



Guideline—leasing Crown land

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Overview

These guidelines support the *Leasing of Crown Land Policy* and give more information about the process used by the Department of Planning, Housing and Infrastructure (the department) to ensure that leases granted are appropriate, consistent and transparent.

Leasing Crown land

A lease is an authority granted by the department under the *Crown Land Management Act 2016*, which gives permission to exclusively occupy and use Crown land for a specified purpose and term.

The department issues leases to individuals, companies, non-government organisations, government agencies and community and sporting groups for a number of purposes including, but not limited to:

- marinas and other waterfront businesses and activities
- caravan and tourist parks
- registered clubs, bowling clubs, golf clubs and other sporting clubs
- aged care, child care and disability services
- restaurants and kiosks
- government agencies and local government
- surf lifesaving clubs, and other sporting clubs and community organisations
- residences
- rural purposes such as grazing, agriculture and irrigation.

Help

For help, please contact the department's Business Centre:

Department of Planning, Housing and Infrastructure — Crown Lands

Telephone: [1300 886 235](tel:1300886235)

Email: cl.western.region@crowmland.nsw.gov.au

Leasing Crown land

Leasing arrangements are structured to recognise the department as the owner and landlord (or **lessor**) and the applicant as the tenant (or **lessee**).

Crown Land Management Act 2016

The *Crown Land Management Act 2016* (CLM Act) contains provisions that establish the powers of the department as the authorised representatives of the Minister for Water, Property and Housing and the Minister for Planning and Public Spaces (the ministers) acting as the lessor's delegate, to address the following essential matters related to leasing:

- terms and conditions of the lease agreement
- principles related to the rent determination and review mechanisms (as relevant)
- transfer, mortgage, sub-leasing or other dealings of lease agreements
- breach or termination of lease if the tenant fails to comply with a condition of the lease agreement
- withdrawal of land from a lease agreement if required for a public purpose
- removal or variation of conditions as appropriate.

Policy – Leasing of Crown land

Crown land will be allocated by way of lease, generally by a competitive process that follows the principles contained in the policy, *Leasing of Crown Land* IND-O-253.

Policy – Sale and lease of Crown land by direct negotiation

There may be circumstances where the lease of Crown land may be considered by direct negotiation. These circumstances are described in the policy, *Sale and lease of Crown land by direct negotiation* IND-O-182 available from the department's website, www.industry.nsw.gov.au/lands/public/community-engagement-strategy

Lease by competitive process or by direct negotiation

Leases may be granted over reserved, dedicated or unreserved Crown land for a range of purposes either by competitive processes (respondents) or by application for direct negotiation (applicants).

When considering a lease application, the department will determine whether a competitive process or direct negotiation with the applicant is appropriate to ensure the process is fair and open.

The department may decide to proceed with a competitive process even though direct negotiation may be allowable under the policy. Such a decision will only be made where an overarching, exceptional circumstance exists.

Other legislation and reference documentation

As relevant, this guideline also references other NSW Government legislation, policies and guidelines and reference documentation that may help in undertaking commercial leasing, including:

- *Conveyancing Act 1919*
- *Real Property Act 1900*
- *Environmental Planning and Assessment Act 1979*
- *Environment Protection and Biodiversity Act 1999 (Cwlth)*
- *Heritage Act 1977*
- *Protection of the Environment Operations Act 1997*
- NSW Treasury Policy and Guidelines Paper TPP 14-1
- NSW Procurement Guideline
- NSW Unsolicited Proposal Guide for Submission and Assessment
- Australian Taxation Office (ATO) Capital Expenditure Guideline referenced TR 2011/6.

Leasing by competitive process

The following procedure shows the steps in granting a lease of Crown land by a competitive process.

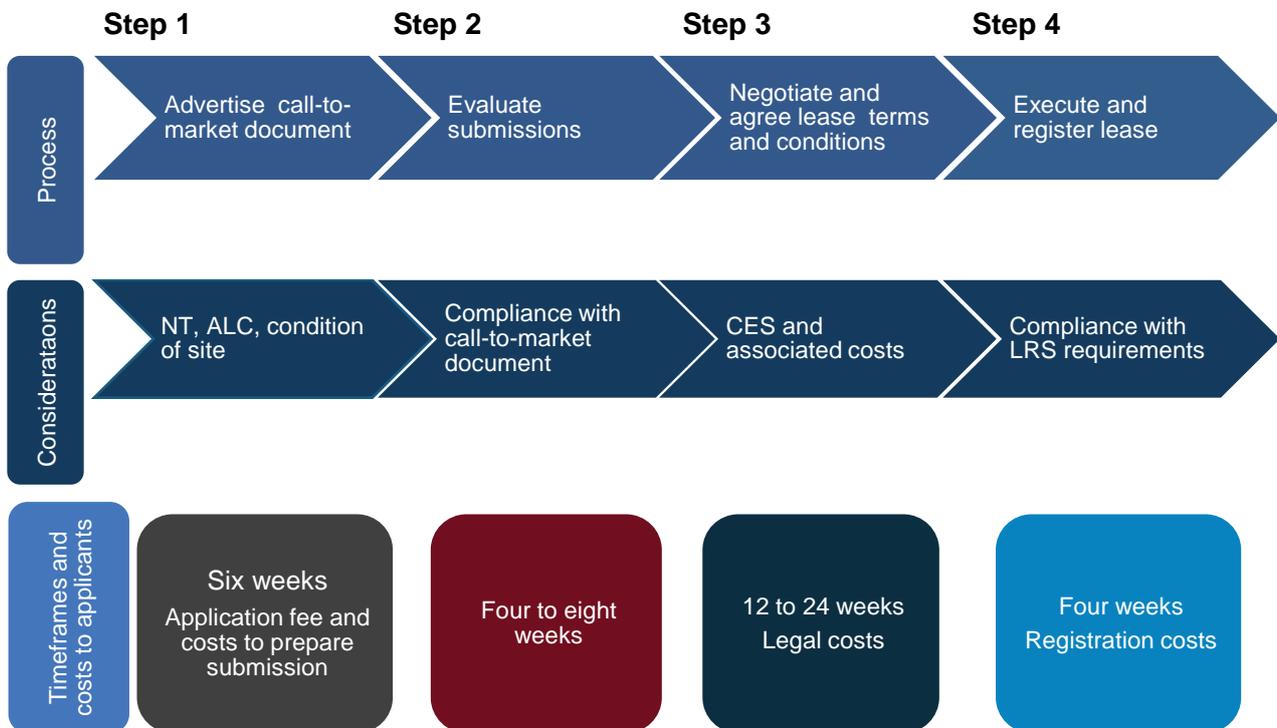


Figure 1. Timeline for leasing by competitive process

Glossary

ALC: Aboriginal Land Claim

CES: Community Engagement Strategy

LRS: NSW Lands Registry Service

NT: Native title

Note: The above timeline is representative of the process for granting a Crown lease by competitive process. The time to negotiate some commercial leases is highly variable and dependent on the complexity of the offer, degree of community engagement required, and the number of other lease applications on hand.

Step 1 – Competitive process (call-to-market)

The department will prepare a ‘call-to-market’ document that allows interested parties to participate in a competitive process to secure the right to negotiate a new lease of Crown land.

The department will structure the competitive process in accordance with the requirements of the NSW Government Procurement Policy Framework.

Generally, the competitive process by expression of interest (EOI) or request for proposal (RFP) will be advertised via the NSW Government eTendering website, <https://tenders.nsw.gov.au/>

For residential leases or other leases of low value, the competitive process may be through a local real estate agent or other approved process.

The competitive process will consider third-party interests, statutory criteria and other relevant matters that must be addressed for a submission to be eligible for evaluation.

The call-to-market document will contain information about the proposed activity to be undertaken on the subject Crown land. The document will include selection criteria that all respondents must address.

All submissions must include a completed lease application form and the associated prescribed fee.

Application fees will not be refunded to unsuccessful respondents.

Step 2 – Successful tenderer selected

An evaluation panel evaluates all submissions received. The panel may refuse an application if the submission does not comply with the call-to-market document.

The panel will recommend a preferred respondent (only if the minimum selection criteria are met).

If any problems are identified during the competitive process, the department will notify all respondents.

The department reserves the right to discontinue a competitive process at any point, without accepting or rejecting submissions.

All respondents must acknowledge that the department will not be liable to the respondent for any expenses or costs incurred by it as a result of participation in the call-to-market process, including where the EOI has been discontinued.

Step 3 – Negotiation of lease

Both parties agree and sign a Negotiation Protocol that sets out the terms under which negotiations are to take place.

Lease terms and conditions are then negotiated between the parties within an agreed timeframe.

Step 4 – Agreement to lease

Lease terms and conditions are agreed and a draft lease is prepared for execution.

Step 5 – Execution and registration of lease

The lease is executed by the leaseholder first and then issued to the department for execution by the delegate of the ministers. The department will manage the registration of the lease with NSW Land Registry Services.

Leasing by direct negotiation

The following procedure shows the steps in granting a lease of Crown land by direct negotiation.

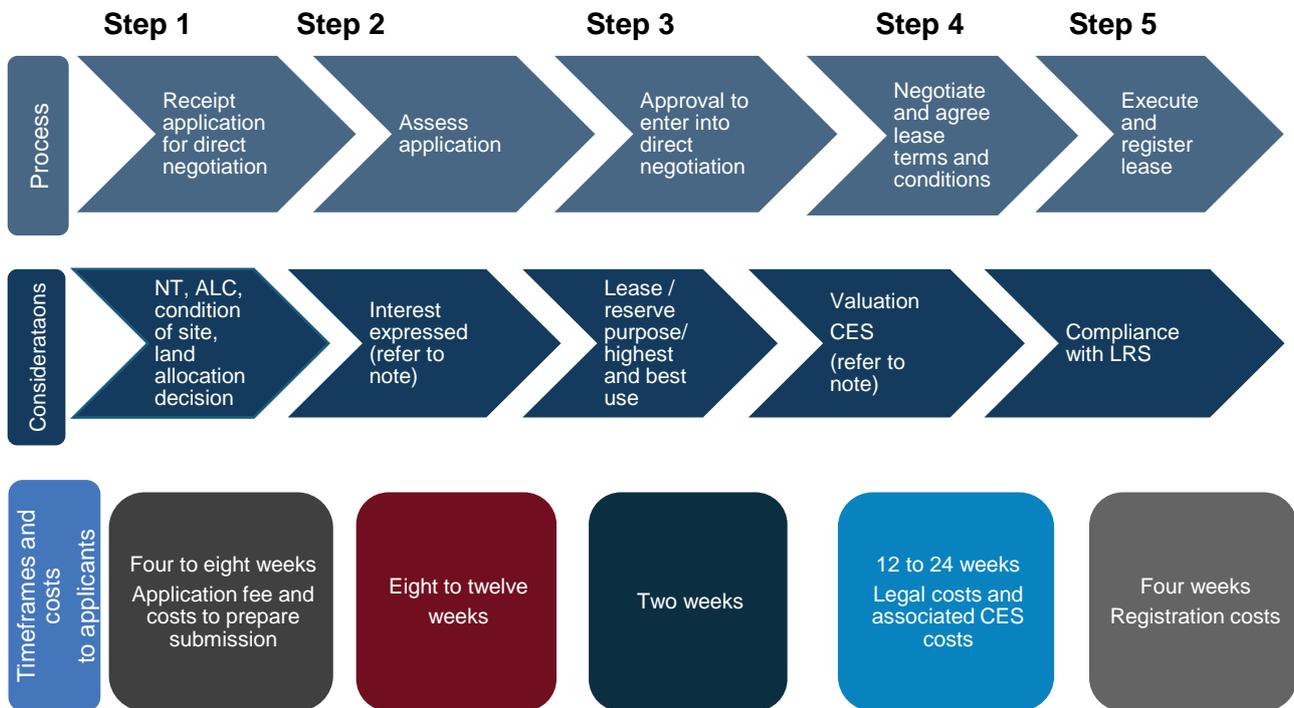


Figure 2. Timeline for leasing by direct negotiation

Glossary

ALC: Aboriginal Land Claim

CES: Community Engagement Strategy

LRS: NSW Lands Registry Service

NT: Native title

Note:

1. The above timeline represents the process for granting a Crown lease by direct negotiation. The time to negotiate some commercial leases is highly variable and dependent on the complexity of the offer, degree of community engagement required, and the number of other lease applications on hand.
2. Refer to the Community Engagement Strategy available from the department's website www.industry.nsw.gov.au/lands/public/community-engagement-strategy for more information.
3. Refer to the *Interest expressed* section of this document for the process when the department has received unsolicited expressions of interest.

Step 1 – Direct negotiation (application to lease)

A proposal for direct negotiation may be initiated by either the department or an applicant.

Requests from an applicant (including those invited by the department) must include a completed lease application form and the associated prescribed fee.

The application must justify, with reference to the *Sale or lease of Crown land by direct negotiation* policy, why direct negotiation is appropriate.

Where requested by the department, the applicant must give more information in the nominated format and within the required timeframe.

Application fees will not be refunded to unsuccessful applicants.

Step 2 – Assessment of the lease application

The department will assess the application to determine if entering into direct negotiations is justified.

This initial assessment considers the criteria provided in the *Direct Negotiation Policy*, third-party interests, statutory criteria and other relevant matters. These considerations must be addressed for an application to proceed.

If the department identifies any issues with the application, we will notify the applicant.

Refer to the *Interest expressed* section in this guideline for the procedure to address the requirements of the policy.

Step 3 – Approval to enter into direct negotiations

If the department approves the application, we will write to the applicant with the next steps for both parties.

If the department decides at this stage that a lease by direct negotiations is not justified, the department may refuse the application.

The department may also refuse the application if it allocates the Crown land for an alternative purpose.

Step 4 – Negotiation of lease

Both parties agree and sign a Negotiation Protocol that sets out the terms under which negotiations will take place.

Lease terms and conditions are then negotiated between the parties within an agreed timeframe.

Step 5 – Agreement to lease

Lease terms and conditions are agreed and the department prepares a draft lease for execution.

Step 6 – Execution and registration of lease

The lease is executed by the leaseholder first and then issued to the department for execution by the delegate of the ministers.

The department will manage the registration of the lease with NSW Land Registry Services.

Lease application assessment

Fit-and-proper criteria

Crown land will be leased to an acceptable applicant that:

- meets the fit-and-proper criteria as a person, business or organisation
- is legally able to hold land under lease.

The fit-and-proper-criteria are documented in Annexure A of the *Leasing Crown Land* policy.

Application process

Before lodging an application, applicants should contact the department for advice about the information required and the application processes.

The department will acknowledge receipt of all applications, undertake a preliminary review to ensure the application is complete, and, if the application is complete, will give the applicant an estimate of processing time.

Applications are processed in accordance with the requirements of the CLM Act and all other relevant NSW Government legislation, policies and procedures.

The time taken to assess each application depends upon its complexity and the total number of applications being assessed by the department at the time. It is usual for the processing and assessment of a lease application to take 6 to 12 months.

The department will advise all parties who submit a response to a competitive process or lodge an application for direct negotiation of the outcome in writing.

The department will offer successful parties the opportunity to negotiate directly through execution of a negotiation protocol. The negotiation protocol will detail the terms and conditions under which the lease will be negotiated.

Once negotiations are completed, all authorised signatories must sign the lease document, and it must be witnessed (where required) and returned to the department for execution.

Acceptance of the lease offer does not constitute the grant of a lease. The lease is granted upon formal execution of the lease by the minister's delegate.

Application to lease

A *Lease application form* must be submitted for lease of Crown land by either competitive process or direct negotiation.

The form is in three parts:

- **Part A — Applicant details**
- **Part B — Property details**
- **Part C — Proposal and business plan**

Applicants must complete **all parts** of the form accurately and in full. Applicants must supply any missing information before we can process the application. Applicants must meet the department's requirements for proof of identity and bona fides.

Fees and charges

The NSW Government determines the fees and charges payable for processing applications for lease over Crown land. These fees and charges are published from time to time in Schedule

1 of the Crown Land Management Regulation 2018 (the Regulation). The fees and charges that apply to lease applications will be in accordance with the Regulation as at the date the department receives the application.

Fees and charges for lease applications comprise:

- **a non-refundable application fee**, which is an initial advance towards the cost of processing applications
- **charges for processing activities** including (but not limited to) the cost of site and land status investigations, land assessment, community engagement where required, compliance with the *Environmental Planning and Assessment Act 1979*, survey and plan preparation, valuation, publication of required notices, negotiation and preparation of documents for execution.

Part A – Personal details

Legal entity of applicant

Applications must be submitted by a legal entity or, if a joint tender, by legal entities, with the capacity to contract. The department will only enter into an agreement with a legal entity or entities.

The department will require an applicant to provide evidence of its legal status or capacity to contract.

Where the lessee is a company, the lease offer must be signed in accordance with Section 127 of the *Corporations Act 2001*, by:

- two appointed directors of the company, or
- an appointed director and a company secretary of the company, or
- for a proprietary company that has a sole director who is also the sole company secretary, that director.

A company seal may also be affixed to the lease document.

ABN requirements

The department will not enter into an agreement with a company that does not have an Australian Business Number (ABN) and is not registered for GST.

In this guideline, 'ABN' means an Australian Business Number as provided in GST law. 'GST' has the meaning given in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*.

Part B – Property details

Applications must include the relevant details of the property that is the subject of the competitive process or request for direct negotiation.

Part C – Proposal and business case

In addition to criteria that may apply to specific opportunities, the general criteria for the department to evaluate all lease proposals are as follows:

- compliance of the proposed use with the CLM Act
- demonstrated social, economic and environmental benefits arising from the proposed use
- suitability and objectives of the proposed use
- demonstrated financial and economic viability of the proposed use

- demonstrated financial capacity of the applicant
- capability of the applicant to execute the proposal, along with demonstrated track record
- general credentials of the applicant including skills, experience and expertise
- demonstrated history of compliance by the applicant with the terms of any past Crown or other leases.

All lease applications must include a description of the proposal and an accompanying business case that can be effectively assessed by the department and includes (at a minimum) the following headings.

Existing use

1. Competitive process

The call-to-market document will give the details applicants need to prepare a submission.

2. Direct negotiations

The application form requires the following minimum information to be submitted:

- description of the existing use of the land
- details of the statutory consents and approvals that authorise the existing use
- asset register and building condition report of any existing fixed improvements
- an accurate plan of the land and the existing site layout and location of any facilities
- financial information related to the current business operation (as required in the application form)
- photographs of the site
- site analysis to identify the constraints and opportunities that the applicant intends to address in their proposal.
- a business case for commercial leasing

Proposal

For both competitive processes and direct negotiations, the application is required to include a proposal for the development of improvements and future management of the leased land.

The proposal will:

- describe the changes and initiatives proposed by the applicant
- include how the proposal addresses the constraints and opportunities of the site
- identify any consents and approvals required to enable the implementation of the project
- adequately describe what the leased land will 'look like' in the future
- acknowledge that an application for a commercial use requires significant capital expenditure and describe the proposed capital works and expenditure program
- nominate an indicative lease term that is being sought, particularly where the applicant will need to amortise the capital expenditure over the term of the lease
- the *Lease options and capital expenditure obligations* section of this guideline should be referenced for information related to the structure of the transaction (lease/agreement for lease) documents.

Business case for commercial leasing by direct negotiation

For a lease for commercial purposes, a business case is required. This must set out the details of the business and/or operations the applicant proposes to carry out on the land, including (but not limited to) details of any proposed major capital investment and/or proposed maintenance works. An applicant/lessee should consider the value and ongoing use of the Crown's improvements and include an analysis of the benefits that will accrue to the Crown and the community.

A financial appraisal of the proposal is required to support the business case. The financial appraisal should:

- demonstrate the financial viability of the proposal over the proposed term of the lease
- justify the proposed term by reference to the time required to amortise the investment associated with the proposed capital improvements

The financial appraisal must set out the applicant's financial projections for at least the initial five-year period of the proposed lease. The projections should consider proposed capital investment and its effects on projected revenue and operating expenses. The financial projections of the business are to include the cash flows from operational revenue, operational expenses and capital expenditure.

The major business case inputs are:

1. **Gross annual revenue** by revenue type (for example, for marinas — berth sales, berth rental fees, mooring fees, fuel sales, boat brokerage commissions, industrial services, retail/chandlery, entertainment, subtenant rental; and for caravan parks — accommodation fees for caravan, cabin and camping; fuel sales; industrial services; food and beverage; retail; entertainment; subtenant rent).
2. **Operating costs** by major expense category (for example, salaries, superannuation, administration, insurance, utilities, repairs and maintenance). Note that financing costs (interest expenses) are not included.
3. **Capital works expenditure** by major capital works item. Note: sunk costs for example, lease purchase costs and business goodwill, for example, are excluded and are not considered in the business case cash flows.

Where the application is for direct negotiation, we expect there will be discussion and liaison between the department and the applicant during the preparation of the business case to ensure the development of a proposal that is:

- appropriate to the character and value of the leased land
- consistent with the long-term objectives for management of adjoining Crown land
- achievable within the parameters and constraints of the existing regulatory environment
- mutually beneficial to the Crown, the community and the tenant.

Business case analysis

As part of the due diligence undertaken by the department to assess an application, a discounted cashflow (DCF) model is used to analyse the applicant's financial appraisal to:

- test the financial feasibility of the proposal using standard methodologies and assumptions
- determine the lease term reasonably required for an applicant to amortise its capital investment, pay a market-based rent and achieve a satisfactory return on its investment.

The department's DCF model is consistent with NSW Treasury guidelines and applies a discount rate to reflect an applicant's weighted average cost of capital (WACC). The financial analysis is applied on the basis of earnings before interest, tax, depreciation and amortisation (EBITDA). As a consequence, the analysis is independent of the financial structure adopted by the applicant, and any rate of return is a pre-tax rate of return.

The discount rate used in the department's DCF model represents a percentage return that a typical commercial business operating in an industry typical to Crown land leases would expect to earn, given the associated risk of a business. The following inputs are used to derive the discount rate:

- Risk free rate — based on the Independent Pricing and Regulatory Tribunal New South Wales (IPART) published WACC
- Market risk premium — based on IPART published WACC
- Risk rating — a ratio of 1.2 reflects the higher risk rating of the type of businesses typically located on Crown land
- Debt to equity ratio — an industry-typical ratio of 60% debt and 40% equity
- Cost of borrowings — based on the Reserve Bank of Australia's published historical weighted-average interest rates on credit outstanding under \$2 million
- Tax rate — 25% for businesses with less than \$50 million turnover

The department undertakes a periodic review of the inputs used to derive its discount rate as a result of movements in the risk-free rate, interest rates and other market conditions. At the time of publication, the department's discount rate is 10.75%.

Financial capability of applicant

The department reserves the right to reject any application if we consider the applicant not to have appropriate financial capability.

The department will not knowingly accept applications from, or award contracts to, applicants who are:

- subject to exclusion from applying as a result of a breach of the NSW Government *Code of Practice for Procurement*
- bankrupt
- subject to a winding-up order
- corporate entities with persons involved directly or indirectly in the management of the entity who are disqualified under corporations law.

Compliance with the NSW Government *Code of Practice for Procurement*

The department will not knowingly accept applications from or enter into negotiations with applicants who demonstrate an inability to meet the requirements of the NSW Government *Code of Practice for Procurement*.

The code can be viewed and downloaded from www.procurepoint.nsw.gov.au

Conflict of interest

A conflict of interest arises when an applicant, or a person or organisation associated with the applicant, is in a position to benefit directly or indirectly from actions of the applicant through an unfair or unintended imposition or loss on the department or other party.

A conflict of interest can also arise when an applicant's integrity, objectivity or fairness in performing the services is at risk due to a personal interest or conflicting business arrangements.

Applicants should disclose in their submissions any potential or actual conflicts of interest that they may have or may be perceived to have in their responsibilities to the NSW Government and other parties in the course of delivering services to the department.

Identification of a conflict of interest or a perceived conflict of interest will not automatically exclude an applicant from consideration.

The department reserves the right to assess the potential impact of the conflict or perceived conflict in relation to the tender before a final decision is made.

The department's decision about exclusion will be final.

Probity principles

Probity principles are essential to NSW Government dealings and underpin the way in which the department procures tenants for its properties. Irrespective of whether a competitive process or direct negotiation is used to secure a tenant, the probity principles must always be complied with.

As well as identifying the tenant offering the best value for money, the leasing process must demonstrate probity and be honest, fair and equitable. It must also be perceived by all involved as being fair and equitable.

The department is not bound to accept the highest rent offered and may pass over, or not consider further, any tenant.

Whichever leasing process is undertaken, it must comply with the following probity principles:

- accountability and transparency – the process will be open, clear, and defensible
- impartiality – those making decisions do so in an unbiased manner
- objectivity – decisions are made based on objective evidence
- reasonableness – decisions are based on the information reasonably known by the evaluation team and are supported by rational and logical argument
- thoroughness – decisions are based on competent and comprehensive analysis of all relevant information
- confidentiality and information security
- identification and resolution of conflicts of interest.

The NSW Government Procurement Guidelines available from www.procurepoint.nsw.gov.au gives guidance on probity.

Crown land Community Engagement Strategy

Crown land is used by the community for a wide range of activities and purposes.

The department's Community Engagement Strategy (CES), available at www.industry.nsw.gov.au/lands/public/community-engagement-strategy, ensures that decisions about Crown land are made in an open and transparent way by setting out engagement requirements for particular dealings, such as leases.

In considering lease applications, the department must follow the requirements of the CES and may be required to consult and engage with the community on the proposed application. Depending on the outcome of any engagement or consultation, the lease application may require changes or be refused.

The department will publish notices of leases granted on its website, in accordance with the CES.

Lease categories

Leasing of Crown land is divided broadly into four categories as follows:

- business purposes
- community purposes
- residential purposes
- rural and urban purposes.

Business purposes

Commercial leasing includes leases by individuals, businesses or other organisations involved in commercial activities on Crown land including, but not limited to:

- **marinas and other marine-related uses** including, mooring or storing boats above or adjacent to the water, jetties, boatsheds, berthing areas, boat ramps, slipways, pontoons, seawalls, boat recovery, repair, fuelling and maintenance, boat and accessories sales, waterfront commercial facilities such as retail, cafés and restaurants, and reclamation areas above and/or below mean high water mark (MHWM)
- **caravan parks and tourist facilities** including commercial camping grounds, powered and unpowered sites, re-locatable homes, long-term residential sites and ancillary uses including retail, cafés and restaurants
- **registered clubs, bowling and other sporting facilities and golf courses** including related uses such as club houses, meeting and conferencing facilities and ancillary uses including retail, cafés and restaurants
- **child and aged care facilities**
- **other stand-alone uses** including kiosks, retail, cafés, restaurants and ancillary use
- **other uses supporting certain commercial industries** such as fishing fleets and extractive industries
- **government agencies and not-for-profit organisations.**

Community purposes

Community leasing includes the grant of leases to eligible community groups. Community uses include, but are not limited to:

- **community volunteer services groups** (organisations that exist for the benefit of the general community and are largely supported by volunteers)
- **single-interest and sporting groups** (organisations that benefit cultural, sporting or special interest groups within the community).

Rural purposes

Rural leasing is generally confined to the Western Division of NSW and leases are issued for grazing, agriculture and irrigation purposes.

Residential purposes

Residential leasing relates to the grant of leases to eligible residential tenants.

Perpetual leases

Perpetual leases may be granted over Crown land in the Western Division for either urban or rural purposes.

Similar to term leases, a competitive process is the preferred method for establishing perpetual leases, unless a direct negotiation with the applicant can be justified.

A business case will not be required if the grant of a lease is necessary as a result of the exclusion or excise of an area from an existing perpetual lease.

Financial concessions and adjustments

The department may apply financial concessions to rent payable under a negotiated lease to support the use and management of Crown land for the benefit of the people of NSW.

Refer to the department's website for more information on financial concessions.

Termination of lease negotiations

At any stage during the lease negotiation process, the department might decide not to continue. Some of the reasons for making this decision include:

- terms and conditions for the lease cannot be concluded within the timeframe agreed in the negotiation protocol
- the offered rent or prevailing market conditions do not provide sufficient financial or public benefit
- there is insufficient interest in the offer
- there is a conflict of interest or other probity concerns with the process
- direct negotiations do not yield the potential benefits initially considered achievable
- environmental and cultural heritage outcomes are not acceptable
- public consultation through the CES demonstrates that the proposal is not appropriate
- there is a change in government policy
- market forces are identified during the negotiation process that require reconsideration of the decision to directly negotiate.

Unsolicited proposals

Unsolicited proposals are defined as an approach to the NSW Government from an applicant with a proposal to:

1. build and/or finance infrastructure
2. provide goods and services
3. where the government has not requested the proposal.

The NSW Department of Premier and Cabinet has developed a *Guide for Submission and Assessment of Unsolicited Proposals*, which can be accessed at www.nsw.gov.au/contact-us/unsolicited-proposals.

The department generally will not accept an unsolicited proposal. Applicants who are considering a commercial proposal when there is no relevant competitive process and/or the circumstances do not meet the conditions for direct negotiation should consider whether their proposal would satisfy the principles in the *Guide for Submission and Assessment of Unsolicited Proposals*.

Leasing principles

Terms and conditions

All leases are subject to terms and conditions that will outline the applicant's duties and responsibilities in respect to the land. The lease may also contain special conditions that relate to the specific purpose of the lease. All applicants are expected to comply with their lease conditions.

The department will take compliance action at various stages of the lifecycle of the lease to ensure that the applicant continues to comply with the lease terms and conditions.

Term of lease

Generally leases (other than perpetual leases) may be granted by the department for a term of up to 25 years (including any option to renew) based on the assessment of information supplied in the business case.

Any proposal that seeks a term greater than 25 years, or to vary the term of a lease, will require a more detailed business case to substantiate the request.

The term of a commercial lease will be negotiated based on the type of proposal and level of capital investment committed.

When assessing the lease term, the department will take the following factors into account:

- level of committed capital investment
- ability to fund, resource and manage the lease over the proposed term
- purpose of the proposed activities
- demonstrated public social, economic and environmental benefit
- market rent as a return to NSW Government.

Lease options and capital expenditure obligations

The department has considered the best way to capture obligations for capital expenditure and program of works (a requirement in all commercial leases).

The department will consider the following options on a case-by-case basis as appropriate for securing capital obligations:

1. **agreement for lease (AFL)** and lease (where the applicant has a current lease with remaining term of more than three years); or,
2. **short-term lease** (one to five years) with further **option** to achieve a 25 year lease term if the committed capital expenditure is completed within the agreed period.

Agreement for lease

An AFL is appropriate where there is an existing underlying tenure that is sufficient to allow the applicant to develop and construct the agreed capital works.

AFLs are industry tested and accepted. They are generally for a short-term period (for example, one to five years) and will detail the works to be undertaken, the cost of the works, and the time within which they are to be completed. It will also detail the mechanism for determining completion of the works and whether they have been completed to an acceptable standard (for example, by receipt of an Occupation Certificate from the consent authority).

Under an AFL, completion of the works to an acceptable standard will trigger the start of the lease.

An AFL is not appropriate if there is no underlying tenure, as it cannot be registered on the title to the land.

Short-term lease with option to renew

If there is no significant lease term remaining, the tenure is already on holdover, or there is no underlying tenure for the site, the department will offer a short-term lease with a long-term option to renew.

The initial lease will be for a term comparable to an AFL (for example, usually one to five years) and will be conditioned similar to an AFL, detailing the works to be undertaken, the cost of the works, the time within which they are to be completed, and the mechanism for determining satisfactory completion.

The tenant's ability to exercise the option to renew will be conditional upon satisfactory fulfilment of the conditions precedent regarding capital works.

The option to renew will be for a longer term (for example 25 years) to allow the tenant an opportunity to amortise the capital investment.

Rent

A market-based rent will be applied with reference to Part 6 of the CLM Act.

The lessees may be eligible for concessions in accordance with the *Crown Land Financial Concessions Policy* (IND-O-254).

Financial analysis of the business case

The department uses a discounted cash flow analysis model as an assessment tool to:

- test the financial feasibility of a proposal using standard financial analysis methodologies and assumptions
- determine a reasonable lease term to provide a satisfactory return on equity, permit amortisation of the capital investment and allow for the payment of a market-based rental to the department.

Bank guarantee

Bank guarantees with no expiry date are required on all leases.

Guarantees will generally be the equivalent of six months' rent paid in advance.

Leases may provide for bank guarantees to be increased should the tenant demonstrate a poor track record in the payment of rent. This is in order for the department to protect its interests for the remaining term of the lease.

In addition, if capital works are proposed under the lease, then the department may require additional security (by way of guarantor or an additional bank guarantee for the life of the works only) for those works to reflect the scope and nature of proposed works.

Rent reviews

At a minimum, market rent reviews will be undertaken at five year intervals. Between market reviews, rent each year will be increased by the consumer price index.

Hold-over provisions

Leases may provide that at the expiry of the term, the tenant may, with consent from the department, remain at the premises on a month-to-month basis. The lease may provide that the rent for this period is at the current yearly rate, and the department may vary the rent with one month's notice.

Under hold-over provisions, the lease will generally be terminable at any time by either party giving one month's notice.

Variation of leases

Where there is a requirement for a variation to a lease, agreement and consideration from both parties is required. This consideration may include an increased rent, or agreement to a more contemporary lease format or additional lease clauses for consistency.

The department will also take into account the improved benefit to government and the satisfactory performance of the tenant under the lease when considering the granting of a lease variation.

Where an application for variation is being considered for an older lease, the department may take the opportunity to review the lease provisions and to negotiate variations of out-dated or inadequate provisions. Environmental requirements, for example, might be varied.

Costs

Before the leasing process starts, allocation of costs will be negotiated and agreed in the negotiation protocol. Generally, a request from an existing tenant for a variation or direct negotiation will result in the tenant paying all applicable costs.

Consent to transfer by way of sale, sublease or mortgage

Refer to the separate guideline for the management of Crown land leases for information about consent to transfer land comprised in a Crown holding by way of sale, sublease or mortgage.

Interest expressed

This section of the guide:

- explains the process for applying for a lease by direct negotiations, where an existing tenant applies to renew the lease before expiration and a third party has expressed interest in the site
- is applicable to all commercial lease agreements issued over Crown land for improvements and uses associated with a commercial business
- will generally be applied by the department unless the executive director determines circumstances exist that justify a departure from this guide, necessary to comply with its obligations at law.

Definition

Interest expressed means a bona fide, unsolicited proposal made by an individual or business entity at any time during the life cycle of a lease and must be site-specific. General interest expressed across multiple sites or a wide geographic areas will not be considered as bona fide.

Intent of interest expressed

The intent of the interest expressed requirement is to ensure there is a fair and managed process should there be a bona fide interest in a site from one or more third parties.

The following procedure shows the steps undertaken where there has been interest expressed identified during an application for direct negotiation, identified at Step 2 in Figure 2. Timeline for leasing by direct negotiation.

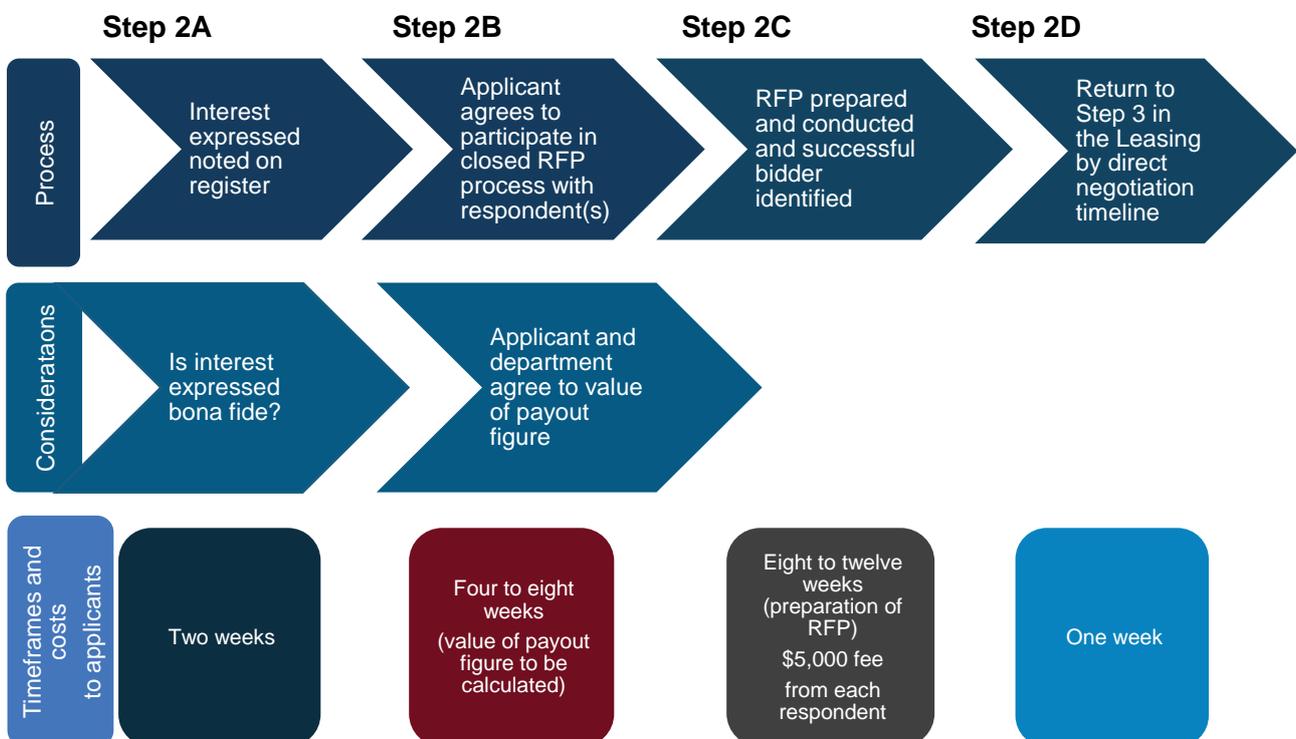


Figure 3. Timeline where interest has been expressed during an application for direct negotiation

Note:

1. The circumstances where direct negotiations are affected by a bona fide interest expressed as referenced in the department's policy, *Sale and lease of Crown land by Direct Negotiation* IND-O-182 are provided as follows:
 - 4.(f) *The proponent holds a current lease of the subject Crown land (including a lease on holding-over provisions) and is seeking to renegotiate the tenure conditions of the lease, including proposing significant investment, and there is no substantial change in expectations of the use of the site, and the department has received no other **interest expressed***
2. The above timeline is representative of the process for granting a Crown lease by direct negotiation where interest has been expressed by a third party in relation to the criteria at 4(f).
3. Following completion of Step 2C in the above timeline, the process for direct negotiation continues in accordance with the direct negotiation timeline.
4. The 'value of payout figure' referenced in the timeline above refers to an amount agreed between the applicant (the incumbent tenant) and the department that will be paid to the applicant if it is unsuccessful in the RFP referenced at Step 2C. If the applicant does not agree with the department as to the amount of the payout figure within a reasonable timeframe, the application process will cease. In this circumstance the existing lease will continue to expiry and no further applications for a new lease by direct negotiation will be accepted.

Step 2A – Interest expressed is identified

If the interest expressed is for a site that is not currently being assessed for a new lease, the contact details of the third party and the nature of the interest will be recorded on a register for a period of twelve months.

If an existing tenant subsequently applies to enter into direct negotiations for a new lease, the department will contact all third party interests, noted on the register of interest expressed to ascertain if the interest is still current.

Step 2B – Tenant to agree to the request for proposal (RFP)

The department will advise the applicant (existing tenant) that there is current bona fide interest expressed recorded for the site. The department will then ask the applicant if they wish to participate in a closed RFP with the parties that have expressed interest.

If the incumbent tenant wishes to proceed with and participate in an RFP, the tenant will be required to:

1. agree to a payout figure (value) that will be paid to the tenant, by the successful bidder, if the tenant is unsuccessful in the RFP process
2. agree to release any remaining term of lease if unsuccessful in the RFP process
3. accept the outcome of the RFP process.

Step 2C – Undertake the RFP

In the event that the applicant agrees to the closed RFP, both the incumbent tenant (applicant) and the respondent(s) will be requested to submit a proposal.

The key terms of the RFP shall include the:

- requirement for capital development based on significant investment
- value amount of the payout figure is required to be included as a compulsory component in a third party respondent's offer
- value amount of the payout figure is paid to the applicant (incumbent tenant), by the successful respondent, if they do not win the EOI
- evaluation criteria will be reliant on the offer made by all parties including rent, term and capital expenditure program.

Respondents must pay a non-refundable application fee of \$5,000 as a precondition to cover the administrative costs associated with the RFP.

If successful, a respondent will have the application fee offset against the other costs associated with negotiating the lease.

The department will advise unsuccessful participants in writing of the outcome.

Step 2D – Negotiation of lease

- Return to Step 3 in Figure 2. Timeline for leasing by direct negotiation.

Definitions

Table 1. Terms and definitions

Term	Definition
applicant	The person or entity making an application to request to lease Crown land
application	A request to lease Crown land
benefit	Freehold or leasehold land which is benefitted by or from the presence of a Crown land tenure
leasehold	The holding of Crown land by lease
lessor	NSW Department of Planning, Housing and Infrastructure
lessee	The person or entity to which Crown land is leased. May alternatively be referred to as a holder.
the department	NSW Department of Planning, Housing and Infrastructure
respondent	The person or entity responding to a competitive process

Related documents

- *Crown Land Management Act 2016*
- *Aboriginal Land Rights Act 1983*
- *Native Title Act 1993*
- *Environmental Planning and Assessment Act 1979*
- Leasing of Crown land Policy
- Crown Land Financial Concessions Policy
- Community Engagement Strategy.