must be the primary coverage without right of contribution from any other cover that may be held by Burwood Council.

The covers listed below must be held by the Principal Contractor, and as required for specific construction and Waste contracts or other, and comply with the above requirement unless specifically precluded by Legislation.

- Public Liability with a products liability extension
- Professional Indemnity
- Motor Vehicle including unregistered Plant & Machinery
- Workers Compensation
- Construction Risk

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### 13. Records Management

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Access to tender documents will be restricted to only those persons involved in the tender process including the Tender Panel.

All documents relating to the Tender will be registered in Council's Electronic Document System Content Manager.

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### 14. Consideration of Late Tenders

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Tenders that are not submitted to Council by the deadline (Closing date of the Tender) will not be considered unless in accordance with Clause 177 of the Regulation as follows:

1. The Tenderer can satisfy Council that the formal tender documents and all necessary information were lodged at a recognised delivery agency prior to the deadline for the closing of the Tender.
2. Council receives those documents within a period it decides is reasonable in the circumstances under Clause 177(5) of the Regulation.

The period will be two working days.

In the circumstances that Council either accepts or does not accept the documents reasons must be documented and agreed by the Tender Panel.

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### 15. Limitations

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The General Manager cannot expend more than \$1,000,000 via a prescribed organisation i.e.: Local Government Procurement (LGP) and Procurement Australia (PA).

The General Manager has the discretion to refer any expenditure to Council for determination.

### Council Resolved Projects

Where Council has approved the project either through a Council resolution or the Operational and Capital Works Program the General Manager cannot expend more than the resolved dollar value.

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### 16. Approval

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In accordance with Section 377 of the Act the General Manager has the authority to accept tenders which are not for services currently provided by members of staff of the Council. Notwithstanding, the General Manager has the option to refer the Tender to Council for acceptance.

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### 17. Purchase of Australian-Made Products

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Council has adopted a policy of purchasing Australian-made products, where possible, taking into account price, quality and other relevant considerations. *(Note: The above policy was endorsed at Council's Services and Policy Committee on 12 June 2001)*

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### 18. Green Action Plan

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Purchasing and procurement decisions shall have regard to the advancement of the sustainable use of resources and the reduction of impacts on the environment and human health.

All Council Officers shall endeavour to purchase only goods and services with the most beneficial environmental impact. *(From Green Action Plan adopted by Council 24 July 2012)*

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## 19. Rotation of Work between Panels

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All Burwood Council Panels are subject to rotation requirements. The utilisation of individual contractors/consultants/ suppliers on those panels must be rotated for each project.

Performance of contractors/consultant/suppliers will be monitored in accordance with Council's Performance Appraisal Process.

A report on the rotation of panels is to be reported to Council annually.

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## 20. Recycled Products

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Council may give preference to recycled and environmentally performing products/services that are cost competitive.

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## 21. Resources

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### 22.1 Tender Manual

A Tender Manual has been developed to ensure that Tender Processes are conducted in accordance with the relevant legislation and that any Tender undertaken by Council withstands the highest level of transparency, accountability and probity.

The Tender Manual is to be used in conjunction with this Policy.

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## 22. Legislative Summary Checklist

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- *A New Tax System (Goods and Services Tax) Act 1999*
- *Electronic Transaction Act 2000*
- *Government Information (Public Access) Act 2009*
- *Local Government Act 1993*
- *Local Government (General) Regulation 2005*
- *Division of Local Government – Tendering Guidelines for NSW Local Government 2009*
- *Work Health and Safety Act 2011*
- *Personal Information Protection Act 2004*
- *Privacy and Personal Information Protection Act 1998*
- *State Records Act 1998*
- *Competition and Consumer Act 2010*
- ICAC publication “*Direct Negotiations with Proponents – When, Why and How*”
- Department of Finance and Services - NSW Government Contractor Performance Reporting System

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## 23. Council Documents

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- Tender Manual
- Code of Conduct and the Administration of the Code of Conduct
- Conflicts of Interest Policy
- Gifts and Benefits Policy
- Risk Management Policy



## **24. Review**

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The Policy will be reviewed every four years.

## **25. Contact**

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Procurement Officer 9911 9835