

COMPETITIVE PRICING PROCEDURES MANUAL

VOLUME 2: PUBLIC PASSENGER TRANSPORT

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TRANSFUND NEW ZEALAND
PO BOX 2331
WELLINGTON
Telephone: (04) 473 0220
Facsimile: (04) 499 0733

Sponsor: Performance Monitoring Manager
Regional Office Contact: Regional Manager

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© 2002, Transfund New Zealand
PO Box 2331, Wellington, New Zealand
Telephone: (04) 473 0220
Facsimile: (04) 499 0733

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FOREWORD

Passenger transport is a key part of – and a significant contributor towards – New Zealand’s land transport sector, and it is important that Transfund’s policies and procedures relating to passenger transport are up-to-date and add value. In that vein, Transfund New Zealand is about to commence work on a “first principles” review of the way in which we fund Passenger Transport in New Zealand.

Transfund’s objective for passenger transport (as set by the government in Transfund’s 2002/03 Performance Agreement) is captured in the following statement contained in that Agreement.

“To improve the efficiency and effectiveness of investment in capital, maintenance and passenger transport projects by, where possible:

- reducing severe congestion, that is congestion which occurs regularly during the week, causes long time delays, and has significant economic, social and environmental impacts
- improving funding and delivery of public transport.”

This volume of the Passenger Transport CPP Manual aims to provide the framework that ensures competitive processes are followed in contracting for passenger transport services.

We expect that there will be further changes required to this volume of our Competitive Pricing Procedures manual, particularly once the review is completed. However, we considered it important to make the changes in this revised manual now, to reflect current industry best practice and to provide a good foundation from which new CPPs might be considered in future.

Martin Gummer
Chief Executive

Important Note for the Reader

Document Status

This document ‘Competitive Pricing Procedures Manual’ has the status of a standard as defined in Transfund New Zealand’s “Standards and Guidelines” Manual.

AMENDMENT PROCEDURES

All mandatory amendments will be issued to Manual holders in the form of dated replacement pages. Changes are indicated by a vertical line in the margin (except for Appendix B which is updated quarterly). The record of amendment table (see next page) will be updated and reprinted each time a new amendment is released.

Amendments will be distributed to all organisations and individuals on the list of registered Manual holders. If you wish to check that you are on this list, or change the number of copies of amendments that are sent to your organisation, please contact:

Customer Services
Standards New Zealand
Private Bag 2439
WELLINGTON

Phone 04 498 5591
Fax 04 498 5994

CHAPTER 1

INTRODUCTION AND GENERAL REQUIREMENTS

Overview

Introduction

This chapter provides a general introduction to this manual and describes:

- the manual's purpose
- requirements of Competitive Pricing Procedures
- terms used in this manual.

In this chapter

This chapter contains **9 pages** and covers the following sections:

	Section	See Page
1.1	This Manual	1-2
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CHAPTER 1: Introduction and General Requirements

1.1 This Manual

This Manual sets out the provisions which constitute the Competitive Pricing Procedures (CPPs) for the classes of project involving payments public passenger transport services undertaken under the Transit New Zealand Act 1989 and subsequent amendments (hereinafter referred to as the Act).

These CPPs have been established by Transfund New Zealand consistent with the requirements and authorities contained in the Act.

Only Transfund New Zealand is empowered to approve CPPs within the terms of the Act, however the Act does not give Transfund New Zealand a sole right to formulate CPPs. Any tendering authority may develop appropriate CPPs and submit them to Transfund New Zealand for approval.

1.2 Purpose and Requirements of Competitive Pricing Procedures

Section 27 of the Act states that with specified exceptions, no payments shall be made by Transfund New Zealand unless the payment relates to an approved output or capital project, the price of which has been determined by a CPP.

Section 27 of the Act also states that no payment shall be made from the Land Transport Disbursement Account of any local authority in respect of any approved output or capital project unless the amount has been determined by a CPP. In respect of public passenger transport services, there is an additional requirement that no payment from any source shall be made by any local authority unless the amount of the payment has been determined by a CPP. The Act prohibits payments to local authorities even when a CPP is used. It also regulates the circumstances in which payment may be made to local authority trading enterprises (LATEs).

Section 26 of the Act requires Transfund New Zealand "from time to time to approve a competitive pricing procedure for each output or capital project or class of output or capital project".

In approving a CPP, Transfund New Zealand may specify particular terms and conditions which shall be *either* included in *or* excluded from any contract formed pursuant to the CPP.

In exercising these powers (under section 26(3) of the Act), Transfund New Zealand is required to have regard to:

- "(a) The efficient application of the State Highways Account and Land Transport Disbursement Accounts:*
- (b) The safety and other interests of the public in respect of the output or capital project or the class of output or capital project:*

- (c) *The desirability of encouraging competition in the sector of industry likely to supply goods or services in relation to the output or capital project or the class of output or capital project:*
- (d) *The undesirability of excluding from competition for the output or capital project or the class of output or capital project any party who might otherwise be willing and able to compete:*
- (e) *The costs of administration associated with the pricing procedure or of any contract formed under that procedure."*

The CPPs are also intended to assist Transfund New Zealand in achieving its principal objective, which is:

". . . to allocate resources to achieve a safe and efficient roading system."

The CPPs defined in this Manual have been developed in accordance with the above requirements. They are designed to enable Transfund New Zealand and local authorities to ensure that public passenger transport services are procured in the most efficient way, having regard to Transfund New Zealand's objectives and the other requirements of the Act. The principal means of achieving this overall objective is to be through the encouragement of competition among potential suppliers of public passenger transport services.

These procedures are designed to ensure that Transfund New Zealand's objectives and requirements are met through the competitive process. They are **not** intended to provide detailed and comprehensive procedures. It is envisaged that individual authorities will develop their own detailed procedures, within the requirements laid down in this Manual.

Guidelines 1.2:

The specified exceptions referred to above are listed in Section 27 (4) of the Act, as amended by the Transit New Zealand Amendment Act 1995.

The following are exempted from this CPP:

- "(a) Any approved project of administration; or***
- (b) Any registered service of any operator in relation to any 2-month period that follows:***
 - (i) The withdrawal or proposed withdrawal of that operator from the provision of the service; or***
 - (ii) The withdrawal of any other operator from the provision of the same or a similar service; or***
- (c) Any expenditure that is necessary in the urgent interests of public safety; or***
- (d) Any expenditure that is necessary for the immediate or temporary repair of damage caused by a sudden and unexpected event."***

In cases that are exempt from the CPP, it is still desirable to include an element of competitiveness in the procurement procedure if possible. This may take the form of a verbal approach to more than one potential operator, and would not necessarily delay the commencement of a new service.

Apart from the above exceptions compliance with an approved CPP is a statutory requirement. It is essential that should any tendering authority identify circumstances that require a variation to approved CPPs it must seek prior approval from Transfund before entering into the tendering process. Failure to do so could put Transfund and tendering authorities in the position whereby it might be unlawful to make any payments.

In situations where Transfund's audit process identifies departures from the CPP, the following points will be considered by Transfund when deciding whether to make financial assistance payments:

- (a) Are the points of non-compliance with the CPP sufficient to raise doubt about whether the contract price was arrived at by a competitive process?*
- (b) Has the non-compliance with the CPP resulted in an outcome that is inconsistent with the intent of the Act? Has the process been unfair to any of the tenderers because of the non-compliance with the CPP?*
- (c) Was strict compliance with the CPP a practical impossibility in the circumstances? Would it be in the public interest to incur the additional costs of repeating the tendering process, and possibly encountering the same problems as in the first round?*

Other factors may be considered if relevant to the particular circumstances.

1.3 Works Not Subject to Competitive Pricing Procedures

The following types of public passenger transport services are exempt from the CPP requirement:

- (1) any approved project of administration;
- (2) any registered service of an operator in relation to any 2-month period that follows-
 - (i) the withdrawal or proposed withdrawal of that operator from the provision of that service; or
 - (ii) the withdrawal of any other operator from the provision of the same or similar service
- (3) any expenditure that is necessary in the urgent interests of public safety;
- (4) any expenditure that is necessary for the immediate or temporary repair of damage caused by a sudden and unexpected event;
- (5) any other activities exempted by subsequent changes in legislation or Ministerial Determinations issued pursuant to the Act.

1.4 Definitions

The following working definitions are used in this Manual:

Alternative Tender

An alternative tender is a tender which is submitted as an alternative tender and which does not satisfy all of the conformance requirements.

Combined RFT

A combined RFT is a request for tenders for a single route, that includes more than one single RFT. A combined RFT can only be issued by the tendering authority.

Combined Tender

A combined tender is a tender submitted in response to a combined RFT.

Composite Contract

A contract which operates as a gross contract for an initial period and as a net contract for the remainder of the contract period.

Conforming Tender

A conforming tender is a tender which is submitted as a conforming tender and which satisfies all the conformance requirements.

Customer Orientated Vehicle Feature

A feature of the vehicle that is noticeable and beneficial to customers, eg: step height.

Gross Contract

A contract in which the operator takes no risk for passenger fares, tendering a price based on the full cost of the service, with the tendering authority receiving the passenger revenue.

Group Tender

A group tender is a tender that includes more than one single RFT, and which is submitted on the initiative of the tenderer.

Net Contract

A contract in which the operator takes the risk for passenger fares, tendering a price based on the difference between the operator's full cost of the service and the operator's fare revenue estimate, with the operator retaining the passenger fares.

Non-conforming Tender

A non-conforming tender is a tender which is submitted as a conforming tender but does not satisfy all the conformance requirements specified in the RFT and can not be evaluated as an Alternative Tender.

Operator

An operator is any person who, or organisation which, operates any passenger transport service.

Optional Features

Optional features are physical or service features for which a tendering authority is prepared to pay extra, and that a tenderer may choose to offer in their tender in addition to the minimum conformance requirements specified in the RFT.

Performance Bond

A performance bond is a bond placed on the successful tenderer and assigned to the tendering authority.

Period Contract

A period contract is a contract for the provision of goods or services for a defined period of time.

Request for Tender (RFT)

The document prepared by a tendering authority which contains the information on which tenderers base their tenders.

Route

A route is the series of streets and roads (or other right-of-ways) covered by passenger transport vehicles between a specific pair of termini. A route may include minor deviations or bifurcations to alternative termini and may cover trips which terminate part way along the route, so long as a substantial portion is common.

Seasonal Service

A seasonal service is a service that runs for only part of the year, depending on the season. A school service qualifies as a seasonal service.

Small Contract

A contract where the gross cost of the service is estimated to be less than \$25,000.

Tenderer

Any person or organisation submitting a tender to a tendering authority. Organisations include but are not limited to companies, LATEs (Local Authority Trading Enterprises), partnerships and joint ventures.

Tendering Authority

A tendering authority is any regional council or territorial authority within the meaning of the Local Government Act of 1974 that makes any expenditure on passenger transport services.

Guidelines 1.4:

For routes covered by single RFTs but with alternative termini, the timetable of the common section of the route should be organised in a logical and integrated manner, reflecting that the trips commencing from alternative termini are part of the same service.

For gross contracts the tendering authority can either receive the passenger revenue by payment from the operator, or by the operator retaining the passenger revenue and the tendering authority making the necessary deduction from the gross payment.

For composite contracts tenderers tender as for a gross contract. The gross price tendered is likely to be influenced by the method to be used in converting from gross to net at a later stage.

Sections 2 and 47 of the Transport Services Licensing Act 1989 define a passenger service as being:

Section 2:

"(a) The carriage of passengers on any road for hire or reward by means of a motor vehicle; and includes the letting on hire of a vehicle by a person who drives the vehicle or provides a driver for the vehicle if, during the hiring, the vehicle is used for the carriage of passengers; and

(b) The carriage of passengers on any road whether or not for hire or reward, by means of a large passenger service vehicle;- but does not include any service specified as an exempt service in Part I of the First Schedule to this Act or in regulations referred to in that Part:"

Section 47:

"(a) Any passenger service within the meaning of section 2 (1) of this Act; and

(b) Except in section 57 of this Act (other than to the extent specified in subsection (3) of that section),

any harbour ferry service, passenger rail service, cable car, hovercraft, monorail, tramway, or other form of public transport (other than air transport) that is available to the public generally:"

1.5 Application of Competitive Pricing Procedures

Subject to the exceptions in Section 1.3 of this Manual, these CPPs apply to all tendering authorities that wish to make a payment for public passenger transport service which is to be wholly or partly funded by Transfund New Zealand.

1.6 Consistency of Tendering Authority Actions

Tendering authorities shall comply with the requirements and the intent of these CPPs, and with the intent of the Act, and with any other Transfund New Zealand requirements which may be issued from time to time in relation to these CPPs.

Tendering authorities shall also comply with the procedures that they adopt pursuant to these CPPs (see Sections 2.1 and 4.1 of this Manual).

Evaluator Competency

Responsibility for evaluating tenders should only be given to evaluators who have the skills to perform such evaluations. The evaluation process must be transparent and impartial.

1.7 Status and Structure of Manual

This is Volume 2 of the Transfund New Zealand Manual of Competitive Pricing Procedures. Volume 1 sets out the procedures to be adopted for physical works and professional services.

This Manual is arranged in the following chapters:

- Chapter 1 - Introduction and General Requirements
- Chapter 2 - Tendering Procedures
- Chapter 3 - Request for Tender Requirements
- Chapter 4 - Concessionary Fare Scheme Competitive Pricing Procedures

Supplementary material is included in appendices.

In the case of payments for Concessionary Fare Schemes (as defined in Chapter 4), Chapters 1 and 4 only of this Manual apply. In the case of all other payments for passenger transport services, only Chapters 1 to 3 apply.

Throughout the Manual, mandatory procedures are the main part of this text. To assist in the interpretation and/or application of these mandatory procedures, guidelines and discussion are also included. These appear in italics and are included with the relevant manual section and shown inside a box.

While the guidelines are not mandatory, they are a statement of recommended good practice. Guidelines may be departed from to suit any particular circumstances but in all cases the actual procedures adopted by the tendering authority need to comply with the provisions of section 26 of the Act.

Guidelines 1.7:

This manual contains the mandatory clauses that must be followed in all cases, except if an alternative CPP or CPP variation has been approved. The shaded text contains guidelines to follow. The Transfund standards and guidelines manual describes the use of guidelines:

"Guidelines may be modified to suit particular circumstances in order to optimise environmental, economic or resource utilisation impacts. Where such a modification is made, sufficient traceable justification should be retained for audit purposes."

1.8 Amendments and Alternative Competitive Pricing Procedures

The CPP Manual allows tendering authorities to propose amendments to the CPPs. The reason for such provisions is that it is recognised that the procedures in the CPP

Manual have to cover a wide variety of circumstances and in some cases other procedures may better achieve the objectives of the Act.

The main type of amendment to the CPPs is a general amendment which is a change to the standard CPPs and applies to all tendering authorities. As well as general amendments, there are two special sorts of amendments; namely alternative CPPs and variations.

Alternative CPPs are stand alone CPPs that tendering authorities can use to cover specified situations (eg the sole supplier CPP). Unlike mandatory amendments, alternative CPPs are optional and tendering authorities can choose to continue to comply with the standard CPP provisions.

Individual tendering authorities are also able to apply for variations to overcome a specific problem. If approved, variations would only be issued to the tendering authority that applied for the variation and then only for the particular contract(s) to which they relate. Any tendering authority making use of such a variation shall prominently identify the variation from the standard CPP in each RFT to which it is applied.

Variations must be approved prior to use and not sought retrospectively to regularise non-compliance with a previously approved CPP.

Transfund New Zealand will consult with interested parties on proposed alternative procedures or variations as appropriate.

Guidelines 1.8:

It should be noted that Transfund will consider for approval alternative CPPs or variations to the requirements contained in this manual where these can be shown to be the best means of maximising the efficiency of the land transport system.

If a contract is being tendered under the provisions of an alternative CPP or an approved variation, this should be prominently stated in the RFT so that tenderers are all aware of the change.

Transfund is not legally able to approve alternative CPPs or variations for a tendering process once an RFT has been issued. Consequently any tendering authority wishing to have Transfund approve an alternative CPP should seek that approval well in advance of commencing any tendering process to which that alternative would apply.

1.9 Audits

Tendering authorities audits shall be limited to confirming that the specified levels of service have been provided, to verifying revenues under gross contracts and verifying the payments made under any concessionary fare scheme.

CHAPTER 2

TENDERING PROCEDURES

Overview

Introduction

This chapter describes how regional councils and territorial local authorities with delegated responsibility for administering financially assisted public passenger transport services shall manage the tendering process.

In this chapter

This chapter contains **16 pages** and covers the following sections:

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CHAPTER 2: TENDERING PROCEDURES

2.1 Tendering Authority Procedures

- 2.1.1 Each tendering authority shall develop and document appropriate administrative procedures relating to all aspects of the tender process, for these CPPs or any alternative CPPs approved under Section 1.8 of this manual. These procedures shall be publicly available.
- 2.1.2 As part of its procedures, each tendering authority shall establish procedures 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; and
 - 3) The Tender Evaluation Details and Recommendations.

Guidelines 2.1:

In many cases tendering authorities will already have properly established adequate procedures for the tender process; in such cases Transfund New Zealand has no desire to require the establishment of duplicate procedures for passenger transport projects. Each tendering authority should verify that its current administrative procedures fall within the procedures specified in this CPP and document those procedures so that they are available for Transfund New Zealand audit.

Tendering authorities should also develop operator consultation and communication procedures. It can be useful, for instance, to consult operators on the specifications of services prior to finalisation and issue of RFTs. A communication procedure might be simply maintaining a register of all operators in the tendering authority area, and advising them of current RFTs and other items of potential interest.

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 Land Transport Programme.*
- (3) Account code to be charged in the Land Transport Disbursement Account.*
- (4) Timetable showing:*
 - (a) Date of issue of RFT*
 - (b) date and time by which tenders must be received, and*
 - (c) date by which final selection shall be made.*
- (5) Price estimate and main features.*

The contract files including the information specified above should be retained for 7 years.

2.2 Invitation to Tender

2.2.1 For each RFT, the tendering authority shall:

- (1) Advertise the RFT and pre-tender meeting in accordance with the following minimum requirements:
 - a) For services wholly or partly within the four largest passenger transport regions (Auckland, Wellington, Canterbury and Otago), notices shall be published in at least one daily newspaper of wide circulation in the region(s) concerned.
 - b) For services outside the four largest passenger transport regions, notices shall be published in at least one daily newspaper of wide circulation in the closest appropriate of the four largest passenger transport regions, and in at least one daily newspaper of wide circulation within the region itself (the same newspaper may cover both the regions concerned).
- (2) Notwithstanding Section 2.2.1(1), a tendering authority may seek from tenderers an annual expression of interest in small contracts. For small contracts, the tendering authority may then invite tenders from operators who have responded to this expression of interest instead of advertising in accordance with the provisions of 2.2.1(1). An operator may join this register for small contracts at any time.
- (3) Distribute any material changes to the RFT, by means of RFT addenda, to all operators that have received the RFT from the tendering authority.
- (4) Adopt a consistent procedure for operator communications with regard to the RFT in advance of tender submittal, including a provision that all questions and answers shall be documented in writing and distributed to all operators that have received the RFT from the tendering authority.
- (5) Adopt a procedure for correction of tender errors and clarification of tenders that is equitable and does not permit material changes to tenders.

2.2.2 If any operator requires it, the tendering authority shall hold a pre-tender meeting regarding each RFT before tender closing date. All operators who have received the RFTs should be invited. Written documentation of questions and answers shall be provided as soon as practicable after the meeting to all operators that have received the RFT from the tendering authority. Attendance/non-attendance at a pre-tender meeting shall not be a relevant factor with respect to tender evaluation.

Guidelines 2.2:

The public advertisement of each RFT is not required for small contracts. By obtaining an expression of interest on an annual basis and then inviting those operators to tender for small contracts, a tendering authority can still maintain contestability but can save on advertising charges. Any operator who wishes to join the register for small contracts should be allowed to join at any period of time.

The tendering authority must prepare to hold a pre-tender the meeting on a date approximately midway between the date of issue of the RFT and tender closing date, and hold the meeting if any tenderer requests a meeting. This will give tenderers the greatest amount of time to both:

- *Consider the RFT and identify any points requiring further clarification at the pre-tender meeting; and*
- *Amend their proposal(s) in light of that pre-tender meeting prior to tender closing date.*

Tendering authorities should allow at least two weeks between the date of issue of RFTs and the date of the pre-tender meeting, and a further two weeks between the date of the pre-tender meeting and tender closing date.

Tendering authorities should also provide written documentation of pre-tender meeting questions and answers (including oral questions) to all operators who uplifted the RFT within three working days of the pre-tender meeting.

Section 2.2.1(5) requires careful consideration prior to the publication of RFTs. A tenderer could easily make an apparently minor error (such as omitting one departure time from a detailed timetable) but that error could result in that tenderer not having submitted a conforming tender. Correcting the error would enable the resulting conforming tender to be evaluated and potentially win the contract. In this case, an unsuccessful tenderer might argue that the original incorrect tender had been materially changed.

2.3 Expedited Tendering Procedure

2.3.1 The expedited tendering procedures is subject to all provisions of the CPPs except where the following provisions override other conflicting provisions.

2.3.2 This expedited tendering procedure may be used for seasonal, trial and special event services or small contracts. It may also be used when, as a result of default of a contracted service or withdrawal of a commercial service, services must be tendered, and it is not possible to complete the standard tendering procedure without an unacceptable gap in service to the public.

2.3.3 Contracts offered using the expedited procedure to cover contract default or withdrawal of a service shall be limited to a maximum of six months duration

2.3.4 Expedited competitive tendering shall required, at a minimum:

- (1) Invitations to three independent operators of the tendering authority's choice to provide written quotations, or advertisement of a simplified RFT or notice of RFT in accordance with Section 2.2.1(1).
- (2) Submission of simplified tenders containing a price proposal and any other necessary information.

- (3) For contracts with a net cost below \$5000 the contract may be negotiated with one operator.

2.3.5 This expedited competitive tendering procedure shall not be used to extend the scope, duration, or price of any existing contract.

Guidelines 2.3:

Tendering authorities are permitted, but not obliged, to use this expedited tendering procedure for the situations listed in clause 2.3.2.

Expedited tenders should be evaluated in the same way as non-expedited tenders; ie as either conforming or alternative, as specified in Sections 2.6 and 2.7.

A seasonal service is a service that runs for only part of the year, depending on the season. A school service qualifies as a seasonal service.

2.4 Trial Service Tendering Procedure

2.4.1 A trial service is a new (or substantially new) service which is clearly introduced on a trial basis by the tendering authority.

2.4.2 Trial services are subject to the following specific provisions in addition to all other provisions of these CPPs except sections 3.7, 3.8 and 3.9.

- (1) No contract for a trial service shall be for longer than 2 years, but an extension of up 4 months is permitted to enable tendering of the established service (or a variant thereof) under the full procedures if the trial is judged a success.
- (2) Notwithstanding clause 2.4.2(1), a trial service may be extended by mutual agreement between the operator and the tendering authority by up to two years to being together contract expiry dates on services where it is planned to significantly change the service structure.
- (3) All trial service contracts shall be of either gross or net cost type, as agreed upon by the tendering authority and the operator.
- (4) Tendering authorities shall be permitted to request prices on a schedule of rates basis instead of requiring a single contract price.

Guidelines 2.4:

Special provisions are made for trial services. The 24 month duration is intended to permit a full trial, plus further time for evaluation of the trial and decision making as to whether the service should continue. If it is decided that the service should continue then a four months extension is permitted to allow time for the full tendering process to be completed.

As a trial, it is likely that the service will be adjusted from time to time; for this reason a single contract price will generally be inappropriate and a schedule of rates is permitted. In this way, the tenderer can tender X/vehicle km, Y/vehicle hr, Z/peak vehicle etc. These prices are then used to determine the variable price as and when service changes are made.

A contract extension of up to two years is permitted on a trial service by mutual agreement between the operator and the tendering authority. If a tendering authority require a longer period than the 24 months plus two years, then the full tendering procedure can be utilised.

2.5 Submittal of Tenders

2.5.1 Tendering authorities shall require each tender to be submitted in two (or more) parts, in separate sealed and marked envelopes:

- (1) Part A envelope shall contain documentation of conformity with all conformance requirements, including the service requirements of the RFT, except those that are optional features.
- (2) Part B envelope shall contain other aspects of the operator's tender, including the operator's price proposals and the optional features that the operator will provide.

2.5.2 Details of alternative tenders shall be submitted in separate envelopes from those containing the conforming tender.

2.5.3 Depending on their preference, tendering authorities may choose to accept alternative tenders without an accompanying conforming tender, or may stipulate that alternative tenders shall only be eligible for consideration where a conforming tender has been submitted for each single RFT. The tendering authority's chosen policy in this regard shall be clearly stated in each RFT.

Guidelines 2.5:

Tendering authorities are permitted to request a single part A submission covering a number of RFTs if the conformance requirements for the RFTs are similar. This could reduce administration for tenderers and tendering authorities.

Tendering authorities may permit tenderers to submit their part A documentation in two (or more) portions. For example the first portion could document conformity with legal requirements, such as the tenderer holding appropriate licences etc. The second portion of the part A envelope documenting conformity with any other conformance requirements, such as service level details, would then be submitted at the time of submitting the part B envelope.

This could assist both the tendering authority and the tenderer; the tendering authority would have more time to assess conformity with legal requirements and other standards and the tenderer could have sufficient notice of non-conformity in order to correct the deficiency prior to tender closing date.

The tendering authority may also define other conformance requirements which must be met in order for the tender to be a conforming tender, but which the tendering authority may allow to be varied in any alternative tenders, eg. timetables, route, etc.

Details of any alternative tender proposals must be in a separate envelope. The tendering authority may choose to request separate envelopes for each alternative tender or allow several alternative tenders be submitted together in a single envelope.

2.6 Tender Evaluation Process - Conforming Tenders

2.6.1 The part A envelope evaluation shall consist of determination of tender conformity with conformance requirements.

- (1) Eligibility for further consideration shall be limited to those tenders for which the part A envelope submission satisfies all the conforming requirements and the tenderer satisfies any conditions pursuant to clause 3.2.1(12). The tendering authority may seek clarification/ modification of part A of the tender providing that no second envelope has been opened.
- (2) The part B envelope of each tender which does not conform to all conformance requirements shall be returned unopened to the tenderer.

2.6.2 The part B envelope evaluation shall consist of applying the optional evaluation factors to the optional features of each eligible tender to determine the preferred tender.

2.6.3 The tendering authority shall not enter into a contract for a conforming tender where there is another conforming tender that has a lower price (after price adjustment for optional features).

2.6.4 Notwithstanding clause 2.6.3, the tendering authority may enter into a contract for an alternative tender pursuant to clauses 2.7.1 to 2.7.4.

2.6.5 If the tendering authority wishes to seek clarification of 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 any tender acceptance.

- 2.6.6 A tendering authority is permitted to carry out face to face interviews as part of the tender evaluation process, if it deems this to be necessary, to obtain clarification of the tender and for no other purpose.
- 2.6.7 Minutes shall be taken at any interview and relevant minutes shall be incorporated in the contract documents. This documentation shall include the purpose of the interview.

Guidelines 2.6:

Conforming Tenders - Evaluation of Conformance Requirements (Part A Envelope)

The purpose of this stage is to identify which tenders satisfy the conformance requirements, and which tenderers are eligible for the contract. As noted in section 2.5 some of the information may be submitted in advance of the final contract closing date.

Evaluation of the conformance requirements on conforming tenders should be on a 'pass/fail' basis, with only those tenders rated as pass on all conformance requirements being considered in the next stage. The tendering authority may seek clarification/modification of part A of the tender if no second envelope has been opened.

Any tender submitted as a conforming tender which does not satisfy the conformance requirements is ineligible for further evaluation.

The Part B envelope of any tender that fails the poor performance clause, or is submitted as conforming but does not meet the conformance requirements and is not required for evaluation under clause 2.8.3, must be returned unopened to the tenderer. Because of this, all tendering authorities are advised to check very thoroughly that the conformance requirements are met before opening the part B envelope. It is advisable to retain all Part B envelopes until a contract has been signed with the preferred tenderer.

The poor performance clause 3.2.1(12) would only be used in exceptional circumstances and should be treated as a Pass/Fail question for an operator as there is the potential for this clause to be used as a barrier to entry. The tendering authority must make the judgement based on documented fact on any particular operator competing for a tender before opening the Part B envelope.

If the clause is to be exercised, then the operator must fail all of following tests at a bare minimum:

(a) Are there other services where the operator in question has consistently performed inadequately? It would be inappropriate to bar an operator on the basis of poor performance on one occasion when there are other instances of adequate service.

(b) Was the poor performance in the recent past? The clause must only be used to bar an operator for recent poor performance.

(c) Have the circumstances causing the previous poor performance been rectified? If an operator has rectified the reasons for previous poor performance, then that operator should not be barred from competing.

Poor performance from one region may be taken into account by another regional council when deciding if a tenderer is to be excluded from the tender evaluation.

The following descriptions of Relevant Experience and Track Record attributes provide a basis for tendering authorities to assess past performance. Each attribute can be made a conformance requirement and tenders can be assessed on a pass / fail basis on each attribute;

Relevant Experience

Definition

The tenderer's previous experience in service operations comparable to this contract.

Comment

This relates more to the tendering company than to the individuals within that company. However, in the case of newly formed firms or consortia consideration may be given to the relevant experience held by key company personnel. In the cases of newly formed firms, it is permissible to examine the work of key individuals when examining relevant experience and track record. This is to ensure that newly formed firms are not precluded from further consideration in the CPP process.

It is necessary to determine whether the tenderer has done the type of work before and how recently. Where the contract requires a high level of operational expertise, the tenderer's experience should be recent and in an area directly comparable with the contract. Where a lower level of operational expertise will be adequate, other relevant experience may be considered.

Where subcontractors are proposed for a significant part of the operations, their relevant experience should also be considered.

The relevant experience and track record attributes normally relate to the firm in question rather than the individual personnel involved. The reason for differentiating between attributes for the firm and attributes for the individual personnel involved is that a proportion of a person's skills will be attributable to the company(s) they worked for and may not be transferable. Therefore when examining the relevant experience and track record of an individual in a newly formed firm, it is important to bear in mind that some of their record in these areas may be due to characteristics (eg management and quality assurance systems) of the firm they used to work for rather than being skills they possess themselves.

Track Record

Definition

The tenderer's record of satisfactorily fulfilling previous contract obligations to the quality standards and service levels required.

Comment

This relates to the performance of the tendering company. However, in the case of newly formed firms or consortia, consideration may be given to the track record of key personnel (see comment on Relevant Experience above).

The assessment of track record should take account of the tenderer's recent past performance and not unduly emphasise individual good or poor performances."

It is reasonable to differentiate between companies who frequently achieve the required standards and provide the level of service prescribed without undue client enforcement and those who only achieve required standards after intensive

supervision and threats of withholding of contract payments.

A tendering authority's assessment should not be limited to its own experience with a tenderer. However, another tendering authority's poor experience with a contractor / consortium should only be considered if the tendering authority also allows for any mitigating circumstances.

This attribute relates to the level of client satisfaction with the tenderer's performance on relevant contracts. Tendering authorities should have a procedure for evaluating the performance of operators at the conclusion of contracts. The performance report should be sent to the operator for comment before being included in the tendering authority's records. Any comments by the operator must be included in the file. This would provide a systematic basis for assessment of track record for future contracts, and such assessment records could be shared with other tendering authorities.

The successful tenderer for a contract should be advised about the form of performance reporting that will ultimately be conducted, before contract commencement.

Evaluation of Optional Features (Part B Envelope)

In principle this part of tender evaluation is straightforward. Each tender price is adjusted to reflect the benefit/disbenefit of better/lesser services, in accordance with the published optional evaluation factors. The conforming tender with the lowest price (after adjustment for optional evaluation features) is then the preferred tender.

When determining the value to place upon each optional feature, the tendering authority should consider the demonstrable public benefit likely to be gained from the provision of each optional feature, or the local community's willingness to pay (assessed through independent survey) for such features. These values must be determined in advance of tendering and included in the RFT (clause 3.2.3(2) of the mandatory section of the CPP).

Features suitable for treatment as optional evaluation factors could include, but are not limited to, the following;

- *aspects of overall fleet quality such as door widths, step heights, heating, electronic ticketing machines etc*
- *accessible buses (low floor, wheelchair access)*
- *use of alternative fuels*
- *provision of timetables and information*
- *participation in area wide ticketing schemes*

Tendering authorities should consider specifying absolute dollar amounts that they are willing to pay for optional evaluation factors, rather than percentages of the tender price. Percentages can have a somewhat arbitrary effect when applied to net contract prices.

2.7 Tender Evaluation Process - Alternative Tenders

- 2.7.1 Alternative tenders shall only be opened once the evaluation of conforming tenders is completed and the lowest price conforming tender (after price adjustment for optional features) has been determined.
- 2.7.2 The preference for the lowest priced conforming tender (after price adjustment for optional features) may be overridden only where the tendering authority determines that selection of an alternative tender is preferred in the public interest. Such determination shall be made only if one of the two following conditions is met, but neither condition shall oblige a tendering authority to select a tender other than the lowest priced conforming tender (after price adjustment for optional features).
- a) The demonstrable public benefit from the alternative tender's features exceeds the difference in price between the selected higher priced alternative tender and the lowest priced conforming tender (after prices adjusted for optional features).
 - b) The difference in price between the selected lower priced alternative tender and the lowest priced conforming tender exceeds the demonstrable loss in public benefit associated with the selected lower priced alternative tender (after prices adjusted for optional features).
- 2.7.3 In considering the part A envelope evaluation of an alternative tender, the tendering authority shall determine the amount by which the price of the alternative tender could differ from that of the lowest priced conforming tender (after price adjustment for optional features) for that alternative tender to be preferred and also whether the tenderer complies with any conditions laid down by the tendering authority pursuant to clause 3.2.1(12).
- 2.7.4 The price contained in the part B envelope of each alternative tender, shall then be adjusted by applying the amounts derived in clause 2.7.3.

Guidelines 2.7:

Alternative tenders are tenders which offer alternatives to some of the RFT conformance requirements. To assist tenderers it might be appropriate for the RFT to specify which conformance requirements the tendering authority may allow to be varied as a result of an alternative tender, and which requirements are mandatory and may not be varied.

The tendering authority should define the public policy goals that will drive its considerations in making a choice between a conforming and an alternative tender. Such public policy goals should be adopted as a result of a consultative process with local authorities and operators, and should be included in the Regional Passenger Transport Plan. They should be consistent with the intent of the TNZ Act. Examples of public policy goals are:

- ***Higher levels of public transport ridership***
- ***Reduced traffic congestion***
- ***Reduced air pollution***

Note that a tendering authority is not obliged to select any alternative tender over the lowest-priced conforming tender (after price adjustment for optional features).

2.8 Tender Rejection and Negotiation

- 2.8.1 A tendering authority may reject all tenders with respect to any RFT if it deems the public interest to be better served by such action.
- 2.8.2 Where only one tenderer submits a conforming tender, the tendering authority may negotiate with that tenderer and may accept a negotiated price not exceeding the tender price. Where more than one tenderer submits a conforming tender, no tender negotiation shall be permitted, unless all the tenderers are related. Tenderers are related if they are organisations which are interconnected or associated or are part of a larger organisation with which they are so interconnected or associated.
- 2.8.3 Notwithstanding clause 2.7.1, where no conforming tender is received the tendering authority shall be permitted to accept the tender that is closest to conforming, providing that the departure from the conformance requirements is not material.

Guidelines 2.8:

Where the tendering authority is not able to negotiate a satisfactory price (either through unsuccessful negotiation or inability to negotiate) it can choose not to award any tenders, provided it deems that the public interest is better served by such action. In such a case, the tendering authority could immediately recommence the tendering process.

In the event of only one tenderer submitting a conforming tender the tendering authority may negotiate with that tenderer and accept a lower price. Where more than one tenderer submits a conforming tender negotiation with any tenderer is specifically prohibited, on the basis of maintenance of the integrity of the tendering procedure.

An organisation is associated with another organisation if that organisation is able, whether directly or indirectly, to exert a [substantial] degree of control over the activities of the other.

The term organisation includes any body corporate, partnership, trust, arrangement for the sharing of profits, union of interest, co-operation, joint venture, reciprocal concession or other similar arrangement.

It will be a question of fact in any case whether an organisation controls another. An organisation may control another organisation by, for example:

- (i) being able to control the votes of any meeting of the members or controlling body; or***
- (ii) having the right to appoint trustees, directors or managers (however they are described) of the organisation whether on its own or jointly with other persons or organisations.***

2.9 Contract Award Publication

- 2.9.1 Tendering authorities shall mail a notice of contract award to all operators that submitted tenders in response to the corresponding RFT as soon as practicable after the successful tenderer has accepted the contract.

- 2.9.2 The notice of contract award shall include a summary of the tender evaluation and recommendation.
- 2.9.3 In the event that a contract is not awarded, notice shall be mailed to all tenderers for the particular RFT within seven days of such determination.

Guidelines 2.9:

The notice of contract award will have a significant impact in encouraging competition; unsuccessful tenderers will be able to judge by how much and/or on what grounds their tender was unsuccessful, and redress that failing in further tender rounds. Potential tenderers will also be able to assess their likely success in subsequent tender rounds. The required notice(s) of contract award should be mailed to all tenderers within seven days of contract acceptance by the successful tenderer(s).

The notice of contract award based on the selection of the lowest-priced (after price adjustment for optional features) conforming tender should include:

- (1) Name of selected tenderer.***
- (2) Selected tender price for the first year.***
- (3) Number of conforming tenders and alternative tenders received.***
- (4) Price range of conforming tenders and alternative tenders for both individual tenders and any group tenders.***
- (5) The total value calculated for any optional features associated with the selected tenderer, if other than the lowest-priced (before price adjustment for optional features) conforming tender.***

In the case of emergency contracts, the tendering authority will need to decide what and how much information is to be made public. Experience has shown that prices for emergency contracts tend to be inflated when the emergency contract is to be followed by a longer term contract, and the emergency contract tender prices are to be made public. This is because if tenderers submitted their best prices for emergency contracts and the winning price was released, other operators could use this information to undercut the emergency contractor for the longer term contract. Therefore, if prices for emergency contracts are to be made public, tenderers may inflate their prices to avoid disclosing their likely tender prices for the longer term contract and being disadvantaged in the longer term contract as a result.

It should be noted that if a tendering authority withholds information on an emergency or longer term contract when this information is requested under the Local Government Official Information and Meetings Act, the Ombudsman's Office may investigate and may require the information to be released.

The notice of a contract award based on the selection of an alternative tender should include, in addition to the information required for conforming tenders:

- (1) A statement of the public benefit that is expected to be obtained from the selected alternative tender compared with the lowest-priced (if available) conforming tender (after price adjustment for optional features) over the life of the contract and the method by which such public benefit has been assessed.***

(2) The estimated difference in price, over the life of the contract, between the selected alternative tender and the lowest-priced (again if available) conforming tender (after prices adjusted for optional features).

The "statement of public benefit that is expected to be obtained" should take the following form:

"The (Tendering Authority) finds that the incremental benefit from the (Alternative Features) in the selected tender is (statement of benefit).

It is projected that this benefit will result in (quantification of benefit) compared to what would have been expected under the lowest priced (after price adjustment for optional features) conforming tender."

An example of such a finding is:

The Tendering Authority finds that the incremental benefit from the doubled frequency of service in the selected tender is higher public transport patronage.

It is projected that this benefit will result in 20 percent higher patronage compared to what would have been expected under the lowest priced (after price adjustment for optional features) conforming tender.

2.10 Contract Conformity with RFT

- 2.10.1 The contract executed must be materially consistent with the provisions of the corresponding RFT, the proposed contract terms contained therein and the operator's tender.
- 2.10.2 Differences in contract duration are deemed to be outside the scope of the RFT. Extensions to period contracts after entering into contracts are not permitted, except in the circumstances defined by clauses 2.10.3, 3.7.2, or 2.4.2(2).
- 2.10.3 In cases where tendering authorities have encountered unexpected difficulties in completing the process or re-tendering prior to expiry of the existing contracts, the contract may be extended on the same terms by the tendering authority for a maximum of three months.
- 2.10.4 Where the tendering authority is considering such an extension, the difficulties encountered and the justification for the extension shall be fully documented and signed by the authorised representative of the tendering authority for that contract. Where the extension is granted, this documentation shall be retained on the contract file for audit purposes.

Guidelines 2.10:

This requires that once a tenderer has submitted a tender, the tendering authority cannot then enter into a contract on materially different terms and conditions from those specified in the RFT, unless the tender process is repeated with a revised RFT.

2.11 Contract Lead Time

- 2.11.1 Tendering authorities shall not allow more than eight months between the issue of a RFT and the start of service.

Guidelines 2.11:

It is important that tendering authorities adopt an appropriate lead time, both to encourage (and not discourage) competition and to allow incoming and outgoing operators time to adjust for their changed level of operation.

Wherever possible, tendering authorities should allow at least four months between contract award and the start of service.

2.12 Contract Provisions

- 2.12.1 Each tendering authority shall develop, maintain records of and follow standard procedures with respect to contracts. These provisions shall form part of the terms of the contract between tendering authority and operator. At a minimum they shall include provisions which:

- (1) Confirm the right of the tendering authority to obtain, and the obligation of the operator to provide passenger count and composition information.
- (2) Prohibit gratuities, collusion and conflict of interest.
- (3) Hold the tendering authority and Transfund New Zealand harmless.
- (4) Permit contract termination by either party to the contract, for reasonable cause by excluding any cause primarily contributed to or within the control of the terminating party.
- (5) Confirm that any optional features offered by the tenderer and included in the tender evaluation, will become a firm requirement of the contract once the tender has been accepted by both parties.
- (6) Document any clarification of conforming requirements as described in Section 2.6.1 (1) and the result of any negotiations if there is only one conforming tenderer.
- (7) Establish procedures for monitoring that services are provided according to the terms of the contract and for ensuring that contract payments are warranted.
- (8) Require the cooperation of the operator with respect to the transfer of the service at the expiration or termination of the contract.
- (9) Specify that with respect to pre-tender meetings, only the written documentation of questions and answers shall be binding on either party.

Guidelines 2.12:

The contract should typically include provisions which:

- (a) Specify the right of the tendering authority to inspect contracted services, without notice to the operator, to ensure consistency with safety and service quality standards.***
- (b) Specify the right for the tendering authority to verify that services are provided according to the terms of the contract to ensure that contract payments are warranted.***
- (c) Require the cooperation of the operator with respect to the transfer of the service at the expiration or termination of the contract.***

With reference to clause (1), it is recommended that tendering authorities should obtain passenger count and composition information from operators for planning and monitoring purposes.

With reference to clause (4) the tendering authority needs to consider whether it should specify operator compensation (eg by liquidated damages) in the case of contract termination, and should differentiate the circumstances in which compensation would or would not be paid. If the tendering authority chooses not to specify operator compensation in the tender document, the operator is likely to determine the extent of the risk and build compensation into the price. Some operators may even be deterred from tendering because of a high perceived risk.

Tendering authorities may enhance competition by including a provision for payment of compensation upon contract termination and may get lower overall prices by taking on this risk.

The tendering authority also needs to specify the grounds on which contracts may be terminated. It should at a minimum permit contract termination by:

- (a) The tendering authority or contractor, in the case of force majeure or other cause reasonably beyond the control of the party wishing to terminate and which goes to the essence of the contract.***
- (b) The tendering authority, if a service fails to meet pre-defined patronage levels, which must be consistently applied within service categories and specified in the contract.***
- (c) The tendering authority, for lack or withdrawal of funding, subject to equitable and consistent treatment of contractors.***
- (d) The contractor, where the tendering authority has required fares lower than those specified in the contract on a net cost contract.***

CHAPTER 3

REQUEST FOR TENDER REQUIREMENTS

Overview

Introduction

This chapter describes how regional councils and territorial authorities with delegated responsibility for administering financially assisted public passenger transport services shall manage the contract requirements specified in each Request for Tender (RFT).

In this chapter

This chapter contains **12 pages** and covers the following sections:

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3.1	General Requirement	3-2
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CHAPTER 3: REQUEST FOR TENDER REQUIREMENTS

3.1 General Requirement

3.1.1 All requests for tenders (RFTs) shall be consistent with the requirements set out in this chapter.

3.2 Request for Tender Contents

3.2.1 Each RFT shall at a minimum:

- (1) Specify any conformance requirements which a tender must satisfy in order to be conforming tender.
- (2) Specify each optional feature that will be considered in tender evaluation.
- (3) Describe the basis of tender evaluation.
- (4) State the date, time and location of any pre-tender meeting.
- (5) State contract terms and conditions.
- (6) Specify 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
- (7) Specify a method for adjusting the contract price in the event of service level variations (Section 3.9)
- (8) Specify the grounds for contract termination by each party.
- (9) Include a proposal “shell” to assist in submission of tenders.
- (10) Specify the contract commencement date and the contract expiry date.
- (11) Specify the tendering authority’s policy on late tenders.
- (12) Specify the tendering authority’s policy on acceptance of tenders from operators whose performance in the past has not been satisfactory.

3.2.2 The following shall be included in the conformance requirements:

- (1) minimum qualifications required to operate the service
- (2) minimum safety and insurance requirements
- (3) a service specification, which defines the proposed service

- (4) any other minimum operator or vehicle requirements

3.2.3 The description of the basis of tender evaluation shall:

- (1) be consistent with the requirements of Section 2.6 of this Manual
- (2) specify the value (dollar figure or percentage of tender price) to be applied to quantify the worth of each optional feature
- (3) explain how any alternative tenders will be evaluated and compared with conforming tenders

Guidelines 3.2:

Clause 3.2.1 broadly describes the minimum RFT contents, with more detailed requirements being listed in Clauses 3.2.2 and 3.2.3.

Each RFT should also include a proposed schedule for the tendering process, including date of contract award.

It is recommended that prior to an RFT being released, the tendering authority liaise with the incumbent operator and any other interested operators in order to make improvements to the services.

Tendering authorities may wish to specify two types of conformance requirements; those which are mandatory and cannot be varied under any circumstances and those which may be varied in an alternative tender. Conformance requirements can pertain both to the operator (e.g. safety and insurance requirements) and to the service itself (e.g. route and timetable).

A conforming tender is a tender which is submitted as a conforming tender and which satisfies all the conformance requirements. An alternative tender is a tender which is submitted, as an alternative tender and which does not satisfy all of the conformance requirements.

To allow as much time as possible to verify compliance with conformance requirements, tendering authorities may require an earlier closing date for the part A envelope, or a portion of the part A envelope. (See also guidelines on Submittal of Tenders in Section 2.5).

The optional features are only optional to the extent that a tenderer may or may not offer those features. Any optional features offered in a tender must be provided if a contract is entered into to provide the services included in that tender, except subject to service level variations as specified in section 3.8.

The proposal 'shell' should include a numbered listing of all questions and aspects to be described in the tender and a form for submitting contract price proposals. This 'shell' will need to allow the tenderer to specify whether the tender is intended to be a conforming or alternative tender. The form for submitting contract price proposals should allow the tenderer to specify a base contract price for the first year (or for the contract period in the case of contracts with a duration of less than one year), and to submit variable costs to be applied in the event of service level variations in accordance with clause 3.9.2 and 3.9.3.

A tendering authority may wish to make available to potential tenderers sufficient patronage data, from the tendering authority's surveys, upon which to base a revenue estimate for their tender, on the grounds of maintenance of contestability in the market.

Tendering authorities should have an established policy on what constitutes a late tender and how such tenders are to be treated. For example a tendering authority might deem a tender to be late if it is not placed in a tenders box by the closing date. Alternatively a tendering authority may be slightly more flexible and only deem it to be late if it was still within the tenderer's control at closing time. The latter interpretation would allow a tender to be accepted that had been collected by a courier well before closing time, but then delayed due to unavoidable causes so that it could not be delivered until after closing time.

In deciding their policy, tendering authorities should be mindful of the fact that competing tenderers might disclose the terms of their tender to another tenderer immediately after the tenders have closed. Consequently late tenders should only be accepted in exceptional circumstances. If a late tender is accepted this should be clearly indicated in the tender evaluation details recorded on the contract file.

The service specification required in Section 3.2.2 (3) should include general route, approximate termini, minimum frequencies and minimum passenger capacities by time of day, revenue type and maximum fares to be charged. There are three principal contract revenue types, gross, net and composite, as defined in section 1.8.

Tenderers need to know the value that the tendering authority will put on optional features when it evaluates tenders. When they know the value to be placed on optional features, tenderers can optimise their tenders to offer the tendering authority the best combination of quality and price. Tenderers are likely to be less concerned with whether the value is too high or too low; they are likely to be primarily concerned with the certainty of a value. This value may be specified in dollar or percentage terms.

The evaluation of alternative tenders is more complex and subjective than the evaluation of conforming tenders, and therefore the scope for alternative tenders should be minimised. To minimise the scope, for such tenders, tendering authorities should specify a value for every optional feature that they anticipate being prepared to pay extra for.

3.3 Other RFT Requirements

- 3.3.1 Tenderers shall be permitted to submit alternative tenders specifying services that serve functions similar to those in the service specification, except that only alternative tenders of the same contract revenue type as specified in the RFT shall be permitted.
- 3.3.2 Any tendering authority inviting composite contracts shall specify in the RFT the initial gross contract period and the method to be applied when converting from gross contract to net contract.

3.3.3 No tendering authority shall, with respect to any RFT or contract:

- (1) include any specifications that have the effect of unreasonably limiting competition or which favour one operator or category of operator over another, except as provided in this CPP.
- (2) Specify any arrangement with respect to labour rates, labour practices or other labour arrangements.

3.3.4 Performance bonds if any, shall not be required for an amount that will unreasonably deter any competent operator who would otherwise wish to compete. The performance bond shall reflect the cost of retendering to the tendering authority.

Guidelines 3.3:

Tendering authorities are able to include specifications regarding vehicle quality matters. Tendering authorities should not specify excessively high quality standards or require expensive vehicle features as mandatory requirements, unless required by law. Such practices would unreasonably limit competition. Inexpensive features may be made mandatory, as may the requirement for a minimum acceptable quality level. For example, specifying that all vehicles must be fitted with heaters is unlikely to unreasonably limit competition; specifying that all vehicles must be of a particular size, type or model may well unreasonably limit competition.

Other features and higher quality standards should be treated as optional evaluation factors, and assigned appropriate values as provided for in 3.2.3(2). These values need not be consistent nationally and it is inappropriate for Transfund New Zealand to specify them. Some communities will place higher values on certain features than others and tendering authorities have flexibility to allow for this. Values can be refined upwards later if the public demands higher quality services, or downwards if they are not prepared to pay, through rates, for higher quality.

The level of any performance bond (clause 3.3.4 of the mandatory) should only reflect the direct costs to tendering authorities that are associated with re-tendering and should not be at a level which would deter potential competitors. It is envisaged that such costs could include staff time, the costs and fees associated with the reconvening of Council to award the contract to a new tenderer, public notification and any costs of emergency services but they may not include an assessment to reflect the inconvenience and disruption to public transport users.

Tender bonds, where the tenderer loses the bond if it chooses not to enter into a contract offered by the tendering authority, should not be used. In instances where an operator feels compelled to tender for more services than could be operated if all tenders were successful, (such as a small scale operator tendering for a number of small scale RFTs in anticipation of winning sufficient to maintain the pre-existing level of operation), tender bonds are likely to discourage competition and/or increase tender prices.

3.4 Tender Size

- 3.4.1 As a general requirement, no single RFT shall exceed 1000 seats in service at any one time. This does not apply to ferry services.
- 3.4.2 An RFT may exceed the limit in clause 3.4.1 if necessary to provide the entire service required on routes or groups of routes which are logically a single entity. If this provision is used, tendering authorities shall be able to demonstrate that a range of differing sized contracts are available for potential operators of all sizes.

Guidelines 3.4:

This section specifies the maximum size of any single RFT.

On the basis of standard 45 seat buses being used, the maximum size of any single RFT is around 22 vehicles in service at any one time.

Clause 3.4.2 allows provision for larger contract sizes on routes or groups of routes which are logically a single entity while still ensuring that a range of tender sizes is available. The determination of whether a route or group of routes is logically a single entity should take into account such factors as route configuration, system integration, passenger demand and operational efficiency. A route or group of routes may include deviations and bifurcations so long as the majority of the route is common.

Application can be made to Transfund for a specific contract approval of an increased tender size if special circumstances exist.

3.5 Combined Tenders

- 3.5.1 Any tendering authority which invites combined tenders shall require tenderers to also tender separately for each single RFT.
- 3.5.2 Any tendering authority which invites combined tenders shall include in the relevant RFTs:
- (1) Any single conditions covering combined tenders or separate tenders for the single RFTs.
 - (2) The method to be used in evaluating combined tenders.

3.5 Combined Tenders

A combined tender is a tender submitted in response to a combined RFT. A combined RFT is a request for tenders for a single route, that includes more than one single RFT.

The characteristic of combined tenders that distinguishes them from group tenders is that they are requested by the tendering authority because of benefits to users and the tendering authority from having a co-ordinated service on a route.

Note that the definitions (Section 1.8) make it clear that tendering authorities may only issue combined RFTs for single routes.

A route may include deviations and bifurcations so long as a substantial portion (the majority) of the route is common.

The tendering authority may include conditions in the single RFTs specifying requirements for operator co-ordination on matters such as timetables and provision of common ticketing for all services covered by the combined RFT. This will enable the tendering authority to ensure a convenient service for the users whether the route is serviced by one or more operators.

The single RFTs covered by a combined RFT should have a common expiry date. If a combined tender is successful, then for convenience, the tendering authority may enter into a single contract for the total service covered by the combined tender, rather than separate contracts in respect of each RFT (as recommended for group tenders).

3.6 Group Tenders

- 3.6.1 Any tendering authority which permits group tenders shall require tenderers to also tender separately for each single RFT.
- 3.6.2 Any tendering authority which permits group tenders shall include in the relevant RFTs:
- (1) any special conditions covering group tenders; and
 - (2) the method to be used in evaluating group tenders.
- 3.6.3 Any tendering authority shall be permitted to specify that all RFTs, or any particular RFT, can not be included in a group tender.
- 3.6.4 Group tenders shall not be considered where they include any single RFT which is larger than the tender size prescribed in clause 3.4.1.

Guidelines 3.6:

A group tender is a tender that includes more than one single RFT, and which is submitted on the initiative of the tenderer.

Tendering authorities are given considerable control over group tenders, from the two extremes of not permitting them, to permitting them without restriction. Tendering authorities need to ensure that any group tendering procedures do not discourage competition. In this regard tendering authorities should be aware of the Court of Appeal Judgement (Ritchies Transport Holdings v Otago Regional Council). Otago Regional Council had permitted group tenders, and after evaluation awarded contracts pursuant to those group tenders. In respect of this issue the Court determined that:

"Combining tenders in large contracts would have the effect of excluding small operators from competing. It is apparent that the encouragement of competition from smaller operators has been deliberately preferred to the provision of services at lower overall costs by taking advantage of any available economies of scale.

It was submitted to us that since operators of all sizes were able to tender for individual routes the acceptance of combined tenders should not be seen as excluding competition thereafter. That may be true in the short term but we are not satisfied that in the longer term such a practice would not prejudice the enhancement of competition. To tender for the provision of passenger transport services requires capital resources which if not used will not be retained. The combining of contracts to the advantage of the big operators eventually would drive out the potential competition from smaller operators, and when that disappears so too will the incentive for the big operators to operate efficiently."

Tendering authorities will be audited against their compliance with section 25 (2) of the Land Transport Management Act 2003 and hence must be cautious in accepting a group tender which is unreasonably large such that it would stifle competition.

Any tendering authority is able to impose special conditions in respect of group tenders. For example, such conditions could specify:

- The maximum number of RFTs to be included in any group tender.*
- The maximum size of a group tender possibly expressed as a ratio of the maximum size of any single RFT as specified in section 3.4.*
- The maximum number of times that any tenderer can include a single RFT in a number of group tenders, and/or whether a tenderer also needs to submit prices on every possible combination and permutation of individual RFTs contained within each group tender.*
- The maximum number of group tenders permitted by any tenderer.*
- The maximum dollar value (percentage or difference) by which any individual tender for a service, where that service is included as part of a group tender, can exceed the otherwise preferred individual tender, for that group tender to be accepted.*
- That each 'preferred' tenderer for geographically adjacent RFTs be required to demonstrate to the tendering authority's satisfaction, a common ticketing system, integrated vehicle scheduling, etc, prior to being formally offered the contract by the tendering authority.*

Tendering authorities, if permitting group tenders, should enter into separate contracts in respect of each RFT covered by the group tender. This will avoid complications which would otherwise arise due to varying contract expiry dates.

Tendering authorities are not permitted to amend varying contract expiry dates when accepting a group tender. Group tenders must be submitted on the understanding that the individual contracts making up the group will expire on the dates specified in the individual RFTs.

Evaluation of large group tenders can be extremely complex; one tenderer submitting a total of three tenders for each of five RFTs and also submitting a group tender for every possible combination, results in over 1,000 different tender combinations. The complexity is of course further compounded where there is more than 1 tenderer!

Any tendering authority which is considering permitting group tenders obviously needs to carefully address and resolve these issues prior to permitting group tenders.

Large contracts exceeding 1000 seats in service at any one time are not permitted for inclusion in any group tenders.

3.7 Contract Duration

- 3.7.1 The maximum length of any fixed term contract shall be five years, except as provided for in clause 2.10.3.
- 3.7.2 Fixed term contracts can be extended by up to 2 years, up to a maximum of seven years, by mutual agreement between the operator and the tendering authority but only to bring together contract expiry dates on services where it is planned to significantly change the service structure or to allow regional councils to respond to Transfund's patronage funding policies or where changes have been made to service quality or frequency in the last two years of the contract.
- 3.7.3 The maximum total duration allowable for a contract containing a built-in rollover provision shall be 8 years, with a first review before the end of year 4. The continuation of the contract will be subject to achievement of predetermined performance measures and the negotiation of a mutually acceptable price taking into account any variations and adjustments for inflation and any significant changes in patronage experienced during the initial period.

Guidelines 3.7:

Contract durations can not be altered after the issue of the RFT with the exception of the contract extensions allowed in clauses 2.10.3, 2.4.2(2), and 3.7.2 even though that might seem desirable in order to synchronise expiry dates of individual RFTs in a group tender.

It is considered that there are significant benefits to be gained from staggering contract expiry dates in the larger passenger transport centres so that an approximately equal number of contracts come up for retender each year. There is no requirement to stagger contracts within a year.

In small tendering authority areas with few contracted services tender rounds each year will probably not be beneficial on competitive grounds and it is allowable for all tenders to expire on the same date.

The contract extension provision of up to two years is only allowed for the integration of routes changes resulting from the service planning process or where changes to service quality or frequency have happened within the last 2 years of the contract. This reflects the fact that often there is an overlap in routes between areas with different contract expiry dates, and it is desirable to change route structure at the same point in time.

3.8 Service Level Variations

- 3.8.1 Tendering authorities shall give reasonable notice of any service level variation to the operator and shall only vary the amount of service provided under a contract within plus or minus 50 percent as measured by the gross contract amount at the start of the contract adjusted for price inflation.
- 3.8.2 Notwithstanding clause 3.8.1, where service variations are for contracts rolled over under clause 3.7.3 then the maximum variation permitted shall be 50 percent prior to the rollover and 50 percent for the balance of the contract as measured by the gross contract amount at the start of the contract adjusted for price inflation.
- 3.8.3 For small contracts of five or fewer buses, a maximum variation of two additional buses is permitted.
- 3.8.4 The method for adjusting the contract price in the event of service level variations shall be specified in the RFT.
- 3.8.5 Tendering authorities shall keep full records of service level variations, including operator and service involved, description of service change and change in contract amount for Transfund New Zealand audit.

Guidelines 3.8:

Generally, the method for determining the gross contract cost adjustment will require multiplying the changed resources required to operate the revised service by the variable prices (gross) submitted by the tenderer.

However, in the case of net cost and composite contracts an assessment of the revenue implication will also be necessary in order to determine the revenue increase/decrease and hence the revised net contract payment.

3.9 Contract Price Adjustments

- 3.9.1 There shall be no revision of contract price except as expressly authorised in this CPP.
- 3.9.2 The change in gross cost, for both gross cost and net cost contracts, shall be calculated by multiplying the change in resources required to provide the varied service by the variable cost rates. The variable cost rates shall be those provided in the contract proposal that was the basis of contract award (with appropriate allowance for a subsequent adjustments for inflation).

3.9.3 In the case of net contracts, any change in contract price following a service level variation shall be adjusted for assessed revenue effects.

3.9.4 Contracts of more than 12 months duration shall make provision for price adjustment. At a minimum, such inflation adjustments shall be done annually.

The maximum frequency of adjustment permitted shall be quarterly. Any such price adjustment shall not be greater than the movement in Transfund New Zealand's public passenger transport index.

3.9.5 Tendering authorities using net contracts shall adopt standard procedures for calculating revised contract amounts to account for changes in fares from the first year.

(1) Revisions according to such procedures shall be calculated in addition to the quarterly price adjustment in clause 3.9.5.

(2) Operators shall be permitted to cancel net contracts with 3 months of any change in fares, with at least 90 days' notice.

3.9.6 The provisions to be made for price adjustment throughout the term of the contract shall be specified in the RFT and incorporated into the contract.

3.9.7 The price of a contract that has been extended under clause 2.10.3, 2.4.2(2) or 3.7.2 of this manual shall be adjusted no more than an adjustment on a pro-rata basis, after allowance for inflation adjustments and contract price adjustments following service level charges.

Guidelines 3.9:

A fundamental precept of this CPP is that wherever possible there should be no negotiation of contract price after contract award. Without this requirement, a less than scrupulous tenderer could win a contract at an initially low price, then by negotiation seek to have the price increased. If this occurred the revised negotiated price could exceed that of another tenderer who may initially have 'lost' the contract on price grounds alone.

However, within this requirement, tendering authorities are given some limited flexibility, as noted in clauses 3.9.2 and 3.9.3. The revenue adjustment should be based on the best assessment of the revenue change; one possibility for assessing this change is an initial assessment that is subsequently adjusted based on before and after service level change revenues.

For any contract with a duration of over twelve months, tendering authorities are required to make adjustments to contract prices for cost fluctuations. Contract price adjustment shall be done at least annually and not more frequently than quarterly.

There are two options available to tendering authorities when considering how contract prices should be adjusted to allow for cost fluctuations.

1. To adopt individual indexation for all contracts, based on the exact cost structure of the operator on each contract.

This would require different indexation calculations for each contract and is likely to be administratively complex.

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There are two options available to tendering authorities when considering how contract prices should be adjusted to allow for cost fluctuations.

1. To adopt individual indexation for all contracts, based on the exact cost structure of the operator on each contract.

This would require different indexation calculations for each contract and is likely to be administratively complex.

2. To adopt a standard indexation formula.

Transfund New Zealand has developed a standard indexation formula using a combination of indexes already produced by the Statistics Department.

Tendering authorities who do not adopt the standard index are required to comply with clause 3.9.4 of the manual which states that no price adjustment shall be greater than the movement in the standard indexation formula supplied by Transfund New Zealand.

In the case of net contracts, the tendering authority needs to state in the RFT the basis on which fares are to be fixed throughout the duration of the contract, and the tenderer needs to respond with the basis of his/her revenue estimates for each year. The fare basis could be stated in absolute terms, or in relation to an inflation index (eg CPI). However, a method which could retain more flexibility is for the tendering authority not to make such a specification, but to request the tenderer to specify his assumption on the proportionate change in base revenue in relation to the proportionate change in average fare imposed. For example, the tenderer could specify that its assumption is that revenue would increase at half the rate of average fare: if fares are increased 10% then revenue is assumed to increase 5% for contract purposes.

CHAPTER 4

CONCESSIONARY FARE SCHEME COMPETITIVE PRICING PROCEDURE

Overview

Introduction

This chapter describes how concessionary fare schemes will be managed if they are used to assist with the provision of public passenger transport services.

In this chapter

This chapter contains **6 pages**.

CHAPTER 4 CONCESSIONARY FARE SCHEME COMPETITIVE PRICING PROCEDURE

Guidelines Chapter 4:

General Comments

In the case of concessionary fare payments, tendering is sometimes not practical. For instance, where the tendering authority wishes to offer fare subsidies for certain groups of people when they use commercial services, tendering is of limited use. That tendering authority is likely to want the concessions to be available on vehicles of all operators on any particular route.

The concept of a meeting to negotiate details of Concessionary Fare Schemes (CFSs) for each region was devised to provide the maximum possible flexibility to tendering authorities, but still ensure an efficient, competitive outcome as required by the Act. This result will be achieved due to the "constructive tension" between the different participants. Users will seek to maximise the funds available for concession fares and the amount of individual concessions. Operators will seek a system which imposes the minimum possible administrative costs. Finally tendering authorities will wish to contain the overall costs of concessionary fare schemes, and maximise the benefits for a given cost.

A formal committee is not needed to achieve this result. The important features are that there be a meeting, or meetings, and that users, operators, and the tendering authority be equally represented. It is the negotiation that takes place in this situation of "constructive tension" that constitutes the competitive pricing procedure (CPP), and which is expected to achieve the desired efficient outcome.

Under this system, if a tendering authority wishes to change a detail of the scheme it simply needs to convene a further CFS meeting to agree the detail changes.

An alternative to the meeting available to regional councils is that the constructive tension implicit in deriving the Regional Passenger Transport Plan is utilised to formulate the CFS. If this process is to be used by a regional council then the same groups (users, operators and the regional councils) must be involved in negotiations surrounding any decisions on the CFS.

- 4.1 This chapter specifies the CPP for payments in relation to concessionary fare schemes. Concessionary fares are any fares that are less than fares paid by non-eligible groups. Fares paid by users of a service provided specifically for people with disabilities are also deemed to be concessionary fares if they are subsidised.

Guidelines 4.1:

This clause is an introduction, and defines concessionary fares.

4.2 Any concessionary fare scheme shall have regard to the requirement of section 26 (3) of the Act.

Guidelines 4.2:

It is expected that the outcome of the "constructive tension" will automatically satisfy this requirement due to the nature of the representation involved in the formulation of the CFS.

4.3 The tendering authority shall specify the groups of passengers eligible for concessionary fares as it deems appropriate. Eligible groups of passengers should be those who have particular characteristics which warrant special consideration such as, for example, age, disability or beneficiary status.

Guidelines 4.3:

Since the tendering authority is providing the funds it should decide who benefits.

4.4 For all payments made, details of concessionary fare schemes shall be agreed through the constructive tension of negotiation either at a meeting, or meetings of representatives of the tendering authority and the users and operators of the scheme, or through constructive tension that is derived in the preparation of the Regional Passenger Transport Plan.

Guidelines 4.4:

Concessionary fare schemes must be agreed by a CFS meeting or through the formulation of the Regional Passenger Transport Plan. It is the negotiation between the different interest groups at this meeting that constitutes the CPP.

4.5 The constructive tension referred to in 4.4 shall be obtained between:

- (1) Representatives of the three groups (the tendering authority, the users and the operators). In the case of the CFS being determined by a CFS meeting, roughly the same number of representatives from each group shall attend the meeting. At least one representative of each of the three groups shall be present at any meeting.
- (2) User representatives shall be appointed by local organisations in the region or area covered by the proposed concessionary fare who the tendering authority considers best represent the interests of the eligible groups of passengers specified pursuant to clause 4.3.
- (3) Operator representatives shall be appointed by the operators.
- (4) The tendering authority shall select and appoint the chairperson for any CFS meeting.

Guidelines 4.5:

Representation in any CFS meeting may be as little as one person from each of the tendering authority, the users and the operator when detail changes are being agreed. For decisions on major aspects of the CFS it would be more appropriate to have three or four representatives from each of the three sides.

Ideally each side should be represented by the same number of people. The word "approximately" has been included so that the meeting does not need to be cancelled or postponed if one of the nominated participants finds at the last minute that they are unable to attend.

Although the tendering authority chooses the chairperson, this need not be one of the tendering authority's representatives.

The essential ingredient of the formulation of any concessionary fares scheme is the constructive tension between the relevant parties in either the CFS meeting or the derivation of the Regional Passenger Transport Plan.

- 4.6 Concessionary fare scheme details to be agreed through the procedure adopted under clause 4.4 shall include the mechanisms for delivering fares to eligible groups, and the amount of fare concession applicable to each eligible group on each route or service.

Guidelines 4.6:

The concession fare mechanisms and amounts are the components of the CFS that are critical in achieving the efficiency objectives of the CPP. In general, a CFS should reflect the following principles:

- ***concessionary fares should be available to all operators;***
- ***concessionary fares should be available over all services;***
- ***concessionary fares should involve reimbursement up to the full adult fare; and***
- ***the cost of the scheme must be transparent and auditable.***

- 4.7 In the case of a service provided specifically for the people with disabilities:
- (1) Payments to the operator, including payments by the tendering authority from any source whatsoever and any fares paid by users, shall not exceed the level of average taxi fares being charged in the area covered by that service.
 - (2) Total Mobility vouchers shall not be used.

Guidelines 4.7:

This provision applies for services which only carry people with disabilities, such as the Mobility (Palmerston North) Incorporated service in Palmerston North. In such cases there is no competitively determined fare upon which to base the subsidy percentage as there is with the Total Mobility service. Therefore in order to ensure that such services are provided for an efficient price, it is necessary to apply a ceiling on payments in relation to such services that is tied to fare levels in competitive markets that provide similar services. In cases where the services utilise voluntary input, the sum of the fare paid and subsidy received should be less than the average taxi fare.

Determining the level of the average taxi fare in each area is the responsibility of regional councils. If there are no taxi operations in the area concerned, a judgement by regional councils will need to be made.

To enable financial assistance payments for such services to be audited, it will be necessary for the tendering authority to obtain information on distances travelled in providing such services.

- 4.8 The number of vehicles equipped with wheelchair hoists in a region that are eligible for payments under this CPP shall be determined following consultation with appropriate representatives of people with disabilities and Transfund New Zealand. Operators receiving payments for purchase and installation of hoists shall be required to enter into contracts that commit them to being on call during reasonable hours. Reasonable hours shall be determined in consultation with appropriate representatives of people with disabilities.

Guidelines 4.8:

The matter of wheelchair hoists, along with concession fares for people with disabilities should still be considered at the CFS meeting but specific additional consultation is required with the representatives of people with disabilities on the provision of hoists.

In most situations the Disabled Persons Assembly will be the appropriate representatives of people with disabilities.

The definition of reasonable hours will vary by region but is likely to be from approximately 7.00 am till 11.00 pm in larger centres.

Duration of contracts should be for the expected service life of the hoist. This is commonly 5-7 years.

- 4.9 Any concessionary fare scheme and any subsequent changes shall be approved by the tendering authority prior to implementation.

Guidelines 4.9:

Any concessionary fare scheme must finally be approved by the tendering authority as it alone is accountable for funds spent on concessionary fares.

The tendering authority is not able to change the proposed scheme. It can approve it, or decline it stating what aspects it considers unsatisfactory. When a tendering authority declines a concessionary fare scheme, the process for producing a CFS must be recommenced to agree on modifications to make it acceptable to the tendering authority.

- 4.10 Any concessionary fare scheme shall be documented and made available for inspection on request by the public.

Guidelines 4.10:

The CFS may be documented in the Regional Passenger Transport Plan if this is convenient.

- 4.11 Participation in concessionary fare schemes shall not be mandatory for commercial operators.

Guidelines 4.11:

Operators of commercial services should be free to choose whether they want to become involved in the possible administrative overheads of participating in a CFS.

APPENDIX A COMPLIANCE WITH THE COMMERCE ACT

This Appendix has been written by the Commerce Commission for the purpose of supplying information to the passenger transport industry on compliance with the Commerce Act. It is a guide only and in cases of doubt parties should refer to their professional advisers.

A.1 Introduction

The purpose of the Commerce Act is to promote competition, in markets within New Zealand, and to ensure that as government regulations are removed, participants in the marketplace do not impose new restraints on competition.

The Commerce Commission investigates alleged breaches of the Act, and where appropriate seeks Court action. Penalties of up to \$500,000 (for individuals), and \$5,000,000 (for companies), may be imposed by the Court where breaches of the Commerce Act occur.

A.2 Restrictive Trade Practices

Although the prohibitions set out in the Act are both comprehensive and complex, the golden rule to be observed is:

A company cannot combine with competitors to raise or fix prices, to exclude or restrict competition in a market, and secondly, a person in a dominant position cannot use that position to deter, restrict or eliminate competition.

Practices which may breach the Act include:

- (1) ENTERING INTO CONTRACTS, ARRANGEMENTS OR UNDERSTANDINGS THAT HAVE THE PURPOSE OF EFFECT OF SUBSTANTIALLY LESSENING COMPETITION (SECTION 27).

Practices that may be subject to scrutiny under this section include:

- (a) *Output arrangements between competitors, including arrangements to promote, or advertise, terms or conditions of sale, product quality, servicing, hours of business and the like*

Any formal, or informal arrangement between competitors is likely to breach the Act, for example, servicing arrangements of equipment/vehicles, between persons in competition would be considered under this section.

- (b) *Territory allocation agreements between competitors*

Any formal, or informal arrangements between competitors regarding, for example, timetables or areas of operation (ie two bus companies cannot decide between themselves, where they will each operate).

- (c) *Price fixing between competitors (including collusive tendering)*

Persons in competition with each other may NOT come to any formal or informal arrangements to set a uniform price for a product or service, nor must they arrange between themselves to submit a common tender price for a contract.

To avoid actions being construed as price fixing arrangement the following should be avoided:

- Meeting with competitors and discussing prices. "Secret" meetings are never quite as secret as one might suppose. If competitors indicate plans concerning competition, avoid agreeing with them, or doing what is indicated. In fact, it is probably better to excuse yourself and leave the room;
- Sending your price lists to a competitor;
- Co-operative schemes with a competitor (unless the exemptions to the Act have been checked out very thoroughly);
- Discussing the activities of a competitor (eg its price cutting) with other competitors;
- Deliberately following the prices of another competitor, unless good commercial reasons exist for so doing.

(2) **RESALE PRICE MAINTENANCE, WHEREBY SUPPLIERS, ASSOCIATIONS OR OTHER THIRD PARTIES SPECIFY AND ENFORCE RESALE PRICES.**

Resale price maintenance or (RPM) is prohibited by sections 37 and 38 of the Act. RPM is a practice that operates between one level of the market and another eg manufacturer to retailer. The basic thrust of RPM is to prevent a reseller discounting.

The legislation prohibits various conduct which is aimed at thwarting sales by a supplied party below the supplier's "specified price".

The specified price is critical to RPM. Without a specified price there is no RPM. This means that you should consider the desirability of abolishing "recommended price" lists. "Recommended" prices can easily become "specified" prices.

(3) **THE ACT ALSO PROHIBITS A PERSON OR ORGANISATION WHICH HAS A DOMINANT POSITION IN A MARKET FROM USING THAT POSITION FOR ANTI-COMPETITIVE PURPOSES, SUCH AS RESTRICTING ENTRY INTO A MARKET, PREVENTING OR DETERRING COMPETITIVE CONDUCT, OR ELIMINATING PERSONS FROM A MARKET.**

A dominant position in a market is defined as one in which a company is in a position to exercise a dominant influence over production, acquisition, supply or price in a market. In assessing whether a company is in a dominant position the Commission considers:

- (a) market share, technical knowledge and access to materials or capital of the company;
- (b) the extent of any constraint on a company's actions from competitors or potential competitors; and
- (c) the extent to which a company is constrained by the conduct of its customers or suppliers.

A full market analysis is required to establish the existence of market power. All persons in a market will have some degree of influence upon it.

Some actions that may breach the Act, in terms of abuse of a dominant position include:

- (a) predatory pricing, whereby the company or person in the "dominant" position exploits that position by cutting the price of goods or services in the short term, thereby foregoing profits for the specific purpose of deterring competitive conduct by inflicting losses on or preventing entry to the market by rivals.
- (b) refusal to deal, whereby a person in a dominant position refuses to deal, or more specifically refuses to supply another person.
- (c) foreclosure of supply or outlets by buying up supplies in excess of need, to deprive competitors of essential materials.

For a breach of the Act to be proven, it is necessary to show that the action was taken for a specific purpose.

The purpose may be to:

- (i) put a competitor out of business.
- (ii) discipline fringe companies, who may be a threat,
- (iii) warn off any possible new entrants.

Some contracts, arrangements or understandings may be authorised by the Commerce Commission before they are entered into or are given effect to. If the Commission is satisfied that the particular practice would have public benefit which would outweigh any detriments from the resulting lessening of competition, the practice may be authorised. Practices within this category are:

- Contracts, arrangements or understandings which substantially lessen competition if public benefit can be shown.
- Exclusionary provisions, which are arrangements between competitors which prevent or restrict trade with another person or persons.
- Price fixing, this is deemed to substantially lessen competition unless in the nature of a joint venture, a joint buying and promotion arrangement or price recommendations to group of more than 50 persons.

Practices which may not be authorised are:

- Use of a dominant position in a market to restrict entry, prevent competitive conduct or eliminate others.

For authorisation to be granted, applicants must apply to the Commission. The investigation of an application for authorisation involves several steps, including a market analysis, to establish whether substantial lessening of competition is outweighed by public benefit.

More information on the Commerce Act may be obtained from:

Commerce Commission
Telephone (04) 471 0180
Fax (04) 471 0771

or

P O Box 2351
Wellington

APPENDIX B COST INDICES

B.1 Contract price adjustment

Contracts awarded under Transfund New Zealand's competitive pricing procedures may specify that amounts payable under the contract will be adjusted in line with an index calculated by Transfund or by some other means stated in the contract documents.

B.2 Derivation of cost indices

The Transfund indexation formula uses indices published by Statistics New Zealand. These indices are combined, using appropriate weights, to produce cost adjustment factors.

The relevant Statistics New Zealand indices used to calculate cost adjustment factors for public passenger transport are:

- Labour Index
- Producer Price Index (Transport and Storage, Road Transport)
- All Farming Inputs Price Index (Fuel and Oil).

B.3 Use of cost adjustment factors

Table 1 presents cost adjustment factors, which are used to adjust the amounts payable under the contract in line with inflation.

Where a contract specifies that cost fluctuation adjustments will be paid, based on the Transfund indexation formula, the factors in Table 1 can be used to calculate the adjustment. Amounts payable are multiplied by the cost adjustment factor applicable to the quarter in which tenders closed and the quarter for which the amount payable is being adjusted. When selecting a factor from Table 1 be sure to use the correct line in the table corresponding to when tenders closed.

Table 2 shows the Statistics New Zealand indices used in the Transfund indexation formula.

B.4 Publication of cost adjustment factors and indices

Tables 1 and 2 are updated quarterly. Updated tables are published on the Transfund New Zealand web site (www.transfund.govt.nz) and can be downloaded and printed.

B.5 Weights applied to indices

The weights applied to the Statistics New Zealand indices (Table 2) in the Transfund indexation formula to calculate the cost adjustment factors, presented in Table 1, are given below.

<i>INDEX</i>	Transport & Storage (PPIQ.SNI)	Road Transport (PPIQ.SNI01)	Fuel & Oil (FPIQ.SI9J)	Labour Index (LCIQ.SE53Z9)
WEIGHT	0.15	0.30	0.10	0.45

TABLE 1 – Cost Adjustment Factors for Public Passenger Transport

Quarter in which tenders closed	Quarter to which contract price is being updated.				
	Mar '01	Jun '01	Sep '01	Dec '01	Mar '02
Jun '91	1.2506	1.2469	1.2513	1.2394	1.2321
Sep '91	1.2506	1.2469	1.2513	1.2394	1.2320
Dec '91	1.2413	1.2376	1.2419	1.2303	1.2231
Mar '92	1.2350	1.2314	1.2357	1.2241	1.2169
Jun '92	1.2344	1.2308	1.2351	1.2235	1.2163
Sep '92	1.2251	1.2215	1.2258	1.2144	1.2073
Dec '92	1.2185	1.2149	1.2192	1.2080	1.2010
Mar '93	1.2170	1.2135	1.2177	1.2064	1.1994
Jun '93	1.2112	1.2078	1.2119	1.2007	1.1937
Sep '93	1.2118	1.2084	1.2125	1.2011	1.1941
Dec '93	1.2189	1.2155	1.2195	1.2079	1.2008
Mar '94	1.2263	1.2230	1.2270	1.2150	1.2078
Jun '94	1.2191	1.2158	1.2198	1.2078	1.2008
Sep '94	1.2110	1.2077	1.2117	1.2000	1.1930
Dec '94	1.2089	1.2056	1.2095	1.1979	1.1909
Mar '95	1.2064	1.2031	1.2071	1.1954	1.1884
Jun '95	1.2092	1.2059	1.2098	1.1981	1.1910
Sep '95	1.2086	1.2054	1.2092	1.1973	1.1902
Dec '95	1.2026	1.1994	1.2032	1.1913	1.1842
Mar '96	1.1961	1.1928	1.1966	1.1849	1.1778
Jun '96	1.1976	1.1943	1.1981	1.1864	1.1793
Sep '96	1.1890	1.1857	1.1895	1.1778	1.1708
Dec '96	1.1777	1.1744	1.1782	1.1667	1.1598
Mar '97	1.1723	1.1690	1.1728	1.1613	1.1544
Jun '97	1.1764	1.1731	1.1769	1.1652	1.1582
Sep '97	1.1700	1.1668	1.1705	1.1588	1.1519
Dec '97	1.1639	1.1607	1.1644	1.1528	1.1459
Mar '98	1.1633	1.1602	1.1638	1.1521	1.1451
Jun '98	1.1702	1.1671	1.1707	1.1586	1.1514
Sep '98	1.1668	1.1636	1.1672	1.1552	1.1481
Dec '98	1.1636	1.1604	1.1640	1.1520	1.1449
Mar '99	1.1650	1.1618	1.1653	1.1532	1.1461
Jun '99	1.1604	1.1573	1.1608	1.1487	1.1416
Sep '99	1.1371	1.1340	1.1375	1.1262	1.1194
Dec '99	1.1086	1.1055	1.1090	1.0984	1.0920
Mar '00	1.0786	1.0757	1.0792	1.0692	1.0632
Jun '00	1.0576	1.0548	1.0583	1.0488	1.0430
Sep '00	1.0310	1.0282	1.0318	1.0231	1.0176
Dec '00	0.9860	0.9835	0.9869	0.9791	0.9743
Mar '01	1.0000	0.9976	1.0010	0.9924	0.9873
Jun '01		1.0000	1.0035	0.9949	0.9897
Sep '01			1.0000	0.9914	0.9862
Dec '01				1.0000	0.9946
Mar '02					1.0000

Please note – the latest values of these adjustment factors can be found on the Transfund New Zealand web site (www.transfund.govt.nz)

TABLE 2 – Statistics New Zealand Indices

	TRANSPORT & STORAGE (PPIQ.SNI)	ROAD TRANSPORT (PPIQ.SNI01)	FUEL & OIL (FPIQ.SI9J)	LABOUR INDEX (LCIQ.SE53Z9)
Jun '91	889	955	941	860.17
Sep '91	889	955	938	860.76
Dec '91	897	965	963	861.36
Mar '92	903	976	956	863.72
Jun '92	906	971	960	865.49
Sep '92	909	980	985	868.45
Dec '92	920	983	1000	870.22
Mar '93	930	981	990	872.59
Jun '93	956	981	980	875.54
Sep '93	958	985	953	877.28
Dec '93	957	974	928	879.03
Mar '94	951	968	892	881.64
Jun '94	973	970	898	883.38
Sep '94	978	971	925	887.73
Dec '94	979	972	927	889.47
Mar '95	980	975	923	892.95
Jun '95	977	965	924	895.56
Sep '95	975	968	904	900.78
Dec '95	981	974	901	906.01
Mar '96	981	976	924	910.36
Jun '96	977	970	926	912.97
Sep '96	981	983	926	918.19
Dec '96	987	993	948	924.28
Mar '97	994	995	949	930.37
Jun '97	990	985	933	935.60
Sep '97	996	994	929	939.95
Dec '97	1000	1000	936	944.30
Mar '98	1002	1008	905	947.78
Jun '98	995	997	877	953.87
Sep '98	1000	996	884	957.35
Dec '98	1008	997	882	960.84
Mar '99	1001	994	878	964.32
Jun '99	1009	998	880	966.93
Sep '99	1034	1010	963	971.28
Dec '99	1075	1042	1033	974.76
Mar '00	1132	1081	1094	978.24
Jun '00	1141	1118	1159	982.59
Sep '00	1184	1144	1297	986.07
Dec '00	1328	1206	1434	990.43
Mar '01	1264	1220	1253	995.65
Jun '01	1237	1209	1272	1000.00
Sep '01	1259	1205	1260	1006.09
Dec '01	1239	1192	1193	1011.31
Mar '02	1212	1182	1173	1016

Please note – the latest values of these Statistics New Zealand indices can be found on the Transfund New Zealand web site (www.transfund.govt.nz)

APPENDIX C GUIDELINES FOR REGIONAL ALTERNATIVE COMPETITIVE PRICING PROCEDURES

The following guidelines should be utilised when tendering authorities are developing regional alternative CPPs. All regional alternative CPPs must be submitted to Transfund for approval. Such approval will be based on economic and legal advice obtained by Transfund in each case.

Evaluation of Supplier Attributes

- 1. Any alternative CPP that is intended to provide some differentiation between tenderers on the basis of supplier attributes such as track record, or strategies for meeting tendering authority goals, must use the quality price trade-off method of tender evaluation. Weighted attribute methods are not appropriate. The quality price trade-off method involves deciding the maximum additional price that the tendering authority is willing to pay for each tender based on that operator's quality attributes, before opening tender price envelopes. Tenders would need to pass all normal conformance requirements and achieve minimum quality thresholds before being eligible for consideration in the quality price trade-off.*
- 2. The quality price trade-off method for physical works and professional services is available on request from Transfund if tendering authorities require more detailed guidelines.*
- 3. Attributes that can be taken into account with the optional evaluation factors in the Transfund CPP manual (ie those which can be quantified and have a value put on them in the RFT) should not be included as attributes in the quality-price trade-off.*
- 4. Tendering authorities should institute appropriate measures to avoid accusations of bias when determining how much extra to pay for attributes such as good track record. For example it might be appropriate to include some other independent person on the tender evaluation panel, with a possible model being the one now used in the tendering of school bus services. This could help to ensure more evenhanded assessment of operators from other regions (without a local track record) and local operators other than the incumbent.*

Trial Services

- 1. Any alternative CPP for trial services should include a competitive process for selection of the proposals to be trialled. A possible means of introducing a competitive element into this concept is for tendering authorities to formally invite proposals for trials. The best proposals would be selected based on a cut-off determined by a preset tendering authority budget for trials.*
- 2. Trial services may be permitted for up to 1 year's duration on a gross contract basis, and then dependent on the trial's success, a net contract for up to 3 years may be awarded to the trial operator (providing for a maximum total trial contract period of up to 4 years). The trial contract should provide for the testing of innovations such as contactless smart cards, late night services and feeder services in certain areas.*

Variations to Contracts

- 1. Any regional alternative CPP provisions in respect of variations to contracts should satisfy the following principles;*

- (a) *The overall principles should be that variations to contracts are permitted where both the tendering authority and operator wish to vary their agreement, provided this is in the public interest and the price adjustments for the variations are transparent and similar to those which would have been achieved through a competitive process.*
- (b) *Variations to contracts may not be used as a means to avoid re-tendering adjacent contracts or amalgamating previous separate contracts. Variations need to have integrity with the scope of the original RFT.*

Contract Duration

1. *Alternative CPPs incorporating greater use of renewal of contracts may be appropriate, provided that predetermined performance criteria are met.*
2. *The maximum contract duration should be reduced to four years and the maximum overall duration including renewals should be eight years. Examples of appropriate contract formats might include:*
 - 4 + 2*
 - 3 + 3*
 - 2 + 2 + 2*
 - 3 + 2*
 - 2 + 2*

The chosen format must be stated in the RFT.

3. *Contract renewal would be subject to achievement of predetermined performance measures, these may include but are not limited to the following:*
 - (a) *increasing patronage while keeping costs constant; or*
 - (b) *reducing costs and holding patronage constant, relative to underlying trend.; or*
 - (c) *measures of customer satisfaction with service quality and performance*

The performance measures should be achievable while still requiring effort on the operator's behalf to meet the predetermined standards and hence justify contract renewal. Under this system, operators would have a much greater drive to examine ways of optimising patronage and would have increased security for investment in operations.

4. *All criteria to be considered when making a decision on contract renewal must be measurable and be clearly detailed in the RFT.*
5. *If the maximum overall contract duration, including renewal exceeds five years then service level variations are restricted to those provided for in clause 3.8.1 only, ie the more relaxed provisions of 3.8.2 shall not apply.*
6. *The provisions of 3.7.4 relating to the spacing of the contract expiry dates throughout the year and between years will still apply.*
7. *Tendering authorities should keep in mind that much can change in a period of 6 years. New (competent) operators may be waiting for an opportunity to offer services in the region. Technology may improve productivity of passenger transport operations and enable operators to pass on the benefit of lower prices to regional councils. The requirements of regional transport plans may change significantly and routes may need considerable restructuring in order to reflect changing demographics and employment opportunities. Also the introduction of new modes of transport such as light rail might*

significantly affect existing services. Patronage may also increase beyond expectations. By adopting longer overall durations between re-tendering, tendering authorities may lose the flexibility to gain the advantage of these changes. The predetermined performance measures should attempt to anticipate such changes, and ensure that gains are shared with the tendering authority at contract renewal time. For example these gains may be reflected as, but are not limited to, a price reduction for the renewed contract or additional service provisions for the same contract payment.

8. *At the contract renewal date, the tendering authority's current RFT requirements relating to technology such as ETMs should then applied to the renewed contract also, with the appropriate reimbursement made for these items.*
9. *Longer contract durations might be appropriate for contracts involving very specialised types of vehicles for which there are limited resale opportunities at other than greatly depreciated values.*
10. *The basis for the decision to renew a contract or not is to be documented and clearly auditable. Evaluation of the performance measures in 3 above is to be included in the documentation.*