

Policy Owner/Responsible Officer	Public Officer
Department	Office of Chief Executive Officer
Date adopted/endorsed	18 June 2024
Resolution number (if applicable)	24/186OC
Next review date	18 June 2025
TRIM reference	24/68245

Contents

Policy Statement/Objectives	2
Scope	2
References	2
Consultations	2
Definitions	3
Variation and review	4
POLICY	4
1. Application of Unsolicited Proposal Policy	4
2. Legislative Requirements	4
3. Commitment to Procurement Principles	4
4. Contact between Council and the Proponent	5
5. Public Private Partnerships	5
6. Staged Assessment	5
7. Probity	6
8. Governance Arrangements	7
9. Assessment Criteria	7
10. Reporting	10
11. Roles and Responsibilities	10
Related Forms/Documents	11
Attachments	11
Authorisation	11

Policy Statement/Objectives

The main objectives of this Policy, and associated procedures, are to:

- provide a clear and identifiable process for parties seeking to put forward investment and innovation proposals to Council;
- provide Council and the community with assurance around transparency, consistency and reporting for Unsolicited Proposals, ensuring that outcomes are always in the best interest of the Municipality of Kiama;
- provide a framework for assessing such proposals with a view to delivering uniqueness, value for money and strategic fit for Council, consistent with Council's strategic direction and existing suite of policies;
- ensure that commercial dealings arising from the Unsolicited Proposal process are conducted with integrity and impartiality following a defined process;
- establish a robust level of probity to be applied to all Unsolicited Proposals, by maintaining accountability and transparency, managing conflicts of interests and confidentiality and implementing appropriate governance structures for each proposal; and
- define processes and information sharing processes that aim to balance resource input at each stage of the Unsolicited Proposal process in order to reduce the potential for unnecessary expenditure by both the proponent and Council.

Scope

From time to time, Council is presented with Unsolicited Proposals from the community, businesses or other government agencies. The purpose of this Policy is to assist business investment and innovation in the Municipality of Kiama with a process to manage governance and probity issues that arise in such circumstances. The Policy seeks to ensure that Unsolicited Proposals are of benefit to the Council and the public interest.

References

This document should be read in conjunction with the following:

- Local Government Act 1993
- Local Government (General) Regulations 2021
- Tendering Guidelines for NSW Local Government 2009
- NSW State Government Unsolicited Proposals Guide for Submission and Assessment, May 2022
- Challenges of Innovative Projects and/or Preferential Treatment under the Tendering Process in NSW Local Government, Local Government Procurement, November 2021.
- Council's Procurement Policy

Consultations

- Audit Risk and Improvement Committee (ARIC)
- Finance Advisory Committee (FAC)

Definitions

Term	Definition
Assessment criteria	The criteria upon which Unsolicited Proposals will be assessed.
Detailed proposal	A submission by a Proponent to Council at Stage 2.
Final Binding Offer	A formal proposal submitted by the Proponent at the conclusion of Stage 2 which is capable of acceptance by Council.
Council	This includes the elected Council and employees. Where possible, specific reference to relevant Council Departments or functions is made throughout the Policy.
Intellectual Property	Inventions, original designs and practical applications of good ideas protected by statute law through copyright, patents, registered designs, circuit layout rights and trademarks; also trade secrets, proprietary know-how and other confidential information protected against unlawful disclosure by common law and additional contractual obligations such as Confidentiality Agreements.
Probity Advisor	An advisor with specialist governance or legal qualifications and experience, including, where appointed, an external contractor.
Proponent	The person or organisation that submits an Unsolicited Proposal.
Proposal Manager	The person with responsibility for coordinating Council input for the receipt and assessment of an Unsolicited Proposal.
Proposal Specific Steering Committee	A committee of senior Council management representatives with responsibility for oversight of any specific Unsolicited Proposal.
Public-Private Partnership (PPP)	An arrangement between a council and a private person where public infrastructure or facilities are provided in part or in whole through private sector financing, ownership or control.
the Act	The <i>Local Government Act 1993</i>
Uniqueness	The elements of a proposal that could provide justification for Council to enter into direct negotiations with the proponent. Unique elements may include characteristics such as: Intellectual property or genuinely innovative ideas, ownership of real property, ownership of software or technology offering a unique benefit, unique financial arrangements, unique ability to deliver strategic outcome or other demonstrably unique elements (refer to section 9.4 for more details).
Unsolicited Proposal	An approach to Council from a Proponent with a proposal to deal directly with Council over a commercial proposition, where Council 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.
Value for Money	The overall value of a proposal to Government (refer to section 9.5 for further details).

Variation and review

Council reserves the right to review, vary or revoke this Policy.

Review History

Date reviewed	Date adopted/ endorsed	Brief detail of amendments
N/A	18 June 2024	New Policy

POLICY

1. Application of Unsolicited Proposal Policy

- 1.1 This Policy applies to all applications made to Council from a Proponent with a proposal to deal directly with Council over a commercial proposition, where Council 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.

2. Legislative Requirements

- 2.1 All Unsolicited Proposals must meet the legislative requirements in relation to procurement, tendering and public private partnerships, as applicable, as defined in the *Local Government Act 1993 (the Act)*.

3. Commitment to Procurement Principles

- 3.1 Council operates consistent with its charter set out within the Act. Under the Act, it generally procures projects, goods and services via an adopted procurement framework, which includes a statutory tendering process for goods or services above a specified value. Council's approach to procurement (whether via quotation or tendering) is based on competition in order to achieve value for money in a fair and transparent manner.
- 3.2 Unsolicited Proposals are not directly covered by Council's procurement framework; however, the statutory requirements under the Act are still applicable to procurement decisions above a certain value that are captured by this Policy as Unsolicited Proposals. Those statutory requirements under the also extend to public-private partnerships (PPP), as further defined in that Act.
- 3.3 The Unsolicited Proposals process is not a substitute for routine competitive procurement by Council. The focus of Unsolicited Proposals is on unique and innovative projects or services with clear and tangible benefits for the Municipality of Kiama. Similarly, the Unsolicited Proposals process is not designed to replace applicable environmental and planning assessment processes. If Council decides to progress an Unsolicited Proposal, it should not be interpreted as any form of explicit or tacit support for planning consents or approvals.
- 3.4 While direct negotiation with a proponent in response to an Unsolicited Proposal may be pursued in justifying circumstances, Council's usual procurement approach is to test the market. This generally results in the demonstrable achievement of value-for-money outcomes and provides fair and equal opportunities.
- 3.5 Accordingly, Council will generally only consider proposals where both the proposal and its proponent have unique attributes such that others could not deliver a similar proposal with the same value-for-money outcome. Council will consider directly negotiating with an individual or organisation that presents an Unsolicited Proposal where circumstances justify this approach and at its absolute discretion, consistent with its statutory responsibilities under the Act.

4. Contact between Council and the Proponent

- 4.1 Once an Unsolicited Proposal has been submitted, Proponents must not contact Councillors or Council Officers, in regard to the submitted proposal, outside of the formal assessment process. This includes organisations authorised to act on the Proponent's behalf. Councillors will be notified by a confidential note that an Unsolicited Proposal (with some detail) has been received and now formal processes are in place, Councillors are obligated to no longer engage with any party involved in the process.

5. Public Private Partnerships

- 5.1 If an Unsolicited Proposal relates to the provision of public infrastructure or facilities, there is potential that such a proposal may be considered a public-private partnership (PPP). Section 400B(1) of the Act defines a PPP as an arrangement:
- a) *between a council and a private person to provide public infrastructure or facilities (being infrastructure or facilities in respect of which the council has an interest, liability or responsibility under the arrangement); and*
 - b) *in which the public infrastructure or facilities are provided in part or in whole through private sector financing, ownership or control.*
- 5.2 All Local Government PPP proposals, regardless of whether they originate from within council or from an external source, are required to be subjected to a market test via a formal Expression of Interest process to identify preferred partners for the project. If circumstances prevent a market test process in accordance with the Office of Local Government PPP Guidelines, council cannot enter into a PPP arrangement.
- 5.3 If an Unsolicited Proposal relates to the provision of public infrastructure or facilities, Council will, as soon as practicable, determine if the proposed arrangement is required to be treated as a PPP. Council will consult with the Office of Local Government in this regard if required.
- 5.4 If an Unsolicited Proposal is determined to be a PPP, the proposal may not be able to continue to be progressed for consideration under this policy.

6. Staged Assessment

- 6.1 A three (3) stage assessment process will be followed to guide the preparation of, and assessment of proposals:
- a) Pre-Submission Concept Review;
 - b) Stage 1: Initial Submission and Preliminary Assessment; and
 - c) Stage 2: Detailed Proposal and Negotiation.

Council recognises the right of Proponents to derive benefit from unique ideas. The approach to the identification, recognition and protection of intellectual property rights will be addressed and agreed with the Proponent during Stage 1 of the process.

6.2 Pre-submission concept review stage

- 6.2.1 Proponents will have an opportunity to meet with a Council appointed Proposal Manager in order to formally explore whether the proposal is likely to meet the Stage 1 assessment criteria and to guide Proponents in their decision regarding whether to lodge their proposal. Council may provide feedback at this stage as to whether it considers that the proposal, as presented, is consistent with this Policy. Notwithstanding this feedback, it is the Proponent's decision as to whether it proceeds with making a formal Stage 1 submission.

6.3 Stage 1: Initial Submission and Preliminary Assessment

6.3.1 Upon submission of a formal proposal under this policy, Council is to undertake a preliminary assessment of the proposal to determine if the submission constitutes an Unsolicited Proposal and if sufficient justification exists to undertake a Stage 2 assessment. Council reserves the right to further consider, or not consider, Unsolicited Proposals beyond this stage at its absolute discretion.

6.3.2 Council's Executive Leadership Team (ELT) shall have the authority to approve progress of a proposal to Stage 2 of the process.

6.4 Stage 2: Detailed Proposal and Negotiation

6.4.1 Following progression of a proposal to Stage 2 of the process, the Proponent and Council will work cooperatively in the development and assessment of a Detailed Proposal, which may require a degree of preliminary negotiation on key issues, subject to the nature of the proposal.

6.4.2 For all Stage 2 proposals council will:

- a) establish a Proposal Specific Steering Committee;
- b) appoint a Probity Advisor;
- c) prepare an internal Governance Plan; and
- d) enter into a Memorandum of Understanding with the Proponent.

6.4.3 If the detailed proposal is considered acceptable, a Council resolution will be required to progress to agreement or a Final Binding Offer.

6.4.4 Full details of the assessment process are outlined in the Unsolicited Proposals Procedures Guidelines.

7. Probity

7.1 Council seeks to conduct its commercial dealings with integrity. The assessment of Unsolicited Proposals must be fair, open and demonstrate the highest levels of probity consistent with the public interest. The assessment of Unsolicited Proposals will be conducted through the application of established probity principles that aim to assure all parties of the integrity of the decision-making processes. In summary Council will:

a) Maintain accountability and transparency

Accountability requires that all participants be held accountable for their actions. The assessment process will identify responsibilities, provide feedback mechanisms and require that all activities and decision making be appropriately documented.

Transparency refers to the preparedness to open a project and its processes to scrutiny, debate and possible criticism. This also involves providing reasons for all decisions taken and the provision of appropriate information to relevant stakeholders. Relevant summary information regarding proposals under consideration at Stage 2 will be made publicly available. Further information may be published as appropriate.

b) Manage Conflicts of Interest

In support of the public interest, transparency and accountability, Council will require the identification, management and monitoring of Conflicts of Interest.

Participants will be required to disclose any current or past relationships or connections that may unfairly influence or be seen to unfairly influence the integrity of the assessment process.

c) Maintain confidentiality

In the assessment of Unsolicited Proposals there is need for high levels of accountability and transparency. However, there is also a need for some information

to be kept confidential, at least for a specified period of time. This is important to provide participants with confidence in the integrity of the process. All proposals submitted will be kept confidential at Stage 1 of the assessment process.

d) Obtain Value for Money

At Stage 2 of the assessment process, the approach to assessing Value for Money will be confirmed. At this stage a Probity Advisor will be appointed, and their role is to monitor the evaluation process, ensure that Value for Money has been optimally considered and that the probity principles have been adhered to. It is not the role of the Probity Advisor to determine whether the proposal meets the required Value for Money criterion.

8. Governance Arrangements

- 8.1 In the spirit of collaboration and efficiency, governance arrangements will include an appointed Proposal Manager, a Proposal Specific Steering Committee where required, a staged approach to assessment, negotiation and contracting, and regular reporting to ELT.
- 8.2 Those arrangements seek to encourage a Council approach that allows input from a range of relevant parts of Council in understanding and assessing an Unsolicited Proposal.
- 8.3 Once a proposal reaches Stage 2 of the assessment process, Council will establish appropriate governance arrangements that will detail the make-up and responsibilities of the Steering Committee and assessment/technical panels, management of confidentiality and Conflict of Interest, and provide details of any appointed Probity Advisor.
- 8.4 Unsolicited Proposals must consider relevant processes and approval requirements in the Act in relation to procurement and Public Private Partnerships (PPP's) (where relevant).
- 8.5 The Stage 2 Participation Agreement will outline whether the proposal will be subject to an approval process outlined in another procurement policy document and/or a project assurance mechanism.

9. Assessment Criteria

- 9.1 Where Council determines a proposal as not meeting the criteria set out below, it reserves its usual right to go to market. The Proponent will be provided with the opportunity to participate in that procurement process should the concept be offered to the market but will have no additional rights beyond those afforded to other market participants. If Council elects to go to market in such circumstances, it will respect any Intellectual Property (IP) owned by the Proponent.
- 9.2 The Unsolicited Proposals assessment process is separate to other Council statutory approvals processes. However, where appropriate, the assessment of Unsolicited Proposals will consider the potential consistency of the proposal with relevant planning and environmental controls, and approvals processes.
- 9.3 Proposals will be initially assessed against the seven (7) Assessment Criteria listed below. Assessment will be based on the proposal satisfactorily meeting each of the criteria. Additional criteria relevant to a particular proposal may also be applied at later stages. If so, the Proponent will be informed of the criteria in order for these to be addressed in its Detailed Proposal during Stage 2.
- 9.4 Uniqueness
 - 9.4.1 Demonstration of unique benefits of the proposal and the unique ability of the proponent to deliver the proposal. In particular, the following are to be demonstrated:
 - a) Can this proposal be readily delivered by competitors? If the answer is yes, then what, if any justification would Council have to the public for not seeking best value through a competitive tender process? What benefit(s) would Council gain? Are the benefits and outcomes of the proposal unlikely

to be obtained via a standard competitive procurement process? Could a competitor present an alternative proposal that would achieve the same or greater benefits for the locality, Council's strategic objectives and the community?

- b) Does the proponent own something that would limit Council from achieving the same beneficial results from other parties if Council went to quotation or tender? This would include intellectual property, real property and other unique assets.
- c) Are there other attributes which may not necessarily stand alone as unique but, when combined, create a "unique" proposal? This may include genuinely innovative ideas, including financial arrangements or a unique ability to deliver a strategic outcome. It is possible that Council might agree to initiate market testing of a new proposal that has merit but is not unique.
- d) Note that while a proposal may contain unique characteristics such as design or technology, this may represent one option among a range of technologies or solutions available to Council.

9.4.2 The following are types of proposals will NOT typically be considered unique and are therefore proposals are unlikely to be progressed:

- a) Proponents seeking to directly purchase or acquire a Council-owned entity or property. Unless the proposal presents a unique opportunity to it, Council is unlikely to enter into such an arrangement without an open tender process. Standard land transaction proposals will be referred to Council's Property and Recreation Division for consideration;
- b) Proponents with an existing Council license or agreement to provide goods or services seeking to bypass a future tender process;
- c) Proposals for significant extensions/variations to existing contracts/leases, or the next stage of a staged project on the basis that the contractor is already "on-site", or has some other claimed advantages, absent of other "uniqueness" criteria;
- d) Proposals seeking to develop land that is not owned by Council or the proponent;
- e) Proposals that do not contain a commercial proposition for Council;
- f) Proposals that identify the proponent's skills or workforce capability as the only unique characteristic are unlikely to progress to Stage 2;
- g) Proposals to provide widely available goods or services to Council;
- h) Proposals seeking only to change Council policy that have no associated project;
- i) Proposals for consultancy services;
- j) Proposals for projects where the tender process has formally commenced, whether published or not;
- k) Proposals that are early concepts or lack detail;
- l) Proposals seeking grants (eg. scientific research), loans or bank guarantees, etc;
- m) Proposals whose claim to uniqueness is trivial, eg. a 'unique' view from particular site;
- n) Proposals seeking Council support for a 'pilot' program;
- o) Proposals seeking to stop or suspend another Council process (eg. compulsory acquisition); and/or
- p) Proposals seeking an exclusive mandate, or exclusive rights over a Council asset, for a period of time so the Proponent can develop a feasibility study.

9.5 Value for Money

9.5.1 Does the proposal deliver value for money to Council? determined by assessing each of the following considerations:

- a) What are the *net* economic benefits of the proposal (the status quo should be defined)?
- b) Is the proposal seeking to purchase a Council asset at less than its value in exchange for other services?
- c) Does the proposal provide time and/or financial benefits/savings that would not otherwise be achieved?

9.5.2 A proposal is Value for Money if it achieves the required project outcomes and objectives in an efficient, high quality, innovative and cost-effective way with appropriate regard to the allocation, management and mitigation of risks.

While Value for Money will be tested appropriately in the context of each specific proposal, factors that will be given consideration are likely to include:

- a) Quality of all aspects of the proposal, including: achievable timetable, clearly stated proposal objectives and outcomes, design, community impacts, detailed proposal documentation and appropriate commercial and/or contractual agreements (including any key performance targets), and a clearly set-out process for obtaining any planning or other required approvals;
- b) Innovation in service delivery, infrastructure design, construction methodologies, and maintenance;
- c) Competitively tendering aspects of the proposal where feasible or likely to yield value for money;
- d) Cost efficient delivery of Council policy targets; and
- e) Optimal risk allocation (refer to criterion below).

9.5.3 Evaluation of Value for Money may also include, but not be limited to the following quantitative analysis:

- a) Interrogation of the Proponent's financial models to determine the reasonableness of any capital, land acquisition, service and maintenance cost estimates and, if relevant, revenue estimates (including the appropriateness of any user fees or prices and estimates of quantity levels);
- b) This evaluation may include the use of independent experts or valuers, benchmarking analysis or sensitivity testing; and
- c) Return on Investment (refer to criterion below).

Note: A high level indicative Value for Money assessment will occur at Stage 1. A more detailed assessment of Value for Money will occur at Stage 2.

9.6 Whole of Council Impact

- a) Does the proposal meet a project or service need?
- b) What is the overall strategic merit of the proposal, how does it align to the Community Strategic Plan objectives?
- c) What is the opportunity cost for Council if it were to proceed with the proposal?
- d) Is the proposal consistent with the Council's plans and priorities?
- e) Does the proposal have the potential to achieve planning approval, considering relevant planning and environmental controls?
- f) Consideration will be given to whether the proposal would require Council to re-prioritise and re-allocate funding.

9.7 Return on Investment

Is the proposed Return on Investment to the proponent proportionate to the proponent's risks, and industry standards? Where feasible, the proposed rate of return may be subject to independent review or benchmarking.

9.8 Capability and Capacity

Does the proponent have the experience, capability and capacity to carry out the proposal? What reliance is there on third parties?

Where appropriate, the Proponent should provide referees in relation to working with government (e.g. local, state or Commonwealth governments).

9.7 Affordability

Does the proposal require other Government or Council funding, or for Council to purchase proposed services? Does Council have these funds available or budgeted and if not, what source would be proposed?

Where Council funding is required, Council may undertake or require the Proponent to undertake a (Preliminary) Business Case and/or an economic appraisal at Stage 2 (where appropriate). Regardless of the outcome of the Business Case/economic appraisal, the proposal still needs to be affordable in the context of Council's other priorities, and to be considered as part of its budget process.

9.10 Risk Allocation

What risks are to be borne by the proponent and by Council? Does the proposal require Environmental and Planning consents or approvals? If so, has the process been appropriately considered, including whether Council or Proponent bears the risks associated in obtaining the approvals.

10. Reporting

10.1 Information on all Unsolicited Proposals that progress to Stage 2 will be reported in the subsequent Council Annual Report as Unsolicited Proposals, even where they do not ultimately result in a report to Council. This may include details of the proponent and proposal, the governance structure for Stage 2, the Probity Advisor appointed and reasons why the proposal has progressed to Stage 2. Further information may be published as appropriate. Council will consult with the Proponent before any information is disclosed to ensure that commercially sensitive information remains confidential.

10.2 Generally, Council would seek to disclose all proposals in this stage. In some cases, Proponents may request that proposals are not listed, if this would pose significant risks to commercial negotiations or Intellectual Property. Council will consider each request and may agree not to disclose a proposal. The ability to undertake an assessment in confidence is considered essential to creating a receptive environment to elicit innovative private sector proposals.

11. Roles and Responsibilities

11.1 Council

The elected Council has final responsibility for the approval of any Unsolicited Proposal. If the detailed proposal is considered acceptable a Council resolution will be required to progress to agreement or a Final Binding Offer. If appropriate the elected Council will have the responsibility to pass a resolution, due to extenuating circumstances, that Council does not proceed to tender for the project, goods or services under contemplation pursuant to section 55A of the Act.

11.2 Proposal Manager

The Proposal Manager will act as the contact-point for Unsolicited Proposals and is charged with evaluating the information supplied by the Proponent in conjunction with the meeting of Council

representatives. The Proposal Manager also reports to Executive Leadership Team (ELT) and the Audit, Risk and Improvement Committee, as required.

11.3 Proposal Specific Steering Committees

A Proposal Specific Steering Committee will be established to oversee assessment of each proposal. The Committee will have at least three (3) members from different Departments of Council and additionally will include the Proposal Manager and the Governance Coordinator, or their delegate.

11.4 Advisers

The following key advisers may be appointed, as required, to provide specialist expertise to assist in project scoping and assessment:

- a) Legal;
- b) Financial;
- c) Technical; and
- d) Environmental.

Advisers are to follow all project governance and probity requirements.

11.5 Probity Adviser

All proposals that progress to Stage 2 will have a probity advisor appointed who reports to the chair of the Proposal Specific Steering Committee and will be available to Proponents to discuss probity related matters. The role of the probity adviser is to monitor and report on the application of the probity fundamentals during the assessment process. The Probity Adviser will:

- a) assist in the development of a Governance Plan (where applicable);
- b) provide a probity report at the end of each step to be considered by a Proposal Specific Steering Committee before the decision to proceed to the next step (or otherwise); and
- c) escalate probity concerns to Council's Public Officer or to the 'escalation contact point', where one has been provided. An escalation contact point can be determined by a Proposal Specific Steering Committee, as needed.

Related Forms/Documents

- Unsolicited Proposals Procedures Guidelines (under preparation)

Attachments

Nil	
-----	--

Authorisation

Name: Council Resolution No: 24/186OC

Date: 18 June 2024