

CITY OF SWAN GENERAL CONDITIONS OF CONTRACT FOR THE PROVISION OF SERVICES

(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 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 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).

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.

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

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

Output means the product of the Services as is expressly identifies 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.

Principal means the City of Swan.

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).

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 at 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 Contractor must, at its expense, comply with all applicable Laws.

- (b) The Contractor indemnifies 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 3.5(a).

3.6 Assignment and Subcontracting

- (a) Neither party may assign its rights or obligations under the Contract.

- (b) The Contractor must not subcontract the Contract, Service or Output without the Principal's prior written consent.

3.7 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.

3.8 Expenses

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.

3.9 Payment

- (a) After the Contractor has satisfied Clauses 3.7(a) to 3.7(d) and:
 - (i) the Completion Date has passed; or
 - (ii) if the Contract expressly provides for the Contractor being paid when certain Output milestones are achieved, the Contractor has achieved an Output milestone for which a portion of the Contract Sum is payable;

the Contractor may issue to the Principal a tax invoice for the performed Services.
- (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 3.9(a), 3.9(b) and 3.9(d), the Principal must, within 20 days of receiving the Contractor's lawfully issued and accurate tax invoice, pay the tax invoice.
- (d) The Principal may setoff 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, 3.12(d) and / or 3.15(c)(ii).

3.10 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 3.10(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 Ownership

- (a) 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.
- (b) The Principal permits the Contractor to use the designs, documents, working methods, materials and information referred to in Clause 3.11(a) for the sole purpose of the Contractor performing the Services.
- (c) The Contractor shall not use the designs, documents, working methods, materials and information referred to in Clause 3.11(a) for any other purpose other than performing the Services.
- (d) 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 3.11(a).

3.12 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 3.12(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 3.12(a).

3.13 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.

3.14 Relationship

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

3.15 Contractor's Default

- (a) If the Contractor:
 - (i) fails to comply with Clause 3.7(a) or 3.7(c);
 - (ii) 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;
 - (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 to complete the Services;

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

- (b) If the Contractor:
- (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 Contractor written notice, immediately terminate the Contract.
- (c) If the Principal terminates the Contract pursuant to Clause 3.15(a) or 3.15(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 Services that have been competently performed in accordance with the Contract; and
 - (ii) the Contractor must indemnify the Principal for any and all expense, cost, damage, loss or liability that the Principal suffers or incurs by reason of the Contractor not having competently performed the entire Services for the Contract Sum.

3.16 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 Contractor and that failure persists for 5 Business Days after the Contract has, in writing, notified the Principal of:
- (i) the Principal's failure; and
 - (ii) 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.

3.17 Resolution of Disputes

All disputes or differences between the Contractor 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.

3.18 Document Retention

Subject to Clause 3.11(d), 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, Services or Output and, within 5 Business Days of receiving the Principal's written request, permit the Principal to inspect and copy those documents and records.

3.19 Entire Agreement

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

3.20 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.

3.21 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.

3.22 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.

3.23 Survival

The following Clauses survive the expiration or termination of the Contract 3.5(b), 3.9(d), 3.10(a), 3.10(b), 3.11, 3.12(a), 3.12(b), 3.12(d), 3.13, 3.14, 3.15(c) and 3.17 to 3.23.

3.24 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; 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>

3.25 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.