

Everything you wanted to know about tendering but were afraid to ask



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1. Introduction

- 1.1 The purpose of this Paper is to give a basic overview of the basics of tendering including:
 - (a) the tendering process and the legal status of that process;
 - (b) typical documentation issued as part of the tendering process;
 - (c) issues which may arise as part of a tendering process including:
 - (i) the formation of a "process contract";
 - (ii) "privilege clauses";
 - (iii) exclusion of liability by the person issuing the request for tender;
 - (iv) compliance with expressly stated assessment criteria;
 - (v) implied terms in the tendering process (good faith and confidentiality);
 - (vi) E-tendering; and
 - (vii) misleading and deceptive conduct by the party issuing the request for tender; and
 - (d) tendering for the public sector.

2. Legal status of tendering process

- 2.1 Goods and services are often procured by both private enterprise and government bodies through a tendering process.
- 2.2 One of the first steps in a tendering process is to issue a Request for Tender (**RFT**). An RFT has been defined in the Commonwealth Government's Procurement Guidelines 2008 as:¹

"a published notice inviting suppliers who satisfy the conditions for participation to submit a tender in accordance with the requirements of the request for tender and other request documentation."
- 2.3 Issuing an RFT by a party (who for the purposes of this Paper will be referred to as the '**Principal**') requesting that a tenderer submit a tender, is no more than an "invitation to treat",² which has been described in Butterworths Australian Legal Dictionary as a "*request to negotiate or make an offer with a contract in mind*".³ Issuing an RFT is not in law regarded as an "offer".
- 2.4 In **Pratt Contractors Ltd v Palmerston North City Council**,⁴ Justice Gallen stated that:⁵

"Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly."
- 2.5 The submission of a tender by a party in response to an RFT is regarded in law as an "offer" by the tenderer.⁶ An offer has been described as "*a clear statement of the terms by which the*

¹ Commonwealth Procurement Guidelines, December 2008, Part C Definitions, 46.

² NSW Government Procurement Guidelines, Tendering Guidelines, December 2011, 8.

³ P. J. Butt, *Butterworths Concise Australian Legal Dictionary* (LexisNexis Butterworths, 3rd ed, 2004) 235.

⁴ [1995] 1 NZLR 469.

⁵ Ibid 478-479.

⁶ Ibid.

person making the offer is prepared to be bound".⁷ The mere provision of a price would not amount to an offer as the offeror (tenderer) has not stated the terms under which it is prepared to commit to the price given.⁸ As with an RFT, generally the provision of an offer by the tenderer (assuming a "process contract" has not been formed - see Part 5) will not be enforceable.

2.6 Whether the acceptance of an "offer" forms a legally binding contract depends on the language of the original RFT.⁹ RFTs may take **two general forms**:

- (a) one where acceptance of an offer produces a binding contract (Section 2.15); and
- (b) one where acceptance does **not** produce a binding contract (Section 2.20 to 2.24).

These two scenarios are discussed below in Section 2.20 to Section 2.24.

2.7 The legal effect of issuing an RFT is different to the Principal merely seeking "expressions of interest". In such a case, a response to an "expression of interest" would not usually be regarded as an "offer" but merely a party providing information only to another party.¹⁰ However, referring to something as an "expression of interest" will not decide what legal implications (if any) will ensue as terms such as "tender" and "expression of interest" are not terms of art.¹¹ The intention of the parties must be determined to establish the form of relationship.

2.8 However, notwithstanding the above, as discussed in Part 5 of this Paper, in some circumstances a contract may be formed during the tendering process.

⁷ NC Seddon and MP Ellinghaus, *Law of Contract* (LexisNexis Butterworths, 9th ed, 2008), 109.

⁸ *Harvey v Facey* [1893] AC 552.

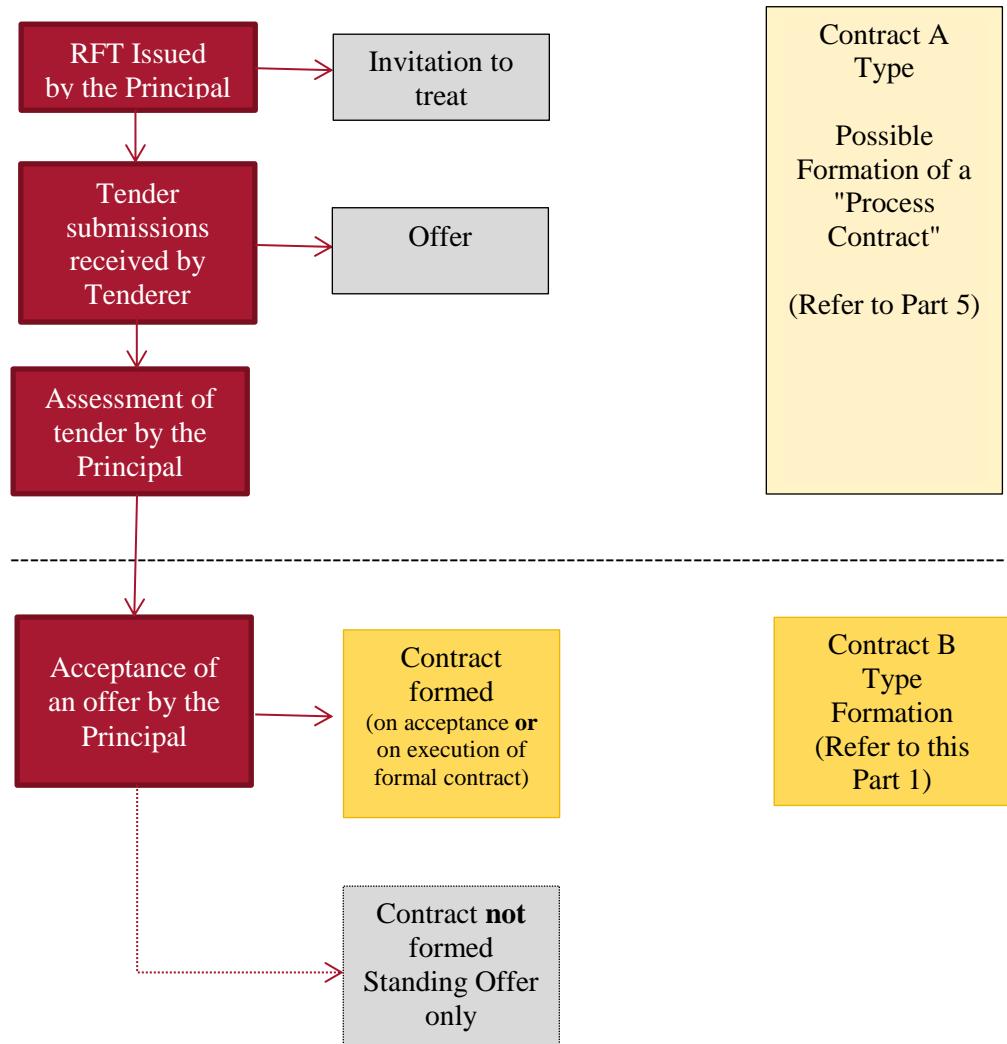
⁹ *Ibid* 128.

¹⁰ NC Seddon and MP Ellinghaus, *Law of Contract* (LexisNexis Butterworths, 9th ed, 2008) 129.

¹¹ NC Seddon, *Government Contracts* (The Federation Press, 4th ed, 2008) 337.

2.9 Diagram 1 summarises the tendering process and when a contract may or may not be formed.

Diagram 1



2.10 As illustrated in Diagram 1, subject to the comments in Part 5 of this Paper (which discusses Contract A Type Formation, that is, formation of a "Process Contract"), a legally binding contract is not usually formed until the tender process has been completed and a tender has been accepted (Contract B Type Formation).

2.11 In a typical tendering process, the successful tenderer will be required to enter a formal written contract with the Principal (in the form provided in the RFT). One issue to be considered in relation to Contract B Type Formation is: Does a binding contract to perform the work the subject of the tender eventuate on acceptance of the offer by the Principal or on execution of the formal written contract? To answer that question, the intention of the parties needs to be established including by reference to the RFT documents.

2.12 The High Court in *Masters v Cameron*¹² noted that where parties who have been in negotiation reach agreement upon terms and also agree that the matter of their negotiations will be dealt with by a formal contract, one of three classes may arise as follows:

- (a) *"It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be **immediately bound** to the performance of those terms, but at the same time propose to have the **terms restated in a form which will be fuller or more precise but not different in effect**"*,¹³
- (b) the parties intend to be immediately bound but may desire the performance of one or more conditional or delayed pending the execution of a formal document;¹⁴ or
- (c) the parties intend not to make a concluded bargain at all, unless and until a formal contract is drawn up and signed.

2.13 Although not without controversy, a fourth category has been added where the parties intend to be immediately bound by the terms which they have agreed whilst anticipating the formation of a further contract with additional terms to replace the first contract.¹⁵

2.14 Some examples of cases where a binding contract is or is not formed are discussed below.

¹² (1954) 91 CLR 353, 362.

¹³ *Godecke v Kirwan* (1973) 129 CLR 629; *South Coast Oils (Qld and NSW) Pty Ltd v Look Enterprises Pty Ltd* [1988] 1 Qd 680; *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631.

¹⁴ *Niesmann v Collingridge* (1921) 29 CLR 177; *Godecke v Kirwan* (1973) 129 CLR 629; *Randwick City Council v Nancor trading Co Pty Ltd* [2002] NSWCA 108.

¹⁵ NC Seddon and MP Ellinghaus, *Law of Contract* (LexisNexis Butterworths, 9th ed, 2008) 243. See *Baulkham Hills Private Hospital Pty Ltd v G R Securities Pty Ltd* (1986) 40 NSWLR 622, 628 and *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 1670.

**Where acceptance at the end of the tendering process DOES produce a binding contract
(Contract B Type)**

2.15 In *City of Box Hill v EW Tauschke Pty Ltd*;¹⁶

- (a) Tauschke Pty Ltd (**Tauschke**) was the successful tenderer for road works;
- (b) the RFT required Tauschke to sign a formal contract within 4 days of notification of acceptance of its tender. The relevant clauses in the RFT provided:

"Clause 7: The successful tenderer shall absolutely forfeit his deposit to the municipal fund if he fails to comply with any of the obligations terms or conditions imposed hereby on the successful tenderer either as to the execution of the contractor.....

Clause 8: The Council will by notice...certify its acceptance of the successful tenderer's tender to the address given in the tender and the successful tenderer shall within four days from the date of posting such notice...execute the contract";

- (c) on 16 March Council sent a letter to Tauschke stating: *"I am directed to inform you that your tender for this contract for the sum of ... has been accepted by the Council. Please arrange to call at my office within four days and sign the contract documents";*
- (d) the proposed formal contract (included in the RFT) included an indemnity clause;
- (e) Tauschke commenced work in accordance with the proposed formal contract but did not sign the formal contract until four months after receiving acceptance of its tender;
- (f) a person was injured and claimed against the City of Box Hill. Tauschke would have been obliged to indemnify the City of Box Hill under an indemnity clause in the contract (if it was bound by the contract);
- (g) the Court held a contract came into effect on 16 March based on the documents referred to in the RFT as:¹⁷
 - (i) the tender contained an offer to execute the whole of the works set out in the drawings, specifications and general conditions which were deemed to have been incorporated in the RFT;
 - (ii) that offer was unconditionally accepted in the letter dated 16 March;
 - (iii) the reference to the signing of a contract in clause 8 of the RFT did not detract from this conclusion; and
 - (iv) for the above reasons the case fell into the first category in *Masters v Cameron* (1954) 91 CLR 353 "[w]here parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract....It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms but at the same time propose to have the terms restated in a form which will be fuller or more precise but not different in effect."

¹⁶ [1974] VR 39.

¹⁷ Ibid 45.

2.16 Where the RFT seeks the supply of a specified range of materials/ supplies (for example, 20 tonnes of scaffolding between January and June of a given year) or services (for example, aerial medical services), an acceptance by the Principal would form a binding contract (whether before or after a formal contract is signed depending on the facts of the case). For example, in *Northern Territory v Skywest Airlines Pty Ltd*:¹⁸

- (a) the Northern Territory Government issued an RFT for the provision of aerial medical flight services. Offers were received from four tenderers. One offer was from the current provider of the services (Air North), another from Sky West and two others. The offers were assessed by the Department of Health. The Department of Health recommended that the Tender Board accept Skywest's offer for a number of reasons including that it was the only one which complied with the specification and its offer provided a high standard of safety;
- (b) the Tender Board considered the tenders based on a business paper which summarised the background to the RFT and the Department of Health's reasons for supporting a recommendation that Skywest be appointed. The business paper recommended that the Tender Board arrange a contract with Skywest to commence 30 days from notification. The decision of the Tender Board was indicated on the bottom of the paper which was stamped "approved" and signed by 5 members of the Board;
- (c) an employee working in the Tender Board sent a telex to Skywest informing it of its success stating "Your Offer.... is hereby accepted". This was the usual practice;
- (d) the Northern Territory Government submitted that the contract with Skywest was not formed on the basis of relevant legislation and therefore, the Tender Board had no authority to so enter contracts. The Court rejected this submission saying that the relevant legislation did not exclusively regulate the method of entering into contracts on behalf of the Northern Territory Government and that as such legislation is permissive only, the usual general law relating to contracts and agency applied;
- (e) the Northern Territory Government also submitted that the Tender Board had not "accepted" Skywest's offer. The Court held that the stamping of "approved" on the business paper followed by the five signatures clearly showed the Tender Board had approved and accepted the offer;
- (f) finally the Northern Territory Government submitted that the employee who sent the telex informing Skywest of its success was acting without authority. The Court held that the telex was merely notification of the acceptance and not the acceptance itself and that the employee had the authority to make the notification; and
- (g) based on the above, the Court determined that a valid contract had been formed with Skywest.

2.17 In *Cana Construction Co v The Queen*,¹⁹ the Supreme Court of Canada was **not** prepared to hold that an "estimate" provided by a contractor was no more than a guess which it had an entitlement to subsequently increase. In this case, the contractor provided the estimate for specified works and the Principal wrote a letter accepting that price. The contractor replied that there was an error in his calculations and that he was withdrawing his estimate. The Principal succeeded in its actions against the contractor for the increased costs of contracting with another party. This principle achieves particular significance for the Principal where, for

¹⁸ (1987) 48 NTR 20.

¹⁹ (1973) 37 DLR (3d) 418.

example, the Principal relies on a tendered and accepted price and enters into binding contract with third parties.

2.18 Generally, however, the formation of a contract at the end of the tendering process is not contentious (as it was in the above case) as the Principal and the tenderer usually quickly enter a written contract based on the proposed contract included with the RFT. However, to eliminate the risk of any uncertainty, RFT documents and acceptance letters should clearly state when it is intended that a legally binding contractual relationship will be formed.

2.19 In ***Randwick CC v Nancor Trading Co Pty Ltd***:²⁰

- (a) the Council called for tenders for the use by licence of a kiosk;
- (b) Nancor's first tender was unsuccessful. The Council re-tendered and invited Nancor to submit a tender;
- (c) the RFT included a term that the term of the licence would be one year with a five year option;
- (d) the Council wrote to Nancor accepting Nancor's offer, noted that it would contract Nancor to execute the licence and arrange for key collection and wished it well in its new business;
- (e) thereafter numerous meetings and discussions took place between the parties in an effort to negotiate the form of the licence agreement. However, during the course of these discussions (and without notice to the respondent) the Council commenced demolishing the kiosk. The Council then resolved to withdraw the offer of a licence to Nancor for the operation of the kiosk and proceeded to completely demolish the building;
- (f) the lower Court held that the case fell within the second category identified in *Masters v Cameron*.²¹ That is, the parties had completely agreed on all of the terms of their bargain and intended no departure or addition to the agreed terms, but nevertheless made performance conditional upon the execution of a formal agreement;
- (g) the Court of Appeal stated that the question is whether the parties intended to be bound upon acceptance notwithstanding their mutual contemplation that further documentation would be involved. The Court held that there was a legally binding agreement between the Council and Nancor (which the Council breached) as:
 - (i) the acceptance letter was couched in terms of offer and acceptance by the Council and required the licence fee to be payable as from the date of occupation, 'notwithstanding the fact that the licence agreement may not have been executed', which showed an intention to be bound contractually;
 - (ii) the letter spoke in terms of final acceptance and it did not indicate that there were more terms of the licence to reach agreement on;
 - (iii) the note on the front of the licence did not contemplate or permit any substantive departure from the terms of the licence; and
 - (iv) the draft licence agreement submitted by the Council significantly and impermissibly departed from the accepted tender.

²⁰ [2002] NSWCA 108.

²¹ (1954) 91 CLR 353 at 360.

Where acceptance at the end of the tendering process DOES NOT produce a binding contract (Contract B Type)

2.20 In contrast to the position described above (as to formation of a contact at the end of the tendering process) if the RFT states that the Principal *may* require the supply of goods or services of a specified description (if and when demanded), the acceptance of an "offer" has a different consequence to that described above. In such a situation the tenderer has made a "standing offer". An acceptance of a "standing offer" does not convert the "standing offer" into a binding contract. The acceptance (subject to the terms of the acceptance) merely means that the tenderer (whose standing offer was accepted) remains willing and ready to provide the goods or services at the agreed price when the Principal demands that a set quantity of goods or services be supplied. Each order by the Principal is an individual act of acceptance that creates a separate contract.²² A "standing offer" may also often be referred to as an "umbrella agreement".

2.21 Accordingly, the offeror (of the standing offer) would not be liable for further delivery of the goods or services²³ but would, however, be bound by individual orders placed.²⁴ The position would be different if the offeror was bound to keep the standing offer open for a certain time.

2.22 Until the tenderer withdraws the standing offer (or until a specified period of time has elapsed), the tenderer stands ready and willing to deliver the goods or services at the agreed price.

2.23 ***Colonial Ammunition Co v Reid***²⁵ concerned the nature of a "standing offer". In that case:

- (a) a tenderer agreed to supply the NSW Government with ammunition in amounts as might be required from time to time;
- (b) large quantities were supplied and paid for by the Government;
- (c) the relevant clauses provided as follows:
 - (i) *"the company to supply small arms ammunition on the terms and conditions specified for 7 years;*
 - (ii) *should the Government require ammunition of a different pattern the company shall have 6 months' notice of any such requirements...and the company shall state in writing whether they will execute orders of such special ammunition; and*
 - (iii) *the Government may cancel the contract in certain instances";*
- (d) the Government then decided that it needed new types of ammunition and bought these from other firms. The tenderer sued for breach of contract;
- (e) the NSW Supreme Court held there was no contract unless and until the Government ordered a specific quantity as follows:²⁶

"There was nothing in the agreement to bind the Government to take any ammunition from the plaintiffs except what they (the Government) chose to order.

²² NC Seddon and MP Ellinghaus, *Law of Contract* (LexisNexis Butterworths, 9th ed, 2008) 129.

²³ *Offord v Davies* (1862) 12 CBN 748; 42 ER 1336; [1861-73] All ER Rep 868.

²⁴ *Great Northern Railway Co v Witham* (1873) LR 9 CP 16 applied in *Kelly v Caledonian Coal Co* (1898) 19 LR (NSW) 1.

²⁵ (1900) 21 LR (NSW) 338, (1900) 17 WN (NSW) 192. See also *Munday and Shreeve v Western Australian Transport Board* [1962] WAR 65.

²⁶ *Ibid* 193.

Once they [NSW Government] ordered the ammunition there is a contract to take the ammunition, but until they give the order, this agreement is nothing more than a tender on the part of the plaintiffs to supply the Government at the prices therein named with the ammunition ordered. It is clear that in this agreement there is no undertaking in terms by the Government to take one ounce of ammunition.”

2.24 However, it can be difficult to determine whether acceptance constitutes a standing offer only or a binding contract, especially when the required quantity is not fixed. For example in ***Jarvis v Pitt Ltd***,²⁷ the Court determined that a firm contract was formed in acceptance as opposed to a standing offer as follows:

- (a) the University of Adelaide issued a tender for the construction of a Great Hall. It prepared a contract, plans and specifications which formed part of the tender;
- (b) the specification stated that stonework for external facing etc. was to be selected from Murray Bridge from the quarries of Pitt Limited;
- (c) the list of pricing for the stonework from Pitt Limited was supplied to all tenderers;
- (d) the successful tenderer (Jarvis) ordered and paid for some stonework from Pitt Limited. The relationship between Jarvis and Pitt Limited broke down. Jarvis (after getting approval from the University) acquired stonework from another supplier;
- (e) Pitt Limited sued Jarvis. Jarvis submitted that the list of prices merely represented a "standing offer" and as such no binding contract was formed until orders for specific amounts of stone had been placed. Pitt Limited submitted that the contract between it and Jarvis was for the supply of all the stonework required;
- (f) the Court held that a binding contract was formed and not a standing offer for the following reasons:
 - (i) the tenderer relied on the pricing statement for stone submitted by Pitt Limited when he made up his tender;
 - (ii) after the tender had been accepted by the University, Jarvis entered upon discussions with Pitt Limited regarding details of the stone to be supplied, sizes, quantities and so on. Orders were placed and fulfilled;
 - (iii) it was clear that Jarvis understood that the prices calculated and submitted by Pitt Limited were formed on the basis that Pitt Limited would supply all the stone;
 - (iv) the price list was headed "Freestone for proposed Bonython Hall";
 - (v) the specification referenced stonework from Pitt Limited;
 - (vi) the entire quantity of stone required for the work is referenced in the price list;
 - (vii) the price list is, therefore, a quotation for the stone as an entirety;
 - (viii) the price list submitted to tenderers was submitted on the basis that the successful tenderer was entitled to rely on the submitted list, that is, an offer which, when the main contract was made, would be incapable of withdrawal or modification;

²⁷ (1935) 54 CLR 506.

- (ix) if Jarvis' tender was to be construed as **an offer by Jarvis** to accept the pricing list, the acceptance of the tender by the University constituted an acceptance of Pitt Limited's price list on behalf of Jarvis; and
- (x) if Jarvis' tender was constructed to be an acceptance of Pitt Limited's price list conditional on Jarvis winning the tender, the acceptance of the tender by the University meant a fulfilment of that condition.

2.25 Based on the above, whether acceptance by the Principal of an offer by a tenderer will form a binding contract as opposed to a "standing offer" will depend on the intention of the parties to be gleaned from the facts of each case (including the wording of the RFT documents and the parties conduct).

2.26 ***Cardinal Construction Ltd v Brockville (City)***,²⁸ is an example of a case (not involving a "standing offer" type situation) where the Ontario High Court held that a contract was not formed where no formal document had been executed and the RFT expressly provided that a formal contract must be signed.

3. Types of Tendering

3.1 Commentators generally consider there to be three broad types of tendering, namely, open tendering, multi-stage tendering and limited tendering. Each of these three types is outlined below. However, these types of tendering processes may be referred to by different names by industry participants and by no means represent the full extent of the types of tendering processes.

Open Tendering

3.2 Open Tendering involves inviting submissions from the open market. An open tendering process is an invitation to tender by public advertisement without restrictions regarding whom may submit a response to the RFT (**Tender**).

3.3 Tenderers must demonstrate in their **Tenders** how they satisfy the evaluation criteria and how they meet the specific RFT requirements.

3.4 Open Tendering is a sound way of gaining assurance of best value for money, particularly in the absence of accurate market price knowledge or clear knowledge of available competent tenderers. It increases competition and gives all potential tenderers the chance to compete for business. Open tendering is generally used where there is a broad competitive market and it is not efficient or cost effective to establish pre-qualified or preregistered tenderer lists.

3.5 John Dörter, however, notes that the disadvantage of an open tendering process ("inviting all the world to tender") is that it "*exposes the industry to irresponsible tenderers who, if a tender be accepted, destroy not only themselves but others in the industry who have thereby been deprived of the work.*"²⁹

Multi-stage Tendering (or pre-registered/prequalified tendering):

3.6 Multi-stage tendering involves a number of stages the ultimate aim of which is to create a panel of suppliers who meet certain criteria and therefore may be relied upon to be "pre-qualified" to perform certain work.

²⁸ (1984) 4 CLR 149.

²⁹ John Dörter, 'Contracting and Tendering - A Legal Perspective' (1996) 12 *Building and Construction Law Journal* 234, 237.

- 3.7 The first stage in multi-stage tendering involves publishing an approach to market, usually by issuing an “Expression of Interest” (**EOI**) or “Request for Proposals” (**RFP**). EOI or RFPs, invite interested service providers to register their interest against an evaluation criteria set out in the EOI or RFP.
- 3.8 Multi-stage tendering may be used to cull a large number of respondents and identify the best service providers in a mature supplier market. It enables the number of final tenderers to be limited to those that can demonstrate the requisite capability to perform the contract.
- 3.9 Multi-stage tendering may be used to:
 - (a) establish a panel of service providers for several contracts in an ongoing work program;
 - (b) establish potential service providers for a single contract; or
 - (c) identify respondents with the best proposals, usually for more complex or unusual procurements.

2. Principals may then direct RFTs to panel members. The RFT process may be more time efficient as Principals may assume that it has already been established that all panel members have certain capabilities and therefore limit the need for a more extensive assessment criteria. Issuing RFTs to only pre-qualified tenderers may be described as “limited” or “invited tendering”.

Limited or invited tendering

- 3.10 Limited tendering involves the Principal approaching one or more potential suppliers to make submissions. As noted above, these potential suppliers may be sourced from an already formed panel of pre-qualified tenderers.
- 3.11 Limited tendering includes “**invited tendering**” and “**direct negotiation**”.

Invited Tendering

- 3.12 Invited tendering may be used:
 - (a) in emergency situations;
 - (b) for specialist work;
 - (c) in special circumstances where only one or a limited number of service providers are known to be able to carry out the work; or
 - (d) for low value, low risk, off-the-shelf procurement.
- 3.13 RFT documents are issued to the known available service providers assessed as the most capable of delivering the work, product or service required. Again, as noted above, this may include those on pre-qualified tenderer lists, lists of other agencies and service providers contracted on a standing offer basis.
- 3.14 With respect to invited tendering, only one service provider may be requested to tender. Single invited tenders are usually used for low value, low risk procurements.

Direct Negotiation

- 3.15 Special circumstances may warrant entering into direct negotiations with a single selected service provider, without any prior competitive tendering process. The Commonwealth

Government Guidelines suggest that this method of tendering should only be used in clear and unambiguous circumstances that indicate such direct negotiation will result in the best value for money outcome.³⁰

4. Tendering Documentation

4.1 The RFT is a document used to seek tenders from suppliers/providers. The RFT document/s usually inform tenderers of the:

- (a) purpose and nature of the RFT and contracting process;
- (b) terms and conditions of the proposed tendering process including the processes and criteria to be used in evaluating tenders (**Tender Conditions**). The Tender Conditions should not be confused with the proposed terms of the final contract or "Draft Contract" (see (c) immediately below). The Tender Conditions set out the processes or rules of the tendering process whereas the Draft Contract sets out the proposed terms of the final contract to be entered into by the Principal and the successful tenderer at the conclusion of the tendering process (conducted in accordance with the Tender Conditions);
- (c) proposed contract terms (**Draft Contract**);
- (d) information required from tenderers to enable tenders to be evaluated (usually attached as Schedules to the RFT); and
- (e) processes and criteria to be used in evaluating tenders.

The RFT may include a deed to be signed by the tenderer (agreeing to be bound by certain obligations) (See Section 11.4.)

It is not unusual for all of the above information to be included in one document to which numerous schedules are attached.

4.2 The Tender Conditions should (at a minimum):

- (a) state the time and lodgement of tenders;
- (b) give details of the criteria to be used to assess tenders;
- (c) have a provision stating that the Principal is not bound to accept the lowest or any tender (often referred to as "privilege clauses". Refer to Section 7);
- (d) outline the process for dealing with non conforming or alternative tenders;
- (e) state the process for answering questions, providing further information, conducting site visits and negotiations, and making presentations (if any);
- (f) provide appropriate tender schedules required to be completed by tenderers which should cover all the information needed to assess the tenders (including, for example, schedules which ask for details about the tenderer's work plans including its work, health and safety plan, workload and resources, program for the proposed works, contract price or rates, proposed amendments to the proposed contract, alternative proposals, insurance details and financial details etc.);
- (g) describe the process for awarding and finalising the contract;

³⁰ NSW Government Procurement Guidelines, 'Tendering Guidelines' (Version 3.2 December 2011) 21 [available at: https://www.procurepoint.nsw.gov.au/sites/default/files/documents/tendering_guidelines-1_october_2011.pdf]

- (h) provide a clear description of the tender documents including **clearly** describing which document or documents will form the final contract between the Principal and the successful tenderer (which is usually contained in a separate schedule);
- (i) cover intellectual property rights and confidentiality;
- (j) provide express provision for the Principal to terminate the tender process; and
- (k) state the period for which the tender must remain valid.

An example of a RFT from the Department of Defence is included at Schedule E to this Paper which consists of the following 5 parts:

- (l) **Part 1 - Tender Conditions** (including evaluation criteria);
- (m) **Part 2 - Tender Particulars** (closing time and date, description of information only documents, the name and contract details of the tender administrator, briefing times etc);
- (n) **Part 3 - Tender Form** (to be submitted by the tenderer with its tender which requires the tenderer to acknowledge and agree that, for example, the tender will remain valid for a set period and that if the Tender is accepted by the Principal, the tenderer will immediately commence the work as well as other warranties and acknowledgments);
- (o) **Part 4 - Tender Schedules** (including schedules in which tenderers are required to provide details of their work load and resources, project and safety plans, work history, program, insurance details, contract price, any required amendments to the proposed Contract etc.); and
- (p) **Part 5 - Contract** (proposed form of final Contract).

4.3 From experience (and particularly with construction contracts) in the rush to "break soil", the final Contract for the performance of the work may be compiled quickly resulting in the potential for contradictions, overlaps and gaps in and amongst the final Contract documents. This in turn provides the opportunity for contractors to engage in "loophole" engineering by, for example, arguing that a particular item of work was not part of the original scope of work and is therefore a variation for which it must be paid an additional amount over and above the lump sum amount. To avoid any such arguments, when compiling the final Contract:

- (a) do not include any "tender language" in the final Contract;
- (b) use clear consistent terminology throughout the final Contract documents. For example, the same terminology should be used in the technical scope of works documents as in the general conditions of contract. As different final Contract documents may be drafted by different authors, it is essential that all Contract documents are reviewed to ensure they all use the same defined terms; and
- (c) do not include post tender correspondence (eg addenda) as final Contract documents. If any post tender correspondence has amended the terms of the Draft Contract (as provided with the RFT), those amendments should be made to the Draft Contract to produce the final Contract. If multiple addenda and other correspondence are included as contract documents, it can be a time consuming and difficult task to later determine what the parties intended to be the final Contract. It also makes the contract administrator's job much harder!

4.4 If time is not taken to ensure the final Contract is clear and unambiguous, it can go horribly wrong and end in expensive and time consuming dispute resolution. In *Alstrom Ltd v Yokogawa Australia Pty Ltd & Anor (No7)*³¹, Bleby J commenting on this issue as follows:

"This was a contract between three large multi-national corporations for a contract sum of almost \$34 million. Breaches of it had ramifications for the performance of another contract worth \$148.5 million inclusive of GST.

It is almost inconceivable that such parties allow themselves, without competent legal advice, to enter into a contract for a project of the size and complexity of this one where the contract was so poorly drafted and so obviously defective.

It stands as appalling indictment against those responsible for its drafting.....These features, but particularly the contract, have resulted in protracted litigation at an additional cost which must now equal or exceed the amounts in dispute, to say nothing of the ongoing cost of executive time in preparing for and managing the litigation."

³¹ [2012] SASC 49.

5. Issue 1 - Formation of a “Process Contract”

5.1 As noted above, a legally binding contract arising from a tendering process will not usually crystallise until a tender is accepted by the Principal (and, depending on the circumstances, a formal agreement is executed by the parties) meaning that terms related to the tendering process could not be enforced as contractual promises.

5.2 However, in Australia, *Hughes Aircraft Systems International v Airservices Australia*³² changed this position by finding that in certain circumstances a mere RFT may give rise to a legally binding contract (covering the pre-award stage of the tendering process) which the Court referred to as a "process contract" (a Contract A Type Formation in Diagram 1). That case and cases subsequent, and the principles from those cases, are discussed below in this Part 5.

5.3 However, before considering those cases and the relevant principles, it is important to note that it may also be possible for an aggrieved tenderer to seek compensation:

- (a) under the *Competition and Consumer Act* (Schedule 2 (Australian Consumer Law), Section 18) (and the States' equivalents) based on misleading and deceptive conduct by the Principal during the tendering process. This is discussed in Part 12;
- (b) based on an estoppel argument (a representation made by the Principal during the tender process which was relied on by the tenderer to its detriment so that it would be unconscionable in the circumstances to enable the Principal to resile from that representation). Aside from *Hughes Aircraft Systems International v Airservices Australia*³³, relatively few tendering cases have discussed this principle. This fact and given that the principle of "estoppel" is a topic in itself, this Paper does not consider this issue; and
- (c) in tort³⁴, restitution³⁵ (although highly unlikely) and administrative review if the tender process is conducted under executive power,³⁶ which again are not considered in this Paper.

5.4 In *Hughes Aircraft Systems International v Airservices Australia*:³⁷

- (a) Hughes was the unsuccessful tenderer in a two tenderer bid (the other party being Thomson) for the award of a contract to provide an air traffic services system, (given this was a "two party bid" it may be an example of a "limited" or "invited" tendering process as described in Sections 3.7 to 3.14);
- (b) on 18 December 1991, the Civil Aviation Authority (CAA) management recommended to the Board that Hughes be selected as the preferred tenderer;
- (c) the Board deferred making a decision;
- (d) a subsequent re-examination of the bids led to Thomson being recommended as the preferred contractor which was adopted by the Board on 13 March 1992;

³² [1997] 146 ALR 1.

³³ See also *Metropolitan Transit Authority (Vic) v Waverley Transit Pty Ltd* [1991] 1 VR 181 regarding the departure from a representation that a contract would be renewed without the need for a retendering process.

³⁴ See NC Seddon, *Government Contracts* (The Federation Press, 4th ed, 2008) [7.31].

³⁵ Ibid [7.24] where the author notes that the elements for a claim in restitution will rarely occur in the tendering process but that the possibility has been acknowledged by the Court.

³⁶ Ibid [7.24] and Chapter 8.

³⁷ [1997] 146 ALR 1.

- (e) on 10 July 1992, a report by Macphee was issued which concluded that the tendering process was in significant respects unsound and unfair;
- (f) in January 1993, the CAA invited Thomson and Hughes to participate in a further bid for the air traffic services contract;
- (g) a restart meeting was held on 19 January 1993 in which the Board emphasised the aim in restarting the tendering process was to ensure fairness to both Hughes and Thomson;
- (h) on and before the 3 March 1993, both tenderers were sent **draft** letters which set out the tendering process (including the evaluation criteria) and each party was asked to comment on the draft letter;
- (i) the final letter was sent on 9 March 1993 (which gave extensive details of the evaluation process) which both parties were required to sign;
- (j) Hughes submitted its tender on 5 October 1993 (Hughes submitted that at this point it and the CAA were bound to a tender process contract on the terms of the RFT);
- (k) Hughes were again recommended as the preferred tenderer notwithstanding that Hughes' Australian Industry Involvement (**AI**) proposal was more restrictive than Thomson's;
- (l) on 14 December 1993, Thomson submitted a price reduction for its bid;
- (m) on 15 December 1993, Hughes as the preferred tenderer remained unchanged;
- (n) on 23 December 1993, the CAA again rejected the recommendation that Hughes be the preferred contractor and determined to engage Thomson;
- (o) on 24 December the Board wrote to Thomson indicating that its price reduction would be taken into account in calculating the contract price;
- (p) in consideration of the above facts, the Court held that a pre-award of process contract existed and that the CAA had breached a term of that contract by failing to evaluate the tenders in accordance with the priorities and methodologies prescribed in the RFT as:

Process contract - letter and RFT

- (i) the signed letter dated 9 March constituted a binding statement of the procedures to be followed and the criteria to be applied in the award of the tender;³⁸
- (ii) to characterise the letter as administrative arrangements that the tenderers were asked to agree to but which was not binding on the CAA (as submitted by the CAA) is to ignore the object of the activity that the CAA had been engaged in up to that point;³⁹
- (iii) "*Objectively viewed the circumstances were redolent of a contractual intent on the part of the parties. I cannot accept that a mere invitation to treat was*

³⁸ *Hughes Aircraft Systems International v Airservices Australia* [1997] 146 ALR 1, 28.

³⁹ *Ibid.*

being proffered by the CAA. It was taking positive steps to procure the participation of the tenderers";⁴⁰

(iv) *"I consider the mandatory language in which the letter expounds the procedures and criteria to be used as being consistent with the imposition of binding obligations... the term of the letter were such that, if the CAA selected a tenderer, that selection was required to be after following the procedures, and in accordance with the criteria, specified";⁴¹*

(v) *"Hughes made... a decision to participate in the process because of the stipulated procedures and criteria - itself a clear benefit to the CAA. Viewed objectively, that participation constituted good consideration for the pre-award contract";⁴²*

(vi) *"The general issue in these cases, and for me, was put squarely by Gallen J in **Pratt Contractors Ltd v Palmerston North City Council** as follows:*

"Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly. On the other hand, it is obviously open to persons to enter into a preliminary contract with the expectation that it will lead in defined circumstances to a second or principal contract....Whether or not the particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or impliedly accepted";⁴³ and

(vii) *"...it seems to me wholly unreasonable to construe the RFT as not embodying a contractual intent. It carried forward the 9 March letter....It specificity, its coverage, its relationship to those matters (a) in the Macphee report, (b) the restart meeting and (c) the 9 March letter which particularised procedures and criteria to be followed and indeed its language are consistent with its being ascribed a contractual character".⁴⁴*

5.5 In **Cubic Transportation Systems Inc v New South Wales**:⁴⁵

- (a) the NSW Government issued "Calls for Proposals" for an integrated public transport ticketing system;
- (b) two shortlisted proponents (Smatpos of which Cubic was a member) and Integrated Transit Solutions Pty Ltd (ITSL) were asked to submit revised proposals;
- (c) the Evaluation Committee recommended ITSL as the preferred proponent;
- (d) Cubic sought an injunction and then filed a claim submitting that the Government had breached a tender process contract that had an implied term of fairness and good faith;
- (e) the relevant clauses considered by the Court were as follows:
 - (i) **Eligibility (cl 3.1.1)** - which stated that *"Each Proponent agrees and acknowledges that notwithstanding anything contained in this Call (except in relation*

⁴⁰ Ibid 29.

⁴¹ Ibid 29.

⁴² Ibid 29.

⁴³ Ibid 30.

⁴⁴ Ibid 31.

⁴⁵ *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656.

to the irrevocable offer described in cl 3.1.17), no contractual relationship exists between the Principal, on the one hand and any Proponent, on the other hand in relation to the evaluation of revised Proposals, or otherwise in dealing with Proponent in relation to the ITS";

(ii) **Offers (cl 3.1.17)** - required Proponents to submit irrevocable offers (Proponent obligation) and obliged the Principal "to consider the Proposal...in accordance with the Call" (Principal obligation). The clause provided that the Principal was to assist the Committee in the ways specified in clause 3.2.1 and to consider the assessment and recommendations made by it (Principal obligation);⁴⁶

(iii) **Probity (cl 3.1.26)** - "*The Government is committed to acting with integrity and probity and expects all participating parties to act with integrity and probity in relation to the Project. The Government requires the Principal and Proponents have due regard to probity throughout all processes undertaken pursuant to this Call*" (Principal and Proponent obligations but not Government obligation);⁴⁷

(iv) **Codes (cl 3.1.27)** - headed "NSW Government Code Requirements" required Proponents (not the Principal) to comply with the Codes of Practice and Tendering (Proponent obligation);⁴⁸ and

(v) **Evaluation Committee (cl 3.2.1)** - which stated the Evaluation committee "*will be responsible for assessing revised offers...in accordance with the evaluation criteria nominated in this section*". The clause also stated that the Probity Auditor is to ensure "*that the process is conducted in accordance with NSW Government Codes*" (Evaluation Committee obligation).⁴⁹

(f) the Court further held:⁵⁰

"In the end, though not without misgivings, I consider that the language of contract in clauses 3.1.1 and 3.1.17 of the Call is such that the conclusion that a contract of some kind was intended is correct. However, giving full weight to the general but emphatic language of clause 3.1.1 denying the existence of any contractual relationship "in relation to the evaluation of revised Proposals, or otherwise in dealing with Proponents in relation to the ITS" it seems to me that the parenthetical exception (except in relation to the irrevocable offer described in cl 3.1.17) relates entirely to a contractual obligation on the Principal to comply with the Call and, in particular, to consider the bids in light of the assessment of the Evaluation Committee, which it is to assist in the ways specified in section 3.2, appoint a Probity Auditor and consider any advice given by the Auditor as to probity concerns. The words in clause 3.1.17, "in accordance with this Call" do not require the Principal to assess or evaluate the bids in any particular way except, as I have said, in light of the assessment made by the Evaluation Committee, still less do they import the Codes into the Call as part of the obligations of the Principal or the Government."

⁴⁶ Ibid [20].

⁴⁷ Ibid [25].

⁴⁸ Ibid [19].

⁴⁹ Ibid.

⁵⁰ Ibid [47].

5.6 In *State Transit Authority of NSW v Australian Jockey Club*:⁵¹

- (a) the State Transit Authority (STA) desired to sell a pocket of land near the Randwick Race Course. The proposed sale was to be by tender;
- (b) the Minister for Transport authorised the STA to conduct negotiations with the Australian Jockey Club (AJC) on the condition that the AJC would use the land in a certain way (bus way etc. for racecourse purposes). No deal was ultimately done with the AJC;
- (c) the AJC alleged there was a contract between the STA and the tenderers that the STA would conduct its tender evaluation fairly, deal fairly and in good faith with each tenderer and would not vary the tender conditions. The AJC submitted that the STA told the AJC that it would not deal with it unless it submitted to the condition regarding the use of the land;
- (d) the tender conditions included the following clauses:⁵²
 - (i) Clause 6.1 - "*Each tender lodged will constitute an offer to purchase the Property for the consideration set forth in the form of tender and subject in all respects to these tender conditions. The tender will be irrevocable and open for acceptance by the vendor at any time after the closing date and on or before 5 pm on the acceptance date*";
 - (ii) Clause 6.2 - "*The tenderer acknowledges and agrees that no legal rights or obligations will be deemed to have arisen between the vendor and the tenderer until a tender is, if at all, accepted*";
 - (iii) Clause 6.5 - which entitled the STA to consider and accept a non-conforming tender and which further stated that any unsuccessful tenderer will not be entitled to any redress whatsoever; and
 - (iv) Clause 6.6 - which gave the STA the right in its discretion to accept or reject any tender including the highest tender, to extend the closing date, to nominate a new acceptance date, to discuss or deal with any tenderer at any time before or after the closing date and to call for new tenders or to exercise its rights under 6.5;
- (e) the Court held that there was **no process contract** between the STA and the tenderers on the following bases:
 - (i) that clause 6.5 and 6.6 made it abundantly clear the STA was the "*master of the situation and was entitled to deal with individual tenderers differently and was under no obligation to follow any particular process*",⁵³
 - (ii) on the authority of Gallen J in *Pratt Contractors Ltd v Palmerstone North City Council*⁵⁴ an uncomplicated request for bids will generally be no more than an invitation to treat;⁵⁵ and

⁵¹ [2003] NSWSC 726.

⁵² Ibid [21]-[23].

⁵³ Ibid [27].

⁵⁴ [1995] 1 NZLR 469, 478.

⁵⁵ Ibid 27.

(iii) on the authority of **Transit New Zealand v Pratt Contractors Ltd**:⁵⁶

*"Whether a request for tenders gives rise to a process contract, once a conforming tender is submitted, is in all cases a question of whether all the elements of contractual formation are made out at that point. Analysis of the terms of the invitation to tender is the starting point. Where the request makes no express commitment concerning the manner in which tenders received will be addressed, that may indicate the invitation was no more than an offer to receive them. On the other hand as **Blackpool and Fylde Aero Club Ltd v Blackpool BC** [1990] 1 WLR 1195 indicates, the rigorous and comprehensive expression of requirements to be complied with by tenderers may give rise to an implied promise by the invitor to consider a conforming tender if others are considered. The law does not, however, have a policy which inclines towards enforcement of implied promises by invitors, even if they are public bodies, and whether there has been a binding promise as to process is to be ascertained by applying general principles of contract law concerning contract creation and implied terms"; and*

(iv) as the circumstances of the case were of relative simplicity, where the tenderers had to go to no great expense in submitting a tender, and in the light of clause 6, the tender was no more than an invitation to treat.

5.7 In **Dockpride Pty Ltd v Subiaco Redevelopment Authority**:⁵⁷

(a) the Subiaco Redevelopment Authority (**Authority**), a state owned corporation, invited Westpoint (a related body corporate of Dockpride) and a number of other entities to bid by way of tender for the purchase and development of land;

(b) tenderers were provided with an Information Package which stated:

"Design guidelines for development within Station Square have been prepared and will form part of the Authority's development control system. Whilst they are currently in draft form, they will in due course be formally adopted by the Authority.

They are included within this informative [sic] package to offer potential developers clear guidance as to the Authority's intentions for Station Square";

(c) Design Guidelines were included as Appendix 1 to the Information Package and included the following special conditions:

Special Condition 3.1: *"A pedestrian route that links the Square to a car park to the north of the site is required and should be on the same alignment as Rokeby Road. This pedestrian route shall be open to public access at all times and may be covered."*

Special Condition 3.1.1: *"The pedestrian link performs a major function in providing pedestrian access to the retail sites from the car park to the north and Station Square to the south. Its preferred location is on an axis line with Rokeby Road and as such its landscape treatment is essential to the precinct's success and character."*

⁵⁶ [2002] 2 NZLR 313 at 332-3; 2002 NZLR LEXIS 87 [77].

⁵⁷ [2005] WASC 211.

- (d) the Tender conditions required the tenderers to pay a tender fee;
- (e) Clause 6 of the Tender Conditions provided:

"NO OBLIGATION TO ACCEPT

The Vendor is not:

- (a) *obliged to accept the highest or any Tender; or*
- (b) *precluded from accepting a Tender for the Lots which is not in strict conformity with this Document."*

- (f) Dockpride was unsuccessful and subsequently alleged that a process contract was in place between the Authority and Dockpride and that the Authority breached implied terms in the process contract. Namely, that it would conduct the tender process fairly and in accordance with defined criteria. Dockpride alleged that in a number of respects the Authority failed to satisfy these obligations. In particular, that the Authority awarded the contract to a tenderer whose design did not comply with two items in the Design Guidelines including the Rokeye Walk Guideline;
- (g) the Court held:
 - (i) *"The existence of a pre-award or process contract in tenders is not automatic. Whether or not a process contract exists depends on the intention of the parties: **Cubic Transportation Systems Inc v State of New South Wales** [2002] NSWSC 656 at [31] — [44] per Adams J; **Transit New Zealand v Pratt Contractors Ltd** [2002] 2 NZLR 313 at [77] — [78]. In an appropriate case a bilateral contract is formed with each tenderer who submits a complying tender. The contents of this bilateral contract depend on the intentions of the parties. The terms, express or implied, of the request for tender will be an important factor in determining the intention of the parties";⁵⁸*
 - (ii) the Invitation to Tender was issued to Westpoint. Westpoint did **not** submit a tender (as noted above the tender was submitted by Dockpride, its related body corporate). No process contract was made between the Authority and Westpoint. Westpoint guaranteed Dockpride's performance of the contract, if it was awarded to Dockpride but that did not give rise to a contract between Westpoint or the Authority of the sort pleaded;⁵⁹
 - (iii) that a process contract **did exist** between the Authority and Dockpride as:⁶⁰
 - (A) Dockpride and the Authority conducted themselves on the basis that there was a contract between Dockpride and the Authority. Dockpride submitted its tender together with a bank cheque in favour of the Authority's agent for the tender fee of \$121,880;
 - (B) the Authority accepted, in the sense of receiving, Dockpride's tender. The Authority accepted and banked the bank cheque tendered by Dockpride. The Authority proceeded to consider Dockpride's tender

⁵⁸ Ibid [109].

⁵⁹ Ibid [120].

⁶⁰ Ibid [122]-[124].

and to hold meetings and communicate with Dockpride, or its representatives, in relation to Dockpride's tender;

(C) the Authority wrote to Dockpride seeking an extension of time to consider tenders as the Invitation to Tender provided that the tender may only be accepted by the Authority executing the tender form on or before the Acceptance Date. The conduct of the Authority in seeking the agreement of Dockpride to an extension of the Acceptance Date is a recognition that, in the absence of Dockpride's agreement, the Authority would not be able to accept Dockpride's tender after the Acceptance Date. This would give rise to a binding contract and the absence of an agreed extension of time implied that it was open to the Authority to accept Dockpride's tender at any time before the Acceptance Date;

(D) each of the tenderers had expended substantial time and resources in preparing and submitting its tender. To conclude that Dockpride and the Authority had no intention to enter into contractual relations does not recognise the commercial realities of the Station Square tender process. Such an approach does not accord with the legitimate expectations of the Authority and Dockpride. As Bingham LJ said in *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 at 1201 there would be "*an unacceptable discrepancy between the law of contract and the confident expectations of commercial parties*" if that approach were adopted; and

(E) clause 6 (refer to 5.7(e) above), which provided that the Authority is not obliged to accept the highest or any tender or precluded from accepting a tender which is not in strict conformity with the tender document, does not preclude the formation of a process contract.

*"Clausles of the kind being discussed are referred to by N C Seddon in "Government Contract", 3rd ed, as **privilege or disclaimer** clauses. Seddon writes (at p 301):*

*There has been a tendency to read such clauses, which provide that the lowest or any tenderer will not necessarily be accepted, against the government party (*contra proferentem*) so that their protective effect is minimised ... The clause does not provide protection if a contract is awarded in breach of one of the express or implied obligations of the pre-award contract (see *M J B Enterprises Ltd v Defence Construction (1951) Ltd* [1999] 1 SCR 619; *Martel Building Ltd v Canada* [2000] 2 SCR 860 at [89]).*

At 278 Seddon writes:

Nor does the inclusion of a clause that states that the government is not obliged to award the contract to the lowest or any tender indicate a lack of intention to contract. There are plenty of cases that have held that this clause does not in any way excuse a breach of the process contract."

5.8 In *Ipex v State of Victoria*:⁶¹

- (a) the Victorian Parliament commenced the 'Parlynet 2002' project to implement a new IT system and equipment in its offices around Victoria;
- (b) the State issued an RFT and Ipex was one of the tenderers who submitted a response;
- (c) Ipex were told they were unsuccessful despite being the cheapest submission and subsequently commenced proceedings against the State;
- (d) Ipex alleged that the State breached the "Tender Process Agreement" and did not act in accordance with the RFT;

The RFT

- (e) the RFT document contained substantial information, and "*provided an overview of the selection process and evaluation criteria. Terms and conditions were set out. Parliament's existing IT environment was set out together with Parliament's requirements*";⁶²
- (f) the RFT "*expressly reserved the right to continue contract negotiation with one or more selected tenderers*";⁶³
- (g) the State prepared a Tender Evaluation Plan that "*set out in some detail the principles to be followed*" but did not make the plan available to tenderers;⁶⁴
- (h) various things were then scored and weighted to determine a "*value for money*" view of each tender submission;

When will a Process Contract be found?

- (i) Ipex submitted that the RFT gave rise to a "*process agreement*" of the kind found in *Hughes*, and the State submitted that the parties were "*treating with each other in a process of negotiation with no binding contractual obligation*";⁶⁵
- (j) the Court outlined relevant sections from *Hughes*, *Cubic*, *Pratt*, *Dockpride* and *Transit* concluded that a process contract is more likely to be found "*where a timeline and detailed process, including evaluation criteria, are set out in such a way that suggests an obligation (promissory in nature) to follow such timeline and process has been incurred*";⁶⁶
- (k) the Court stated the "*RFT was intended to be a legally binding contract as to process*" as it did not just provide relevant information, but instead "*included in some detail the specific criteria that would form the basis of the evaluation. These were matters considered to be of importance in the cases referred to*";⁶⁷
- (l) the Court stated: "*An examination of the whole of the RFT must be considered in determining the presumed intention of the parties from the language they have used. I*

⁶¹ [2010] VSC 480.

⁶² Ibid [14].

⁶³ Ibid [78].

⁶⁴ Ibid [15].

⁶⁵ Ibid [22].

⁶⁶ Ibid [42].

⁶⁷ Ibid [44].

conclude after such examination that the presumed intention of the parties was to enter into a legally binding process contract";⁶⁸

- (m) the Court found clause 1.2 to be "decisive" as it "contained detailed evaluation criteria that Parliament said "will" or "must" be applied. This clause and others suggests a commitment, promissory in nature, to abide by a process particularly in relation to the evaluation of tenders";⁶⁹
- (n) despite the fact that the tender conferred wide discretion on the State in relation to various matters, this does not "detract from the conclusion"⁷⁰ that there was a process contract; and
- (o) although the Court found a process contract existed, Ipex's claim was dismissed.

5.9 In ***Wagdy Hanna and Associates Pty Ltd v National Library of Australia***:⁷¹

- (a) Wagdy (a losing tenderer) alleged that the National Library of Australia had breached an implied term of confidentiality as evidenced by the winning tenderer constructing the facility using unique design features in the Wagdy tender;
- (b) although the case mostly dealt with whether there was an implied term of confidentiality, the Court held that a "process contract" existed as:⁷²
 - (i) there is a growing body of cases in which an invitation to tender gives rise to contractual obligations arising that bind the party issuing the request for tender: ***Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council*** [1990] 3 All ER 25; ***R v Ron Engineering and Construction (Eastern) Ltd*** (1981) 119 DLR (3d) 267; ***Fairclough Building Ltd v Port Talbot Borough Council*** (1992) 62 BLR 82; ***Hughes Aircraft Systems International v Airservices Australia (No 3)*** (1997) 76 FCR 151; ***Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd*** [1986] AC 207; ***IPEX ITG Pty Ltd (in liq) v Victoria*** [2010] VSC 480; ***Cubic Transportation Systems Inc v New South Wales*** [2002] NSWSC 656; ***Pratt Contractors Ltd v Transport New Zealand*** [2005] 2 NZLR 433; ***Dockpride Pty Ltd v Subiaco Redevelopment Authority*** [2005] WASC 211;
 - (ii) not all pre-tender processes, even those with some complexity, have been held to be conducted contractually, though those cases tend to be older cases: ***Streamline Travel Service Pty Ltd v Sydney City Council*** (1981) 46 LGRA 168; ***Gregory v Rangitikei District Council*** [1995] 2 NZLR 208; though see more recently ***Hickinbotham Developments Pty Ltd v Woods*** (2005) 92 SASR 52;
 - (iii) the question of whether there is a contract will, as pointed out by Gallen J in ***Pratt Contractors Ltd v Palmerston North City Council*** [1995] 1 NZLR 469 at 478–9 be a matter of considering all the circumstances of the case as follows:

"Authority makes it clear that the starting point is that a simple uncomplicated request for bids will generally be no more than an

⁶⁸ Ibid [44].

⁶⁹ Ibid [45].

⁷⁰ Ibid [46].

⁷¹ ***Wagdy Hanna and Associates Pty Ltd v National Library of Australia*** [2012] ACTSC 126.

⁷² Ibid [219]-[221].

invitation to treat, not giving rise to contractual obligations, although it may give rise to obligations to act fairly. On the other hand, it is obviously open to persons to enter into a preliminary contract with the expectation that it will lead in defined circumstances to a second or principal contract ... Whether or not the particular case falls into one category or the other will depend upon a consideration of the circumstances and the obligations expressly or impliedly accepted."

(iv) in **IPEX ITG Pty Ltd (In liq) v Victoria**, Sifris J said (at [42]):

"A review of the authorities suggests that Courts are more willing to find process contracts as governing the relationship of the parties pre-award in cases where a timeline and detailed process, including evaluation criteria, are set out in such a way that suggests that an obligation (promissory in nature) to follow such timeline and process has been incurred"; and

(v) in this case, there was included in the Request for Tender a detailed regime for the extension of the deadline for submission of late tenders, a detailed set of selection criteria and a tender validity period. They were such as to suggest that the State was obliged to follow this process.

5.10 In summary and based on the above cases, whether or not a process contract exists will depend on the intention of the parties.⁷³ In ascertaining that intention the Courts:

- (i) will consider the language of the RFT documents;⁷⁴ and
- (ii) the conduct of the parties during the tendering process (including written and oral correspondence).⁷⁵

5.11 The Courts may find that a "process contract" exists where:

- (a) the RFT documents contain mandatory language;⁷⁶
- (b) the tenderers have spent significant time and resources in preparing and lodging a tender;⁷⁷
- (c) tenderers are asked to comment on and accept the conditions of tendering or agree to an extension of time by which tenders must be submitted;⁷⁸

⁷³ *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211; *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656 at [31]-[44] per Adams J and *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313 at [77] — [78].

⁷⁴ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 and *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726.

⁷⁵ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 and *Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195 at 1201.

⁷⁶ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558; *Cubic Transportation Systems Inc v New South Wales* [2006] NSWSC 656; *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726 and *Iplex v State of Victoria* [2010] VSC 480.

⁷⁷ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 and *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

⁷⁸ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 and *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

- (d) the Principal calls a start meeting in which the Principal makes promissory statements including, for example, that the tendering process aims to ensure fairness to tenderers;⁷⁹ and
- (e) a timeline and detailed process, including evaluation criteria, are set out in such a way that suggests an obligation (promissory in nature) to follow such timeline and process.⁸⁰

5.12 The Courts may find that a "process contract" does **not** exist where:

- (a) the tender conditions give the Principal great flexibility such that the Principal is a "master of the situation";⁸¹
- (b) the RFT is a simple uncomplicated request to provide a price;⁸² and
- (c) the Principal makes no express commitment concerning the manner in which tenders received will be addressed.⁸³

⁷⁹ *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 and *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

⁸⁰ *Iplex v State of Victoria* [2010] VSC 480 and *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2012] ACTSC 126.

⁸¹ *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726.

⁸² *Hughes Aircraft Systems International v Airservices Australia* [1997] FCA 558 and *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469.

⁸³ *State Transit Authority of NSW v Australian Jockey Club* [2003] NSWSC 726.

6. Issue 2 - Compliance with Assessment Criteria

6.1 Most RFTs provide significant details on how the Principal will evaluate the tenders including criteria to be used in that assessment process. Whether or not the Principal must comply with any such assessment process will depend on whether a "process contract" has been formed and the language used in that contract in describing the Principal's obligations with respect to this issue. *Pratt Contractors v Transit New v Transit New Zealand*⁸⁴ is an example of where the Principal was not obliged to comply with the assessment criteria set out in a particular document as the document was held not to have been incorporated into the RFT. This case and the case of *JS Mc Millan v Commonwealth of Australia*⁸⁵ are discussed below.

6.2 *Pratt Contractors v Transit New v Transit New Zealand*:⁸⁶

- (a) Pratt Contractors (Pratt) was a road building contractor and Transit was a Crown entity;
- (b) the dispute arose out of the tendering process for road works at Vinegar Hill;
- (c) at the time of the tender, Pratt was in dispute with a District Council;
- (d) the parties accepted that a process contract or preliminary contract was in place between Pratt and Transit;
- (e) legislation required Transit to employ approved competitive pricing procedures. These were drawn up by Transit and were contained in Transit's Manual of Competitive Pricing Procedures (**CPP**). The mandatory requirements in the CPP are accompanied by guidelines as to their practical application;
- (f) the introduction to the CPP stated that it is not intended to provide 'detailed and comprehensive procedures'. Individual tendering authorities such as Transit or local highway authorities were meant to formulate their own procedural rules in conformity with the CPP. Transit had two such sets of internal rules The first is the State Highway Tender Evaluation Manual (**SHM**), which laid down detailed procedures for evaluating tenders for state highway projects. The introduction said that it is intended to supplement the CPP, which in case of conflict should prevail. It also said that head office may override its provisions in individual cases. The second set of procedures was the Contract Administration Manual (**CAM**) which outlined the mechanics of tendering: how tenders should be submitted, whether the documents should be in one envelope or two, where the tender box should be sited (near the inquiry counter) and so on;
- (g) the trial judge held that the preliminary contract **required** Transit to comply with the method of selection in the RFT and Transit's own internal procedural rules (CPP, the SHM and CAM);
- (h) however, the Court of Appeal construed Transit's obligations more restrictively by holding that the internal rules were **not** incorporated into the contract;
- (i) in relation to Transit's own internal procedural rules, their Lordships held:⁸⁷

"the RFT did not incorporate the terms of the SHM or the CAM. The RFT said only that tenders would be evaluated in accordance with the weighted attributes

⁸⁴ [2005] 2 NZLR 433.

⁸⁵ [1997] FCA 619.

⁸⁶ Ibid.

⁸⁷ *Pratt Contractors v Transit New Zealand* [2003] UKPC 83, [44].

method prescribed by the CPP. The detailed procedures prescribed by the other manuals are no doubt intended in part to ensure that Transit does comply with the terms of the CPP and in part for its own administrative convenience. But they are not something upon which an outsider can rely. The claim based on the single-envelope procedure must therefore fail."

6.3 Based on the above, those with an interest in the tendering process, whether that be the Principal, the tenderer or the person drafting the RFT should carefully consider whether a document on which they tend to rely has been clearly incorporated into the RFT documents .

6.4 In *JS Mc Millan v Commonwealth of Australia*:⁸⁸

- (a) McMillan was a consortium that responded to a Commonwealth RFT relating to purchase of packages of work for the Australian Government Printing Service (AGPS). McMillan were not shortlisted and they alleged two instances of misleading conduct as follows:
 - (i) that the Commonwealth had said prior to tenders closing that McMillan would be shortlisted; and
 - (ii) that McMillan had a reasonable expectation they would be informed that if they failed to accept certain conditions contained in the RFT, they would not be shortlisted.⁸⁹
- (b) McMillan was concerned from the beginning of the RFT that there was insufficient information to comply with clauses 10.5 and 10.7. Clause 10.5 required a commitment to provide services under Memoranda of Understanding that did not exist yet and clause 10.7 required a commitment to provide core work on no less favourable terms (including price);
- (c) regarding the information available in the data room, McMillan stated that whilst it was "*adequate to determine the printing work involved in the core work...the product specification was inadequate to enable a determination of costs.*"⁹⁰ For example, with respect to the work to be delivered the number of pages required ranged from "*2 to 1500*" and copies were "*970 to 2000*".⁹¹ Therefore McMillan submitted they were "*unable to accept the specific terms and conditions of this section*" for both clauses 10.5 and 10.7;⁹²
- (d) the Commonwealth did not shortlist McMillan and in a report it stated that the reason for this was their "*inability to accept the specific terms and conditions of s 10.5 at p 29 of the RFT, this matter is considered a fundamental term and condition that underpins the philosophy and strategy of the RFT...the committee considers JS McMillan bid to be non-compliant and as such cannot be considered further;*"⁹³ and
- (e) the Court held that the Commonwealth's view that because the tender was non-compliant, it could not be considered and that conclusion was reflected in the tender terms, was incorrect. Relevantly, clause 1.1 which dealt with the assessment criteria, part (5) stated that tenders would be assessed regarding "*the extent to which the tenderers meet the requirements of this request for tender*". The Court held that this

⁸⁸ [1997] FCA 619.

⁸⁹ Ibid 419-420.

⁹⁰ Ibid 424.

⁹¹ Ibid.

⁹² Ibid 429.

⁹³ Ibid 430.

implied that non-compliance would not be fatal to being short listed. Accordingly, the Commonwealth had failed to comply with its own assessment criteria.

- 6.5 Based on the above, consideration should be given to whether a particular assessment criteria is mandatory or discretionary and Principals should make assessment decisions in accordance with those considerations. Principals should also keep this consideration in mind when providing reasons to tenderers as to why they have not been successful.

7. Issue 3 - “Privilege” tender provisions and duty of fairness

7.1 “Privilege” clauses are those clauses which reserve certain “privileges” to the Principal such as the right to reject any tender, to reject all tenders, not to accept the lowest tender etc. Such clauses are common in RFTs.

7.2 In *The Halifax (Regional Municipality) v Amber Contracting Limited*⁹⁴ the Court, regarding “privilege” clauses, said:⁹⁵

“The wording of privilege clauses is limited only by the creativity and requirements of the owner. Consequently, they can vary enormously in extent and detail. They can be simple, such as the one which reserves the right to not necessarily award the bid to the lowest bidder. They can also be quite explicit. For example, a privilege clause can expand on the criteria that the owner can use in exercising its discretion in evaluation and selection: See, for example, that in Cherubini Metal Works Ltd v New Brunswick Power Corp 2008 NBCA 89 (Can LII)”.

7.3 Privilege clauses aim to give the Principal flexibility during the tendering process. The following cases look at the effect of such clauses in protecting the Principal from claims by aggrieved tenderers.

7.4 In *Dockpride Pty Ltd v Subiaco Redevelopment Authority*:⁹⁶

(a) clause 6 of the Tender Conditions provided:⁹⁷

“NO OBLIGATION TO ACCEPT

The Vendor is not:

(a) obliged to accept the highest or any Tender; or

(b) precluded from accepting a Tender for the Lots which is not in strict conformity with this Document.”

(b) the Court held that clause 6 **does not preclude the formation of a process contract**;

(c) the Court further wrote:

*“Clauses of the kind being discussed are referred to by N C Seddon in “Government Contract”, 3rd ed, as **privilege or disclaimer clauses**. Seddon writes (at p 301):*

*“There has been a tendency to read such clauses, which provide that the lowest or any tenderer will not necessarily be accepted, against the government party (*contra proferentem*) so that their protective effect is minimised ... The clause does not provide protection if a contract is awarded in breach of one of the express or implied obligations of the pre-award contract (see *M J B Enterprises Ltd v Defence Construction (1951) Ltd* [1999] 1 SCR 619; *Martel Building Ltd v Canada* [2000] 2 SCR 860 at [89]).”*

⁹⁴ (2009) NSCA 103.

⁹⁵ Ibid [25].

⁹⁶ [2005] WASC 211

⁹⁷ Ibid [39].

At 278 Seddon also writes:

“Nor does the inclusion of a clause that states that the government is not obliged to award the contract to the lowest or any tender indicate a lack of intention to contract. There are plenty of cases that have held that this clause does not in any way excuse a breach of the process contract.”

7.5 In ***The Halifax (Regional Municipality) v Amber Contracting Limited***:⁹⁸

- (a) the Halifax Regional Municipality (**HRM**) appealed a previous decision that held that HRM had breached its duty of fairness to Amber Contracting Limited (**Amber**) and that HRM could not rely on the privilege clauses to suggest that Amber had waived its right to make a claim;
- (b) HRM called for tenders for the upgrade of the Plymouth Road sanitary pumping station;
- (c) three tenderers bid on the project, all of whom tendered a price which exceeded the project estimate and budget. In accordance with the conditions of tender, the tendered prices were published on the HRM website and also by the Construction Association of Nova Scotia following the opening of tenders;
- (d) as a result of the tendered prices, HRM cancelled the tender and informed each tenderer of this decision by letter. However, HRM entered into negotiations with the lowest priced tenderer, Amber, in an attempt to negotiate a price which was acceptable to HRM. Negotiations concluded when no acceptable cost could be negotiated;
- (e) almost a year later, HRM issued another tender for the construction of the pumping station. The plans and specifications were substantially the same as those issued in the original tender. Four tenders were received, three of which had participated in the original tender process and one which had not;
- (f) all prices again exceeded the budget and the estimate. The lowest priced tenderer, Eisener Contracting, which was not one of the original tenderers, was awarded the contract;
- (g) Amber claimed that HRM had breached the contractual duty of fairness and good faith owed to Amber in the process contract by engaging in the process of 'bid shopping' and, consequently, HRM could **not** rely on the privilege clauses in the tender document which provided as follows:

“The Owner specifically reserves the right to reject all tenders if none is considered to be satisfactory and, in that event, at its option, to call for additional tenders....

No term or condition shall be implied, based upon any industry or trade practice or custom, any practice or policy of the Owner or otherwise, which is inconsistent or conflicts with the provisions contained in these conditions.

⁹⁸ (2009) NSCA 103. Please note that although Canadian decisions are not binding in Australia, the Canadian and the Australian legal systems are similar common law jurisdictions, so this Canadian Supreme Court may have persuasive influence. In any event, this decision has implications for the drafting of procurement documents and the owner's conduct throughout the process.

The Owner reserves the right to cancel any request for tender at any time without recourse by the contractor. The Owner has the right to not award this work for any reason including choosing to complete the work with the Owners' [sic] own forces;

- (h) HRM relied on the privilege clauses of the tender documents and argued that there was no implied contractual obligation to award the contract to the lowest bidder in the first tender process. It further contended that, by running a second tender process after publicly opening and disclosing prices, as it was required to do, and then cancelling the first tender, no unfairness or compromise to the initial bidders resulted;
- (i) the Appeal Court:
 - (i) held that it is well established in law of tendering that the owner is under an obligation to treat all bidders fairly and equally;⁹⁹
 - (ii) referred to ***MJB Enterprises v Defence Construction (1951) Ltd 1951*** CanLII 677 (SCC), [1999] 1 SCR 619 which held that a privilege clause did not allow an owner to disregard the lowest bid in favour of a non-compliant bid;¹⁰⁰
 - (iii) referred to ***Martel Building v Canada 2000 SCC 60*** (CanLII) in which case the RFT contained a privilege clause stating that the Principal did not have to accept the lowest or any bid and quoted from that case as follows:¹⁰¹

“A privilege clause reserving the right to accept the lowest or any bids does not exclude the obligation to treat all bidders fairly. Nevertheless, the tender documents must be examined closely to determine the full extent of the obligation of fair and equal treatment. In order to respect the parties’ intentions and reasonable expectations, such a duty must be defined with due consideration to the express contractual terms of the tender. A tendering authority had the right to include stipulations and restrictions and to reserve privileges to itself;”
 - (iv) held that a privilege clause reserving the right not to accept the lowest or any bid does not exclude the obligation of fair and equal treatment (if such an obligation exists) and accordingly would not authorise awarding a contract based on undisclosed criteria;¹⁰²
 - (v) held that the fact that HRM wanted to obtain a lower price did not breach the duty of fairness; and
 - (vi) held that the conditions of tender specifically permitted HRM to reject all tenders if none were satisfactory and re-tender; cancel a tender without recourse to any tenderer; not award the work for any reason; and/or call for additional tenders. The broad privilege clauses also provided that no term should be implied into the process contract based on previous custom or practice. As a result, the fact that it was not normal custom to call additional tenders did not give rise to a breach of the duty of fairness.

⁹⁹ Ibid [17].

¹⁰⁰ Ibid.

¹⁰¹ Ibid [20].

¹⁰² Ibid [21].

7.6 In *JJ Richards & Sons Pty Ltd v Bowen Shire Council*:¹⁰³

- (a) Bowen Shire Council invited tenders relating to the provision of rubbish removal services. The tender invitation provided that tenders were required to be received by the Council no later than 1.00 pm on Friday 4 January 2008. There were three tenders submitted;
- (b) when the tenders were opened, the only person present, apart from officers of the Council, was a representative of the appellant, JJ Richards & Sons (**JJ Richards**), who was informed of the price bid by each tenderer, and JJ Richards was the lowest tenderer. At 2.15 pm the Council received a late tender from Cleanaway, a competitor of JJ Richards. Thereafter, the Council terminated the tender and invited new tenders;
- (c) JJ Richards applied for a review under the *Judicial Review Act 1991* (QLD) ("the **Act**") of the Council's decision to terminate the tender process and institute a new tender process. The primary judge dismissed the application and concluded the Council's decisions were not subject to review under the Act as JJ Richards did not have standing to challenge the decisions;
- (d) JJ Richards appealed on the basis that the judge erred in failing to appreciate that JJ Richards had standing to seek review of the Council's decisions as a person "aggrieved" thereby within the meaning of the Act;
- (e) Section 20(1) of the Act provides "*a person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to that decision;*"
- (f) JJ Richards also argued that the Council failed to take account of the principles in section 481 of the *Local Government Act 1993* (Qld) (**LGA**), that when entering into contracts local government must have regard to open and effective competition, ethical and fair dealing;
- (g) the Court considered the decision of *KC Park Safe (Brisbane) Pty Ltd v Cairns City Council* [1997] 1 Qd R 497 and said that it supported the notion that a decision by a local government not to accept a tender is authorised under the LGA so that it is amenable to review as a decision made under an enactment. However, the Court distinguished the JJ Richards case from *KC Park Safe (Brisbane) Pty Ltd v Cairns City Council* as in the current case the Council was **not** considering the tenders, and this was expressly reserved to the Council by the terms of its invitation to tender, and it was instituting a new tender process, this being the exercise of capacity enjoyed by the council as a legal person;¹⁰⁴
- (h) the Court stated that the decision of the High Court in *Griffith University v Tang* (2005) 221 CLR 99 at [25], [80], [82] and [89] "*makes it clear that a decision by a governmental agency to enter a contract is not a decision under an enactment merely because the agency is a creature of statute which confers legal personality and the capacity to contract upon the agency.*" The Council's decision to terminate the tender process and recommence it, is not afforded authority by the LGA, rather it is a characteristic of any legal person;
- (i) the Court wrote: "*Whether or not the appellant had standing to challenge the decisions of Council, in our respectful opinion, the decisions were not made "under an enactment" so as to be amendable to review under the Act"; and*

¹⁰³ [2008] QCA 16.

¹⁰⁴ *Ibid* [18]-[19].

(j) the Judge held that the decisions which JJ Richards sought to challenge were not decisions to which the Act applied. Therefore it was "*unnecessary to decide if the primary Judge was correct to conclude that the appellant had no sufficient standing to seek review under the Act as a person aggrieved*" by the Council.

7.7 ***Cubic Transportation Systems Inc v New South Wales***¹⁰⁵

(a) considered a number of privilege clauses which arguably attempted to exclude a "process contract" being formed including as follows:¹⁰⁶

"Notwithstanding anything contained in this Call (RFT).....the Principal shall have no legal obligations whatsoever to any Proponent (tenderers) (Clause 3.1.18)".

and

"Each Proponent (tenderer) acknowledges and agrees that notwithstanding anything contained in the Call (RFT).....no contractual relationship exists (except in relation to the irrevocable offer described in Clause 3.1.17) between the Principal and any...Proponent (Clause 3.1.1)"

(b) These privilege clauses were read down by the Court after holding there was a "process contract" or "pre-award contract" as referred to in that case.

(c) With respect to clause 3.1.18, the Court determined that the clause (read in context with the rest of the clause) was concerned with the **selection** of a preferred Proponent (tenderer) only.¹⁰⁷

(d) With respect to clause 3.1.1, the Court held that the clause referred to the **evaluation of the revised Proposal** only;¹⁰⁸ and

(e) The Court noted the poor and contradictory draft of the Call (RFT).

7.8 Based on *Cubic*, drafters of RFTs containing a "privilege clause" which attempts to disclaim a "process contract" being formed should be mindful of possible contradictions with other clauses. In such a case, the Court may attempt to read down any such attempts to exclude a "process contract" being formed.

7.9 Refer to Section 11.5 for more commentary on privilege clauses.

¹⁰⁵ [2002] NSWSC 656.

¹⁰⁶ *Ibid* [16].

¹⁰⁷ *Ibid* [16].

¹⁰⁸ *Ibid* [10].

8. Issue 4 - Exclusion of liability clauses

8.1 Principals often include a clause in the RFT which attempts to 'exclude' its liability for damages in the event a process contract is held to have been formed. Principals see such an exclusion of liability as a 'second round' defence from claims from potentially aggrieved tenderers.

8.2 In *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*:¹⁰⁹

- (a) the Ministry of Transportation and Finance (**Province**) issued a RFT for designing and building a highway in British Columbia. Later that year, the Province informed the six tenderers, including Tercon and Bretwood Enterprises Ltd, that it now intended to design the highway itself and would issue a RFP for its construction;
- (b) under the terms of the RFP, only the six original proponents were eligible to submit a proposal;
- (c) The RFP also included an exclusion clause **excluding all claims for damages "as a result of participating in this RFP"**;
- (d) unable to submit a competitive bid alone, Brentwood teamed up with EAC (which was not a qualified bidder) in a joint venture and submitted a bid in Brentwood's name. Brentwood and Tercon were the two short-listed proponents and the Province selected Brentwood as the preferred tenderer;
- (e) Tercon brought an action in damages, alleging that the Province had breached the tendering contract by accepting a bid from an ineligible bidder and, but for that breach, Tercon would have been awarded the contract. It also claimed that the exclusion clause did not bar Tercon's claim for damages for breaches of the tendering contract found by the trial judge;
- (f) in reliance on the exclusion clause, the Province argued that the parties were free to agree to limitations and did so;
- (g) the trial judge found in favour of Tercon and awarded damages. The Court of Appeal reversed the trial judge's decision finding that the exclusion clause was clear, unambiguous and barred compensation for all defaults;
- (h) the Supreme Court of Canada (5:4) allowed the appeal and found in favour of Tercon, agreeing with the decision at first instance. The Court held that:
 - (i) The Province "*breached the express and implied terms of the contract by considering a bid from an ineligible bidder*", and it did so "*in a manner that was an affront to the integrity and business efficacy of the tendering process*";¹¹⁰
 - (ii) properly interpreted, the exclusion clause does **not** protect the Province from Tercon's damages claim, which arises from the Province's dealings with a party ineligible to bid, nor from its breach of the implied duty of fairness to bidders; and
 - (iii) The Province's liability arises from its unfair dealings with a party who was not entitled to participate in the process, by accepting a bid from an ineligible bidder, and by taking steps to ensure that this fact was not disclosed. The

¹⁰⁹ (2010) SCC4.

¹¹⁰ Ibid [6] (Cromwell J).

Province did not succeed in excluding liability for damages flowing from this conduct through an exclusion clause inserted into the contract. The parties did not intend, through the words of the exclusion clause, to waive compensation for conduct, like that of the Province, that strikes at the heart of the tendering process.

- 8.3 Based on the above, when drafting exclusion of liability clauses consideration should be given to the full circumstances under which an exclusion of liability is required to apply.

9. Issue 5 - Implied terms in tendering (good faith, confidentiality)

9.1 The implication of a duty of good faith (in law) in the performance of contractual obligations is not settled in Australia and is a topic in itself. One commentator suggests, however, that any government tendering process is a prime candidate for the implication of such a duty.¹¹¹

9.2 The following cases consider the implication of a duty of good faith (in law and in fact) in the tendering process.

9.3 In *Hughes Aircraft Systems International v Airservices Australia*¹¹² (See Section 5.4 for the facts of this case):

(a) Hughes submitted the following term should be implied in law and ad hoc:

"[t]he CAA would conduct its evaluation fairly and in a manner that would ensure equal opportunity to Hughes and Thomson".

Implied term of good faith – ad hoc (in fact)

(b) the Court applied the test in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*¹¹³ and held:

"I would have to say I regard the case for this implication as overwhelming. Fairness in process and dealing was a priori of this business relationship. I need not repeat the history here:.. comments at the restart meeting were emblematic of what all parties were reasonably entitled to expect for the future. And their expectations were to be given the guarantee of an independent audit of compliance and fairness. Without the assurance of fairness, there would have been no contract. Such was Hughes' evidence. Despite the criticism mounted by the respondent of the term's "nebulous" language, it was the actual language of the parties; it was intended to convey meaning and to be relied upon. It was, relevantly, definite and capable of precise expression. And, in my view, it was "so obvious that [the parties] would clearly have agreed to its inclusion in the contract...had they directed their mind to it at the time".¹¹⁴

Implied term of good faith – in law

(c) the Court discussed the uncertain basis (in Australia) as to the basis of implying a term in law. The Court acknowledged the overlap between the two categories (implication ad hoc and in law) but **rejected the idea** that the "necessity test" (where the contract would be rendered nugatory, worthless, or, perhaps, be seriously undermined without such a term) as discussed in *Byrnes' v Australian Airlines Ltd* (1995) 185 CLR 410¹¹⁵ provided a "complete account of the reasons for which and implication of law can be made";¹¹⁶

(d) the Court opined: *"It is not at all surprising that, even absent the finding of a contract, Courts have assumed that "obligations to act fairly" in the treatment of tenderers can*

¹¹¹ NC Seddon, *Government Contracts* (The Federation Press, 4th ed, 2008) 352.

¹¹² [1997] 146 ALR 1.

¹¹³ (1997) 180 CLR 266.

¹¹⁴ *Hughes Aircraft Systems International v Airservices Australia* [1997] 146 ALR 1, 35 applying *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia)* (1986) 160 CLR 226 at 241.

¹¹⁵ *Ibid* 37-39.

¹¹⁶ *Ibid* 39.

still arise: see *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478.... In the tender process context such a duty seems little more than an appropriate adaptation of the duty to cooperate recognised in *Butt v Mc Donald* (1896) 7 QLJ 68 at 70-17";¹¹⁷

- (e) the Court also opined that public policy played a part in considering whether such a term should be implied in law. To that end the Court noted that the CAA was a "Public body - a body whose owners are, ultimately, the Australian community whom the Authority serves under and in accordance with its statutory mandate. As with any agency of government - and I do not mean by this that it is thereby within "the shield of the Crown" - it has no private or self-interest of its own separate from the public interest";¹¹⁸
- (f) the Court held: "Not only is the contract of a type, as I have indicated above, the tenderers could properly expect the other contracting party to act fairly in its performance, that other contracting party is an agency of government and as such can properly be expected to act fairly with those with whom it deals in such contracts. It is to this latter feature of the contractual relationship that I wish to draw attention";¹¹⁹ and
- (g) the Court concluded: "Given the view I earlier expressed that **fair dealing** is, in effect, a proper **presupposition** of a competitive **tender process contract** (especially one involving the disposition of **public funds**), and given that a **public body** is the contracting party whose performance of the contract is being relied upon, a necessary incident of such a contract with a public body is, I am prepared to conclude, that it **will deal fairly with the tenderers in the performance of its tender process contracts with them**".¹²⁰

9.4 In *Cubic Transportation Systems Inc v New South Wales*:¹²¹

- (a) Cubic submitted that there was an implied term the evaluation of offers would be conducted fairly "and in a manner which would ensure equal opportunity" to each Proponent. With regard to an implication of a term of good faith or fairness, the Court held that there was an implied obligation on the Government to act reasonably, honestly and fairly. The Court held and made the following observations:¹²²
 - (i) "If there are to be implied terms of good faith and reasonableness (the formulation adopted by the Court of Appeal in *Burger King Corporation v Hungry Jacks Pty Limited* [2001] NSWCA 187 at [159]), "they are to be implied as a matter of law" (*ibid* at [164]), which requires that it be "both reasonable and necessary" to do so (*ibid* at [167]). Of course, the implied term must be necessary for fulfilment of the explicit or necessarily implied contractual obligations (*ibid* at [173]), which must, accordingly, be identified. I am satisfied that the nature of the contractual obligations of the parties in the context of this tender, requires the implication of a term of reasonableness and good faith, especially because (so far as the Principal is concerned) of the broad powers the Call reserves to it to vary the Call and the processes under it. That is not to say that specific reservations of unqualified

¹¹⁷ *Ibid* 39.

¹¹⁸ *Ibid* 40

¹¹⁹ *Ibid* 40.

¹²⁰ *Ibid* 42.

¹²¹ [2002] NSWSC 656.

¹²² *Ibid* [44].

*powers must be read down but I think that they cannot be exercised capriciously or dishonestly, cited with approval in **Burger King** at [159]); and*

(ii) *"the Australian cases make no distinction between the implied term of reasonableness and that of good faith" (**Burger King** at [169]). I think that the obligation of the Principal and of the Government was to act honestly, reasonably and fairly. However, that does not mean that the Principal "is not entitled to have regard only to its own legitimate interests" in exercising its obligations and powers under the contract but "it must not do so for a purpose extraneous to the contract": **Burger King** at [185]). The effect of my conclusion that the Codes are not part of the Principal's or the Government's contractual obligations will, I think, be minimal (if it has any significance at all) since the sections of the Codes which are said to apply are, I think, merely elaborations of what would at all events be contained within the requirement of acting reasonably and in good faith which I have identified above";*

(b) the Court referred to **Transit New Zealand v Pratt Contractors Ltd**¹²³ and noted McGrath J's comments on provisions entitling an invitor to reject all tenders which are intended to give legitimate protection to the invitor's interests. Mc Grath J wrote "should not readily be eroded by an expansive approach to judicial recognition of implied terms" and:

*"[91] In this context the implied duty of equal treatment, that is, even handedness, should not be expanded by further implication to found obligations in relation to Transit's administration of tenders over and above those actually stipulated in the conditions of tender unless they meet the general requirements for implied contractual terms, including necessity for business efficacy, as expressed in such decisions as **Devonport Borough Council v Robbins** [1979] 1 NZLR 1 and **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** (1977) 16 ALR 363. The concept of fair dealing is more often likely to be of importance in considering whether there has been compliance with contractual terms in tender process administration, rather than as a source of new terms";¹²⁴ and*

(c) the Court also commented on Finn J's decision in **Hughes Aircraft Systems International v Air Services Australia** (1997) 76 FCR 151, (1997) 46 ALR 1 with respect to his Honour's consideration of public policy as a basis on which to imply a term of good faith as a matter of law. Adams J opined:¹²⁵

*"[I]t seems to me, a very great gulf between the public policy considerations underlying cases such as **Haoucher and Annett v McCann**, (the cases relied on in **Hughes** for this principle) dealing with human and civil rights and those which should apply to determining the nature and extent of contractual obligations between Government and large commercial corporations. I confess to some feelings of scepticism that these contexts are usefully regarded as part of the same general notion as to how Governments should behave, especially where it is sought to enforce special obligations on Government negotiating as a contractor for goods and services. If the requirement of fair dealing is to be implied in "as a generalisation of universal application, [being] the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts" (76 FCR at 193, emphasis added), it is difficult to see that*

¹²³ *Transit New Zealand v Pratt Contractors Ltd* [2002] 2 NZLR 313.

¹²⁴ *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656, [35].

¹²⁵ *Ibid.*

*jurisprudence developed to protect human and civil rights and subject the executive to the requirement to act within its legislative remit will provide a useful point of reference as to whether such a term should be implied or, if so, its appropriate standard. In this respect, the implications of the statement by **Gummow J** in **Service Station Association Ltd v Berg Bennett & Associates Pty Ltd** (1993) 45 FCR 84 at 97 that -*

“...it requires a leap of faith to translate these well-established [equitable] doctrines and remedies into a term as to the quality of contractual performance, implied by law”

(with which Finn J did not agree) must surely apply to public law doctrines developed to control “the insolence of office” (Hamlet, Act III, Scene 1) and prevent unauthorised oppression of the subject.”

9.5 In **Dockpride Pty Ltd v Subiaco Redevelopment Authority**¹²⁶ (See Section 5.7 for the facts of this case):

- (a) Dockpride alleged that there was an implied term that the Authority would not accept a tender which did not comply with a mandatory and/or material requirement in the Design Guidelines including, amongst others, the Rokeby Walk Guideline.
- (b) The Court held:¹²⁷

“the form, structure and language of the Design Guidelines are not consistent with being terms of a contract. For example, it is stated in the introduction section of the Design Guidelines that the design of the roads and parking within the Square is conceptual at that time with further detailed design development to be undertaken prior to settlement on the lots. In para 1.12 of the Design Guidelines it is stated that the use of artists as part of the design team for new development is strongly encouraged. Subparagraph 2.4.1 includes a statement that ground floor tenancies other than the anchor retail tenancy are encouraged to incorporate entrances to external street frontages. Paragraph 3.1 states that a pedestrian route (Rokeby Walk) that links the Square to a car park on the north of the site is required and must be on the same alignment as Rokeby Rd. However, that is different from subpara 3.1.1, which states that the preferred location of the pedestrian access is on an axis line with Rokeby Rd”.

- (c) Having regard to the form, structure and contents of the Design Guidelines, the Court concluded that:
 - (i) the document was a **guide** to what the Authority considered to be appropriate development within Station Square and against which the Authority would assess tenders and that the Design Guidelines did **not contain mandatory or prescriptive requirements**, compliance with which was a pre-condition to the tender being considered or accepted by the Authority; and
 - (ii) the form, structure and contents of the Design Guidelines gave the Authority a significant margin of discretion to determine what in its opinion constituted acceptable variances from the Design Guidelines.

¹²⁶ *Dockpride Pty Ltd v Subiaco Redevelopment Authority* [2005] WASC 211.

¹²⁷ *Ibid* [138]-[139].

(d) The Court also held there was an implied term that the Authority (not breached by the Authority) would not accept (and therefore not evaluate) a bid that was unresponsive to the Design Guidelines on the basis that:¹²⁸

- (i) clause 6 did not permit the Authority to accept a bid that so failed to **meet the requirements of the tender documents that it did not amount to a response to the Invitation to Tender**. In this case, the tender **must respond** to the Design Guidelines. If the bid was **clearly unresponsive** to the Design Guidelines then it was **not a tender** in response to the Invitation to Tender and it was not open to the Authority to award the contract to that bidder;
- (ii) the implication of such a term was consistent with the principles set out in **BP Refinery (Westernport) Pty Ltd v Hastings Shire Council** (1977) 180 CLR 266 and **Byrne & Frew v Australian Airlines Ltd** (1995) 185 CLR 410;
- (iii) a number of Canadian cases support a flexible approach that allows consideration of tenders which are substantially compliant. For example, in **R v Ron Engineering & Construction (Eastern) Ltd** (1981) 1 SCR 111, Estey J said 278:

It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission to insert in the appropriate blank in the contract the numbers of weeks already specified by the contractor in its tender.

(e) The Court found that the "process contract" had an implied term (again which was not breached by the Authority) that the Authority would deal with Dockpride, fairly and in good faith as:¹²⁹

- (i) good faith has been recognised as implied in a contract in a number of cases in Australia: eg **Hughes (supra); Renard Constructions (ME) Pty Ltd v Minister for Public Works** (1992) 26 NSWLR 234; **Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd** [1999] FCA 903; **Alcatel Australia Ltd v Scarella** (1998) 44 NSWLR 349;
- (ii) "*a duty to act in good faith in the performance of a contract is an emerging doctrine in Australian contract law: see N C Seddon and M P Ellinghaus "Cheshire & Fifoot's Law of Contract", 8th Australian ed, 2002 [10.43–10.46]. Seddon argues that not only can this duty apply to the performance of the pre-award contract but that the tendering procedure to be followed in awarding a government contract is a prime candidate for the imposition of such a duty. Seddon says that the milieu of tendering, with its attendant emphasis on conducting a fair competition and, in public contracts, the need to ensure the best use of public money, militates in favour of finding a duty to act in good faith: Seddon "Government Contracts", at 7.21";*
- (iii) in **Hughes**, Finn J found that it was an implied term of the process contract that the CAA would conduct its evaluation of the tenders fairly and in a manner that would ensure equal opportunity to the two tenderers. Finn J also found that, as a matter of law, a term would be implied in any event that obliged the CAA to deal fairly with the tenderers in its performance of the process contract; and

¹²⁸ Ibid [142]-[149].

¹²⁹ Ibid [151]-[158].

(iv) with respect to the content of the duty, the Court referred to ***Pratt Contractors Ltd v Transit New Zealand*** [2003] UKPC 83 (see Section 9.6 below).

9.6 In ***Pratt Contractors v Transit New v Transit New Zealand***¹³⁰ (See Section 6.2 for the facts of this case):

- (a) the parties accepted that a process contract or preliminary contract was in place between Pratt and Transit;
- (b) the parties accepted that, in general terms, a duty to act fairly and in good faith existed in that case;
- (c) their Lordships said that the issue in that case was as to the **specific content of that duty** in relation to the particular acts required to be performed by Transit in evaluating the tenders. Their Lordships stated their agreement with Finn J in *Hughes* (supra) where his Honour had said that the implied term "*does not as such impose on [the employer] under the guise of contract law, the obligation to avoid making its decision or otherwise conducting itself in ways which would render it amenable to judicial review of administrative action*"; and
- (d) their Lordships then stated at [47]:

"The judge's findings of apparent bias were therefore no ground for holding Transit to have breached the process contract. It is nevertheless necessary to identify exactly what standard of conduct was required of the TET in making its assessment. In their Lordships opinion, the duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the TET. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same. But Transit was not obliged to give tenderers the same mark if it honestly thought that their attributes were different ... The obligation of good faith and fair dealing also did not mean that TET had to act judicially. It did not have to accord Mr Pratt a hearing or enter into debate with him about the rights and wrongs of, for example, the Pipiriki contract. It would no doubt have been bad faith for a member of the TET to take steps to avoid receiving information because he strongly suspected that it might show that his opinion on some point was wrong. But that is all".

9.7 In ***Wagdy Hanna and Associates Pty Ltd v National Library of Australia***,¹³¹ with respect to Wagdy's submission that there was an implied term (as a matter of law) of confidentiality (as there was no express mention of any confidentiality obligation), the Court reasoned:¹³²

- (a) "*the law as to confidentiality in tender documents seems to me to be accurately stated in Seddon, N Government Contracts (Federation Press, 4th ed, 2009) at p 388; [7.33], where the author writes:*

"During the tendering process a duty of confidentiality may arise to protect information provided by either party. This duty exists whenever information, such as trade secrets or sensitive government or commercial information, is provided in circumstances where it is obvious that it is being provided in confidence. This may arise expressly or by implication. Alternatively, the parties may enter into a

¹³⁰ [2005] 2 NZLR 433.

¹³¹ [2012] ACTSC 126. See Section 5.9 for the facts of this case.

¹³² *Ibid* [212].

confidentiality agreement. The existence of a duty of confidentiality may indirectly control one practice sometimes resorted to in negotiated tenders by the body seeking tenders, namely, disclosing to one tenderer an innovative feature of another tenderer's bid. So long as the innovative feature was in the form of information provided in confidence, the disclosure would be in breach of confidence. The appropriate remedy would depend on the circumstances but may include an injunction and damages";

- (b) *there was an express mention that material submitted may be subject to the Freedom of Information Act 1982 (Cth) which somewhat told against there being a confidentiality obligation;*
- (c) *the process was presumably subject to governmental regulation including the Commonwealth Government Procurement Guidelines which stated “[y]ou should not, of course, divulge to one vendor information which is confidential to another” and to Standards Australia, Code of Tendering (Australian Standard AS 4120–1994, Council of Standards Australia, 31 December 1994), which required that “[a]ll information provided between Tenderers and the Principal shall be treated as confidential information.” This would certainly found the duty of confidence, but the question is whether, as a matter of fact (not law) this provision was incorporated in the tender process;*
- (d) *some conduct of the parties indicated there was no implied obligation of confidentiality including Wagdy's request that the National Library of Australia provide him with a list of bids and details of those bids;*
- (e) *on the other hand, Wagdy was very keen, at this stage, to protect information which it had provided. In letters it expresses the view that it was “entitled ... [to a] statutory declaration that none of our [sic] intellectual property was passed onto the successful tenderer”. Similarly, the National Library of Australia in its reply to Wagdy regarding its request for information relating to other bids, declined to provide the information sought on the ground that it was “commercial-in-confidence”;*
- (f) *again, while these are communications subsequent to the making of any contract, they seem to come within the exception that they may be relied on to work out the terms of the contract: **County Securities Pty Ltd v Challenger Group Holdings Pty Ltd** [2008] NSWCA 193 at [21] “; and*
- (g) *based on the above, the Court considered the determined objective intention of the parties and found that there was an implied term in the “tender process contract”, that the tender material of each tenderer would be kept confidential. The Court, however, found no breach of such a term by the National Library of Australia.*

9.8 In summary, from the above cases, terms will be implied in a “process contract” (whether they be implied by law or ad hoc (in fact) using the same principles as are applied to general contracts. As this is a topic in itself, only brief commentary has been provided.

10. Issue 6 - E-tenders

10.1 Submitting tenders electronically will become more frequent if not the norm in the near future. Accordingly, it is important to carefully consider the obligations in the RFT with respect to uploading tenders and how circumstances which may prevent a tenderer from complying with those stated obligations will be managed by the Principal. Failure to do so may lead to unwanted court action.

10.2 In *JB Leadbitter & Co Limited v Devon County Council*.¹³³

- (a) Devon County Council (DCC) sent an invitation to tender (ITT) for a framework agreement to J B Leadbitter & Co Limited (Leadbitter). The ITT stated the deadline and method of submission of tenders;
- (b) it was the responsibility of Tenderers to ensure that all relevant tender documents were uploaded in full as an incomplete set of documents would result in an invalid tender. Submission of the e-tender was a once-only option, no provision was made for it to be changed or added to except as provided for in the ITT;
- (c) on the morning of the deadline another tenderer suffered a power cut and DCC extended the deadline for all by three hours. Although Leadbitter's e-Tender was complete and ready for submission, it took advantage of the extra time and did not upload its documents until the extended deadline;
- (d) however, when Leadbitter did eventually upload its documents, Leadbitter failed to upload the whole tender to the secure portal, only realising the error 15 minutes before the deadline. It was unable to add the missing case studies as only **one** upload was allowed;
- (e) Leadbitter phoned the DCC helpdesk and emailed the omitted Case Studies shortly after the deadline hoping they would still be considered;
- (f) the tender was rejected as incomplete;
- (g) Leadbitter claimed that DCC was in breach of the duty of equality and non-discrimination by not waiving strict compliance with the requirements because the deadline was extended and another bidder had been given the opportunity to rectify an error in its tender using a sealed hard copy as a back-up to the uploaded version in compliance with the ITT;
- (h) the Court held:
 - (i) the power outage had been outside the tenderer's control and therefore was not comparable with Leadbitter's mistake;
 - (ii) unlike Leadbitter's email, the delivery of the hard copy tender by the other tenderer had been within the deadline; and
 - (iii) furthermore, by sending the case studies via email Leadbitter failed to preserve the level of security of a secure portal or sealed envelope;
- (i) Leadbitter argued it should have been allowed to correct its mistake as the ITT permitted rectification of "errors". The Court acknowledged that Leadbitter had completed the Case Studies in good time before the deadline and that the failure to attach the documents to the rest of the tender was an unintended technical error, such

¹³³ [2009] EWHC 930.

that no unequal treatment need arise with the acceptance of these Case Studies. However, the Court held that DCC was entitled to reject Leadbitter's tender and was not acting disproportionately in doing so. "*Although an authority may not be required to reject non-compliant bids, it has a general discretion to do so.*" The deadline and other key elements of tender submission were made clear and well understood by Leadbitter;

- (j) Leadbitter also said DCC had a duty to act proportionately and that DCC had acted in breach of this duty, imposing a sanction which was disproportionate to Leadbitter's error. The Court agreed this duty applied but there would have to be exceptional circumstances, such as fault on the part of the procuring party, for this to require the acceptance of a late tender. Even if there was a discretion to accept late submissions, there is no requirement to do so, particularly where it results from a fault on the part of the tenderer. The decision of DCC to reject Leadbitter's tender was "*well the margin of discretion given to contracting authorities*". Waiving formalities or allowing late tenders may violate equal treatment, resulting in an advantage for the tenderer concerned that is not available to other tenderers; and
- (k) contracting authorities are permitted to set strict deadlines and methods for the submission of tenders and where tenderers fail to meet these, even as a result of a genuine mistake, there is no obligation on the contracting authority to accept the tender. The duty to act proportionately is unlikely to impose any duty to accept a non-compliant tender unless there are exceptional circumstances, such as a fault by the authority itself.

11. Issue 7 - "Process contract"? - consequences

11.1 This Part will discuss some of the consequences of the formation or not of a "process contract".

11.2 It goes without saying that if there is no "process contract," then any obligations in the RFT could not be enforced as contractual promises. Including, for example, obligations of the Principal that a contract will be awarded to the lowest tender, that a late tender will not be accepted, that a non conforming tender will not be accepted and that only expressly noted assessment criteria will be used not be enforceable.

11.3 Similarly:

- (a) tenderers' obligations that a price offered in the tender will remain open for acceptance for a stipulated period,¹³⁴ that tenderers must comply with a stipulated code of practice,¹³⁵ or
- (b) any warranties required from tenderers such that they did not rely on information provided by the Principal and that tenderers have ascertained all facts affecting risk themselves,

will not be enforceable.

11.4 To overcome this issue, especially where the RFT contains a clause which expressly excludes a "process contract" being formed, Principals often require tenderers to execute a deed covering those obligations which the Principal considers to be essential.¹³⁶ See, for example, Part 3 of the Department of Defence's RFT included at Schedule E to this Paper (**Tender Deed**). The Tender Deed covers various tenderer obligations or warranties including (but not limited to):

- (a) to immediately commence work on acceptance;
- (b) to be bound by the tender for a stipulated period of time;
- (c) that the tenderer will not engage in collusive tendering practices;
- (d) that it has not relied in any way on any information documents and that it has prepared its tender based on its own investigations; and
- (e) to keep confidential information confidential.

The Tender Deed also covers various discretions of the Commonwealth (Principal) including (but not limited to):

- (f) that the Commonwealth is not bound to accept the lowest or any tender;
- (g) that the Commonwealth will be relying on warranties provided by the tenderer;
- (h) that the Commonwealth may conduct the tender process in any way; and
- (i) that the Commonwealth may vary, suspend, discontinue or terminate the tendering process.

The Department of Defence presumably requires tenderers to provide such a deed as clause 8 of the Tender Conditions arguably expressly excludes a "process contract" being formed. It provides:

¹³⁴ *Macquarie Generation v CNA Resources Ltd* [2001] NSWSC 1040, [52]-[53].

¹³⁵ *New South Wales v Banabelle Electrical Pty Ltd* (2002) 54 NSWLR 503, 533-534.

¹³⁶ NC Seddon, *Government Contracts*, (The Federation Press, 4th ed, 2009), 341.

"The Tenderer acknowledges that no other document issued and no other representation made or conduct engaged in, by or on behalf of the Commonwealth (other than as set out in paragraph 8(b)) will be deemed to be acceptance of a Tenderer's Tender or to create any contractual or other legal relationship between the Commonwealth and a Tenderer or otherwise oblige the Commonwealth to enter into a Contract with the Tenderer."

11.5 Given that a "process contract" may be found (absent an express term stating otherwise which does not conflict with the other terms of the RFT and therefore is safe from being read down by the Court),¹³⁷ it is essential that the drafter of any RFT give the Principal flexibility by including "privilege clauses" giving the Principal wide discretions including (but not limited to) the discretion to:

- (a) **determine** whether a tender is or is not compliant.¹³⁸ As noted in Section 11.5 this is essential as most tenders submitted by tenderers are likely to be non-compliant in some minor way. Without a "privilege clause" giving the Principal the discretion to consider non compliant tenders, the Principal faces the possibility of not being able to consider a number of promising bids;¹³⁹
- (b) accept and consider a non-complying tender. Commentators suggest that it is unwise to include a privilege clause which provides that the Principal will **not** consider non-conforming tenders or that tenderers must comply with all tender conditions.¹⁴⁰ This is because tenderers rarely strictly comply with all the tenders terms. Notwithstanding such a situation, the Principal may wish to accept a non-conforming tender (eg one which provides a more innovative and cheaper way to construct a project) which may provide grounds for unsuccessful tenderers claims. For this reason it is better for the privilege clause to state "*the Principal may disregard any non-compliant tender*", or similar, which gives the Principal the discretion to accept a non-conforming tender;
- (c) not to award to the lowest bidder. This arguably, is an essential privilege clause to include as without such a clause it may provide an aggrieved lowest tenderer the basis to argue that there was an implied term to award the tender to the lowest bidder. In *Acme Building & Construction Ltd v Newcastle(Town)*¹⁴¹ the Council accepted the second lowest bidder as it could complete the project sooner than the lowest bidder. The Court held that even if there was a implied term at law that a contract would be awarded to the lowest tenderer, such a term could not prevail over the express terms in the RFT. However, in *Pratt Contractors Ltd v Palmerston North City Council*¹⁴² the Court held that such a privilege clause (no obligation to award tender to the lowest bidder) did not exclude the obligation to comply with other aspects of the tendering process such as the assessment criteria;
- (d) call off a tender;

¹³⁷ *R v Canamerican Auto Lease and Rental Ltd* [1987] 3 FC 144, (1987) 37 DLR (4th) 591 and *Cubic Transportation Systems Inc v New South Wales* [2002] NSWSC 656.

¹³⁸ See *Gestion Complexe Cousineau (1989) Inc v Minister for Public Works and Government Services of Canada* [1995] 2 FC 694 in which it was held that a Court could not "second guess" a decision made by the Minister regarding the compliance of the tender. The Court held: that the RFT "gave the Minister a significant margin of discretion which enabled him to determine what in his opinion constituted acceptable variances from the requirements stated in the documents

¹³⁹ NC Seddon, *Government Contracts* (The Federation Press, 4th ed, 2009) 345.

¹⁴⁰ Including J Dorter. See Dorter, J, 'Contracting and Tendering - A Legal Perspective' (1996) 12 *Building and Construction Law Journal* 234.

¹⁴¹ (1992) 2 CLR (2d) 308. In this case the Court distinguished a Canadian case which found otherwise on the grounds that it was custom and usage of the trade to accept the lowest tender in Canada and that the RFT was not inconsistent with that implied term.

¹⁴² [1995] 1 NZLR 469, 485.

- (e) amend tender documents;
- (f) not respond to all queries lodged by tenderers;
- (g) have or not have a briefing session;
- (h) consider alternative proposals. In *Pratt Contractors Ltd v Palmerston North City Council*¹⁴³ the Court stressed the importance of clearly drafting privilege clauses dealing with alternative proposals when it held: "*In the end, if tendering is to be on a basis other than that disclosed by the documents themselves, there is a risk of unfairness and I think that if a manual in its entirety is to be part of the tendering process, then it should be specifically incorporated*". In that case a manual referred to the possibilities of alternative bids being considered. The winning tender was an alternative bid but the Court held that the Principal had breached a terms of the "process contract" as the manual had not been incorporated into the RFT and therefore the Principal had no discretion to consider alternative proposals; and
- (i) not give one assessment criteria any more or less significance than another.

However, if too much flexibility is given to the Principal, it may deter tenderers from participating in the process. A balance must therefore be achieved between giving the Principal flexibility and the commercial realities existing at the time.

¹⁴³ Ibid.

12. Issue 8 - Misrepresentation and Information provided to Tenderers

12.1 Notwithstanding expressly stated obligations in the RFT which provide that tenderers must not rely on any information provided by the Principal, aggrieved may tenderers still have an entitlement to seek redress under the *Australian Consumer Law* (Schedule 2 to the *Competition and Consumer Act 2010* (Cth)) and State and Territory equivalents. This Part briefly considers some cases considering this issue.

12.2 In *JS Mc Millan v Commonwealth of Australia*:¹⁴⁴

- (a) McMillan was a consortium that responded to a Commonwealth RFT relating to purchase of packages of work for the Australian Government Printing Service (**AGPS**). McMillan were not shortlisted and they alleged two instances of misleading conduct as follows:
 - (i) that the Commonwealth had said prior to tenders closing that McMillan would be shortlisted; and
 - (ii) that McMillan had a reasonable expectation they would be informed that if they failed to accept certain conditions contained in the RFT, they would not be shortlisted.¹⁴⁵
- (b) McMillan was concerned from the beginning of the RFT that there was insufficient information to comply with clauses 10.5 and 10.7. Clause 10.5 required a commitment to provide services under MOUs that did not exist yet and clause 10.7 required a commitment to provide core work on no less favourable terms (including price);
- (c) regarding the information available in the data room, McMillan stated that whilst it was "*adequate to determine the printing work involved in the core work...the product specification was inadequate to enable a determination of costs.*"¹⁴⁶ Therefore McMillan submitted they were "*unable to accept the specific terms and conditions of this section*" for both clauses 10.5 and 10.7;¹⁴⁷
- (d) the Commonwealth did not shortlist McMillan and in a report it stated that the reason for this was their "*inability to accept the specific terms and conditions of s 10.5 at p 29 of the RFT, this matter is considered a fundamental term and condition that underpins the philosophy and strategy of the RFT...the committee considers JS McMillan bid to be non-compliant and as such cannot be considered further;*"¹⁴⁸
- (e) the Court found the conduct of the Commonwealth to be misleading, and that "*there is nowhere to be found in the request for tender a statement that the terms and conditions of s 10.5 are a fundamental terms and condition that underpins the philosophy and strategy of the request for tender;*"¹⁴⁹
- (f) the Court held:

"However, in so far as the decision to short list was made on the basis that acceptance of the specific terms and conditions of 10.5 was a fundamental term and condition that underpins the philosophy and strategy of the request to tender and on the basis that non-acceptance of those specific terms and

¹⁴⁴ [1997] FCA 619.

¹⁴⁵ Ibid 419-420.

¹⁴⁶ Ibid 424.

¹⁴⁷ Ibid 429.

¹⁴⁸ Ibid 430.

¹⁴⁹ Ibid.

*conditions rendered a tender non-compliant such that it could not be considered further, the request for tender did not fairly reflect the manner in which the tenderers would be dealt with. As I have said above, tenderers could be excused for assuming that it was not fundamental to acceptance of a tender that there be an unconditional acceptance of cl 10.5 and 10.7. To that extent I consider that the conduct of the Commonwealth has been misleading;*¹⁵⁰ and

(g) further the Judge held that although the Commonwealth's conduct was misleading, that in dealing with prospective tenderers, the Commonwealth was not engaged in the activity of carrying on a business, therefore the Trade Practices Act did not apply.¹⁵¹ The Judge concluded "*One might harbour a wish that in the circumstances, the Commonwealth would remedy the effect of the conduct which I have found misleading. However, it is not bound to do so.*"¹⁵²

12.3 **BGC Construction Pty Ltd v Minister for Works**¹⁵³ concerned a hearing for interlocutory relief in which factual issues were not determined. It simply had to be shown that there was a serious question to be tried. In this case:

- (a) BGC Construction Pty Ltd (BGC) was one of 7 short listed tenderers who had meetings with the Minister;
- (b) BGC alleged that in its meeting with the Minister, a representative of the Minister engaged in misleading and deceptive conduct, contrary to section 10 of the *Fair Trading Act 1987* (WA), and sought urgent interlocutory injunctive relief;
- (c) BGC's claims (both its estoppel claim and claim under the *Fair Trading Act 1987*) were based on a representation made by the representative, namely "*You can submit more than one sub-contractor per trade but they must each be submitted on their own schedule*", reliance upon the representation and subsequent detriment suffered.
- (d) the Minister argued that a representative of BGC asked whether they could submit more than one subcontractor for each trade. The Minister allegedly responded with words to the effect that "*we'll take that on board and we'll review the questions and then determine if we will change the intent.*" The intent referred to being that only one sub-contractor per trade be nominated;
- (e) the Minister issued an addenda which stated (amongst other things), "*The Tenderers must still nominate one (1) sub-contractor for each schedule, and that schedule is to be signed by both parties*";
- (f) the Court determined that addenda issued by the Minister were capable of being interpreted as confirming that provided each proposed subcontractor is submitted on an individual schedule, that would be acceptable to the Minister; and there was no express terms stating that there cannot be more than one subcontractor per area of work;
- (g) the Court held that viewed "*in light of the tender documentation as a whole*", BCG was successful in showing that there was an arguable case. There was a serious question to be tried and the balance of convenience justified the granting of interlocutory relief. The Court held that the plaintiff stood to "*sustain immeasurable*

¹⁵⁰ Ibid 431.

¹⁵¹ Ibid 438.

¹⁵² Ibid 438.

¹⁵³ [2009] WASC 398.

loss and damage of an unquantifiable kind, if its tenders remain summarily ejected as non-conforming, on a basis of what appears to be an unfortunate misunderstanding in communication;”

- (h) the Court ordered that the Minister be restrained from awarding the contract until it had considered BGC’s tenders as conforming tenders; and
- (i) the Court noted the persuasive fact that if it were to be later established that BGC was entitled to final relief based on the alleged representations then it would be too late to effectively “unscramble the egg”. BGC would be left with a claim for equitable compensation or statutory compensation under the *Fair Trading Act*, making it difficult to determine the value of the lost opportunity. Alternatively, there was no significant prejudice in making the Minister consider the BGC’s tender as per the orders of the Court.

12.4 In *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 3)*:¹⁵⁴

- (a) the Sydney Catchment Authority (SCA) prepared or supervised the preparation of a RFT for the design and construct a dam spillway. Part of the work involved the excavation of material from a certain part of the site down to the rock level and refilling that space;
- (b) as part of the tender documents, the SCA also provided a geotechnical report authored by the Department of Public Works and Services (DPWS);
- (c) there was no time for tenderers to verify independently the information contained in the tender documents, including in particular geological and geotechnical conditions, and it was clear that the SCA did not want prospective tenderers crawling all over the site;
- (d) Abigroup had an interest in ensuring that the information was accurate as possible as it wanted to tender an accurate price to avoid including a massive margin for latent conditions, a risk tenderers were required to assume;
- (e) the SCA represented expressly in the tender documents that "*No plans are available of this embankment or of the outlet pipe*";
- (f) however, the SCA did hold a Plan (of which it was not aware at the time the tender documents were issued) which would have been material to the pricing of the contract works; and
- (g) the RFT contained numerous disclaimers to the effect that the SCA did not warrant the accuracy of information provided and that such information may contain errors and that the tenderers must not rely of the information provided but must independently check the accuracy of the information.

12.5 The Court held that:

- (a) Abigroup had been misled by the SCA’s conduct in saying that no plan of the outlet pipe existed especially given the circumstances of the case including that Abigroup had no opportunity to undertake any geological or geotechnical investigation of its own;¹⁵⁵ and

¹⁵⁴ [2006] NSWCA 282.

¹⁵⁵ Ibid [56].

- (b) the question to be asked in determining causation was **not** what would Abigroup have done if the statement "*that there are not plans of the outlet pipe*" had not been made (as submitted by the SCA) **but** what would Abigroup have done if the plan had been disclosed.¹⁵⁶

12.6 In *Abigroup Contactors Pty Ltd v Sydney Catchment Authority*¹⁵⁷ (an earlier appeal case) the Court held that SCA had not merely "passed on" the geotechnical report authored by the DPWS (as alleged by the SCA) but that the SCA had "adopted" the report. In determining whether the report had been adopted by the SCA or it merely passed on the information, the Court:

- (a) noted that the fact that it was obvious on the geotechnical report that the report was authored by the DPWS and not the SCA is not the point unless the SCA made that fact clear;
- (b) referred to *Gardam v George Willis & Co. Limited* [1998] FCA 194 in which French J said "...when, however, a representation is conveyed in circumstances in which the carrier would be regarded by the relevant section of the public as adopting it, then he makes that representation";
- (c) said that there was no evidence that the SCA had expressly made known to tenderers that it was merely passing on information;¹⁵⁸ and
- (d) opined that words in the RFT such as "*the Principal has prepared*" and "*the Principal has provided*" could only mean that the SCA was putting forward the documents as its own.¹⁵⁹

12.7 Accordingly, based on the conclusion arrived at by the Court as set out above in Section 12.6, those preparing RFT documents should clearly and expressly make it clear if reports authored by those other than the Principal are merely being passed on to limit the Principal's exposure to claims in relation to such information.

¹⁵⁶ Ibid [59].

¹⁵⁷ [2004] NSWCA 270.

¹⁵⁸ Ibid [91].

¹⁵⁹ Ibid [97].

13. Tendering for Government - Policies and Codes

13.1 The Commonwealth, States and Territories and local governments each have their own legislation and guidelines governing procurement. Whilst not legally binding, it is important to understand the legislative framework to understand the procurement rules and the options available when challenging procurement decisions, including obtaining information about the decision making process (under freedom of information legislation), timing for valid challenges, and understanding authorities' obligations to disclose information for award criteria, weightings and selection criteria.¹⁶⁰

13.2 For the purposes of this Paper, relevant Commonwealth and NSW Government policies and codes will be briefly reviewed. For other States' and Territories' guidelines and legislation which may be relevant, see Section 13.16.

Commonwealth

13.3 **Commonwealth Procurement Rules 2014 (which replace the Commonwealth Procurement Guidelines)** are the cornerstone of the Commonwealth Government's procurement policy framework and are made under the *Public Governance, Performance and Accountability Act 2013* (Cth).

13.4 Division 1 of the Guidelines sets out "Rules for all Procurements" which apply to all procurements including (but not limited to) the following principles:

- (a) **Value for Money** - "*When a business requirement arises, officials should consider whether a procurement will deliver the best value for money*";
- (b) **Encouraging Competition** - "*Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes.*"
- (c) **Efficient, Effective, Economical and Ethical Procurement** - "*The Australian Government promotes the proper use and management of public resources. Proper means efficient, effective, economical and ethical*";
- (d) **Accountability and Transparency in Procurement** - "*The Australian Government is committed to ensuring accountability and transparency in its procurement activities. Accountability means that officials are responsible for the actions and decisions that they take in relation to procurement and for the resulting outcomes. Transparency involves relevant entities taking steps to enable appropriate scrutiny of their procurement activity. The fundamental elements of accountability and transparency in procurement are outlined in this section*";
- (e) **Procurement Risk** - "*Risk management comprises the activities and actions taken by a relevant entity to ensure that it is mindful of the risks it faces, that it makes informed decisions in managing these risks, and identifies and harnesses potential opportunities; and*
- (f) **Procurement Method** - "*Australian Government procurement is conducted by one of three methods open tender, prequalified tender or limited tender*".

13.5 Division 2 sets out additional rules for procurements at or above the relevant procurement thresholds.

¹⁶⁰ Andrew Chew and Geoff Wood, 'The Tendering landscape in Australia' (2011) *International Construction Law Review* 1.

13.6 To enable the reader to have an understanding of the contents of the Commonwealth Procurement Rules, the first pages of the rules are included at **Schedule A** including the Table of Contents.

New South Wales

13.7 The NSW Government's **Procurement Policy Framework For NSW Government Agencies** (issued by the NSW Procurement Boards dated October 2014) (**NSW Procurement Policy**) sets out the policy and operating framework for the NSW public sector procurement system and provides a single source of guidance on the rules for procurement. It includes links to other relevant policies and material including standard form documentation. Again (to enable the reader to gain an understanding of the contents), the first few pages of the NSW Procurement Policy (including the Table of Contents) are provided at **Schedule B**.

13.8 Like the **Commonwealth Procurement Rules 2014** it provides that the overaching requirement for procurement is to provide:

- (a) value for money;
- (b) promotion of competition;
- (c) innovation;
- (d) access to procurement opportunities for small to medium enterprises;
- (e) sustainable procurement; and
- (f) apply and record fairness and probity requirements in the planning and conduct of procurement activities.

13.9 The **NSW Procurement Policy** also states that standard contract templates are available for use and that such standard contracts are recommended but not mandatory.

13.10 Additionally, the **NSW Procurement Policy** provides that the **NSW Government Code of Practice for Procurement (NSW Code)** is mandatory and applies to construction procurement.

13.11 The **NSW Code** covers:

- (a) Code Responsibilities (tenderers required to comply with Code);
- (b) Standards of Behaviours (honesty, fairness, accountability, transparency, rule of law, anti-competitive behaviours, etc...);
- (c) Best Practice Requirements (minimise costs for all parties, use best tender method, critical evaluation criteria);
- (d) Compliance with Code (reporting breaches); and
- (e) in Appendix A, specific practice requirements (environmental management, work, health and safety, industrial relations, SOP legislation, training management, aboriginal participation, conditions of tendering, etc).

13.12 A copy of the first few pages of the **NSW Code** (including the Table of Contents) is provided at **Schedule C**.

13.13 In addition to the **NSW Procurement Policy** and **NSW Code**, the NSW Government also publishes a document titled "**Tendering Guidelines December 2011**" (**Tendering**

Guidelines) which aims to provide industry with an understanding of the process undertaken by NSW Government. The **Tendering Guidelines** cover (amongst other things):

- (a) planning and tendering processes;
- (b) Tendering methods (open tendering, multi-stage tendering, limited tendering);
- (c) RFT documentation (conditions of tendering, specifications, other documents);
- (d) Tendering process (tender period, enquiries, meetings, amendments to RFT);
- (e) Evaluations (methodology, late tenders); and
- (f) Outcomes of Tendering (announcing results, contract award, debriefings, complaints);

13.14 The Tendering Guidelines also state that tenderers must comply with the **NSW Code**.

13.15 A copy of the first few pages of the Tendering Guidelines (including the Table of Contents) is provided at **Schedule D**.

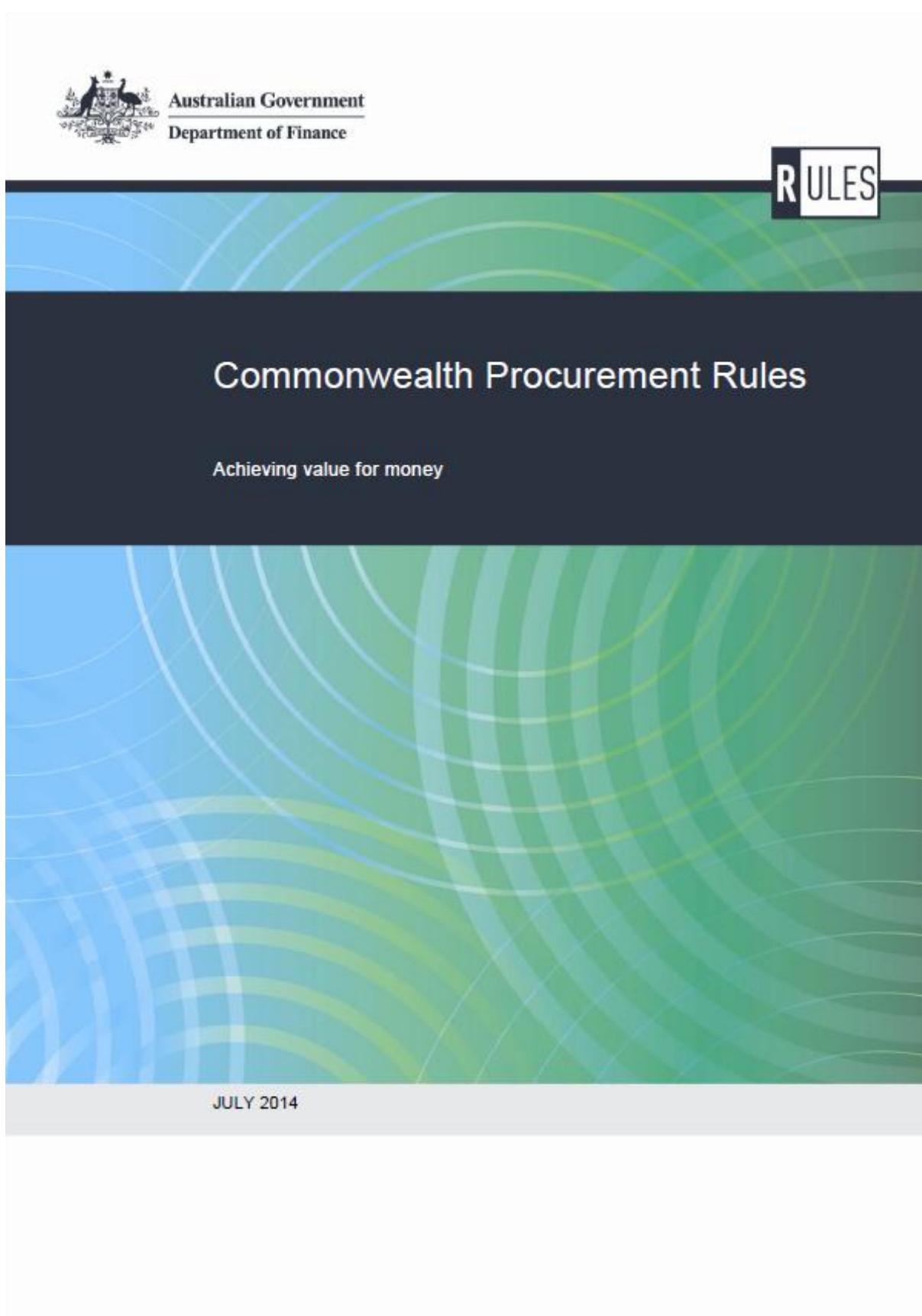
Other States and Territories

13.16 The Table below details other States' and Territories' guidelines and legislation relevant to tendering.

State/Territory	Document
Queensland	Queensland Procurement Policy (July 2013) Purchasing and Procurement Procedures (26 March 2014) Queensland State Procurement Plan (June 2014) Queensland Procurement Resources Purchasing and Procurement Instructions (January 2014)
Victoria	Governance policy (1 February 2013) Complexity and capability assessment policy Market analysis and review policy Market approach policy Guides: - Guide to building innovation into the procurement process - Guide to improving access to government business for SMEs - Guide to pre-qualified supplier arrangements
Australian Capital Territory	Government Procurement ACT 2001 Government Procurement Regulation 2007 ACT Government Tendering Guide
South Australia	State Procurement Act 2004 State Procurement Regulations Procurement Policy Framework
Western Australia	Procurement Practice Guide: A Guide to Products and Services Contracting, for Public Authorities (January 2015) Suppliers Guide to Tendering with Western Australian Government Agencies for Products and Services
Northern Territory	Procurement Act 1995 Procurement Regulations 2014 Procurement Code (February 2011)

	<u>Procurement Directions (July 2014) (215 pages)</u>
Tasmania	<u>Guidelines for Tender Evaluation using Weighted Criteria for Building Works and Services</u> <u>Treasurer's Instructions</u> (numerous including <u>Procurement Principles; goods and services (May 2014)</u>) Purchasing Policies (numerous including <u>Tasmanian Annexure to the National Code of Practice for the Construction Industry</u>)

Schedule A “Commonwealth Procurement Rules”



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Schedule B “NSW Procurement Policy”



**PROCUREMENT
POLICY FRAMEWORK**

FOR NSW GOVERNMENT AGENCIES

ISSUED BY THE NSW PROCUREMENT BOARD

October 2014

Version 3

Page 1 of 35

NSW Procurement Policy Framework

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Introduction

This Policy Framework sets out the policy and operating framework for the NSW public sector procurement system and provides a single source of guidance on the rules for procurement. It includes links to other relevant policies and material including standard form documentation.

The principles-based Policy Framework has been developed by the Procurement Board in consultation with agencies for use by agencies and suppliers to government. Feedback is welcomed and contact details are provided at the end of this document.

This Policy Framework sets out mandatory requirements that must be followed by all agencies. It may be mandatory because it is the law¹, or mandated at a policy level by government, the NSW Procurement Board, or other administrators within government (for example, Treasury Circulars). References to the source or authority have been included.

The mandatory sections of this Policy Framework are 'policy' for the purposes of section 176 of the *Public Works and Procurement Act 1912*, which requires agencies to exercise procurement functions in accordance with:

- any policies and directions of the Board
- the terms of its accreditation
- the principles of probity and fairness.

Agencies are also required to:

- ensure that the agency achieves value for money in the exercise of its functions
- provide information to the Board at its request
- monitor compliance with this Procurement Policy Framework.

Agencies should ensure that their procurement activities align with their business needs and work towards service improvements. Agencies should also ensure that their internal policies and controls are consistent with any obligations under this Policy Framework, including financial management obligations and policies relating to fraud and corruption control.

Under the NSW Government Procurement Policy Framework:

- agencies are responsible for their own procurement and for compliance with procurement law and the Procurement Policy Framework
- accreditation is a key element in the devolution of responsibility

¹ Agencies should note that, for brevity, not all legislative obligations affecting the way an agency conducts procurement are repeated within this Policy Framework. This Framework focuses on the legislative obligations in Part 11 of the *Public Works and Procurement Act 1912*, and references other key obligations such as those within the *Public Finance and Audit Act 1983* and the *Independent Commission Against Corruption Act 1988*.

NSW Procurement Policy Framework

- less red tape and prescriptive rules apply to procurement, and the requirements that do apply to procurement are principle-based
- there is greater competition for supply to government, with small and medium enterprises in particular encouraged to participate in procurement processes
- the default open tender model has been replaced with the option of using a broader range of procurement methods
- the default long term, panel contracts, which lock out suppliers and innovation, is replaced with more flexible supplier arrangements such as prequalified schemes and lists
- government contracts for procurement are being brought in line with commercial and private sector standards
- there is more effective planning for procurement through category management approaches and principles
- probity and fairness are highly significant and essential elements of a procurement, however they should not be used as a shield to stifle competition, value for money, or innovation outcomes.

How to use this document

To assist agencies to apply this Policy Framework, at the beginning of each section there is a summary of mandatory procurement requirements, key activities and key documents:

Mandatory requirement

Key activities and issues

Documents and templates

Guidance material represents the NSW public sector's best practice for procurement which agencies are encouraged to adopt. Further advice is provided on the [ProcurePoint website](#).

A glossary of commonly used terms in this Policy Framework is at Appendix A and a procurement practice checklist is at Appendix B.



New South Wales Government

Code of Practice for Procurement

Current issue dated 18 January 2005:
applies to procurements for which tenders close
on or after 1 February 2005

NSW GOVERNMENT CODE OF PRACTICE FOR PROCUREMENT

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NOTE:

NOTE: This Code of Practice for Procurement may be revised periodically.

First issue dated 1 July 2004:

applies to procurements for which tenders closed up to and including 31 January 2005.

Current issue dated 18 January 2005:

applies to procurements for which tenders close on or after 1 February 2005.

NSW GOVERNMENT CODE OF PRACTICE FOR PROCUREMENT

1. INTRODUCTION

This *Code of Practice for Procurement* outlines how the New South Wales Government will conduct its procurement activities when interacting with the private sector.

The Code sets the framework for all business relationships by:

- Establishing the standards of behaviour expected from government agencies (as clients), tenderers, service providers, employer and industry associations and unions
- Requiring a strong commitment to continuous improvement and best practice performance by all participants in the supply chain.

The Government will use its right as a major client to do business only with service providers who display a commitment to and consistent application of the standards of behaviour outlined in the Code.

This Code replaces the following Codes relating to government procurement, namely:

- Code of Practice – NSW Government Procurement (1999)
- Code of Tendering – NSW Government Procurement (1999)
- Code of Practice for the Construction Industry (July 1996)
- Code of Tendering for the Construction Industry (July 1996)
- Code of Practice on Employment and Outwork Obligations – Textile Clothing and Footwear Suppliers (February 1998).

The Code applies to all procurements for which tenders are invited or negotiations commenced on or after 1 July 2004. Where a revision to the Code has been introduced, the date of the revision is noted in the Code's Log of Revisions. The above replaced Codes continue to apply to procurements for which tenders were invited or negotiations commenced prior to 1 July 2004.

The New South Wales Government Procurement Policy framework is an essential reference to give proper effect to this Code. The Policy incorporates all relevant policies, guidelines and procedures which underpin the practice requirements of this Code.

In particular, the following pre-existing Implementation Guidelines for earlier Codes of Practice expand on key aspects of this Code and should be read together with this Code:

- Implementation Guidelines – NSW Government Procurement (1999)
- Implementation Guidelines on Employment and Outwork Obligations – Textile Clothing and Footwear Suppliers (1998).

References in these Implementation Guidelines to previous Codes should be read as references to the current Code, although section numbers are not consistent.

The Code is also to be read together with the Implementation Guidelines to the NSW Code of Practice for Procurement: Building and Construction (2013).

Code of Practice for Procurement New South Wales Government. Current issue dated 18 January 2005 applies to all procurements for which tenders close on or after 1 February 2005. Updated 7 November 2013.

Schedule D “Tendering Guidelines”



New South Wales Government

NSW Government Procurement Guidelines

Tendering Guidelines

December 2011

version	3.2
revision date	December 2011
phone	02 9372 8600 or 1800 NSW BUY (1800 679 289)
e-mail	nswbuy@services.nsw.gov.au

These guidelines were commissioned by NSW Treasury and prepared by the NSW Finance and Services for the NSW Government. These guidelines are a key element of the Procurement Policy Framework of the NSW Government. They are available from the NSW Government procurement website <http://www.nswprocurement.com.au/Government-Procurement-Frameworks/Goods---Services/Tendering-Guidelines---Policy.aspx>

The document shall be updated on an ongoing basis by the Department of Finance and Services to reflect changes to government tendering policy and procedures. To ensure accurate and up to date information, agencies are advised to access the latest version directly from the website.

For further information on these guidelines contact NSW Procurement help desk by phone 02 9372 8600 or 1800 679 289 (1800 NSWBUY) or e-mail nswbuy@services.nsw.gov.au

Issue log

Issue number	Release date	Details
2	December 2006	Update of Schedule 1 definition and PM 06-11
2.1	January 2007	Update on release of Freedom of Information Amendment (Open Government— Disclosure of Contracts) Act 2006
3	July 2010	Reference the new government procurement website Include NSW Local Jobs First Plan obligations Update on release of Government Information (Public Access) Act 2009 General review and update
3.1	October 2011	Update on release of M2011-16 NSW Government Tenders advertised on tenders.nsw.gov.au only
3.2	December 2011	Reference to exemptions from Public Sector Employment and Management (Goods and Services) Regulation 2010

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1 Introduction

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1.1 Context, purpose and scope of Guidelines

The NSW Government Procurement Policy Framework, available on the NSW Government procurement website <http://www.nswprocurement.com.au/>, has a fundamental objective to ensure that NSW Government procurement achieves value for money. Efficiency and effectiveness, probity and equity, and effective competition are key principles underpinning the Policy Framework.

The Policy Framework includes a single *NSW Government Code of Practice for Procurement* to cover all Government procurement. These Tendering Guidelines (the *Guidelines*) build on the objectives, responsibilities, and standards of behaviour in the Code and are a key component of the Policy Framework.

The *Guidelines* are designed to provide agencies with a structured approach to planning and implementing tendering and associated processes. Agencies may in addition require more detailed procedures for specific agency tendering activities.

The *Guidelines* also provide industry with an understanding of the processes undertaken by NSW Government agencies to ensure fairness and probity in tendering.

The *Guidelines* apply to procurement undertaken by all agencies, including government departments, statutory authorities, trusts and other government entities. State Owned Corporations under the State Owned Corporations Act are exempt although they are encouraged to use the *Guidelines*. Internet links throughout the *Guidelines* provide further explanation of the subject matter.

The *Guidelines* may be revised periodically. The latest version can be accessed from the NSW Government procurement website <http://www.nswprocurement.com.au/>.

1.2 Principles

Before an agency embarks on a tendering process there should be consideration as to whether tendering is the most appropriate procurement method. For example, can the agency undertake the work in-house and achieve value for money?

Schedule E “Department of Defence RFT Documents”



Australian Government

Department of Defence
Defence Support and Reform Group

TENDER DOCUMENTS

[LAST AMENDED: 4 JULY 2014 - PLEASE REMOVE PRIOR TO [TENDER](#) ISSUE]

Please note:

- matters in **[SQUARE BRACKETS AND ITALICS]** are to be completed by [Defence](#) before [Tender Documents](#) are issued to [Tenderers](#); and
- matters in **[SQUARE BRACKETS AND BOLD]** are to be completed by the [Tenderer](#) before submitting a [Tender](#).

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PART 1 - TENDER CONDITIONS

TENDER CONDITIONS

1. INFORMATION FOR TENDERERS

1.1 General

(a) The Tenderer is invited to submit a Tender for the Contractor's Activities on the terms of the Tender Documents.

(b) **[HC-1 2003 ONLY]** If clauses 6.13 and 6.14 of the Conditions of Contract in Part 5 apply, the successful Tenderer will be required to accept a novation of the agreements between the Commonwealth and the Commonwealth's Novated Design Consultants, on the terms of clauses 6.13 and 6.14.

[IF USING AUSTENDER, INSERT THE FOLLOWING CLAUSE 1.2.]

[IF USING AUSTENDER, THE RELEVANT REFERENCE TO AUSTENDER IN CLAUSES 2.1(a)(v), 2.1(a)(vii), 2.2(a), 2.2(c), 2.2(d), 2.3(a), 6(a) AND 6(b) MUST ALSO BE INSERTED.]

1.2 **[AusTender, the Australian Government Tender System]**

(a) AusTender is the Australian Government's procurement information system. Access to and use of AusTender is subject to terms and conditions. In participating in this Tender, Tenderers must comply with those terms and conditions and any applicable instructions, processes, procedures and recommendations as advised on AusTender from time to time at www.tenders.gov.au.

(b) All queries and requests for technical or operational support must be directed to:

AusTender Help Desk

Telephone: 1300 651 698

International: +61 2 6215 1558

Email: tenders@finance.gov.au

The AusTender Help Desk is available between 9am and 5pm ACT Local Time, Monday to Friday (excluding ACT and national public holidays). Tenderers should note that all questions related to this Tender must be addressed to the in accordance with clause 2.2(a).

(c) Tenderers should inform themselves of the security measures and other aspects of AusTender prior to using it for any matter related to this Tender. The Commonwealth makes no representations or warranties about the security or unauthorised access to any information transmitted via the internet to, or from, AusTender or to or from the Commonwealth and accepts no responsibility arising from any use or attempted use of AusTender by a Tenderer.

(d) If the Commonwealth amends the Tender Documents prior to the Tender Closing Time specified in clause 2.1(a)(iii), then the Commonwealth will issue an amendment to these Tender Documents via AusTender. The Commonwealth will endeavour to issue an electronic advice to tenderers who have registered with AusTender for that purpose.

(e) The Commonwealth accepts no responsibility if a tenderer fails to become aware of any addition, deletion, variation, modification or amendment to the Tender Documents, notice or further Information Documentation available for tenderers as referred to in clause 2.1(a)(v) which would have been apparent from a visit to the AusTender internet site or from other information available from the Tender Administrator.

(f) Tenderers acknowledge that it is their responsibility to download any addition, deletion, variation, modification or amendment to the Tender Documents or further Information Documentation available for Tenderers as referred to in clause 2.1(a)(v) via AusTender. The Tender Documents or any addition, deletion, variation, modification or amendment published through the AusTender internet site will take precedence over any other version of the Tender Documents or addition, deletion, variation, modification or amendment if there is any inconsistency.]

2. INTERPRETATION OF TENDER DOCUMENTS, QUESTIONS, AMENDMENTS AND INDUSTRY BRIEFING

2.1 Interpretation

(a) In these Tender Conditions and in the other Tender Documents:

(i) all words and expressions will (unless the context otherwise requires) have the meanings assigned to them in

	clauses <i>[1.1 and 1.2 -if HC-1 2003/ 21.1 and 21.2 -if MW-2 2004]</i> of the Conditions of Contract in Part 5 or the meanings assigned to them in these Tender Conditions ;	(vi) Tender means the documents lodged with the Commonwealth pursuant to these Tender Conditions ;
(ii)	Claim includes (without limitation) any claim:	(vii) Tender Administrator means the person specified in the Tender Particulars or any other person notified to the Tenderer by the Commonwealth <i>[by fax or post/via AusTender]</i> ;
	A. under, arising out of, or in any way in connection with, any contract which the Tenderer may enter into with the Commonwealth in respect of the project;	(viii) Tender Conditions means these tender conditions in Part 1 (including Appendix 1);
	B. arising out of, or in any way in connection with, any task, thing or relationship connected with the project; or	(ix) Tender Documents means:
	C. otherwise at law or in equity including (without limitation):	<ul style="list-style-type: none"> A. the Tender Conditions; B. the Tender Particulars in Part 2; C. the Tender Form and Statutory Declaration in Part 3; D. the Tender Schedules in Part 4; E. the Contract in Part 5; F. the <i>[Works Description - if HC-1 2003 / Design Documents - if MW-2 2004]</i> (as defined in the Conditions of Contract in Part 5); and G. the other documents referred to in the reference in the Contract Particulars in Part 5, which correspond to the definition of "Contract" in clause <i>[1.1 - if HC-1 2003 / 21.1 - if MW-2 2004]</i> of the Conditions of Contract in Part 5,
	1) by statute;	but excludes the Information Documents ;
	2) in tort for negligence or otherwise, including (without limitation) negligent misrepresentation; or	(x) Tenderer means the entity (or entities) invited to submit a Tender ;
	3) for restitution;	(xi) any reference to a Part is a reference to a Part of the Tender Documents ; and
(iii)	Closing Time and Date means the time and date set out in the Tender Particulars;	(xii) any reference to one of the documents described in the definition of the Tender Documents in subparagraph (ix) is a reference to the document so entitled which is included in the Tender Documents .
(iv)	Defence means the Department of Defence;	
(v)	Information Documents means:	
	A. the documents listed in the Tender Particulars; and	
	B. any other document or amendment to a document which is:	
	1) issued by the Tender Administrator to the Tenderer prior to the Closing Time and Date <i>[by fax or post/via AusTender]</i> ; and	
	2) at the time of issue, expressly stated to be an "Information Document" or an amendment to an Information Document;	(b) One copy of the Tender Documents will be supplied to the Tenderer without charge.

2.2 Questions and Amendments to Tender Documents

(a) If a Tenderer finds any discrepancy, error or omission in the Tender Documents or has any question or wishes to make any enquiry concerning the Tender Documents or the tender process, it must notify the Tender Administrator by fax or post prior to the Closing Time and Date. Subject to paragraph (b), answers to any such notices may be given by the Tender Administrator (in its absolute discretion) in the form of addenda under paragraph (c) or as Information Documents. Subject to the Commonwealth Procurement Rules, the Tender Administrator is not obliged to respond to all such notices. The address and fax number of the Tender Administrator are as set out in the Tender Particulars or as otherwise notified to the Tenderer by the Commonwealth *[by fax or post/ via AusTender]*.

(b) At the time of its notice under paragraph (a), the Tenderer may request that a matter notified under paragraph (a) and any answer remain confidential on the basis that its request and any answer contain commercial in confidence material. The Tenderer must clearly state in its notice that it is a request under this paragraph (b) and must provide justifications for its request. If the Tender Administrator:

- (i) agrees (in its absolute discretion) that the whole or any part of the matter notified or any answer should remain confidential on the basis that the request and any answer contain commercial in confidence material, it must notify the Tenderer by fax or post and the matter notified and any answer will not be issued to all Tenderers; or
- (ii) does not agree (in its absolute discretion) that the whole or any part of the matter notified or any answer should remain confidential on the basis that the request and any answer contain commercial in confidence material:
 - A. it must notify the Tenderer by fax or post;
 - B. the Tenderer must notify the Tender Administrator by fax or post within 2 days of receiving notice from the Tender Administrator under subsubparagraph A if it wishes to withdraw its notice under paragraph (a); and

C. if the Tenderer does not withdraw its notice or fails to respond in accordance with this subparagraph (ii), the matter notified and any answer may be given by the Tender Administrator in the form of addenda under paragraph (c) or as Information Documents and issued to all Tenderers *[by fax or post/ via AusTender]*.

(c) *[INSERT "SUBJECT TO" IF USING AUSTENDER]* *[The/Subject to clauses 1.2(d) to 1.2(f), the]* Tender Administrator may amend the Tender Documents at any time prior to the Closing Time and Date. All amendments to the Tender Documents will be issued in the form of an addendum and will be issued to all tenderers *[by fax or post/ via AusTender]*. No explanation or interpretation of the Tender Documents may be relied upon by the Tenderer unless given in the form of an addendum. Addenda issued under this paragraph (c) will become part of the Tender Documents.

(d) In the event of a discrepancy between:

- (i) *[INSERT IF USING AUSTENDER]* *[a communication made via AusTender and any other form of communication, the communication made via AusTender will prevail;]*
- (ii) a form of communication specified in the Tender Documents and an email communication used in addition to a form of communication specified in the Tender Documents, the form of communication specified in the Tender Documents will prevail; or
- (iii) a fax and post communication, the post communication will prevail.

2.3 Industry Briefing

Clause 2.3 applies unless the Tender Particulars state that it does not apply.

(a) The Commonwealth may (in its absolute discretion) conduct industry briefings in relation to the Works. The Tender Administrator will *[notify/provide notification to]* the Tenderer of the time and place for any industry briefing *[by fax or post/ via AusTender]*.

(b) Subject to paragraphs (c) and (d), the maximum number of Tenderer personnel

permitted to attend any industry briefing is set out in the Tender Particulars.

(c) If the Tenderer wishes to attend any industry briefing, it must forward to the Tender Administrator by fax or post:

- (i) the Tenderer's name and location;
- (ii) the full names and addresses of Tenderer personnel that will attend the industry briefing; and
- (iii) any other details specified by the Tender Administrator in its notice under paragraph (a),

within the time specified in the Tender Administrator's notice or, where no such time is specified, at least 72 hours before any industry briefing.

(d) The Commonwealth may (in its absolute discretion) refuse to permit Tenderer personnel to attend an industry briefing if the Tenderer:

- (i) exceeds the maximum number of Tenderer personnel specified in paragraph (b);
- (ii) fails to comply with paragraph (c); or
- (iii) replaces Tenderer personnel after the time specified in the Tender Administrator's notice, or, where no such time is specified, within 72 hours before any industry briefing.

(e) All industry briefings are conducted for the purpose of providing background information only. The Tenderer must not in any way rely upon any industry briefing for the purposes of preparing, amending or negotiating its Tender or entry into any contract with the Commonwealth with regard to the Contractor's Activities and the Works. The Tenderer will not be provided with copies of any industry briefing materials.

(f) Without limiting the Tender Conditions, the Tender Administrator may (in its absolute discretion) issue Information Documents or addenda to address matters arising out of any industry briefing.

3. TENDERS

3.1 **Conforming Tender, including Closing Time and Date, Minimum Form and Content Requirements and Conditions for Participation**

To submit a conforming Tender:

- (a) the Tender must be submitted:
 - (i) in the tender box located at:

Defence Mail Services
Queanbeyan Annex 6
14-22 Wycombe Street
QUEANBEYAN NSW 2620; and
 - (ii) by the Closing Time and Date;
- (b) the Tender must satisfy each minimum form and content requirement as follows:
 - (i) the Tender must remain valid for 90 days, during which period the Tenderer cannot withdraw its Tender;
 - (ii) the Tenderer must accept (without departure, qualification, amendment, limitation or exclusion) the Contract in Part 5, except to the extent provided for in clause 3.2 and set out by the Tenderer in Tender Schedule I - Alternative Proposals; and
 - (iii) the Tenderer must complete and submit Tender Schedule J - Building Code 2013; and
- (c) the Tenderer must at the time of submitting its Tender (subject to subsubparagraph A below) satisfy:
 - (i) each condition for participation as follows:
 - A. the Tenderer complies with the Building Code 2013 at the time of submitting its registration of interest or if no registration of interest was submitted, at the time of submitting its Tender; and
 - B. the Tenderer must not be precluded from tendering for Australian Government funded work or specifically excluded from participating in this tender process; and

(ii) each additional condition for participation stated in the Tender Particulars (if any).	(d) if it does not satisfy each condition for participation specified in clause 3.1(c), then the <u>Tender</u> will be regarded as non-conforming and will not be evaluated (or continue to be evaluated).
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3.2 Alternative Proposals

- (a) The Commonwealth offers the Tenderer the opportunity to provide alternative proposals in the pursuit of greater value for money. The Tenderer should note, however, that (subject to the Commonwealth's absolute discretion under clause 3.3(c)) it must submit a conforming Tender before an alternative proposal will be considered.
- (b) If the Tenderer wishes to submit any alternative proposal, it must be set out in Tender Schedule I - Alternative Proposals. The Tenderer should note that this is a minimum form and content requirement for its Tender under clause 3.1(b)(ii).
- (c) If the Commonwealth (in its absolute discretion) selects or accepts any alternative proposal, the Commonwealth will make any necessary alterations to the Contract in Part 5.

3.3 Non-Conforming Tender

In submitting its Tender, the Tenderer acknowledges and agrees that:

- (a) if it did not submit its Tender in accordance with clause 3.1(a), then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated) unless the reason it was not submitted in accordance with clause 3.1(a) was solely due to mishandling by the Commonwealth;
- (b) it is responsible for submitting its Tender in accordance with clause 3.1(a) and managing all surrounding risks, including those associated with mishandling by a courier or mail service provider engaged by the Tenderer, travel arrangements and weather conditions;
- (c) if the Tender does not satisfy each minimum form and content requirement specified in clause 3.1(b), then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated) unless the Commonwealth considers (in its absolute discretion) that the failure to satisfy any minimum form and content requirement was due to an unintentional error by the Tenderer and the Commonwealth (in its absolute discretion) seeks, reviews and accepts any correction to the unintentional error; and

3.4 Administrative Arrangements

To assist the Commonwealth in identifying the Tenderer, identifying its Tender and evaluating its Tender, the Tenderer is requested to:

- (a) provide the information requested in:
 - (i) the Tender Form and Statutory Declaration in Part 3;
 - (ii) Tender Schedule A - Workload and Proposed Resources;
 - (iii) Tender Schedule B - Plans [*and Preliminary Design Solution - if HC-1 2003/MW-2 2004 design and construct method only*];
 - (iv) if the Tenderer was not required to submit a registration of interest, Tender Schedule C - Previous Performance;
 - (v) Tender Schedule D - Program;
 - (vi) Tender Schedule E - Tenderer's Security and Insurance Details;
 - (vii) Tender Schedule F - Miscellaneous Contract Particulars;
 - (viii) Tender Schedule G - Tenderer's Commercial-in-Confidence Information; and
 - (ix) Tender Schedule H - Contract Price;
- (b) in the Tender Form and Statutory Declaration in Part 3:
 - (i) confirm that the Tenderer has allowed in the Tender for the requirements contained in all addenda issued under clause 2.2(c) and identify each addendum by its number and date of issue;
 - (ii) provide:
 - A. if the Tenderer is:
 - 1) a person, the name in full and the address of the person;
 - 2) a firm, the name in full and the address of each

	member of the firm and its ABN (if applicable);	B.	the details set out in subparagraph (ii) for each party to the joint bid;
3)	a trust or operating under any other fiduciary capacity, the name in full and details of the trust or fiduciary arrangements (including a copy of the trust deed) and its ABN (if applicable); or	C.	details of the joint bid arrangements, including details of incorporation or otherwise, joint venture or special purpose vehicle; and
4)	a corporation, the name of the corporation, the date and place of incorporation, address of its registered office, address of its principal place of business and its ACN and ABN;	D.	confirmation that each party to the joint bid will be jointly and severally liable to the Commonwealth if they are the successful <u>Tenderer</u> ; and
B.	details (as applicable) concerning:	(iv)	execute the Tender Form and Statutory Declaration by:
1)	organisational structure (including by way of a current organisational chart or diagram);	A.	having a person or persons with full authority to bind the <u>Tenderer</u> for the purposes of the <u>Tender</u> and the Contractor's Activities execute the Tender Form and Statutory Declaration; or
2)	any trading or business name, if different from a registered name;	B.	if the <u>Tenderer</u> is a corporation, affixing the common seal in the manner prescribed by the <i>Corporations Act 2001</i> (Cth) to the Tender Form and Statutory Declaration; and
3)	related bodies corporate within the meaning of the <i>Corporations Act 2001</i> (Cth); and	C.	if the <u>Tenderer</u> consists of more than one entity, having each entity execute the Tender Form and Statutory Declaration in accordance with either subsubparagraph A or B (as applicable),
4)	for a foreign individual, firm or corporation, details of its registration, incorporation and place of business in Australia, together with the name of any Australian representative;		and if the Tender Form and Statutory Declaration are executed in the manner described in subsubparagraph A, the <u>Tenderer</u> is also requested to provide evidence of the authority of the person or persons executing the Tender Form and Statutory Declaration;
C.	a street address (not a post office) and fax number for service of notices for the purpose of its <u>Tender</u> ; and	(c)	endorse the outside of each sealed package with the words set out in the Tender Particulars;
D.	details of its builder's registration or licence number;	(d)	enclose the <u>Tender</u> in sealed packages, each of which do not exceed 16 kilograms and 400mm x 500mm in any two lineal dimensions;
(iii)	if the <u>Tenderer</u> wishes to submit its <u>Tender</u> on a Joint Bid Basis (as defined in clause 11.4), provide:		
A.	a Tender Form and Statutory Declaration from each party to the joint bid (as applicable);		

(e) submit the number of bound copies and unbound copies specified in the Tender Particulars, with one bound copy marked "Original" and each other copy marked "Copy". In the event of any discrepancies between the copies, the copy marked "Original" will prevail;

(f) unless otherwise specified, express measurements in Australian legal units of measurement;

(g) unless otherwise specified, state all prices in Australian Dollars;

(h) ensure that all contents are readable by using appropriate print colours and font size (equivalent to at least Arial 10 point or Times New Roman 11 point); and

(i) ensure that all contents, alterations and erasures are clearly and legibly stated and initialled by the Tenderer (if applicable),

but these are not minimum form and content requirements for its Tender.

4. EVALUATION OF TENDERS

Subject to the Tender Conditions, Tenders will be evaluated to determine the Tender which represents the best value for money to the Commonwealth. In considering the Tender, the Commonwealth:

(a) will apply the following evaluation criteria:

(i) **workload and proposed resources.** The extent to which the Tenderer has demonstrated that it has the availability and ability to resource the Contractor's Activities and the Works (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule A - Workload and Proposed Resources);

(ii) **plans [and preliminary design solution - if HC-1 2003/MW-2 2004 design and construct method only].** The extent to which the Tenderer has demonstrated that it:

A. comprehends key issues and will implement appropriate solutions for the Contractor's Activities and the Works; and

B. will implement appropriate management strategies for the Contractor's Activities and the Works, including methodology, quality assurance, work health and safety, site management, environmental management, time and cost control, commissioning and handover, Whole-of-Life (WOL), employment and training opportunities for indigenous Australians (in regions where a significant indigenous population exists), ensuring gender equality in the workplace and adding and retaining trainees and apprentices (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule B - Plans *[and Preliminary Design Solution - if HC-1 2003/MW-2 2004 design and construct method only]*);

(iii) if the Tenderer was not required to submit a registration of interest, **previous performance.** The extent to which the Tenderer has demonstrated that it has the experience and ability to perform the Contractor's Activities and the Works (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule C - Previous Performance);

(iv) **program.** The extent to which the Tenderer has demonstrated that it has satisfactorily programmed the Contractor's Activities and the Works (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule D - Program);

(v) **the Tenderer's commercial position.** The extent to which the Tenderer has demonstrated that it has a satisfactory commercial position in respect of the Contract, the Works and the Contractor's Activities, which may include (in the Commonwealth's absolute discretion):

A. **security and insurance details** (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule E - Tenderer's Security and Insurance Details);

B. **miscellaneous Contract Particulars** (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule F -

	Miscellaneous Contract Particulars);	(ii) take into account any information submitted or likely to be submitted by the <u>Tenderer</u> in any registration of interest, tender, proposal or similar procurement process in connection with this or any other Department of Defence Capital Facilities and Infrastructure Branch project; and
C.	commercial-in-confidence information (if any) (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule G - Tenderer's Commercial-in-Confidence Information); and	(iii) without limiting any other right or remedy of the Commonwealth, decide not to evaluate a <u>Tender</u> (or continue to evaluate a <u>Tender</u>) if the <u>Tenderer</u> has failed to comply with any of its obligations in these <u>Tender Conditions</u> or has otherwise acted inconsistently with the tender process.
D.	Building Code 2013. The extent to which the <u>Tenderer</u> has demonstrated compliance with the Building Code 2013 (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule J - Building Code 2013, item C);	
(vi)	Contract Price. The extent to which the <u>Tenderer</u> has demonstrated that its Contract Price, when considered in conjunction with all other evaluation criteria and other information taken into account, constitutes value for money (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule H - Contract Price); and	
(vii)	subject to clause 3.2 (including the Commonwealth's absolute discretion with respect to alternative proposals), alternative proposals (if any). The extent to which the <u>Tenderer</u> has demonstrated greater value for money (noting that the type of information the Commonwealth is seeking is outlined in Tender Schedule I - Alternative Proposals);	
(b)	will apply any additional evaluation criteria specified in the Tender Particulars;	
(c)	may (in its absolute discretion) take into account the information which the <u>Tenderer</u> provided under clause 7(b) but not the information which the <u>Tenderer</u> provided under clause 7(a); and	
(d)	may (in its absolute discretion):	
	(i) obtain and take into account information from its own inquiries and investigations, including from referees on prior or current projects on which a <u>Tenderer</u> may have been involved (whether or not nominated by the <u>Tenderer</u> in its registration of interest) (if any) or its <u>Tender</u> ;	
		(ii) take into account any information submitted or likely to be submitted by the <u>Tenderer</u> in any registration of interest, tender, proposal or similar procurement process in connection with this or any other Department of Defence Capital Facilities and Infrastructure Branch project; and
		(iii) without limiting any other right or remedy of the Commonwealth, decide not to evaluate a <u>Tender</u> (or continue to evaluate a <u>Tender</u>) if the <u>Tenderer</u> has failed to comply with any of its obligations in these <u>Tender Conditions</u> or has otherwise acted inconsistently with the tender process.
		5. TENDERER'S DUE DILIGENCE
		(a) No representation has been or is made to the <u>Tenderer</u> by the Commonwealth, the <u>Tender Administrator</u> , the Contract Administrator or any of their employees, agents or consultants about the accuracy, completeness or sufficiency of the <u>[Works Description - if HC-1 2003 / Design Documents - if MW-2 2004]</u> or that the <u>[Works Description - if HC-1 2003 / Design Documents - if MW-2 2004]</u> represents a completed design of the Works which is suitable for construction purposes and the Commonwealth:
		(i) has not assumed; nor
		(ii) does it assume,
		a duty of care to the <u>Tenderer</u> concerning the <u>[Works Description - if HC-1 2003 / Design Documents - if MW-2 2004]</u> .
		(b) The <u>Tenderer</u> is required to do, and will be deemed to have done, everything that would be expected of a prudent, competent and experienced contractor in:
		(i) assessing the risks which it is assuming under the Contract; and
		(ii) ensuring that its tendered Contract Price contains allowances to protect it against any of these risks, including all those things, activities and tasks set out in the Tender Form and Statutory Declaration.
		(c) The <u>Tenderer</u> may, subject to any conditions or restrictions imposed by the <u>Tender Administrator</u> , inspect the Site and related <u>Information Documents</u> and for this purpose should contact the <u>Tender Administrator</u> by fax or post to arrange an inspection.

(d) *[If HC-1 2003/ MW-2 2004 construct only method only - otherwise, delete paragraph (d)]* Without limiting paragraph (a), no representation has been made or is made to the Tenderer by the Commonwealth, the Tender Administrator, the Contract Administrator or any of their employees, agents or consultants about the accuracy, completeness or sufficiency of the *[Works Description - if HC-1 2003/Design Documents - if MW-2 2004]* or that the *[Works Description - if HC-1 2003/Design Documents - if MW-2 2004]* represents a completed design of the Works which is free from Buildability Problems and the Commonwealth:

(i) has not assumed; nor

(ii) does it assume,

a duty of care to the Tenderer concerning any Buildability Problems.

6. INFORMATION DOCUMENTS

(a) With respect to the Information Documents:

(i) those Information Documents referred to in clause 2.1(a)(v)A have been made available *[electronically or in hard copy/via AusTender]* and are immediately available for the information only of the Tenderer;

(ii) those Information Documents of the kind referred to in clause 2.1(a)(v)B may be issued to the Tenderer by the Tender Administrator from time to time prior to the Closing Time and Date for the information only of the Tenderer; and

(iii) they do not form part of the Tender Documents and will not form part of any eventual contract for the Contractor's Activities.

(b) The Tenderer acknowledges and agrees that, before the Tender Documents or any Information Documents were made available to the Tenderer, the Tenderer entered into a disclaimer and confidentiality agreement, a pro-forma copy of which is Appendix 1 to these Tender Conditions, and returned it by fax or post to the Tender Administrator *[.IF USING AUSTENDER, INSERT "BY" AND DATE FOR RETURN OF DISCLAIMER AND CONFIDENTIALITY AGREEMENT]*.

7. PROPOSED PROCEDURE BEFORE AND AFTER CLOSING TIME AND DATE

(a) In submitting its Tender, the Tenderer acknowledges that:

(i) the Commonwealth requires the submission of fully competitive Tenders from each Tenderer, which will generally maximise the possibility of exceptional performance by the successful Tenderer in accordance with the terms of the Tender Documents;

(ii) in light of subparagraph (i), before the Closing Time and Date, the Commonwealth may (in its absolute discretion and without being under any obligation to do so):

A. meet separately with representatives of each Tenderer to:

1) obtain information in relation to, and clarify aspects of, the Tenderer's proposed Tender;

2) explain the intention of, and answer questions about, any aspect of the Tender Documents; and

3) raise and address any other issues which the Commonwealth may (in its absolute discretion) identify;

B. require the Tenderer, within a specified time, to provide the Commonwealth by fax or post with further information or clarification in relation to aspects of the Tenderer's proposed Tender; and

C. request the Tender Administrator to amend the Tender Documents and otherwise issue such addenda as the Commonwealth considers (in its absolute discretion) necessary or desirable to further the objective in subparagraph (i);

(iii) because each Tenderer is likely to have a different approach to the submission of its Tender and the performance of

<p>the Contractor's Activities, the Commonwealth may (in its absolute discretion):</p>	<p>(c) The <u>Tenderer</u> must:</p> <ul style="list-style-type: none"> (i) attend and participate in all meetings required by the Commonwealth under paragraph (a) or (b); and (ii) provide all information, documents, evidence or clarifications required by the Commonwealth under paragraph (a) or (b) within the time periods and in the formats specified by the <u>Tender Documents</u> or as otherwise specified by the Commonwealth.
<p>A. raise issues with a <u>Tenderer</u> which it does not raise with other <u>Tenderers</u>;</p> <p>B. raise issues with a <u>Tenderer</u> which improves the proposed <u>Tender</u> to be submitted by that <u>Tenderer</u>; and</p> <p>C. provide a <u>Tenderer</u> with opportunities to ask questions, provide information in relation to or clarify aspects of its proposed <u>Tender</u>, or improve its proposed <u>Tender</u>, which it does not provide to the other <u>Tenderers</u>;</p>	<p>(d) The Commonwealth may (in its absolute discretion) by notice by fax or post appoint one or more <u>Tenderers</u> as preferred <u>Tenderers</u>:</p> <ul style="list-style-type: none"> (i) with whom the Commonwealth will enter into negotiations; and (ii) subject to the satisfaction of such conditions (if any) as may be stated in the notice, including the signing of any preferred <u>Tenderer</u> negotiation protocol (setting out the basis on which the Commonwealth will negotiate with the preferred <u>Tenderer</u>).
<p>(iv) the Commonwealth is not obliged to:</p> <p>A. provide any information or explanation, answer any questions or otherwise act in any particular manner in or arising out of or in connection with any meeting convened under this paragraph (a); or</p> <p>B. request the <u>Tender Administrator</u> to amend the <u>Tender Documents</u> or otherwise issue any addenda arising out of or in connection with any meeting under this paragraph (a).</p>	<p>(e) Without limiting paragraph (h), clause 8 or the legal effect of the preferred <u>Tenderer</u>'s obligations under any preferred <u>Tenderer</u> negotiation protocol required under paragraph (d)(ii), the appointment of a <u>Tenderer</u> as a preferred <u>Tenderer</u> under paragraph (d) is not to be taken as a representation that the Commonwealth will award the Contract to the preferred <u>Tenderer</u> and does not bind the Commonwealth to do so.</p>
<p>(b) Following the <u>Closing Time and Date</u>, the Commonwealth may (in its absolute discretion) do one or more of the following from time to time with one or more <u>Tenderers</u>:</p> <ul style="list-style-type: none"> (i) meet with representatives of the <u>Tenderer</u> to obtain further information, documents or evidence in relation to, and otherwise clarify, aspects of the <u>Tenderer</u>'s <u>Tender</u>; (ii) require the <u>Tenderer</u> to provide the Commonwealth by fax or post with further information, documents, evidence or clarification in relation to any aspect of the <u>Tenderer</u>'s <u>Tender</u> or as otherwise described in the <u>Tender Documents</u>; and (iii) set aside a <u>Tender</u>, pending negotiations with one or more preferred <u>Tenderers</u> under paragraph (d). 	<p>(f) Negotiations with preferred <u>Tenderers</u> under paragraph (d):</p> <ul style="list-style-type: none"> (i) may be conducted on any basis which the Commonwealth (in its absolute discretion) considers will enable the Commonwealth to improve the value for money which it would obtain from acceptance of any preferred <u>Tenderer</u>'s <u>Tender</u>; (ii) without limiting subparagraph (i), may involve the amendment of any aspect of the <u>Tender Documents</u> (including the Contract in Part 5) or a preferred <u>Tenderer</u>'s <u>Tender</u>, regardless of how substantial the amendment or the fact that the amendment is only proposed to a particular preferred <u>Tenderer</u>; and (iii) do not require the Commonwealth to provide each preferred <u>Tenderer</u> (if

more than one) with the same information, opportunity to negotiate, or proposed amendment of any aspect of the Tender Documents (including the Contract in Part 5) or the preferred Tenderer's Tender.

(g) Without limiting paragraph (h)(v), the Commonwealth may (in its absolute discretion) discontinue negotiations at any time and for any reason with a preferred Tenderer or appoint one or more other preferred Tenderers with which to enter into negotiations.

(h) In submitting its Tender, each Tenderer:

- (i) acknowledges that the entire tender process (including the process for meeting with Tenderers under paragraph (a) and then obtaining, evaluating and (if applicable) negotiating Tenders) (**Process**) is being conducted solely for the benefit of the Commonwealth;
- (ii) acknowledges that, without limiting the legal effect of the preferred Tenderer's obligations under any preferred Tenderer negotiation protocol required under paragraph (d)(ii), the Commonwealth does not intend to create any contract or other relationship under which the Commonwealth is legally obliged to conduct the Process in any manner or at all (whether in accordance with the terms of these Tender Documents or otherwise) and that there is in fact no such contract or other relationship in existence;
- (iii) acknowledges that there will be no procedural or substantive limitation upon the manner in which the Commonwealth may (in its absolute discretion) conduct the Process;
- (iv) acknowledges that, to the extent permitted by law:
 - A. the Commonwealth does not make any warranty, guarantee or representation about a Tenderer's Tender, the Commonwealth's requirements for the Contractor's Activities or the way in which it will evaluate Tenders arising out of or in connection with anything which the Commonwealth states or does or omits to state or do in, arising out of or in connection with any meeting under paragraph (a) or (b) or any industry briefing (**Meeting Conduct**);
 - B. the Commonwealth does not owe any duty of care to the Tenderer in respect of any Meeting Conduct; and
 - C. the Tenderer will not in any way rely upon any such Meeting Conduct for the purposes of preparing, amending or negotiating its Tender or entry into any contract with the Commonwealth with regard to the Contractor's Activities;

(v) acknowledges that, without limiting subparagraph (iii), the Commonwealth may (in its absolute discretion) vary, suspend or, if the Commonwealth believes (in its absolute discretion) that it may do so in accordance with the Commonwealth Procurement Rules, discontinue or terminate the Process at any time and for any reason;

(vi) acknowledges that, notwithstanding subparagraphs (i) - (v), the Tenderer is submitting to the Process because it considers that this represents a valuable commercial opportunity for the Tenderer;

(vii) releases the Commonwealth from all Claims in respect of any costs, expenses, losses or damages incurred or suffered as a result of or in connection with the Process, the rejection of, failure to evaluate or failure to accept the Tenderer's Tender, any failure to comply with the Tender Documents, any Meeting Conduct or any debrief;

(viii) acknowledges that the Commonwealth is proceeding with the Process strictly on the basis of, and in reliance upon, the acknowledgements and releases set out above;

(ix) will indemnify the Commonwealth in respect of all claims, losses, damages, liabilities, costs and expenses of any kind suffered or incurred as a result of or in connection with any breach of any acknowledgement or release given by the Tenderer under this paragraph (h); and

<p>(x) acknowledges that, except to the extent provided for in clause 3.2 and expressly set out in Tender Schedule I - Alternative Proposals, it accepts (without departure, qualification, amendment, limitation or exclusion) the Contract in Part 5.</p>	<p>B. will notify the <u>Tenderer</u> by fax or post if its <u>Tender</u> was unsuccessful (regardless of whether or not its <u>Tender</u> was set aside under clause 7(b)(iii)).</p>
	<p>(b) Within 14 days of:</p> <ul style="list-style-type: none"> (i) receipt of a notice from the Commonwealth under paragraph (a)(ii)B stating that its <u>Tender</u> has been unsuccessful; or (ii) the date upon which the <u>Tenderer</u>'s <u>Tender</u> is accepted in accordance with clause 8, <p>(as the case may be) the <u>Tenderer</u> may notify the Commonwealth by fax or post that a debrief is requested.</p>
	<p>(c) Where requested within the timeframe required under paragraph (b), the Commonwealth will provide a debrief at a suitable time to be determined by the Commonwealth (in its absolute discretion) after the Award Date.</p>
	<p>(d) The <u>Tenderer</u> acknowledges that the purpose of the debrief is to discuss the reasons why the <u>Tenderer</u>'s <u>Tender</u> was successful or unsuccessful (as the case may be) and that neither the Commonwealth nor the <u>Tender Administrator</u> is obliged to make any comparison with or provide any information about any other tenderer or tender at any debrief.</p>
	<p>10. COSTS AND CLAIMS</p> <p>Without limiting any other provision of the <u>Tender Documents</u>, no payment will be made by the Commonwealth to the <u>Tenderer</u> or any other entity for any costs, expenses, losses or damages incurred or suffered by the <u>Tenderer</u> or any other entity arising out of or in connection with:</p> <ul style="list-style-type: none"> (a) preparing a <u>Tender</u>; (b) the tender process (including any industry briefing, debrief or any discussions, negotiations or enquiries or any work undertaken by the <u>Tenderer</u> after submission of its <u>Tender</u>, including in relation to anything that occurs under clause 7); or (c) any failure to comply with the <u>Tender Documents</u>.
<p>8. ACCEPTANCE OF TENDERS</p> <ul style="list-style-type: none"> (a) The Commonwealth is not bound or required to accept the lowest or any <u>Tender</u>. (b) A <u>Tenderer</u>'s <u>Tender</u> (as amended, if at all, under clause 7) will not be deemed to be accepted unless and until: <ul style="list-style-type: none"> (i) the Formal Agreement set out in Part 5 is signed by the <u>Tenderer</u> and the Commonwealth; or (ii) the Commonwealth gives the <u>Tenderer</u> notice by fax or post: <ul style="list-style-type: none"> A. that the <u>Tenderer</u>'s <u>Tender</u> (as amended, if at all, under clause 7) has been accepted; and B. which is titled "Letter of Acceptance under clause 8(b)(ii)", <p>in which case that acceptance and, therefore, the resultant Contract will be on the terms set out in the notice.</p> (c) The <u>Tenderer</u> acknowledges that no other document issued and no other representation made or conduct engaged in, by or on behalf of the Commonwealth (other than as set out in paragraph (b)) will be deemed to be acceptance of a <u>Tenderer</u>'s <u>Tender</u> or to create any contractual or other legal relationship between the Commonwealth and a <u>Tenderer</u> or otherwise oblige the Commonwealth to enter into a Contract with the <u>Tenderer</u>. 	<p>9. NOTIFICATION AND DEBRIEF</p> <ul style="list-style-type: none"> (a) If the <u>Tenderer</u>: <ul style="list-style-type: none"> (i) did not submit a conforming <u>Tender</u>, the Commonwealth will notify the <u>Tenderer</u> by fax or post and no debrief will be provided; or (ii) did submit a conforming <u>Tender</u>, the Commonwealth: <ul style="list-style-type: none"> A. may (in its absolute discretion) notify the <u>Tenderer</u> by fax or post if its <u>Tender</u> has been set aside under clause 7(b)(iii); and

11. JOINT BIDS

11.1 If Tenderer was required to submit Registration of Interest

(a) If the Tenderer was required to submit a registration of interest and that registration of interest:

- (i) was not submitted on a Joint Bid Basis (as defined in clause 7 of the Invitation to Register Interest), the Tenderer must not submit its Tender on a Joint Bid Basis (as defined in clause 11.4) (whether with any one or more of the other tenderers for the Works or any other entity); or
- (ii) was submitted on a Joint Bid Basis (as defined in clause 7 of the Invitation to Register Interest), the Tenderer must:
 - A. subject to subsubparagraph B, submit its Tender on the basis described in its registration of interest; or
 - B. request permission from the Commonwealth by fax or post no later than 14 days prior to the Closing Time and Date to submit its Tender on a basis other than that described in its registration of interest.

(b) Where a request is made under paragraph (a)(ii)B, the Commonwealth may (in its absolute discretion):

- (i) grant permission by fax or post, whether with or without such conditions as the Commonwealth thinks fit and the Tenderer must submit its Tender in accordance with such permission and conditions; or
- (ii) refuse permission by fax or post and require the Tenderer to submit its Tender on the basis described in its registration of interest.

(c) If the Commonwealth refuses permission under paragraph (b)(ii) and the Tenderer is unwilling to submit its Tender on the basis described in its registration of interest, the Commonwealth may (in its absolute discretion):

- (i) notify the Tenderer by fax or post that it has been removed from the shortlist and is disqualified from submitting a Tender; and

- (ii) request a Tender from such other entities as the Commonwealth thinks fit.
- (d) The Commonwealth may (in its absolute discretion) decide not to evaluate (or continue to evaluate) a Tender that is not submitted in accordance with clause 11.
- (e) The Tenderer submits its Tender on the basis that it will make no Claim against the Commonwealth arising out of, or in any way in connection with, any action taken by the Commonwealth under paragraph (a), (b), (c) or (d).

11.2 If Tenderer was not required to submit Registration of Interest

Unless otherwise notified by the Commonwealth by fax or post at the time that the Tenderer was invited to submit a Tender, if the Tenderer was not required to submit a registration of interest, the Commonwealth offers the Tenderer the opportunity to submit its Tender on a Joint Bid Basis.

11.3 Amendments to Contract

(a) If the Commonwealth considers negotiating or accepting a Tender submitted on a Joint Bid Basis, the Commonwealth reserves the right to require such amendments to the Contract in Part 5 as the Commonwealth considers (in its absolute discretion) are necessary to:

- (i) ensure the joint and several liability of the entities comprising the Contractor; and
- (ii) otherwise provide it with sufficient protection in the event of default or financial difficulty of any type (including the circumstances described in the definition of **Insolvency Event** in clause [1.1 - if HC-1 2003/21.1 - if MW-2 2004] of the Conditions of Contract in Part 5),

including in relation to the provision of cross guarantees, parent company guarantees, indemnities, collateral warranties, direct collateral covenants with subcontractors or otherwise.

11.4 Definition of Joint Bid Basis

For the purposes of the Tender Documents, **Joint Bid Basis** means a Tender submitted:

- (a) by an incorporated or unincorporated joint venture or special purpose vehicle; or

(b) on any other basis involving more than one party where the Commonwealth is relying upon a representation that those parties will be jointly (whether fully or partially) responsible for the delivery of the Works described in the [Tender Documents](#).

12. IMPROPER ASSISTANCE IN PREPARATION OF TENDER

Without limiting clause 4(d)(iii), the Commonwealth may (in its absolute discretion) decide not to evaluate (or continue to evaluate) a [Tender](#) if the [Tender](#) has been prepared:

- (a) with the improper assistance of employees of the Department of Defence;
- (b) with the utilisation of information unlawfully obtained from the Commonwealth; or
- (c) in breach of an obligation of confidentiality to the Commonwealth.

13. USE OF FORMER DEFENCE PERSONNEL IN PREPARATION OF TENDER

- (a) Without limiting clauses 4(d)(iii) or 12 and subject to paragraph (c)(i), the Commonwealth may (in its absolute discretion) decide not to evaluate (or continue to evaluate) a [Tender](#) if, in the reasonable opinion of the Commonwealth, the [Tender](#) was prepared (in whole or in part) by an officer, employee, agent or adviser of the [Tenderer](#) where that person was:
 - (i) an employee of, service provider to or otherwise engaged by, the Department of Defence at any time during the six months immediately preceding the date of issue of the [Tender Documents](#);
 - (ii) involved in the planning or performance of the project to which the tender process relates at any time during the 12 months immediately preceding the date of issue of the [Tender Documents](#); or
 - (iii) involved in the management of the tender process or preparation of the [Tender Documents](#) at any time.
- (b) Before the [Closing Time and Date](#), the [Tenderer](#) may request permission to have a person described in paragraph (a) contribute to or participate in the preparation of the [Tender](#) by fax or post to the Director General Capital Facilities and Infrastructure, providing details of such person's status under paragraph (a).

(c) Where a request is made under paragraph (b), the Director General Capital Facilities and Infrastructure may (in its absolute discretion) at any time:

- (i) grant permission by fax or post, whether with or without such conditions as the Director General Capital Facilities and Infrastructure thinks fit; or
- (ii) refuse permission by fax or post.

14. CONFLICT OF INTEREST

- (a) The [Tenderer](#) must not place itself, and must ensure that its officers, employees, agents and advisers do not, place themselves, in a position that may or does give rise to an actual, potential or perceived conflict of interest between the interests of the Commonwealth and the [Tenderer](#) during this tender process.
- (b) If, during this tender process a conflict of interest arises, or appears likely to arise, the [Tenderer](#) must notify the Director General Capital Facilities and Infrastructure immediately by fax or post and take such steps as the Director General Capital Facilities and Infrastructure notifies by fax or post to resolve or otherwise deal with the conflict.
- (c) Without limiting clause 4(d)(iii), the Commonwealth may (in its absolute discretion) decide not to evaluate (or continue to evaluate) a [Tender](#) if the [Tenderer](#):
 - (i) has not complied with paragraph (a);
 - (ii) fails to notify the Director General Capital Facilities and Infrastructure under paragraph (b); or
 - (iii) fails to take the steps notified by the Director General Capital Facilities and Infrastructure under paragraph (b) to resolve or otherwise deal with the conflict.

15. USE OF TENDERS

In submitting its [Tender](#), the [Tenderer](#) acknowledges that:

- (a) its [Tender](#) and any other documents arising out of or in connection with this tender process become the property of the Commonwealth; and
- (b) subject to the Commonwealth Procurement Rules, the Commonwealth may (in its absolute

discretion) use, retain and copy the information contained in its Tender and any other documents arising out of or in connection with this tender process for any purpose arising out of or in connection with:

- (i) the evaluation and selection of Tenderers;
- (ii) the development and preparation of tender documentation and any subsequent tender process conducted by the Commonwealth in respect of the project;
- (iii) verifying the accuracy, consistency and adequacy of information provided under any other invitation to register interest or tender process conducted by the Commonwealth; or
- (iv) the development and preparation of invitation to register interest or tender documentation and any subsequent invitation to register interest or tender process to be conducted by the Commonwealth.

16. UNLAWFUL INDUCEMENTS

Without limiting clause 4(d)(iii), the Commonwealth may (in its absolute discretion) decide not to evaluate (or continue to evaluate) a Tender if the Tender has been prepared in breach of or otherwise inconsistently with any Statutory Requirement or a Commonwealth policy regarding the offering of unlawful inducements in connection with the preparation of a Tender or during a tender process.

17. LIMITED TENDER

Subject to the Commonwealth Procurement Rules and without limiting the Commonwealth's right to direct variations under any contract entered into in relation to this project, the Tenderer acknowledges that the Commonwealth may (in its absolute discretion and at any time) conduct a limited tender for new construction services (consisting of the repetition of similar construction services that conform to the basic project for which the initial contract has been awarded and which are the subject of the Tender Documents).

18. BUILDING CODE 2013

18.1 General

The Tenderer's attention is drawn to the Building Code which applies to this project. A copy of the Building Code 2013 is available at www.employment.gov.au/building-code-2013.

By submitting a Tender, the Tenderer:

- (a) will be deemed to have read; and
- (b) agrees that it must comply with,

the Building Code 2013.

18.2 Tenderer's Response

As part of its Tender, the Tenderer must complete and submit Tender Schedule J - Building Code, which includes:

- (a) signing a Declaration of Compliance in the form set out in item A; and
- (b) as indicated in the Tender Particulars and item B and item C of Tender Schedule J, either:
 - (i) if the Tenderer was required to submit a registration of interest, setting out the amendments to the information provided in Schedule D - Building Code 2013 of its registration of interest as necessary to reflect any change in the Tenderer's position as at the Closing Time and Date and providing the details in item C; or
 - (ii) if the Tenderer was not required to submit a registration of interest, completing the Questionnaire in item B and providing the details in item C.

The Tenderer should note that this is a minimum form and content requirement for its Tender under clause 3.1(b)(iii). If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4), it must provide the information in Tender Schedule J - Building Code 2013 for each joint bid party (as applicable). The Tenderer should also note that such details are an evaluation criterion under clause 4(a)(v)D.

At the time of submitting its registration of interest or if no registration of interest was submitted, at the time of submitting its Tender, the Tenderer:

- (c) must comply with the Building Code 2013; and
- (d) must not be precluded from tendering for Australian Government funded work or specifically excluded from participating in this tender process.

The Tenderer should note that these are conditions for participation in this tender process under clause 3.1(c)(i). If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4), each joint bid party must satisfy the conditions for participation (as applicable).

The Tenderer should be aware that the Building Code 2013 applies to:

- (e) this project; and
- (f) all building work (as specified in Schedule 1 of the Building Code 2013) including:
 - (i) privately funded building work as defined in item 9 of Schedule 1 of the Building Code undertaken by the Tenderer and its Related Entities; and
 - (ii) building work undertaken by the Tenderer's Related Entities (as defined in section 3(2) of the Building Code 2013), subcontractors and Consultants (being consultants engaged in building work as defined in the *Fair Work (Building Industry) Act 2012* (Cth) who may be engaged by the Tenderer on this project.

Notwithstanding any other provision of the Tender Documents, by submitting its Tender, the Tenderer consents to the disclosure of information concerning compliance with the Building Code 2013 and sanctions in respect of non-compliance with the:

- (g) Building Code 2013; and
- (h) National Code of Practice for the Construction Industry (**National Code**) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry (**Guidelines**) (which were replaced by the Building Code 2013).

This consent extends to disclosure by the Commonwealth, its agencies and Ministers and disclosure to others for the purposes of facilitating compliance with the Building Code 2013 and the exercise of their statutory and portfolio responsibilities. The Tenderer must also ensure that its Related Entities, subcontractors and Consultants are also aware of, and agree to comply with, these rights of use and disclosure.

The Tenderer is requested to submit copies of any relevant correspondence to and from the Department of Employment with respect to the application of the:

- (i) Building Code 2013; and
- (j) National Code and Guidelines (which were replaced by the Building Code 2013),

including with respect to the industrial instruments described in the Questionnaire in item B of Tender Schedule J - Building Code 2013.

The Tenderer's attention is also drawn to the Department of Employment's online assessment tool available at www.employment.gov.au/building-code-2013 (accessed by clicking on "Code Assessments Online"). The Tenderer is encouraged to submit the industrial instruments described in the Questionnaire in item B below of Tender Schedule J - Building Code 2013 via the online assessment tool for assessment of the industrial instruments against the requirements of the Building Code 2013. As the online assessment may take approximately 14 days to complete (depending on the complexity of the assessment), the Tenderer is encouraged to submit any such industrial instruments via the online assessment tool as soon as possible after receiving the Tender Documents.

The Tenderer is requested to submit copies of any relevant correspondence to and from the Department of Employment with respect to any submission made via the online assessment tool.

18.3 Project Agreements

The Department of Defence advises that it will not be approving the negotiation or the application of any project agreements in relation to the project.

18.4 Unregistered Written Agreements

The Tenderer is also referred to the Building Code 2013's provisions on "unregistered written agreements and other agreements". The Tenderer is requested to note that the bargaining for and making of unregistered written agreements is not permitted under section 10(1) of the Building Code 2013 unless the agreement falls within one of the exceptions specified in section 10(3) of the Building Code 2013.

18.5 Sham Contracting

The Tenderer is also referred to the Building Code 2013's provisions on "sham contracting". The Tenderer is requested to note that section 11 of the Building Code 2013 prohibits building contractors or building industry participants engaging in activity that is prohibited under a provision in Division 6 of Part 3-1 of the *Fair Work Act 2009* (Cth).

18.6 Engagement of Non-Citizens/Non-Residents

The Tenderer is also referred to the Building Code 2013's provisions on the engagement of non-citizens or non-residents. The Tenderer is requested to note that section 12 of the Building Code 2013 provides that a building contractor or building industry participant is required by the Building Code 2013 to ensure that a person engaged to undertake building work by the building contractor or building industry participant is lawfully entitled to be so engaged under Australian law, and that a building contractor or

building industry participant must comply with its responsibilities under Australian law in relation to the sponsorship, engagement and employment of persons who are not Australian citizens.

provided for in this clause 19; and

- C. all persons employed by it and all entities to whom the Confidential Information (or any part of it) is disclosed do not do or omit to do anything which, if done or omitted to be done by the Tenderer, would be a breach of the Tenderer's obligations under the disclaimer and confidentiality agreement referred to in clause 6(b).

19. CONFIDENTIALITY

19.1 Obligation to keep Confidential Information Confidential

- (a) The Tenderer:

- (i) acknowledges and agrees that the Confidential Information is confidential;
- (ii) must not, without the consent by fax or post from the Commonwealth (in its absolute discretion):
 - A. copy or otherwise reproduce in any form or medium the contents of the Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be copied or reproduced in any form or medium; or
 - B. disclose or use or deal with, the contents of the Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be disclosed, used or dealt with,
for any purpose other than preparing a Tender for the project or carrying out the project if its Tender is successful;
- (iii) must ensure that:
 - A. the Confidential Information and all documents, materials, media and all other things on or in which the Confidential Information (or any part of it) may be recorded, contained, set out or referred to are kept secure and protected at all times from any unauthorised use or access;
 - B. all persons employed by it and all entities to whom the Confidential Information (or any part of it) is disclosed comply with the conditions of confidentiality and security as

19.2 Return of Confidential Information

- (a) Within 7 days of receipt of:

- (i) a request from the Commonwealth by fax or post, at any time; or
- (ii) a notice from the Commonwealth by fax or post under clause 9(a)(ii)B stating that the Tenderer has been unsuccessful, except to the extent that the Tenderer is notified by fax or post by the Commonwealth or the Tender Administrator that compliance with this clause 19.2 (or any part of this clause 19.2) is not required,

the Tenderer must:

- (iii) subject to paragraph (b), as directed by the Commonwealth or the Tender Administrator:
 - A. return all copies of the Confidential Information (to the extent the Confidential Information is in a tangible form) to the Commonwealth; or
 - B. promptly destroy all copies of the Confidential Information (to the extent the Confidential Information is in a tangible form) and promptly provide the Commonwealth with written certification by fax or post that the Confidential Information (to the extent the Confidential Information is in a tangible form) has been securely and appropriately destroyed by the Tenderer; and
- (iv) notify the Commonwealth by fax or post of all Confidential Information (or any part of it) which the Tenderer knows or ought to know is beyond the

<p><u>Tenderer</u>'s possession, power, custody or control, giving full particulars (including the nature and extent of the Confidential Information, precise location, entity in possession, custody or control and any security arrangements).</p>	<p>document, drawing, information or communication (whether in written, oral or electronic form) described in subparagraph (iii), including documents, notes, records, memoranda, materials, software, disks and all other media, articles or things.</p>
<p>(b) Where required by law, the <u>Tenderer</u> may keep one copy of the Confidential Information for its records.</p>	<p>(b) For the purposes of this clause 19, Confidential Information does not mean any document, drawing, information or communication (whether in written, oral or electronic form) given to the <u>Tenderer</u> by the Commonwealth (or anyone on the Commonwealth's behalf), whether or not owned by the Commonwealth which:</p>
<p>(c) The <u>Tenderer</u> acknowledges and agrees that:</p>	<p>(i) is in the possession of the <u>Tenderer</u> without restriction in relation to its disclosure or use before the date of its receipt from the Commonwealth (or anyone on the Commonwealth's behalf);</p> <p>(ii) is in the public domain otherwise than due to a breach of clause 19; or</p> <p>(iii) has been independently developed or acquired by the <u>Tenderer</u>.</p>
	<p>20. SECURITY CLEARANCES AND CLASSIFIED INFORMATION</p>

19.3 Definition of Confidential Information

(a) Subject to paragraph (b), for the purposes of this clause 19, **Confidential Information** means:

- (i) the Tender Documents;
- (ii) the Information Documents;
- (iii) any document, drawing, information or communication (whether in written, oral or electronic form) given to the Tenderer by the Commonwealth (or anyone on the Commonwealth's behalf), whether or not owned by the Commonwealth which is in any way connected with the project which:
 - A. by its nature is confidential; or
 - B. the Tenderer knows or ought to know is confidential; and
- (iv) everything recording, containing, setting out or making reference to the

(a) At the request of the Commonwealth, the Tenderer must comply with the Commonwealth's security clearance process, obtain the level of security clearance requested by the Commonwealth and comply with all security policies and procedures notified by the Commonwealth from time to time.

(b) Without limiting clause 19, the Tenderer must not disclose any Classified Information unless the disclosure:

- (i) is strictly in accordance with provisions of the Defence Security Manual; and
- (ii) has first been approved by fax or post by the Commonwealth (in its absolute discretion).

(c) In giving any approval to the Tenderer under paragraph (b), the Commonwealth may (in its absolute discretion) impose such conditions as the Commonwealth thinks fit, including conditions requiring any recipient of Classified Information to obtain a level of security clearance and to enter into a deed in a form acceptable to the Commonwealth.

(d) Without limiting clause 19, the **Tenderer** must handle and store any Classified Information in its possession or control strictly in accordance with the provisions of the Defence Security Manual.

(e) For the purposes of this clause 20:

(i) **Classified Information** includes:

- A. any Commonwealth document marked with a national security classification; and
- B. any information or document that the **Tenderer** knows or ought to know is subject to, or ought to be treated in accordance with, the provisions of the Defence Security Manual; and

(ii) **Defence Security Manual** is a reference to that document as amended from time to time.

21. COMMONWEALTH POLICIES

The **Tenderer** acknowledges that the Commonwealth is and will be subject to a number of Commonwealth requirements and policies, which support internal and external scrutiny of its tendering and contracting processes and the objectives of transparency, accountability and value-for-money, including requirements to:

- (a) publish details of agency agreements, Commonwealth contracts, amendments and variations to any agreement or contract and standing offers with an estimated value of \$10,000 or more on AusTender (the Commonwealth's business opportunity website located at www.tenders.gov.au);
- (b) report and post on the internet a list of contracts valued at \$100,000 or more and identify confidentiality requirements in accordance with the Senate Order on Department and Agency Contracts; and
- (c) report and post on the internet information about its contracts in other ways pursuant to its other reporting and disclosure obligations, including annual reporting requirements and disclosure to any House or Committee of the Parliament of the Commonwealth of Australia.

22. AUSTRALIAN NATIONAL AUDIT OFFICE

- (a) The **Tenderer**'s attention is drawn to the *Auditor-General Act 1997* (Cth), which provides the Auditor-General or an authorised person with certain rights to have access to information, documents and records.
- (b) Without limiting the Contract Administrator's rights, or the Contractor's obligations or liabilities under clause 6.12 of the Conditions of Contract in Part 5, the Auditor-General or other authorised persons may be nominated by the Contract Administrator under clause 6.12 of the Conditions of Contract in Part 5 for the purpose of exercising their rights under the *Auditor-General Act 1997* (Cth).

23. FREEDOM OF INFORMATION

- (a) The *Freedom of Information Act 1982* (Cth) (**FOI Act**) gives members of the public rights of access to official documents of the Commonwealth Government and its agencies. The FOI Act extends, as far as possible, rights to access information (generally documents) in the possession of the Commonwealth Government, limited only by considerations for the protection of essential public interest and of the private and business affairs of entities in respect of whom information is collected and held by departments and public authorities.
- (b) Commonwealth requirements and policies will require certain identifying details of the Contract to be made available to the public via the internet.

24. TENDERER'S COMMERCIAL-IN-CONFIDENCE INFORMATION

- (a) Subject to paragraph (c), the Commonwealth must keep confidential any information provided to the Commonwealth by a **Tenderer** after the Award Date when:
 - (i) a request to keep specific information confidential and the justification for keeping such information confidential is included in a **Tender** by a **Tenderer** in Tender Schedule G - **Tenderer**'s Commercial-in-Confidence Information;
 - (ii) the Commonwealth agrees (in its absolute discretion) that such information is commercial-in-confidence information; and

(iii) the Commonwealth notifies the Tenderer by fax or post of its agreement (including the terms of any agreement) under subparagraph (ii),

(Commercial-in-Confidence Information).

(b) The Commonwealth will notify the Tenderer by fax or post if it does not agree that such information is commercial-in-confidence information.

(c) The Commonwealth's obligation in paragraph (a) does not apply if the Commercial-in-Confidence Information is:

- (i) disclosed by the Commonwealth to its legal or other advisers, or to its officers, employees, contractors or agents by virtue of or in connection with evaluation of the Tender;
- (ii) disclosed by the Commonwealth to any responsible Minister or any Ministerial adviser or assistant;
- (iii) disclosed by the Commonwealth to any House or Committee of the Parliament of the Commonwealth of Australia;
- (iv) disclosed to any Commonwealth department, agency or authority by virtue of or in connection with its functions, or statutory or portfolio responsibilities;
- (v) authorised or required by law to be disclosed; or
- (vi) in the public domain otherwise than due to a breach of paragraph (a).

25. PRIVACY

(a) The Tenderer agrees, when doing any act or engaging in any practice for the purposes of submitting a Tender under these Tender Conditions, to comply with the Australian Privacy Principles as if the Tenderer were an agency as defined in the Privacy Act.

(b) The Tenderer acknowledges that, in addition to the requirements of this clause 25, the Tenderer may also be obliged to comply with other obligations in relation to the handling of Personal Information, such as the Australian Privacy Principles or other Statutory Requirements.

(c) This clause survives the expiration or earlier termination of the tender process for the Contract in Part 5.

(d) In this clause 25:

- (i) **Australian Privacy Principle** has the meaning given in the Privacy Act;
- (ii) **Personal Information** has the meaning given in the Privacy Act; and
- (iii) **Privacy Act** means the *Privacy Act* 1988 (Cth).

26. WORKPLACE GENDER EQUALITY

The *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**) requires private sector employers of 100 or more employees (or employers of 80 or more employees where the employer used to be covered by the WGE Act) and higher education institutions to prepare, submit to the Workplace Gender Equality Agency and otherwise make available (in accordance with the WGE Act) public reports in relation to gender equality indicators, and to comply with minimum standards determined by the Workplace Gender Equality Agency within relevant time periods specified in the WGE Act. The Australian Government has adopted a policy of not purchasing goods or services from suppliers who do not comply with their obligations, if any, under the WGE Act.

At the Award Date, the successful Tenderer must comply with the WGE Act if it applies to the successful Tenderer.

At any time before the Award Date, the Commonwealth may (in its absolute discretion) request by fax or post that the Tenderer provide to the Tender Administrator by fax or post:

- (a) a statutory declaration by one of its officers that the WGE Act does not apply to the Tenderer; or
- (b) if the WGE Act applies to the Tenderer, a letter or such other evidence in writing confirming that the Tenderer is not named by the Workplace Gender Equality Agency as an employer not currently complying with the WGE Act.

If the Tenderer has submitted its Tender on a Joint Bid Basis (as defined in clause 11.4), it must provide this statutory declaration or evidence for each joint bid party (as applicable).

27. EMPLOYEE ENTITLEMENTS

The Tenderer should note that it is a requirement of the Commonwealth Procurement Rules that the Commonwealth must not enter into a contract with tenderers who have a judicial decision (being a decision of any court, tribunal or other body with authority to make a decision or determination which

is binding on the Tenderer) against them (not including a decision under appeal) relating to employee entitlements and have not paid the claim.

At the Award Date, the successful Tenderer must not:

- (a) have a judicial decision against them (not including a decision under appeal) relating to employee entitlements; and
- (b) have not paid the claim.

At any time before the Award Date, the Commonwealth may (in its absolute discretion) request by fax or post that the Tenderer provide to the Tender Administrator by fax or post a declaration in a form approved by the Commonwealth:

- (c) stating that it has not had any judicial decision against it (not including a decision under appeal) relating to any employee entitlements which requires the entitlement to have been paid, yet which remains unpaid at the date of the declaration; and
- (d) providing details of any matter in respect of which the Tenderer is a party which is before any court, tribunal or authority referred to in paragraph (c) and which relates to any employee related entitlement (whether on appeal or otherwise).

If the Tenderer has submitted its Tender on a Joint Bid Basis (as defined in clause 11.4), it must provide this declaration for each joint bid party (as applicable).

28. SAFE BASE ALERT STATE SYSTEM

- (a) The Tenderer should note the requirements of the SAFE BASE Alert State System.
- (b) The Tenderer should note that clause *[18.3(d) - if HC-1 2003/17.3(d) - if MW-2 2004]* of the Conditions of Contract in Part 5 requires the Contractor (and its subcontractors) to comply, in carrying out the Contractor's Activities, with these requirements:
 - (i) at the SAFE BASE Alert State System level set out in the Contract Particulars; and
 - (ii) at any alternative SAFE BASE Alert State System level (or individual measure from a higher alert state to meet a specific threat or threats) applicable to the Site from time to time.
- (c) The Tenderer submits its Tender on the basis that the Contractor:

- (i) has no entitlement to make any Claim against the Commonwealth for complying with the requirements of the SAFE BASE Alert State System up to and including the level set out in the Contract Particulars, and this obligation is deemed to be covered by the Contract Price; and
- (ii) otherwise may be entitled to payment of its extra costs (and reimbursement of its subcontractors' extra costs) in accordance with clause *[18.3 - if HC-1 2003/17.3 - if MW-2 2004]* of the Conditions of Contract in Part 5.

29. SOLVENCY STATEMENT AND OTHER FINANCIAL INFORMATION

Without limiting clause 7, at any time before the Award Date, the Commonwealth may (in its absolute discretion) request by fax or post that the Tenderer provide any of the following information or documents to the Tender Administrator by fax or post by the date specified in the request:

- (a) a duly executed solvency statement in the form attached to the Commonwealth's notice;
- (b) where it is a:
 - (i) Public Company or a Large Proprietary Company, the following:
 - A. audited Annual Financial Reports for the last three financial years; and
 - B. the most recent audited or reviewed half yearly financial report (where the *Corporations Act 2001* (Cth) requires it to prepare such a report) if that report post dates the latest annual financial report provided pursuant to subsubparagraph A;
 - (ii) Small Proprietary Company, partnership or an entity not falling within the scope of paragraph (i) the following:
 - A. audited Annual Financial Reports for the last three financial years where they are required to be prepared by law or pursuant to a contractual arrangement to which the Tenderer is a party (and if the Tenderer does not have at least three years of audited Annual Financial Reports, the Tenderer

must provide details as to why this is the case); or

B. if subsubparagraph A does not apply, audited or unaudited financial accounts and records for the last three financial years (and if the Tenderer does not have at least three years of financial accounts and records, the Tenderer must provide details as to why this is the case); or

(iii) foreign entity, the following:

A. audited or unaudited financial accounts and records for the last three financial years (and if the Tenderer does not have at least three years of financial accounts and records, the Tenderer must provide details as to why this is the case); and

B. details of all assets and liabilities in Australia;

(c) where the Tenderer is a company and forms part of a corporate group, details of the structure of the corporate group, including whether or not there are any deeds of cross-guarantee in place and the information described in paragraph (a) for the ultimate holding company of the corporate group;

(d) where substantial inter-group or inter-associated company or entity loans exist, the information described in paragraph (b)(i), (b)(ii) or (b)(iii) (as applicable) for the companies or entities to which those loans have been provided or from whom they have been obtained;

(e) details of any pending, threatened or actual litigation, arbitration or other forms of dispute resolution involving the Tenderer;

(f) details of all securities provided by the Tenderer (including details of the type of security, the issuer of the security, details as to whom the security has been provided, the assets secured and the amounts secured);

(g) an outline of key management control systems (including budgetary control systems, inventory management systems and cost estimating processes);

(h) details of any contingent liabilities;

(i) details of all finance facilities that the Tenderer has in place, including the dates upon which the facilities expire; or

(j) any additional financial information specified in the request.

For the purposes of this clause 29:

(k) **Annual Financial Report** means:

(i) the financial statements for the year comprising a profit and loss statement for the year, a balance sheet at the end of the year, a statement of cash flows for the year and (if required by the accounting standards) a consolidated profit and loss statement, balance sheet and statement of cash flows;

(ii) the notes to the financial statements; and

(iii) the directors' declaration about the financial statements and notes; and

(l) **Large Proprietary Company, Public Company and Small Proprietary Company** have the meanings given to them in the *Corporations Act 2001* (Cth).

If the Tenderer has submitted its Tender on a Joint Bid Basis (as defined in clause 11.4), it must provide the information or documents for each joint bid party (as applicable).

30. SPECIAL CONDITIONS OF TENDER

These Tender Conditions also include any special conditions of tender referred to in the Tender Particulars.

31. INDIGENOUS OPPORTUNITIES

Clause 31 does not apply unless the Tender Particulars state that it does apply.

The Australian Government is committed to promoting employment and training opportunities for indigenous Australians where a contract involves expenditure in excess of \$5 million (\$6 million for construction) where the relevant activities take place in regions where there are significant indigenous populations.

The Tenderer's attention is drawn to the Indigenous Opportunities Policy (**IOP**) and related guidance material. More information on the IOP can be found at www.employment.gov.au/indigenous-opportunities-policy.

If the IOP applies:

(a) unless it has already done so, the Tenderer must develop and submit an Indigenous Training, Employment and Supplier Plan (**ITES Plan**) to the Department of Prime Minister and Cabinet for review and approval before the Award Date (or such other date notified by fax or post by the Commonwealth);

(b) at the Award Date (or such other date notified by fax or post by the Commonwealth) the successful Tenderer must have a current, approved ITES Plan; and

(c) at any time before the Award Date (or such other date notified by fax or post by the Commonwealth), the Commonwealth may (in its absolute discretion) request the Tenderer to provide evidence by fax or post that:

- (i) it has a current, approved ITES Plan in accordance with the IOP; or
- (ii) it has taken steps to obtain approval of its ITES Plan in accordance with the IOP.

Without limiting the IOP, an ITES Plan must address how the Tenderer will:

(d) provide training and employment opportunities to local indigenous Australians;

(e) utilise small to medium indigenous business enterprises; and

(f) address the objectives of the IOP, generally.

In preparing and submitting an ITES Plan to the Department of Prime Minister and Cabinet for approval, the Tenderer must use the template ITES Plan set out in the online management system (**My Plan**) available at <https://ecsn.gov.au/IOP/Home.aspx/Conditions> and must submit its draft ITES Plan via My Plan. The Tenderer should note the periods for the Department of Prime Minister and Cabinet approval of an ITES Plan described in the IOP Guidelines 2011 (version October 2013) and related guidance material.

If the IOP applies, after the Award Date (or such other date notified by fax or post by the Commonwealth), the successful Tenderer will also be required to:

(g) comply with its current, approved ITES Plan;

(h) maintain a current, approved ITES Plan for the duration of the Contract;

(i) report annually to the Commonwealth or any person authorised by the Commonwealth (including the Department of Prime Minister

and Cabinet) (in a format required by the IOP) on the implementation of and outcomes achieved under its ITES Plan;

(j) provide the Commonwealth or any person authorised by the Commonwealth (including the Department of Prime Minister and Cabinet) with access to documents concerning the IOP and its ITES Plan (and copies of the documents requested); and

(k) co-operate with the Commonwealth or any person authorised by the Commonwealth (including the Department of Prime Minister and Cabinet) in an audit and review of its compliance with the IOP and its ITES Plan.

The Tenderer acknowledges and agrees to the Commonwealth or any person authorised by the Commonwealth (including the Department of Prime Minister and Cabinet) publicising or reporting:

- (l) on its performance concerning compliance with its ITES Plan; and
- (m) any information contained in its ITES Plan or any report submitted in accordance with the Contract regarding the IOP.

32. OHS ACCREDITATION SCHEME

Clause 32 applies unless the Tender Particulars state that it does not apply.

The Australian Government is committed to improving work health and safety outcomes in the building and construction industry.

The Tenderer's attention is drawn to the Australian Government Building and Construction Occupational Health and Safety Accreditation Scheme (**OHS Accreditation Scheme**) authorised by the *Fair Work (Building Industry) Act 2012* (Cth) and the *Fair Work (Building Industry - Accreditation Scheme) Regulations 2005* (Cth) which apply when the building work under the contract has a value in excess of \$3 million (GST inclusive).

Section 35(4) of the *Fair Work (Building Industry) Act 2012* (Cth) provides that the Commonwealth must not fund building work unless:

- (a) contracts for the building work entered into with builders will be entered into with builders who are accredited persons; and
- (b) at the time of funding, the Commonwealth takes appropriate steps to ensure that builders will be accredited persons when they carry out the building work.

Section 35(5) provides that the "Commonwealth funds building work" if (amongst other things) it pays

for or otherwise finances the building work (either directly or indirectly). Section 35(8) provides that a "builder", in relation to building work, means a person who carries out any of the building work.

The OHS Accreditation Scheme does not apply to building work prescribed by the *Fair Work (Building Industry - Accreditation Scheme) Regulations 2005* (Cth) for the purposes of section 35(4) of the *Fair Work (Building Industry) Act 2012* (Cth).

At the Award Date, the successful Tenderer must be fully accredited in accordance with the OHS Accreditation Scheme.

The successful Tenderer will also be required to:

- (c) comply with all conditions of accreditation under the OHS Accreditation Scheme; and
- (d) maintain accreditation while the building work is being carried out.

To be assessed for accreditation, the Tenderer needs to submit an application addressing specific work health and safety criteria to the Office of the Federal Safety Commissioner. More information on the OHS Accreditation Scheme is available at www.fsc.gov.au/ or by contacting the Office of the Federal Safety Commissioner on 1800 652 500.

At any time before the Award Date, the Commonwealth may (in its absolute discretion) request by fax or post that the Tenderer provide evidence by fax or post to the Tender Administrator that:

- (e) it has obtained full accreditation in accordance with the OHS Accreditation Scheme (including any expiry dates for such accreditation); or
- (f) it has taken steps to obtain full accreditation in accordance with the OHS Accreditation Scheme.

If the Tenderer has submitted its Tender on a Joint Bid Basis (as defined in clause 11.4), it must provide this evidence for each joint bid party (as applicable).

APPENDIX 1

DISCLAIMER AND CONFIDENTIALITY AGREEMENT

This agreement is made on _____ day of _____

BETWEEN THE COMMONWEALTH OF AUSTRALIA (Commonwealth)

AND THE ENTITY SPECIFIED IN ITEM 1 OF THE SCHEDULE (Tenderer)

RECITALS

A. The Commonwealth intends to invite the Tenderer to submit a Tender for the project specified in item 2 of the Schedule (Project) and will provide the Tenderer with:

- (a) the documents described in clause 2.1(a)(ix) (Tender Documents) of the tender conditions for the Project (Tender Conditions); and
- (b) the documents relating to the Project set out in item 3 of the Schedule (Information Documents) for the information only of the Tenderer.

B. In consideration of the Commonwealth agreeing to pay the sum of \$1.00, the Tenderer has agreed to make the acknowledgements, agreements and warranties and undertake the obligations set out in this agreement.

OPERATIVE

1. The Commonwealth agrees to pay the Tenderer the sum of \$1.00.
2. The Tenderer:
 - (a) acknowledges and agrees that the Information Documents will be provided by the Commonwealth for the information only of the Tenderer;
 - (b) warrants that it will not in any way rely upon:
 - (i) the Information Documents; or
 - (ii) the relevance, completeness, accuracy or adequacy of the Information Documents,

for the purposes of preparing its Tender for the Project or entering into any contract with the Commonwealth with respect to the Project;

- (c) warrants that it will prepare its Tender for the Project and enter into any contract with the Commonwealth with respect to the Project based on its own

investigations, interpretations, deductions, information and determinations; and

(d) acknowledges and agrees that:

- (i) neither the Commonwealth, nor anyone on the Commonwealth's behalf, warrants, guarantees or makes any representation about:
 - A. the relevance, completeness, accuracy or adequacy of the Information Documents; or
 - B. whether or not any other information exists;
- (ii) the Commonwealth does not owe any duty of care to the Tenderer with respect to the Information Documents;
- (iii) the Information Documents will not form part of any contract with the Commonwealth with respect to the Project;
- (iv) to the extent permitted by law, the Commonwealth will not be liable upon any Claim by the Tenderer arising out of or in any way in connection with the Information Documents; and
- (v) the Commonwealth will not be entering into any contract with the Tenderer with respect to the Project in reliance upon the terms of this agreement.

3. The Tenderer:

- (a) acknowledges that the entire tender process (including the process for meeting with the Tenderer under clause 7(a) of the Tender Conditions and then obtaining, evaluating and (if applicable) negotiating the Tender (Process) is being conducted solely for the benefit of the Commonwealth;

(b) acknowledges that, without limiting the legal effect of the preferred Tenderer's obligations under any preferred Tenderer negotiation protocol required under clause 7(d)(ii) of the Tender Conditions, the Commonwealth does not intend to create any contract or other relationship under which the Commonwealth is legally obliged to conduct the Process in any manner or at all (whether in accordance with the terms of the Tender Documents or otherwise) and that there is in fact no such contract or other relationship in existence;

(c) acknowledges that there will be no procedural or substantive limitation upon the manner in which the Commonwealth may (in its absolute discretion) conduct the Process;

(d) acknowledges that, to the extent permitted by law:

- (i) the Commonwealth does not make any warranty, guarantee or representation about a Tenderer's Tender, the Commonwealth's requirements for the Contractor's Activities or the way in which it will evaluate Tenders arising out of or in connection with anything which the Commonwealth states or does or omits to state or do in, arising out of or in connection with any meeting under clause 7(a) or 7(b) of the Tender Conditions or any industry briefing (**Meeting Conduct**);
- (ii) the Commonwealth does not owe any duty of care to the Tenderer in respect of any **Meeting Conduct**; and
- (iii) the Tenderer will not in any way rely upon any such **Meeting Conduct** for the purposes of preparing, amending or negotiating its Tender or entry into any contract with the Commonwealth with regard to the Contractor's Activities;

(e) acknowledges that, without limiting paragraph (c), the Commonwealth may (in its absolute discretion) vary, suspend, or, if the Commonwealth believes (in its absolute discretion) that it may do so in accordance with the Commonwealth Procurement Rules, discontinue or terminate the Process at any time and for any reason;

(f) acknowledges that, notwithstanding paragraphs (a) - (e), the Tenderer is submitting to the Process because it considers that this represents a valuable commercial opportunity for the Tenderer;

(g) releases the Commonwealth from all Claims in respect of any costs, expenses, losses or damages incurred or suffered as a result of or in connection with the Process, the rejection of, failure to evaluate or failure to accept the Tenderer's Tender, any failure to comply with the Tender Documents, any **Meeting Conduct** or any debrief;

(h) acknowledges that the Commonwealth is proceeding with the Process strictly on the basis of, and in reliance upon, the acknowledgements and releases set out above; and

(i) will indemnify the Commonwealth in respect of all claims, losses, damages, liabilities, costs and expenses of any kind suffered or incurred as a result of or in connection with any breach of any acknowledgement or release given by the Tenderer under this clause 3.

4. In clauses 2 and 3, Claim includes (without limitation) any claim:

- (a) under, arising out of, or in any way in connection with, any contract which the Tenderer may enter into with the Commonwealth in respect of the Project;
- (b) arising out of, or in any way in connection with, any task, thing or relationship connected with the Project; or
- (c) otherwise at law or in equity including (without limitation):
 - (i) by statute;
 - (ii) in tort for negligence or otherwise, including (without limitation) negligent misrepresentation; or
 - (iii) for restitution.

5. The Tenderer acknowledges that:

(a) within 14 days of:

(i) receipt of a notice from the Commonwealth under clause 9(a)(ii)B of the Tender Conditions stating that the Tenderer has been unsuccessful; or

(ii) the date upon which the Tenderer's Tender is accepted in accordance with clause 8 of the Tender Conditions,

the Tenderer may notify the Commonwealth by fax or post that a debrief is requested;

(b) where requested within the timeframe required under paragraph 5(a), the Commonwealth will provide a debrief (and, where required by Commonwealth policy, a written debrief by fax or post) at a suitable time to be determined by the Commonwealth (in its absolute discretion) after the Award Date; and

(i) the purpose of the debrief is to discuss the reasons why the Tenderer's Tender was unsuccessful or accepted (as the case may be) and that neither the Commonwealth nor the Tender Administrator is obliged to make any comparison with or provide any information about any other tenderer or tender at any debrief.

6. The Tenderer:

(a) acknowledges and agrees that the Confidential Information is confidential;

(b) must not, without the consent by fax or post from the Commonwealth (in its absolute discretion):

(i) copy or otherwise reproduce in any form or medium the contents of the Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be copied or reproduced in any form or medium; or

(ii) disclose or use or deal with, the contents of the Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be disclosed, used or dealt with,

for any purpose other than preparing a Tender for the Project or carrying out the Project if its Tender is successful; and

(c) must ensure that:

(i) the Confidential Information and all documents, materials, media and all other things on or in which the Confidential Information (or any part of it) may be recorded, contained, set out or referred to are kept secure and protected at all times from any unauthorised use or access;

(ii) all persons employed by it and all entities to whom the Confidential Information (or any part of it) is disclosed comply with the conditions of confidentiality and security as provided for in clauses 6 to 11; and

(iii) all persons employed by it and all entities to whom the Confidential Information (or any part of it) is disclosed do not do or omit to do anything which, if done or omitted to be done by the Tenderer, would be a breach of the Tenderer's obligations under clauses 6 to 11.

7. The Tenderer acknowledges and agrees that within 7 days of receipt of:

(a) a request from the Commonwealth by fax or post, at any time; or

(b) a notice from the Commonwealth by fax or post under clause 9(a)(ii)B of the Tender Conditions stating that the Tenderer has been unsuccessful, except to the extent that the Tenderer is notified by fax or post by the Commonwealth or the Tender Administrator that compliance with this clause 7 (or any part of this clause 7) is not required,

the Tenderer must:

(c) subject to clause 8, as directed by the Commonwealth or the Tender Administrator:

(i) return all copies of the Confidential Information (to the extent the Confidential Information is in a tangible form) to the Commonwealth; or

(ii) promptly destroy all copies of the Confidential Information (to the extent the Confidential Information is in a tangible form) and promptly provide the Commonwealth with written certification by fax or post that the Confidential Information (to the extent the Confidential Information is in a tangible form) has been securely and appropriately destroyed by the Tenderer; and

(d) notify the Commonwealth by fax or post of all Confidential Information (or any part of it) which the Tenderer knows or ought to know is beyond the Tenderer's possession, power, custody or control, giving full particulars (including the nature and extent of the Confidential Information, precise location, entity in possession, custody or control and any security arrangements).

8. Where required by law, the Tenderer may keep one copy of the Confidential Information for its records.

9. The Tenderer acknowledges and agrees that:

(a) the return or destruction of the Confidential Information does not affect the Tenderer's obligations under clauses 6 to 11; and

(b) without limiting any other right or remedy of the Commonwealth, if the Tenderer has failed to comply with the obligations in clauses 6 to 11, the Commonwealth may (in its absolute discretion) do one or more of the following:

(i) decide not to evaluate (or continue to evaluate) a Tender; or

(ii) take the failure into account in assessing any future registration of interest or tender submitted by the Tenderer.

10. Subject to clause 11, for the purposes of clauses 6 to 9, **Confidential Information** means:

(a) the Tender Documents;

(b) the Information Documents;

(c) any document, drawing, information or communication (whether in written, oral or electronic form) given to the Tenderer by the Commonwealth (or anyone on the Commonwealth's behalf), whether or not owned by the Commonwealth which is in any way connected with the Project which:

(i) by its nature is confidential; or

(ii) the Tenderer knows or ought to know is confidential; and

(d) everything recording, containing, setting out or making reference to the document, drawing, information or communication (whether in written, oral or electronic form) described in paragraph (c), including documents, notes, records, memoranda, materials, software, disks and all other media, articles or things.

11. For the purposes of clauses 6 to 10, **Confidential Information** does not mean any document, drawing, information or communication (whether in written, oral or electronic form) given to the Tenderer by the Commonwealth (or anyone on the Commonwealth's behalf), whether or not owned by the Commonwealth which:

(a) is in the possession of the Tenderer without restriction in relation to its disclosure or use before the date of its receipt from the Commonwealth (or anyone on the Commonwealth's behalf);

(b) is in the public domain otherwise than due to a breach of clauses 6 to 10; or

(c) has been independently developed or acquired by the Tenderer.

12. If the Tenderer consists of more than one entity, the provisions of this agreement jointly and severally bind, and apply to, each such entities.

13. The Tenderer acknowledges and agrees that:

- (a) if it did not submit its Tender in accordance with clause 3.1(a) of the Tender Conditions, then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated) unless the reason it was not submitted in accordance with clause 3.1(a) of the Tender Conditions is solely due to mishandling by the Commonwealth;
- (b) the Tenderer is responsible for submitting its Tender in accordance with clause 3.1(a) of the Tender Conditions and managing all risks associated with mishandling by a courier or mail service provider engaged by the Tenderer, travel arrangements and weather conditions;
- (c) if the Tender does not satisfy each minimum form and content requirement specified in clause 3.1(b) of the Tender Conditions, then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated) unless the Commonwealth considers (in its absolute discretion) that the failure to satisfy any minimum form and content requirement is due to an unintentional error by the Tenderer and the Commonwealth (in its absolute discretion) seeks, reviews and accepts any correction to the unintentional error; and
- (d) if it does not satisfy each condition for participation specified in clause 3.1(c) of the Tender Conditions, then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated).

14. This agreement is governed by the law of the State or Territory specified in item 4 of the Schedule.

SCHEDULE

1. Tenderer: **[INSERT NAME AND ABN BEFORE SIGNING AGREEMENT]**
2. Project: Project No: **[INSERT PROJECT NUMBER]**
Project Name: **[INSERT PROJECT NAME]**
3. Information Documents:
 - (a) The following documents:

**[INSERT LIST OF DOCUMENTS COMPRISING "INFORMATION DOCUMENTS".
SEE DEFINITION IN CLAUSE 2.1(a)(v) OF THE TENDER CONDITIONS AND
CLAUSE 6 OF THE TENDER CONDITIONS]**
 - (b) Any other document or amendment to a document issued by the Tender Administrator to the Tenderer prior to the Closing Time and Date and which is expressly stated to be an Information Document or an amendment to an Information Document.
4. Governing Law: **[INSERT]**

SIGNED as an agreement.

SIGNED for and on behalf of **THE
COMMONWEALTH OF AUSTRALIA** in the)
presence of:)

.....
(Signature of Witness)

.....
(Signature of Authorised Officer)

.....
(Name of Witness in Full)

.....
(Name of Authorised Officer in Full)

EXECUTED by **THE TENDERER** by or in the)
presence of:)

.....
(Signature of Secretary/Director)

.....
(Signature of Director)

.....
(Name of Secretary/Director in Full)

.....
(Name of Director in Full)

**[THE TENDERER IS REQUESTED TO ENSURE THAT THE DISCLAIMER AND CONFIDENTIALITY
AGREEMENT IS COMPLETE, ACCURATE AND VALID]**

PART 2 - TENDER PARTICULARS

TENDER PARTICULARS

<u>Closing Time and Date:</u> (Part 1, clause 2.1(a)(iii))	12.00 noon (local time at the location of the tender box) on [INSERT CLOSING DATE E.G. "1 January 2014", HAVING REGARD TO MINIMUM TIMEFRAMES IN THE COMMONWEALTH PROCUREMENT RULES AND DEFENCE POLICY AS TO CLOSING DAYS]
<u>Information Documents:</u> (Part 1, clause 2.1(a)(v)A)	[INSERT SAME LIST AS IN ANNEXURE 1 - SCHEDULE, ITEM 3(a)]
<u>Tender Administrator:</u> (Part 1, clause 2.1(a)(vii))	[INSERT NAME]
Address and Fax Number of <u>Tender Administrator:</u> (Part 1, clause 2.2(a))	[INSERT POSTAL ADDRESS AND FAX NUMBER - DO NOT INSERT EMAIL ADDRESS OR TELEPHONE NUMBER]
<u>Industry Briefing:</u> (Part 1, clause 2.3)	Clause 2.3 [DOES/DOES NOT] apply. (Clause 2.3 applies unless stated otherwise) [DELETE WHICHEVER OPTION DOES NOT APPLY]
Maximum Number of <u>Tenderer</u> Personnel to attend Industry Briefing: (Part 1, clause 2.3(b))	[INSERT NUMBER]
Additional Conditions for Participation: (Part 1, clause 3.1(c)(ii))	<p>The additional conditions for participation applicable to this tender process are that the <u>Tenderer</u> must:</p> <p>None stated. ["None stated" IS THE DEFAULT POSITION. IF THE <u>TENDER ADMINISTRATOR</u> WISHES TO INSERT ADDITIONAL CONDITIONS FOR PARTICIPATION IN THIS TENDER PROCESS, PRIOR APPROVAL MUST BE SOUGHT FROM THE DCFPC. IF PRIOR APPROVAL IS GIVEN, INSERT THE ADDITIONAL CONDITIONS FOR PARTICIPATION AND THE FOLLOWING:]</p> <p>The <u>Tenderer</u> should note that [this is/these are] additional condition/s for participation in this tender process under clause 3.1(c)(ii) of the <u>Tender Conditions</u> and it must attach information in its <u>Tender</u> demonstrating that it meets each additional condition for participation. If the <u>Tenderer</u> wishes to submit its <u>Tender</u> on a Joint Bid Basis (as defined in clause 11.4 of the <u>Tender Conditions</u>), it must provide this information for each joint bid party (as applicable).]</p>

Endorsement for Outside of Each Sealed Package: (Part 1, clause 3.4(c))	Attention Mailroom Manager/Tender Officer Infrastructure Division Tender No: [INSERT TENDER NUMBER] for the [Head / Medium Works] Contract for Project No: [INSERT PROJECT NUMBER] [INSERT PROJECT NAME AND DESCRIPTION OF WORKS, AS APPLICABLE]
Number of Copies of Tender to be Submitted: (Part 1, clause 3.4(e))	[INSERT] bound copies and [INSERT] unbound copies.
Additional Evaluation Criteria: (Part 1, clause 4(b))	None stated. <i>["None stated" IS THE DEFAULT POSITION. IF THE TENDER ADMINISTRATOR WISHES TO INSERT ADDITIONAL EVALUATION CRITERIA, PRIOR APPROVAL MUST BE SOUGHT FROM THE DCFPC. IF PRIOR APPROVAL IS GIVEN, INSERT ADDITIONAL EVALUATION CRITERIA AND THE FOLLOWING:]</i> The Tenderer should note that <i>[this is an/these are]</i> additional evaluation criterion/a in this tender process under clause 4(b) of the Tender Conditions and that it should attach information in its Tender demonstrating that it satisfies each additional criteria. If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information which it considers relevant to any joint bid arrangements (as applicable).]
Building Code 2013 - Questionnaire: (Part 1, clause 18 and Part 4, item B and item C, Tender Schedule J - Building Code 2013)	[OPTION 1 / OPTION 2] applies. <i>[DELETE WHICHEVER OPTION DOES NOT APPLY]</i>
Special Conditions of Tender: (Part 1, clause 30)	None stated. <i>["None stated" IS THE DEFAULT POSITION. IF THE TENDER ADMINISTRATOR WISHES TO INSERT SPECIAL CONDITIONS OF TENDER, PRIOR APPROVAL MUST BE SOUGHT FROM THE DCFPC. NOTE THAT SPECIAL CONDITIONS OF TENDER ARE NOT THE SAME AS SPECIAL CONDITIONS OF CONTRACT WHICH MAY BE INCLUDED IN PART 5]</i>

<p>Indigenous Opportunities: (Part 1, clause 31)</p>	<p>Clause 31 [DOES/DOES NOT] apply. (Clause 31 does not apply unless stated otherwise)</p>
<p>[DELETE WHICHEVER OPTION DOES NOT APPLY]</p>	<p>[IF THE CONTRACT IS WORTH MORE THAN \$5 MILLION (\$6 MILLION FOR CONSTRUCTION) AND INVOLVES ACTIVITY IN REGIONS WITH A SIGNIFICANT INDIGENOUS POPULATION - CLAUSE 31 APPLIES.</p>
<p>[IF THE CONTRACT IS NOT WORTH MORE THAN \$5 MILLION (\$6 MILLION FOR CONSTRUCTION) OR DOES NOT INVOLVE ACTIVITY IN REGIONS WITH A SIGNIFICANT INDIGENOUS POPULATION - CLAUSE 31 DOES NOT APPLY.]</p>	
<p>OHS Accreditation Scheme: (Part 1, clause 32)</p>	<p>Clause 32 [DOES/DOES NOT] apply. (Clause 32 applies unless stated otherwise)</p>
<p>[DELETE WHICHEVER OPTION DOES NOT APPLY]</p>	<p>[IF THE CONTRACT INVOLVES DIRECTLY FUNDED BUILDING WORK AND IS VALUED IN EXCESS OF \$3 MILLION, CLAUSE 32 APPLIES.</p>
<p>Key People: (Part 4, Tender Schedule A - Workload and Proposed Resources, item 2(b))</p>	<p>[IF THE CONTRACT DOES NOT INVOLVE DIRECTLY FUNDED BUILDING WORK OR IS VALUED AT LESS THAN \$3 MILLION - CLAUSE 32 DOES NOT APPLY.]</p>
<p>[If HC-1 2003 only] Additional Project Plans: (Part 4, Tender Schedule B - Plans [and Preliminary Design Solution - if HC-1 2003 design and construct method only], item 1)</p>	<p>[IF HC-1 2003 ONLY - INSERT DESCRIPTION OF ADDITIONAL PLANS - SAME AS DESCRIBED IN CONTRACT PARTICULARS IN PART 5. IF MW-2 2004, DELETE THIS ROW]</p>
<p>[If HC-1 2003/MW-2 2004 design and construct only] Preliminary Design Solution: (Part 4, Tender Schedule B - Plans [and Preliminary Design Solution - if HC-1 2003/MW-2 2004 design and construct method only], item [3 - if HC-1 2003/2 -if MW-2 2004])</p>	<p>[INSERT LEVEL OF PRELIMINARY DESIGN SOLUTION E.g. "30% concept design". IF NOT HC-1 2003/MW-2 2004 DESIGN AND CONSTRUCT METHOD, DELETE THIS ROW]</p>
<p>Program Format: (Part 4, Tender Schedule D - Program)</p>	<p>[PRIMAVERA SURETRAK/MICROSOFT PROJECT] or approved equivalent.</p>
<p>[DELETE WHICHEVER OPTION DOES NOT APPLY]</p>	

Adjustment for Imported Items:

(Part 4, Tender Schedule H - Contract Price, item 2)

Item 2 of Tender Schedule H - Contract Price, [DOES/DOES NOT] apply.

(Item 2 of Tender Schedule H - Contract Price does not apply unless stated otherwise)

[DELETE WHICHEVER OPTION DOES NOT APPLY]

PART 3 - TENDER FORM AND STATUTORY DECLARATION

TENDER FORM AND STATUTORY DECLARATION

TENDER FORM

To: **Commonwealth of Australia (Commonwealth)**

By: **[INSERT NAME OF TENDERER INCLUDING ABN]**

1. THE OFFER

- (a) We tender to perform the Contractor's Activities in accordance with the [Tender Documents](#) and the enclosed Tender Schedules.
- (b) We undertake, if this [Tender](#) is accepted, to immediately commence the Contractor's Activities and to carry them out in accordance with the [Tender Documents](#).
- (c) In consideration of the Commonwealth promising to pay us the sum of One Dollar (\$1.00), we agree to be bound by this [Tender](#) until 90 days from the [Closing Time and Date](#) and that this [Tender](#) may be accepted by the Commonwealth at any time before the expiration of that period.
- (d) The [Tender](#) will not be deemed to have been accepted unless and until:
 - (i) the Formal Agreement set out in Part 5 is signed by us and the Commonwealth; or
 - (ii) the Commonwealth gives us written notice:
 - A. that our [Tender](#) (as amended, if at all, under clause 7 of the [Tender Conditions](#)) has been accepted; and
 - B. which is titled "Letter of Acceptance under clause 8(b)(ii)",

in which case that acceptance and therefore the resultant Contract will be on the terms set out in the notice.

(e) We understand that the Commonwealth is not bound to accept the lowest or any [Tender](#) it may receive.

- (f) We warrant that, in preparing our [Tender](#), we did not communicate (verbally or otherwise) or have any arrangement or arrive at any understanding with any of the other tenderers or with any employee of an association of which we or any of the other tenderers are a member concerning the [Tender Documents](#) or any aspect of the Contractor's Activities and, without limitation, further warrant that we did not engage in:
 - (i) any discussion or correspondence with such entities concerning the prices included in our [Tender](#);
 - (ii) any collusive tendering with any of the other tenderers; or
 - (iii) any other conduct or have any other arrangement or arrive at any other understanding with any of the other tenderers,

which in any way reduced, or could have the effect of reducing, the competitiveness of the tender process for the Contractor's Activities.

(g) We:

- (i) acknowledge that the [Information Documents](#) were provided to us by the Commonwealth for our information only;
- (ii) warrant that we have not in any way relied upon:
 - A. the [Information Documents](#); or
 - B. the relevance, completeness, accuracy or adequacy of the [Information Documents](#),for the purposes of preparing our [Tender](#);
- (iii) acknowledge and agree that:

- A. the Commonwealth (or anyone on its behalf) does not warrant, guarantee, assume any responsibility for or make any representation about the relevance, completeness, accuracy or adequacy of the Information Documents or whether or not any other information exists, and nor has it (or anyone on its behalf) done any of these things;
- B. the Information Documents will not form part of any contract with the Commonwealth with respect to the Contractor's Activities; and
- C. to the extent permitted by law, the Commonwealth will not be liable upon any Claim by us arising out of, or in any way in connection with, the Information Documents;

(iv) prepared our Tender, and will enter into any contract with the Commonwealth, based on our own investigations, interpretations, deductions, information and determinations;

(v) calculated our tendered Contract Price to cover, in addition to all other obligations under the Contract, the assumption of the risks described in clause 5 of the Tender Conditions;

(vi) obtained independent legal advice as to the effect of the provisions of these Tender Conditions and the eventual Contract as to the assumption by the successful Tenderer of the risks described in clause 5 of the Tender Conditions;

(vii) examined all information relevant to the risks, contingencies and other circumstances having an effect on our Tender including (without limitation) the Information Documents, the material contained in the Tender Documents, any relevant technical advice made available by the Commonwealth and the terms and conditions of all Statutory Requirements;

(viii) examined the Site and its surroundings, conditions and characteristics and made an appropriate allowance in our Tender for any effect on our Tender;

(ix) satisfied ourselves as to the correctness and sufficiency of our Tender for the Contractor's Activities and that our tendered Contract Price covers the cost of complying with all the Contractor's obligations under the Contract;

(x) examined all Statutory Requirements relevant to any part of the Contractor's Activities and which may restrict or inhibit the execution of any part of the Contractor's Activities and satisfied ourselves of our capacity to execute the Contractor's Activities in accordance with the terms and conditions of the Contract without breaching any such Statutory Requirement;

(xi) understand that our failure to do all or any of the things we are deemed to have done under the Contract in Part 5 will not relieve us of our liability to perform and complete the Contract in accordance with its terms and conditions;

(xii) are aware that if selected as the Contractor we will, except as expressly contained in the Contract, accept total responsibility for and assume the whole risk of all increased costs and expenses and all damages and other losses arising out of or in any way connected with:

- A. the physical conditions and characteristics of the Site and its surroundings encountered in the execution of the Contractor's Activities; and
- B. the relevance, completeness, accuracy or adequacy of any information in the Information Documents.

and further that, except as expressly contained in the Contract, we hereby acknowledge that if selected as the Contractor we will have no entitlement whatsoever to make any Claim for any extension of time or costs, losses, expenses or damages if delayed or disrupted as a result of any of the above matters; and

(xiii) are aware that the Commonwealth will be relying upon each of the promises, representations and warranties given by us in this Tender in selecting a Tenderer to perform the Contractor's Activities.

(h) We acknowledge that:

- (i) the entire tender process (including the process for meeting with Tenderers under clause 7(a) of the Tender Conditions, obtaining, evaluating and (if applicable) negotiating Tenders) (**Process**) is being conducted solely for the benefit of the Commonwealth;
- (ii) without limiting the legal effect of the preferred Tenderer's obligations under any preferred Tenderer negotiation protocol required under clause 7(d)(ii) of the Tender Conditions, the Commonwealth does not intend to create any contract or other relationship under which the Commonwealth is legally obliged to conduct the Process in any manner or at all (whether in accordance with the terms of the Tender Documents or otherwise) and that there is in fact no such contract or other relationship in existence;
- (iii) there will be no procedural or substantive limitation upon the manner in which the Commonwealth may (in its absolute discretion) conduct the Process;
- (iv) to the extent permitted by law:
 - A. the Commonwealth does not make any warranty, guarantee or representation about our Tender, the Commonwealth's requirements for the Works or the way in which it will evaluate our Tender arising out of or in connection with anything which the Commonwealth states or does or omits to state or do in, arising out of or in connection with any meeting under clause 7(a) or 7(b) of the Tender Conditions or any industry briefing (**Meeting Conduct**);
 - B. the Commonwealth does not owe any duty of care to us in respect of any Meeting Conduct; and
 - C. we did not in any way rely upon any such Meeting Conduct for the purposes of preparing, amending or negotiating our Tender or entry into any contract with the Commonwealth with regard to the Works;
- (v) without limiting subparagraph (iii), the Commonwealth may (in its absolute discretion) vary, suspend or, if the Commonwealth believes (in its absolute discretion) that it may do so in accordance with the Commonwealth Procurement Rules, discontinue or terminate the Process at any time and for any reason;
- (vi) notwithstanding subparagraphs (i) - (v), we are submitting to the Process because we consider that this represents a valuable commercial opportunity for us;
- (vii) we release the Commonwealth from all Claims in respect of any costs, expenses, losses or damages incurred or suffered as a result of or in connection with the Process, the rejection of, failure to evaluate or failure to accept our Tender, any failure to comply with the Tender Documents, any Meeting Conduct or any debrief;
- (viii) the Commonwealth is proceeding with the Process strictly on the basis of, and in reliance upon, the acknowledgements and releases set out above;
- (ix) we will indemnify the Commonwealth in respect of all claims, losses, damages, liabilities, costs and expenses of any kind suffered or incurred as a result of or in connection with any breach of any acknowledgement or release given by us under this paragraph (h); and
- (x) we accept (without departure, qualification, amendment, limitation or exclusion) the Contract in Part 5, except to the extent provided for in clause 3.2(a) of the Tender Conditions and expressly set out in Tender Schedule I - Alternative Proposals.

(i) We acknowledge that:

- (i) within 14 days of:
 - A. receipt of a notice from the Commonwealth under clause 9(a)(ii)B of the Tender Conditions stating that we have been unsuccessful; or

B. the date upon which our [Tender](#) is accepted in accordance with clause 8 of the [Tender Conditions](#),

we may notify the Commonwealth by fax or post that a debrief is requested;

(ii) where requested within the timeframe required under subparagraph (i), the Commonwealth will provide a debrief (and, where required by Commonwealth policy, a written debrief by fax or post) at a suitable time to be determined by the Commonwealth (in its absolute discretion) after the Award Date; and

(iii) the purpose of the debrief is to discuss the reasons why our [Tender](#) was unsuccessful or accepted (as the case may be) and that neither the Commonwealth nor the [Tender Administrator](#) is obliged to make any comparison with or provide any information about any other tenderers or tender at any debrief.

(j) We:

(i) acknowledge and agree that the Confidential Information is confidential;

(ii) must not, without the consent by fax or post from the Commonwealth (in its absolute discretion):

A. copy or otherwise reproduce in any form or medium the contents of the Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be copied or reproduced in any form or medium; or

B. disclose or use or deal with, the contents of the Confidential Information (or any part of it) or otherwise cause, permit or allow the Confidential Information (or any part of it) to be disclosed, used or dealt with,

for any purpose other than preparing a [Tender](#) for the project or carrying out the project if our [Tender](#) is successful;

(iii) must ensure that:

A. the Confidential Information and all documents, materials, media and all other things on or in which the Confidential Information (or any part of it) may be recorded, contained, set out or referred to are kept secure and protected at all times from any unauthorised use or access;

B. all persons employed by us and all entities to whom the Confidential Information (or any part of it) is disclosed comply with the conditions of confidentiality and security as provided for in paragraphs (j) to (m); and

C. all persons employed by us and all entities to whom the Confidential Information (or any part of it) is disclosed do not do or omit to do anything which, if done or omitted to be done by us, would be a breach of our obligations under the disclaimer and confidentiality agreement referred to in clause 6(b) of the [Tender Conditions](#).

(k) We acknowledge and agree that within 7 days of receipt of:

(i) a request from the Commonwealth by fax or post, at any time; or

(ii) a notice from the Commonwealth by fax or post under clause 9(a)(ii)B of the [Tender Conditions](#) stating that we have been unsuccessful, except to the extent that we are notified by fax or post by the Commonwealth or the [Tender Administrator](#) that compliance with this paragraph (k) (or any part of this paragraph (k)) is not required,

we must:

(iii) subject to paragraph (l), as directed by the Commonwealth or the [Tender Administrator](#):

A. return all copies of the Confidential Information (to the extent the Confidential Information is in a tangible form) to the Commonwealth; or

B. promptly destroy all copies of the Confidential Information (to the extent the Confidential Information is in a tangible form) and promptly provide the Commonwealth with written

certification by fax or post that the Confidential Information (to the extent the Confidential Information is in a tangible form) has been securely and appropriately destroyed by us; and

(iv) notify the Commonwealth by fax or post of all Confidential Information (or any part of it) which we know or ought to know is beyond our possession, power, custody or control, giving full particulars (including the nature and extent of the Confidential Information, precise location, entity in possession, custody or control and any security arrangements).

(l) Where required by law, we may keep one copy of the Confidential Information for our records.

(m) We acknowledge and agree that:

(i) the return or destruction of the Confidential Information does not affect our obligations under paragraphs (j) to (l); and

(ii) without limiting any other right or remedy of the Commonwealth, if we have failed to comply with the obligations in paragraphs (j) to (l), the Commonwealth may (in its absolute discretion) do one or more of the following:

- A. decide not to evaluate (or continue to evaluate) our Tender; or
- B. take the failure into account in assessing any future registration of interest or tender submitted by us.

(n) We acknowledge that each party constituting the Tenderer is bound jointly and severally by this Tender.

(o) We acknowledge and agree that:

(i) if we did not submit our Tender in accordance with clause 3.1(a) of the Tender Conditions, then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated) unless the reason it was not submitted in accordance with clause 3.1(a) was solely due to mishandling by the Commonwealth;

(ii) we are responsible for submitting our Tender in accordance with clause 3.1(a) of the Tender Conditions and managing all risks associated with mishandling by a courier or mail service provider engaged by us, travel arrangements and weather conditions;

(iii) if the Tender does not satisfy each minimum form and content requirement specified in clause 3.1(b) of the Tender Conditions, then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated) unless the Commonwealth considers (in its absolute discretion) that the failure to satisfy any minimum form and content requirement was due to an unintentional error by us and the Commonwealth (in its absolute discretion) seeks, reviews and accepts any correction to the unintentional error; and

(iv) if we do not satisfy each condition for participation specified in clause 3.1(c) of the Tender Conditions, then the Tender will be regarded as non-conforming and will not be evaluated (or continue to be evaluated).

(p) We acknowledge and agree that, following the Closing Time and Date, we will:

- (i) attend and participate in all meetings required by the Commonwealth; and
- (ii) provide all information, documents, evidence or clarifications required by the Commonwealth within the time periods and in the formats specified by the Tender Conditions or as otherwise specified by the Commonwealth.

(q) Without limiting paragraph (p), we acknowledge and agree that if the Commonwealth notifies us by fax or post that we are a/the preferred Tenderer for the Contractor's Activities, we will:

- (i) attend and participate in all meetings, provide all information, documents and evidence and clarifications necessary to assist in the finalisation of the Contract for execution;
- (ii) negotiate in good faith all issues (if any) necessary prior to finalisation of the Contract for execution; and

(iii) if required by the Commonwealth, execute 3 copies of the Formal Agreement in Part 5 of the [Tender Documents](#) on the date required by the Commonwealth.

2. ADDENDA

We have allowed in our [Tender](#) for the requirements contained in all addenda issued to us under clause 2.2(c) of the [Tender Conditions](#) and identify each addendum by its number and date of issue as follows:

Number [INSERT] Dated [INSERT]

Number [INSERT] Dated [INSERT]

3. DETAILS OF TENDERER

[INSERT ALL DETAILS REQUIRED BY CLAUSE 3.4(b)(ii) AND (iii) OF THE [TENDER CONDITIONS](#) HERE REGARDING ORGANISATIONAL STRUCTURE, TRADING AND BUSINESS NAMES, RELATED BODIES CORPORATE, AUSTRALIAN CONTACTS, STREET ADDRESS AND FAX NUMBER, BUILDER'S REGISTRATION OR LICENCE NUMBER, JOINT BID DETAILS AND CONFIRMATION OF JOINT AND SEVERAL LIABILITY]

DATED this day of 20

[COMPLETE ONE OF THE FOLLOWING SIGNING BLOCKS THEN DELETE THOSE NOT USED - SEE CLAUSE 3.4(b)(iv) OF [TENDER CONDITIONS](#) AND INSERT ALL FURTHER DETAILS REQUIRED HERE]

SIGNED by [INSERT NAME AND POSITION)
OF SIGNATORY)
for and on behalf of the)
Tenderer in the presence of:)

Witness:

Print name and position:
.....

[OR]

I [INSERT NAME OF SIGNATORY] warrant that I hold the position of [INSERT] in the Tenderer and am duly authorised to sign this Tender for and on behalf of the Tenderer:

.....
[OR]
THE COMMON SEAL of)
[INSERT NAME AND ABN OF TENDERER])
was affixed in the presence of:)
.....

.....
(Signature of Secretary/Director)

.....
(Signature of Director)

.....
(Name of Secretary/Director in Full)

.....
(Name of Director in Full)

[THE TENDERER IS REQUESTED TO ENSURE THAT THE TENDER FORM IS COMPLETE, ACCURATE AND VALID]

STATUTORY DECLARATION

Commonwealth of Australia Statutory Declaration

Statutory Declarations Act 1959 (Cth)

I, [INSERT NAME, ADDRESS AND OCCUPATION OF PERSON MAKING THE DECLARATION], make the following declaration under the *Statutory Declarations Act 1959* (Cth):

DEFINITIONS

1. In this statutory declaration:

Commonwealth means the Commonwealth of Australia;

Contractor's Activities means all tasks and things which the [Tenderer](#) would be required to do if it were the successful tenderer for the Contract for [INSERT PROJECT];

Industry Association means any organisation of building or construction contractors and includes the Master Builders' Association and the Australian Federation of Construction Contractors;

Tenderer means [INSERT NAME AND ABN OF TENDERER]; and

tender price means the amount indicated by a tenderer as being the lowest amount for which that tenderer was prepared to perform any of the Contractor's Activities.

PREAMBLE

2. I hold the position of [INSERT TITLE - E.G. MANAGING DIRECTOR] of the [Tenderer](#) and am duly authorised by the [Tenderer](#) to make this declaration on its behalf.
3. I make this declaration on behalf of the [Tenderer](#) and on behalf of myself.

COLLUSIVE TENDERING

4. Neither the [Tenderer](#) nor any of its servants or agents had knowledge of the tender price of any other tenderer prior to the [Tenderer](#) submitting its [Tender](#) for the Contractor's Activities.
5. Neither the [Tenderer](#) nor any of its servants or agents disclosed the tender price submitted by the [Tenderer](#) to any other tenderer who submitted a tender for the Contractor's Activities or to any other entity or organisation prior to the close of tenders.

COVER BIDDING

6. Neither the [Tenderer](#) nor any of its servants or agents provided information to any other tenderer, entity or organisation, to assist another tenderer for the Contractor's Activities to prepare a tender known in the building and construction industry as a "cover bid", whereby the [Tenderer](#) was of the opinion or belief that another tenderer did not intend to genuinely compete for the contract.
7. The [Tenderer](#) is genuinely competing for the contract for the Contractor's Activities and its [Tender](#) is not a "cover bid".

INDUSTRY ASSOCIATION AGREEMENTS

8. Prior to the [Tenderer](#) submitting its [Tender](#) for the Contractor's Activities, neither the [Tenderer](#) nor any of its servants or agents entered into any contract, agreement, arrangement or understanding, other than as disclosed to the Commonwealth, that the successful tenderer for the Contractor's Activities would pay any money to, or would provide any other benefit or other financial advantage to, an Industry Association in respect of the [Tender](#).

UNSUCCESSFUL TENDERERS' FEES

9. Prior to the [Tenderer](#) submitting its tender for the Contractor's Activities, neither the [Tenderer](#) nor any of its servants or agents entered into any contract, agreement, arrangement or understanding that the successful

tenderer for the Contractor's Activities would pay any money, or would provide any other benefit or other financial advantage, to or for the benefit of any other tenderer who unsuccessfully tendered for the [Tender](#).

I understand that a person who intentionally makes a false statement in a statutory declaration is guilty of an offence under section 11 of the *Statutory Declarations Act 1959* (Cth), and I believe that the statements in this declaration are true in every particular.

[SIGNATURE OF PERSON MAKING DECLARATION]

Declared at [INSERT PLACE] on the [INSERT] day of [INSERT] 20[INSERT].

Before me,

[SIGNATURE OF WITNESS BEFORE WHOM THE DECLARATION IS MADE]

[FULL NAME OF WITNESS, ADDRESS OF WITNESS AND QUALIFICATION OF WITNESS]

Note 1 A person who intentionally makes a false statement in a statutory declaration is guilty of an offence, the punishment for which is imprisonment for a term of 4 years — see section 11 of the *Statutory Declarations Act 1959* (Cth).

Note 2 Chapter 2 of the *Criminal Code* applies to all offences against the *Statutory Declarations Act 1959* — see section 5A of the *Statutory Declarations Act 1959* (Cth).

A list of "Prescribed Persons" (witnesses) for the purposes of the *Statutory Declarations Act 1959* (Cth) is available at www.defence.gov.au/im.

[THE TENDERER IS REQUESTED TO ENSURE THAT THE STATUTORY DECLARATION IS COMPLETE, ACCURATE AND VALID]

PART 4 - TENDER SCHEDULES

TENDER SCHEDULE A

WORKLOAD AND PROPOSED RESOURCES

1. WORKLOAD

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(i) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to provide details of its current and potential future workload (including those contracts for which tenders have been submitted but not yet accepted or rejected) in table format as set out below. The Tenderer is permitted to submit the information requested in this item 1 of Tender Schedule A - Workload and Proposed Resources in folded A3 or landscape format.

If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information in this item 1 of Tender Schedule A - Workload and Proposed Resources which it considers relevant to proposed joint bid arrangements (as applicable).

CURRENT WORKLOAD

PROJECT AND LOCATION	CLIENT AND CONTACT DETAILS	CONTRACT PRICE	CONTRACT PRICE REMAINING	KEY START AND COMPLETION DATES	KEY DISCIPLINES/ TRADES

POTENTIAL FUTURE WORKLOAD

PROJECT AND LOCATION	CLIENT AND CONTACT DETAILS	APPROX VALUE	KEY AWARD, START AND COMPLETION DATES	KEY DISCIPLINES/ TRADES

2. PROPOSED RESOURCES (INCLUDING CONTRACTOR'S REPRESENTATIVE AND KEY PEOPLE)

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(i) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to provide details of its proposed resources for the Contractor's Activities and the Works, including:

- (a) the Contractor's Representative; and
- (b) the key people for the roles described in the Tender Particulars,

and in respect of each of (a) and (b) above:

- (c) their current and potential future location (and if not within the general geographical location of the Site, how the Tenderer proposes to manage the Contractor's Activities and the Works from that location);
- (d) the nature and extent to which they are proposed to be involved in the Contractor's Activities and the Works (including whether they will be based on or off the Site and the estimated number of hours per week that they will be dedicated to the Contractor's Activities and the Works);

- (e) the nature and extent of their involvement in the current and potential future projects identified in item 1 above;
- (f) their current and potential future workload and availability; and
- (g) their relevant qualifications and other relevant experience.

Such details should be provided in table format as set out below. The Tenderer is permitted to submit the information requested in this item 2 of Tender Schedule A - Workload and Proposed Resources in folded A3 or landscape format.

The Tenderer is also requested to provide details of the percentage of time against activities each of the Tenderer's proposed resources described in this Tender Schedule A - Workload and Proposed Resources would be dedicated to the Contractor's Activities and the Works.

If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information in this item 2 of Tender Schedule A - Workload and Proposed Resources which it considers relevant to proposed joint bid arrangements (as applicable).

POSITION, NAME	CURRENT AND POTENTIAL FUTURE LOCATION	PROPOSED INVOLVEMENT IN CONTRACTOR'S ACTIVITIES AND THE WORKS (INCLUDING ON OR OFF SITE ESTIMATED HOURS)	INVOLVEMENT IN CURRENT AND POTENTIAL FUTURE PROJECTS IDENTIFIED IN ITEM 1	CURRENT AND POTENTIAL FUTURE WORKLOAD AND AVAILABILITY	RELEVANT QUALIFICATIONS AND OTHER RELEVANT EXPERIENCE
Contractor's Representative					
[OTHER ROLES AS DESCRIBED IN THE TENDER PARTICULARS]					
[OTHER ROLES AS DESCRIBED IN THE TENDER PARTICULARS]					

The Tenderer is also requested to submit:

- (h) a project-specific organisational chart; and
- (i) curricula vitae for each of the Contractor's Representative and each key person for the roles described in the Tender Particulars, which should provide details of all relevant projects worked on in the last 5 years and the name and telephone number of a client referee.

If the Tenderer has submitted a registration of interest, has been invited to submit a tender or has submitted a tender for any other Department of Defence Capital Facilities and Infrastructure Branch project, which will or has included any of the proposed resources described above, the Tenderer is requested to provide details of any amendments to the information provided by the Tenderer in this item 2 of Tender Schedule A - Workload and Proposed Resources which would be proposed by the Tenderer in the event that the Tenderer is invited to submit a tender, selected as a preferred tenderer or the successful tenderer for those projects.

The information provided by a Tenderer in this item 2 of Tender Schedule A - Workload and Proposed Resources is for evaluation purposes only and will not limit or affect the scope of the Contractor's Activities, the Works or the Contract in Part 5.

3. PROPOSED SUBCONTRACTORS, CONSULTANTS AND MATERIAL SUPPLIERS

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(i) of the [Tender Conditions](#) and to assist the Commonwealth in evaluating its [Tender](#), the [Tenderer](#) is requested to provide details of its proposed subcontractors, consultants and material suppliers for the Contractor's Activities and the Works, including:

- (a) their current and potential future location (and if not within the general geographical location of the Site, how the [Tenderer](#) proposes to manage the Contractor's Activities and the Works from that location);
- (b) the reasons why it recommends each subcontractor, consultant and material supplier;
- (c) the nature and extent to which they are proposed to be involved in the Contractor's Activities and the Works (including whether or not they will be based on or off the Site and the estimated number of hours per week that they will be dedicated to the Contractor's Activities and the Works);
- (d) the nature and extent of their involvement in the current and potential future projects identified in item 1 above;
- (e) their current and potential future workload and availability; and
- (f) the qualifications and relevant experience of each key person from each subcontractor, consultant and material supplier.

Such details should be provided in table format as set out below. The [Tenderer](#) is permitted to submit the information requested in this item 3 of Tender Schedule A - Workload and Proposed Resources in folded A3 or landscape format.

The [Tenderer](#) is also requested to provide details of the percentage of time against activities each of the [Tenderer](#)'s proposed subcontractors, consultants and material suppliers described in this Tender Schedule A - Workload and Proposed Resources would be dedicated to the Contractor's Activities and the Works.

If the [Tenderer](#) wishes to submit its [Tender](#) on a Joint Bid Basis (as defined in clause 11.4 of the [Tender Conditions](#)), it is requested to provide any information in this item 3 of Tender Schedule A - Workload and Proposed Resources which it considers relevant to proposed joint bid arrangements (as applicable).

NAME, ENTITY (E.G. SUBCONTRACTOR, CONSULTANT, MATERIAL SUPPLIER)	CURRENT AND POTENTIAL FUTURE LOCATION	REASONS FOR RECOMMENDATION	PROPOSED INVOLVEMENT IN CONTRACTOR'S ACTIVITIES AND WORKS (INCLUDING ON OR OFF SITE, ESTIMATED HOURS)	INVOLVEMENT IN CURRENT AND POTENTIAL FUTURE PROJECTS IDENTIFIED IN ITEM 1	CURRENT AND POTENTIAL FUTURE WORKLOAD AND AVAILABILITY	RELEVANT QUALIFICATIONS AND OTHER RELEVANT EXPERIENCE OF KEY PEOPLE

The [Tenderer](#) is also requested to submit:

- (g) a project-specific organisational chart; and
- (h) curricula vitae for each key person from each subcontractor, consultant and material supplier, which should provide details of all relevant projects worked on in the last 5 years and the name and telephone number of a client referee.

If the [Tenderer](#) has submitted a registration of interest, has been invited to submit a tender or has submitted a tender for any other Department of Defence Capital Facilities and Infrastructure Branch project, which will or has included any of the proposed subcontractors, consultants and material suppliers described above, the [Tenderer](#) is requested to provide details of any amendments to the information provided by the [Tenderer](#) in this item 3 of Tender Schedule A

- Workload and Proposed Resources which would be proposed by the [Tenderer](#) in the event that the [Tenderer](#) is invited to submit a tender, selected as a preferred tenderer or the successful tenderer for those projects.

The information provided by a [Tenderer](#) in this item 3 of Tender Schedule A - Workload and Proposed Resources is for evaluation purposes only and will not limit or affect the scope of the Contractor's Activities, the Works or the Contract in Part 5.

TENDER SCHEDULE B

PLANS [AND PRELIMINARY DESIGN SOLUTION - IF HC-1 2003/MW-2 2004 AND DESIGN AND CONSTRUCT METHOD ONLY]

[HC-1 2003 ONLY. DO NOT USE FOR MW-2 2004]

1. OUTLINE PROJECT PLANS [HC-1 2003 ONLY. DO NOT USE FOR MW-2 2004]

The Tenderer's attention is drawn to the definitions of Site Management Plan, Environmental Management Plan, Commissioning and Handover Plan, Work Health and Safety Plan and Project Plans in clause 1.1 of the Conditions of Contract in Part 5 and clause 9.2 of the Conditions of Contract in Part 5.

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(ii) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to prepare and submit the following **outline** plans:

- (a) Site Management Plan;
- (b) Environmental Management Plan;
- (c) Commissioning and Handover Plan;
- (d) Work Health and Safety Plan; and
- (e) any additional Project Plans specified in the Tender Particulars,

to indicate how the Tenderer proposes to perform the Contractor's Activities.

The Tenderer should note that:

- (f) subject to paragraph (g), the outline Project Plans submitted by the successful Tenderer will become the outline approach for the purposes of clause 9.2(a)(ii)A of the Conditions of Contract in Part 5; and
- (g) the Commonwealth reserves the right to negotiate the outline Project Plans submitted by the Tenderer, with a view to amending the terms of the outline approach, before entering into any Contract with the successful Tenderer.

The Tenderer is requested to ensure that its outline Project Plans are focused on the Contractor's Activities and the Works described in the Contract in Part 5.

The Tenderer is also requested to provide a brief narrative which demonstrates that the Tenderer will implement appropriate management strategies with respect to the employment and training opportunities for indigenous Australians (in regions where a significant indigenous population exists), ensuring gender equality in the workplace and adding and retaining trainees and apprentices.

If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information in this item 1 of Tender Schedule B - Plans *[and Preliminary Design Solution - if HC-1 2003 design and construct method only]* which it considers relevant to proposed joint bid arrangements (as applicable).

[THE TENDERER IS REQUESTED TO ENSURE THAT IF IT PROPOSES ADDITIONAL PLANS, SUCH PLANS DO NOT ADDRESS MATERIAL ALREADY REQUIRED TO BE ADDRESSED IN THE PROJECT PLANS REQUIRED BY THE CONTRACT.]

THE TENDERER SHOULD ALSO NOTE THAT PLANS REQUIRED AS PART OF ITS INTERNAL GOVERNANCE PROCESSES MAY NOT BE CONSISTENT WITH OR BE IN ACCORDANCE WITH THE REQUIREMENTS OF THE CONTRACT]

2. WOL PLAN [HC-1 2003 ONLY. DO NOT USE FOR MW-2 2004]

The [Tenderer](#)'s attention is drawn to clause 17 of the Conditions of Contract in Part 5.

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(ii) of the [Tender Conditions](#) and to assist the Commonwealth in evaluating its [Tender](#), the [Tenderer](#) is requested to:

- (a) demonstrate its compliance with the ESD Principles (as defined in clause 1.1 of the Conditions of Contract in Part 5); and
- (b) prepare and submit a plan to clearly indicate how the [Tenderer](#) proposes to:
 - (i) design the parts of the Works which the Contract requires the Contractor to design; and
 - (ii) construct the Works,

so as to achieve the WOL Objectives (as defined in clause 1.1 of the Conditions of Contract in Part 5).

The [Tenderer](#) is requested to ensure that the WOL Plan is focused on the Contractor's Activities and the Works described in the Contract in Part 5.

The [Tenderer](#) should note that:

- (c) the Commonwealth acknowledges that the nature and extent of the WOL Plan requested to be submitted by each [Tenderer](#) will vary for each project and the extent to which (having regard to the delivery method), the [Tenderer](#):
 - (i) if successful, will design the parts of the Works which the Contract requires the Contractor to design (including the production of Design Documentation, designing Provisional Sum Work (if applicable) and carrying out any Variations requested by the Contractor); and
 - (ii) if successful, will construct the Works.
- (d) subject to paragraph (e), the plan submitted by the successful [Tenderer](#) will become the WOL Plan for the purpose of clause 17 of the Conditions of Contract in Part 5; and
- (e) the Commonwealth reserves the right to negotiate the WOL Plan submitted by the [Tenderer](#), with a view to amending the terms of the WOL Plan, before entering into any Contract with the successful [Tenderer](#).

If the [Tenderer](#) wishes to submit its [Tender](#) on a Joint Bid Basis (as defined in clause 11.4 of the [Tender Conditions](#)), it is requested to provide any information in this item 2 of Tender Schedule B - Plans [*and Preliminary Design Solution - if HC-1 2003 design and construct method only*] which it considers relevant to proposed joint bid arrangements (as applicable).

3. PRELIMINARY DESIGN SOLUTION [HC-1 2003 DESIGN & CONSTRUCT METHOD ONLY. IF HC-1 2003 CONSTRUCT ONLY OR DOCUMENT AND CONSTRUCT, DELETE THIS ITEM. DO NOT USE FOR MW-2 2004]

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(ii) of the [Tender Conditions](#) and to assist the Commonwealth in evaluating its [Tender](#), the [Tenderer](#) is requested to prepare and submit a preliminary design solution for the Works to the level specified in the Tender Particulars. The [Tenderer](#) should note that:

- (a) subject to paragraph (b), the preliminary design solution submitted by the successful [Tenderer](#) will form part of the design to be prepared by the Contractor under clause 6.2 of the Conditions of Contract in Part 5; and
- (b) the Commonwealth reserves the right to negotiate the preliminary design solution submitted by the [Tenderer](#) before entering into any Contract with the successful [Tenderer](#).

If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information in this item 3 of Tender Schedule B - Plans *[and Preliminary Design Solution - if HC-1 2003 design and construct method only]* which it considers relevant to proposed joint bid arrangements (as applicable).

1. TASK APPRECIATION AND METHODOLOGY [MW-2 2004 ONLY. DO NOT USE FOR HC-1 2003]

The Tenderer's attention is drawn to the definitions of Site Management Plan, Environmental Management Plan, Commissioning and Handover Plan, Work Health and Safety Plan and Project Plans in clause 21.1 of the Conditions of Contract in Part 5 and clause 8.7 of the Conditions of Contract in Part 5.

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(ii) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to prepare and submit:

- (a) a brief narrative setting out its understanding of the nature and scope of the Contractor's Activities and the Works;
- (b) its methodology for undertaking the role and responsibilities of the Contractor, including an outline Site Management Plan, Environmental Management Plan, Commissioning and Handover Plan and Work Health and Safety Plan; and
- (c) a brief narrative describing its understanding of specific problems which may arise and any potential solutions for those problems.

The Tenderer should note that:

- (d) subject to paragraph (e), the outline Project Plans submitted by the successful Tenderer will become the outline approach for the purposes of clause 8.7(a)(ii)A of the Conditions of Contract in Part 5; and
- (e) the Commonwealth reserves the right to negotiate the outline Project Plans submitted by the Tenderer, with a view to amending the terms of the outline approach, before entering into any Contract with the successful Tenderer.

The Tenderer is requested to ensure that its task appreciation and methodology is focused on the Contractor's Activities and the Works described in the Contract in Part 5.

The Tenderer is also requested to provide a brief narrative which demonstrates that the Tenderer will implement appropriate management strategies with respect to the employment and training opportunities for indigenous Australians (in regions where a significant indigenous population exists), ensuring gender equality in the workplace and adding and retaining trainees and apprentices.

If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information in this item 1 of Tender Schedule B - Plans [*and Preliminary Design Solution - if MW-2 2004 design and construct method only*] which it considers relevant to proposed joint bid arrangements (as applicable).

2. PRELIMINARY DESIGN SOLUTION [MW-2 2004 DESIGN & CONSTRUCT METHOD ONLY. IF MW-2 2004 CONSTRUCT ONLY, DELETE THIS ITEM. DO NOT USE FOR HC-1 2003]

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(ii) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to prepare and submit a preliminary design solution for the Works to the level specified in the Tender Particulars. The Tenderer should note that:

- (a) subject to paragraph (b), the preliminary design solution submitted by the successful Tenderer will form part of the design to be prepared by the Contractor under clause 5.1 of the Conditions of Contract in Part 5; and
- (b) the Commonwealth reserves the right to negotiate the preliminary design solution submitted by the Tenderer before entering into any Contract with the successful Tenderer.

If the [Tenderer](#) wishes to submit its [Tender](#) on a Joint Bid Basis (as defined in clause 11.4 of the [Tender Conditions](#)), it is requested to provide any information in this item 2 of Tender Schedule B - Plans *[and Preliminary Design Solution - if MW-2 2004 design and construct method only]* which it considers relevant to proposed joint bid arrangements (as applicable).

TENDER SCHEDULE C

[PREVIOUS PERFORMANCE/NOT USED]

[IF THE TENDERER WAS REQUIRED TO SUBMIT A REGISTRATION OF INTEREST, DELETE THE WORDS "PREVIOUS PERFORMANCE/" AND LEAVE "NOT USED" IN THE HEADING. ALSO DELETE THE REST OF THIS TENDER SCHEDULE C]

[IF THE TENDERER WAS NOT REQUIRED TO SUBMIT A REGISTRATION OF INTEREST, DELETE THE WORDS "/NOT USED" AND LEAVE THE REST OF THIS TENDER SCHEDULE C, AS SET OUT BELOW]

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(iii) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to provide details of its previous performance in respect of projects that are relevant to the Works limited as follows:

- (a) all projects completed or being carried out during the last 12 months; and
- (b) the number of projects in respect of each of the project values set out below,

in table format as set out below. The Tenderer is permitted to submit the information requested in this Tender Schedule C - Previous Performance in folded A3 or landscape format.

If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it is requested to provide any information in this Tender Schedule C - Previous Performance which it considers relevant to proposed joint bid arrangements (as applicable).

ALL PROJECTS COMPLETED OR BEING CARRIED OUT DURING THE LAST 12 MONTHS

	[PROJECT AND LOCATION]	[PROJECT AND LOCATION]
CLIENT		
NATURE AND EXTENT OF INVOLVEMENT OF ANY PROPOSED RESOURCES IDENTIFIED IN ITEM 2 AND ITEM 3 OF TENDER SCHEDULE A - WORKLOAD AND PROPOSED RESOURCES		
CONTRACT PRICE (AGREED)		
CONTRACT PRICE (ADJUSTED)		
REASONS FOR DIFFERENCE IN CONTRACT PRICE (AGREED) AND CONTRACT PRICE (ADJUSTED) (IF ANY)		
DATE FOR COMPLETION (AGREED)		
DATE FOR COMPLETION (ADJUSTED)		
DATE OF COMPLETION (ACTUAL)		
NUMBER OF EXTENSION OF TIME CLAIMS AND REASONS FOR EACH EXTENSION OF TIME		
DETAILS OF CLAIMS/DISPUTES BY EITHER PARTY OVER \$50,000 (EXCLUDING PROGRESS CLAIMS)		
DETAILS OF ANY CALLS ON SECURITY		

DETAILS OF INNOVATIONS AND VALUE ADDING, INCLUDING LONG TERM BENEFITS		
DETAILS OF PROBLEMS AND SOLUTIONS WHICH RESOLVED PROBLEMS		
CLIENT REFEREE - NAME AND CURRENT TELEPHONE NUMBER		
PROJECT MANAGER		
PROJECT MANAGER REFEREE - NAME AND CURRENT TELEPHONE NUMBER		

[\$INSERT - \$INSERT] - NO MORE THAN [INSERT E.G. "2"] PROJECTS [THE TENDER ADMINISTRATOR MUST CONSIDER AND AMEND THE VALUES AND NUMBER OF PROJECTS AS APPROPRIATE, HAVING REGARD TO THE ESTIMATED VALUE OF THE WORKS WHICH ARE THE SUBJECT OF THE TENDER DOCUMENTS]

	[PROJECT AND LOCATION]	[PROJECT AND LOCATION]
CLIENT		
NATURE AND EXTENT OF INVOLVEMENT OF ANY PROPOSED RESOURCES IDENTIFIED IN ITEM 2 AND ITEM 3 OF TENDER SCHEDULE A - WORKLOAD AND PROPOSED RESOURCES		
CONTRACT PRICE (AGREED)		
CONTRACT PRICE (ADJUSTED)		
REASONS FOR DIFFERENCE IN CONTRACT PRICE (AGREED) AND CONTRACT PRICE (ADJUSTED) (IF ANY)		
DATE FOR COMPLETION (AGREED)		
DATE FOR COMPLETION (ADJUSTED)		
DATE OF COMPLETION (ACTUAL)		
NUMBER OF EXTENSION OF TIME CLAIMS AND REASONS FOR EACH EXTENSION OF TIME		
DETAILS OF CLAIMS/DISPUTES BY EITHER PARTY OVER \$50,000 (EXCLUDING PROGRESS CLAIMS)		
DETAILS OF ANY CALLS ON SECURITY		
DETAILS OF INNOVATIONS AND VALUE ADDING, INCLUDING LONG TERM BENEFITS		
DETAILS OF PROBLEMS AND SOLUTIONS WHICH RESOLVED PROBLEMS		
CLIENT REFEREE - NAME AND CURRENT TELEPHONE NUMBER		

PROJECT MANAGER		
PROJECT MANAGER REFEREE - NAME AND CURRENT TELEPHONE NUMBER		

The **Tenderer** should note that the Commonwealth may (in its absolute discretion) decide not to evaluate any material provided in excess of the number or value of projects specified above.

TENDER SCHEDULE D

PROGRAM

The Tenderer's attention is drawn to clause *[10.2 - if HC-1 2003 / 9.2 - if MW-2 2004]* of the Conditions of Contract in Part 5.

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(iv) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to submit a detailed program showing its order of work, periods for carrying out all *[design, documentation and/ if HC-1 2003 - design and construct/document and construct/ if MW-2 2004 - design and construct only]* construction activities, including off-site activities and key dates.

The program should also:

- (a) *[show all individual design activities including all co-ordination and design development meetings (both internal and with Defence); - if design and construct only]*
- (b) allow for all necessary meetings (internal and external), reviews, consents and approvals;
- (c) be in a format compatible with the software described in the Tender Particulars; and
- (d) otherwise satisfy the requirements for the program described in the Contract in Part 5.

The program should be based on achieving Completion of the Works or each *[Stage - if HC-1 2003 / Section - if MW-2 2004]* by the relevant Date for Completion.

The Tenderer should note that the program referred to in this Tender Schedule D - Program will not form part of the Contract but will, subject to any negotiation of that program prior to the Award Date, form the basis of the initial program submitted by the successful Tenderer under clause *[10.2 - if HC-1 2003 / 9.2- if MW-2 2004]* of the Conditions of Contract in Part 5.

TENDER SCHEDULE E

TENDERER'S SECURITY AND INSURANCE DETAILS

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(v)A of the [Tender Conditions](#) and to assist the Commonwealth in evaluating its [Tender](#), the [Tenderer](#) is requested to provide details of the security and insurances which it has or proposes to put in place for the purposes of the Contract in Part 5.

If the [Tenderer](#) wishes to submit its [Tender](#) on a Joint Bid Basis (as defined in clause 11.4 of the [Tender Conditions](#)), it is requested to provide any information in this Tender Schedule E - Tenderer's Security and Insurance Details which it considers relevant to proposed joint bid arrangements (as applicable).

1. SECURITY

The [Tenderer](#)'s attention is drawn to clause 4 of the Conditions of Contract in Part 5.

The levels of security specified for the purposes of clause 4 of the Conditions of Contract in the Contract Particulars in Part 5 are provided as indicative levels only. The Commonwealth reserves the right to negotiate the levels of security required before entering into any Contract with the successful [Tenderer](#).

The [Tenderer](#) is also requested to confirm that, as at the Award Date, it will be in a position to provide the Approved Security required by clause 4 of the Conditions of Contract in Part 5. The [Tenderer](#) is also requested to provide evidence from each relevant financial institution that the relevant security is in accordance with clause 4 of the Conditions of Contract in Part 5.

2. INSURANCE

The [Tenderer](#)'s attention is drawn to clause [5.4 - if HC-1 2003 / 4.3 - if MW-2 2004] of the Conditions of Contract in Part 5.

The levels of insurance specified for the purposes of clause [5.4 - if HC-1 2003/4.3 - if MW-2 2004] of the Conditions of Contract in the Contract Particulars in Part 5 are provided as indicative levels only. The Commonwealth reserves the right to negotiate the levels of insurance required before entering into any Contract with the successful [Tenderer](#).

Such details should include:

INSURANCE TYPE	INSURANCE COMPANY	POLICY NO	EXTENT OF COVER PER OCCURRENCE/CLAIM \$A	AGGREGATE \$A	POLICY PERIOD	DEDUCTIBLE \$A
Other than where the Tenderer is self-insured (see below) Workers Compensation Insurance						
Employees Liability Insurance						
Construction Risks Insurance:	Material Damage					
	Defects Maintenance					
	Legal Liability					

Public Liability Insurance						
Professional Indemnity Insurance/Errors and Omissions Insurance [<i>if HC-1 2003/design and construct or document and construct /MW-2 2004 design and construct only</i>]						

[IF HC-1 2003: INSERT OTHERS REQUIRED UNDER CLAUSE 5.4(a)(iv) OF CONDITIONS OF CONTRACT IN PART 5]

[IF MW-2 2004: ENSURE THAT ABOVE INSURANCES CORRESPOND WITH THOSE SET OUT IN THE CONTRACT PARTICULARS]

For Construction Risks Insurance [*and*] Public Liability Insurance [*and Professional Indemnity Insurance/Errors and Omissions Insurance - if HC-1 2003 design and construct or document and construct only /MW-2 2004 design and construct only*], the Tenderer is requested to provide a letter from each relevant insurer or a reputable broker stating that the relevant policy is in accordance with clause [*5 – if HC-1 2003 / 4 – if MW-2 2004*] of the Conditions of Contract in Part 5.

For Workers Compensation Insurance, the Tenderer is requested to provide either:

- (a) a certificate of currency; or
- (b) where a Tenderer is self insured pursuant to the *Safety Rehabilitation and Compensation Act 1988* (Cth) and the *Safety Rehabilitation and Compensation Regulations 2002* (Cth), a copy of its licence to self insure.

For Employees Liability Insurance, the Tenderer is requested to provide a certificate of currency.

[THE TENDERER IS REQUESTED TO ENSURE THAT THE INFORMATION PROVIDED IN THE TABLE IS CONSISTENT WITH THE INFORMATION OTHERWISE PROVIDED IN THIS TENDER SCHEDULE E - TENDERER'S SECURITY AND INSURANCE DETAILS]

TENDER SCHEDULE F

MISCELLANEOUS CONTRACT PARTICULARS

[HC-1 2003 ONLY. DO NOT USE FOR MW-2 2004]

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(v)B of the [Tender Conditions](#) and to assist the Commonwealth in evaluating its [Tender](#), the [Tenderer](#) is requested to submit the following information for the purposes of the Contract Particulars in Part 5.

The [Tenderer](#) should ensure that the information provided in this Tender Schedule F - Miscellaneous Contract Particulars is consistent with information given in other parts of its [Tender](#) (as applicable).

***Date for Completion:**
(Clause 1.1)

Where there are no Stages, for the Works is:

[INSERT]

Where there are Stages, for each Stage is:

Stage	Date for Completion
-------	---------------------

[INSERT]	[INSERT]
----------	----------

[INSERT]	[INSERT]
----------	----------

[INSERT]	[INSERT]
----------	----------

Contractor's Executive Negotiator:
(Clause 1.1)

[INSERT]

(The [Tenderer](#) is requested to note that this should not be the same person as the Contractor's Representative nominated in Tender Schedule A - Workload and Proposed Resources.)

***Incentive Date:**
(Clause 1.1)

Where there are no Stages, for the Works is:

[INSERT]

Where there are Stages, for each Stage is:

Stage	Incentive Date
-------	----------------

[INSERT]	[INSERT]
----------	----------

[INSERT]	[INSERT]
----------	----------

[INSERT]	[INSERT]
----------	----------

[INSERT]	[INSERT]
----------	----------

***Percentage for additional profit and attendance for Provisional Sum Work exceeding provisional sum allowance by stated percentage:**
(Clause 8.12)

[INSERT] %

***Agreed damages:**
(Clause 10.11)

Where there are no Stages, the agreed damages for the Works are \$[INSERT] per working day.

If there are Stages, the agreed damages for each Stage are:

Stage	Agreed damages
[INSERT]	\$[INSERT] per working day
[INSERT]	\$[INSERT] per working day

***Percentage of extra costs reasonably incurred due to acceleration:**
(Clause 10.15(b)(ii))

[INSERT] %

***Percentage adjustments for valuing a Variation:**
(Clauses 11.3(b)(i), 11.3(c) and 11.6(f))

[INSERT] % of amount determined for off-site overheads and profit.

[INSERT] % of amount determined for non-time related on-site overheads and preliminaries.

***Percentage of wages:**
(Clause 11.6(b))

[INSERT] %

Address and fax number for the giving or serving of notices upon the Contractor:
(Clause 16.7(b)(i))

[INSERT]

[INDICATES DELETE IF NOT TO BE TENDERED]*

[MW-2 2004 ONLY. DO NOT USE FOR HC-1 2003]

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(v)B of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to submit the following information for the purposes of the Contract Particulars in Part 5.

The Tenderer should ensure that the information provided in this Tender Schedule F - Miscellaneous Contract Particulars is consistent with information given in other parts of its Tender (as applicable).

***Agreed damages:** \$[INSERT] for each day for which an extension of time is granted due to a breach of contract by the Commonwealth
(Clause 9.6)

Address and fax number for the giving or serving of notices upon the Contractor: [INSERT]
(Clause 16.1)

***Date for Completion:** For the Works is [INSERT] weeks/days after the Award Date
(Clause 21.1)

For each Section is:

Section	Date for Completion
[INSERT]	[INSERT] weeks/days after the Award Date
[INSERT]	[INSERT] weeks/days after the Award Date
[INSERT]	[INSERT] weeks/days after the Award Date
[INSERT]	[INSERT] weeks/days after the Award Date

Contractor's Executive Negotiator: [INSERT]
(Clause 21.1)

(The Tenderer is requested to note that this should not be the same person as the Contractor's Representative nominated in Tender Schedule A - Workload and Proposed Resources.)

[* INDICATES DELETE IF NOT TO BE TENDERED]

TENDER SCHEDULE G

TENDERER'S COMMERCIAL-IN-CONFIDENCE INFORMATION

The [Tenderer](#)'s attention is drawn to clause 24 of the [Tender Conditions](#) and clause 20 of the Conditions of Contract in Part 5.

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(v)C of the [Tender Conditions](#) and to assist the Commonwealth in evaluating its [Tender](#), the [Tenderer](#):

- (a) may identify any specific information provided by the [Tenderer](#) to the Commonwealth that it wishes the Commonwealth to keep confidential; and
- (b) must provide justification why the information identified under paragraph (a) should be kept confidential.

The [Tenderer](#) should note that the Commonwealth policy principles of transparency and accountability promote the disclosure of contractual information to the maximum extent.

Without limiting the Commonwealth's absolute discretion under clause 24(a)(ii) of the [Tender Conditions](#):

- (c) the following types of information in, or in relation to, contracts would generally not be considered Commercial-in-Confidence Information:
 - (i) performance and financial guarantees;
 - (ii) indemnities;
 - (iii) the price of an individual item, or groups of items of goods or services;
 - (iv) rebate, liquidated damages and service credit clauses;
 - (v) performance measures applicable to the Contract;
 - (vi) clauses which describe how Intellectual Property Rights are to be dealt with;
 - (vii) payment arrangements; and
 - (viii) the performance of the Contractor against the requirements of the Contract and agreed assessment criteria; and
- (d) the following types of information may meet the criteria of being protected as Commercial-in-Confidence Information:
 - (i) trade secrets;
 - (ii) proprietary information (this could be information about how a particular technical or business solution is to be provided);
 - (iii) internal costing information or information about profit margins; and
 - (iv) pricing structures (where this information would reveal whether there was a profit or loss on the supply of a particular good or service).

SPECIFIC INFORMATION	JUSTIFICATION	PERIOD OF CONFIDENTIALITY
[INSERT (IF APPLICABLE)]	[INSERT (IF APPLICABLE)]	[INSERT (IF APPLICABLE)]

TENDER SCHEDULE H

CONTRACT PRICE

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(vi) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer is requested to submit the information described in this Tender Schedule H - Contract Price.

The Tenderer should note that all amounts submitted are not and will not be subject to rise and fall and should be GST-exclusive (see clause [12.17 - if HC-1 2003/11.15- if MW-2 2004] of the Conditions of Contract in Part 5).

The Tenderer should note that provisional sum amounts included in the Contract Price should only relate to those items identified as Provisional Sum Work (see clause [8.7 - HC-1 2003/7.5 - if MW-2 2004] of the Conditions of Contract in Part 5).

The Tenderer should note that:

- (a) it is a minimum form and content requirement for its Tender under clause 3.1(b)(ii) of the Tender Conditions that the Tenderer must accept (without departure, qualification, amendment, limitation or exclusion) the Contract in Part 5, except to the extent provided for in clause 3.2 and expressly set out by the Tenderer in Tender Schedule I - Alternative Proposals;
- (b) if it does not do so, its Tender may be regarded as non-conforming and clause 3.3 of the Tender Conditions will apply; and
- (c) accordingly, if the Tenderer wishes to depart from, qualify, amend, limit or exclude any part of the Contract (including the [Works Description - if HC-1 2003/Design Documents- if MW-2 2004]) in Part 5, it must expressly set such matters out in Tender Schedule I - Alternative Proposals and not in this Tender Schedule H - Contract Price.

1. CONTRACT PRICE

[HC-1 2003 ONLY - DO NOT USE FOR MW-2 2004]

- (a) **Lump Sum**

\$[INSERT] (GST exclusive).

[IF CONTRACT PRICE IS BASED ON SCHEDULE OF RATES ONLY, INSERT "Not Applicable".]

- (b) **Breakdown of Lump Sum Contract Price**

[INSERT TABLE SHOWING BREAKDOWN OF BUILDING ELEMENTS, STAGES, TRADES ETC. IF THERE IS PROVISIONAL SUM WORK, INCLUDE PROVISIONAL SUM WORK AND AMOUNTS FOR PROVISIONAL SUM WORK SET OUT IN THE CONTRACT PARTICULARS]

This breakdown is for tender evaluation purposes and will not limit or affect the scope of the Contractor's Activities, the Works or the Contract in Part 5.

[IF CONTRACT PRICE IS BASED ON SCHEDULE OF RATES ONLY OR NO BREAKDOWN OF THE LUMP SUM IS REQUIRED BY DEFENCE, INSERT "Not Applicable"]

- (c) **Schedule of Rates**

[IF A SCHEDULE OF RATES IS TO BE USED FOR THE PURPOSE OF CALCULATING THE CONTRACT PRICE, INSERT TABLE SHOWING ITEMS AND QUANTITIES FOR PRICING USING RATES HERE. NOTE LIMITS OF ACCURACY IN CONTRACT PARTICULARS WHICH APPLY ONLY IF THERE IS A SCHEDULE OF RATES. RATES TO BE TENDERED ARE TO BE GST-EXCLUSIVE]

[IF A SCHEDULE OF RATES IS NOT TO BE USED FOR THE PURPOSE OF CALCULATING THE CONTRACT PRICE, INSERT "Not Applicable"]

(d) **Table of Variation Rates and Prices**

[IF A TABLE OF VARIATION RATES AND PRICES FOR POTENTIAL VARIATION ITEMS/GOODS/MATERIALS APPLIES, INSERT TABLE OF VARIATION RATES AND PRICES FOR PRICING HERE]

[IF A TABLE OF VARIATION RATES AND PRICES DOES NOT APPLY, INSERT "Not Applicable"]

(e) **Proposed progress payments for the Contract Price**

[IF PAYMENT CLAIMS AND PAYMENTS ARE TO BE BASED ON A SPECIFIED DAY OF THE MONTH (E.G. HC-1 2003 CONSTRUCT ONLY), INSERT THE FOLLOWING:]

The Tenderer is requested to provide an anticipated monthly cash flow. This cash flow is for tender evaluation purposes and will not limit or affect the scope of the Contractor's Activities, the Works or the Contract in Part 5.

[ALTERNATIVELY, IF PAYMENT CLAIMS AND PAYMENTS ARE TO BE BASED ON COMPLETION OF MILESTONES (E.G. HC-1 2003 DESIGN AND CONSTRUCT), INSERT THE FOLLOWING:]

The Tenderer is requested to provide a breakdown of proposed progress payments for the Contract Price based on the milestones set out in the Conditions of Contract in Part 5 and as follows:

MILESTONES	AMOUNT
<i>[INSERT MILESTONES FROM CONTRACT PARTICULARS]</i>	\$[INSERT]
<i>[INSERT MILESTONES FROM CONTRACT PARTICULARS]</i>	\$[INSERT]
<i>[TENDERER TO INSERT PROPOSED ADDITIONAL MILESTONES (IF ANY)]</i>	\$[INSERT]
CONTRACT PRICE	\$[INSERT] (GST exclusive)

The Tenderer should note that any proposed additional milestones should be significant milestones which represent the completion of a discrete activity and (without limitation) should not be based on monthly instalments against existing milestones.

The Tenderer should note that the Commonwealth reserves the right to negotiate the proposed progress payments of the Contract Price and any proposed additional milestone submitted by the Tenderer with a view to amending the proposed progress payments of the Contract Price and any proposed additional milestones before entering into any Contract with the successful Tenderer.

[NOTE THAT SPECIAL CONDITIONS WILL BE REQUIRED TO ADDRESS ANY "TENDER OPTIONS" TO BE PRICED (E.G. ADDITIONAL ELEMENTS OF THE WORKS NOT INCLUDED AT THE TIME OF TENDER BUT WHICH MAY BE REQUIRED TO BE PRICED NOW FOR FURTHER CONSIDERATION BY DEFENCE EITHER BEFORE OR AFTER THE AWARD DATE)]

[SPECIAL CONDITIONS MAY ALSO BE REQUIRED TO DIFFERENTIATE VALUES TO BE APPLIED TO THE DISCOVERY OF LATENT CONDITIONS AND VALUES TO BE APPLIED TO TABLE OF VARIATION RATES AND PRICES WORK, DEPENDING ON THE ITEMS/GOODS/MATERIALS DESCRIBED]

[MW-2 2004 ONLY - DO NOT USE FOR HC-1 2003]

(a) **Lump Sum**

\$ [INSERT] (GST exclusive).

(b) **Breakdown of Lump Sum and Monthly Cash Flow**

[INSERT TABLE SHOWING BREAKDOWN OF BUILDING ELEMENTS, SECTIONS, TRADES ETC. IF THERE IS PROVISIONAL SUM WORK, INCLUDE PROVISIONAL SUM WORK AND AMOUNT FOR PROVISIONAL SUM WORK SET OUT IN THE CONTRACT PARTICULARS]

This breakdown is for tender evaluation purposes and will not limit or affect the scope of the Contractor's Activities, the Works or the Contract in Part 5.

[IF NO BREAKDOWN IS REQUIRED, INSERT "Not Applicable"]

The Tenderer is requested to provide an anticipated monthly cash flow. This cash flow is for tender evaluation purposes and will not limit or affect the scope of the Contractor's Activities, the Works or the Contract in Part 5.

[IF NO CASH FLOW IS REQUIRED, INSERT "Not Applicable"]

(c) **Table of Variation Rates and Prices**

[IF A TABLE OF VARIATION RATES AND PRICES FOR POTENTIAL VARIATION ITEMS/GOODS/MATERIALS APPLIES, INSERT TABLE OF VARIATION RATES AND PRICES FOR PRICING HERE]

[IF A TABLE OF VARIATION RATES AND PRICES DOES NOT APPLY, INSERT "Not Applicable".]

[NOTE THAT SPECIAL CONDITIONS WILL BE REQUIRED TO ADDRESS ANY "TENDER OPTIONS" TO BE PRICED (E.G. ADDITIONAL ELEMENTS OF THE WORKS NOT INCLUDED AT THE TIME OF TENDER BUT WHICH MAY BE REQUIRED TO BE PRICED NOW FOR FURTHER CONSIDERATION BY DEFENCE EITHER BEFORE OR AFTER THE AWARD DATE)]

SPECIAL CONDITIONS MAY ALSO BE REQUIRED TO DIFFERENTIATE VALUES TO BE APPLIED TO THE DISCOVERY OF LATENT CONDITIONS AND VALUES TO BE APPLIED TO TABLE OF VARIATION RATES AND PRICES WORK, DEPENDING ON THE ITEMS/GOODS/MATERIALS DESCRIBED]

2. ADJUSTMENT FOR IMPORTED ITEMS

This item 2 of Tender Schedule H - Contract Price does not apply unless the Tender Particulars state that it applies.

The Tenderer's attention is drawn to clause *[8.25 - if HC-1 2003 / 7.6 - if MW-2 2004]* of the Conditions of Contract in Part 5 (if applicable).

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(vi) of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, where the Tenderer's Tender is based on the provision of any imported items, the Tenderer should submit its Tender in Australian dollars and provide the following information with this item 2 of Tender Schedule H - Contract Price:

- (a) details of the item(s) to be imported;
- (b) the F.O.B. value of the imported item(s);
- (c) the price of the imported item(s) and country of origin;
- (d) the applicable exchange rate in effect seven days prior to the Closing Time and Date and the name and address of the bank from which the rate was obtained;
- (e) the cost of freight, name and address of the firm or company providing the service; and
- (f) the date upon which the Tenderer proposes the account for the imported item(s) to be settled.

If the Tenderer does not submit the information required by this item 2 of Tender Schedule H - Contract Price for any imported item(s), it will not be entitled to any adjustment to the Contract Price for exchange rate fluctuations which impact on the imported item(s).

TENDER SCHEDULE I

ALTERNATIVE PROPOSALS

The [Tenderer](#) should note that it is a minimum form and content requirement for its [Tender](#) under clause 3.1(b)(ii) of the [Tender Conditions](#) that the [Tenderer](#) must accept (without departure, qualification, amendment, limitation or exclusion) the Contract in Part 5, except to the extent provided for in clause 3.2 of the [Tender Conditions](#) and expressly set out by the [Tenderer](#) in this Tender Schedule I - Alternative Proposals.

The Commonwealth offers the [Tenderer](#) the opportunity to provide alternative proposals in pursuit of greater value for money. The [Tenderer](#) should note that (subject to the Commonwealth's absolute discretion under clause 3.2 of the [Tender Conditions](#)), it must submit a conforming [Tender](#) before an alternative proposal will be considered.

The [Tenderer](#) must demonstrate how an alternative proposal will achieve greater value for money. The [Tenderer](#) is requested to note that providing detailed comments from insurers, brokers and legal advice (without more information, including any effect on pricing) will be unlikely to meet this requirement.

To assist the [Tenderer](#) to demonstrate its ability to satisfy the evaluation criterion described in clause 4(a)(vii) of the [Tender Conditions](#) and to assist the Commonwealth in evaluating an alternative proposal, the [Tenderer](#) must provide a brief explanation of each alternative proposal and provide supporting evidence (for example, details of the alternative, technical descriptions, costing information, program information, technical specifications, testing information, data and any other relevant information).

The [Tenderer](#) must also clearly explain the impact that any alternative proposal submitted in this Tender Schedule I - Alternative Proposals will have on the information provided in any other Tender Schedule submitted with its [Tender](#). This explanation must be set out in this Tender Schedule I - Alternative Proposals.

Without limiting clause 7 of the [Tender Conditions](#), the Commonwealth may (in its absolute discretion) require the [Tenderer](#), within a specified time and in a specified format, to provide the Commonwealth by fax or post with further information or clarification in relation to any aspect of a [Tenderer](#)'s alternative proposal.

Any decision by the Commonwealth regarding any alternative proposal will be final. The [Tenderer](#) submits its [Tender](#) on the basis that it will make no, and the Commonwealth will not be liable upon, any [Claim](#) by the [Tenderer](#) arising out of or in any way in connection with any decision by the Commonwealth in respect of any alternative proposal.

CONDITIONS OF CONTRACT						
CLAUSE	ALTERNATIVE	EFFECT ON PRICING	EFFECT ON PROGRAM	SUPPORTING INFORMATION	EFFECT ON OTHER TENDER SCHEDULES (IF ANY)	VALUE FOR MONEY
SPECIAL CONDITIONS						
CLAUSE	ALTERNATIVE	EFFECT ON PRICING	EFFECT ON PROGRAM	SUPPORTING INFORMATION	EFFECT ON OTHER TENDER SCHEDULES (IF ANY)	VALUE FOR MONEY

[WORKS DESCRIPTION - IF HC-1 2003/DESIGN DOCUMENTS - IF MW-2 2004]						
DOCUMENT TITLE, REFERENCE ETC	ALTERNATIVE	EFFECT ON PRICING	EFFECT ON PROGRAM	EXPLANATION AND SUPPORTING EVIDENCE	EFFECT ON OTHER TENDER SCHEDULES (IF ANY)	VALUE FOR MONEY
TENDER SCHEDULES						
REFERENCE	ALTERNATIVE	EFFECT ON PRICING	EFFECT ON PROGRAM	SUPPORTING INFORMATION	EFFECT ON OTHER TENDER SCHEDULES (IF ANY)	VALUE FOR MONEY
OTHER						
REFERENCE	ALTERNATIVE	EFFECT ON PRICING	EFFECT ON PROGRAM	SUPPORTING INFORMATION	EFFECT ON OTHER TENDER SCHEDULES (IF ANY)	VALUE FOR MONEY

TENDER SCHEDULE J

BUILDING CODE 2013

The Tenderer is referred to clause 3.1(b)(iii) of the Tender Conditions.

The Tenderer must complete and submit Tender Schedule J - Building Code 2013, which includes:

- (a) signing a Declaration of Compliance in the form set out in item A below; and
- (b) as indicated in the Tender Particulars and item B and item C of Tender Schedule J, either:
 - (i) if the Tenderer was required to submit a registration of interest, setting out the amendments to the information provided in Schedule D - Building Code 2013 of its registration of interest as necessary to reflect any change in the Tenderer's position as at the Closing Time and Date and providing the details in item C; or
 - (ii) if the Tenderer was not required to submit a registration of interest, completing the Questionnaire in item B and providing the details in item C.

The Tenderer should note that this is a minimum form and content requirement for its Tender under clause 3.1(b)(iii) of the Tender Conditions. If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), it must provide the information in this Tender Schedule J - Building Code 2013 for each joint bid party (as applicable). The Tenderer should also note that such details are an evaluation criterion under clause 4(a)(v)D of the Tender Conditions.

At the time of submitting its registration of interest or if no registration of interest was submitted, at the time of submitting its Tender, the Tenderer:

- (c) must comply with the Building Code 2013; and
- (d) must not be precluded from tendering for Australian Government funded work or specifically excluded from participating in this tender process.

The Tenderer should note that these are conditions for participation in this tender process under clause 3.1(c)(i) of the Tender Conditions. If the Tenderer wishes to submit its Tender on a Joint Bid Basis (as defined in clause 11.4 of the Tender Conditions), each joint bid party (as applicable) must satisfy the conditions for participation (as applicable).

The Tenderer is requested to submit copies of any relevant correspondence to and from the Department of Employment with respect to the application of the:

- (e) Building Code 2013; and
- (f) National Code and Guidelines (which were replaced by the Building Code 2013),

including with respect to the industrial instruments described in item B.

The Tenderer's attention is also drawn to the Department of Employment's online assessment tool available at www.employment.gov.au/building-code-2013 (accessed by clicking on "Code Assessments Online"). The Tenderer is encouraged to submit the industrial instruments described in the Questionnaire in item B below of Tender Schedule J - Building Code 2013 via the online assessment tool for assessment of the industrial instruments against the requirements of the Building Code 2013. As the online assessment may take approximately 14 days to complete (depending on the complexity of the assessment), the Tenderer is encouraged to submit any such industrial instruments via the online assessment tool as soon as possible after receiving the Tender Documents.

The Tenderer is requested to submit copies of any relevant correspondence to and from the Department of Employment with respect to any submission made via the online assessment tool.

A DECLARATION OF COMPLIANCE

Declaration of Compliance with the Building Code 2013

[INSERT [TENDER NUMBER, PROJECT NUMBER AND NAME OF PROJECT](#)]

[INSERT NAME OF [TENDERER](#), ABN AND ACN] ([Tenderer](#))

1. COMMONWEALTH FUNDED PROJECTS

The [Tenderer](#):

- (a) confirms that it has complied with the Building Code 2013 in preparing this [Tender](#);
- (b) undertakes that, at the time of submitting its registration of interest or if no registration of interest was submitted, at the time of submitting its [Tender](#):
 - (i) it complies with the Building Code 2013; and
 - (ii) it is not precluded from tendering for Australian Government funded work or specifically excluded from participating in this tender process;
- (c) undertakes that it will comply with the Building Code 2013 from the time of submitting its registration of interest or if no registration of interest was submitted, from the time of submitting its [Tender](#);
- (d) undertakes that it has required compliance by its Related Entities (as defined in section 3(2) of the Building Code 2013) with the Building Code 2013 from the time of submitting its registration of interest or if no registration of interest was submitted, from the time of submitting its [Tender](#);
- (e) undertakes to ensure compliance from all subcontractors and Consultants engaged on this project, including confirming compliance at all site and project meetings, should it be the successful [Tenderer](#);
- (f) undertakes to ensure that all contracts (including subcontracts) will expressly require compliance with the Building Code 2013;
- (g) agrees that it must provide and must ensure its Related Entities, subcontractors and Consultants provide the Commonwealth or any person authorised by the Commonwealth (including a person appointed as a Fair Work Building Industry Inspector or Fair Work Inspector as defined in the *Fair Work (Building Industry) Act 2012* (Cth) and the *Fair Work Act 2009* (Cth) respectively) ([Inspector](#)), with access to:
 - (i) inspect any work, material, machinery, appliance, article or facility;
 - (ii) inspect and copy any record relevant to the project, the Works or the Contractor's Activities the subject of this [Tender](#); and
 - (iii) interview any person,as is necessary to demonstrate its compliance with the Building Code 2013;
- (h) agrees that it must and must ensure its Related Entities, subcontractors and Consultants produce any document requested by the Commonwealth or any person authorised by the Commonwealth (including an Inspector and the Director of the Fair Work Building Industry Inspectorate), within the specified period, in person, by fax or by post;
- (i) acknowledges that it is aware the Code Monitoring Group, Commonwealth or the Minister for Employment may impose a sanction on a tenderer or contractor if that tenderer or contractor does not comply with the Building Code 2013. The sanction imposed may include but is not limited to:
 - (i) the reporting of the breach to an appropriate statutory body or law enforcement agency (if there is evidence that the breach may also be a breach of a Commonwealth or State law) or industry association;
 - (ii) issuing of a formal warning that future breaches may lead to more significant sanctions;

- (iii) preclusion from tendering for any Commonwealth work for a specified period;
- (iv) communication of sanction details to all Commonwealth agencies to ensure a "whole-of-government" approach;
- (v) publication of details of the breach and identification of the party committing the breach; and
- (vi) a reduction in the number of tendering opportunities that are given;

(j) acknowledges that the Commonwealth, its agencies and Ministers must be able to disclose information concerning the Tenderer's, its Related Entities', its subcontractors' and its Consultants' compliance with the Building Code 2013 for the purposes of facilitating compliance with the Building Code 2013 and the exercise of their statutory and portfolio responsibilities (**Purposes**) and to this end:

- (i) the Tenderer has previously given its consent and confirms its Related Entities have previously given their consent to disclosure by the Commonwealth, its agencies and Ministers of information concerning the Tenderer's and its Related Entities' compliance with the:
 - (A) Building Code 2013; or
 - (B) National Code and Guidelines (which were replaced by the Building Code 2013), and whether or not a sanction has been imposed on the Tenderer or any Related Entity for the Purposes and confirms that:
 - (C) the Tenderer and its Related Entities have not revoked that consent; and
 - (D) it applies to the Building Code 2013; and

[OR] [THE TENDERER IS TO DELETE AS APPLICABLE]

- (i) the Tenderer hereby gives its consent and confirms that its Related Entities give their consent to disclosure by the Commonwealth, its agencies and Ministers of information concerning the Tenderer's and its Related Entities' compliance with the:
 - (A) Building Code 2013; or
 - (B) National Code and Guidelines (which were replaced by the Building Code 2013), for the Purposes; and
- (ii) the Tenderer has obtained or must obtain the consent of each subcontractor and Consultant proposed in its Tender to disclosure by the Commonwealth, its agencies and Ministers of information concerning the subcontractors' and Consultants' compliance with the:
 - (A) Building Code 2013 and whether or not a sanction has been imposed on the subcontractor or Consultant under the Building Code 2013; or
 - (B) National Code and Guidelines (which were replaced by the Building Code 2013), for the Purposes;

(k) acknowledges that the consents provided in this declaration are not limited to this tender process and the Tenderer is expected to comply with the Building Code 2013 on future projects;

(l) has described how the Tenderer has complied with the:

- (i) Building Code 2013; and
- (ii) National Code and Guidelines (which were replaced by the Building Code 2013), in the past (if the Tenderer has undertaken Australian Government funded building work in the past), including whether or not the Tenderer has ever been subject to a sanction imposed under the:

(iii) Building Code 2013; or

(iv) National Code and Guidelines (which were replaced by the Building Code 2013),

and how it:

- (v) intends to comply with the Building Code 2013 in performing the contract, should it be the successful tenderer;
- (vi) will ensure that any unregistered written agreements it enters into falls within one of the exceptions specified in section 10(3) of the Building Code 2013;
- (vii) has applied or will apply the Building Code 2013 to all privately funded building work (as defined in item 9 of Schedule 1 of the Building Code 2013) that commence after the Tenderer first lodges a registration of interest or tender for Australian Government projects after 1 November 2005;
- (viii) will ensure that all contracts (including subcontracts) permit the rights of access described in this Declaration of Compliance (including for privately funded building work);
- (ix) will ensure that all persons engaged in the performance of the building works by the Tenderer (or its subcontractors and Consultants) are lawfully entitled to work in Australia;
- (x) will establish appropriate processes to ensure freedom of association;
- (xi) will ensure that all contracts (including subcontracts) permit the right of entry described in section 16 of the Building Code 2013;
- (xii) will ensure that all enterprise agreements made on or after 1 February 2013 will include a genuine dispute settlement procedure' as described in section 17 of the Building Code 2013;
- (xiii) will comply with any applicable dispute settlement requirements of the *Fair Work Act* 2009 (Cth) relating to dispute settlement;
- (xiv) will ensure that there is a work health and safety management system for the project in accordance with section 20(1) of the Building Code 2013;
- (xv) if the Tenderer will be a principal contractor in respect of the project, will ensure that there is a work health and safety management plan for the project in accordance with section 20(2)-(3) of the Building Code 2013;
- (xvi) will ensure that where threatened or actual industrial action occurs on a project, the Tenderer and its employees, subcontractors and Consultants report such action to the Commonwealth;
- (xvii) will respond to requests for information concerning Building Code 2013 related matters made on behalf of the Code Monitoring Group and the Director of the Fair Work Building Industry Inspectorate;
- (xviii) will, where practicable, ensure that the Tenderer, its subcontractors and Consultants initiate voluntary remedial action aimed at rectifying non-compliant behaviour where it is drawn to their attention;
- (xix) will ensure that the Tenderer notifies the Code Monitoring Group secretariat and the Director of the Fair Work Building Industry Inspectorate of any alleged breaches, voluntary remedial action taken or other Building Code 2013 related matters within 21 days of the Tenderer becoming aware of the alleged breach; and
- (xx) will be aware of and ensure that sanctions applied under the:
 - (A) Building Code 2013; and
 - (B) National Code and Guidelines (which were replaced by the Building Code 2013),

are enforced, including the exclusion of identified parties from work opportunities in accordance with decisions advised by the Code Monitoring Group,

in item C below; and

(m) where it is proposed to subcontract an element of the project, has described either:

- (i) the information detailed in paragraph (l) above in relation to each subcontractor and Consultant; or
- (ii) how the Tenderer intends to ensure each subcontractor and Consultant complies with the Building Code 2013 before it does business with them,

in item C below.

2. PRIVATELY FUNDED BUILDING WORK

The Tenderer declares that in respect of privately funded building work (as defined in item 9 of Schedule 1 of the Building Code 2013):

- (a) the Tenderer and its Related Entities must comply with the Building Code 2013 on all of the Tenderer's and its Related Entities' future privately funded building work;
- (b) the Tenderer must maintain adequate records of compliance with the Building Code 2013 by the Tenderer, its Related Entities, subcontractors and Consultants;
- (c) it must provide and must ensure its Related Entities, subcontractors and Consultants provide the Commonwealth or any person authorised by the Commonwealth (including an Inspector), with access to:
 - (i) inspect any work, material, machinery, appliance, article or facility;
 - (ii) inspect and copy any record relevant to the project, the Works or the Contractor's Activities the subject of the relevant contract; and
 - (iii) interview any person,

as is necessary to demonstrate its compliance with the Building Code 2013;

- (d) the Tenderer must produce and must ensure that its Related Entities, subcontractors and Consultants produce any specified document to the Commonwealth or any person authorised by the Commonwealth (including an Inspector) within the specified period, in person, by fax or by post; and
- (e) the Tenderer must provide and must ensure that its Related Entities, subcontractors and Consultants provide the Commonwealth or any person authorised by the Commonwealth (including an Inspector) with access to records and to the Related Entities', subcontractors' and Consultants' premises (to inspect and copy records), as is necessary to ensure that the Related Entities, subcontractors and Consultants are complying with the Building Code 2013.

Date:

.....
Signature of Tenderer/Director

.....
Name of Tenderer/Director

[THE TENDERER MUST ENSURE THAT THE DECLARATION OF COMPLIANCE IS COMPLETE, ACCURATE AND VALID]

B QUESTIONNAIRE

(Refer to Tender Particulars as to which Option applies)

AMENDMENTS TO INVITATION TO REGISTER INTEREST - Option 1

[**TENDERER** TO INSERT (IF APPLICABLE)]

QUICK ASSESSMENT - Option 2

QUICK ASSESSMENT

[INSERT **TENDER NUMBER, PROJECT NUMBER AND NAME OF PROJECT**]

Will the **Tenderer** engage any existing or new employees for the project? YES NO

If Yes, please identify the industrial instrument(s) under which the employees are employed or are to be employed. **The Tenderer must provide the full and accurate name of the instrument.** If requested by the Commonwealth, the **Tenderer** must provide a copy for assessment against the requirements of the Building Code 2013.

The **Tenderer** is requested to note that:

- the Department of Defence advises that it will not be approving the negotiation or the application of any project agreements in relation to the project;
- section 10(1) of the Building Code 2013 states that the bargaining for and making of unregistered written agreements is not permitted unless the agreement falls within one of the exceptions specified in section 10(3) of the Building Code 2013; and
- section 11 of the Building Code 2013 (sham contracting) prohibits building contractors and building industry participants from engaging in activity that is prohibited under a provision of Division 6 of Part 3-1 of the *Fair Work Act 2009* (Cth).

TYPE OF INSTRUMENT	TICK IF APPLICABLE	NAME OF APPLICABLE INSTRUMENT
Instrument made <u>after</u> 1 July 2009		
Single enterprise agreement		
Multi enterprise agreement		
Single-interest employer enterprise agreement		
Greenfields agreement		
Modern Award		
Workplace determination		
Individual agreement-based transitional instrument (made <u>before</u> 1 July 2009)		
Australian Workplace Agreement (AWA)		
Individual Transitional Employment Agreement (ITEA)		
Pre-Reform Australian Workplace Agreement (AWA)		
Preserved individual State agreement		
Collective agreement-based transitional instrument (made <u>before</u> 1 July 2009)		
Multiple business agreement		

TYPE OF INSTRUMENT	TICK IF APPLICABLE	NAME OF APPLICABLE INSTRUMENT
Employee collective agreement		
Union collective agreement		
Employer greenfields agreement		
Union greenfields agreement		
Workplace determination		
Pre-reform certified agreement		
Old IR Agreement		
Section 170MX Award		
Preserved collective State agreement		
Division 2B State Agreement		
Award-based transitional instrument (made <u>before</u> 1 July 2009)		
Unmodernised Federal Award		
NAPSA		
Division 2B State Award		
Division 2B State Reference Transitional Award		
State-system instrument made <u>before</u> or <u>after</u> 1 July 2009 (for non-Federal system employers ONLY)		
State Award		
State Agreement		

The **Tenderer** must note in its **Tender** any failure to comply with the Building Code 2013.

The following questions apply to **[INSERT TENDER NUMBER, PROJECT NUMBER AND NAME OF PROJECT]**, described in the **Tender Documents**:

1. Does the **Tenderer** use any unregistered written agreements (within the meaning of section 10 of the Building Code 2013)?

YES NO

If Yes, please provide details:

[INSERT]

2. Does the **Tenderer** have workplace agreements, policies or practices that encourage or discourage employees on the project site to join or maintain financial membership with a relevant union or any industrial association, including the provision of union application forms with induction packages and informing prospective employees of their rights, obligations and benefits of union membership?

YES NO

If Yes, please provide details:

[INSERT]

3. Are there any requirements or practices that encourage, suggest or pressure subcontractors or Consultants to adopt or require any particular form of workplace arrangement or to have any particular workplace arrangement in place?

YES NO

If Yes, please provide details:

[INSERT]

4. Does the [Tenderer](#) use induction forms that require employees to identify their union status or require subcontractors or Consultants to identify the union status of employees?

YES NO

5. Does the Tenderer ensure personal information is not dealt with in breach of the *Privacy Act 1988* (Cth) or the *Fair Work Act 2009* (Cth)?

YES NO

6. Do the industrial instruments of the [Tenderer](#) grant access to a site to a representative of an industrial association other than in strict compliance with the right of entry provision in section 16 of the Building Code 2013?

YES NO

7. Are there any arrangements for the employment of a non-working shop steward or job delegate, or hire of an individual nominated by a union, on the project site?

YES NO

8. Is there any requirement for the payment by any person or enterprise of a 'bargaining fee', however described, to any industrial association?

YES NO

9. Does the [Tenderer](#) allow "no ticket, no start" signs or "show card" days on the project site?

YES NO

10. Does the [Tenderer](#) accede to reasonable requests from workplace delegates to represent employees in relation to grievances and disputes or discussions with members?

YES NO

11. Does the [Tenderer](#) comply with all of its obligations under the *Fair Work Act 2009* (Cth), including but not limited to bargaining in good faith?

YES NO

12. Has the Tenderer (or a Related Entity of the Tenderer within the meaning of the Building Code 2013) ever been subject to a sanction imposed under the:

(a) Building Code 2013 and the Building Code 2013 - Supporting Guidelines for Commonwealth Funding Entities; or
(b) National Code and Guidelines (which were replaced by the Building Code 2013)?

YES NO

If Yes, please provide details:

[INSERT]

13. Has the Tenderer had an adverse Court or Tribunal decision (not including decisions under appeal) for a breach of workplace relations law, work health and safety law, or workers' compensation law?

YES NO

If Yes, is the Tenderer fully complying with the order imposed by the decision(s)?:

YES NO

The Tenderer should note that:

- (a) the above is not a comprehensive list of non-compliant matters; and
- (b) if the Tenderer is unsure of whether any aspect of their workplace relations arrangements fails to comply with the Building Code 2013, it is preferable that the arrangement be noted in the Tender so that an assessment can be made.

C DETAILS REGARDING COMPLIANCE

To assist the Tenderer to demonstrate its ability to satisfy the evaluation criterion in clause 4(a)(v)D of the Tender Conditions and to assist the Commonwealth in evaluating its Tender, the Tenderer must submit the following details regarding its compliance with the Building Code 2013.

(Refer to Tender Particulars as to which Option applies)

AMENDMENTS TO INVITATION TO REGISTER INTEREST - Option 1

[TENDERER TO INSERT (IF APPLICABLE)]

DETAILS REGARDING COMPLIANCE - Option 1 and Option 2

- (a) The Tenderer is referred to paragraphs 1(l) and 1(m) of the Declaration of Compliance in item A above.
- (b) The Tenderer must describe how it has complied with the:
 - (i) Building Code 2013; and
 - (ii) National Code and Guidelines (which were replaced by the Building Code 2013),

in the past (if the Tenderer has undertaken Australian Government funded construction work in the past), including whether or not the Tenderer has ever been subject to a sanction imposed under the:

- (iii) Building Code 2013; and
- (iv) National Code and Guidelines (which were replaced by the Building Code 2013),

and how it has and will address the requirements set out in paragraphs 1(l) and 1(m) of the Declaration of Compliance in item A above.

PART 5 - CONTRACT