
Delivering Community Services in Partnership

Purchase of Community Services
By Public Authorities

Process Terms and Conditions and Definitions
(Request for Offers)

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.

Service Provider's Obligations means the obligations that will be owed by the

- (ii) an Offer 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 [document] (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;
- (k) 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 State Party or the Respondent;
- (l) a reference to a document published at an electronic address is to the document as published at that electronic address on the date of first public issue of the Request;
- (m) a reference to a clause, schedule, attachment or appendix is a reference to a clause, schedule, attachment or appendix to the Request;
- (n)

- (r) a reference to writing includes any means of representing or reproducing words in visible form including by electronic means such as facsimile transmission;
- (s) a reference to a liability includes all obligations to pay money and all other losses, costs and expenses of any kind;
- (t) a reference to a month is to a calendar month and a reference to a year is to a calendar year;
- (u) 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;
- (v) 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;
- (w) a reference to a monetary amount means that amount in Australian currency; and
- (x)

- (i) a reference to any loss, cost or expense incurred by the "State Party" is a reference to such loss, cost or expense incurred by either or both of the issuing agency referred to in clause 3.2(a) and the State; and
- (ii) a release, or limitation of liability or responsibility, in favour of or for the benefit of the "State Party" is deemed to be in favour of or for the benefit of both the issuing agency referred to in clause 3.1(a) and to the State.

3.2 Facsimile lodgement

If the Respondent lodges an Offer by facsimile, the Respondent agrees that:

- (a) receipt of the Offer will be determined by the date and time which the State Party's recipient facsimile machine records that the facsimile was successfully received;
- (b) in the event that there is any discrepancy between the facsimile Offer and an original Offer subsequently lodged by the Respondent, the facsimile Offer will take precedence unless the Respondent can demonstrate to the State Party conclusively that an error occurred in the transmission of the facsimile Offer; and
- (c) facsimile transmission is not a reliable method of submitting Offers and the Respondent submits the Offer entirely at its own risk in respect of transmission failures and transmission errors howsoever caused.

3.3 Lodgement of electronic documents

If the Respondent lodges an Offer through Tenders WA or otherwise in electronic form, the Respondent agrees that:

- (a) in respect of an Offer lodged through Tenders WA:
 - (i) receipt of the Offer will be determined by the date and time shown on the electronic tender lodgement service receipt issued or, if no receipt is issued, the date and time of receipt of the Offer as recorded in the Tenders WA data base; and
 - (ii) lodgement of electronic files may take time and the Respondent must make its own assessment of the time required for full transmission of the Offer;
- (b) in respect of an Offer lodged in hard copy and in electronic form, in the event that there is any discrepancy between the electronic copy of the Offer and the hard copy of the Offer lodged by the Respondent, the hard copy of the Offer will take precedence;
- (c) if the electronic copy of the Offer contains a virus then, notwithstanding any disclaimer made by the Respondent in respect of viruses, the Respondent must pay to the State Party all costs incurred by the State Party arising from, or in connection with, the virus;

- (d) the State Party will not be responsible in any way for any loss, damage or corruption of the electronic copy of the Offer;
- (e) if the electronic copy of the Offer becomes corrupted, illegible or incomplete as a result of transmission, storage, encryption or decryption, then the State Party may request the Respondent to provide another copy of the Offer either electronically or in hard copy or both; and
- (f) if the State Party 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 State Party;
 - (ii) provide a statutory declaration that the copy is a true copy of the Offer which was originally submitted by the Respondent and that no changes to the Offer have been made; and
 - (iii) where the original copy of the Offer 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 Offer which is not lodged before the Closing Time will be excluded from consideration unless the Respondent can provide conclusive evidence of mishandling of its Offer.
- (b) For the purposes of the Request, mishandling of an Offer will only have occurred where:
 - (i) the Offer 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 Offer 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 Offer 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

4.1 Rights

The Respondent acknowledges and agrees that the State Party reserves the right at any time to:

- (a) cancel, suspend or change the Request or any aspect of the Procurement Process or to take such other action as the State Party considers appropriate in relation to the Procurement Process or the Request;

- (b) require additional information from the Respondent in which case the Respondent must provide such information within a reasonable time of the State Party's request;
- (c) refuse to consider or evaluate the Respondent's Offer or terminate the Respondent's participation in the Procurement Process if:
 - (i) the Respondent breaches the Process Terms and Conditions; or
 - (ii) the Respondent's Offer is materially incomplete or fails to properly address or meet to the State's satisfaction the Evaluation Criteria or any other requirement contained in the Request; or
 - (iii) the Respondent fails to meet a direction or requirement of the State Party under the Request;
- (d) decline all Offers;
- (e) in evaluating the Respondent's Offer have regard to:
 - (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 other 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 Offer that does not comply with the requirements of the Request, other than an Offer which:
 - (i) is not lodged before the Closing Time; or
 - (ii) fails to satisfy a Mandatory Requirement; or
 - (iii)

- (j) 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 Preferred Respondent

The Respondent acknowledges and agrees that:

- (a) the State Party may select, but is not obliged to select, one or more Respondents as a Preferred Respondent;
- (b) the selection of a Preferred Respondent does not constitute an acceptance of the Offer submitted by the Preferred Respondent or otherwise confer any rights on a Preferred Respondent and is without prejudice to the right of the State Party to decline to enter into the Service Agreement, or to enter into the Service Agreement with the Respondent or a competing Respondent;
- (c) the State Party may:
 - (i) choose to negotiate any aspect of a Preferred Respondent's Offer; or
 - (ii) request a Preferred Respondent to provide a performance guarantee, a bank guarantee or some other form of security in connection with the Service Agreement on terms and conditions acceptable to the State Party; and
- (d) the State Party may at any time and for any reason terminate or suspend any negotiations with a Preferred Respondent and, without limiting its rights under the Process Terms and Conditions, accept that Respondent's original Offer, or commence negotiations with any other Respondent or appoint any other Respondent as a Preferred Respondent.

4.3 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 Procurement Process.

(a)

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) request that the Respondent provide written clarification in respect of any aspect of its Offer; or
- (b) conduct Workshops with the Respondent, either alone or with other Respondents, to discuss the Request or the relevant Respondent's Offer or prospective Offer or to otherwise request clarification or other information.

9. RESPONDENT'S REPRESENTATIONS AND WARRANTIES

By lodging an Offer the Respondent represents and warrants that:

- (a) its Offer 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 Offer 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) it has complied with its obligations in relation to the registration of any Lobbyist (as that term is defined in the Public Sector Commissioner's Circular 2009-13 "Contact with Lobbyists Code and the Register of Lobbyists") in relation to the Request. A copy of the circular is available at:
<http://www.publicsector.wa.gov.au/AgencyResponsibilities/PSCCirculars/Pages/Default.aspx>

10. STATUS OF REQUEST, OFFER AND RESPONDENT

10.1

without allowing or requiring any other Respondent to do so.

10.3 No requirements to return

- (a) The Respondent agrees that:
 - (i) each Offer is the absolute property of the State Party; and
 - (ii) the State Party will not be required to return the Respondent's Offer or any documents, materials, articles or information lodged by the Respondent as part of, or in support of the Offer.
- (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 Offer for the purposes of evaluation and clarification of the Respondent's Offer and in respect of a Preferred Respondent for the finalisation of the Service Agreement.

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 Offer and otherwise participating in the Procurement Process; or
 - (ii) as authorised in writing by the State Party; or
 - (iii)

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 Procurement Process.

12. STATE PARTY'S PUBLIC DISCLOSURE AND FREEDOM OF INFORMATION

12.1 State Party's public disclosure obligations

The Respondent agrees to:

- (a) the disclosure by any person to the State Party of information concerning the Respondent's Offer, or the Respondent, for the purpose of the State Party exercising its rights set out in the Request or at law;
- (b) the State Party disclosing any aspect of the Respondent's Offer or any other information provided by the Respondent to the State Party during the Procurement Process to enable the State Party to meet public disclosure obligations the State Party may have:
 - (i) under any current or future legislation; or
 - (ii) under any current or future policy of the State or the State Party; or
 - (iii) in the course of official duties of the Minister responsible for the State Party; or
 - (iv) to satisfy requirements of parliamentary accountability; or
 - (v) under annual reporting obligations of the State Party; or
 - (vi) to satisfy any other recognised public requirement; and
- (c) the State Party publicly disclosing information in relation to the Procurement Process, the Request or the details of the Respondent, including the terms and conditions of the Service Agreement.

12.2 Freedom of Information Act and other legislation

- (a) The Respondent acknowledges that the Freedom of Information Act 1992 (WA) (FOI Act) applies to the information provided by the Respondent in its Offer or as otherwise submitted by the Respondent to the State Party pursuant to the Request.
- (b) 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 limited or otherwise affected by the Request.

- (c) The Respondent releases the State Party from all liability whatsoever for any loss, injury, damage, liability, costs or expense resulting from the disclosure of its Offer or information, other than the Respondent's Offer, submitted by the Respondent in response to, or in connection with, the Request, under this clause by the State Party.

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

- (a) disclose in the Offer 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 the performance of the Service Agreement (if awarded) by the Respondent;
- (b) provide details of its proposed strategy for managing any actual, potential or perceived conflict of interest disclosed in its Offer 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 Procurement 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 the Respondent's obligations under the Request (including in respect to the Service Agreement).

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 Procurement 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 Procurement Process.

15. MISCELLANEOUS

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) If the State Party fails or delays in exercising or enforcing any right or remedy under a similar document to the Request against any member of a competing Respondent, the Respondent will not have or make any Claim against the State Party