



Government of **Western Australia**
Department of **Treasury and Finance**

Request Conditions

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1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In the Request, unless the context otherwise requires:

Addendum means any addendum issued by the Requesting Agency in relation to the Request.

Applicable Policies means the applicable part(s) of the Government policies specified in the Request, which form part of the Request.

Business Day means any day except a Saturday, Sunday or a public holiday in Perth, Western Australia.

Closing Time means the time and date specified in the Request as the closing time for the submission of Offers.

Contract means the contract for the supply of the Contract Deliverables to be formed between the Requesting Agency and the successful Respondent (if any) in the contract form specified in the Request.

Contract Deliverables has the meaning given in the Request.

Electronic Lodgement Platform means the Western Australian Government's electronic tender lodgement platform – Tenders WA www.tenders.wa.gov.au, or such alternative platform specified in the Request.

Financial Information means any information of a financial nature, including:

- (a) legal structure and ownership;
- (b) financial reports prepared by a qualified accountant;
- (c) quarterly financial accounts for the current financial year signed by a director;
- (d) up to date management accounts;
- (e) current year budgets and forecasts;
- (f) details of debt facilities, financial covenants and contingent liabilities;
- (g) details of any current or pending legal action; and
- (h) details of directors and senior management.

Offer means the offer submitted by the Respondent in response to the Request.

Offer Information means all information, other than the Offer, submitted by the Respondent in response to, or in connection with, the Request.

Offer Validity Period means the period of time specified as such in the Request, commencing from the Closing Time, as may be extended in accordance with the Request.

Offered Price means the price, or the price determined by applying the formula or method, specified in the Offer.

Respondent means any person who submits an Offer.

Request means the request issued by the Requesting Agency for the Contract Deliverables, which includes these Request Conditions.

Request Conditions means this document.

Requesting Agency means the State Agency issuing the Request, as noted on the front page of the Request.

State means the State of Western Australia.

State Agency has the meaning given in the *Procurement Act 2020* (WA).

1.2 Interpretation

In the Request, unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) a reference to any thing is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them, but is not to be taken as implying that performance of part of an obligation constitutes performance of the whole;
- (c) a reference to a gender includes other genders;
- (d) a reference to a person includes a State Agency, a public body, a company and an incorporated or unincorporated association or body of persons;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including a person taking by novation) and permitted assigns;
- (f) if the Respondent consists of a partnership or joint venture, then:
 - (i) an obligation imposed on the Respondent under the Request binds each person who comprises the Respondent jointly and severally;
 - (ii) each person who comprises the Respondent agrees to do all things necessary to enable the obligations imposed on the Respondent under the Request to be undertaken; and
 - (iii) the act of one person who comprises the Respondent binds the other persons who comprise the Respondent;
- (g) an agreement, representation or warranty on the part of or in favour of two (2) or more persons binds, or is for the benefit of, them jointly and severally;
- (h) a reference to the Request or another instrument includes all variations and replacements of either of them despite any change of, or any change in the identity of, the Requesting Agency or the Respondent;
- (i) a reference to a clause, schedule, attachment or appendix is a reference to a clause, schedule, attachment or appendix to the Request;
- (j) all the provisions in any schedule, attachment or appendix to the Request are incorporated in, and form part of, the Request and bind the Requesting Agency and the Respondent;
- (k) headings are included for convenience and do not affect the interpretation of the Request;

- (l) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of it;
- (m) no rule of interpretation is to be applied to disadvantage the Requesting Agency on the basis that it was responsible for preparing the Request;
- (n) if a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (o) if the word “including” or “includes” is used, the words “without limitation” are taken to immediately follow;
- (p) a reference to writing includes any means of representing or reproducing words in visible form including by electronic means;
- (q) a reference to a liability includes all obligations to pay money and all other losses, costs and expenses of any kind;
- (r) a reference to a day is to a calendar day, a month is to a calendar month and a year is to a calendar year;
- (s) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated inclusive of that day;
- (t) if a date stipulated for payment or for doing an act is not a Business Day, the payment must be made, or the act must be done, on the next Business Day;
- (u) a reference to a monetary amount means that amount in Australian currency, and
- (v) a reference to time means Australian Western Standard Time.

2. SUBMISSION OF OFFER

2.1 Complete Offer before Closing Time

- (1) Any Offer which:
 - (a) is not submitted before the Closing Time; or
 - (b) is incomplete or otherwise not received in full by the Requesting Agency at the Closing Time; or
 - (c) is not submitted in accordance with the other mandatory submission requirements in the Request,will be excluded from consideration, unless the Respondent can provide conclusive evidence of mishandling of the Offer.
- (2) In the case of submission of the Offer by hand or by post, mishandling will only have occurred where the Offer was received by the Requesting Agency prior to the Closing Time but the Offer was not transferred by the Requesting Agency to the tender box by the Closing Time.

2.2 Electronic Submission

If the Respondent submits the Offer electronically, the Respondent:

- (1) must comply with any specific electronic upload requirements described in the Request; and
- (2) agrees that:
 - (a) receipt of the Offer will be determined by the date and time shown on the receipt issued by the Electronic Lodgement Platform or, if no receipt is issued, the date and time which the Requesting Agency's computer records that the Offer was received;
 - (b) if any file uploaded as part of the Offer contains a virus then, notwithstanding any disclaimer made by the Respondent in respect of viruses, the Respondent must pay to the Requesting Agency all costs incurred by the Requesting Agency arising from, or in connection with, the virus;
 - (c) electronic lodgement of the Offer may take time and the Respondent must make its own assessment of the time required for full transmission of its Offer;
 - (d) the Requesting Agency will not be responsible in any way for any loss, damage or corruption of the electronic copy of the Offer;
 - (e) if the Offer becomes corrupted, illegible or incomplete as a result of transmission, storage, encryption or decryption, then the Requesting Agency may request the Respondent to provide another copy of the Offer either electronically or in hard copy or both; and
 - (f) if the Requesting Agency requests the provision of another copy of the Offer, then the Respondent must:
 - (i) provide the copy in the form or forms requested within the period specified by the Requesting Agency;
 - (ii) provide a statutory declaration that the copy is a true copy of the Offer which was electronically submitted by the Respondent and that no changes to the Offer have been made after the initial attempted electronic submission; and
 - (iii) provide a copy of the Electronic Lodgement Platform receipt for the initial attempted electronic submission.

3. CANCELLATION AND VARIATION OF REQUEST

- (1) The Request may only be varied, supplemented, superseded or replaced by an Addendum. No statement or representation made by the Requesting Agency varies, supplements, supersedes or replaces the Request, unless the statement or representation is confirmed by an Addendum.
- (2) The Requesting Agency reserves the right, at any time and from time to time, to cancel, vary, supplement, supersede or replace the Request or any part of the Request, in which case:
 - (a) the Requesting Agency will notify potential Respondents, or publish a notification electronically on or through the Electronic Lodgement Platform, that an Addendum has been issued or the Request has been cancelled; and
 - (b) the Respondent shall not have any recourse against the Requesting Agency whatsoever including for claims for any costs or expenses incurred up to and including the date that the Request or any part of the Request is cancelled, varied, supplemented, superseded or replaced.
- (3) Each Addendum issued shall be deemed to be incorporated in, and to form and be read as part of, the Request. The Respondent must prepare its Offer to take into account and reflect the content of each Addendum.

4. REQUESTING AGENCY'S RIGHTS

4.1 Accepting or Rejecting Offers

- (1) The Requesting Agency is not obliged to accept the Offer containing the lowest Offered Price or any Offer.
- (2) The Requesting Agency may, without liability, reject any Offer or all Offers, in the Requesting Agency's absolute discretion, including if in the Requesting Agency's opinion:
 - (a) **(failure to comply with Request Conditions or Request)** an Offer fails to comply with these Request Conditions or any of the requirements of the Request;
 - (b) **(false or misleading)** an Offer contains information or representations that are false or misleading;
 - (c) **(change of control)** anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Respondent to another person, including in respect of a Respondent which is a body corporate, if there is a change in control of the Respondent within the meaning of the *Corporations Act 2001* (Cth);
 - (d) **(change of consortium membership)** in respect of a Respondent which consists of a consortium, there is a change of membership of the consortium members;

- (e) **(change of policy or commercial reasons)** the Request should be cancelled for any reason, including due to changes of policy or for commercial reasons; or
 - (f) **(reputation)** the reputation of the Requesting Agency or the State is, or is likely to be, damaged by any act or omission of the Respondent or by the Requesting Agency or the State dealing with the Respondent.
- (3) In evaluating an Offer, the Requesting Agency may take into account any information in connection with the Offer or regarding the Respondent that the Requesting Agency has in its possession or receives from any other State Agency, the public domain, investigations or any other source, including information about the past or current performance of the Respondent under any other contract, arrangement or dealing between the Respondent and the State or any State Agency.

4.2 Clarifying Offers and Requesting Information

- (1) After the Closing Time, the Requesting Agency may request that the Respondent provide:
- (a) additional information in relation to the content of the Offer for the sole purpose of clarifying the Offer;
 - (b) Financial Information regarding the financial capacity of the Respondent;
 - (c) additional documents or information as specified in the Request; or
 - (d) evidence to the satisfaction of the Requesting Agency to verify the validity of the Respondent's claim for any financial preference,
- and the Respondent must provide such information to the Requesting Agency within two (2) Business Days of the request to provide the information or such later time as specified by the Requesting Agency.
- (2) The Requesting Agency reserves the right to:
- (a) conduct site visits of one or more Respondents as it deems appropriate;
 - (b) hold interviews and workshops with the Respondent to discuss any matter arising out of the Request or its Offer;
 - (c) request that one or more Respondents provide additional information including samples, testing and presentations; and
 - (d) provide additional information to one or more Respondents.
- (3) The Requesting Agency has no obligation to identify matters requiring clarification.
- (4) Any decision to make a request for a clarification or additional information or to exercise another right under this condition 4.2 is at the sole and absolute discretion of the Requesting Agency.
- (5) If a Respondent is unable to provide satisfactory evidence to the Requesting Agency in accordance with condition 4.2(1)(d), that component of the Offer may be considered invalid and the preference may not be applied to the Offer.

4.3 Discretion

- (1) Whenever the consent of the Requesting Agency is required under the Request, that consent may be given or withheld by the Requesting Agency in the Requesting Agency's absolute discretion and may be given subject to such conditions as the Requesting Agency may determine.
- (2) The Requesting Agency is not obliged to give reasons for the exercise of its discretion or the imposition of any condition.

5. SHORTLISTING AND PREFERRED RESPONDENT

5.1 Shortlisting

- (1) The Requesting Agency may, but is not obliged to, short-list a number of Respondents.
- (2) Short-listing does not confer any rights on a Respondent and the Request Conditions, including condition 4, continue to apply until such time as a Contract is awarded or the Request is terminated.

5.2 Selection of Preferred Respondent

- (1) The Requesting Agency may select, but is not obliged to select, one or more Respondents as a preferred Respondent.
- (2) Selection as a preferred Respondent does not confer any rights on a preferred Respondent and the Request Conditions, including condition 4, continue to apply until such time as a Contract is awarded or the Request is terminated.
- (3) The Respondent agrees that, if it is selected as a preferred Respondent, then:
 - (a) its Offer will remain open for acceptance by the Requesting Agency at any time prior to the expiry of the Offer Validity Period;
 - (b) the Requesting Agency may choose to negotiate any aspect of the Offer; and
 - (c) if the Contract Deliverables are goods and/or services, it must on request provide a performance guarantee, a bank guarantee or other form of security on terms and conditions acceptable to the Requesting Agency.
- (4) At any time during the negotiations either the Requesting Agency or a preferred Respondent may terminate the negotiations for any reason in which case, the Requesting Agency may, without limiting its rights under these Request Conditions:
 - (a) accept the Respondent's original Offer;
 - (b) select and then negotiate with any other Respondent as a preferred Respondent in accordance with this condition 5.2; or
 - (c) terminate the Request.

6. OFFERS

6.1 Respondent's Agreement

In submitting an Offer, the Respondent is deemed to have read and agreed to these Request Conditions and agrees that:

- (1) **(information true and correct)** all information in its Offer and all Offer Information is true and correct at the time of its submission;
- (2) **(relies on own enquiries)** other than in respect of information provided by the Requesting Agency to the Respondent in writing, it relies entirely on its own enquiries in relation to all matters in respect of the Request and the Contract;
- (3) **(understood Request)** it has examined and understood the Request, the Contract and any other information available to the Respondent in respect of the Request;
- (4) **(understood Addenda)** it will, prior to the Closing Time, log on to the Electronic Lodgement Platform to ensure that prior to submitting its Offer it has examined and understood each Addendum in respect of the Request. By submitting its Offer the Respondent will be deemed to have examined, understood and incorporated each Addendum into its Offer;
- (5) **(Applicable Policies)** it has examined, understood and will comply with the Applicable Policies;
- (6) **(made reasonable enquiries)** it has examined all information relevant to the risks, contingencies and other circumstances having an effect on its Offer which is obtainable by the making of reasonable enquiries, which enquiries the Respondent has made;
- (7) **(does not rely on warranties)** other than information provided by the Requesting Agency to the Respondent in writing, it does not rely on any warranty or representation of the Requesting Agency or any person actually or ostensibly acting on behalf of the Requesting Agency;
- (8) **(no reference to information on websites)** it must not make reference to any information contained on the Respondent's website or on any other website. All information on which the Respondent wishes the Requesting Agency to rely must be set out in full in the Offer;
- (9) **(no secret commission)** it has not paid or received, and will not pay or receive, any secret commission in respect of the Request;
- (10) **(no collusion)** it has not colluded, and will not collude, with any other person in respect of the Request or the Offer;
- (11) **(no inflation or deflation of Offered Price)** its Offered Price is not inflated or deflated to advantage another Respondent;
- (12) **(no anti-competitive or unethical behaviour)** it has not otherwise engaged in any anti-competitive or unethical behaviour that has the potential to advantage or disadvantage itself, any other Respondent or the Requesting Agency;

- (13) **(no unlawful arrangement)** it has not entered, and will not enter, into any unlawful arrangement with any other person in respect of the Request;
- (14) **(no improper influence)** it has not sought, and will not seek, to influence any decision in respect of the Request by improper means;
- (15) **(own cost and expenses)** it will pay its own costs and expenses in connection with:
 - (a) the preparation and submission of its Offer; and
 - (b) any enquiries or consideration of further information or discussions or negotiations with, or provision of further information to, the Requesting Agency, whether before or after the submission of its Offer,
 irrespective of whether its Offer is accepted or not; and
- (16) **(use of Request documents)** the Request documents (and all intellectual property in the Request documents) are the property of the Requesting Agency, and the Respondent will not:
 - (a) divulge information contained in the Request documents except as necessary for the compilation of an Offer; or
 - (b) use information contained in the Request documents for any purpose other than the preparation and submission of an Offer.

6.2 Offer Validity and Withdrawal

- (1) The Respondent may withdraw its Offer at any time prior to acceptance of its Offer by notifying the Requesting Agency in writing.
- (2) Unless the Respondent withdraws its Offer under condition 6.2(1), the Respondent agrees that its Offer will remain open for acceptance by the Requesting Agency for the Offer Validity Period.
- (3) The Offer Validity Period may be extended or further extended by the Requesting Agency by advising each Respondent in writing at any time or times.

6.3 Departures, Non-compliances and Alternative Offers

The Request will specify whether, and on what terms, departures, non-compliances and alternative Offers will be considered by the Requesting Agency.

6.4 Disclosure of Offer and Offer Information

- (1) The Requesting Agency may:
 - (a) make copies of the Offer and Offer Information; and
 - (b) provide the Offer and any Offer Information (including Financial Information) to its officers, employees, agents and contractors and any officer or employee of any other State Agency involved in the Request,
 for the purpose of evaluating the Offer.

- (2) The Respondent agrees and acknowledges that its Offer and its Offer Information:
 - (a) are subject to the *Freedom of Information Act 1992* (WA); and
 - (b) may be disclosed by the Requesting Agency or the State under a court order, upon request by a Minister, Parliament or any committee of Parliament or if otherwise required by law.
- (3) By submitting an Offer, the Respondent releases the Requesting Agency and the State from all liability whatsoever (including for negligence) for any loss, injury, damage, liability, costs or expense resulting from the disclosure of its Offer and its Offer Information under this condition 6.4 by the Requesting Agency or the State.
- (4) The Respondent agrees and acknowledges that the powers and responsibilities of the Auditor General for the State under the *Financial Management Act 2006* (WA) and the *Auditor General Act 2006* (WA) are not affected in any way by the Request.
- (5) Subject to this condition 6.4 and to the provisions of the *Financial Management Act 2006* (WA) and the *Auditor General Act 2006* (WA), the Requesting Agency will not make public any part of the Offer or any Offer Information that the Respondent expressly and reasonably nominates in its Offer as confidential. However, the Requesting Agency may require the Respondent to withdraw any claim to confidentiality in respect of any part of the Offer or any Offer Information as a condition of further consideration, or acceptance, of the Offer.

6.5 Joint and Several Liability

If an Offer is submitted by a consortium of two (2) or more persons either by way of joint venture, partnership or otherwise, the Offer is binding on those persons jointly and severally.

6.6 Assignment of Offer

An Offer is not assignable or transferrable by the Respondent without the prior written consent of the Requesting Agency.

6.7 Property in Offer

An Offer is, upon submission, the absolute property of the Requesting Agency and will not be returned to the Respondent. Subject to condition 6.4, nothing in this provision affects the ownership of intellectual property rights of the Respondent in the Offer.

7. GENERAL

7.1 Authorised Officers and Representatives

Any matter which may be done, or notice which may be given, by the Requesting Agency may be done, or given, by an authorised officer or nominated representative of the Requesting Agency.

7.2 Conflict of Interest

- (1) The Respondent must, prior to any acceptance of its Offer by the Requesting Agency, disclose to the Requesting Agency any information that is or might be relevant to determining whether an actual, potential or perceived conflict of interest exists or might exist in relation to the Request or the performance of the Contract (if awarded) by the Respondent.
- (2) The Respondent must declare any relevant information under condition 7.2(1) immediately upon identifying or becoming aware of that information.
- (3) The Requesting Agency may, in its discretion, accept or reject the Offer if the Requesting Agency considers that the Respondent has, or could reasonably be considered to have, an actual, potential or perceived conflict of interest in relation to the Request or the performance of the Contract (if awarded).

7.3 No Bribe, Inducement or Offer of Employment

- (1) The Respondent must not, without the prior written consent of the Requesting Agency, directly or indirectly approach or communicate with any officer or employee of the Requesting Agency having any connection or involvement with the Request, with respect to:
 - (a) an offer of employment; or
 - (b) availability of employment,with the Respondent or any related entity.
- (2) The Respondent must not directly or indirectly offer a bribe, gift or inducement to any officer or employee of the Requesting Agency in connection with the Request.