Unsolicited Proposal Procedure

Keywords: Proposal, Procurement

Corporate Plan:	*Building strong and influential relationships with others to strengthen and diversify our economy and underpins Council's economic planning and development activities.*
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Applicable Legislation:	*Local Government Act 1999* *Independent Commissioner Against Corruption Act 2012* *Freedom of Information Act 1991 (FOI Act)*
Relevant Policies:	*Procurement Policy, Unsolicited Proposal Policy*
Related Procedures:	*N/A*
Delegations:	*Berri Barmera Council Delegations Register*

1. Purpose

The unsolicited proposal procedure sets out the various steps for the lodgement assessment and determination of an unsolicited proposal.

The procedure will provide clarity to the proponent, assessors and decision makers in relation to a proposal. The procedure will reinforce Council's procurement objectives to:

- enhance value for money;
- promote the use of resources in an efficient, effective and ethical manner; and
- make decisions with probity, accountability and transparency.

2. Procedure

2.1 Pre-lodgement meeting

Before submitting an unsolicited proposal, the proponent may request a pre-lodgement meeting with the Council's Chief Executive Officer.

This meeting is not mandatory but may assist the proponent to determine if their proposal is one that may be considered under this procedure.

2.2 Stage One Lodgement

The objective of the Initial Proposal Stage (Stage 1) is to enable a proponent to provide the Council with a high level overview of its proposal which enables the Council to form a preliminary view as to whether:

2.2.1 The proposal is not one that can be considered under this procedure; or
2.2.2 The proposal warrants further consideration under this procedure.

A proposal must be submitted with a completed Application Form (available on Councils website) and any further information the proponent may wish to provide to support their proposal.

The Chief Executive Officer may, at their discretion, request further information from the proponent at this stage, if deemed necessary.

2.3 Stage One Assessment Criteria

In determining whether a proposal will proceed to Stage 2, with or without a period of exclusivity, the proposal will be assessed against the following criteria:

2.3.1 is the subject of the proposal already the subject of an existing or proposed procurement process? If the answer is yes, it is unlikely that an unsolicited proposal will pass Stage 1 unless the proponent can demonstrate that their proposal has a distinct advantage;

2.3.2 the proposal demonstrates outstanding value for money in the form of financial, environmental and/ or community benefits;

2.3.3 the proposal cannot be readily delivered by competitors at all or within the timeframes proposed by the proponent;

2.3.4 the proponent owns something that would limit other parties from being able to deliver the proposal (for example, intellectual property or strategic land holdings);

2.3.5 that the proponent has innovative financial arrangements that enable it to deliver the proposal where other parties would not be able to;

2.3.6 that the proponent has a genuinely innovative idea;

2.3.7 a combination of factors which may not stand alone as being innovative, but which together create a proposal worthy of consideration.

2.3.8 the proponent has the capacity, capability, skills, experience and required resources to successfully deliver their proposal. The proponent must provide evidence of such capability and capacity to deliver the proposal and must include any relevant experience in similar projects.

Any unsolicited proposal must, in addition to the criteria above:

- be consistent with the goals and objectives outlined in the Berri Barmera Council Strategic Plan 2020-2025 or any strategy;
- be consistent with Council's role and function; and

- provide an economic, social or environmental outcome for the council and community.

2.4 Stage One – Assessment Process

A proposal will not involve negotiation at this stage. This opportunity will arise in later stages should the Council determine to proceed to Stages 2 and 3.

2.4.1 Once a proposal has been submitted in accordance with this procedure and the Chief Executive Officer determines there is sufficient information about the proposal to consider it, the Chief Executive Officer will then refer the proposal to relevant council staff, and external expert advisors as required.

2.4.2 Acting on the advice received, the Chief Executive Officer will either:

- advise the proponent that the proposal does not adequately meet the criteria for the proposal to proceed further; or
- prepare a report for Council's consideration recommending that the proposal proceed to Stage 2.

2.4.3 If the Chief Executive Officer determines that the proposal is not accepted or the Council Elected Members do not endorse the proposal, the proponent will be notified in writing of this outcome by the Council's Chief Executive Officer. This notice may also notify the proponent that the subject matter of the proposal may form the basis of a competitive bidding process.

Where the Council Elected Members endorse the proposal through a confidential report, the proposal will proceed to Stage 2 and the proponent will be provided with the following:

- notification that the proposal has been approved by the Council to proceed to Stage 2;

- the broad terms and timeframes for Stage 2 consideration of the proposal including the period of exclusivity (if any) for discussions with the proponent; and

- information on any other matters relevant to the proposal and the Council's further consideration of it that the Council considers to be appropriate.

2.4.4 The anticipated timeframe for the completion of Stage 1 is 90 days and commences from when the Council's Chief Executive Officer has all the information that is needed to consider the proposal.

2.5 Exclusivity Period

If the Council determines to enter into a period of exclusive negotiation with a proponent, the following broad terms will apply:

2.5.1 during the exclusivity period, the Council will not enter into negotiations with another party in relation to another proposal that is substantially similar to the subject matter of the proposal;

2.5.2 the exclusivity period will be limited to the development of the specific proposal submitted by the proponent to the Council;

2.5.3 the exclusivity period will be for a set period as advised by the Council to the proponent;

2.5.4 the Council may set, in its absolute discretion, specific terms and conditions for the exclusivity period which it will advise the proponent of in writing;

2.5.5 the Council may end the exclusivity period at any time and withdraw from exclusivity or all negotiations with the proponent, at which time all relevant documents will be returned to the proponent or destroyed; and

2.5.6 all correspondence between the Council and the proponent will be kept confidential until released, as per legislative requirements.

3. Stage Two – Detailed Proposal

3.1 Stage 2 involves further consideration of the feasibility of the proposal, how it will be delivered, whether it represents value for money for the Council and what outcomes it will deliver for the Council and the community. Stage 2 will be an interactive process between the Council and the proponent within a framework established by the Council.

The Council will establish a framework for Stage 2 which may include:

3.1.1 confidentiality, conflict of interest, communication and probity Protocols;

3.1.2 stage 2 participation terms and conditions;

3.1.3 stage 2 assessment criteria;

3.1.4 timeframes including a period of exclusivity (if applicable) for discussion with the proponent;

3.1.5 information to be provided and/or shared;

3.1.6 governance requirements; and

3.1.7 any other matters that the Council considers necessary or desirable.

3.2 The matters that the Council may consider during Stage 2 are:

3.2.1 the value for money proposition from the proposal for the Council;

3.2.2 if the proposal is legally, technically and financially feasible;

3.2.3 how the proposal would best be structured to deliver the best outcome for the Council;

3.2.4 a cost/benefit analysis of the proposal;

3.2.5 whether the proposal or any part of it would more appropriately be the subject of a competitive bidding process;

3.2.6 the appropriate allocation of risk; and

3.2.7 the proposed delivery method.

3.3 During Stage 2 the Council's Chief Executive Officer will:

3.3.1 convene meetings of council staff with any other subject matter experts, professional advisers and other persons that the Council's Chief Executive Officer sees fit;

3.3.2 convene meetings with the proponent;

3.3.3 request further information from the proponent as required;

3.3.4 obtain reports and further information for the Council's consideration of the proposal; and

3.3.5 arrange the preparation of a detailed report on the proposal for the Council Elected Members' consideration.

3.4 During Stage 2, a proponent must:

3.4.1 develop and submit a detailed proposal, consistent with the requirements outlined by the Council at the end of Stage 1;

3.4.2 provide any additional information as required by Council: and

3.4.3 make themselves available to participate in meetings requested by, and respond to communications from, the Council's Chief Executive Officer.

3.5 At the end of Stage 2, a confidential report will be prepared for the Council Elected Members' consideration and the proponent will be advised in writing of the Council's resolution and one of the following:

3.5.1 that all or part of the proposal will proceed to Stage 3 on an exclusive consideration basis;

3.5.2 that all or part of the proposal will not continue to be considered on an exclusive basis but that all or part of the proposal warrants a competitive bidding process; or

3.5.3 that all or part of the proposal is not suitable for further consideration and its consideration under this procedure is now at an end.

3.6 Any endorsement by Council of a proposal at Stage 2 is "in principle" endorsement of the detailed proposal and a desire to proceed to contract negotiations (Stage 3). Stage 2 endorsement does not bind or commit the council in any way other than to commence contract negotiations. Council retains the right not to proceed with the proposal should contract negotiation be unsuccessful.

All costs of preparing, lodging, developing and negotiating a proposal are to be borne by the proponent.

4. Stage Three – Contract Negotiation and Finalisation

4.1 If a proposal is successful in progressing through Stage 2, the Council and the proponent will then proceed to Stage 3 and enter into formal and final contract negotiations.

4.2 If a proposal is successful in progressing through Stage 2, the Council and the proponent will then proceed to Stage 3 and enter into formal and final contract negotiations.

- both parties agree on the terms of a contract and execute same;
- the Council agrees to the contract, subject however to specified terms or conditions the Council requires;
- the Council does not agree to enter into the contract but resolves to pursue the proposal through another form of procurement; or
- the Council does not agree to enter into the contract and concludes any further consideration or assessment of the proposal.

5. General Provisions

5.1 Probity Framework

It is a primary objective of this procedure to ensure the probity of the processes employed by the Council to consider unsolicited proposals. As such, in addition to any specific requirement outlined in this procedure, probity principles and protocols will be established when dealing with proponents in relation to proposals submitted to ensure:

- that proposals are received, assessed and negotiated, and decisions are made through an approved and transparent framework;
- that decisions are made through a robust framework and so that they will deliver the best outcomes for the Council and its community;
- that confidential information is protected and not disclosed (except for disclosures to professional advisers and where disclosure is required by law); and
- that any perceived conflict of interest, bias or misconduct is eliminated.

The Council may, at any Stage outlined in this procedure, engage a probity adviser or auditor.

5.2 Intellectual Property Rights

The Council acknowledges the innovative proposals may contain Intellectual Property of the proponent and/or third parties.

If the Council declines to consider, or ends its consideration of, an innovative proposal submitted in accordance with this procedure, and the Council elects to engage in a competitive bidding process or other approach to the market in relation to the subject matter of the proposal, the Council will respect any Intellectual Property rights of the proponent and/or third parties.

5.3 Supplementary Information

The Council may from time to time at its discretion publish supplementary information to assist proponents with the interpretation and application of this procedure.

5.4 No Legal Relationship

By making an unsolicited proposal the proponent acknowledges:

5.4.1 without confirmation in writing, that no discussions in relation to a proposed unsolicited proposal or the submission of an unsolicited proposal assumes exclusivity between the parties;

5.4.2 that no legally binding contract exists or is to be implied between the Council and the proponent unless and until a formal contract document is signed by both parties in Stage 3; and

5.4.3 that the Council is under no contractual or other legal obligation to the proponent with respect to the receipt, assessment, consideration, acceptance or rejection of any proposal or the failure to receive, assess, consider or accept any proposal.

5.5 Legislative Obligations

In submitting a proposal proponents acknowledge that:

5.5.2 the Council may have legislative obligations that it will need to comply with in relation to a particular proposal and nothing in this procedure is intended to override or circumvent those obligations; and

5.5.3 that the processes established by this procedure are separate from, and do not override, other legislative approval processes that a proponent may need to participate in order to progress its proposal (for example, planning approval processes).

5.6 No Soliciting or Outside Discussions

All queries or communications in relation to innovative proposals must be directed to the Chief Executive Officer to ensure consistency and transparency in the process. The Council reserves the right to discontinue assessment of, or negotiations on, a proposal if the proponent discusses the proposal with members of Council staff or Elected Members otherwise than as directed by the Council's Chief Executive Officer.

A proponent must not offer any incentive to, or otherwise attempt to, influence any person who is either directly or indirectly involved in an assessment or negotiation process. The Council reserves the right to end any consideration of a proposal if a proponent fails to comply with this requirement.

5.7 Conflict of Interest

Proponents must inform the Council of any circumstances or relationships which will constitute a conflict or potential conflict of interest if the proponent is successful in negotiating a contract for its unsolicited proposal. If any conflict or potential

conflict exists, the proponent must advise the Council how it proposes to address this.

5.8 Costs of Proposal

A proponent bears its own costs of preparing, discussing and negotiating any innovative proposal with the Council.

5.9 Use of Documents

Any documents provided by the Council to a proponent during any of the Stages outlined in this procedure must only be used for the purpose of progressing a proposal in accordance with this procedure and must be returned to the Council at the end of the process on request.

5.10 Change in Circumstances

A proponent must inform the Council promptly in writing of any material change to any of the information contained in the proponent's submission.

5.11 Interaction with Other Council Policies

Any policy on the sale and disposal of Council assets and procurement policies that the Council has adopted for the purposes of section 49 of the LG Act do not apply to an innovative proposal that is covered by this procedure.

5.12 General Acknowledgements

Proponents acknowledge when submitting an innovative proposal in accordance with this procedure that the Council:

- makes no representations or undertakings that it will enter into a contract with any proponent in respect of the subject matter of any innovative proposal;
- may undertake 'due diligence';
- will not be responsible for any costs or expenses incurred by a proponent arising in any way from the preparation, submission or negotiation of its proposal;
- accepts no responsibility for any proponents failing to undertake any investigations or understanding any matters that may impact on its proposal;
- will not be liable for or pay any expenses or losses incurred by a proponent, whether in the preparation of a proposal or prior to the signing of any agreement relating to a proposal or otherwise; and
- will not be bound by any verbal advice given or information furnished by any member, officer or agent of the Council except written advice or information furnished by the Council's Chief Executive Officer.

5.13 Council's General Rights

The Council may, at any stage of the process of receiving, considering and negotiating an unsolicited proposal:

- if it assesses that a proposal does not meet the criteria to be considered or considered further under this procedure, to make an approach to the market in respect of the subject matter of the proposal and end consideration of the innovative proposal and withdraw from any negotiation with the proponent in relation to it;
- amend, vary or revoke and replace this procedure at any time;
- accept or reject any unsolicited proposal;
- subject to any period of exclusivity determined in accordance with this procedure and any agreement with a proponent to the contrary, make them public;
- accept all of part of an unsolicited proposal;
- discontinue negotiations with any proponent; and
- include any proponent's name in Council reports and, subject to any period of exclusivity determined in accordance with this procedure and any agreement with a proponent to the contrary, make them public.

5.14 Ombudsman

Proponents should also be aware that the Independent Commissioner Against Corruption Act 2012 establishes the Independent Commissioner Against Corruption and the Office for Public Integrity. The Act empowers the Commissioner to investigate corruption, misconduct and maladministration in public administration. Proponents must ensure compliance with all obligations arising under the Act.

5.15 ICAC

Proponents should also be aware that the Independent Commissioner Against Corruption Act 2012 establishes the Independent Commissioner Against Corruption and the Office for Public Integrity. The Act empowers the Commissioner to investigate corruption, misconduct and maladministration in public administration. Proponents must ensure compliance with all obligations arising under the Act.

5.16 Freedom of Information

The Freedom of Information Act 1991 (FOI Act) gives members of the public rights to access documents of the Council. The FOI Act promotes openness in governance and accountability of government agencies and to achieve these objects confers on members of the public a legally enforceable right to be given access to such restrictions as are consistent with the public interest, commercial in confidence and/or the preservation of personal privacy in respect of those from whom information is collected and held by the Council and other public authorities.

5.17 Departure from Procedure

The Council may, by resolution, where it is justified in the circumstances, determine that this procedure will not apply to a particular unsolicited proposal.

5.18 Review of Procedures

These procedures will be reviewed regularly by the Council to ensure that the objectives of the procedure remain relevant and are met.

Annexure A – Process Flowchart

Stage 1 – Initial Proposal		
Proponent Actions	**Council Actions**	**Possible Outcomes**
• Submit the completed Application Form and any further information • Submit any further information that may be requested	• Determine if sufficient information has been provided to be considered under the policy and in terms of exclusivity. • Convene a meeting of relevant staff and external experts where appropriate • Determine whether the proposal meets the criteria for it to be considered under the procedure • Prepare a report to the Council if the proposal is recommended for Stage 2. • Advise the proponent of the Council decision.	• That the proposal is not suitable for further consideration and is now closed; OR • That the proposal may form the basis for a competitive bidding process. OR • That the proposal will proceed to Stage 2.

Stage 2 – Detailed Proposal		
Proponent Actions	**Council Actions**	**Possible Outcomes**
• Submit a detail proposal • Provide additional information as requested. • Attend meetings as requested with, and respond to communications from, the Council.	• Establish the Stage 2 framework and advise the proponent of this • Arrange meetings of relevant staff with any other subject matter experts, professional advisers and other persons. • Arrange meetings with the proponent as required. • Obtain reports and further information for the Council's consideration of the proposal. • Arrange the preparation of a detailed report on the proposal for the Council Elected Members' consideration. • Advise the proponent of the Council's decision.	• That all or part of the proposal will proceed to Stage 3 on an exclusive consideration basis OR • That all or part of proposal should not continue to be considered on an exclusive basis but that all or part of the proposal warrants a competitive bidding process OR • That all or part of the proposal is not suitable for further consideration and its consideration under this procedure is now at an end.

Stage 3 – Contract Negotiation		
Proponent Actions	**Council Actions**	**Possible Outcomes**
• Negotiate contract terms	• Advise the proponent of the process and protocols for the development of a contract. • Negotiate the contract • Submitted the agreed contract to the Council Elected Members to seek approval for the contract to be executed. • Advise the proponent of the Council's decision.	• That the Council agrees to the terms and conditions of the contact and will proceed to execute it. OR • That the Council agrees to the contract, subject however to specified variations or conditions. OR • That the Council does not agree to enter into the contract but instead determines to pursue or consider pursuing the innovative proposal through another process. OR • That the Council does not agree to enter into the contract

		and that its consideration of the proposal under the procedure is now at an end.

6 Access to Procedure and Further Information

For further information on this Procedure, please contact:

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