

Sale or lease of Crown land by direct negotiation

Policy IND-0-182 Version 6.1

Policy Statement

This policy sets out when and how the NSW Department of Planning and Environment – Crown Lands (the department) will consider entering direct negotiations for the sale or lease of Crown land.

As a general principle, the department will use competitive processes for the sale or lease of Crown land. However, there are circumstances where it may not be possible or practical to use a competitive process. For these instances, this policy provides transparency and consistency in the approach the department will adopt in the assessment of an application for the sale or lease on Crown land by direct negotiation.

For those seeking a direct negotiation, this policy provides clarity and confidence on how they will receive consistent, transparent and fair treatment in the assessment of an application for the sale or lease on Crown land by direct negotiation.

Scope

This policy applies to the sale or lease of Crown land under the *Crown Land Management Act 2016* (the Act) by a direct negotiation.

Nothing in this policy:

- requires the department to enter into a direct negotiation, even in circumstances where a direct negotiation may be permitted under this policy, or
- allows a departure from a consideration of the objects and principles of the Act.

For the avoidance of doubt, a reference to the Deputy Secretary in this policy is a reference to the appropriate delegate in accordance with the delegations in force at the time a decision is being made.

Requirements

1 Acceptable proponents

Any proposal for sale or lease by direct negotiation will only progress if the proponent is deemed to be an acceptable proponent, having regard to the 'fit and proper' criteria contained in the Leasing of Crown land Policy (IND-O-253).

2 Proposals to directly negotiate

A proposal for direct negotiation may be initiated by either the department or a proponent. Requests from a proponent, including those invited by the department, must be received by the department in writing, and include the following:

- a. a detailed description of the parcel of Crown land (for example: Lot/DPs, adjoining lands or waterways).
- b. the background of the proponent, including how they meet the 'fit and proper' criteria and whether they are in a unique position to offer a solution that cannot be offered by competitors (if applicable).
- c. justification (with reference to this policy) for why direct negotiation is the most suitable approach.
- d. justification of the proposal's alignment with strategic Government objectives (including the *Crown land 2031–State strategic plan for Crown land*).
- e. a statement as to perceived value for money outcomes (if applicable).

Where requested by the department, the proponent must provide additional information in the nominated format and within the required timeframe.

3 Evaluation of whether to permit direct negotiation

When evaluating whether to permit direct negotiation, the Deputy Secretary may consider:

- a. how the direct negotiation may assist Crown Lands to achieve its strategic objectives.
- b. why direct negotiation is appropriate in comparison to a competitive or other alternative processes.
- c. whether the proposal is considered to be value for money to the State – noting that a comprehensive value for money assessment will be conducted should the proposal be approved to proceed to direct negotiation.
- d. whether the proponent has the capability and capacity to deliver the proposal.
- e. whether the proposal represents an acceptable risk allocation to the State.
- f. how the proposal satisfies the requirements of the Independent Commission Against Corruption's (ICAC) *Direct Negotiations – Guidelines for Managing Risks, 2018* and the NSW Government's – *Direct Dealing Guidelines, 2021*.

4 Approval for direct negotiation

Written approval of the Deputy Secretary must be obtained before Crown land is sold or leased by direct negotiation.

There must be written evidence on file to show that the ICAC *Direct Negotiations – Guidelines for Managing Risks, 2018* and the NSW Government's – *Direct Dealing Guidelines, 2021* have been considered and applied as appropriate. This must include a clear justification for entering into exclusive negotiations with the proponent rather than conducting a competitive (market) process. This justification must be approved in writing by the Deputy Secretary.

The department requires that a proponent enter a negotiation protocol for all leasing proposals, and for all high value sale of Crown land proposals, and in any situation where the department considers the probity risk is sufficiently high.

For direct negotiations of significant size, risk and cross-government impact or where probity risk is considered sufficient, the department may also require setting up transaction-specific governance processes and bodies to recommend and assess proposals for direct negotiation, including:

- establishing an independent body to oversee the direct negotiation (e.g. an independent probity advisor, steering committee).
- a team to engage in discussions and negotiations with the proponent.
- a panel to evaluate the direct negotiation.

Circumstances where direct negotiations will generally be permitted

5 Sale of Crown land

Where one or more of the following circumstances exist in respect to the sale of Crown land the Deputy Secretary will generally permit direct negotiation:

- a. the purchase of land comprising a Crown road that has been closed at the request of an adjoining land holder.
- b. the conversion of a leasehold interest into a freehold interest by a lessee, where that lessee has a statutory right under the Act or under the lease
- c. sale of improved land comprising a proponent's principal place of residence, where evidenced by legitimate occupation.

6 Lease of Crown land

Where one or more of the following circumstances exist in respect to the lease of Crown land the Deputy Secretary will generally permit direct negotiation:

- a. the grant of new leases to existing lessees following the subdivision of a Western Lands lease under Clause 17 of Schedule 3 of the Act.
- b. addition of a closed Crown road or a closed public road that is unformed to adjoining Western Lands leases as part of the rationalisation of the legal road network.
- c. the grant of a residential lease to holders of residential mineral claims at Lightning Ridge.
- d. the grant of a new lease of improved land comprising a proponent's principal place of residence, where evidenced by legitimate occupation.
- e. the grant of a lease as a result of the exclusion or excise of an area from a perpetual lease which is subject to a purchase of lease application.

In any case, the Deputy Secretary retains sole discretion to determine not to proceed by way of direct negotiation.

Circumstances where direct negotiation may be permitted

7 Sale or lease of Crown land

Where one or more of the following criteria apply in respect of the sale or lease of Crown land the Deputy Secretary will determine whether to permit direct negotiation:

- a. the proposal is limited to an exchange of freehold land for Crown land where it is of strategic value to the State.
- b. the proposal involves Crown land that is only of material benefit to the proponent.
- c. the proposal involves Crown land that is of a value that is less than the anticipated cost of conducting a competitive process.
- d. the proposal is for a lease and involves Crown land that commands an annual market rent that is less than the anticipated cost of conducting a competitive process.
- e. the proponent owns land (or occupies land subject to a Western Lands lease) abutting the relevant Crown land and is the only person who could feasibly use the Crown land for the intended purpose.
- f. the proponent holds a current lease of the subject Crown land — 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.
- g. the proponent is a not-for-profit, and is a community service, charitable, sporting, recreational or government organisation that seeks to lease Crown land for a help or service facility of benefit to the general community, or to provide an active sporting or passive recreational facility.
- h. the proposal relates to an emergency situation to protect public health and safety, mitigate damage to the environment or a serious legal or financial risk to Government.
- i. a previous competitive process failed to identify a successful proponent and it is considered that repeating the process will produce the same result.
- j. a competitive process is likely to fail on the basis that it would not receive any responses or that such responses would not be commercially viable to the State.

Referral to Department of Enterprise, Investment and Trade

8 Unsolicited proposals

Where a proposal is received without a request from Crown Lands which meets any of the criteria listed below and is not a standard land transaction, the Deputy Secretary will determine whether it needs to be referred to the Department of Enterprise, Investment and Trade to consider whether it requires assessment against the *Unsolicited Proposals: Guide for Submission and Assessment, May 2022*, prior to deciding if direct negotiation is appropriate:

- a. high value Crown land (exceeding \$10 million for sales assessed at market value).

- b. Crown land that is in a sensitive location.
- c. Crown land that will be or is part of a major project.
- d. the proposal involves delivering or affecting infrastructure/places/services for NSW Government managed by other departments.

Direct negotiation with government entities which do not represent the Crown

9 Government entities

The government entities to which this section applies are limited to:

- State owned corporations (SOCs) – entities incorporated under the *NSW State-owned Corporations Act 1989*
- Statutory corporations that do not represent the Crown – entities incorporated under statute, and
- Local councils – entities under the *NSW Local Government Act 1993*.

There may be circumstances where directly dealing with these government entities is appropriate, even where the proposal does not satisfy any other direct negotiation criteria set out in this policy.

The Deputy Secretary may approve directly dealing with a SOC, statutory corporation or local council where all of the following criteria are met:

- a. the proposal is necessary for the advancement of the State's priorities;
- b. the Deputy Secretary has made a decision that the State priorities are in alignment with the Act, thereby warranting direct negotiation; and
- c. the Chief Executive Officer (or equivalent) of the SOC, statutory corporation or local council agrees that the State's priorities are in alignment with its incorporating or administering statute.

Prior to entering into a direct engagement with the government entity, Crown Lands should document the justification for entering exclusive negotiations, which should be approved in writing by the Deputy Secretary. Depending on the scale and complexity of the deal, Crown Lands may wish to follow the process set out in the NSW Government's – *Direct Dealing Guidelines, 2021*, and the process can be adapted to suit the specific requirements of the transaction.

Advice of outcome

The department will determine, in accordance with this policy, whether the proposal can proceed by way of direct negotiation. If it cannot proceed the proponent will be advised in writing of the reasons why the application has been formally refused.

If it is determined the proposal can proceed by way of direct negotiation a detailed assessment of the proposal will then be completed in accordance with the relevant guidelines.

Roles and responsibilities

- The department:
 - a. reviews and responds to requests in accordance with this policy and associated procedural guidance
 - b. complies with all legislative, policy and delegation requirements relating to sale or lease transactions
 - c. responds to proponents in a timely manner with accurate and fulsome information
- Proponents:
 - a. respond to the department in a timely manner with accurate and fulsome information
 - b. abide by the terms of sale or leasing processes, including probity requirements whether by competitive process or direct negotiation.

Definitions

For the purpose of this policy, the definitions below are not provided for by the Act, and are defined in this policy to provide guidance and ensure consistency.

- **Acceptable proponent:** a proponent considered acceptable, having regard to the ‘fit and proper’ criteria (See Annexure A to the Leasing of Crown land policy – IND-O-253)
- **Competitive process:** a non-exclusive process designed to introduce competition between more than one party
- **Deputy Secretary:** Deputy Secretary responsible for Crown Lands or otherwise the appropriate delegate in accordance with the delegations in force at the time a decision is being made
- **Direct negotiation:** negotiating directly with one proponent in accordance with the circumstances specified in this policy
- **Holding-over:** the continued approved occupation of the premises by the tenant after the lease term has expired
- **Interest expressed:** an unsolicited proposal made by one or more proponents at any time during the life cycle of a lease and must be site specific. General, non-specific, interest expressed will not be considered or recorded. Refer to Guideline – allocation of Crown land leases.
- **Material benefit:** any commercial return or economic benefit from the land could only be obtained by the adjoining land holder
- **Negotiation protocol:** a protocol that will detail the terms and conditions under which the sale or lease will be negotiated.
- **Proponent:** a person or organisation that submits an application to purchase or lease Crown land
- **Proposal (or application):** a request to purchase or lease Crown land

- **Significant investment:** the amount of capital expenditure that is proposed to be invested in the site.

Legislation

- NSW *Crown Land Management Act 2016*.

Related policies

- NSW Department of Planning and Environment – Crown Lands Allocation of Crown Land Policy (IND-O-263)
- NSW Department of Planning and Environment – Crown Lands Leasing of Crown Land Policy (IND-O-253)
- NSW Department of Planning and Environment – Crown Lands Sale of Crown Land Policy (IND-O-251)
- NSW Department of Planning and Environment – Fraud and Corruption Control Policy (2021)
- NSW Department of Planning and Environment – Code of Ethics and Conduct (2022)

Other related documents

The following documents provide further information to support compliance with this policy.

- Department of Planning and Environment – Crown Lands Guideline – Management of Crown land leases
- Department of Planning and Environment – Crown Lands Guideline – Allocation of Crown land leases
- Department of Planning and Environment – Crown Lands Guideline – Sale of Crown land
- ICAC, Direct Negotiations: Guidelines for Managing Risks (2018)
- NSW Government, Unsolicited Proposals - Guide for Submission and Assessment (2022)
- NSW Government, Direct Dealing Guidelines (2021)

Safety considerations

This policy does not negate any work health and safety requirements.

Contact

Department of Planning and Environment – Crown Lands

Telephone: 1300 886 235

Email: cl.enquiries@crowmland.nsw.gov.au

cl.leases@crowmland.nsw.gov.au

Website: www.crowmland.nsw.gov.au

Revision history

Version	Date Issued	Notes	By
1	14/03/2016	New policy as a result of practice and governance improvements	Group Director Governance & Strategy
2	28/8/2016	Amendment of clauses 5.1 and 5.3 in response to feedback from ICAC. Amendment to 5.5 and 7 to clarify who is responsible for determining when consultation with DPC is required.	Group Director Governance & Strategy
3	01/07/2017	Updated to support the <i>Crown Land Management Act 2016</i>	Director Crown Property Services
4	20/09/2018	Minor update made to policy	Director Crown Property Services
5	3/12/19	Minor update made to document reference	Policy Team
6	15/04/2020	Updated to support appointment of new Deputy Secretary and organisational structure.	A/Executive Director Greater Sydney and Commercial
6.1	01/06/2023	Updates to support published guidance on direct dealings and unsolicited proposals	Deputy Secretary, Crown Lands

Review Date

15 April 2023