

Conditions of Responding – Council Expression of Interest

The purpose of the '*Conditions of Responding – Council Expression of Interest*' is to provide instructions to Contractors for preparing a Response to the Expression of Interest (EOI) to ensure that participation requirements and EOI conformance is achieved.

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1 Introduction

1.1 Structure and Purpose of the Expression of Interest (EOI)

The Request is intended to provide Contractors with information on the project requirements and Council arrangements for the submission and evaluation of Expressions of Interest. It comprises the following parts:

Volume 1 - Specification

Provides all details of the requirement, including outputs, deliverables and drawings (if applicable).

Volume 2 - Response Schedules

Contains the schedules that Contractors are required to complete when submitting an Expression of Interest with regard to pricing, commercial aspects and technical aspects.

Volume 3 - Conditions of Contract

A draft copy of the Contract that Council proposes to enter into with the successful proponent (depending on EOI requirements).

2 How to Prepare an EOI Response

2.1 Understanding Council's EOI

When preparing an EOI response, Contractors must ensure that they:

- Carefully read all parts of the EOI and ensure that all requirements of the EOI are understood; and
- Complete and submit *Volume 2 – Response Schedules* and include all other supporting documentation (as attachments) that have been requested by Council in the EOI.

2.2 Clarification of the EOI

If the Contractor has any doubt as to the meaning of any part of the EOI they should seek to clarify points of doubt or difficulty with the Contact Officer before submitting an EOI.

All requests for clarification must be made in writing and be directed to the Contact Officer as outlined in the EOI documentation. Depending on the nature of the Request for Clarification, the Contact Officer may respond in writing distributing both the clarification enquiry and the response to all Respondents. **Respondents should not seek information from any person(s) or rely on any information provided by any person(s) other than the Contact Officer.**

- If a Contractor considers the subject matter of a question to be confidential in nature, they must clearly indicate this in the correspondence. Council, at its sole discretion, shall determine whether the matter raised in the question is of a confidential nature. If Council does not consider the subject matter of the question to be of a confidential nature, it shall give the Contractor the opportunity to withdraw the question.
- Council also reserves the right to issue the responses to any questions raised by one Contractor to all other Respondents while ensuring that information proprietary or confidential to a particular Contractor remains as such.

- Council will respond in writing to questions submitted by Respondents as quickly as possible after receipt of the questions, however, the nature and extent of the questions will determine the timeframe in which Council will be able to respond.

Council Expressions of Interest will have a *Clarification and Questions Closing Date* where Council reserves the right not to answer requests for clarification made after that date. In the event that a *Clarification and Questions Closing Date* has not been documented in the EOI, the deadline for requesting clarifications is set for seven (7) days prior to the *EOI Closing Date*.

2.3 Respondents to Inform Themselves

The Information in the EOI has been provided in good faith. It is intended only as an explanation of Council's requirements and is not intended to form the basis of a Respondent's decision on whether to enter into any contractual relationship with Council.

The Information provided does not purport to be all-inclusive or to contain all information that a prospective Contractor may require. Respondents and their advisers must take their own steps to verify information which they use and must make an independent assessment of the opportunity described in the EOI after making such investigation and taking such professional advice as they deem necessary.

Respondents will be deemed to have:

- examined the EOI and any other information available in writing to Respondents for the purpose of submitting an Expression of Interest;
- examined all further information relevant to the risks, contingencies and other circumstances having an effect on their Response which is obtainable by the making of reasonable enquires;
- satisfied themselves as to the correctness and sufficiency of their Response including quoted prices which will be deemed to cover the cost of complying with the EOI and of all matters and things necessary for the due and proper performance and completion of the work described therein; and
- satisfied themselves they have a full set of the EOI documents and all relevant attachments which includes all pages which are numbered consecutively and that all supplements referred to are also included.

None of Council's members, management, officers, employees, agents or advisers make any representation or warranty as to the adequacy, accuracy, reasonableness or completeness of the information.

Neither Council nor their professional advisers shall be liable for any loss or damage arising as a result of reliance on the information or for any expenses incurred by the Respondent at any time.

Any advisers or agents appointed by Council, whether legal, financial, technical or other, will not be responsible to anyone other than Council for providing advice in connection with the EOI.

2.4 Amendments to the EOI / Council Rights

The Contractor must not alter or add to the EOI documents unless it has been communicated to Respondents as a requirement of the Expression of Interest.

Without limiting its rights by law or otherwise, Council reserves the right, at its absolute discretion, to at any time do one or any combination of the following prior to the closing date by notice to each Respondent:

- Defer the closing date or any other date under the EOI; or
- Vary, amend, change or modify any aspect of the EOI, in which case Council will issue an addendum to all Respondents;
- Issue an addendum to all Respondents correcting any ambiguity or mistake concerning or arising out of the EOI and any such addendum will become part of the EOI;
- Cease to proceed with the process outlined in the Expression of Interest or subsequent process;
- Withdraw the Expression of Interest.

3 Submission and Lodgement of an EOI

3.1 Submission of an Expression of Interest

Respondents must submit all information as requested in the EOI documentation.

General information about a company such as advertising, product or company information, marketing brochures or presentations other than what has been requested as part of the EOI must not form part of the Respondent's submission. If required, the EOI Evaluation Panel will request these materials separately.

3.2 Lodgement of an Expression of Interest and Delivery Method

The Expression of Interest must be lodged by the closing date and time and by the method/s outlined in the EOI documentation. This can either be electronically, physically, by email to the email address as specified in the EOI, or by any other method as outlined.

Where applicable, EOI submissions are to be lodged electronically (preferred method of lodgement) through Council's nominated electronic system website which corresponds with where the EOI was advertised:

e-Tendering: <https://tenders.nsw.gov.au/>

VendorPanel: <https://www.vendorpanel.com.au/>

Alternatively, EOI submissions are to be lodged via the physical "Tender Box" located at the Wingecarribee Shire Council Civic Centre, 68 Elizabeth Street Moss Vale 2577 or by post:

Wingecarribee Shire Council
PO Box 141
Moss Vale NSW 2577

3.3 Electronic Submission Conditions

e-Tendering is the electronic system used to allow the electronic publication of information in regard to Council's EOI to include all EOI documentation and for the issue of any notifications or addendums to accommodate the Contractor for completing their EOI response.

Submissions lodged electronically will be treated in accordance with the *NSW Electronic Transactions Act 2000*, and given no lesser level of confidentiality, probity and attention than an Expression of Interest lodged by other means.

Respondents lodging an EOI electronically must accept conditions shown on the *e-Tendering* website which include conditions with regard to acceptable file types and file sizes. Please review the terms and conditions with regard to the *e-Tendering* system prior to uploading your EOI response.

Council may not consider EOI responses that cannot be evaluated due to being incomplete or corrupt.

Electronic lodgement must be “fully complete” by the EOI closing time. The electronic link will cut off right on closing time. At such time, if your submission is not complete it will be deemed as a late submission and will not be considered.

If a Respondent encounters any technical issues on the e-Tendering website when submitting their EOI Response they must contact the NSW Procurement Service Centre to seek assistance, report the issue and receive a receipt number.

The NSW Procurement Service Centre Contact Information for advice and assistance is:

Email: nswbuy@finance.nsw.gov.au

Phone: 1800 679 289

Hours: 8:30am - 5:00pm, Monday to Friday

Files must be checked by a reputable virus scanning application prior to submission and be found to be free from virus, malicious code or other properties (including executable code) that may compromise Council’s IT environment.

The files containing the Response Schedules provided by Council for completion and return by the Respondent must remain in the version that they were provided in. i.e. not a different version of MS Word, Excel etc.

4 Outcome of an Expression of Interest

4.1 Acceptance of an Expression of Interest

Unless otherwise stated in the EOU documentation, responses may be for all or part of the requirement of the EOI and may be accepted by Council either wholly or in part. Council is not bound to accept the lowest submission and may reject any or all submissions and may waive any irregularities therein.

Once the outcome of an Expression of Interest has been determined, if applicable to that particular EOI a Letter of Acceptance and a copy of the Formal Contract Agreement will be provided to the Contractor. In most instances this will be by email where the time of email shall be deemed to be the time of acceptance.

The Expression of Interest and the acceptance thereof shall constitute a binding Contract between Council and the Contractor on and subject to the terms of the:

- Formal Contract Agreement;
- General Conditions of Contract and any Special Conditions of Contract;
- The Specification; and
- Respondent's Offer Form via the Response Schedules.

4.2 Rejection of an Expression of Interest

An Expression of Interest will be rejected without consideration of its merits in the event that:

- it is not submitted before the closing date and time;
- it is not submitted via the method(s) specified in the Request; or
- it is not submitted at the place specified in the Request.

4.3 Late Expression of Interest

If an Expression of Interest is to be submitted by post and is received after the deadline, Council will only consider an Expression of Interest received within such period after the Deadline as it decides to be reasonable in the circumstances.

In the event of receiving a late hard copy Expression of Interest, the late Expression of Interest will only be considered if the Contractor satisfies Council that the Expression of Interest and all other requisite essential information were posted or lodged at a Post Office or other recognised delivery agency in sufficient time to enable the documents to have been received by Council in the ordinary course of business before the deadline or Council actually receives those documents within such period as it decides to be reasonable in the circumstances.

5 Consideration of Expressions of Interest

5.1 Opening of an Expression of Interest

Expression of Interest will be opened in Council's offices, following the closing date and time of the Expression of Interest.

Unless specified otherwise, the opening of the Expression of Interest will be held at Wingecarribee Shire Council Civic Centre, Elizabeth Street, Moss Vale 2577.

5.2 Standard Selection Criteria

Information provided by the Respondent in their Response to Council's Expression of Interest will be evaluated on the basis of the selection criteria set out in the Expression of Interest documentation. Respondents are advised to respond clearly to all of the requirements listed in *Volume 1 - Specification* and *Volume 2 - Response Schedules* which form part of the Expression of Interest.

Council's format for standard selection criteria for the evaluation of Expressions of Interest may, at Council's discretion, be divided into and include all or some of the following parts, depending on the requirements of the EOI:

- Mandatory Participation Criteria
- Non-Cost Weighted Selection Criteria
- Non- Cost Selection Criteria Threshold
- Cost Weighted Selection Criteria

- Total Evaluation Score

5.3 Mandatory Participation Criteria (Compliance)

Mandatory Participation Criteria must be met by the Contractor and are measured on a YES or NO basis to determine whether a Contractor has satisfactorily met all compliance criteria required for carrying out the Contract/Project as deemed by Council.

Examples of Mandatory Participation Criteria could include: insurances, accreditations, qualifications or licences.

If a Response fails to fully comply with any of the outlined Mandatory Participation Criteria, Council may deem the response to be non-conforming and therefore not be eligible to be shortlisted or progress any further in the evaluation.

5.4 Non-Cost Selection Criteria and Weighting

Non-Cost Selection Criteria are used to evaluate a Respondent's submission in accordance with their capabilities for carrying out a project or performing works under Contract.

Non-Cost Selection Criteria will be evaluated as weighted criteria where submissions will receive a score in accordance with the Evaluation Criteria.

Examples of Non-Cost Selection Criteria could include: capability, experience, specifications, service and support, fit for purpose, procurement risk, quality, innovation, community, social, work health and safety (WHS), environment, sustainability, and physical requirements.

Respondents are to refer to the EOI documentation for all Non-Cost Selection Criteria and weightings for the EOI.

5.5 Non-Cost Selection Criteria Threshold

A Non-Cost Selection Criteria Threshold may be applied to Non-Cost Selection Criteria for an EOI where:

- Respondents must achieve a percentage score greater than the Non-Cost Selection Criteria Threshold to be eligible to be shortlisted and progress any further in the evaluation process; and/or
- Respondents must receive a ranking in the top (pre-determined number) of submissions based on the Non-Cost Selection Criteria scores to be eligible to be shortlisted and progress any further in the evaluation process.

Respondents are to refer to the EOI documentation to determine whether a Non-Cost Selection Criteria Threshold has been applied to the EOI.

5.6 Cost Selection Criteria and Weighting

The Cost Selection Criteria measure the price received in an EOI response as a weighted score.

Examples of Cost Selection Criteria could include: lump sum or unit rates.

Respondents are to refer to the EOI documentation for the weightings applied to the Cost Selection Criteria in accordance with the EOI and satisfactorily complete the Schedule of Prices in *Volume 2 - Response Schedules*.

5.7 Total Evaluation Score

A combined score from the Non-Cost Selection Criteria and the Cost Selection Criteria will achieve a Total Evaluation Score out of 100%.

6 Clarification of Information

6.1 Requests for Clarification

Council may, at its sole discretion, request clarification from Respondents with regard to their EOI Response and may do so without notification to any other Respondent. All Requests for Clarification will be in writing and be emailed to a Respondent to provide a Clarification Response within the timeframes set by Council.

Council will only seek clarification on information in an EOI Response that is open to interpretation or is not clear, and where further clarification is required in order for Council to properly evaluate the submission.

A Request for Clarification is not an opportunity for a Respondent to revise or enhance their original submission in order to gain an unfair advantage over other Respondents.

6.2 Reference Checks

Council may, at its sole discretion, conduct reference checks on some or all Respondents as a way of confirming information provided in an EOI Response.

6.3 Evaluation Interviews

Council may, at its sole discretion, request to conduct interviews or request presentations from some or all Respondents, either in person or via conference call, as a way of clarifying or demonstrating information contained within an EOI response.

The invitation to attend an interview or conduct a presentation does not guarantee that the Respondent has been shortlisted for being awarded a Contract.

6.4 Financial Capacity

Respondents must have sufficient financial capacity to perform the services required under the Formal Contract Agreement.

Council may, at its sole discretion, organise for a Financial Capacity Check to be carried out by a third party on some or all Respondents to confirm that the Respondent has the financial stability and capacity required for undertaking the proposed works under Contract.

7 Innovative, Alternative, and Non-Conforming Expressions of Interest

7.1 Innovative Expressions of Interest

In the event that Council provides an opportunity for Respondents to submit innovative or alternative concepts as part of the Expression of Interest, this is not considered to be a non-conforming submission. Such Expressions of Interest will include a *Schedule of Innovation* as part of *Volume 2 – Response Schedules* which is to be completed as part of the Respondent's EOI submission. Respondents are required to follow the instructions set out in the Expression of Interest documentation.

Council may, at its absolute discretion, consider or accept proposed innovations, however it is not obliged to do so.

7.2 Alternative or Non-Conforming Expressions of Interest

In the event that Council does not provide an opportunity for Respondents to submit innovative or alternative concepts as part of the Expression of Interest, if a Contractor wishes to submit an Alternative or Non-Conforming EOI they must:

- a) Submit a conforming EOI and complete the *Schedule of Departures, Clarifications and Assumptions* to identify and address any areas of non-conformance in accordance with the EOI documentation; and
- b) Submit an Alternative, Non-Conforming or Innovative EOI in addition to the conforming EOI (where the Contractor offers Council something different) and complete the *Schedule of Departures, Clarifications and Assumptions* to identify and address any areas of non-conformance in accordance with the EOI documentation. The Respondent must clearly name the submission as an alternative, non-conforming or innovative EOI to ensure that this is clearly identifiable to Council.

Council may, at its absolute discretion, consider or accept an Alternative or Non-Conforming EOI, however it is not obliged to do so.

7.3 Departures, Clarifications and Assumptions

The Respondent is to declare and detail any Departures, Clarifications or Assumptions that have been taken into account and included in their Response to the EOI in the *Schedule of Departures, Clarifications and Assumptions* in *Volume 2 - Response Schedules*.

These Departures, Clarifications or Assumptions can address any conditions or positions in the Conditions of Contract or requirements as detailed in the supplied Specification that are material to the Response.

Submissions will be assumed to be accepting of, and complying with, all terms and conditions of the EOI, the Conditions of Contract and the Specification unless expressly noted in the *Schedule of Departures, Clarifications and Assumptions* in *Volume 2 - Response Schedules*. If the Contractor does submit a separate document of departures, clarifications and assumptions, the separate document is

to be referenced in the *Schedule of Departures, Clarifications and Assumptions in Volume 2 - Response Schedules*.

8 Participation in the EOI Process

8.1 EOI Validity Period

All Expressions of Interest will remain valid and open for acceptance for a minimum period of ninety (90) days from the closing date and time. Respondents may withdraw their Expression of Interest at any time after the expiration of the EOI Validity Period.

8.2 Variation of an Expression of Interest

There are circumstances in which an Expression of Interest may be varied after having been received by Council, but before Council's acceptance of the EOI Response. These circumstances permit an explanation, clarification, or correction of mistakes or anomalies.

Such variations can be made:

- At the request of Council;
- At the request of the Contractor and with the consent of Council where Council considers it reasonable for the Respondent to provide the information or correct the mistake or anomaly.

When this occurs, Council must:

- Provide all other Respondents whose submissions have the same or similar characteristics the opportunity to vary their submissions;
- Keep a record of the circumstances requiring a variation of the Expression of Interest and the name of the staff member handling the matter.

Variations that may considerably alter the original Expression of Interest will not be accepted.

Departures, Clarifications and Assumptions provided by Respondents may be treated as anomalies. In the event that received Departures, Clarifications and Assumptions will significantly alter the value of the EOI, Council may, at its discretion, seek clarification for the purpose of identifying any price adjustments for the purpose of EOI comparisons. A Request for Clarification is not an opportunity for Respondents to provide any additional departures, clarifications or assumptions or to modify EOI prices.

Council may give consideration to any departures, clarifications or assumptions that have been received as part of a Respondent's submission. For any departures, clarifications or assumptions that are not accepted by Council, Council will notify the Respondent requesting that the departures, clarifications or assumptions are withdrawn from the Respondent's submission. In the event that Council and a Respondent disagree on any departures, clarifications and assumptions, this may result in the Respondent's submission being deemed as non-conforming and no longer being considered for acceptance under Council's EOI process.

8.3 Identity of the Respondent

The identity of the Contractor is fundamental to Council. The Contractor will be the individual(s) or corporation(s) named in *Volume 2 - Response Schedules*.

8.4 Quoted Price

The price submitted in the Expression of Interest must be quoted inclusive of GST.

The submitted price will be net and what Council will be required to pay pursuant to the Contract and must include all costs associated with the Contract.

The quoted price should be firm for the duration of the Contract and is not subject to rise and fall unless there are provisions made within the Contract.

The Contractor must provide their Australian Business Number (ABN), or, if they do not have an ABN, the reason for not having one.

Payments between Council and the Contractor will be exclusively in Australian Dollars (AUD).

8.5 Conditions of Contract

Where applicable, Expressions of Interest will be deemed to have been made on the basis of, and to incorporate, Volume 3 - Conditions of Contract as provided as part of the Expression of Interest Documentation.

8.6 Precedence of Documents

In the event of any conflict or inconsistency between the terms and conditions in the EOI and those in the Conditions of Contract, the terms and conditions appearing in Council's Conditions of Contract will have precedence.

8.7 Ownership of Expressions of Interest

All documents, materials, articles and information submitted by the Respondent as part of or in support of an Expression of Interest will become the property of Council and will not be returned to the Respondent at the conclusion of the EOI process. The Respondent will be entitled to retain copyright and other intellectual property rights therein, unless otherwise provided by the Contract.

The Respondent does not acquire intellectual property rights in the Request documents. Respondents shall not reproduce any of the Request documents in any material form (including photocopying or storage in any medium by electronic means) without the written permission of Council other than for use strictly for the purpose of preparing an Expression of Interest.

8.8 Registration or Licensing of Contractors

Where an Act requires that a Contractor (as defined by the Act) be registered or licensed to carry out the work described in the Request, the Contractor shall state their registration or licence number in the appropriate Response Schedule. The Expression of Interest may not be considered if the Contractor fails to provide such registration or license number.

8.9 WHS Obligations

Lodgement of an Expression of Interest will, in itself, be an acknowledgement and representation of requirements in relation to WHS, that the Contractor will comply with all relevant legislation, agrees to provide periodic evidence of compliance, and give access to all relevant information to demonstrate compliance for the duration of any Contract that may be awarded.

8.10 Jurisdiction

The Expression of Interest and the Formal Contract Agreement will be governed by the Law of NSW. By lodging an Expression of Interest the Contractor irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of NSW.

8.11 Costs

Respondents remain responsible for all costs incurred by them in connection with their Expression of Interest, whether before or after the submission date, whether incurred directly by them or their advisers and regardless of whether such costs arise as a direct or indirect consequence of amendments made to the EOI by Council. For the avoidance of doubt, Council shall have no liability whatsoever to Respondents for the costs of any negotiations conducted in the event that Council decides not to accept any Expression of Interest.

9 Participation in the EOI Process - Conduct

9.1 Canvassing of Officials

Any Respondent who solicits or attempts to solicit support for their Expression of Interest or otherwise seeks to influence the outcome of the EOI process will be excluded from the EOI process.

Council makes information available on condition that it is treated as confidential by the Respondent and is not disclosed, copied, reproduced, distributed or passed to any other person at any time except for the purpose of enabling an Expression of Interest to be made, for example by disclosure by a Respondent to their insurers or professional advisers, provided they have each given an undertaking at the time of receipt of the relevant information (and for the benefit of Council) to keep such information confidential. Other than specified above, or as required by law, and save insofar as the information is in the public domain, Respondents shall not make any of the Information available to any other parties in any circumstances without the prior written consent of Council nor use it for any purpose other than that for which it is intended.

9.2 Statement of Business Ethics

Council is committed to the highest standards of honesty, fairness and integrity in all its business dealings. Council's [Statement of Business Ethics](#) and [Code of Conduct](#) set out the standards of behaviour that Council expects from its private sector partners. These standards of behaviour relate to fair, ethical and honest dealings with Council, and ensuring that the best level of service is provided to the community. Behaviour contrary to the Statement of Business Ethics or Code of Conduct may constitute grounds for termination of a Contract.

9.3 Non Collusion

A Contractor who is found to have been involved in any form of collusion, including but limited to any of the below, may, at the discretion of Council, be disqualified from any further involvement in the EOI process (without prejudice to any other civil remedies available to Council and without prejudice to any criminal liability which such conduct by a Contractor may attract):

- 9.3.1. fixing or adjusting the amount of their Expression of Interest by or in accordance with any agreement or arrangement with any other Respondents; or
- 9.3.2. entering into any agreement or arrangement with any other Contractor that they shall refrain from expressing an interest or as to the amount of any Expression of Interest to be submitted; or
- 9.3.3. causing or inducing any person to enter such agreement or to inform the Contractor of the amount or approximate amount of any rival EOI for the Contract; or
- 9.3.4. canvassing any of the persons previously discussed in connection with the EOI or the outcome of the EOI process; or
- 9.3.5. offering to pay, agreeing to pay, or paying any sum of money, inducement or valuable consideration to influence the outcome of the EOI process, this being directly or indirectly to any person for doing, having done, causing, or caused to be done in relation to any other EOI or proposed EOI or any act or omission; or
- 9.3.6. communicating to any person other than Council the amount or approximate amount of their proposed EOI, except where such disclosure is made in confidence in order to obtain quotations necessary for the preparation of the EOI, for insurance or Contract guarantee bonds and/or performance bonds or professional advice required for the preparation of an EOI.

9.4 Publicity

Respondents must obtain the written approval from the Contact Officer before any disclosures relating to the Expression of Interest or the Contract are made to the press or in any other public domain. Respondents must not undertake any publicity activities with any part of the media in relation to the Expression of Interest or Contract without the agreement of Council, including agreement on the format and content of any publicity.

END OF CONDITIONS OF RESPONDING – COUNCIL EXPRESSION OF INTEREST