

Direct negotiations policy for the sale or lease of Crown land

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VERSION 2

AUTHORISED BY Deputy Director General, Land & Natural Resources

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ISSUED BY Department of Industry - Lands

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1. Policy Statement

The allocation of Crown land under the provisions of the *Crown Lands Act 1989* (CLA) or the *Western Lands Act 1901* (WLA), whether by sale, exchange or lease, will be by a genuine Competitive Process, unless circumstances warrant entering into Direct Negotiations with a Proponent.

The circumstances that warrant entering into Direct Negotiations for the sale or leasing of Crown land are set out in this policy. This policy also establishes the framework that delegated decision makers must follow when considering applications and/or Proposals that seek to secure Crown land by Direct Negotiation.

As a general principle, the NSW Department of Industry – Lands (DoI Lands) will use Competitive Processes for the sale of Crown land and the issue of lease(s). There are circumstances where it may not be possible to use a Competitive Process. In other cases a Competitive Process may be possible, but for various reasons may be so impractical or expensive that Direct Negotiations are the most appropriate way to establish terms and conditions for the use of Crown land.

Where approval is given to proceed by Direct Negotiations, the allocation of Crown land will accord with the relevant policy for that transaction.

2. Scope

This policy applies to the allocation of Crown land by sale or lease under s.34 and s.34A of the CLA and ss.28A and 35C of the WLA.

This policy only relates to the decision as to whether allocation should proceed by a Competitive Process or by Direct Negotiation. It does not deal with the detailed assessment of the particular application/proposal once a decision has been made to proceed by Direct Negotiation or Competitive Process. Detailed assessments will be undertaken against the relevant policy/guideline that applies to that particular transaction i.e. if the transaction is an application to purchase Crown Land, the application will be assessed under the guideline for the sale of Crown land in NSW.

3. Application of Government policies

This policy conforms with the guiding principles for determining whether an unsolicited Proposal should proceed by Direct Negotiation with a Proponent, as contained in the NSW Government's Unsolicited Proposal - Guide for Submission and Assessment (2014). The unsolicited proposals process focuses on innovative and unique proposals. The Guide states that standard land transaction proposals will be referred to Government Property NSW or the owner agency for consideration.

ICAC's Guidelines for Managing Risks in Direct Negotiations (2006) were taken into account when developing this policy.

This policy deals with the process for Proposals referred to DoI Lands, and for the general allocation of Crown land that DoI Lands deals with on a day to day basis.

4. Hierarchy

This policy prevails over other DoI Lands' policies, procedures and guidelines to the extent of any inconsistency.

5. Requirements

5.1. Circumstances where Direct Negotiations will always be permitted

Direct Negotiations with a Proponent will always be permitted where the proposal involves:

- The purchase of land within a Crown road that has been closed at the request of the Proponent
- The purchase of a lease by its lessee, where that lessee has a statutory right to either:
 - purchase the leased property; or
 - apply to the Minister to purchase the leased property
- The granting of new leases to existing lessees following the surrender and subdivision of broad acre Western Lands Leases for grazing
- Sales of residential Western Lands Leases over residential mineral claims at Lightning Ridge, or
- Addition of Crown roads to adjoining Western Lands Leases as part of the rationalisation of the legal road network.

In these circumstances the procedures set out below do not need to be followed, but the decision for proceeding with the Direct Negotiation must always be clearly documented in writing.

Nothing in this policy requires DoI Lands to enter into a Direct Negotiation, even in circumstances where a Direct Negotiation may be permitted under this policy.

5.2. Proposals for Direct Negotiations

Other than in the circumstances as set out in 5.1, all proposals seeking to secure Crown land must be submitted in writing as an interest to purchase or lease.

5.3. Approval for Direct Negotiations

- The written approval of the Deputy Director General, Land & Natural Resources must be obtained for Crown land to be allocated by Direct Negotiation with a Proponent.
- Prior to considering proposals to enter into Direct Negotiation with a Proponent, regard must be had to ICAC's Direct Negotiations - Guidelines for Managing Risks in Direct Negotiations, 2006. There must be written evidence on file to show that the Guidelines have been appropriately taken into consideration.
- DoI Lands requires that a Proponent enter into a Negotiation Protocol for all commercial leasing proposals and for all High Value sale and lease of Crown land proposals and in any situation where DoI Lands considers the probity risk sufficiently high.
- DoI Lands may also require an independent probity advisor be appointed to oversee the process where probity risk is considered sufficient to warrant appointment or for large-scale projects.

5.4. Criteria under which a Direct Negotiation may be appropriate

Direct Negotiations with a Proponent may be considered in circumstances where:

- (a) the Proposal is limited to an exchange of freehold land for Crown land
- (b) the Proposal involves Crown land that is only of Material Benefit to the Proponent
- (c) the Proposal involves Crown land that is of a value that is less than the anticipated cost of conducting a Competitive Process
- (d) the Proposal is for a lease and involves Crown land that commands an annual market rent that is less than the anticipated cost of conducting a Competitive Process
- (e) the Proponent owns land (including Western Lands leasehold land) abutting the relevant Crown land and is the only person who could feasibly use the Crown land for the intended purpose
- (f) the Proponent holds a current lease of the subject Crown land, is a good and complying tenant, and is looking to renegotiate the tenure conditions of the lease (including a lease on holding-over provisions); and there is no substantial change in expectations of the use of the site and we have had no other interest expressed
- (g) the Proponent holds a perpetual lease
- (h) the Proponent is a community service, charitable, non-profit making, sporting or recreational organisation that seeks to lease Crown land for a help or service facility of benefit to the general community, or to provide an active sporting, passive recreational facility

- (i) the Proposal relates to an emergency situation to protect public health and safety, to mitigate damage to the environment or a serious legal or financial risk to Government
- (j) a previous Competitive Process failed to produce a successful Proponent and it is considered that a repeat of that process will produce the same result
- (k) both the Proposal and its Proponent satisfy the uniqueness test as detailed in the NSW Government's Unsolicited Proposals – Guide for Submission and Assessment 2014, and/or
- (l) The Proposal is considered to be value for money to the State (noting that a comprehensive value for money assessment will be conducted should the proposal be approved to proceed to Direct Negotiation).

5.5 Situations where referral to the Department of Premier and Cabinet (DPC) is generally required

Where a Proposal is received for an unsolicited Direct Negotiation in any of the situations described in the dot points below, staff must refer it to the relevant Director who must determine whether the Proposal should be referred to DPC and, if so, that Director must consult with DPC regarding the need to have the Proposal assessed under the Unsolicited Proposals – Guide for Submission and Assessment 2014:

- Crown land that has a High Value
- Crown land that is in a Sensitive Location, and/or
- Crown land that will be or is part of a Major Project.

6. Procedures

6.1. DoI Lands will determine whether the Proposal can proceed on the basis of applicable policy. If it cannot proceed the Proponent shall be advised in writing the reasons why the application has been formally refused.

6.2. If it can proceed, DoI Lands will assess the Proposal against the criteria in section 5.4, and if necessary, request additional supporting information from the Proponent.

6.3. If the Proposal is assessed and meets one or more of the criteria in section 5.4, approval must be obtained from the Deputy Director General, Land & Natural Resources.

6.4. If Direct Negotiation is not approved by the Deputy Director General, the Proponent will be advised of the reason for that decision and, if appropriate, details of when the subject Crown land will be made available by a Competitive Process, in which the Proponent is also able to participate.

6.5. If Direct Negotiation is approved by the Deputy Director General, the Proponent will be advised accordingly.

6.6. DoI Lands will then complete a detailed assessment of the Proposal in accordance with the relevant policy.

7. Roles and responsibilities

DoI Lands staff are responsible for:

- Assessing Proposals for Direct Negotiation based on the criteria set out in sections 5.1 and 5.4
- Preparing Proposals for Direct Negotiations under section 5.4
- Consulting with Proponents to assess the suitability of the proposed lease or sale and advising Proponents of DoI Lands' decisions, and
- Referring Proposals for Direct Negotiation to the relevant Director for consideration as to whether subsequent referral to DPC is required.

DoI Lands Directors are responsible for:

- Determining whether a Proposal for Direct Negotiation requires referral to DPC in accordance with the Unsolicited Proposals – Guide for Submission and Assessment 2014; and consulting with DPC if referral is required, and
- Submitting Proposals for Direct Negotiations under section 5.4 to the Deputy Director General for consideration and written approval.

The Deputy Director General, Land & Natural Resources is responsible for:

- Deciding whether it is appropriate to enter a Direct Negotiation as per section 5.3.

8. Delegations

The approval for Direct Negotiation rests with the Deputy Director General, Land & Natural Resources.

9. Definitions

In this policy document:

- **Competitive Process** means a transparent process by which competing Proponents apply to secure Crown land with full knowledge of the scope and specifications of the Proposal, including the terms and conditions of any proposed sale or lease, and the criteria by which DoI Lands will evaluate the applications received.
- **Crown land** includes land defined as such in s.3 of the *Crown Lands Act 1989* and land within a Crown reserve subject to the provisions of Part 5 of the *Act*.
- **DoI Lands** means the NSW Department of Industry – Lands, the division that is responsible for the administration and management of Crown land in NSW.
- **Direct Negotiation** means exclusive negotiations between DoI Lands and a Proponent without undergoing a Competitive Process.
- **Expensive** means that the cost to conduct a competitive leasing or sale process would exceed the market value of the land being sold or offered for lease.
- **High Value** generally means Crown land that is of high strategic and/or monetary value, or is part of or adjacent to a major government initiative or project.
- **Holding-over** means continued approved occupation of the premises by the tenant after the lease term has expired.
- **Impractical** means to deal with the land by any other means other than Direct Negotiation is not possible or nor value for money and/or there are no other real mechanisms or Proponents available to deal in the land.
- **Major Projects** is a project as listed on the New South Wales Government major project webpage.
- **Material Benefit** means that any commercial return or economic benefit from the land could only be obtained by the adjoining land holder.
- **Negotiation Protocol** means an agreement between the Proponent and DoI Lands that defines the obligations of each party for the negotiation including, but not limited to timing, costs, communications, delegations and probity.
- **Proponent** means the person or organisation that submits a Proposal to secure Crown land.
- **Proposal** means a request to secure Crown land for the Proponent, whether by sale, transfer, exchange, lease or otherwise.
- **Sensitive Location** means a location with significant environmental or heritage value or subject to a high level of community interest.
- **Value** means the market value of land as determined by reference to a valuation obtained by DoI Lands.

10. Legislation

The allocation of Crown land in accordance with this policy will be made under the provisions of the:

- *Crown Lands Act 1989*, or
- *Western Lands Act 1901*.

11. Related policies

- NSW Trade & Investment - Fraud and corruption prevention policy (2013)
- Policy for leasing and licensing under s34A Crown Lands Act 1989 (2009)

12. Other related documents

- ICAC Guidelines for Managing Risks in Direct Negotiations (2006)
- Unsolicited Proposals - Guide for Submission and Assessment (2014)
- Guideline for the Sale and Disposal of Crown Land (2011)
- Guideline for leasing and licensing under s34A Crown Lands Act 1989 (2009)

13. Revision history

Version	Date issued	Notes	By
1	14/03/2016	New policy as a result of practice and governance improvements	Group Director Governance & Strategy
2	28/8/2016	Amendment of clauses 5.1 and 5.3 in response to feedback from ICAC. Amendment to clauses 5.5 and 7 to clarify who is responsible for determining when consultation with DPC is required.	Group Director Governance & Strategy

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