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BROOKS LAW CPP FOR THE PURCHASE OF PASSENGER RAIL SERVICES IN THE WELLINGTON REGION

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1 Introduction

- 1.1 This CPP is to provide for the Purchase of Passenger Rail Services in the Wellington Region and shall only apply to that output. It is to be used to select a single supplier (or suppliers) to undertake the provision of each of the passenger rail services in the Wellington region. The selection is based on non-price attributes alone.
- 1.2 The Brooks Law Model for the Purchase of Passenger Rail Services in the Wellington Region (i) The Brooks Law model in general terms is:
- (a) the selection of a preferred supplier through a competency based approach using the standard six non-price attributes;
 - (b) negotiation with the supplier to establish a price structure for the delivery of each of the services in accordance with the Funding Agreement.
 - (c) the delivery of the services.
- (ii) There are a number of important control mechanisms associated with the application of the Brooks Law model as follows:
- (a) the selection process must determine the most appropriate supplier, and
 - (b) the negotiated price structure for the delivery of each of the services must be tested for value through an external audit. If agreement cannot be reached on a price structure for the delivery of the services then the tendering authority must enter negotiations with the second preferred tenderer.

2 Components of this Competitive Pricing Procedure

- 2.1 The following components together form this CPP.
- (1) Chapter 1, Introduction and General Requirements of Transfund's Competitive Pricing Procedures Volume 2: Public Passenger Transport; and
 - (2) The sections contained in this document;

TENDERING PROCEDURES

3 Tendering Authority Procedures

- 3.1 Each tendering authority shall develop and document appropriate administrative procedures relating to all aspects of the tender process for this CPP. These procedures shall be publicly available. Procedures for handling tenders from a business unit shall not disadvantage any tenderer.
- 3.2 As part of its procedures, each tendering authority shall establish a system for adequate recording of information in respect of each contract, for Transfund New Zealand audit purposes. Information recorded shall include:
- (1) The Request for Tender;
 - (2) The Record of Tenders Received;
 - (3) The Tender Evaluation and Recommendation.

4 Invitation to Tender

- 4.1 For each contract, an invitation to tender shall be advertised in appropriate print media. The extent of advertising shall bear a relationship to the size of the contract.
- 4.2 Every tendering authority shall make available on request a list of all parties who have 'uplifted documents. This requirement shall not apply on the tender closing day.

5 Tender Evaluation Specification

- 5.1 Each RFT shall specify the attributes to be considered by the tendering authority when evaluating competing tenders. The attributes shall comprise all of the following but no others:
- (1) Relevant Experience
 - (2) Track Record
 - (3) Technical Skills
 - (4) Resources
 - (5) Management Skills
 - (6) Methodology
- 5.2 Where the evaluation method requires that a weight be assigned to each attribute, the RFT shall also specify these weights.
- When assigning weights the tendering authority shall ensure that:
- (1) All non-price attributes are assigned a minimum weight of 10;
 - (2) The sum of all weights is 100.

6 Tender Evaluation Process

- 6.1 The tender evaluation shall be undertaken using the method described in Section 8.7 of this CPP for the Purchase of Passenger Rail Services in the Wellington Region.

BROOKS LAW CPP FOR PURCHASE OF PASSENGER RAIL SERVICES IN THE WELLINGTON REGION.

- 6.2 Tenders shall only be evaluated as specified in the RFT.
- 6.3 If the tendering authority wishes to seek clarification of, or receive further information about, a tender for any reason, and/or modification such as removal of tags to ensure conformance with the RFT, it shall do so before or during tender evaluation, and prior to tender acceptance.
- 6.4 A tendering authority is permitted to carry out face to face interviews and receive oral presentations, and conduct workshops as part of the tender evaluation process, if it deems this to be necessary. Such interviews, presentations or workshops shall be conducted before knowledge of price. There is no obligation on the tendering authority to conduct interviews or receive presentations from all or any tenderers.
- 6.5 Records shall be kept from any interview, presentation, or workshop.

7 Tender Evaluation - Brooks Law CPP Model

- 7.1 Tenderers shall be required to submit tenders in a single envelope containing only non-price attribute information.
- 7.2 The tender evaluation shall be conducted in three stages as follows:
- (1) The first stage shall involve the assessment of tenders against the non-price attributes and no others. This assessment may include interviews and workshops. The RFT will describe the mechanism to determine which Tenderers will be interviewed and workshoped with, and which will be excluded from further consideration as the process unfolds. Each attribute shall be scored on a points basis, from 0 (completely inadequate) to 100 (excellent). Any tender that scores a 35 or less on any attribute shall be excluded from further consideration.
 - (2) The second stage shall consist of multiplying the weight of each attribute, as previously specified in the RFT, by the grade of that same attribute and then dividing by 100 to give an index for each attribute. For each tender, the indices derived for each attribute shall then be summed to give an index for each respective tender.
 - (3) The third stage shall involve negotiation only with the tenderer which scored the highest overall index, in accordance with Section 7.2(2), to resolve and agree details of the contract including the price structure for the delivery of the **services**.
- 7.3 If agreement can not be reached, in accordance with Section 7.2(3), with the tenderer which scored the highest overall index, then that tender shall be rejected, and the tenderer advised in writing. The negotiation procedure described in Section 7.2 (3) above shall then be repeated with the tenderer which scored the next highest overall index in accordance with Section 7.2(2).

BROOKS LAW CPP FOR PURCHASE OF PASSENGER RAIL SERVICES IN THE WELLINGTON REGION.

- 7.4 Once a tender has been rejected, for any reason whatsoever, the tendering authority shall not subsequently accept that tender, either in its original form or any negotiated form.

8 Tender Negotiation

- 8.1 Where only one conforming tender is received, the tendering authority may negotiate with the tenderer.

9 Notification procedures

- 9.1 All tenderers shall be provided with a summary of the tender evaluation and recommendation, but notification shall not extend to cover disclosure of the details of the tenders or the details of how the evaluation was arrived at.

10 Conformity with RFT

- 10.1 No contract which is subject to this CPP shall be entered into where the end result or quantum is outside the scope of the RFT.

11 Use of Particular Inputs

- 11.1 A contract input shall only be made available by the tendering authority under the following conditions:
- (1) The availability of the contract input is notified in the RFT;
 - (2) The contract input is available to all tenderers;
 - (3) The terms on which the contract input is available are specified in the RFT;
 - (4) The terms on which the contract input is actually made available are those specified in the RFT; and
 - (5) There is no compulsion on any tenderer to use the contract input.
- 11.2 Notwithstanding Section 11.1, the tendering authority may make a contract input available to a particular tenderer provided that the contract input is made available on terms which are usual for a contract of that type and at a price which is fair in the prevailing market. In this case the contract input need not be mentioned in the WT.
- 11.3 Notwithstanding Section 11.2 where the successful tender did not contemplate or allow for the provision of a contract input by the tendering authority, this may still occur during the course of the contract, provided that the contract input is made available on the terms described in section 11.2.

REQUEST FOR TENDER REQUIREMENTS

12 General Requirements

BROOKS LAW CPP FOR PURCHASE OF PASSENGER RAIL SERVICES IN THE WELLINGTON REGION.

- 12.1 No tendering authority shall, with respect to any RFT or contract, include any requirement that has the effect of unreasonably limiting competition, or which unreasonably favours one tenderer or category of tenderers over another.

13 Request for Tender Contents

- 13.1 RFT contents shall include, at a minimum:

- (1) Appropriate contract terms and conditions.
- (2) Performance standards with respect to safety and service quality, including:
 - (a) service monitoring procedures
 - (b) any sanctions for failure to achieve performance standards; and
 - (c) any incentives for superior performance.
- (3) Project scope and specification (including quantum and duration where applicable).
- (4) Price model.
- (5) The tendering authority's policy on late tenders.
- (6) Any conformance requirements which a tenderer must satisfy in order to be a conforming tender, including:
 - (a) Minimum qualifications required to operate the services.
 - (b) Minimum safety and insurance requirements.
 - (c) A service specification, which defines the proposed services.
 - (d) Any other minimum operator or vehicle requirements.
- (7) A method for adjusting the contract price in the event of service level variations.
- (8) How probity will be managed.

- 13.2 In particular, the contract terms shall include:

- (1) provisions for termination of the contract at any stage should
 - (a) funding not be available; or
 - (b) the parties fail to reach agreement on price in relation to any stage of the contract;
- (2) requirements for the supply of passenger and financial information by the service provider;
- (3) provisions for the funding of maintenance, refurbishment and renewal of the assets controlled by the service provider, and for the determination of asset condition and value at the end of the contract term

14 Basis of Tender Evaluation

BROOKS LAW CPP FOR PURCHASE OF PASSENGER RAIL SERVICES IN THE WELLINGTON REGION.

- 14.1 Each RFT shall include a description of the basis of tender evaluation, consistent with the requirements of *Sections 5 to 7 of this Brooks Law CPP for the Purchase of Passenger Rail Services in the Wellington Region*. **The basis of tender evaluation shall include an explanation of how alternative tenders will be evaluated and compared with conforming tenders.**

15 Contract Duration

- 15.1 No contract awarded under this CPP shall have a duration of more than 10 years.

16 Contract Area

- 16.1 (No mandatory requirement)

17 Price Adjustment

- 17.1 The price of the project may be adjusted for inflation using an appropriate index for passenger rail services negotiated during the tendering process. The price of the project may be increased or decreased during the term of the contract in accordance with the formula specified in the Funding Agreement and related to any agreed capital expenditure items not covered by the original Funding Agreement, subject to these capital items being competitively tendered or negotiated within the terms of this CPP. The price for the project may be increased or decreased in accordance with output measures or performance standards specified in the Funding Agreement.

18 Errors and Omissions

- 18.1 Each RFT shall specify the procedures to be used in the event of errors and/or omissions in tender documents.



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BROOKS LAW CPP FOR THE PURCHASE OF PASSENGER RAIL SERVICES IN THE WELLINGTON REGION

Guidelines

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

TENDERING PROCEDURES

8.3 *Tendering Authority Procedures*

*It should be noted that Transfund New Zealand will consider for approval alternative CPPs or variations to the requirements contained in **Transfund's Competitive Pricing Procedures Volume 2: Public Passenger Transport** where these can be shown to be the best means of maximising the efficiency of the land transport system. In many cases tendering authorities will already have properly established and adequate administrative procedures for the tender process. In such cases, there is no requirement for tendering authorities to establish duplicate procedures. Each tendering authority should verify that its current administrative procedures fall within the procedures specified in this CPP and document its procedures so that they are available for Transfund New Zealand audit.*

Transfund New Zealand audit would be facilitated if all information relating to the history of each contract was held on an individual contract file. It is recommended that the contract file begins with a Contract Information Sheet including the following information.

- (1) Summary description of contract.*
- (2) Item number in approved National Land Transport Programme.*
- (3) Account code to be charged in the Land Transport Disbursement Account.*
- (4) Timetable showing:
 - (i) Date and time by which the Statement of Interest and Ability must be received (where relevant).*
 - (ii) Date that tendering authority will complete screening to short-list (where relevant).*
 - (iii) Date that short-listed tenderers will be invited to submit full tender (where relevant).*
 - (iv) Date and time by which full tenders must be received.*
 - (v) Date by which final selection shall be made.**
- (5) Price estimates and main features.*

Where the tenderer may have access to information contained in such a Contract File tendering authorities may wish to have two files; one containing all the record of tenders information and another containing the non-confidential information for the contractor's use.

The record of Tenders should contain the following;

- (1) Name of Tenderers*
- (2) Tender Prices (where applicable)*
- (3) Number of tenderers received*
- (4) Name of evaluating officer/s*

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

8.4 Invitation to Tender

Tendering authorities should ensure that, wherever practical, their choice of newspapers is consistent for projects of similar type and size, and that the choice of newspaper does not advantage one potential tenderer over another.

In general, large contracts should be advertised in at least one local and at least one metropolitan (Auckland, Wellington, Christchurch, Dunedin) daily newspaper; small contract need only be advertised in local newspapers. Consideration should also be given to advertising in the Tenders Gazette.

When providing the list of parties who have uplifted documents, tendering authorities should make it clear that the list is only complete up to the time it is requested. There is no obligation on the tendering authority for forward subsequent updates. Tendering authorities should provide the list by telephone or fax if requested to do so by tenderers who are not based in the same location as the tendering authority.

8.5 Tender Evaluation Specification

Only these non-price attributes may be considered.

The definition and interpretation of the non-price attributes is discussed in Appendix E of Transfund's Competitive Pricing Procedures Volume 1: Physical Works and Professional Services Manual), however tendering authorities are able to interpret the terms flexibly to cater for evaluation requirements specific to the form of contract and procurement model. Clarification of the definition and interpretation of the non-price attribute, to take precedence, shall be specified within each RFT. Where the definition and interpretation of the non-price attributes are not defined within the RFT the definition and interpretation discussed in Appendix E of Transfund's Competitive Pricing Procedures Volume 1: Physical Works and Professional Services Manual) shall take precedence. Each tendering authority should apply the same interpretation of each non-price attribute when evaluating tenderers for any single project, and also for different projects of similar size and type.

*Where tenders are to be evaluated using the **Brooks Law CPP Model**, numerical weights or percentages should be assigned to each and every attribute to reflect each attributes importance; the more the tendering authority considers the attribute, the larger the share of total weighting points (100) that should be assigned to that attribute. The weighting to be used need to be specified in the RFT and each tendering authority should develop a consistent approach so that, for projects of a similar type and size, the same attributes are given similar weights.*

8.6 Tender Evaluation Process

Interviews, presentations, and t workshops are permitted during tender evaluation.

If a tendering authority decides to undertake interviews, presentations or such workshops, it should be conscious of the need for all tenderers to be treated fairly and for this to be perceived to be so.

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

Interviews may be particularly useful when the tendering authority does not know the individual personnel well and the contract in question requires significant contact with the public. Tendering authorities are not easily able to assess whether a tenderer has the necessary public relations and interpersonal skills for such contracts from a written proposal.

For all interviews, the tendering authority should have an explicit reason for undertaking interviews and this should be communicated prior to or early in the interview. Consideration should be given to using a common list of questions for all interviews

Tendering authorities should be aware of the administrative cost to all parties associated with interviewing and should advise in the RFT if interviews are to be part of the evaluation process. Such advice would not compel the tendering authorities to interview any or all tenderers. Tendering authorities should not interview tenderers who, based on their knowledge of their score for non-price attributes, clearly will not achieve the highest overall grade. Particular care should be taken not to penalise tenderers who are not interviewed.

As specified, it is highly desirable that all tender clarification by interview or other discussion takes place prior to selection of the successful tenderer. However, it is recognised that further clarification and re-direction of the work will be appropriate during the work itself.

8.7 Tender Evaluation – Brooks Law CPP Model

*The first stage requires, for each tender, the tendering authority assigning a grade to each attribute to reflect the **quality** of the tender in respect to each attribute. Tendering authorities should exercise judgment, when evaluating tenders, to ensure that attribute grades reflect the tendering authority's requirements.*

In the second stage, the grade and previously assigned weight for each attribute are multiplied together and then divided by 100. The indices are then summed to give a preliminary index out of 100.

The final stage involves negotiating with the tenderer which scored the highest overall index to resolve and agree details of the contract. These details should include the methodology, resources to be applied, programme and price structure (including profit margin and corporate overheads secured to a percentage) for the delivery of the services. If negotiation is not successful, negotiation commences with the tenderer having the next highest overall index.

The reason for tendering authorities not being able to revisit a tenderer once it has been rejected is to prevent a tendering authority being able to go back and re-enter negotiations having knowledge of another tenderer's price. This could be unfair.

Negotiation plays a major role in this form of tender evaluation. Therefore, it is important that tendering authorities using this method are aware of the requirements of the job in question and have the knowledge of what a reasonable price would be so that they can negotiate on a sound footing. If during negotiations, some major changes in a quality feature such as methodology or personnel is considered necessary, for example

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

to meet a budgetary constraint, consideration should be given to terminating the negotiations and proceeding to the next highest scoring tenderer, particularly if the features being varied were significant in the attribute evaluation.

8.8 Tender Negotiation

For various reasons tendering authorities may on occasion wish to reject all tenders with respect to any RFT. In such situations legal advice should be sought as case law is very fluid in this area. Some recent court cases are finding that a de-facto contract is established as soon as a tendering authority has invited tenders and suppliers have submitted tenders in response to this. Tenderers can successfully sue tendering authorities which break this contract by declining all tenders. Tendering authorities that wish to reject all tenders should seek legal advice that considers the specifics of their situation and the latest legal precedents.

8.9 Notification Procedures

All parties should be notified of the tender result within seven working days of the tendering authority's decision. To avoid criticism tendering authorities should ensure consistency in notifying unsuccessful tenderers.

Under the Official Information Act, tenderers are entitled to receive certain information. It is considered that the following should be provided:

- (1) Name of the successful tenderer*
- (2) Number of tenders received*
- (3) Range of preliminary indices scores for each non-price attribute*
- (4) For each tenderer, their individual attribute preliminary indices scores*

An important reason for supplying the above information is to help promote future competition. For example, if a tenderer notes that their score for a particular attribute is at the low end of the range of scores for that attribute they can take steps to improve it in future tenders. They might do this by recruiting personnel with more relevant skills or joint-venturing with another organisation that has complementary attributes.

Tendering authorities should also be prepared, on request, to confirm that a particular tenderers' tender has arrived if the tenderer in question is not locally based and therefore cannot hand deliver their tender.

8.10 Conformity with RFT

Once a tenderer has submitted a tender, the tendering authority can not then enter into a contract on terms and conditions substantially different from those specified in the

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

RFT, unless the tender process is repeated with a revised RFT. When seeking clarification of any issues before or during the evaluation process, tendering authorities will need to ensure that any clarification does not alter the requirements of the RFT.

This section does not prevent tenderers from proposing innovative methods for achieving the end result specified within the RFT.

8.11 Use of Particular Inputs

It is generally not efficient for the tenderer to be required to use certain inputs and is inconsistent with the emphasis on end result specifications. Most efficient results will be obtained if the tenderer is permitted to choose whether or not to use tendering authority provided inputs.

Transfund New Zealand audit in respect of these provisions would be facilitated if the tendering authority were able to produce from its records, the following information relating to resources provided for the contract by the tendering authority:

- (1) Details of all tendering authority resources used by a tenderer in relation to a particular contract.*
- (2) Details of the terms under which such resources were made available (in particular the price).*
- (3) Copies of relevant contracts between the tendering authority and the tenderer.*

Where a tendering authority is contemplating making a contract input available to a private sector party, it should be aware of and seek appropriate expert advice on, the provisions of the Local Government Act with respect to the inadvertent constitution of a LATE.

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

REQUEST FOR TENDER REQUIREMENTS

8.13 *Request for Tender Contents*

(1) *Terms and Conditions for Physical Works*

(No guideline)

(2) *Project Scope and Specification*

Where practicable, tendering authorities should specify end results and should avoid specifying the methods to be used.

(3) *Late Tenders*

Tendering authorities should have an established policy on late tenders. It is recommended that this policy be to not accept late tenders under any circumstances.

If a tendering authority's policy is to accept late tenders, then such tenders should only be accepted in exceptional circumstances which are clearly specified in their late tenders policy.

One major reason for this wariness in accepting late tenders is that competing tenderers may disclose the contents of their tender to the "late" tenderer who could then alter their tender accordingly.

This refusal to accept late tenders unless there are exceptional circumstances ensures that the onus remains on the tenderer to do everything possible to ensure that the tender is received on time.

If *a later tender is accepted this should be clearly indicated in the tender evaluation details recorded on the contract file.*

8.15 *Contract Duration*

(No guideline)

8.16 *Contract Area*

In general the works included in any RFT should be confined to the geographic boundaries of the tendering authority issuing the RFT.

8.17 *Price Adjustment*

(No guideline)

8.18 *Errors and Omissions*

The procedures must be equitable and must not permit material changes to tenders. Transfund New Zealand recommends that the procedure provide that, in the event or errors and/or omissions in tender documents being discovered by the tendering

The Purchase of Passenger Rail Services in the Wellington Region: Guidelines

authority, the tenderer should be requested to either confirm the tender without correction, or to withdraw.