Delivering Community Services in Partnership

Purchase of Community Services
By Public Authorities

Process Terms and Conditions and Definitions
(Request for Expressions of Interest)

July 2011 Edition

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In the Request, unless the context otherwise requires, terms which are not otherwise defined but which have a defined meaning in the General Provisions, have the same meaning when used in the Request.

In the Request, unless the context otherwise requires:

Addendum means modifications or clarifications to the Request issued by the State Party pursuant to clause 7 which, by virtue of clause 7, are deemed to form part of the Request.

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

Change in Control means, in respect of the Respondent, a change in the person or persons who, directly or indirectly, ultimately Control the Respondent.

Claim means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity).

Closing Time means the date and time set out as the closing time on the front page of the Request.

Confidential Information means information in the Request or otherwise in connection with the EOI Process that:

(a) is by its nature confidential; or

(b) .

Evaluation Criteria means the criteria for evaluation of EOIs set out in the Request.

Mandatory Requirements means the requirements (if any) referred to as such in the Response Form.

Officer has the meaning given in the *Corporations Act* 2001 (Cth).

Process Terms and Conditions means the terms and conditions for the EOI Process set out in the Request (including, for the avoidance of doubt, in this Process Terms and Conditions Document).

Process Terms and Conditions Document means this document.

Public Authority has the meaning given in the *State Supply Commission Act* 1991 (WA).

Qualitative Criteria means the criteria (if any) referred to as such in the Response Form.

Requirement means the potential requirement for a community outcome or services which is the subject of the Request.

Respondent means the entity named as the Respondent in the relevant EOI and where the context permits or requires reference to the Respondent includes the Respondent's Officers, agents, advisers, consultants, contractors, nominees, licensees and employees and volunteers used by the Respondent.

Response Form means the form , part or schedule so entitled in the Request.

Site means the proposed site (if any) for the Requirement.

Specified Personnel means any individual named by the Respondent in responding to the Qualitative Criteria.

State means the State of Western Australia.

State Party has the meaning given in clause 3.1 and where the context permits or requires reference to the State Party includes the State Party's Officers, agents, advisers, consultants, contractors, nominees, licensees and employees.

State Party Representative means a person described as such in the Request or, if a State Party Representative has been replaced under clause 15.4, that replacement State Party Representative.

Tenders WA means the Western Australian Government electronic tender

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;

(c) a reference to a gender includes other genders;

(d) a reference to a person includes a Public Authority, 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, but not limited to, a person taking by novation) and permitted assigns;

(f) if the Respondent consists of a consortium of two or more persons whether by way of partnership or joint venture or otherwise, then:

(i) an obligation imposed on the Respondent under the Request binds each person who comprises the Respondent jointly and severally;

(ii) an EOI lodged by the Respondent is binding on those persons jointly and severally;

(iii) 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

(iv) 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 or more persons binds, or is for the benefit of, them jointly and severally;

(h) no rule of interpretation applies to the disadvantage of the State Party on the basis that the State Party put forward the Process Terms and Conditions;

(i) "includes" in any form is not a word of limitation;

(j) the meaning of "or" will be that of the inclusive "or", meaning one, some or all of a number of possibilities;

1.3 Exclusions

If any of the Process Terms and Conditions purports to exclude liability for a particular matter, such exclusion only operates to the extent permitted by law.

1.4 Status of this document

This Process Terms and Conditions Document is deemed to be incorporated in, and to form and to be read as part of, the Request and to bind the State Party and the Respondent.

2. RESPONDENT'S PARTICIPATION IN EOI PROCESS

By lodging an EOI, the Respondent agrees:

(a) to comply with the Request (including the

(iii) where the original copy of the EOI was lodged through Tenders WA, provide a copy of the Tenders WA receipt for the initial attempted electronic submission.

3.4 Late lodgement

(a) Any EOI which is not lodged before the Closing Time will be excluded from consideration unless the Respondent can provide conclusive evidence of mishandling of its EOI.

(b) For the purposes of the Request, mishandling of an EOI will only have occurred where:

(i) the EOI was received by or on behalf of the State Party (whether by hand, by post or by facsimile) prior to the Closing Time, but the EOI was not transferred by or on behalf of the State Party to the tender box by the Closing Time; or

(ii) the Respondent attempted to lodge the EOI through Tenders WA but the Respondent was unable to do so due to a systems error experienced by Tenders WA.

4. STATE PARTY'S RIGHTS

(3i)

(i) the State Party's knowledge of and previous experience and dealings with the Respondent;

(ii) without limiting clause 4.1(c)(i), information about the past or current performance of the Respondent under any contract, arrangement or dealing between the Respondent and a Public Authority; and

(iii) information concerning the Respondent which is in the public domain or which is obtained by the State Party through investigations;

(f) consider and accept any EOI that does not comply with the requirements of the Request, other than an EOI which:

(i) is not lodged before the Closing Time; or

(ii) fails to satisfy a Mandatory Requirement; or

(iii) fails to meet any requirement when the Request expressly states that an EOI which fails to fulfil or meet that requirement will be excluded from further consideration;

(g) allow a Respondent to undergo a Change in Control or other change in structure with or without notifying the other Respondents;

(h) publish the name of the Respondent; and

(i) waive any requirement or obligation under the Request.

The State Party is not required to give reasons for the exercise of any of the State Party's rights in accordance with this clause.

4.2 State Party's discretion

(a) Whenever the State Party (including when acting through the State Party Representative) has any rights or powers under the Request, including the provision of consents and approvals, the State Party:

(i) may exercise its right or power in its sole and absolute discretion;

(ii) is not obliged to give reasons; and

(iii) may impose such conditions as it determines.

(b) The Respondent agrees that any failure by it to comply with or perform a condition imposed will constitute a breach of the EOI Process.

5. LEGAL RELATIONSHIP

The State Party and the Respondent acknowledge and agree that:

(a) the Request does not constitute an offer to enter into any agreement;

(b) the Request constitutes the entire agreement of the parties in respect of the EOI Process;

(c) to the maximum extent permitted at law any obligations and liabilities which may otherwise be implied or imposed on the State Party and the Respondent under contract or otherwise at law, in equity, by statute or otherwise are excluded;

(d) subject to clause 5(f) only, neither party is liable to the other in respect of any Consequential Loss arising out of or in connection with a breach of the Request or the EOI Process generally;

(e) subject to clause 5(f) only, and without limiting clause 5(d), to the maximum extent permitted at law:

(i) the liability of the State Party to the Respondent arising out of or in connection with a breach by the State Party of the Request or the EOI Process generally is limited to the reasonable legal and other professional costs (excluding internal costs) directly incurred by the Respondent in preparing and subt

(d) the Respondent must prepare its EOI to take into account and reflect the content of any Addendum.

7.2 REQUEST ONLY AMENDED OR SUPPLEMENTED BY ADDENDA

The Respondent agrees that the Request may only be amended or supplemented by Addenda issued under clause 7.1.

8. PROTOCOL FOR ENQUIRIES, CLARIFICATION QUESTIONS ETC.

8.1 Disclosure of Information

(a) Subject to clause 8.1(b), the State Party reserves the right to disclose:

(i) enquiries or clarification questions made or asked by the Respondent; and

(ii) information provided by the State Party to the Respondent,

to other Respondents in any manner the State Party considers appropriate, including circulating written enquiries or clarification questions of a general nature, together with the State Party's response, to the Respondent and all competing Respondents.

(b) If the Respondent is of the view that an enquiry or clarification question it proposes to make or ask (whether during a Workshop or otherwise) is not of a general nature, but relates to proprietary aspects of its EOI, the Respondent must identify that enquiry or question as such when making or asking it. If, in the opinion of the State Party:

(i) the enquiry or question is not proprietary, the State Party Representative will advise the Respondent who has the option to withdraw the enquiry or question. If the Respondent continues to request a response to that question, the enquiry or question and the State Party's response may be disclosed to all competing Respondents in accordance with clause 8.1(a) above; or

(ii) the enquiry or question does relate to proprietary aspects of the Respondent's EOI, the State Party's response to the question will be provided to the Respondent only (and will not be circulated to any competing Respondents).

8.2 State Party requests clarification

The State Party may, but is not obliged to:

(a)

or prospective EOI or to otherwise request clarification or other information.

9. RESPONDENT'S REPRESENTATIONS AND WARRANTIES

By lodging an EOI the Respondent represents and warrants that:

(a) its EOI and any subsequent information submitted to the State Party pursuant to the Request:

(i) are based on its own independent assessment and investigations, interpretations, deductions, information and determinations;

(ii) are complete and accurate; and

(iii) take into account all information relevant to the risks, contingencies and other circumstances having an effect on its EOI which is obtainable by the making of reasonable enquiries, which enquiries the Respondent has made;

(b) it has examined all information and documents which are relevant to the Requirement;

(c) it has not paid or received and will not pay or receive any secret commission in respect of the Request;

(d) it has not entered and will not enter into any unlawful arrangement with any other person in respect of the Request;

(e) it has not sought and will not seek to influence any decision in respect of the Request by improper means;

(f)

(b) The Respondent agrees to grant the State Party an irrevocable, perpetual, royalty free, non-exclusive licence to disclose, copy, use, adapt, modify, sublicense or reproduce the whole or any portion of the Respondent's EOI for the purposes of evaluation and clarification of the Respondent's EOI and for the purposes of any action which the State Party takes in respect of the Respondent's EOI..

11. CONFIDENTIALITY AND DISCLOSURE BY RESPONDENT

11.1 Confidential Information

(a) The Respondent must keep Confidential Information confidential. The Respondent must not disclose, use, reproduce or distribute to any person the Confidential Information except:

(i) where necessary (and only to the extent necessary) for the purpose of preparing and lodging an EOI and otherwise participating in the EOI Process; or

(ii) as authorised in writing by the State Party; or

(iii) to the extent that the Confidential Information is public knowledge (other than because of a breach of this clause by the Respondent); or

(iv) as required by any law, judicial or parliamentary body or governmental agency; or

(v) when required (and only to the extent required) to the Respondent's professional advisers, and the Respondent must ensure that such professional advisers are bound by the confidentiality obligations imposed on the Respondent under this clause 11.1(a).

(b) The Respondent must immediately notify the State Party if it becomes aware of a suspected or actual unauthorised disclosure, copying or use of the Confidential Information.

(c) The Respondent must ensure that each person to whom it discloses the Confidential Information (except a person to whom disclosure is legally required) including any Officers, agents, advisers, consultants, contractors, nominees, licensees, employees and volunteers of the Respondent, complies with the obligations in clauses 11.1(a) and 11.1(b).

11.2 Survives termination

The obligations in clause 11.1 are continuing obligations and survive expiration or termination of the Respondent's participation in the EOI Process.

13. PROBITY

13.1 Inducement

The Respondent must not offer any incentive to, or otherwise attempt to, influence any of the persons who are either directly or indirectly involved in the EOI Process, or in the awarding of any subsequent contract. Without limiting the generality of this obligation, the Respondent must not:

(a) without the prior written consent of the State Party, directly or indirectly approach or communicate with any officer or employee of the State Party or the State having any connection or involvement with the Request, with respect to:

(i) an offer of employment; or

(ii) availability of employment,

with the Respondent or any related entity; or

(b) directly or indirectly offer a bribe, gift or inducement to any officer or employee of the State Party or the State in connection with the Request.

13.2 Probity checks

Without limiting the State Party's rights pursuant to clause 4.1, the Respondent consents to the State Party undertaking probity checks in respect of the Respondent which may include:

(a) investigations into organisational structure, business and credit history;

(b) prior contract compliance in respect of other supplies of services;

(c) police checks or any checks for any criminal records or pending charges; and

(d) research into any relevant activity that is, or might reasonably be expected to be, the subject of regulatory investigation.

13.3 Conflict of interest

The Respondent must:

(a) disclose in the EOI submitted by the Respondent any circumstances, arrangements or understandings which constitute, or may reasonably be perceived to constitute, an actual or potential conflict of interest with either the Respondent's obligations under the Request or any potential involvement of the Respondent in the Requirement;

(b) provide details of its proposed strategy for managing any actual, potential or perceived conflict of interest disclosed in its EOI pursuant to clause 13.3(a);

(c) not place itself in a position which may, or will give rise to a conflict of interest, or a potential conflict of interest during the EOI Process; and

(d) otherwise notify the State Party promptly in writing upon becoming aware of any actual or perceived circumstances, arrangements or understandings which constitute, or may reasonably be considered to constitute, an actual or potential conflict of interest with either the Respondent's obligations under the Request or any potential involvement of the Respondent in the Requirement.

To the extent that the State Party directs the Respondent to take particular action in respect to a conflict of interest, the Respondent must comply with such a direction. If the Respondent is unable or unwilling to comply with any such direction, the State Party may exclude the Respondent from further participation in the EOI Process.

14. COLLUSION

The Respondent must not engage in any collusive tendering, anti-competitive conduct or any other similar conduct with any competing Respondent or other person in relation to the EOI Process.

15. MISCELLANEOUS

15.1 Site inspections

(a) The State Party Representative may give permission for the Respondent to attend the Site.

(b) The Respondent must comply with any protocols, procedures or requirements notified by the State Party prior to or during any inspection.

(c) The Respondent releases the State Party from any Claim or liability that the Respondent may have arising out of or relating to any Site inspection, to the extent caused by an act or omission including any negligence, of the Respondent.

(d) The Respondent indemnifies the State Party from and against any costs, losses, expenses or damages incurred by the State Party arising out of or relating to any Site inspection to the extent caused by an act or omission, including any negligence, of the Respondent.

15.2 Waiver

(a) Subject to the express provisions of the Request, if the State Party fails or delays in exercising or enforcing any right or remedy under the Request, it will not preclude or amount to a waiver of any further exercise or enforcement of that right or remedy, or of any other right or remedy under the Request or provided by law.

(b)