

SUPPLEMENTARY DOCUMENTATION

To: The Mayor and all Councillors

Date: 27 March 2012

Subject: Item 3 – Council Meeting 27 March 2012
RYDE CIVIC PRECINCT REDEVELOPMENT TENDER DOCUMENTATION



RYDE COUNCIL
RYDE CIVIC PRECINCT REDEVELOPMENT
REQUEST FOR TENDERS AND TENDERS
ADVICE

1. Ryde Council (Council) is proposing to undertake a major redevelopment of the existing Council Chambers, offices and associated lands. The project will involve the successful tenderer in designing constructing and financing, amongst other things, a new Civic Building and a new Council Administration Centre for the Council. The proposed development will also involve the construction by the successful tenderer of a substantial residential and mixed use facility that could include 400 to 500 new apartments and commercial facilities for its own purposes.
2. Council sought Expressions of Interest (EOI) in relation to the project. The EOI documentation included provisions as to confidentiality.¹ As a result of this process, Council has short listed four companies to respond to a Request for Tenders (RFT). An RFT has been issued, the closing date for which is 10 April 2012. The tender period therefore remains open.
3. The RFT documentation includes a Probity Plan which requires, amongst other things, that there will be confidentiality maintained in respect of the tenders² at least up to the time that the tenders are opened. This constitutes an agreement between the Council and the proposed tenderers. Revelation of such documents as are, or would normally be regarded as, "business or commercial in confidence" would constitute a breach by the Council of such agreement. The considerations set out in this paragraph would be a proper basis for refusing access to documents that are characterised as "business or commercial in confidence".
4. Under the Local Government Act 1993 (the Act) a distinction is drawn between the position of a councillor, as a member of the governing body of the Council on the one hand, and the role of a councillor as an individual elected person on the other.³ An individual councillor, as an elected person, has obligations in relation to the residents and ratepayers, the giving of leadership and guidance and the facilitation of communication between the community and the Council. Such role and the fulfilment of the obligations involved in it must be understood in the context of the Act and are subject to any specific provisions in that regard .
5. By contrast the role of the General Manager is to be generally responsible for the efficient and effective operation of the Council's organisation and for ensuring the implementation of the decisions of the Council without undue delay.⁴ This general statement of the duties of the General Manager carries with it correlative powers to fulfil such duties. Furthermore there are particular functions expressly conferred on the General Manager by the Act. They include the day to day management of the Council.⁵ Such a power would involve the General Manager in making management decisions which would include decisions in relation to the

¹ RFT Clause

² RFT Clause 11.7

³ Section 232

⁴ Section 335(1)

⁵ Section 335(2)

characterisation of given documents. This power of itself would be sufficient to confer a right to determine whether given documents were sensitive in the business or commercial sense.

6. The reason for confidentiality of tenders is obvious. It ensures that rival tenderers are not made aware of the content of tenders submitted by others. This means that the contents of a given tender cannot be used by a rival tenderer to undercut or make special provision, or qualifications in relation to, matters contained in the RFT documentation.
7. The RFT documentation may itself contain provisions relating to confidentiality (as is the case here) as well as particular provisions which may impact on the business or commercial nature of the tenders that are submitted. In other words, it is not only the tenders themselves that may be "business or commercial in confidence" but such characterisation may extend to the RFT. Whether this is so or not will depend on a judgment or decision by the responsible officer of Council.
8. It is a commonplace that access to tender documents (including in appropriate circumstances the RFT documentation) will be subject to the individual who is granted such access signing a confidentiality agreement. This is common not only for officers of a Council but also for lawyers and other advisers. It operates as an additional safeguard for confidentiality and is recognised by the ICAC guidelines.⁶
9. The powers conferred on the General Manager not only enable him to grant or refuse access to given documents or information, but empowers him to grant any such access on the basis of appropriate conditions. These would include the signing of a confidentiality agreement and could extend to a prohibition on the making of copies of the relevant documents.
10. Ryde Council has, in accordance with Chapter 14 of the Act, adopted a Code of Conduct. It is binding on councillors⁷ and is in addition to the requirement that every councillor must act honestly and exercise a reasonable care and diligence in carrying out his or her functions under the Act or any other act.⁸ Under such Code a councillor is required to maintain integrity and security of confidential documents or information, the protection confidential information, and only release it if there is appropriate authority to do so or in accordance with established Council policies and procedures.⁹
11. The provisions of the Code of Conduct are consistent with the imposition of a condition in relation to a grant of access to confidential material, such as the signing of a confidentiality agreement.
12. In my opinion the General Manager would be acting within his power if he decided that access should not be given to the RFT documents or to such parts thereof as were sensitive and hence confidential in the business or commercial sense. For example provisions in the RFT in relation to any breakthrough into the existing road tunnel, leasing arrangements, requirements or terms etc could fall within the ambit of matters that could properly be characterised as business or commercial in confidence.
13. Should the General Manager decide to refuse access, or to make it conditional on the signing of a confidentiality agreement, then he is required to give reasons for such decision.

⁶ ICAC: Probity and Probity Advising: Guidelines for Managing Public Sector Projects - November, 2005

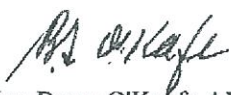
⁷ Section 440(1)

⁸ Section 439(1)

⁹ Code of Conduct clauses 5.9, 5.10(a) and (b) and 5.8(d)

14. Commercial or business in confidence would be a sufficient reason for taking the steps referred to in paragraph 12 above.

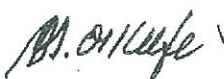
Sydney
26 March 2012


The Hon Barry O'Keefe AM QC
Senior Counsel

RYDE COUNCIL
RYDE CIVIC PRECINCT REDEVELOPMENT
REQUEST FOR TENDERS AND TENDERS
SUPPLEMENTARY ADVICE

1. On 26 March 2012 I advised in relation to Request For Tender (RFT) documents relating to the Civic Precinct Redevelopment Project.
2. In paragraph 14 of such advice I expressed, in abbreviated or summary form, a sufficient basis for declining to produce such documents or for doing so subject to there being a protection of the confidentiality of such documents such as the signing of a Confidentiality Agreement by individual Councillors to whom such documents were made available for viewing.
3. The tender period does not close until 10 April 2012. The issue of confidentiality is therefore applicable until that date.
4. Should the General Manager determine that he will not make the documents available, or that he should do so only on the basis of there being some additional protection for their confidentiality, then the following reasons would be appropriate:
 - (i) the documents have been characterised by the General Manager as "business/commercial in confidence";
 - (ii) it would not be in the public interest for such documents to be made available prior to the closing of the tender period on 10 April 2012;
 - (iii) the protection of confidentiality in relation to such documents as they are sensitive in a business/commercial sense;
 - (iv) to maintain integrity and confidentiality in relation to the tender process for the Civic Precinct Development Project;
 - (v) to ensure that the tender process for the Civic Development Project accords with the 2005 guidelines of the ICAC and with common business/commercial practice for projects of such a kind;
 - (vi) the documents in question are of a kind that disclosure of them could found an action for breach of confidence by the tenderers or potential tenderers.

Sydney
27 March 2012


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