



## Part 3: Procurement Process Conditions

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**DRFA Program Theodore Area – Reconstruction Works**

**CONTRACT NO.: T2526.24**

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# Procurement Process Conditions

## 1. GENERAL

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- 1.1 **(Conduct of the Procurement Process)** The Principal will endeavour to conduct the Procurement Process in a manner which is consistent with these Procurement Process Conditions.
- 1.2 **(Rights of the Principal)** The Principal may do anything which it considers to be prudent or necessary for the proper conduct of the Procurement Process, including:
  - (a) **(alteration of Procurement Documents)** amend, add to or delete any part of the Procurement Documents including:
    - (i) the procedures and timeframes provided in the Procurement Process Conditions;
    - (ii) the Evaluation Criteria (including weightings);
    - (iii) the Scope; and
    - (iv) where one is included in the Procurement Documents, the Contract;
  - (b) **(suspension or termination)** suspend or terminate the Procurement Process;
  - (c) **(attendances)** request any one or more Respondents to attend a briefing, site inspection or other meeting or to make a presentation of their Response in person at the Principal's office at no cost to the Principal;
  - (d) **(change or error in Procurement Documents)** request any one or more Respondents to change their Response to take account of a change in the Procurement Documents or any error in such documents;
  - (e) **(clarification or alteration)** request any one or more Respondents to clarify or alter any aspect of the Respondent's Response;
  - (f) **(additional information)** request additional information from one or more Respondents relating to a Response, the Procurement Process, the Respondent's compliance with the Procurement Process Conditions or any other matter which the Principal considers relevant to its assessment (including information that should have been, but was not, included in the Respondent's Response);
  - (g) **(negotiation)** negotiate amendments to any aspect of a Response with any one or more Respondents and suspend or terminate such negotiations at any time;
  - (h) **(revised Responses)** invite one or more Respondents to provide a revised Response or best and final offer; and/or
  - (i) **(shortlisting)** create a shortlist of one or more Respondents and exercise any of its rights only in respect of one or more of the shortlisted Respondents.
- 1.3 **(Conduct of Respondents)** The Respondent must not, and must ensure that its Personnel do not, engage in any Improper Conduct. The Respondent must immediately notify the Principal in the event that it becomes aware that it, or any of its Personnel, have engaged in Improper Conduct. Where appropriate, the Principal may report Improper Conduct by the Respondent to the appropriate Authority and provide that Authority with any relevant information related to that conduct.
- 1.4 **(Complaints in relation to the Procurement Process)** The Respondent must make any complaint in relation to the Procurement Process using the Communication Method immediately upon the cause of the complaint arising or upon the Respondent becoming aware of the cause.

# Procurement Process Conditions

The complaint must be made in writing to the Complaints Manager and must contain adequate detail to allow the Complaints Manager to properly investigate the complaint.

- 1.5 **(No warranty)** The Principal gives no warranty and makes no representation that the Procurement Documents or any other information provided to the Respondent in connection with the Procurement Process is accurate, adequate or complete.
- 1.6 **(No liability)** Neither the Principal nor its Personnel shall be liable upon any Claim for any Specified Loss in connection with the Procurement Process.

## **2. BRIEFINGS AND SITE INSPECTIONS (RFT ONLY)**

- 2.1 **(Attendance)** The Respondent must attend any briefing or a site inspection which is identified in the General Information as mandatory. Respondents are encouraged to attend any briefing or site inspection which is not described as mandatory.
- 2.2 **(RSVP)** The Respondent must confirm that it intends to attend the briefing or site inspection to the email address and by the time and date stated in the General Information and may only bring a maximum of the number of Personnel stated in the General Information.
- 2.3 **(Safety)** The Respondent must inform itself of risks to health and safety arising from attendance at the briefing or site inspection and take all reasonable steps to ensure that such risks are eliminated or, if it is not possible to eliminate them, to minimise them so far as is practicable.
- 2.4 **(Obligation to inspect)** Where no site inspection is identified in the General Information, the Respondent must make its own arrangements to inspect the site prior to lodging its Response.

## **3. COMMUNICATIONS DURING PROCUREMENT PROCESS**

- 3.1 **(Communication Method)** All communications by the Principal to the Respondent shall at first instance be made using the Communication Method. Except where expressly permitted by these Procurement Process Conditions, all communications by the Respondent to the Principal in connection with the Procurement Process shall at first instance be directed to the Principal using the Communication Method. No other communication method may be utilised by the Respondent unless expressly permitted by the Principal or where technical difficulties prevent the Respondent from utilising the Communication Method or the Principal expressly agrees to an alternative method.
- 3.2 **(Respondent's responsibility)** The Respondent must ensure that it is capable of receiving and does receive all communications to the Respondent in connection with the Procurement Process. Where the Communication Method is email, it is the Respondent's responsibility to ensure that it notifies the Principal of the correct email address for receiving communications. Where the Communication Method is through a website, the Respondent must ensure that it is properly registered with and capable of receiving communications through the website.
- 3.3 **(Confidentiality of communications)** The Principal may notify any or all Respondents of a request for further information made by a Respondent and the Principal's response to it without identifying the submitting Respondent or may keep a request for information confidential and respond only to the Respondent if it considers that it is appropriate to do so.
- 3.4 **(No reliance)** The Respondent must not rely upon any information (including information provided at a briefing or site inspection) unless it is confirmed by the Principal through the Communication Method.
- 3.5 **(Communication Closing Time)** The Principal will not respond to any request for information received after the Communication Closing Time.

## **4. THE RESPONSE (RFT ONLY)**

- 4.1 **(Application of clause)** This clause 4 only applies in respect of an RFT .

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4.2 **(Acceptance of Contract and Scope)** If one has not been provided, the Respondent must obtain a copy of the Contract from the Principal by requesting a copy through the Communication Method. Except to the extent that the Respondent has detailed a proposed alternative, amendment, qualification or departure in a Response, the Respondent will be taken to have unconditionally accepted and agreed to:

- (a) be bound by the terms and conditions of the Contract; and
- (b) carry out and complete the whole of the obligations described in or to be reasonably inferred from the Procurement Documents.

4.3 **(Price)** The Price must be submitted exclusive of GST and in Australian dollars.

4.4 **(Discrepancy in Price)** Where the Response Form requires the Respondent to provide a Price and there is a discrepancy between the amount stated in the Response Form as the Respondent's Price and the sum total of the items in any Price Schedule then:

- (a) if the Contract provides that it is a lump sum contract, then the sum total of the items in the Price Schedule shall be the Respondent's Price; or
- (b) if the Contract provides that it is a schedule of rates contract or a part lump sum and part schedule of rates contract, then the rate, price or lump sum of each item will prevail over the total shown, and the total shall be adjusted accordingly.

4.5 **(Response Validity Period)** The Respondent's Response will remain valid and open for acceptance by the Principal until the end of the Response Validity Period and thereafter until it is withdrawn in writing by the Respondent or the Procurement Process is finalised. The Principal may consent to the Respondent withdrawing its Response before the end of the Response Validity Period. The Principal may request an extension of the Response Validity Period at any time by giving written notice to the Respondent. If the Respondent does not agree to the requested extension then the Principal may exclude the Respondent's Response from assessment or further assessment as the case may be.

4.6 **(Alternative Responses)** If the Respondent wishes to submit an Alternative Response, then the Respondent is encouraged to:

- (a) also submit a Conforming Response; and
- (b) submit the Alternative Response on a separate Response Form to the Conforming Response, clearly marked, "ALTERNATIVE RESPONSE" accompanied by a clear summary of all points of difference between the Alternative Response and the Conforming Response.

## 5. RESPONDENT'S GENERAL WARRANTIES AND REPRESENTATIONS

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5.1 **(Warranties and Representations)** By lodging a Response, the Respondent warrants and represents that:

- (a) **(conduct of Respondent)** neither the Respondent nor any of its employees or agents has engaged in any Improper Conduct;
- (b) **(authority)** the Response has been signed and lodged by a person with authority to do so on behalf of the Respondent;
- (c) **(basis of Response)** the Respondent:
  - (i) has received or obtained copies of all of the Procurement Documents and all information or documents referred to in the Procurement Documents; and

## Procurement Process Conditions

- (ii) has not relied on the accuracy, adequacy or completeness of any documents or information provided or any representation made by or on behalf of the Principal in connection with the Procurement Process in preparing its Response;
- (d) **(accuracy of Response)** all information provided in or with the Response is accurate;
- (e) **(ability)** the Respondent and its relevant Personnel:
  - (i) hold (and are compliant with all requirements of) all necessary competencies, licences (including if necessary, a licence under the *Queensland Building and Construction Commission Act 1991* (Qld)), accreditations, certifications, permits, clearances and other authorisations which will be required for the Respondent to carry out the Scope if it is ultimately engaged to carry out that Scope; and
  - (ii) are not excluded from submitting a tender under any applicable Queensland or Federal Government scheme, code or policy;
- (f) **(suitability etc. of works, goods or services)** where the Principal has stated in the Procurement Documents the purpose(s) for which the works, goods or services must be suitable, appropriate, adequate or fit, the works, goods or services shall be suitable, appropriate, adequate and fit for those purposes (but this warranty and representation will not apply to the extent (if any) that the Respondent has expressly excluded or limited it in the Respondent's Response);
- (g) **(Effect of implied warranties)** neither clause 5 nor clause 6 shall operate in any way to limit, exclude or otherwise restrict the operation of any warranty implied by law.

### **6. RESPONDENT'S FURTHER WARRANTIES AND REPRESENTATIONS (RFT ONLY)**

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- 6.1 **(Application of clause)** This clause 6 only applies in respect of an RFT.
- 6.2 **(Warranties and Representations)** By lodging a Response, the Respondent warrants and represents that:
  - (a) **(investigations)** the Respondent has undertaken its own enquiries and investigations to satisfy itself of:
    - (i) the nature and extent of the Scope, its contractual obligations and all other risks, contingencies and other circumstances which could have an impact on its ability to carry out and complete the obligations it will have under the Contract if its Response is accepted for the Price; and
    - (ii) the suitability, appropriateness and adequacy of the Scope (including, in respect of contracts under which the successful Respondent is required to design works, any preliminary design included in the Scope) for the purposes stated in or to be reasonably inferred from the Scope;
  - (b) **(ability)** the Respondent and its relevant Personnel:
    - (i) have and will maintain the necessary experience, expertise and skill to perform its obligations under the Contract in accordance with the requirements of the Contract in the event that its Response is accepted; and
    - (ii) have and will maintain the resources necessary to comply with the timeframes for the performance of the Contract stated in the Procurement Documents (as amended if at all, pursuant to these Procurement Process Conditions);
  - (c) **(price)** the Price, and all rates, sums and prices included in the Response allow for:

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- (i) all of the risks, contingencies and other circumstances which could have an effect on the Respondent's ability to carry out and complete the obligations it will have under the Contract if its Response is accepted for the Price, except to the extent that the Contract expressly allows an adjustment;
- (ii) the provision of all materials, plant, labour and other services necessary for the proper completion of the obligations it will have under the Contract if its Response is accepted, whether or not those items are expressly mentioned in the Contract; and
- (iii) unless the Contract expressly allows an adjustment, rise and fall in costs;

(d) **(competitive neutrality)** if the Respondent is required by law to comply with principles of competitive neutrality, the Respondent has properly considered, assessed and complied with the applicable competitive neutrality principles in relation to the Procurement Process and the acceptance by the Principal of the Respondent's Response will not breach those principles;

(e) **(notice)** the Respondent has notified the Principal in its Response of any:

- (i) ambiguity, inconsistency, uncertainty, error or omission which it has discovered in or from the Procurement Documents;
- (ii) any assumptions that it has made in determining its Price;
- (iii) further information or investigations which it considers that it requires to enable it to give the warranties and make the representations in this clause 6,

and otherwise gives all warranties and makes all representations which the Contract requires to be given or made by the successful Respondent. The Respondent acknowledges that the Principal will rely on these warranties and representations in entering into a contract with the successful Respondent.

## 7. LODGEMENT AND OPENING OF RESPONSES

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### 7.1 **(Method of lodgement)** A Response must be lodged:

- (a) if the Tender Box is a website, by uploading it to the Tender Box;
- (b) if the Tender Box is an email address, by sending it as an attachment to an email to the Tender Box; or
- (c) if the Tender Box is a physical address, by delivering it to the Tender Box.

The Principal may direct or allow the Response to be lodged by an alternative method.

### 7.2 **(Time of lodgement)** A document forming part of a Response shall be deemed to have been lodged:

- (a) where the Tender Box is a website, at the time that the document is successfully uploaded to the Tender Box, as indicated on the electronic receipt issued to the Respondent;
- (b) where the Tender Box is an email address, at the time that an email attaching the document is successfully delivered to the Tender Box, as indicated on the email system on which the Tender Box is hosted;
- (c) where the Tender Box is a physical address, at the time that the document is physically received at the Tender Box; or

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- (d) where the Response is lodged by an alternative method allowed by the Principal, when it is received by the Principal by that method.

7.3 **(Response opening)** Responses will not be opened publicly and the Respondent will not be permitted to attend the opening of Responses.

### **8. ASSESSMENT OF RESPONSES**

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8.1 **(Evaluation Criteria)** In determining which Response(s) are most advantageous to the Principal, each Response evaluated in accordance with these Procurement Process Conditions will be assessed, but not necessarily exclusively, against the Evaluation Criteria (if any).

8.2 **(Considerations)** In assessing Responses, the Principal may consider any information which the Principal reasonably considers to be relevant to its assessment (however obtained), including:

- (a) information contained in the Response or any amendment to or clarification of a Response;
- (b) information provided at a meeting with or presentation by the Respondent;
- (c) outcomes from discussions with a Respondent's referees (if any);
- (d) information obtained pursuant to clause 8.5;
- (e) the Respondent's past performance under other contracts with the Principal or third parties; and
- (f) the reasonably held subjective opinions of the persons appointed by the Principal to evaluate Responses or any advisor to such persons.

8.3 **(Uncertainties)** The Principal may ignore any part of a Response which is ambiguous, uncertain, unclear or illegible without seeking clarification from the Respondent and may assess the balance of the Response.

8.4 **(Right to exclude)** The Principal may, but shall not be obliged to, reject or exclude from assessment any Response including:

- (a) a Non-Conforming Response, an Alternative Response or a Late Response;
- (b) a Response, in respect of which the Principal reasonably believes that the Respondent has:
  - (i) failed to comply with these Procurement Process Conditions or any request made by or on behalf of the Principal pursuant to them within the time required; or
  - (ii) breached a warranty given or representation made pursuant to these Procurement Process Conditions or that a warranty, declaration or representation in the Respondent's Response is false or misleading in any material respect;
- (c) a Response in respect of which the Principal reasonably believes that the Respondent cannot reasonably comply with the obligations which it will have under the Contract (in the event that its Response is successful) for the Price; or
- (d) a Response which fails to achieve a satisfactory score against any of the Evaluation Criteria, even if the overall score of the Response is satisfactory;

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8.5 **(Other information or assistance)** The Principal may undertake its own investigations, or engage third parties to do so on its behalf, in relation to any aspect of a Response (including verifying any warranty, representation or declaration made or given in the Response or pursuant to these Procurement Process Conditions) or any other matter which it considers relevant to the conduct of the Procurement Process. The Respondent must cooperate with such investigations and provide all information and assistance reasonably requested by or on behalf of the Principal in connection with the investigation.

### **9. SHORTLISTING (RFT)**

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9.1 **(Application of clause)** This clause 9 only applies in respect of an RFT.

9.2 **(Shortlisting)** The Principal intends, but is not bound, to create a shortlist of Respondents and invite tenders from the shortlisted Respondents.

9.3 **(No obligation)** The Principal is not bound to shortlist or invite a tender from any Respondent, including the Respondents with the highest scores against the Evaluation Criteria. The Principal may shortlist and invite tenders from as many or as few Respondents as the Principal sees fit and may choose not to shortlist any Responses or invite any tenders.

9.4 **(Local preference- Not used)** The Principal may shortlist an EOI that is from a Local Supplier in preference to comparable EOIs from Non-Local Suppliers even if the EOIs from the Non-Local Suppliers have been assessed as more favourable in terms of one or more Evaluation Criteria.

9.5 **(RFT)** A Respondent shall not be entitled to submit a tender unless and until the Principal expressly invites the Respondent to submit a tender in writing.

9.6 **(Unsuccessful Respondents)** Unsuccessful Respondents will be notified after the Procurement Process is concluded. The Principal may provide feedback to unsuccessful Respondents if requested to do so, but such feedback may be general in nature, will be limited to the Respondent's EOI only and may be postponed until after any related Request for Tender process is finalised.

### **10. ACCEPTANCE (RFT ONLY)**

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10.1 **(Application of clause)** This clause 10 only applies in respect of an RFT.

10.2 **(Ability to accept)** The Principal is not bound to accept the Response with the lowest Price or the Response with the highest score against the Evaluation Criteria, or any Response. The Principal will, if it accepts a Response, accept the Response(s) which it reasonably believes are the most advantageous to it having regard to the Sound Contracting Principles and the requirements of the *Local Government Regulation 2012* (Qld) to the extent that they are applicable and relevant to the Procurement Process.

10.3 **(Local preference)** The Principal may accept a Response lodged by a Local Supplier in preference to comparable Responses from Non-Local Suppliers even if the Responses from the Non-Local Suppliers have been assessed as more favourable in terms of one or more Evaluation Criteria, so long as the overall differences are not substantial, and so long as it is clear that the Local Supplier can meet the Principal's requirements at an acceptable standard which is generally comparable to that of the Non-Local Suppliers.

10.4 **(Acceptance of more than one Response and acceptance of part of a Response)** The Principal may accept a Response in whole or in part. Without limiting this, where the Scope comprises distinct portions of works, goods or services, the Principal may accept a Response from one or more Respondents in relation to different portions of the works, goods or services as if those portions had been the subject of separate Procurement Processes.

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10.5 **(No contract or appointment until formal acceptance)** Unless and until the Principal expressly notifies the Respondent in writing that the Respondent's Response (as amended by any post-Response negotiation, if any) has been successful or the parties execute a contract:

- (a) no binding contract for the provision of any work, services and/or goods by the Respondent will exist between the parties; and
- (b) in respect of an RFT for appointment as a Pre-qualified Supplier or Preferred Supplier, the Respondent will not be considered to be appointed as a Pre-qualified Supplier or Preferred Supplier.

For clarity, a statement published by the Principal but not specifically notified to the Respondent (including a record of a council resolution) to the effect that a Response has been accepted or a contract has been awarded does not, of itself, constitute an acceptance of the Response or notice that the Response has been successful or constitute a rejection of any other Response.

10.6 **(Form of Contract)** Unless the RFT stated that the Respondent would not be required to enter into a contract until it is separately engaged by the Principal to provide works, goods or services, if a Response is accepted, the successful Respondent will be required to enter into a contract in the form of the Contract, as amended by agreement between the parties.

10.7 **(Unsuccessful Respondents)** Unsuccessful Respondents will be notified after a Response has been accepted. The Principal may, at its discretion, notify unsuccessful Respondents of the name of, and Price submitted by, the successful Respondent. The Principal may provide feedback to unsuccessful Respondents if requested to do so, but such feedback may be general in nature and will be limited to the Respondent's Response only.

10.8 **(Arrangement with other local governments)** The Respondent acknowledges that if, pursuant to the Procurement Process, the Respondent is selected to be a Preferred Supplier or Pre-qualified Supplier for goods and/or services then any Related Local Government may make a contract with the Respondent for the supply of those goods and/or services, as if that Related Local Government had itself selected the Respondent to be a Preferred Supplier or Pre-qualified Supplier of those goods and/or services.

## **11. DOCUMENTS AND INFORMATION**

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11.1 **(Ownership)** The Procurement Documents remain the property of the Principal. The Response will become the property of the Principal upon lodgement.

11.2 **(Intellectual Property Rights)** Intellectual Property Rights in documents and information provided on behalf of a party in connection with the Procurement Process remain, as between the parties, with the party on whose behalf they were provided. The Principal and the Respondent grant each other a perpetual, non-exclusive, royalty free licence to do the things contemplated by clause 11.9. The licence so granted by the Respondent is irrevocable. The licence granted by the Principal may be revoked at any time on the giving of written notice.

11.3 **(Warranty and representation)** The Respondent warrants and represents that:

- (a) it owns or has a right to use the Intellectual Property Rights in its Response for the purpose of lodging a Response and undertaking the obligations which it will have under a contract with the Principal in the event that the Respondent's Response is accepted; and
- (b) it has the right and authority to grant the licence in clause 11.2 and the Principal's exercise of the rights so granted will not infringe the Intellectual Property Rights of a third party.

11.4 **(Confidentiality)** Except to the extent otherwise provided in these Procurement Process Conditions, each party shall keep Confidential Information of the other party confidential. The Respondent must inform each of its Personnel and any other person to whom Confidential

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Information of the Principal is disclosed of the Respondent's obligations under this clause 11.4. Subject to clause 11.9(b), the Respondent must return any and all Confidential Information when requested to do so by the Principal.

11.5 **(Information Privacy Act)** If the Respondent collects or has access to 'Personal Information' as that term is defined in the *Information Privacy Act 2009* (Qld) in connection with the Procurement Process, the Respondent must comply with Parts 1 and 3 of Chapter 2 of that Act as if the Respondent was the Principal. The Principal collects and uses personal information and non-personal information in the Response so that it can properly conduct the Procurement Process and otherwise carry out its functions as a Local Government. The Principal is authorised to collect this information under the *Local Government Act 2009* (Qld) and the *Local Government Regulation 2012* (Qld) and other law. The information in the Respondent's Response will be accessible by employees of the Principal and third party personnel engaged to assist the Principal in conducting the Procurement Process or otherwise carrying out the functions of the Principal. Information in the Response may also be disclosed as required by the *Local Government Regulation 2012* (Qld) and the *Right to Information Act 2009* (Qld) as described below.

11.6 **(Local Government Regulation)** The *Local Government Regulation 2012* (Qld) provides that the Principal must, as soon as possible after entering into a contractual arrangement worth \$200,000 or more (exclusive of GST) publish relevant details of the contract (including the person with whom the Principal has entered into the contractual arrangement, the value of the contractual arrangement and the purpose of the contractual arrangement) on the Principal's website and display those details in a conspicuous place in the Principal's public office. The relevant details must be published or displayed in this manner for a period of at least 12 months.

11.7 The *Local Government Regulation 2012* (Qld) may also require the Principal to make documentation and information contained in, or provided by the Respondent in connection with, a Response (including documentation and information identified by the Respondent as confidential) publicly available where that documentation or information is:

- (a) discussed in a Local Government Meeting;
- (b) included in a report or other document that:
  - (i) relates to an item on the agenda for a Local Government Meeting and is made available to Councillors or committee members for the purposes of the meeting;
  - (ii) is directly relevant to a matter considered or voted on at a Local Government Meeting; or
  - (iii) is presented at a Local Government Meeting for the consideration or information of the Local Government or committee; or
- (c) otherwise required to be disclosed pursuant to a provision of the *Local Government Act 2009* (Qld) or the *Local Government Regulation 2012* (Qld).

11.8 **(Right to Information)** The *Right to Information Act 2009* (Qld) provides members of the public with a legally enforceable right to access documents held by Queensland Government agencies (including the Principal). The Act requires that documents be disclosed upon request, unless the documents are exempt or on balance, disclosure is contrary to public interest. Information or documentation contained in or provided by the Respondent in connection with a Response is potentially subject to disclosure to third parties, including documentation and information identified by the Respondent as confidential. Any application for disclosure will be assessed in accordance with the terms of the Act. Notwithstanding any other provision of the Procurement Documents or a Response, if a Response is accepted, the Principal may publish on a Queensland Government website or by any other means, contract information including:

- (a) the name and address of the Principal and the successful Respondent;

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- (b) a description of the goods and/or services to be provided or works to be carried out pursuant to the contract;
- (c) the date of award of the contract (including the relevant stages if the contract involves more than one stage);
- (d) the contract value (including the value for each stage if the contract involves more than one stage and advice as to whether any non-price criteria were used in the evaluation of Responses);
- (e) the procurement method used; and
- (f) for contracts with a value over \$10 million, the contract, or summary information in respect of the contract, between the Principal and the Respondent.

11.9 **(Use of documents and information)** Documents and information provided on behalf of a party to the other party in connection with the Procurement Process (including documentation and information identified by the Respondent as confidential) may be used, copied, modified or disclosed as required by any law and otherwise:

- (a) by the Principal, as the Principal considers to be reasonably necessary to:
  - (i) properly conduct the Procurement Process;
  - (ii) exercise the rights granted to it in these Procurement Process Conditions;
  - (iii) obtain legal, accounting or other professional advice in connection with the Response;
  - (iv) report any actual or suspected Improper Conduct to the appropriate Authority; and/or;
  - (v) to otherwise properly carry out its functions as a Local Government;
- (b) by the Respondent, as is reasonably necessary to enable the Respondent to:
  - (i) prepare the Response;
  - (ii) obtain legal, accounting or other professional advice in connection with the Response; or
  - (iii) comply with the Respondent's corporate governance requirements.

If the Respondent is required by law to disclose Confidential Information of the Principal, the Respondent must notify the Principal of this prior to making such disclosure and must only disclose the minimum amount of information required to meet its obligation to disclose.

11.10 **(Media)** The Respondent must not, either on its own account or in conjunction with other parties, issue any publication, advertisement, document, article or information whether verbal or written, in connection with the Procurement Process in any media without the prior approval of the Principal.

## **12. DEFINITIONS**

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12.1 **(Definitions)** In these Procurement Process Conditions, unless the context otherwise requires:

- (a) **Addenda and Addendum** means any communication issued to Respondents in accordance with these Procurement Process Conditions which is identified as an Addendum;

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- (b) **Alternative Response** means a Response which is otherwise a Conforming Response but which in the opinion of the Principal, contains significant alternatives, qualifications or amendments to or departures from the Contract or the Scope;
- (c) **Authority** means a local government, the State of Queensland, the Commonwealth or other any Federal, State, or local government authority, administrative or judicial body or tribunal, department, commission, agency, government owned corporation, statutory body or instrumentality having jurisdiction over the project;
- (d) **Business Day** means a day that is not a Saturday, Sunday or public holiday at Biloela;
- (e) **Claim** includes any claim, action, demand, proceeding, suit, defence or set-off, however arising including at law (including a breach of an express or implied term of contract), under statute, in equity, in tort (including for negligence), in quasi-contract, for unjust enrichment and to the extent permitted by law, pursuant to any other principle of law, in connection with the Procurement Process;
- (f) **Communication Closing Time** means the time identified in the General Information as the time by which communications by Respondents must be submitted;
- (g) **Communication Method** means submitting an enquiry through the website forum or sending an email to the email address nominated for communications by Respondents in the General Information;
- (h) **Complaints Manager** means the person identified in the General Information as the person to whom complaints regarding the Procurement Process should be directed;
- (i) **Confidential Information** means documents and information provided or made available by or on behalf of one party to the other party in connection with the Procurement Process which are of their nature confidential (including copies of such documents and information) but not including documents and information which are in the public domain other than through a breach of clause 11.4;
- (j) **Conforming Response** means a Response which, in the opinion of the Principal:
  - (i) is substantially in the form and contains substantially all of the documentation, information, acknowledgements, warranties, declarations and undertakings required by the Response Schedules;
  - (ii) contains no significant alternatives, qualifications or amendments to or departures from the Contract or the Scope; and
  - (iii) in respect of Tenders or EOIs only, does not substantially exceed the Maximum Page Limit (if any);
- (k) **Contract** means:
  - (i) a contract which may be entered into between the Principal and a Respondent pursuant to an RFT and which will be in the form referenced in Part 4 – Contract of the RFT , as amended (if at all) by the express written agreement of the Principal; and
  - (ii) where an RFT is for appointment as a Preferred Supplier or Pre-qualified Supplier, also includes a contract which may be entered into during the term of the appointment unless the context requires otherwise;
- (l) **Councillor** has the same meaning as in the *Local Government Act 2009* (Qld);

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- (m) **EOI (Expression of Interest)** means a Response lodged by a Respondent in response to an RFEOI and includes all documents and information lodged with or as part of the expression of interest;
- (n) **Evaluation Criteria** means:
  - (i) for an RFT, the evaluation criteria (if any) set out in the General Information;
- (o) **General Information** means Part 2 – General Information of the RFT (as the case may be);
- (p) **GST** has the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (q) **Improper Conduct** means:
  - (i) engaging in any activity or obtaining any interest which results in or is likely to result in any actual, potential or perceived conflict between the interests of the Respondent and the Respondent's obligations to the Principal in connection with the Procurement Process;
  - (ii) engaging in misleading or deceptive conduct in connection with the Procurement Process;
  - (iii) engaging in any collusive tendering, anticompetitive conduct, or any other unlawful or unethical conduct with any other Respondent, or any other person in connection with the Procurement Process;
  - (iv) canvassing, attempting to improperly influence, offering any inducement to or accepting or inviting improper assistance from any Councillor or other Personnel (or former Personnel) of the Principal in connection with the Procurement Process;
  - (v) using any information improperly obtained, or obtained in breach of any obligation of confidentiality in preparing the Respondent's Response;
  - (vi) breaching any law in connection with the Procurement Process;
  - (vii) engaging in aggressive, threatening, abusive, offensive or other inappropriate behaviour or committing a criminal offence; or
  - (viii) engaging in conduct contrary to sections 199 and 200 of the *Local Government Act 2009* (Qld);
- (r) **Intellectual Property Rights** means copyright, patents and all rights in relation to inventions, registered and unregistered trademarks (including service marks), registered designs, circuit layouts and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;
- (s) **Late Response** means any Response that is not received in the Tender Box (or otherwise received by the Principal by an alternative method permitted under the Procurement Process Conditions) by the Response Closing Time;
- (t) **Local Government** has the same meaning as in the *Local Government Act 2009* (Qld);
- (u) **Local Government Meeting** has the same meaning as in the *Local Government Act 2009* (Qld);

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(v) **Local Supplier:**

- (i) where the Principal's procurement policy provides a meaning of local supplier, has the meaning given in the Principal's procurement policy, a copy of which can be obtained from the Principal upon request; or
- (ii) where the Principal does not have a procurement policy, or the procurement policy does not provide a meaning of local supplier, means a supplier that:
  - (A) is beneficially owned and operated by persons who are residents or ratepayers of the local government area of the Principal as determined under the *Local Government Regulation 2012* (Qld); or
  - (B) has its principal place of business within that local government area; or
  - (C) otherwise has a place of business within that local government area that solely or primarily employs persons who are residents or ratepayers of that local government area;

(w) **Maximum Page Limit** means the number of pages which may be lodged as, with or in relation to the Response (including, unless otherwise indicated, all attachments, annexures, supplements, parts, schedules or appendices), which the General Information states a Response should not be longer than;

(x) **Non-Conforming Response** means a Response which is not a Conforming Response or an Alternative Response;

(y) **Non-Local Supplier** means a supplier (including a Respondent) that is not a Local Supplier;

(z) **Personnel** includes the officers, employees, agents, representatives, contractors and consultants of a party and any other person or entity for whom that party is vicariously liable;

(aa) **Preamble** means Part 1 – Preamble of the RFT (as the case may be);

(bb) **Preferred Supplier** means a supplier that has been selected as a preferred supplier pursuant to section 233 of the *Local Government Regulation 2012* (Qld);

(cc) **Pre-qualified Supplier** means a supplier that has been selected as a pre-qualified supplier pursuant to section 232 of the *Local Government Regulation 2012* (Qld);

(dd) **Price** means:

- (i) where the Procurement Process is for appointment as a Preferred Supplier or Pre-qualified Supplier, the rates, sums or prices stated in the Response;
- (ii) otherwise, subject to clause 4.4, the total price stated in the Response;

(ee) **Price Schedule** means a Response Schedule which provides a breakdown of the Price, and which may include rates, lump sums, prices, provisional sums, estimated quantities and other information;

(ff) **Principal or Purchaser** means Banana Shire Council;

(gg) **Procurement Documents** means:

- (i) the RFT (as the case may be); and
- (ii) any Addenda issued pursuant to these Procurement Process Conditions,

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and includes all documents included in or incorporated by reference into these documents;

- (hh) **Procurement Process** means the process by which the Principal intends to, or does, invite, assess and where applicable, accept or reject Responses in respect of the Scope;
- (ii) **Procurement Process Conditions** means these procurement process conditions;
- (jj) **Quotation** means a Response lodged by a Respondent in response to an RFQ and includes all documents and information lodged with or as part of the quotation;
- (kk) **Related Local Government** means a local government that has entered into an arrangement with the Principal, as contemplated in section 235(f) of the *Local Government Regulation 2012* (Qld), to the effect that the local government may make a contract with a supplier that has been selected by the Principal to be a Preferred Supplier or Pre-qualified Supplier of goods and/or services, as if that local government had itself selected that supplier to be a Preferred Supplier or Pre-qualified Supplier of those goods and/or services.
- (ll) **Respondent** means:
  - (i) any person who lodges a Response; and
  - (ii) to the extent to which the term can apply to any other person who obtains a copy of any of the Procurement Documents during the Procurement Process, also includes such other persons,and includes a Tenderer;
- (mm) **Response** means, where these Procurement Process Conditions are incorporated into an:
  - (i) RFT, a Tender; or
- (nn) **Response Closing Time** means the time identified in the General Information as the time by which Responses must be submitted as varied (if at all) pursuant to these Procurement Process Conditions;
- (oo) **Response Form** means in respect of an:
  - (i) RFT :
    - (A) the document identified as the tender form or the quotation form (as the case may be) in the Response Schedules; or
    - (B) otherwise where there is no document identified as the tender form or quotation form, any document (other than a Price Schedule) which states the total price offered by the Respondent in the Response;
- (pp) **Response Schedules** means the schedules identified in Part 6 – Response Schedules of the RFT (as the case may be);
- (qq) **Response Validity Period** means the period stated in the General Information as the time for which Responses are to be valid as extended (if at all) pursuant to clause 4.5;
- (rr) **RFT (or Request for Tender)** means the request for tenders issued by the Principal and all documents included in or incorporated by reference into it (including these Procurement Process Conditions, the Contract and the Scope);

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- (ss) **Scope** means the scope described in Part 5 – Scope of the RFT (as the case may be) and all documents incorporated into it (whether physically or by reference), and includes any amendments provided for in an Addendum;
- (tt) **Sound Contracting Principles** has the meaning given in section 104(3) of the *Local Government Act 2009* (Qld);
- (uu) **Specified Loss** means:
  - (i) any loss of, or loss of anticipated, profit, income, revenue, saving, production; business, contract or opportunity; increase in financing or operating costs; liability for loss or damage suffered by third parties; legal costs (on a solicitor and client basis); fines levied; loss of reputation or embarrassment and the cost of abating or reducing such; any other financial or economic loss; and
  - (ii) any indirect, special or consequential loss, damage, cost, expense or penalty not expressly referred to in the preceding paragraph, howsoever arising;
- (vv) **Tender** means a Response lodged by a Tenderer in response to an RFT and includes all documents and information lodged with or as part of the tender;
- (ww) **Tender Box** means the website, email address or physical location at which the General Information states that Responses are to be submitted;
- (xx) **Tenderer** means:
  - (i) any person who lodges a Tender; and
  - (ii) to the extent to which the term can apply to any other person who obtains a copy of any of the Procurement Documents during the Procurement Process, also includes such other persons,

and words or terms not defined in these Procurement Process Conditions but defined in a Contract have the same meaning as in the Contract, except where the context otherwise requires.

### **13. GENERAL PROVISIONS**

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- 13.1 **(Interpretation of Procurement Documents)** The Procurement Documents must be read and construed together and are intended to be mutually explanatory.
- 13.2 **(Joint and several obligations)** An obligation of two or more parties binds them jointly and each of them severally and an obligation incurred in favour of two or more parties is enforceable by them severally.
- 13.3 **(Headings)** Clause headings are for reference purposes only and must not be used in interpretation.
- 13.4 **(No limitation)** The words 'include', 'includes' and 'including' shall be read as if followed by 'without limitation'.
- 13.5 **(Grammatical Forms)** Where any word or phrase is given a defined meaning, any other part of speech or other grammatical form concerning the word or phrase has a corresponding meaning. Words importing the singular number include the plural number and words importing the plural number include the singular number.
- 13.6 **(Time)** References to time are to local time in Queensland. Where time is to be reckoned from a day or event, the day or the day of the event must be excluded. If any time period specified in the Procurement Documents expires on a day which is not a Business Day, the period will expire at the end of the next Business Day.

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13.7 **(Discretion)** Unless expressly provided otherwise:

- (a) any right of the Principal pursuant to these Procurement Process Conditions may be exercised; and
- (b) any consent of the Principal required under these Procurement Process Conditions may be given, withheld or given subject to conditions,

in the absolute discretion of the Principal without giving reasons and without reference to the Respondent unless, and then only to the extent that the Procurement Process Conditions provide otherwise.

13.8 **(Law)** A reference to 'law' includes:

- (a) legislation (including subordinate legislation), local laws, by-laws, orders, ordinances, awards, requirements and proclamations of an Authority having jurisdiction and any related fees and charges; and
- (b) certificates, licences, accreditations, clearances, authorisations, approvals, consents, and permits and any related fees and charges,

which are applicable to the Procurement Documents, the Procurement Process or the Contract or which are otherwise in force at any place where an obligation under the Contract is to be carried out.

13.9 **(Governing Law)** The Procurement Process is governed by the laws of Queensland and the Commonwealth of Australia which are in force in Queensland. The Principal and the Respondent submit to the jurisdiction of the Courts of Queensland, relevant Federal Courts and Courts competent to hear appeals from them.

13.10 **(Contra proferentem)** The *contra proferentem* rule and other rules of construction will not apply to disadvantage a party whether that party put the clause forward, was responsible for drafting all or part of it or would otherwise benefit from it.

13.11 **(Rights Cumulative)** The rights and remedies of the Principal and the Respondent provided in the Procurement Process Conditions are cumulative on each other and on any rights or remedies conferred at law or in equity.

13.12 **(Severance)** If a provision of the Procurement Process Conditions is void or unenforceable it must be severed and the provisions that are not void or unenforceable are unaffected by the severance.

13.13 **(No waiver)** No waiver by the Principal of a provision of these Procurement Process Conditions is binding unless made in writing.

13.14 **(Other references)** A reference to:

- (a) a person includes any other legal entity and a reference to a legal entity includes a person;
- (b) the Respondent or the Principal includes their respective heirs, executors, successors and permitted assigns;
- (c) writing includes any mode of representing or reproducing words in tangible and permanently visible form, and includes email and facsimile;
- (d) a monetary amount is a reference to an Australian currency amount; and
- (e) a measurement or quantity is a reference to an Australian legal unit of measurement as defined under the *National Measurement Act 1960* (Cth).