



**Communities
& Justice**

DCJ Conditions of Tendering

DEFINITIONS

The following terms have the meanings set out below:

Addendum and Addenda means an addition to the RFX issued by the Department via the Portal before the RFX Closing Date and Time.

Agreement means the agreement entered into between the Department and the Respondent substantially in the form set out in the Draft Agreement of the RFX.

Alternative Response means a Response that is intended to offer a different method of meeting the objective and intent of the Requirement.

Closing Date and Time means the Closing Date and Time for receipt of Responses.

Conditions of Tendering document covers all types of RFX including Request for Tender (RFT), Request for Information (RFI), Request for Proposal (RFP), Request for Quotation (RFQ) and Expression of Interest (EOI).

Conflict of Interest means where the exercise of a person's duty or decision-making is influenced, or may appear to be influenced, by his or her personal interests.

Conforming Response means a Response that conforms to the Requirement.

Consortium means a group of organisations established as a single Legal Entity to the Response or the RFX.

Department means the Crown in Right of the State of NSW, acting through the NSW Department of Communities and Justice.

Draft Agreement means the terms and conditions of the proposed agreement with the successful Respondent for the engagement and provided to all Respondents as part of the RFX process so that they are aware of the proposed terms and conditions of the agreement.

GST is a goods and services tax and has the same meaning as in the GST Law.

GST Free Services and Input Taxed Services have the same meaning as in the GST Law.

GST Law means any law imposing a GST and includes A New Tax System (Goods & Services Tax) Act 1999 (Cth) or if that Act does not exist, means any Act imposing, or relating to a GST and any regulation made under those Acts.

Joint Working Arrangement or Partnership is a group of organisations collaborating together to respond to the RFX; where more than one Legal Entity is intending on delivering the Agreement; and with a lead Legal Entity accepting overall responsibility for the Agreement.

Late Response means a Response received after the Closing Date and Time and includes a Response which is only partly received by the Closing Date and Time.

Legal Entity means an individual, corporation or incorporated association that has legal capacity to enter into an Agreement.

Portal refers to the NSW eTendering 'Portal' and is accessible via the URL <https://www.tenders.nsw.gov.au/>.

NSW eTendering is an online tendering system used by NSW Government agencies to make available information about tendering opportunities.

Requirement means the requirement for Services and associated deliverables to be met by the Response, set out in the Introduction and Description of the Requirement of the RFX.

RFX encompasses the entire formal request process and can include any of the following: RFT, RFI, RFP, RFQ and EOI (which is referred to as RFT within the Portal).

Response means the offer to provide the Services submitted in response to the RFX.

Respondent means the Legal Entity submitting a response to an RFX.

Services means the human services sought under the RFX, as described in the Requirement.

The Tender means the RFX and 'to Tender' means to submit a Response.

CONDITIONS OF TENDERING

1. Conformity of Responses

1.1 The Department seeks Conforming Responses.

1.2 A Response which contains areas of non-conformity may, in the discretion of the Department, be treated as a Conforming Response.

1.3 Responses that do not include sufficient information to permit a proper evaluation to be conducted, or which cannot be effectively evaluated because the file has become corrupt, may be excluded from the RFX process without further consideration at the Department's discretion.

Respondents may, if the option is available for the particular RFX, and if they so choose, submit an Alternative Response, but only in conjunction with a Conforming Response. Respondents are encouraged to offer options or solutions that contribute to the Department's ability to carry out its business in a more cost-effective manner.

1.4 The Department may, in its discretion, choose not to further consider an Alternative Response that does not sufficiently conform to the Requirement. The Department may evaluate an Alternative Response against the evaluation criteria where submitted with a Conforming Response.

1.5 An Alternative Response must be clearly marked 'Alternative Response'.

1.6 The Department expressly reserves the right to accept, in its discretion, either or both of the following:

- (a) any Alternative Response or part of an Alternative Response which is of at least the same standard and potential as those described in the Requirement; and
- (b) any other Response that, in the Department's opinion, is substantially a Conforming Response.

2. Form of Response

- 2.1 The Response, including any Alternative Response, must comprise responses created within the Portal and any attachments, as may be required. Attachments should be labelled to identify those parts of the RfX to which they relate.
- 2.2 The Response will be taken to be for the supply of the Requirement on the terms and conditions stated in Draft Agreement except to the extent that these are amended by the Response.

3. Addenda

- 3.1 If, for any reason, the Department requires the RfX to be amended, an Addendum will be issued, and in each case the Addendum will form part of the RfX.
- 3.2 Respondents should, subject to any time period specified in the RfX, notify the contact officer identified in the RfX as soon as possible and before the Closing Date and Time if they require any clarification or information; or find any discrepancy, error or omission in the RfX.
- 3.3 Respondents should regularly check the Portal for Addendum issued, as well as their emails, to see whether an Addendum has been issued and, if appropriate, to download the information.

4. Minimum RfX validity period

- 4.1 Responses must remain open and valid for acceptance for a period of at least 180 days from the Closing Date and Time, unless otherwise stated in the Requirement. If a Response is to remain open and valid for any longer period, the Respondent must specify the period in their Response.

5. Respondents to inform themselves

- 5.1 Before submitting its Response, a Respondent must:
 - (a) examine all information relevant to the risks and contingencies and other circumstances that may affect its Response; and
 - (b) satisfy itself:
 - (i) that the Response is correct; and
 - (ii) that it is financially and practically viable for it to enter into and perform the proposed Agreement.
- 5.2 The Department makes no representation and does not warrant that any information supplied in connection with the RfX is accurate or complete.

6. Respondent's costs for participating in this RfX process

- 6.1 The Respondent acknowledges that the Department will not be liable to the Respondent for any expenses or costs incurred by the Respondent as a result of its participation in this RfX, including where any of the actions in clause 28 of this Conditions of Tendering are taken.

7. Policy Requirements

- 7.1 The Department conducts its procurement in conformance with the NSW Government Procurement Policy Framework.
- 7.2 In order to participate, the Respondent must comply with the NSW Government Supplier Code of Conduct.
- 7.3 In submitting its Response, the Respondent may be required to comply with current and relevant NSW Government and Commonwealth policies.

A. SUBMISSION OF RESPONSES

8. Closing Date and Time

- 8.1 A Response must be received by the Closing Date and Time electronically within the Portal.
- 8.2 In submitting its Response electronically through the Portal, the following is to be noted by the Respondent:
- (a) the Portal is at peak use before the RFX Closing Date and Time:
 - (i) it may take longer to submit a Response near Closing Date and Time than at other times; and
 - (ii) it is recommended that a Response be submitted well in advance of the Closing Date and Time.
 - (b) the Portal may experience difficulties in accepting a Response with large file size. A Response lodged via the Portal should ideally be below seven (7) megabytes (MB) in total file size.

9. Electronic Responses to the Portal

- 9.1 All Responses must be submitted electronically and will be treated in accordance with the Electronic Transactions Act 2000 (NSW).
- 9.2 A Respondent, by submitting a Response, is taken to have accepted the conditions specified within the Conditions of Tendering.

10. Submitting a Response

- 10.1 All Responses must be submitted via the Portal.
- 10.2 To submit a Response, the Respondent must follow the steps and instructions in the Portal, and any instructions which may have been supplied with the RFX. The Respondent must create a Response within the Portal and attach relevant files as requested.

11. Joint Responses

- 11.1 The Department's preference is for each of its Agreements to be with a single organisation. However a Joint Working Arrangement, or Consortia Response may be considered by the Department in its discretion.
- 11.2 Consortium or Joint Working Arrangement RFX submissions must include evidence of the legal agreement entered into, outlining accountabilities and joint working arrangements.

12. Subcontractors

- 12.1 If a Respondent proposes that any part of the requirement in this RFX is to be performed under subcontract, the names of the proposed subcontractors and details of the work proposed to be undertaken by them must be set out in the Response.
- 12.2 The Respondent in the event of being awarded an Agreement will be responsible for the actions of any subcontractor, and will remain responsible for the fulfilment of the requirements under the Agreement.
- 12.3 The Department reserves the right to assess the legal and financial viability of the subcontracting organisation/s.

13. Pre-Tender Briefing

13.1 The RFX may set out that a pre-tender briefing will be held, and if so will state the date, time and location of the briefing. The RFX may further stipulate that attendance at the briefing is mandatory for intending Respondents.

13.2 If the RFX stipulates that attendance at a pre-tender briefing meeting is mandatory and the Respondent or its representative does not attend, the Department reserves the right, in its absolute discretion, to reject a Response submitted by that Respondent by reason of that non-attendance. Evidence of attendance will generally be by means of an attendance register signed by attendees but may be by any other means as the Department sees fit.

14. Format for Responses

14.1 A Respondent must observe the following format for Responses:

- (a) A Response must be submitted through the Portal in the format indicated within the questions in the Portal. If a Respondent compresses files, it must be possible for the Department to decompress them using WinZip. A Respondent must not submit self-extracting (*.exe) zip files;
- (b) Files must be uploaded in a file format which can be read, formatted, displayed and printed by Microsoft Word 2010 and/or Microsoft Excel 2010, or any format requested as part of the Response within the Portal. PDF files will be accepted.

15. Incomplete or corrupt Responses

15.1 Responses may be incomplete or made corrupt, for example by computer viruses. The Department may decline to consider for acceptance a Response that cannot be effectively evaluated because it is incomplete or corrupt. To reduce the likelihood of viruses:

- (a) A Respondent must not include any macros, applets, or executable code or files in a Response;
- (b) A Respondent should ensure that uploaded files are free from viruses by checking the files with an up to date virus checking program before submission.

16. Issues with the Portal

16.1 If a Respondent has problems accessing the Portal or submitting a Response through the Portal, or has failed to receive an email confirming receipt of the Response:

- (a) The Respondent should immediately contact the NSW Procurement Service Centre to notify them and attempt to resolve the issue. The contact details for the Helpdesk can be found on the Portal;
- (b) In addition, the Respondent should inform the contact officer identified in the Requirement of the RFX of any issues accessing the Portal, or submitting a Response through the Portal;
- (c) If there is a defect or failure of the Portal and the Respondent has notified the contact officer nominated, the Department may admit the Response into the evaluation, provided that, in the view of the Department, the integrity and competitiveness of the RFX process will not be compromised.

17. Custody of Responses after receipt

- 17.1 Submitted Responses are stored securely within the Portal awaiting official opening by authorised personnel within the Department (after the Closing Date and Time). The Department is unable to view Responses prior to the opening.
- 17.2 For reasons of probity and security, the Department is unable to access Responses prior to the Closing Date and Time for verification purposes, and no further confirmations will be issued by the Department.
- 17.3 The email receipt that is sent to the Respondent after successfully uploading the Response is the only evidence of Response submission provided.

18. Corrections, additions and replacement Responses

- 18.1 If a Respondent becomes aware of an error or omission in its Response and wishes to submit a correction or additional information, this must be submitted in the Portal before the Closing Date and Time.
- 18.2 The Respondent may incorporate the correction or addition into a replacement Response. The Response which the Respondent designates as a replacement will be deemed as superseding its earlier Response which will then be disregarded.
- 18.3 Respondents should note that since Addenda become part of the RFX, it may be necessary to update their Response to incorporate the content of Addenda that were issued after their Responses have been submitted.
- 18.4 If a Respondent attempts to submit multiple Responses, the latest Response received will be the Response to be evaluated. The Department is not obliged to consider corrections, additional information, replacement or Alternative Responses submitted after the Closing Date and Time.

19. Late Responses

- 19.1 Late Responses will not be considered except when it is clear that the cause of lateness was beyond the Respondent's control and the Department is satisfied that the integrity and competitiveness of the RFX process will not be compromised or the Department exercises its rights in this Conditions of Tendering.

20. Extension of the Closing Date and Time

- 20.1 The Department may, in its discretion, extend the Closing Date and Time and will advise by way of Addendum on the RFX.

21. No legal relationship

- 21.1 This RFX is an invitation to Respondents to make offers to the Department. It is not intended to be construed, interpreted or relied upon, whether expressly or impliedly as an offer capable of acceptance by any person, or as creating any form of contractual, quasi-contractual, restitutionary or other grounds for claims by any Respondent.
- 21.2 No contractual relationship exists or will arise between the Department and any Respondent in respect to the RFX or the RFX process until an Agreement is executed by the Department and the successful Respondent.
- 21.3 The Department's expectation is that the Agreement will be executed by the parties electronically via the Department's approved platform unless the Respondent indicates in its Response that it has an objection to the electronic execution of the Agreement or unless otherwise agreed with both parties.

- 21.4 Conducting or requesting a presentation, interview, demonstration, site visit or sample in no way represents a commitment by the Department to accept any aspect of the Response.
- 21.5 No Respondent submitting a Response shall have any claim for compensation of any kind whatsoever as a result of participating in this RFX and by submitting a Response, each Respondent shall be deemed to have agreed that it has no claim.
- 21.6 These Conditions of Tendering will not form part of any Agreement with the successful Respondent.

B. EVALUATION OF TENDERS

22. General

- 22.1 Responses will be evaluated as set out in the RFX.
- 22.2 Information supplied by the Respondent in their Response will contribute to the evaluation. Respondents are advised to consider the evaluation criteria as listed in this RFX.
- 22.3 If any criterion or sub-criterion is stated to be 'mandatory', a failure by the Response to fully comply with that criterion or sub-criterion will result in automatic exclusion of the Response without further consideration.
- 22.4 By submitting a Response the Respondent consents to:
- (a) The Department consulting nominated referees and appropriate authorities;
 - (b) The Department carrying out independent financial credit/financial checks to satisfy itself as to the suitability of the Respondent;
 - (c) The Department undertaking probity checks which may include investigations into commercial structure, business and credit history, prior contract compliance and any criminal records or pending charges;
 - (d) The Department seeking further information about the Respondent's organisation, capabilities or previous performance including from referees concerning prior contracts on which the Respondent may have been involved or affiliates or associates of the Respondent (whether or not nominated by the Respondent in its Response).
- 22.5 The Department is under no obligation to provide to the Respondent the results of any checks or information obtained.
- The Department may take into account any matters revealed by the checks and information obtained, in evaluating the Response; and the Department may reject any Response or take such other action as it considers appropriate, in its absolute discretion, in light of matters revealed by the checks and information obtained.
- 22.6 As part of the RFX evaluation process:
- (a) the Department may conduct a site visit of premises currently being operated or formerly operated by one or more of the Respondents.
 - (b) Respondents may be called upon at their own expense to:
 - (i) attend an interview as part of the evaluation phase;

- (ii) make a presentation of their proposals to the Department;
- (iii) provide a demonstration of their service/s; and/or
- (iv) provide samples of their service/s.

22.7 Details made available by Respondents during any of the activities listed in subclause 22.6 shall contribute towards the evaluation of Responses.

23. Clarification of Responses

23.1 The Department may seek clarification in writing of certain matters from a Respondent to obtain a better understanding of aspects of a Response. Generally, Respondents must respond to clarification requests in writing within the timeframe as advised by the Department.

23.2 If, in the Department's opinion, the information provided in response to a clarification request has the effect of substantially altering the Response, then the Department may in its discretion disregard the information and either issue a revised clarification request or notify the Respondent that its offer as originally submitted will be evaluated.

24. Corrupt or unethical conduct

24.1 If a Respondent, or any of its officers, employees, agents or sub-contractors is found to have:

- (a) offered any inducement or reward to any public servant or employee, agent or subcontractor of the Department or the NSW Government in connection with this RFX or the submitted Response;
- (b) committed corrupt conduct in accordance with the provisions of the Independent Commission Against Corruption Act 1988; or
- (c) a record or alleged record of unethical behaviour; or
- (d) engaged in anti-competitive practices in relation to the Response;

this may result in the Response not receiving further consideration.

Before the Department excludes a Respondent or Response the Department may, in its discretion, invite a Respondent to provide written comments within a specified time.

25. Conflict of Interest

25.1 Respondents must identify in their Response whether, to the best of their knowledge after making diligent inquiry, a Conflict of Interest concerning itself, its officers, employees, agents, subcontractors, consortium member or related entity exists, or is likely to arise, in the RFX process or in the delivery of the Services specified in the Requirement.

25.2 If at any time prior to entering into the Agreement, a Conflict of Interest arises or appears likely to arise, the Respondent must make full disclosure in writing to the contact officer identified in the Requirement of the RFX of all relevant information relating to the Conflict of Interest, and take such steps as the Department may reasonably require to resolve or otherwise deal with the conflict.

25.3 If a Conflict of Interest that exists, or that appears likely to arise, cannot be resolved to the Department's satisfaction, the Department may, in its absolute discretion, exclude a Response from further consideration.

C. OUTCOMES OF THE RFX PROCESS

26. Negotiations before determination of outcome

26.1 Before making any determination as to acceptance or rejection of Responses, the Department may, at its discretion, elect to conduct limited negotiation with preferred Respondents, including those who have submitted Alternative Responses or who have submitted substantially Conforming Responses, to mutually improve outcomes.

26.2 After shortlisting, the Department may elect to engage in negotiations with one or more Respondents with a view to maximising the benefits of the Responses submitted. The Department may request that a Respondent improve one or more aspects of their Response and to submit a best and final offer in relation to all or certain aspects of their Responses. The Department is under no obligation to give a Respondent the opportunity to submit a best and final offer.

27. Confidentiality

27.1 Respondents must ensure that the confidentiality of any confidential information that they are provided by the Department or that they become aware of during the RFX process, is maintained indefinitely including after the completion of the RFX process.

27.2 Respondents must act ethically in their use of the media or public communication channels and must not make any disparaging comments regarding the Department, NSW Government, or any matters associated with the RFX.

28. Acceptance or rejection of Responses

28.1 The Department may accept all or any part or parts of any Response or Responses, including any Alternative Response.

28.2 The Department is not bound to accept the lowest bid or to accept any Response.

28.3 If the Department rejects all the Responses received it may:

- (a) invite fresh Responses based on the same or different criteria; or
- (b) conduct post-RFX negotiations in accordance with clause 33 of this Conditions of Tendering.

29. Discontinuance of the RFX process

29.1 In addition to its rights under clause 28 of this Conditions of Tendering, the Department reserves the right to discontinue the RFX process at any point, without making a determination regarding acceptance or rejection of Responses.

29.2 The Department will not be liable for any losses suffered by a Respondent as a result of discontinuance of the RFX process, including costs of preparing a Response or costs of the Tender process.

30. Notification of outcome

30.1 Following the Department's decision, all Respondents will be notified in writing of the outcome of their Response(s) to the RFX.

31. Second Stage RFX

31.1 Following the completion of the RFX in the Portal, The Department may choose to publish a second stage RFX via the Portal, which may be an open RFX or a selective RFX.

31.2 In regards to selective RFX, the Department may invite specific Respondents from the RFX, and only those Respondents will be eligible to participate in the second stage.

32. Award of Agreement

32.1 Acceptance of a Response or part Response by the Department will be subject to the execution of a formal Agreement in accordance with the conditions set out in Draft Agreement in the RFX.

33. Negotiations in the event all Responses are rejected

33.1 If the Department rejects all Responses on the basis that they do not substantially satisfy the Requirement, but considers that conformity with the requirements of this RFX is achievable, it may enter into negotiations with any Respondent with a view to achieving a Conforming Response and entering into an Agreement. However, the Department is not obliged to enter into negotiations with any Respondent.

33.2 The purpose of the negotiations will be advised by the Department and made clear to the participants before the commencement of negotiation. Negotiations will not seek to trade off Respondents' prices against other Respondents' prices.

34. Disclosure of information concerning successful and unsuccessful Responses

34.1 The Department may publish the following information about any Agreement awarded under this RFX:

- (a) details of the Agreement (description of Services to be provided; the term of the Agreement);
- (b) the full identity of the contractor/Respondent;
- (c) the contract value (estimated value of the goods and services over the term of the Agreement) and the basis for any variation to the amount payable to the contractor/Respondent;
- (d) the evaluation criteria used in evaluation and their weightings; and
- (e) provisions for re-negotiation (where applicable).

34.2 The Department will not disclose the following information about any Agreement awarded under this RFX unless the Respondent agrees, or release is determined under the Government Information (Public Access) Act 2009 or is otherwise required to be disclosed by law:

- (a) the Respondent's financing arrangements;
- (b) the Respondent's cost structure;
- (c) items of the Respondent having an intellectual property characteristic (e.g. non-tangible property that is the result of creativity, such as patentable ideas or inventions, trademarks, copyrights).

34.3 A Respondent may request that the Department not disclose particular information included in its Response but must provide reasons, and should submit this in writing to the contact officer specified in the Requirement. The Department will advise in writing of its decision. The Department's decision is final and is at the Department's absolute discretion.

35. Exchange of Information between Government Agencies

35.1 By submission of a Response, the Respondent authorises the Department to make available, to any NSW Government agency information, including but not limited to, information dealing with the Respondent's performance on any contract that may be awarded or the Respondent's financial position.

35.2 The Respondent acknowledges that any information about the Respondent from any source, including but not limited to reports of unsatisfactory performance may be taken into account by the Department and other NSW Government agencies in considering whether to offer the Respondent opportunities for NSW Government work including but not limited to evaluation of suitability for registration, pre-qualification, selective tender lists, expressions of interest or the award of a contract or termination of contract.

35.3 The Respondent acknowledges and agrees that the provision of the information by the Department to any other NSW Government agency is a communication falling within section 30 of the Defamation Act 2005 (NSW).

35.4 The Respondent releases and indemnifies the Department and the State of New South Wales from and against any claim in respect of any matter arising out of the provision or receipt of such information. Without limitation of the above, the Respondent releases the Department and the State of New South Wales from any claim it might otherwise have for any loss to the Respondent arising out of the communication of information including but not limited to evaluation by any NSW Government agency or the use of such information by a recipient.

36. Ownership of Responses

36.1 All Responses become the property of the Department once submitted.

36.2 The Department may make copies of the Responses for any purpose related to this RFx.

37. Post-Tender Briefings

37.1 The Respondent may request a debriefing on the assessment of its Response. This includes a Respondent to whom an Agreement has been awarded. Requests for debriefings should be emailed to the contact officer named in the RFx, within the allowed timeframes.

37.2 Where the debriefing is in relation to a rejected Response, the purpose of the debriefing is to explain how the Respondent performed against the assessment criteria, rather than in comparison with the successful Respondent, with the object of improving future Respondent's responses. It is to be distinctly understood that a debriefing will not be an opportunity to contest the outcome.

37.3 Debriefings may be conducted as face-to-face meeting held at the Department's premises, by video conferencing or by telephone at the Department's discretion.

38. Complaints

38.1 Complaints about the tender process or what the Respondent considers was defective in the process will need to be communicated to the contact officer in writing as soon as the Respondent becomes aware of it.

38.2 Where the complaint is about the contact officer or the conduct of the contact officer, the complaint should be emailed to procurement@justice.nsw.gov.au

38.3 If the Respondent believes that the probity of the tender process has been compromised, it may express its concern in writing to:

CONFIDENTIAL
Chief Procurement Officer
Department of Communities and Justice
Locked Bag 5111
PARRAMATTA NSW 2124

38.4 Covered Procurement Complaint

- (a) Complaints relating to an alleged breach or breaches of the Enforceable Procurement Provisions must be submitted in writing and emailed to procurement@justice.nsw.gov.au
- (b) The complaint must include the following:
 - (i) a clear statement regarding what the complainant considers was defective in the procurement;
 - (ii) the date of the contravention or when complainant became aware of it; and
 - (iii) copies of, or references to, information to support the complaint.

38.5 Any formal complaint will be acknowledged in writing. Complaints will be investigated by officers of the Department who are independent of those involved in the actions leading to the complaint. The outcome of the investigation will be advised to the complainant in writing.