



Conditions: Tendering and Contract

IT Consultant Services

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CONDITIONS OF TENDERING AND CONTRACT IT CONSULTANT SERVICES

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1. CONDITIONS OF TENDERING

1.1 GENERAL

Unless the contrary intention is indicated this RFT is to be interpreted in the same manner and words have the same meaning as in the Conditions of Contract.

In these Conditions of Tendering the following definitions apply:

'Addendum' means any document expressly stated to be an Addendum, which is issued by the Principal varying some provision in the original RFT prior to the stated closing time and date.

'RFT' means this request for tender and includes all conditions, annexures, schedules, attachments and addenda.

'Tender' means all documents lodged by the Tenderer in response to the RFT.

'Tenderer' means the person lodging a Tender in response to the RFT.

1.2 LODGEMENT OF TENDERS

For the Tender to be considered, the Tenderer shall complete and submit one copy of the documents listed in the section of the Annexure to the Conditions of Tendering and Contract titled "Documents to be Lodged" (ie all Response Schedules).

- (a) in English;
- (b) in the form required; and
- (c) to be fully received by the stated time and date for closing of the Tender.

Any Tender that does not comply with these conditions or which contains provisions not required or allowed by the RFT may result in the Tender being declared ineligible for consideration.

Oral Tenders or Tenders submitted by electronic mail (other than via the Quotations and Tenders Online eLodgement Service) shall be declared ineligible for consideration.

The Principal will not be liable for any expense or loss, which may be incurred by any Tenderer in the preparation of its Tender. Once lodged, the Tender shall become the property of the Principal.

1.2.1 Closing Time and Date

Tenders will close at the time and on the date stated on the front cover of the RFT.

1.2.2 Lodged by Hand

Tenders delivered by hand (including by a commercial courier service) shall be enclosed in a sealed envelope marked with the RFT Number and closing date. NOTE: Lodgement by commercial courier service is **NOT PERMITTED** at the Palmerston Quotation and Tender Box.

The preferred Quotation and Tender Box for lodgement of the hand delivered Tender is as stated on the cover of the RFT. Tenders however may be lodged by hand in any of the following Quotation and Tender Boxes:

Department of Business and Employment
Contract and Procurement Services
Ground Floor, Enterprise House
28-30 Knuckey Street
DARWIN NT 0800

Department of Business and Employment
1st Floor, Herbarium (Gaymark Plaza)
4 Mansfield Street
PALMERSTON NT 0830

Department of Business and Employment
1st Floor, NT Government Centre
5 First Street
KATHERINE NT 0850

Department of Business and Employment
1st Floor, Alice Plaza
Corner Parsons Street and Todd Mall
ALICE SPRINGS NT 0870

Department of Business and Employment
Shop 2, Ground Floor, Barkly House
99 Paterson Street
TENNANT CREEK NT 0860

Tenderers lodging by hand in other than the Quotation and Tender Box referred to on the front cover of the RFT must take particular care to show the RFT Number and closing time and date on the envelope.

1.2.3 Lodged by Post

Tenders sent by prepaid post must be directed to the postal address stated on the cover of the RFT.

1.2.4 Lodged by Facsimile

Tenders sent by facsimile must be directed to the facsimile number stated on the cover of the RFT.

1.2.5 Lodged by Electronic Lodgement

Where electronic lodgement has been allowed, Tenders sent by electronic lodgement must be:

- (a) submitted using the eLodgement button via the Quotations and Tenders Online eLodgement Service as stated on the front cover of the RFT; and
- (b) in the electronic format as specified (ie .arf, .doc, .jpg, .pdf, .rft, .tif, .txt, .xls, .zip)

Tenders lodged in an unspecified electronic format will be invalid and declared ineligible for consideration.

Where select tenders have been sought and access to the RFT is provided from an e-mail link, Tenders must be submitted electronically using the same e-mail link.

The Tender may be admitted for consideration on the basis that the transmission of the Tender is acknowledged by the Tenderer as being the true and legal version and is completed, submitted and acknowledged by the stated time and date for closing of Tenders.

In choosing to use the eLodgement option, Tenderers agree to comply with the conditions of use, of the Quotations and Tenders Online eLodgement Service.

If, for any reason, the electronic Tender (except pricing schedule[s]) submitted becomes corrupt, illegible, inadequate or incomplete as a result of transmission, storage, etc. a hard copy or a further electronic copy of the Tender must be provided by the Tenderer on request from the Principal. Pricing schedule(s) submitted electronically that become corrupt, illegible, inadequate or incomplete as a result of transmission, storage, etc will result in the Tender being declared ineligible for consideration.

1.2.6 Late Tenders

Tenders received (in part or full) after the stated time and date for closing of Tenders are ineligible for consideration.

Notwithstanding the preceding paragraph Tenderer may appeal such decisions however:

- (a) Tenders submitted by prepaid post or a commercial courier service, received after the stated time and date for closing of Tenders may be considered only if it can be established to the satisfaction of the Procurement Review Board that the Tender was posted or despatched before the stated time and date for closing of Tenders and in the ordinary course of business would not have been received late. Impressions of company owned franking machines are not acceptable evidence of timely posting or despatch.
- (b) Tenders submitted via the Quotations and Tenders Online Service may be considered only if it can be established to the satisfaction of the Procurement Review Board that they were submitted before the stated time and date for closing of Tenders, as evidenced in the acknowledgment of receipt from the NT Government Tender Lodgement host server.
- (c) The Procurement Review Board may, but is not obliged to, consider Tenders that appear to its satisfaction to have been submitted prior to the stated time and date for closing of Tenders where those Tenders were not received before the stated time and date for closing of Tenders because of a fault or failure of Quotations and Tenders Online eLodgement Service.
- (d) Times and dates displayed on transmissions from company owned facsimile transmission devices are not acceptable evidence of timely transmission.

1.3 TENDERERS TO INFORM THEMSELVES

Tenderers at their own expense shall inform themselves fully of all circumstances and conditions relating to submitting a Tender, including compliance with all legislation applicable to performance of the Services, an inspection of the Site if applicable, and shall satisfy themselves as to the correctness and sufficiency of the RFT documentation.

The NT Government Procurement Framework which includes the NT Procurement Code can be found at the web address www.nt.gov.au/dbe/business/tenders-contracts/references/Pages/code.aspx or is available at the point of issue of the RFT.

1.4 COMPLIANCE WITH NT PROCUREMENT CODE

- (a) In preparing its Tender, submitting its Tender and throughout the tendering period and process the Tenderer shall comply with the Northern Territory Procurement Code ('Code').
- (b) A copy of the Code is available at the web address specified in the clause entitled "Tenderers To Inform Themselves".
- (c) If the Principal:
 - (i) has evidence that the Tenderer has not complied with the Code; or
 - (ii) is of the reasonable opinion that the Tenderer has not complied with the Code,the Principal may, at its absolute discretion, deem the Tender submitted by the Tenderer to be ineligible for consideration.

1.5 ENQUIRIES

Should the Tenderer:

- (a) have any doubts as to the meaning of any part of the RFT; or
- (b) find any discrepancy or error; or
- (c) find any omission in the RFT (for example all pages are not numbered consecutively and that all drawings, attachments or supplements referred to are not included, etc);

the Tenderer shall seek clarification in writing (which may be by means of electronic transmission) from the person specified in the Annexure, as early as possible but in any event before the stated time and date for closing of Tenders.

Where attachments or supplements have been referred to in any section of the RFT these should be read in conjunction with the section to which they refer.

Any clarification given pursuant to this clause may also be issued to all other prospective Tenderers. No explanation or amendment to the RFT shall be recognised unless in the form of a written addendum issued by the Principal.

Any Tenderer who believes the RFT to be discriminatory, restrictive or biased should inform the Director, Contract and Procurement Services in writing to capsassist.dbe@nt.gov.au as early as possible, but in any event before the stated time and date for closing of Tenders.

1.6 SITE INSPECTION

Arrangements for a Site inspection are as stated in the Annexure.

APPLICABLE IF SPECIFIED IN ANNEXURE - ANYTIME

Prior to submitting a Tender it is recommended the Tenderer inspect the Site.

APPLICABLE IF SPECIFIED IN ANNEXURE - BY ARRANGEMENT - NOT MANDATORY

Prior to submitting a Tender the Tenderer is encouraged to inspect the Site. Inspection of the Site is **not mandatory**. However permission to visit the Site **must** be first obtained by contacting the person nominated in the Annexure.

APPLICABLE IF SPECIFIED IN ANNEXURE - SET TIME - NOT MANDATORY

Prior to submitting a Tender the Tenderer is encouraged to inspect the Site. Inspection of the Site is **not mandatory**.

The Site inspection will be held at the location, date and time specified in the Annexure. Any additional information provided at the Site inspection will be distributed to Tenderers by issue of an addendum.

Any subsequent Site inspections will be solely at the Principal's discretion and, where subsequent Site inspections are organised, Tenderers will be advised and invited to attend by issue of an addendum.

APPLICABLE IF SPECIFIED IN ANNEXURE - SET TIME - MANDATORY

Prior to submitting a Tender, the Tenderer **must** attend a **mandatory** Site inspection. The Site inspection shall be held at the location, date and time specified in the Annexure.

All prospective Tenderers must attend the Site inspection regardless of any previous knowledge or familiarity with the Site. Subsequent or alternative inspections for individual Tenderers will not be permitted. Any additional information provided at the Site inspection will be distributed to Tenderers by issue of an addendum.

In addition to attending the Site inspection the Tenderer is required to have the Schedule of Attendance at the Mandatory Site Inspection (**'Schedule'**) (which is included in the Response Schedules) signed by the Principal's Officer conducting the Site inspection. The completed and signed Schedule must be lodged as part of the Tenderer's Tender. Where the Tender is lodged electronically via the Quotations and Tenders Online eLodgement Service, the Schedule shall include the signature of Principal's Officer conducting the Site inspection (ie be a scanned document lodged in .pdf format or similar).

A Tenderer may authorise a third party to attend the mandatory Site inspection as its authorised representative, however, it remains the responsibility of the Tenderer to have the Schedule of Attendance at the Mandatory Site Inspection completed and attendance on its behalf noted in the Principal's record of attendees at the Site inspection.

Failure to attend the mandatory Site inspection and/or lodge the signed Schedule where expressed as mandatory will result in the Tenderer's Tender being declared ineligible for consideration.

The Procurement Review Board shall be the sole arbiter of any Tender declared ineligible for consideration under the provisions of this clause.

1.7 SITE RULES

Tenderers are advised that there may be restrictions on carrying out the Services to be performed at the Site. Tenderers shall become familiar with the rules and regulations in force at the Site as issued by the relevant authority.

Where Site Rules apply the Tenderer if awarded the Contract will be required to comply with the Site Rules and to ensure that their employees and sub-consultants undertaking work within the Site are made aware of the Site Rules, their application and that they comply with the Site Rules.

1.8 SIGNING OF DOCUMENTS

The Tenderer shall sign its Tender as indicated below:

- (a) In the case of a corporation:
 - (i) with its common seal, and the fixing of the seal witnessed by:
 - 2 directors of the company; or
 - a 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; or
 - (ii) without its common seal, if signed by:
 - 2 directors of the company; or
 - a 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; or
 - (iii) by signature of two persons (other than the persons described in clause [ii]) authorised by the corporation to bind it in contract. In such circumstances a copy of the authorisation duly executed by the corporation in accordance with clause (i) or (ii) must be submitted with the Tender.
- (b) In the case of a firm (including a firm trading under a business or trading name and a partnership):
 - (i) by signature of each proprietor of the firm; or
 - (ii) in the case of firms having more than five proprietors, by signature of the proprietors authorised to bind the firm in contract. In the case of the later evidence of the authority of those proprietors to bind the firm may be required by the Principal; or
 - (iii) any proprietor who is a corporation must sign the Tender in the manner indicated in paragraph (a) above.

Where the Tenderer is lodging its Tender via the Quotations and Tenders Online eLodgement Service, there is no requirement to complete the "signature" block on the Declaration by Tenderer form.

Where the Tender is from a:

- (a) person or persons, full given names are to be provided; or
- (b) firm or business or trading name, full given names of each member of the firm are to be provided; or
- (c) company, the full name and registered address are to be provided.

Each Tender shall contain the Tenderer's unique business identifier required by law (eg ACN/ARBN/ABN) and an address for service of any notices necessary or required to be or which may be served on or given to the Tenderer in connection with its Tender and any subsequent contract arising out of acceptance of the Tender.

1.9 TENDER VALIDITY

Tenders shall remain valid for the period stated on the Tender Form. If a Tender is not formal in accordance with these Conditions of Tendering, the tender validity period shall commence from the date on which the Tender is formalised to the satisfaction of the Principal. A Tenderer may withdraw their Tender at any time after the expiration of the tender validity period, but shall not withdraw their Tender prior to the expiration of such period unless such withdrawal is accepted by or on behalf of the Principal.

1.10 ALTERNATIVE TENDERS

Tenderers may submit alternative Tenders where the RFT states that alternative Tenders are allowed. Where the RFT specifies that an alternative Tender must be accompanied by a conforming tender, a conforming tender must be submitted with the alternative Tender.

Alternative Tenders must be clearly identified as an "Alternative Tender".

Tenderers are encouraged to offer options or solutions, which may (for example in a novel or innovative way), contribute to Principal's ability to carry out its business in a more cost-effective manner. These may be related to the outputs; or functional, performance and technical aspects of the requirement.

Where a Tenderer submits an offer which meets the requirements in an alternative and practical manner, it shall include any supplementary material, together with associated prices, which demonstrates in detail that such an alternative will fully achieve and/or exceed all the specified requirements, together with references as to why the additional features may be advantageous.

1.11 PART OFFER AND PART ACCEPTANCE

Unless otherwise provided in the Annexure the Tenderer shall offer for the whole of the Services.

Where part offers are allowed, the Principal reserves the right to accept a portion or the whole of any Tender at the price or prices tendered unless the Tenderer specifically states to the contrary in its offer.

1.12 TAXES, DUTIES AND FEES ETC.

The Tenderer shall ensure that the Tender is inclusive of all taxes, fees, duties, royalties, premiums, costs, charges and the like which will be due and payable to any person or authority under the Contract.

1.13 PRICING

All prices shall be stated in Australian dollars and where applicable be inclusive of GST. Unless otherwise indicated prices shall allow for labour, materials, transport, freight, overheads, profits and all other costs applicable.

Any Schedule of Rates/Fees/Lump Sum Break-up, which is included in the Response Schedules shall be completed and lodged with the Tender. Unless otherwise required, pricing shall be submitted for each item in the Schedule.

Any Tender in which the Schedule is not fully completed as required may result in the Tender being declared ineligible for consideration.

Unless otherwise stated, any quantities given in the Schedule are not guaranteed as to the amount of work under the Contract to be undertaken under the Contract, but shall be used for Tender assessment purposes only. The Principal will only be liable for the acceptance, subject to contract, of the Services ordered.

1.14 COMPETITIVE NEUTRALITY

Government owned businesses, Local, Territory, State and Federal Government agencies and authorities responding to public tenders must submit two prices against each item in the pricing schedule provided. One price is to be the tendered price offered and the other being the adjusted competitively neutral price. The competitively neutral price is to be prepared in accordance with the "Northern Territory Government

Competitive Tendering Guidelines". A copy of the Guidelines is available from the place of issue of the RFT documents or from the following web address:

www.nt.gov.au/dbe/business/tenders-contracts/references/tendering-contract/Pages/competitive-neutrality.aspx

1.15 LOCAL DEVELOPMENT

The NT Government is committed to supporting businesses that use local contractors and suppliers and hire and train Territorians. Assessment will take into consideration businesses that demonstrate a commitment to employing Territorians including indigenous Territorians, accredited training of its employees and sourcing goods and services from local businesses.

Tenderers must include in the Response Schedules provided and submit with its Tender, details of sub-consultants/suppliers to be used (where applicable), indigenous employees and all employees undertaking accredited training.

Employees listed as undertaking accredited training through an apprenticeship or trainee pathway will only be recognised as being compliant for Tender purposes if:

- (a) a signed contract of training for the apprentice or trainee is currently with the Australian Apprenticeships NT Office; or
- (b) the apprentice or trainee details appear on the Data Entry Level Training Agreement (DELTA) database, maintained by the Department of Business and Employment (DBE); or
- (c) the training being undertaken is a recognised accredited training course.

Further information on NT Government Policy on the use of apprentices or trainees on Government Contracts and accredited training programs can be obtained from:

Training Operations Unit, Department of Business and Employment 11 th Floor, Mitchell Centre 55 – 59 Mitchell Street DARWIN NT 0800 Telephone: (08) 8935 7711	OR	GPO Box 2391 DARWIN NT 0801 Facsimile: (08) 8901 1326
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Further information regarding the employment of apprentices or trainees can be obtained from:

Australian Apprenticeships NT, 6 Searcy Street DARWIN NT 0800 Telephone: 1300 137 130	OR	GPO Box 3049 DARWIN NT 0801 (08) 8935 8200
19 Hartley Street ALICE SPRINGS NT 0870 Telephone: (08) 8953 3311	OR	

1.16 CHANGES TO CONDITIONS OF CONTRACT

1.16.1 Conditions of Tendering

Tenderers **ARE NOT PERMITTED** to request changes or propose alternatives to the Conditions of Tendering applicable to the RFT. Any Tenderer who attempts to do so will have their Tender declared ineligible for consideration.

1.16.2 Conditions of Contract

Tenderers may request changes to the Conditions of Contract applicable to the RFT, or propose alternative Conditions of Contract **only** if stated in the Annexure that this is allowed.

Where Tenderers request changes to the Conditions of Contract or propose alternative Conditions, they must clearly specify in the appropriate section of the Response Schedules the changes to the Conditions that are being requested or the alternative Conditions that are being proposed.

Where Tenderers request changes to the Conditions of Contract or propose alternative Conditions of contract, they do so at their own risk, as the changes will be deemed to have formed part of their offer and their Tender will be assessed on that basis. If the requested changes or the alternative Conditions included in a Tender are not acceptable to the Principal, the Tender will not be successful.

If the RFT states that the changes to the Conditions of Contract or alternative Conditions are not allowed, then Tenderers may not request changes to the Condition of Contract applicable to this RFT, or propose alternative Conditions of contract. If a Tenderer does so, their Tender will be declared ineligible for consideration.

Nothing in this clause affects the Principal's right to negotiate with one or more Tenderers as provided for in this RFT.

1.17 TREATMENT OF LOW OR ABERRANT PRICES

Where a Tender price (or a key element of a Tender price) is considered well below the median price and/or the projects estimated value, the Tenderer, as a part of the assessment process, may be requested to confirm the tendered price and /or respond to questions regarding particular aspects of the Tender. The Tenderer may also be asked to provide written confirmation that the scope of requirement and contractual obligations are fully understood. Where the price submitted is confirmed the Principal will, at its discretion, either:

- (a) proceed with the evaluation of the Tender; or
- (b) where there is evidence that acceptance of the Tender may pose a substantial risk to the provision of the Services and the sustainability of the Tenderer, give consideration to passing over that Tender.

1.18 DISCLOSURE OF PERCENTAGE WEIGHTINGS

Tender assessment criteria and percentage weightings applicable to the RFT are detailed in either the Annexure or the document titled "Tender Assessment Criteria – Weightings" provided separately with the RFT.

Although Tender assessment criterion may include sub-criteria, percentage weightings shall only be published as a cumulative percentage against the tender assessment criterion. If sub-criteria are used and the sub-criteria are to be given percentage weightings, the weightings applying to the sub-criteria shall not be disclosed or published.

The clause titled "Tender Assessment Criteria" in the Conditions of Tendering provides examples of the types of consideration that may form part of each criterion if not stated as sub-criteria.

The Principal reserves the right to apply percentage weightings to each criterion in its total discretion, having regard to the required outcomes of the Tender.

1.19 TENDER ASSESSMENT CRITERIA

Tender responses will be scored against the assessment criteria. Selection of the successful Tenderer will be based on a best value for money assessment of Tenders against the following Tender Assessment Criteria requested in the specific Response Schedules.

The elements under each criterion are offered for the purpose of providing tenderers examples of the types of consideration that may form part of each criterion. These elements as stated under each criterion are not to be considered exclusive to any specific tender.

- (a) Past Performance:
 - (i) Performance history experience in providing similar Services and extent to which previous undertakings were achieved.
 - (ii) Standard/quality of Services provided.
 - (iii) Extent of supervision of the Consultant required.
 - (iv) Previous disputes and claims.
 - (v) References.
 - (vi) Safe and fair workplace record.
- (b) Timeliness:
 - (i) Compliance with the timeframe specified.
 - (ii) Vulnerabilities to the completion timeframe.
- (c) Capacity:
 - (iii) Ability to perform Services including the experience of the personnel nominated to perform the Services and those of any sub-consultants to be used (eg physical and technical capacity).
 - (iv) Number, details and value of Contracts in progress.
 - (v) Legal action pending.
 - (vi) Financial capacity (including current credit rating).
 - (vii) Risk.
- (d) Local Development and Value Adding:
 - (i) Enhancement of industry and business capability in the Northern Territory.

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- (ii) Improved capacity and quality in supply and/or service response.
 - (iii) Accredited training programs currently supported by the Tenderer and/or will be supported or utilised in providing these Services.
 - (iv) Proposed level of usage of apprentices and/or trainees that will be supported or utilised in providing these Services.
 - (v) Proposed number of jobs for Territorians that will be supported or utilised in providing these Services.
 - (vi) Proposed number of jobs for Indigenous Territorians that will be supported or utilised in providing these Services.
 - (vii) Proposed level of involvement of local Indigenous enterprise on these Services.
 - (viii) Any regional development opportunities.
 - (ix) Any Northern Territory research and development proposals being undertaken or proposed by the Tenderer.
- (e) Innovation:
- (i) New technology.
 - (ii) Alternative solutions.
- (f) Scope Specific Criteria:
- (i) Scope Specific Criteria are those criteria that are considered relevant to the nature of the Services being sought. Scope Specific Criteria could include, but are not limited to, any one or more of the following: environmental issues or requirements, technical requirements, and specific experience and expertise applicable to the Service required.

- (g) Price:
- (i) Upfront costs; OR
 - (ii) Through-life costs eg:
 - Cost of ongoing training of Agency staff in performing the Services over a specific time.
 - Cost of transit in and out or implementation from one Consultant to another.
 - (iii) Any other factors that would impact on costs to the Government.

Tenderers should provide all relevant factors addressing the selection criteria specified in the Response Schedules, which may assist the Principal in making an assessment of the Tender.

The Principal reserves the right to apply weightings to each criterion in its total discretion, having regard to requirements contained in the NT Government Procurement Framework.

1.20 CLARIFICATION AND ADDITIONAL INFORMATION

The Tenderer may be called upon to clarify information contained in their Tender or to supply information additional to that provided in their Tender to demonstrate to the satisfaction of the Principal that the Tenderer has the ability to perform the work specified.

The Tenderer shall within the time specified comply with any such requests. Failure to submit any or all of the information required, in the time stipulated, may result in the Tender being declared ineligible for further consideration.

1.21 NEGOTIATIONS

- (a) The Principal may engage in detailed discussions and negotiations with one or more Tenderers.
- (b) Without limiting sub-clause 1.21 (a), the selection of Tenderers under this clause does not bind the Principal to a contractual relationship and is not a representation that a contract will be entered into between the Principal and the Tenderer.
- (c) The selection of a preferred Tenderer is subject to successfully concluding negotiations. The result of any negotiations will be incorporated into the final Contract.
- (d) If the parties fail to complete satisfactory negotiations, the Principal may, at its sole discretion, terminate negotiations with that Tenderer and commence negotiation with another Tenderer or to terminate this Tender Process or to exercise any other right reserved to the Principal under law or elsewhere in this RFT.

1.22 PERFORMANCE REPORT

The Tenderer will, if awarded the Contract, agree to the preparation and use of the Performance Report in the manner set out in the Conditions of Contract.

1.23 PRIVACY NOTICE

The Principal is collecting the information on the Response Schedules to determine eligibility to contract with the Principal. This is required by Procurement Regulation 6 (7)(h). The Principal may give some or all of this information to the Procurement Review Board. Failure to provide the information in full or in part may result in the Tender being declared ineligible for consideration.

Personal information provided in the Response Schedules can be accessed by the Tenderer on request. Any queries should be directed to the Officer stated in the Annexure as the contact point.

1.24 NOTIFICATION OF ACCEPTANCE

The Principal shall not be bound to accept the lowest or any Tender.

The Notice of Acceptance of the Tender shall constitute a binding Contract between the Principal and the successful Tenderer (hereinafter called the “**Consultant**”). The Notice of Acceptance will, at the Principal’s discretion, be issued by pre-paid post, facsimile or email to the address stated in the Tender.

If Notice of Acceptance has not been given there shall be no agreement between the Principal and the Tenderer and the Tenderer shall not act on any representations or statements made by the Principal or its employees or agents prior to the issue of the Notice of Acceptance.

1.25 DEBRIEFING TENDERERS

Tenderers may request a debriefing as to the specific reasons why their Tender was unsuccessful. This is for the purpose of assisting Tenderers to improve their competitiveness for future Tenders.

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Information will be confined to discussion of the Tenderer's Tender and under no circumstances will information relating to another Tender be disclosed.

2. CONDITIONS OF CONTRACT

2.1 INTERPRETATION

In these Conditions of Contract, unless the context otherwise requires:

'Agency' means a department, agency or statutory authority of the Northern Territory of Australia.

'Annexure' means the section in the RFT detailing the specific requirements applicable to the Conditions of Tendering and Contract.

'Business Day' means any day which is not a Saturday, Sunday or a NT wide public holiday within the meaning of the *Public Holidays Act*.

'Business Hours' means from 8.00am to 5.00pm on a Business Day at the place where the Services are to be provided.

'Completion' means the Principal has determined that the performance of the Services has been completed.

'Consultant' means the legal entity that, as party to the Contract is bound to perform the Services in accordance with the Contract and includes the successors and lawful assigns of the Consultant.

'Contract' means the document that constitutes or evidences or, as the case may be all the documents which constitute or evidence the final and concluded agreement between the Principal and the Consultant concerning the performance of the Services.

'Date of Acceptance' means the date, which appears on the Notice of Acceptance and if no date appears is the date on which the Principal sent the Notice of Acceptance issued by the Principal accepting the Tenderer's Tender.

'Developed Software' means software specifically designed for the Principal under the Contract. Depending how advanced its development is, it may be either a Product or a Service or both.

'Documents' means all material stored by any means and produced or used by the Consultant in the course of the Contract including sketches, plans, drawings, specifications, designs, estimates, calculations, reports, models, computer source codes and other articles, equipment, information, files and data.

'Fee' means the rate per any section or item of the Services as stated in the Contract.

'Indigenous Person' is a person of Australian Aboriginal or Torres Strait Islander descent who identifies themselves as Indigenous and is accepted in the community in which they live as an indigenous person.

'Intellectual Property' means all copyright, patents, registered and unregistered trademarks (including service marks), registered designs, semiconductor or circuit layouts, trade secrets and know-how.

'Law' includes common or customary law, equity, judgement, legislation, order, regulation, statute, by-law, ordinance or any other legislative or regulatory measure in each case of any jurisdiction whatsoever and includes any amendment, modification or re-enactment of them (and "lawful" and "unlawful" shall be construed accordingly).

'Licensed Software' includes software to be used to fulfil the Services which was not developed by the Consultant or the Principal and which is not freely useable by any member of the public.

'Lump Sum' means the total sum (fee) which will have become payable to the Consultant by the Principal upon completion of the Services.

'Notice of Acceptance' means the written notification and any accompanying documentation sent to the Consultant by the Principal advising acceptance of its Tender to provide the Services under the Contract.

'Principal' means the Northern Territory of Australia. The Principal for Power and Water Contracts is the Power and Water Corporation.

'Principal's Representative' means the person nominated by the Principal or other person from time to time appointed in writing by the Principal to act as the Principal's Representative for the purposes of the Contract.

'Request for Tender (RFT)' means the document(s) containing or referring to the Conditions of Tendering Conditions of Contract, the Annexure, Special Conditions of Contract (if any), Northern Territory Procurement Code, Scope of Services, Response Schedules, Drawings or Diagrams (if any) and any other document issued for the purposes of inviting tenders for the Services.

'Schedule of Rates' means any schedule included in the Contract which, in respect of any section or item of the Services to be carried out, shows the respective rate (Fee) of payment for performance of that service and which may also include lump sums, other sums, quantities and prices.

'Services' means the work specified in Contract, and includes all information describing the functional, operational, qualitative, quantitative, time and cost requirements and other supporting information provided by the Principal from time to time, which the Consultant is required to provide, as stated in the Notice of Acceptance, and includes all variations and remedial work.

'sub-consultant' means a person other than the Consultant's employees engaged by the Consultant to carry out parts or a part of the Services for the Consultant.

'Tax Invoice' has the meaning given in *A New Tax System (Goods and Services Tax) Act 1999*.

In the Contract, unless the contrary intention appears:

- (e) headings are for the purpose of convenient reference only and shall not be used in the interpretation of these conditions;
- (f) the singular includes the plural and vice-versa;
- (g) a reference to one gender includes the other;
- (h) a reference to a person includes a natural person, a body politic, body corporate, a partnership, joint venture, incorporated association, government, local government authority or agency;
- (i) a reference to a party includes that party's administrators, successors, and permitted assigns, including any person to whom that party novates any part of the Contract.
- (j) if the last day of any period prescribed for the doing of an action falls on a day which is not a Business Day, the action shall be done no later than the end of the next Business Day;
- (k) a reference to time is to Australian Central Standard Time;
- (l) a reference to an Act is a reference to an Act of the Commonwealth, State or Territory of Australia, as amended from time to time, and includes a reference to any subordinate legislation made under the Act;
- (m) a reference to a 'dollar', '\$', '\$A' or 'AUD' means the Australian dollar unless otherwise stated;
- (n) a reference to a "measurement" means Australian legal units of measurement unless otherwise specified;
- (o) a reference to a specification, publication, Commonwealth policy or other document is a reference to that specification, publication, Commonwealth policy or document, in effect on the date of the Notice of Acceptance and updated from time to time, or alternatively, a reference to another version of the document if agreed in writing between the parties;
- (p) the word 'includes' in any form is not a word of limitation;
- (q) a reference to a clause includes a reference to a subclause of that clause; and
- (r) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this Contract, and a reference to this Contract includes any schedule or annexure.

2.2 FORMATION OF THE CONTRACT

The Contract between the Principal and the Consultant shall comprise:

- (a) these Conditions of Contract and any Special Conditions;
- (b) the Notice of Acceptance;
- (c) the RFT;
- (d) the Tenderer's Tender response; and
- (e) any other document expressly referred to in items (a) to (c) of this clause as forming part of the contract (together the Contract).

If there is any inconsistency between any part of the Contract, a descending order of precedence shall be accorded to the:

- (a) Special Conditions (if any);
- (b) these Conditions of Contract;
- (c) Annexure to the Conditions of Tendering and Contract;
- (d) Notice of Acceptance;
- (e) Scope of Services;
- (f) Drawings included in the RFT (if any);
- (g) any other document expressly referred to in items (a) to (f) inclusive of this clause as forming part of the Contract;
- (h) Conditions of Tendering and all other documents, other than those specified above in (a) to (f) inclusive, forming the RFT or the Contract (other than the Tenderer's Tender); and
- (i) the Tenderer's Tender response including any drawings,

so that the provision in the higher ranked document, to the extent of the inconsistency, shall prevail.

2.3 FEES AND CHARGES

2.3.1 Basis of Payment

Unless otherwise provided for in the Contract, the fee and associated disbursement and expenses shall constitute the Consultant's only remuneration for the Services performed under the Contract and shall be deemed to include familiarisation and compliance with all the requirements, standards, procedures and instructions of the Principal.

The basis of payment will be as stated in the Annexure. Unless otherwise stated in the RFT, prices will be considered firm.

2.3.2 Lump Sum Fee

Where the fee is payable on a lump sum basis, the fee shall be the lump stated in the Contract and shall not be adjusted except as provided for in the clause titled "Variations".

2.3.3 Percentage Fee

Where the fee is payable on a percentage basis, the Services shall be carried out in stages and with the respective fee percentages applying to each stage as stated in the Contract. Fees shall not be adjusted except as provided for in the clause titled "Variations".

2.3.4 Upper Limit Estimate

Where the fee is payable on the basis of an upper limit estimate or fixed price comprising professional fees, disbursements and expenses will be specified in the Contract.

During the execution of the Contract should the anticipated costs exceed the upper limit estimate or fixed price the Consultant must seek the approval of the Principal for variation to the upper limit or fixed price before proceeding.

2.3.5 Time Charge Fee

Where the fee is payable on a time charge basis, the remunerative rate payable by the Principal in respect of any person engaged by the Consultant to perform the Services shall be relative to the level of the task performed by that person as set out in the Contract.

Hourly rates shall be applicable only to the Consultant's professional and technical staff, and no payment shall be made in respect of time spent on the Services by support staff including managerial and administration staff and inexperienced students as due allowance for such staff shall be incorporated in the overhead loading included in the agreed hourly rates.

The Consultant shall keep accurate time sheets to substantiate any fee claims based on a time charge basis.

2.3.6 Disbursements and Expenses

Where not already included in the negotiated fee, the Consultant shall be reimbursed for disbursements and expenses as have been reasonably and properly incurred in performing the Services. Such expenses must have the prior approval of the Principal and shall be limited to the following:

- (a) Travelling time allowance, where applicable, shall be paid at the appropriate hourly rate for the time spent in travelling, where the Consultant actually pays such an allowance.
- (b) Accommodation and meals shall be reimbursed at current allowances payable to officers of the Principal.
- (c) Car allowances shall be paid per kilometre in accordance with the current Australian Taxation Office rates.
- (d) Fares for travel by means of public transport shall be reimbursed at actual costs except for travel by air, which shall be limited to the cost of economy class fares.
- (e) Unless provided otherwise in the Contract, the cost of reproducing final documents in quality where directly by the Principal shall be reimbursed at commercial rates agreed in advance.
- (f) The cost of reproducing documents in small quantities for periodic reviews will not be reimbursed.
- (g) The cost of other approved expenses shall be reimbursed at cost.

The Consultant shall submit a claim for such authorised expenses and disbursements and provide the Principal with evidence of those costs.

Expenses associated with attending meetings within a fifty (50) kilometre radius from the Consultant's office shall not be reimbursed.

2.4 GOVERNING JURISDICTION

Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the Courts of the Northern Territory of Australia and waives any immunity or any objection it may have to any action in those

Courts and to a claim that any action has been brought in an inconvenient forum or to those Courts not having jurisdiction

2.5 ENTIRE AGREEMENT

The Contract formed between the parties for undertaking the Services constitutes the entire agreement between the parties relating to the subject matter hereof, and supersedes any previous agreements or understandings.

2.6 GENERAL OBLIGATIONS OF THE PARTIES

Both the Principal and the Consultant will, at all times:

- (a) act reasonably in performing their obligations and exercising their rights under the Contract;
- (b) diligently perform their respective obligations under this Contract; and
- (c) work together in a collaborative manner.

2.7 PRINCIPAL'S RESPONSIBILITIES AND OBLIGATIONS

The Principal shall give or cause to be given to the Consultant timely instructions, decisions and information sufficient to define the requirements of the Services including budgetary arrangements and limitations.

The address for service of Notices is as stated in the Annexure.

2.7.1 Principal's Representative

The Principal's representative shall exercise the duties; discretions and powers vested in the Principal under the Contract except this power of appointment.

The Principal's Representative is nominated in the Annexure.

2.7.2 Contract Manager

For the purpose of exercising some of the powers, duties, discretions and authorities, vested in him on behalf of the Principal, the Principal's Representative may from time to time appoint a representative ('**Contract Manager**'). The Contract Manager will be notified in the Notice of Acceptance.

The Contract Manager will act as first point of contact for all matters under the Contract.

The Consultant shall recognise and accept notices from the Contract Manager as if the Principal issued such. Any reference to the Principal within these conditions shall be deemed to be a reference to the Contract Manager so far as it concerns the exercise of the Contract Manager's powers by virtue of his appointment.

2.7.3 Equipment Provided By Principal

The Principal shall provide the Consultant with adequate access to computer terminals and security clearance and access to data and codes necessary to perform the Services.

Word processing and other administrative support are the responsibility of the Consultant.

2.8 DIRECTIONS

The Consultant shall comply with any direction either orally or in writing issued given or served upon him by the Principal. Any direction given orally shall, as soon as practicable after it is given, be confirmed in writing.

For the purposes of this clause the word "direction" includes any agreement, approval, authorisation, certificate, decision, demand, determination, direction, explanation, instruction, notice, notification, order, permission, rejection, request or requirement which the Principal may make, give or issue pursuant to the provisions of the Contract.

2.9 CONSULTANT'S RESPONSIBILITIES AND OBLIGATIONS

The Principal will be relying on the professional skills of the Consultant to provide a service, which is technically sufficient and complete. The Consultant shall:

- (a) provide all professional advice and skills which are normally required for the class of services which it has agreed to provide under the Contract;
- (b) remain fully responsible for all work undertaken by the Consultant regardless of any review or acceptance of that work by the Principal;
- (c) supply publications, aids and documentation which is in English, of a reasonable standard in terms of presentation, accuracy, content and with all key terms, words and symbols adequately defined or explained;

- (d) be liable for any loss or damage suffered as a result of any negligent act, error, omission or statement by it or its employees, agents or sub-consultants except to the extent that the loss or liability is directly attributable to the failure of the Principal, its employees or agents to take reasonable care;
- (e) employ competent staff with qualifications and experience appropriate to their task for the Services;
- (f) ensure that its employees, agents or sub-consultants meet the provisions of the clause titled "Site Rules";
- (g) promptly inform the Principal in writing if information or any document provided or caused to be provided by the Principal is found to be insufficient or inaccurate;
- (h) acknowledge that the provision of the Services within the required deadlines is an essential term of the engagement of the Consultant and of the provision of the Services; and
- (i) when using the Principal's premises or facilities, comply with all security and office regulations in effect at those premises or in regard to those facilities, as notified by the Principal.

The Consultant shall observe and comply with all requirements of all relevant Acts of the Commonwealth of Australia, Acts of the Northern Territory, and with the requirements of all regulations, by-laws, orders or subordinate legislation made or issued under any such Act, the Northern Territory Procurement Code and with the lawful requirements of any relevant authority, regulator or standard setting as shall be in force in the place affecting or applicable to the Services or the execution of the Services.

2.10 CONSULTANT'S REPRESENTATIVE

The Consultant shall appoint a representative ('**Consultant's Representative**') to be the first point of contact with the Principal. The Consultant's Representative shall be nominated to the Principal in writing.

Any direction given to the Consultant's Representative shall be deemed to be a direction issued to or served upon the Consultant.

Matters within the knowledge of the Consultant's Representative shall be deemed to be within the knowledge of the Consultant.

The Consultant or its representative shall have sufficient command of the English language to be able to read, converse and receive instructions in English.

The Consultant may, with the prior written approval of the Principal, cancel the appointment and shall nominate another Consultant's Representative.

2.11 REPLACEMENT OF CONSULTANT'S PERSONNEL

The Consultant shall notify the Principal immediately of any changes in the Consultant's personnel undertaking the Services.

The Principal may, in its absolute discretion, give notice requiring the Consultant to remove any of its personnel or sub-contracted personnel from work in respect of the Services.

The Consultant shall promptly arrange for the removal of such personnel from work in respect of the Services and their replacement with personnel acceptable to the Principal.

2.12 STATUS OF CONSULTANT

The Consultant, its employees and sub-consultants thereof, in performing the Services, are not for any purpose a servant or employee of the Principal.

2.13 NOTICES

2.13.1 Services of Notices

Notice must be:

- (a) in writing, in English and signed by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or by electronic means to the recipient's address for Notices set out in the Contract, as varied by any Notice given by the recipient to the sender.

2.13.2 Effective Date of Service

Any notice given in accordance with sub-clause 2.13.1 sent to the address set out in the Contract, takes effect when it is taken to be received (or at a later time specified in it) and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by post, three (3) Business Days after the date of posting (or seven (7) Business Days after the date of posting if posted to or from a place outside Australia); and

- (c) if sent by electronic transmission, on receipt by the sender of a transmission report from the despatching machine indicating that the notice sent was received in its entirety at the recipient's machine unless, within eight (8) Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice;

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 8.00am on the next Business Day..

2.14 SITE RULES

The Consultant, his employees and sub-consultants required to enter the Site in connection with the Services shall comply with all rules and regulations in force at the Site, including security screening through Criminal History Checks where required.

The Consultant is responsible for obtaining all relevant permits and the payment of all associated fees and/or charges which are levied by the appropriate Authority.

2.15 CONFLICT OF INTEREST

The Consultant warrants that:

- (a) At the date of Contract award, no conflict of interest exists or is likely to arise in the performance of its obligations under this Contract; and
- (b) It shall use its best endeavours to ensure that no conflict of interest exists or is likely to arise in the performance of the obligations of any sub-consultant.

The Consultant shall notify the Principal of any matter, which may give rise to an actual or potential conflict of interest of the Consultant at any time during the currency of the Contract. This information will be treated confidentially.

2.15.1 Conflict of Interest and Confidentiality Deed

Following the award of a contract and if requested by the Principal, the Consultant shall:

- (a) execute a deed in favour of the Principal regarding confidentiality and conflicts of interests as they relate to the performance of the Services; and
- (b) ensure that each of its employees, agents and sub-consultants involved in performing the Services executes such a deed.

Sample Deeds can be found at the web address:

<http://www.nt.gov.au/dbe/business/tenders-contracts/references/tendering-contract/Pages/default.aspx>

2.16 CONFIDENTIALITY AND PUBLICITY

2.16.1 Confidentiality

- a) For the purposes of this sub-clause 2.16.1 '**Confidential Information**' means any information or material relating to the Contract or the Services including (without limitation):
- (i) any information that by its nature is confidential;
 - (ii) any information designated as confidential; and
 - (iii) any information that the Consultant knows is confidential.
- b) The Consultant shall hold all Confidential Information in confidence and shall not make any use of it, except for the purposes of performing its obligations or exercising its rights under the Contract and shall not disclose or permit or cause the Confidential Information to be disclosed to any person, except:
- (i) as authorised by the Principal under the Contract or otherwise;
 - (ii) to its employees or sub-consultant, to the extent needed to perform their obligations under the Contract;
 - (iii) where the disclosure is required to be disclosed by law.
- c) The Consultant shall ensure that its employees and all sub-consultants, contractors and suppliers engaged by the Consultant for the performance of the Contract comply with the requirements of this sub-clause 2.16.1.

2.16.2 Media and Publicity

- a) The Consultant shall not issue or be involved with the release of, any information, publication, statement, interview, advertisement (other than the legitimate advertising eg for sub-consultants), award nomination, document or article for publication concerning the Contract, the Services or the site in any media without the prior written approval of the Principal.

- b) Prior to taking any action or doing anything the Consultant shall refer:
- (i) any media enquiries concerning the Contract, the site, the Principal or the Services to the Principal for the Principal's written response; and
 - (ii) any media requests concerning the Contract, the site, the Principal or the Services (including, without limitation, requests to access or take photographic or video footage of the site) to the Principal, for the Principal's written consent, which consent may be given or withheld, in the Principal's absolute discretion.

The Consultant shall ensure that its employees and all sub-consultants, contractors and suppliers engaged by the Consultant for the performance of the Contract comply with the requirements of this sub-clause 2.16.2 and obtain the Principal's prior written consent (through the Consultant) before responding to enquiries or publishing anything of the type referred to in this sub-clause 2.16.2.

2.17 LOCAL DEVELOPMENT

Except in those cases where the Consultant can reasonably demonstrate to the Principal that it is impractical for commercial, technical or other reasons to do so, the Consultant shall:

- (a) use labour including apprentices, trainees and indigenous labour available within the Northern Territory; and
- (b) use the services located and obtain supplies/materials available within the Northern Territory.

The Consultant shall, when requested by the Principal, submit a written report concerning the compliance with the provisions of this clause.

The Consultant's level of compliance with the requirements of this clause will be included in the Performance Report on the Consultant at the completion of the Contract and will be taken into consideration for further Northern Territory Government contracts for a period of twelve (12) months.

2.18 INDEMNITIES

The Consultant shall keep the Principal and employees or agents of the Principal indemnified against any legal liability, loss, claim, action or proceeding for personal injury to, or death of any person or for damage to any property arising from the carrying out of the Services (except loss or damage caused by any negligent act, omission or default of the Principal or employees or agents of the Principal) and from any costs and expense that may be incurred in connection with any such loss, claim, action or proceeding.

The Consultant shall indemnify the Principal at all times against any compensation paid or any action, claim, demand or expense arising from or incurred by reason of the existence of any patent, design, trademark or copyright or other protected right in respect of any machine, plant, work material or thing, system or method of using, fixing, working or arrangement, used or fixed or supplied by the Consultant in connection with the carrying out of the Services.

2.19 INSURANCES

2.19.1 Workers Compensation Insurance

For the purpose of this clause "worker" shall have the definition it is given in the *Workers Rehabilitation and Compensation Act 2009*.

Before commencing the Services, the Consultant shall take out and shall maintain for the duration of the Contract appropriate Workers Compensation insurance cover for all workers employed by the Consultant. This cover shall comply with the *Workers Rehabilitation and Compensation Act 2009* of the Northern Territory and policies shall be purchased from Northern Territory approved insurers. Details can be found at the following web address:

<http://www.worksafe.nt.gov.au/ServiceProviders/Insurers/Pages/Find-an-Approved-Insurance-Company.aspx>

The Consultant shall ensure that all sub-consultants who employ workers have Workers Compensation insurance cover in accordance with the *Workers Rehabilitation and Compensation Act 2009*.

The Consultant shall ensure that all persons employed under labour hire agreements, whether by the Consultant or through a labour hire firm, are appropriately covered by Workers Compensation insurance.

Self-employed Consultants should ensure that they have adequate insurance coverage in place.

The Consultant shall be responsible for ensuring that all sub-consultants have appropriate insurance policies, and, upon request, shall provide to the Principal copies of all Certificates of Currency, including those of any sub-consultants (including self-employed consultants and persons employed under labour hire agreements).

2.19.2 Public Liability

Before commencing the Services, the Consultant shall take out and shall maintain during the currency of the Contract a Public Liability policy of insurance to cover its liabilities to third parties.

The Policy shall:

- (a) note the Principal for its respective rights and interests;
- (b) include a cross-liability clause in which the insurer accepts the term "insured" as applying to each of the persons covered by the insurance as if a separate policy of insurance had been issued to each of them; and
- (c) be for an amount of not less than the sum stated in the Annexure, for any one occurrence.

The effecting of insurance shall not limit the liabilities or obligations of the Consultant under other provisions of the Contract.

The Consultant shall ensure that all sub-consultants take out Public Liability insurance that meets the requirements of this clause.

2.19.3 Professional Indemnity

Before commencing the Services, the Consultant shall take out, and shall maintain during the currency of the Contract a Professional Indemnity insurance policy for an amount not less than the sum stated in the Annexure.

The Consultant shall continue to maintain a professional indemnity policy after the conclusion of the Contract for a period and for such amount as is necessary to indemnify the Consultant in respect of all liabilities arising out of this Contract. The Consultant's liability to the Principal shall not be limited or otherwise affected by the terms of any such insurance policy.

2.19.4 Insurance of Documents

Until all original documents are finally delivered to the Principal, all risks whatsoever connected with the total or partial loss of the documents shall be the responsibility of the Consultant. The Consultant shall ensure that this responsibility is met at all times by an appropriate insurance policy.

2.19.5 Lodgement of Certificates of Currency

The Consultant shall, if so requested, provide the Principal with copies of Certificates of Currency and summaries of key provisions for all insurance policies required under clause **Error! Reference source not found.** including those of any sub-contractors (including self-employed contractors and persons employed under labour hire agreements):

- (a) prior to commencing the Services under the Contract;
- (b) within two (2) days of a written request by the Principal;
- (c) within seven (7) days after the Consultant renews an insurance policy; and
- (d) within seven (7) days after the Consultant makes any change to an insurance policy.

The Consultant will not cancel any insurance policy, or conduct itself in a manner that brings about such a cancellation of an insurance policy, except with the written consent of the Principal.

2.20 DOCUMENTS

2.20.1 Ownership and Custody

The property in all documents produced under the Contract, including title thereto and all Intellectual Property therein shall invest upon their creation in the Principal. Upon completion of the Services, the Consultant shall deliver to the Principal the originals and all copies and reproductions of all documents required by the Principal.

Unless otherwise instructed by the Principal, all manuals, standard drawings, computer programs and other documents supplied to the Consultant for reproduction or guidance during the course of the Contract shall be returned to the Principal by the Consultant upon termination or completion of the Contract.

2.20.2 Warranty and Indemnity

The Consultant warrants that any Intellectual Property embodied in or used in connection with the Services is the sole property of the Consultant or the Consultant is legally entitled to use same for the performance of the Services.

The Consultant shall indemnify and at all times keep the Principal indemnified against any action, claim, suit or demand, including a claim, suit or demand for or liability to pay compensation or damages and costs or expenses associated therewith:

- (a) under Part VII of the *Copyright Act 1968* or Part XIV of the *Patents Act 1952* in respect of the use or exercise of any letters patent or copyright; or

- (b) for any infringement or alleged infringement of letters patent, trademark, design, copyright or other protected rights, in respect of any equipment, software, machinery, plant, material or thing, system or method of using, fixing, working or arrangements used or fixed or supplied by the Consultant (hereinafter collectively referred to as "the equipment") but such indemnity shall not cover any use of any of the equipment otherwise than in accordance with the Contract.

2.20.3 Intellectual Property in Material Supplied by the Principal

Intellectual Property in all manuals, standard drawings, computer programs and other information supplied to the Consultant for reproduction or guidance in relation to the Services remains vested in the Principal. This information may not be used or reproduced for any other purpose without the prior written approval of the Principal.

2.20.4 Patents

Without limiting the generality of sub-clause titled "Ownership and Custody", any patentable inventions or processes arising in the course of, or out of the Contract are the property of the Principal and the Consultant will on demand execute such notices, waivers or assignments as may be necessary to enable the Principal to register patents.

If any analysis, design, process or construction proposed by the Consultant involves, or might involve, the payment of royalties, fees or licence fees, the Consultant shall notify the Principal in writing. Unless the Principal approves in writing of the proposal, the Consultant shall amend its proposal so that such payments are avoided.

Where any document, procedure, design or patentable work is produced as a consequence of an original or unique concept of the Consultant, the Principal may agree that the copyright or patent may vest in the Consultant or be vested jointly in the Consultant and the Principal on agreed terms.

2.21 TIME FOR COMMENCEMENT AND COMPLETION

The Consultant shall commence and complete the Services within the time stated in the Annexure or within such extended time as agreed to in writing by the Principal.

2.21.1 Program

The Consultant within fourteen (14) days of Contract award submit to the Principal a program for the delivery of the Services to meet the completion date as stated in the Annexure.

The program shall be in a form appropriate to the Services and acceptable to the Principal and may:

- (a) indicate the interdependencies of each component part of the Services;
- (b) allow appropriate periods for the review by the Principal of documents to be produced by the Consultant;
- (c) clearly indicate any allowances made in the program for delays to the provision of the Services or any component parts of the Services outside the Consultant's control; and
- (d) include a separate time line for each discrete component of the Services and a completion date for each of those components.

During the Contract, the Consultant shall progressively make the necessary adjustments to the program to ensure each stated completion date is achieved..

2.21.2 Completion Date

As soon as it becomes evident to the Consultant that the commissioned completion date is delayed or cannot be met, the Consultant may request to the Principal in writing, together with a statement of the facts on which the claim is based, an extension to the completion date.

Upon receipt of the request, the Principal will determine whether the circumstances of the delay are such as to justify any extension of time to the completion date, and notify the Consultant as soon as practicable whether the extension has been granted or not.

Notwithstanding that the Consultant has not claimed an extension of time to the completion date, the Principal may, for any reason, by notice to the Consultant extend the completion date, by nominating a date which shall be deemed to be the amended completion date.

Extra costs incurred by the Consultant by reason or as a result of or arising from the exercise by the Principal of the power to determine any extension of time shall be borne and paid by the Principal only if the extension of time was due to a breach of the provisions of the Contract by the Principal, or an act or omission on the part of the Principal or any other cause provided for elsewhere in the Contract.

If the Consultant fails to achieve the completion date or amended completion date, the amount of moneys payable to the Consultant, for the Services completed under the Contract by the Principal, shall be reduced by the amount, five per cent (5%) of the upper limit estimate or fixed price for the first ten (10) working days lapsed after the completion date or amended completion date, and an additional amount of five per cent

(5%) of the upper limit estimate/fixed price/lump sum for every five (5) working days thereafter until the completion of the Services, but the total amount of reduction shall not exceed fifteen per cent (15%) of the upper limit estimate/fixed price/lump sum.

2.21.3 Progress Reports

The Consultant shall submit reports to the Principal in an agreed format and at agreed intervals as to the progress of the Services. The Consultant shall attend progress review and coordination meetings as directed by the Principal.

2.21.4 Compliance with Laws

The Consultant shall, unless instructed by the Principal in writing that compliance is not required, ensure that the documents produced under the Contract comply with relevant Laws and shall obtain all required approvals in respect thereof.

The Consultant shall promptly advise the Principal in writing should the requirements of the Services or that part of the Services to which this work relates, conflict with any Laws or if any necessary approvals have not been obtained.

The obligations under this sub-clause shall not apply if a failure to obtain a necessary approval is due to an act, default or omission on the part of the Principal.

2.21.5 Checking, Signing and Certification

All documents prepared under the Contract shall be signed by the Consultant to certify that the documents have been prepared by competent staff and have been checked and approved for accuracy, compliance with relevant Laws, the requirements of the Contract and coordination with related documents.

The Consultant shall coordinate all documents provided or to be provided by a sub-consultant, with documents generated by the Consultant under the Contract.

The Consultant is not required to check standard documents provided by the Principal, but shall ensure that the standard documents are appropriate for their proposed use.

2.21.6 Corrections

Notwithstanding any reviews, approvals or directions undertaken or given by the Principal with respect to documents prepared by the Consultant, any error, ambiguity or deficiency, which subsequently becomes apparent, and is referred to the Consultant for correction or clarification shall be corrected or clarified by the Consultant to the satisfaction of the Principal.

The Consultant shall not be entitled to an additional fee where the correction or clarification arises from a fault of the Consultant.

The Consultant is not required to check standard documents provided by the Principal, but shall ensure that the standard documents are appropriate for their proposed use.

2.21.7 Review of Work by Others

Where the Consultant is required to take over work provided by or on behalf of the Principal, they shall review such work before proceeding. If following this review it is considered necessary by the Principal for the Consultant to make good deficiencies in such work, an additional fee will be chargeable.

In such a case, the Consultant shall obtain the Principal's written approval before proceeding with the additional work.

2.22 TESTING AND ACCEPTANCE

2.22.1 Completion Date

The Principal will accept the Services on the date the Principal agrees the tests have been successfully completed in accordance with the requirements for acceptance testing ('**Acceptance Testing**') as set out in the Contract.

Where the parties agree, that acceptance tests are not required the Services will be deemed to have been accepted where it has been delivered and/or installed in accordance with the Contract.

2.22.2 Certificate of Acceptance

Where the Contract provides for acceptance testing as a condition of payment, the Principal will issue a Certificate of Acceptance within five (5) working days after the date of completion of the Acceptance Testing. The Certificate of Acceptance will indicate the actual date of completion of the Acceptance Testing.

2.22.3 Acceptance Testing

The Principal will specify in the Contract, the Services to be tested before acceptance, and details of the testing required.

If the tests are not agreed in the Contract, and are deemed to be required, the Principal and the Consultant will agree on the content of the test, the timeframe within which it is to be conducted, the method for

conducting it and the criteria, in sufficient time for the testing to be performed before the Services is due to be delivered and/or installed in accordance with the Contract.

The Principal will provide whatever is reasonably necessary for the conduct of the tests, including power, environment, consumables and data media.

2.22.4 Failure

If the Services fail an Acceptance Test, if required, the Principal may:

- (a) require further tests, at the Consultant's expense; or
- (b) reject the Services and require its removal.

2.22.5 Additional Tests

The Principal may at any time during the Acceptance Testing period require the Consultant to carry out additional or different tests which are reasonably required to establish whether or not the Services complies with the requirements of Contract.

The Principal will pay the costs of any additional or different test except where the test was reasonably required to establish that the Services did not comply with the requirements of the Contract. In the latter situation, the Consultant will pay the costs.

2.23 INVOICING AND PAYMENT

The fee payable by the Principal to the Consultant for the provision of the Services shall be calculated as specified in the Annexure.

Unless otherwise agreed, the Consultant shall submit to the Principal a Tax Invoice not more frequently than at monthly intervals. The Tax Invoice shall be substantiated by an itemised account of actual fees, disbursements and expenses incurred.

The Consultant's Tax Invoice will include details of any Adjustments under clause titled 'Goods and Services Tax' of the Conditions of Contract and an explanation as to how such Adjustments were calculated.

The Consultant shall provide any further details in regards to the Services and/or Tax Invoice upon request by the Principal.

The Principal shall make payments within thirty (30) days of receipt of a Tax Invoice that is not disputed.

The making of a payment is not acknowledgment of the satisfactory performance of the Services. The Principal reserves the right to recover any overpayment.

Failure by the Principal to pay the amount by the due date:

- (a) will not be grounds to vitiate or avoid the contract; and
- (b) will entitle the Consultant to make a claim for interest penalties on the late payment.

Interest penalties must be claimed within ninety (90) days of the date the late payment was made by the Principal and the claim must be in the form of a tax invoice. Interest penalties are to be calculated daily, for the period after the due date until the date payment is made by the Principal, at the ninety (90) day bank bill swap rate published on 1 June each year by the Australian Financial Markets Association. Where an interest penalty period spans 1 June, the rate shall be the rate published in the year the original invoice was issued.

The Principal will not be liable for interest penalties on any payments in respect of interest penalties.

2.24 VARIATIONS

The Principal may, by written notice during the currency of the Contract, direct or permit the Consultant to vary the scope or nature of the Services including the program order of work without prejudice to the Contract. Any resultant adjustment to the fee payable to the Consultant shall be negotiated and agreed by the parties.

2.25 ASSIGNMENT

The Consultant shall not assign the Contract mortgage, charge or encumber any of the monies payable under the Contract or any other benefit whatsoever arising under the Contract, without consent of the Principal. Such consent shall not be unreasonably withheld.

2.26 SUB-CONTRACTING

Unless specifically provided for in the Contract, the Consultant shall not sub-contract any part of the Services without the prior written approval of the Principal. Such approval shall not be unreasonably withheld.

Any sub-contract shall be in writing and contain the provision that progress payments to the sub-consultant shall be made within fourteen (14) days after the Consultant has received payment from the Principal.

Any approval by the Principal to engage a sub-consultant for any part of the Services shall not relieve the Consultant from any of its liabilities under the Contract. The Consultant shall be fully liable to the Principal for the work of the sub-consultant or any employee or agent of the sub-consultant.

2.27 DISPUTES

2.27.1 Continuation of Work during Disputes

During disputes and until such time that work under the Contract are completed, the Consultant shall at all times continue to fulfil its obligations under the Contract and comply with all directions given to it by the Principal in accordance with the provision of the Contract, provided that such directions do not touch upon the subject matter of the dispute in respect of which written notice has been given in accordance with the following sub-clause.

2.27.2 Procedures for Resolution of Disputes

The Consultant shall, in respect of any dispute or difference arising out of the Contract and not later than fourteen (14) days after the dispute or difference arises, submit the matter at issue in writing with detailed particulars of the matter at issue to the Principal for decision and the Principal shall as soon as practicable thereafter give a decision in writing to the Consultant.

If the Consultant is dissatisfied with the decision of the Principal, the Consultant may, not later than twenty-eight (28) days after the decision is given, notify the Principal that it requires the matter to be referred for expert determination, in accordance with the expert determination process detailed in "Northern Territory of Australia - Expert Determination", a copy of which is available from the place of issue of the RFT documents or from the web address:

www.nt.gov.au/dbe/business/tenders-contracts/references/tendering-contract/Pages/eddr.aspx

If the Principal does not receive the notice requiring expert determination within the prescribed time, the Principal's decision shall not be subject to expert determination.

2.28 TERMINATION, SUSPENSION AND DEFERMENT OF THE CONTRACT

2.28.1 Termination by Mutual Agreement

The Contract may be terminated at any time by mutual agreement between the Principal and the Consultant or by either party giving thirty (30) days notice to the other party. Termination shall be without prejudice to any claim, which either party may have against the other arising out of any negligent act or omission prior to the date of termination.

Upon termination, the Consultant shall provide the Principal with all documents produced up to the date of termination regardless of their stage of completion.

2.28.2 Termination due to Default

The Principal may terminate the Contract if the Consultant:

- (a) commits any serious breach or persistent breach either expressly or implicitly of the Contract;
- (b) is guilty of any grave misconduct or any wilful neglect in the discharge of its duties;
- (c) make any assignment or arrangement or composition with, or for the benefit of its creditors;
- (d) is guilty of any inefficiency, misbehaviour, incompetence, negligence or carelessness in accordance with its obligations under the Contract;
- (e) is unable to provide acceptable replacement personnel;
- (f) if circumstances arise as described in the clause titled "Conflict of Interest"

Where the Principal gives notice in accordance with this sub clause then the Contract shall terminate immediately with effect from the date of the service of such notice.

2.28.3 Change in Constitution of Consultant

Where the Consultant, being a partnership, company, consortium or other composite body, undergoes a change in its structure, which in the opinion of the Principal renders the Consultant unsuitable, the Principal may terminate the Contract.

2.28.4 Incapacitation of Consultant

Where the Consultant, due to circumstances beyond his control such as retirement, death, physical or mental injury, is in the opinion of the Principal rendered incapable of completing the Services, the Principal may terminate the Contract without prejudice to the accrued rights of either party in relation to the other.

2.28.5 Suspension and Deferment

The Principal may, at any time by written notice to the Consultant, suspend or defer all or any part of the Services. Upon such suspension or deferment, the Consultant shall be entitled to payment of those fees and expenses, which have been properly accrued under the Contract up to the effective date of suspension or deferment.

2.28.6 Fee Entitlement Upon Termination

If the Principal terminates the Contract for any reason other than default by the Consultant, the Principal shall pay to the Consultant a fair and reasonable fee for the Services as at the date of termination together with reimbursement for any expenses reasonably incurred by the Consultant in contemplation of it's carrying out the balance of the Services.

If the Principal terminates the Contract as a result of default by the Consultant or the Consultant terminates the Contract for any reason other than default by the Principal, the Consultant shall be liable for any extra cost incurred by the Principal in obtaining completion of any unfinished Services.

2.29 PERFORMANCE REPORT

The Consultant agrees that upon completion of the Services or the termination of the Contract:

- (a) the Principal will prepare a Performance Report (**'the Report'**);
- (b) the Principal shall liaise with the Consultant in completing the Report although the Principal reserves the ultimate right to complete the Report (other than the Consultant's comments); and
- (c) the Principal may use and/or release the report to any other NT Government Agency for evaluation of the Consultant's performance in the assessment of future tenders.

The Consultant agrees that neither the Consultant nor any other person shall have any claim against the Principal or employees or agents of the Principal under any circumstances as a result of the preparation and use of the Report.

2.30 WAIVER

Any failure or omission by a party either wholly or in part to enforce strict compliance with any of the Terms and Conditions or any act, mission, delay, forbearance, or indulgence granted by a party to the other shall not operate as a waiver and shall not affect or impair that provision in any way or impair the rights of the party to avail itself of the remedies it may have in respect of any breach of any such provision.

No waiver by a party of any breach of any provision of Contract shall be a waiver of any preceding or succeeding breach of the same or any other provision.

2.31 FORCE MAJEURE

Neither party shall be responsible for any failure to fulfil any of its obligations hereunder to the extent that fulfilment has been delayed, hindered or prevented by any event of Force Majeure. The party unable to fulfil its obligation in the circumstances provided in this clause shall promptly notify the other party stating the particulars of such circumstances and the time that it estimates that non-performance will continue. The party effected by the occurrence will only be relieved from liability for a reasonable period of time within which by the exercise of due diligence such party could have remedied the situation preventing its performance.

Once the intervening event has ended the Consultant shall carry out all acts that it would have been liable to carry out had the intervening event not occurred.

The Consultant shall take all reasonable steps to ameliorate and eliminate the intervening event and resume performance as promptly as practicable.

In this context Force Majeure means any occurrence beyond the reasonable control of the party effected by it and without limiting the generality of the above includes:

- (a) an act of a public enemy, a war declared or undeclared, explosion, insurrection, public riot, civil commotion, military action, an act of sabotage;
- (b) a strike, blockade, lockout, an industrial action, dispute or disturbance of any kind;
- (c) an act of restraint of any government or any governmental authority including foreign governments and authorities;
- (d) an act of God;
- (e) a storm, tempest, lightning, fire, flood, earthquake or other natural calamity; and
- (f) unavailability of equipment.

2.32 GOODS AND SERVICES TAX

For the purposes of this Clause unless the context otherwise requires:

- 'GST'** means any tax imposed on Supplies by or through the *New Tax System (Goods and Services Tax) Act 1999* (**'the Act'**) and any related *Tax Imposition Act* and **"New Tax System Changes"** has the meaning it bears in the *New Tax System (Trade Practices Amendment) Act 1999* (**'the TPA'**). Where any other term is used in this clause which is defined in the Act or the TPA it shall have the meaning which it bears in the Act, or (if the term is not defined in the Act) then the meaning which it bears in the TPA;
- 'GST Rate'** means the percentage amount of GST payable determined under section 9-70 of the Act as amended from time to time;
- 'Input Tax Credit'** has the meaning it bears in the Act;
- 'Recipient' 'Entity' and 'Supplies'** have the meaning they bear in the Act, and, in addition for the purposes of this contract shall also be read as follows:
"Supplier" shall also mean Consultant;
"Entity" shall also mean Principal;
"Supplies" shall also mean the Goods and/or Service.
- 'Adjustment'** means each form of adjustment to consideration provided for in this clause.

The parties acknowledge that the consideration under this Contract is inclusive of GST, where GST is calculated using the GST rate at the time of forming this Contract.

The Consultant shall provide the Recipient with a Tax Invoice and/or adjustment notes in relation to the supply prior to an amount being paid by the Recipient under this Contract, and shall do all things reasonably necessary to assist the Recipient to enable it to claim and obtain any Input Tax Credit available to it in respect of a Supply.

Where the GST rate is changed after the date of formation of this Contract the consideration under this Contract will be increased or decreased so that the consideration remains inclusive of GST, with GST calculated using the new GST Rate from the date of the change of the GST Rate that applies at the date of formation of this Contract.

2.33 PRIVACY

For the purposes of this Clause unless the context otherwise requires:

- 'Act'** means the *Information Act (NT)*;
- 'Privacy Laws'** means the Act; and the Information Privacy Principles set out in the Act or any "code of practice" approved under the Act that applies to any of the parties to this Contract.
- 'Personal Information'** means all information about a person that is "personal information" as defined in the Act, which is collected and/or handled by any of the parties in connection with this Contract.

The Consultant agrees to deal with all Personal Information in a manner, which is consistent with the Privacy Laws and any other relevant privacy legislation, as if the Consultant were a public sector organisation.

The Consultant is to collect, use, disclose or otherwise deal with Personal Information only for the purposes of fulfilling its obligations under this Contract.

The Consultant is not to disclose Personal Information without the written authority of the Principal, and in any event disclosure is to be in accordance with the Privacy Laws. The Consultant is to immediately notify the Principal where it becomes aware that a disclosure of Personal Information may be required by law.

The Consultant is to ensure that any employees, agents or sub-consultants, and any other person who may have access to Personal Information held by the Consultant, are aware of the obligations of the Consultant under this Contract and undertake to not collect, access, use, disclose or otherwise deal with Personal Information except in performing their duties of employment and in accordance with this Contract.

The Consultant is to take all reasonable measures to ensure that Personal Information is protected from misuse and loss and from unauthorised access, modification, disclosure or other misuse and that only personnel necessary to fulfil the obligations under this Contract have access to the Personal Information.

The Consultant is to develop, and obtain the written approval of the Principal:

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- (a) policies for the management of personal information; and
- (b) complaint handling procedures.

Each party is to immediately notify the other when a complaint is received. The Consultant acknowledges that individuals have the right to request access to, or correction of, the Personal Information held about them.

The Consultant must not transfer Personal Information outside the Northern Territory without the prior approval of the Principal. The Consultant, in respect to Personal Information, is to immediately notify the Principal where the Consultant becomes aware of a breach of this clause or the Privacy Laws.

The Consultant indemnifies the Principal in respect of any liability, loss or expense incurred arising out of or in connection with a breach of the obligations of the Consultant under this Contract.

When this Contract expires or is terminated, the Consultant must, at the Principal's discretion:

- (a) either return to the Principal all records containing Personal information;
- (b) retain any material containing Personal Information in a secure manner as approved by the Principal;
or
- (c) destroy or delete any Personal Information.

This sub-clause will survive the expiration or termination of this Contract.