

## CITY OF SWAN GENERAL CONDITIONS OF CONTRACT FOR ICT GOODS AND SERVICES

(Part 3 of Request Document)

### 3.1 Governing Law

The Contract shall be governed by the Laws of the State of Western Australia and all parties submit to the jurisdiction of the Courts of Western Australia to resolve any dispute.

### 3.2 Definitions

In these Conditions:

**Business Day** means a day that is not a Saturday, Sunday or public holiday in Western Australia.

**Commencement Date** means the date expressed in the Contract on which the Contractor must commence performing the Services.

**Completion Date** means the date expressed in the Contract by which the Contractor must complete the Services and deliver the Output to the Principal.

**Contract** means all the documents which constitute the parties' written agreement.

**Contract Sum** means:

- (a) where payment is to be made for a fixed amount, then that amount exclusive of GST;
- (b) where payment is to be made on a Schedule of Rates basis, the amount determined by having regard to (as is applicable):
  - (i) the Goods or Services supplied by the Contractor to the Principal pursuant to the Contract;
  - (ii) the rates for each of the Services supplied as expressed in the Contract's Schedule of Rates; and
  - (iii) GST;
- (c) if the Contract expressly provides for the Contractor being paid when certain Output milestones are achieved by the Contractor, then the aggregate of those milestone payments inclusive of GST; or
- (d) if the Contract expressly provides for the Contractor being paid by a combination of any of the methods referred to in (a) to (c), then the aggregate of them (as is applicable).

**Contractor** means the party to the Contract who is not the Principal.

**Contractor Failure** means any or all of the events referred to in Clause 3.15(a).

**Date of Acceptance** means the date that the Principal accepts the Goods in accordance with Clause 3.11.

**Date for Delivery** means:

- (a) if the Contract specifies a date for the supply of Goods, that date; or
- (b) if the Contract specifies a period of time for the supply of Goods, the last day of that period.

**Date of Delivery** means the date that the relevant Goods are actually supplied to the Place for Delivery.

**Delay Event** means any event or circumstance beyond the reasonable control of a party and not caused by either party, which prevents or impedes the due performance of the Services or the supply and delivery of the Goods and the consequences of which could not have been reasonably prevented or avoided, including but not limited to strikes; lock-outs or other industrial disputes; failure of a utility service or transport network; act of God; war; riot; civil commotion; compliance with any law or governmental order, rule, regulation or direction; outbreak of disease or infection or COVID-19, pandemic or epidemic.

**Goods** means the goods expressly identified in the Contract

**GST** means goods and services tax as is applicable pursuant to *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Laws** means all relevant Acts, Regulations, by-laws, orders, proclamations, the common law and equity.

**Order** means the written order issued by the Principal to the Contractor which expressly:

- (a) identifies the Good and/or Services;
- (b) identifies the Output for the Services;
- (c) identifies the Contract Sum, alternatively all information and the method required to determine the Contract Sum; and
- (d) requires the Contractor to supply and deliver the Goods or perform the Services and deliver the Output.

**Output** means the product of the Services as is expressly identified by the Contract.

**parties** means both of the Principal and the Contractor.

**party** means each of the Principal and Contractor.

**Personnel** includes but is not limited to, every owner, officer, employee, representative or agent.

**Place for Delivery** means the location for the delivery of the Goods as expressed in the Contract.

**Principal** means the City of Swan.

**Safety Management Plan** means the Contractor's written plan to establish and maintain an effective health and safety management system.

**Services** means the services expressly identifies in the Contract.

**Specifications** means all of the technical specifications, designs, drawings and schedules that form part of the Contract.

**tax invoice** has the same meanings as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

## **Contractors' obligations (applicable only to the supply of goods)**

### **3.3 Supply**

- (a) The Contractor must supply all of the Goods in full, to each relevant Place for Delivery and by the Date for Delivery.
- (b) Time is of the essence.
- (c) Immediately upon the Contractor becoming aware that:
  - (i) its supply of any of the Goods may be delayed beyond the Date for Delivery; or
  - (ii) any of the Goods have been damaged or contain defects;

the Contractor must, in writing, notify the Principal of (as is applicable):

- a. the likely duration of the delay, damage or defects; and the cause of the delay, damage or defects; and
- b. the cause of the delay, damage or defects.

### **3.4 Packaging, Labelling and Placarding**

- (a) During supply, the Contractor must ensure that the Goods are properly, safely, securely and lawfully packaged, labelled and placarded.

### **3.5 Quality of Goods**

- (a) All Goods supplied by the Contractor must conform with the Specifications and Contract and, if no Specifications are incorporated into the Contract, then:
  - (i) unless the Contract expressly provides otherwise, all Goods must be new; and
  - (ii) the Goods must comply with:
    - a. the standards published by the Standards Association of Australia that are relevant to the Goods and current as at the Date of Delivery; or

- b. if the Standards Association of Australia has not published any standards that are relevant to the Goods and current as at the Date of Delivery, then the standards published by the International Standards Organisation that are relevant to the Goods and current as at the Date of Delivery.

- (b) All Goods supplied by the Contractor must be fit for their intended purpose, free of damage and defects and safe to use.

## 3.6 Expenses of Supply and Removal

- (a) Unless otherwise expressly provided by the Contract, the Contractor must at its own expense:
  - (i) supply the Goods to the Place for Delivery; and
  - (ii) decommission, unfix and remove from the Place for Delivery all Goods that do not comply with the Contract.
- (b) The Contractor must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Contractor's failure to comply with Clause 3.6(a).

## 3.7 Acceptance and Protection of the Goods

- (a) Neither the:
  - (i) Contractor's supply of the Goods to the Place for Delivery or any other place; nor
  - (ii) Principal's receipt of the Goods;shall constitute the Principal's acceptance of the Goods.
- (b) The Principal shall be deemed to have accepted the Goods only if and when:
  - (i) it notifies the Contractor, in writing, that the Principal has accepted the Goods; or
  - (ii) subject to Clause 3.7(c), after 21 days have lapsed after the Contractor has both:
    - a. supplied the Goods to the Place for Delivery; and
    - b. satisfied its obligations expressed in Clause 3.15.

- (c) Clause 3.7(b)(ii) has no effect and the Principal is not deemed to have accepted the Goods if:
  - (i) within 21 days of the Contractor supplying the Goods to the Place for Delivery, the Principal rejects the Goods in accordance with Clause 3.8; or
  - (ii) the Contract requires the Contractor to test, install or commission the Goods. In those circumstances, the Goods may only be accepted in accordance with Clause 3.7(b)(i) and the Principal is not obliged to accept any of the Goods until 21 days after all testing, installing and commissioning is successfully completed to the Principal's satisfaction.
- (d) During the period commencing from the Principal's issue of the Order and ending on the Date of Acceptance, alternatively the Contract's termination, the Contractor must protect the Goods (**Protection Period**).
- (e) The Contractor:
  - (i) is solely liable to the Principal for any and all damage suffered by or loss of the Goods that occurs during the Protection Period; and
  - (ii) must, if any damage occurs to the Goods or any of the Goods are lost during the Protection Period from any cause whatsoever, indemnify the Principal for the replacement or repair (at the Principal's election) of the Goods.
- (f) The indemnity referred to in Clause 3.7(e) is reduced proportionately to the extent that the damage to or loss of the Goods was directly caused by the Principal's negligence.

### 3.8 Rejection and Removal of Goods

- (a) If, acting lawfully, the Principal determines that the Goods do not comply with the Contract or are defective or damaged, the Principal may reject the Goods by, prior to the Date of Acceptance, issuing to the Contractor a written notice expressly:
  - (i) rejecting the Goods;
  - (ii) identifying the grounds upon which the Principal rejects the Goods; and
  - (iii) directing the Contractor to, within a specified time remove, replace or rectify the Goods.
- (b) The Contractor must, at its expense, comply with the Principal's direction made in accordance with Clause 3.80(a)(iii). Time for the Contractor's compliance is of the essence.
- (c) The Contractor must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Contractor's failure to comply with Clause 3.8(b).

## 3.9 Ownership

- (a) The legal and beneficial ownership of each of the Goods passes to the Principal on the Date of Acceptance.

## Contractors' obligations (applicable only to the provision of services)

### 3.10 Contractor's Obligations

- (a) The Contractor must:
  - (i) commence performing the Services on the Commencement Date;
  - (ii) deliver the Output to the Principal on or before the Completion Date; and
  - (iii) complete the Services on the Completion Date.
- (b) Time is of the essence.
- (c) The Contractor must perform the Services:
  - (i) in accordance with the Specifications;
  - (ii) with due care, skill and diligence;
  - (iii) conscientiously, expeditiously and to the highest standard; and
  - (iv) in accordance with all relevant Laws.
- (d) If the Contractor is required to provide or use equipment to perform the Services, then such equipment must be accurately calibrated, fit and proper for the task, well maintained, in good working condition and free from defects.
- (e) The Contractor warrants that each of its Personnel whom performs any Services is lawfully qualified and skilfully trained to perform the Services competently, safely and in accordance with the Contract.

### 3.11 Intellectual Property

- (a) The Contractors warrant that its:
  - (i) supply of the Services; and

- (ii) supply or use of any design, document, working method or material that relates to the Services;

does not infringe any copyright, patent, registered design, trademark or other intellectual property right of any person.

- (b) The Contractor must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Contractor's breach of warranty expressed in Clause 3.13(a).

## 3.12 Expenses

- (a) Unless otherwise provided for in the Contract, the Principal shall not be liable to the Contractor for any expenses incurred by the Contractor to perform the Services, including without limitation travel expenses, accommodation, subsistence expenses, materials, products, plant or equipment.

## Contractors' obligations (applicable to both the supply of goods and services)

### 3.13 No Rise and Fall Adjustment

The Contract Sum is not subject to rise and fall adjustment.

### 3.14 Notices

- (a) Any notice given under the terms of the Contract must be in writing, signed by the issuing party and sent by pre-paid post or email to or left at the recipient's address recorded in the Contract.
- (b) A notice is deemed to have been received by a party:
  - (i) if sent by pre-paid post, upon the expiration of 3 business days after the date on which it was sent; or
  - (ii) if sent by email:
    - a. prior to 5.00pm on a business day, that business day; or
    - b. if not prior to 5.00pm on a business day, the next business day.
  - (iii) if left at an appropriate place at the recipient party's address:
    - a. prior to 5.00pm on a business day, that business day; or
    - b. if not prior to 5.00pm on a business day, the next business day.
- (c) A notice sent by email is deemed to have been signed by the sender if it expressly records that it is sent by the sender.

## 3.15 Legal Compliance

- (a) The Contractor must, at its expense, comply with all applicable Laws.
- (b) The Contractor must indemnify the Principal to the extent that it suffers or incurs expense, cost, damage, loss, liability or penalty by reason of the Contractor's failure to comply with Clause 3.17(a).

## 3.16 Assignment

Neither party may assign its rights or obligations under the Contract.

## 3.17 Payment

- (a) Upon the Contractor satisfying Clauses 3.7(a), 3.9 and 3.16 and after the Date of Acceptance, the Contractor may issue to the Principal a tax invoice.
- (b) The Contractor must not issue to the Principal a tax invoice that is unlawful or does not accord with the contract.
- (c) Subject to Clauses 3.14(a), 3.14(b) and 3.14(d), the Principal must, within 30 days of receiving the Contractor's lawfully issued and accurate tax invoice, pay the tax invoice.
- (d) The Principal may set off from any monies owed by it to the Contractor pursuant to the Contract any amount owed by the Contractor to the Principal by reason of Clause 3.5(b), 3.10(b), 3.11(e), 3.12(c), 3.19(b) and/or 3.21(c)(ii).

## 3.18 Indemnity

- (a) The Contractor must indemnify and keep indemnified the Principal against any and all expense, cost, damage, loss, liability or penalty that the Principal suffers or incurs arising out of or in any way related to the Services, the Contractor's performance of the Services or the Output.
- (b) The indemnity referred to in Clause 3.23(a) is reduced proportionately to the extent that the Principal's liability, loss, damage, cost or expense was directly caused by the Principal's negligence.

## 3.19 Ownership

- (a) The Principal retains complete ownership of its Data, including metadata.
- (b) All designs, documents, working methods, materials and information of whatever nature:
  - (i) produced or developed by the Contractor or under the direction of the Contractor pursuant to the Contract or in the course of performing the Services;
  - (ii) produced or developed by the Principal and provided to the Contractor; or



- (iii) produced or developed jointly by the Principal and Contractor or a person under the direction of the Contractor;

are, shall be and become, upon their production or development, solely, completely, legally and beneficially owned by the Principal.

- (c) The Principal permits the Contractor to use the designs, documents, working methods, materials and information referred to in Clause 3.24(b) for the sole purpose of the Contractor performing the Services.
- (d) The Contractor shall not use the designs, documents, working methods, materials and information referred to in Clause 3.24(a) for any other purpose other than performing the Services.
- (e) Upon receipt of the Principal's written request, the contractor must provide to the Principal all originals and copies of the designs, documents, working methods, materials and information referred to in Clause 3.24(a).

## 3.20 Intellectual Property

- (a) The Contractor warrants that each and every design, document, working method and material that it prepares, creates, employs, applies, uses or disseminates to perform the Services or in relation to the Contract does not infringe any copyright, patent, registered design, trademark or other intellectual property right of any person.
- (b) All copyright and property in each and every design, document, working method and material (whether in draft, revision or final) prepared or created by either or both the Principal or Contractor for the purpose of the Contract or Services vests in the Principal.
- (c) The Principal grants to the Contractor a non-exclusive licence to use the designs, documents, working methods and materials referred to in Clause 3.25(b) for the sole purpose of performing the Services.
- (d) The Contractor must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Contractor's breach of warranty expressed in Clause 3.25(a).

## 3.21 Warranties and Manual

On or before the earlier of the Date for Delivery or termination of the Contract, the Contractor must:

- (a) obtain and transfer to the Principal and ensure that the Principal receives the benefit of all warranties specified in the Contract; and
- (b) supply to the Principal all operation, service, maintenance and every other manual relevant to the Goods.

## 3.22 Workmanship

If the Contract requires the Contractor to test, install or commission any of the Goods, then such services and workmanship carried out or to be carried out must:

- (a) be performed with due care, skill and diligence; and
- be fit and proper having regard to and comply with the Contract and all Laws.

### 3.23 Occupied Sites

The Contractor must consult and cooperate with all other persons authorised to be at the Place for Delivery so as to ensure that:

- (a) no person at the Place for Delivery is exposed to a risk of injury, damage or loss by reason of the supply of the Goods; and
- (b) the supply of the Goods does not obstruct or interfere with other persons authorised to be at the Place for Delivery.

### 3.24 Safety Management Plan

- (a) At least 7 days prior to the Contractor entering the Place for Delivery, the Contractor must submit to the Principal the Contractor's Safety Management Plan.
- (b) The Contractor's Safety Management Plan must expressly provide for and oblige all persons under the Contractor's control to, prior to entering the Place for Delivery, successfully complete induction training on all of the hazards and risks relevant to the supply of the Goods at the Place for Delivery and the controls and methods to be used to eliminate, or if it is not reasonably practicable to do so minimise, those hazards and risks.
- (c) The Contractor must, at its expense, comply with the Principal's direction to review and amend its Safety Management Plan.
- (d) Throughout the term of the Contract, the Contractor must implement, comply with and enforce its Safety Management Plan.

### 3.25 Confidentiality

- (a) The Contractor must treat as and keep confidential all information that is (**confidential information**):
  - (i) disclosed or made known to the Contractor by the Principal or its agents; and
  - (ii) not information that is available to the general public in Western Australia.
- (b) The Contractor must not use, disclose or authorise the use or disclosure of any confidential information to any person without the prior written consent of the Principal.

## 3.26 Contractor's Default

- (a) If the Contractor:
- (i) fails to supply the Goods or perform the Services in the timeframes specified in the Contract;
  - (ii) fails to comply with Clause 3.9, 3.15, 3.16, or 3.18;
  - (iii) fails to provide to the Principal copies of the insurance certificates that the Contractor is obliged to effect and maintain in accordance with the Contract; or
  - (iv) intimates that it is unwilling or unable to supply the Goods or Services;

and the Contractor Failure persists for 7 days after the Principal has, in writing, notified the Contractor of:

- a. the Contractor Failure; and
- b. the Principal's intention to terminate the Contract if the Contractor does not immediately remedy the Contractor Failure;

then the Principal may, without prejudice to any other rights that the Principal has or may have pursuant to any Laws, terminate the Contract by written notice.

- (b) If the Contractor:
- (i) causes or contributes to the death of any person whilst at the Place for Delivery; or
  - (ii) becomes bankrupt or externally administered in accordance with Chapter 5 of the *Corporations Act 2001 (Cth)* (as is applicable);

then the Principal may, by giving the Contractor written notice, immediately terminate the Contract.

- (c) If the Principal terminates the Contract pursuant to Clause 3.21(a) or 3.21(b), then:
- (i) the Principal's liability to the Contractor arising from or in any way connected to the Contract is limited to that portion of the Contract Sum that is payable for the Goods or Services that have been supplied to the Principal, are fit for their purpose, undamaged, free of defects, comply with the Contract and have been accepted by the Principal pursuant to Clause 3.11;
  - (ii) the Contractor must indemnify the Principal for any and all loss, costs, expenses and liability that the Principal suffers or incurs by reason of the Contractor not having supplied all of the Goods or Services for the Contract Sum; and

- (iii) without limiting the rights of the Principal, the Principal may recover from the Contractor any loss, expense or damage suffered or incurred by the Principal by reason of the Contractor not having supplied all of the Goods or Services for the Contract Sum.

### 3.27 Principal's Default

If the Principal fails to make a payment that is by reason of Clause 3.14, due and payable to the Contractor and that failure persists for 7 days after the Contractor has, in writing, notified the Principal of:

- (a) the Principal's failure; and
- (b) the Contractor's intention to terminate the Contract if the Principal does not immediately remedy the Principal's failure;

then the Contractor may, without prejudice to any other rights that the Contractor has or may have pursuant to any Laws, terminate the Contract by written notice.

### 3.28 Delay Event

- (a) If the Contractor considers that a Delay Event will or has occurred, the Contractor must promptly give the Principal written notice of:
  - (i) the nature of the Delay Event;
  - (ii) the reasons for:
    - a. the Delay Event preventing or impeding the due performance of the Services; and
    - b. the Contractor being unable to prevent or avoid the consequences of the Delay Event; and
  - (iii) the estimated impact of the Delay Event on the performance of the Services, including but not limited to the estimated delay or increased cost arising from the Delay Event.
- (b) If:
  - (i) the Principal receives written notice under clause 3.25(a); or
  - (ii) the Principal, without receiving written notice under clause 3.25(a), in any event considers that a Delay Event will or has occurred;

the Principal may, by giving the Contractor written notice, immediately suspend the Contractor's execution or performance of the Services and any of either party's obligations under the Contract, to any extent considered reasonable by the Principal.
- (c) The Contractor must recommence the Services and any other obligations under the Contract that were suspended under clause 3.25(b) when directed to do so in writing by the Principal.

- (d) If any part of the Contract is suspended under clause 3.25(b), the Principal's liability to the Contractor arising from the suspension is limited to that portion of the Contract Sum that is payable for the Services that have been competently performed in accordance with the Contract.
- (e) If any suspension under clause 3.25(b) continues for five (5) consecutive Business Days or more, the Principal may, by giving the Contractor written notice, immediately terminate the Contract.
- (f) If the Contract is terminated under clause 3.25(e), the Principal's liability to the Contractor arising from or in any way connected to the Contract is limited to that portion of the Contract Sum that is payable for the Services that have been competently performed in accordance with the Contract.

### **3.29 Resolution of Disputes**

All disputes or differences between the Contractor and the Principal arising out of the Contract which cannot be resolved by negotiation must, unless the parties agree otherwise in writing, be referred to a mediator, who shall be appointed either by:

- (a) the written agreement of the parties; or if agreement cannot be reached
- (b) the Resolution Institute.

### **3.30 Document Retention**

Subject to Clause 3.15, the Contractor must, at its own cost, for 7 years following the completion or termination of the Contract, keep and maintain in good condition all documents and records that the Contractor prepared, created or received that relate to the Contract and, within 7 days of receiving the Principal's written request, permit the Principal to inspect and copy those documents and records.

### **3.31 Entire Agreement**

The Contract constitutes the entire agreement between the parties regarding the Goods and Services, and Contract Sum. It supersedes any and all previous arrangements, correspondence, quotes, purchase orders, tenders, representations, proposals, understandings and communications between the parties.

### **3.32 Severability**

If any provision or part of the Contract becomes void or unenforceable, then that provision or part will be severed from the Contract and the rest of the Contract will remain in full force and effect and will be unaffected by such severance.

## 3.33 Amendment and Waiver

- (a) No term of the Contract or right or obligation of a party arising from or under the Contract is amended, waived, discharged or released without the parties' prior written agreement signed by them.
- (b) A party's waiver of a right arising from or under the Contract does not prejudice that party's rights in respect of any subsequent breach of the Contract.

## 3.34 Joint and Several Obligations and Liabilities

If the Contractor is a partnership or comprised of two or more entities, then each of the partners or entities comprising the Contractor shall be bound to the Contract jointly and severally.

## 3.35 Survival Default

The following Clauses survive the expiry or termination of the Contract 3.5(b), 3.10(b), 3.11(e), 3.11(f), 3.12, 3.13, 3.14(d), 3.15, 3.19(b), 3.20, 3.21(c) and 3.23 to 3.29.

## 3.36 Access and Inclusion Plan

If the Contract involves the supply of services to the public, then the Contractor will:

- (a) to the extent practicable, implement the Principal's 'Access and Inclusion Plan' prepared under the Disability Services Act 1993, located at [https://www.legislation.wa.gov.au/legislation/statutes.nsf/law\\_a224.html](https://www.legislation.wa.gov.au/legislation/statutes.nsf/law_a224.html); and
- (b) respond to the Principal's request to report on the extent to which the Contractor has implemented the Principal's Access and Inclusion Plan.
- (c) The Principal's 'Access and Inclusion Plan' may be downloaded at: <https://www.swan.wa.gov.au/Your-Community/Access-inclusion>