

## CITY OF SWAN GENERAL CONDITIONS OF CONTRACT FOR THE ENGAGEMENT OF CONSULTANTS

(Part 3 of Request Document)

### 3.1 Governing Law

The Contract shall be governed by the Laws of Western Australia and all parties submit to the jurisdiction of the Court 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** mean the date expressed in the Contract on which the Consultant must commence performing the Services.

**Completion Date** means the date expressed in the Contract by which the Consultant must complete the Services and deliver the Works 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 Services supplied by the Consultant 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 Consultant being paid when certain Works milestones are achieved by the Consultant, then the aggregate of those milestone payments inclusive of GST; or
- (d) if the Contract expressly provides for the Consultant being paid by a combination of any of the methods referred to in (a) to (c), then the aggregate of them (as is applicable).

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

**Consultant Failure** means any or all of the events referred to in Clause 3.16(a).

**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 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.

**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.

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

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

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

**Principal** means the City of Swan.

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

**Services** means the services expressly identified 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).

**Works** means the product of the Services and the whole of the work, goods, materials, products and things to be carried out, performed and supplied by the Consultant pursuant to the Contract and compliance with all directions issued by the Principal.

### **3.3 No Rise and Fall Adjustment**

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

**3.4 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; or
  - (iii) if left in an appropriate place at the 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.

**3.5 Legal Compliance**

- (a) The Consultant must, at its expense, comply with all applicable Laws.
- (b) The Consultant indemnifies the Principal to the extent that it suffers or incurs expense, cost, damage, loss, liability or penalty by reason of the Consultant's failure to comply with Clause 3.5(a).

**3.6 Assignment and Subcontracting**

- (a) Neither party may assign its rights or obligations under the Contract.
- (b) The Consultant must not subcontract any part of the Contract, Services or Works without the Principal's prior written consent.

**3.7 Consultant's Obligations**

- (a) The Consultant must:
  - (i) commence performing the Services on the Commencement Date;
  - (ii) deliver the Works 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 Consultant must perform the Services and Works:
  - (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 Consultant 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 Consultant 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.

### **3.8 Expenses**

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

### **3.9 Payment**

- (a) At the intervals expressed in the Contract, the Consultant may issue to the Principal a tax invoice for the performed Services and Works.
- (b) The Consultant must not issue to the Principal a tax invoice that is unlawful or does not accord with the Contract.
- (c) Subject to Clauses 3.9(a), 3.9(b) and 3.9(d), the Principal must, within 35 days of receiving the Consultant's lawfully issued and accurate tax invoice, pay the tax invoice.
- (d) The Principal may setoff from any monies owed by it to the Consultant pursuant to the Contract any amount owed by the Consultant to the Principal by reason of Clause 3.5(b), 3.10(a), 3.13(d) and/or 3.16(c)(ii).

### **3.10 Indemnity**

- (a) The Consultant 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 Consultant's performance of the Services or the Works.

- (b) The indemnity referred to in Clause 3.10(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.

### **3.11 Safety Management Plan**

- (a) If the consultant intends to perform any of the Services or Works at a place under the control of the Principal, then at least 5 Business Days prior to the Consultant entering the place, the Consultant must submit to the Principal the Consultant's Safety Management Plan.
- (b) The Consultant's Safety Management Plan must expressly provide for and oblige all persons under the Consultant's control to, prior to entering a place under the control of the Principal, successfully complete induction training on all of the hazards and risks relevant to the performance of the Services and Works 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 Consultant 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 Consultant must implement, comply with and enforce its Safety Management Plan.

### **3.12 Ownership**

- (a) All designs, documents, working methods, materials and information of whatever nature:
  - (i) produced or developed by the Consultant or under the direction of the Consultant pursuant to the Contract or in the course of performing the Services;
  - (ii) produced or developed by the Principal and provided to the Consultant; or
  - (iii) produced or developed jointly by the Principal and Consultant or a person under the direction of the Consultant;are, shall be and become, upon their production or development, solely, completely, legally and beneficially owned by the Principal.
- (b) The Principal permits the Consultant to use the designs, documents, working methods, materials and information referred to in Clause 3.12(a) for the sole purpose of the Consultant performing the Services.
- (c) The Consultant shall not use the designs, documents, working methods, materials or information referred to in Clause 3.12(b) for any purpose other than performing the Services.

- (d) Upon receipt of the Principal's written request, the Consultant must provide to the Principal all originals and copies of the designs, documents, working methods, materials and information referred to in Clause 3.12(a).

### **3.13 Intellectual Property**

- (a) The Consultant 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 of the Principal or Consultant for the purpose of the Contract or Services vests in the Principal.
- (c) The Principal grants to the Consultant a non-exclusive licence to use the designs, documents, working methods and material referred to in Clause 3.13(b) for the sole purpose of performing the Services.
- (d) The Consultant must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Consultant's breach of warranty expressed in Clause 3.13(a).

### **3.14 Confidentiality**

- (a) The Consultant must treat as and keep confidential all information that is (**confidential information**):
  - (i) disclosed or made known to the Consultant by the Principal or its agents; and
  - (ii) not information that is available to the general public in Western Australia.
- (b) The Consultant 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.

### **3.15 Relationship**

- (a) The Contract does not create or give rise to any partnership, joint venture or other association between the parties.
- (b) The Consultant is not authorised to act as an agent of the Principal or bind the Principal to any agreement.

### **3.16 Consultant's Default**

- (a) If the Consultant:
  - (i) fails to comply with Clause 3.7(a), 3.7(c) or 3.11;

- (ii) fails to provide to the Principal copies of the insurance certificates that the Consultant is obliged to effect and maintain in accordance with the Contract;
- (iii) is, in respect of the Services, issued with an improvement or prohibition notice by a regulatory authority, including but not limited to WorkSafe or Department of Mines and Petroleum; or
- (iv) intimates that it is unwilling or unable to complete the Services;

and the Consultant Failure persists for 5 Business Days after the Principal has, in writing, notified the Consultant of:

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

- (i) becomes bankrupt or externally administered in accordance with Chapter 5 of the *Corporations Act 2001* (Cth) (as is applicable); or
- (ii) is unable to lawfully perform the Services by reason of his/her professional registration having been restricted, suspended or cancelled;

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

(c) If the Principal terminates the Contract pursuant to Clause 3.16(a) or 3.16(b), then:

- (i) the Principal's liability to the Consultant 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; and
- (ii) the Consultant must indemnify the Principal for any and all expense, cost, damage, loss or liability that the Principal suffers or incurs by reason of the Consultant not having competently performed the entire Services for the Contract Sum.

### 3.17 Principal's Default

- (a) If the Principal fails to make a payment that is by reason of Clause 3.9 due and payable to the Consultant and that failure persists for 5 Business Days after the Consultant has, in writing, notified the Principal of:

- (i) the Principal's failure; and
- (ii) the Consultant's intention to terminate the Contract if the Principal does not immediately remedy the Principal's failure;

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

### **3.18 Resolution of Disputes**

All disputes or differences between the Consultant and the Principal arising out of the Contract or Services raised before or after the Completion Date 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.

### **3.19 Document Retention**

Subject to Clause 3.12(d), the Consultant 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 Consultant prepared, created or received that relate to the Contract or Services and, within 5 Business Days of receiving the Principal's written request, permit the Principal to inspect and copy those documents and records.

### **3.20 Entire Agreement**

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

### **3.21 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.

### **3.22 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.

### 3.23 Joint and Several Obligations and Liabilities

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

### 3.24 Survival

The following Clauses survive the expiry or termination of the Contract 3.5(b), 3.9(d), 3.10(a), 3.10(b), 3.12, 3.13(a), 3.13(b), 3.13(d), 3.14, 3.15, 3.16(c) and 3.18 to 3.24.

### 3.25 Disability 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 'Disability Access and Inclusion Plan' prepared under the Disability Services Act 1993, located at [https://www.slp.wa.gov.au/legislation/statutes.nsf/main\\_mrtitle\\_267\\_homepage.html](https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_267_homepage.html); and
- (b) respond to the Principal's request to report on the extent to which the Contractor has implemented the Principal's Disability Access and Inclusion Plan.
- (c) The Principal's 'Disability Access and Inclusion Plan' may be downloaded at: <http://www.swan.wa.gov.au/City-Council/About-the-organisation/Access-inclusion>

### 3.26 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 3.26(a); or
- (ii) the Principal, without receiving written notice under clause 3.26(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 3.26(b) when directed to do so in writing by the Principal.
- (d) If any part of the Contract is suspended under clause 3.26(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 3.26(b) continues for 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 3.26(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.