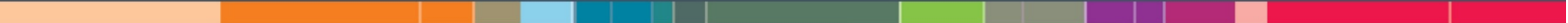


Tender Process Terms



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1. Interpretation

1.1. Definitions

In these Tender Process Terms:

Acceptance Notice has the meaning given to that term by **clause 9.2(a)**.

Notice to Respondents has the meaning given to that term by **clause 3.4(b)**.

Alternative Tender means a Tender submitted in accordance with **clause 5.5**.

Associate of the Respondent means any Related Body Corporate of the Respondent and any officer, employee, agent, contractor, consultant, adviser of the Respondent.

Business Day means a day which is not a Saturday, Sunday or public holiday in Gympie, Queensland.

Closing Date means the time and date set out in **item 1 of Schedule 1**.

Conflict of Interest includes engaging in any activity, or having any interest, which conflicts or may conflict with the ability of the Respondent to submit a Tender in good faith and objectively.

Conforming Tender has the meaning given in **clause 5.4**.

Consequential Loss means:

- (a) indirect loss;
- (b) loss of profits;
- (c) loss of revenue;
- (d) loss of savings;
- (e) loss of opportunity;
- (f) loss of bargain;
- (g) loss of use;
- (h) damage to credit rating;
- (i) loss of or damage to reputation, future reputation or publicity;
- (j) loss in connection with claims made by third parties;
- (k) remote, abnormal or unforeseeable loss; and
- (l) any consequential loss or damage that is similar to the losses in this definition, whether or not such loss or damage was foreseeable or within the contemplation of Council, Prospective Respondents and/or the Respondents at the time Council entered into these Tender Process Terms.

Contract Administrator means the person identified in **item 5 of Schedule 1**.

Contract Documents means:

- (a) the Invitation to Tender;
- (b) the General Terms and Conditions contained in and referred to in **Schedule 4** of the Invitation to Tender;
- (c) the Service Specification contained in **Schedule 5** of the Invitation to Tender;
- (d) all Schedules to the Invitation to Tender excluding the Supporting Documentation;
- (e) all Notice to Respondents;
- (f) the Tender Response Form of the successful Respondent; and
- (g) the Acceptance Notice.

Contract Number for the Service Contract means the unique identifying number for the Service Contract specified in **item 2 of Schedule 1**.

Council means Gympie Regional Council.

Council Confidential Information means any technical, commercial or other information, ideas, concepts, know-how, data, drawings, specifications or designs of any kind in any form or medium supplied or made available by Council or brought into existence by the Respondent for the submission of the Tender, including (but without limiting the generality of this definition):

- (a) the information in these Tender Process Terms; and
- (b) the Respondent's Tender.

Evaluation Criteria for the Service means the evaluation criteria for the Service set out in **Schedule 3**.

General Terms and Conditions means the document titled "General Terms and Conditions" set out in **Schedule 4**.

Government Entity means any government or statutory body (including a business unit or division of Council, a local government, a government owned business, State agency or authority or Commonwealth agency or authority).

Information Session means the information session referred to in **clause 2.1(a)** and set out in set out in **Schedule 2**.

Intellectual Property Rights means all intellectual and industrial property rights and interests throughout the world, whether registered or unregistered, including trademarks, designs, patents, inventions, circuit layouts, copyright and analogous rights, confidential information, know-how and all other intellectual property rights as defined in Article 2 of the convention establishing the World Intellectual Property Organisation of 14 July 1967 as amended from time to time.

Invitation to Tender means:

- (a) the document titled "Invitation to Tender" and its schedules to which these Tender Process Terms are attached; and
- (b) these Tender Process Terms (excluding the Information Session).

Local Government Act means the *Local Government Act 2009* (Qld).

Negotiations means negotiations in accordance with **clause 7.4**.

Non-conforming Tender has the meaning given in **clause 5.4(b)**.

Prospective Respondent means any person that has requested or obtained a copy of the Invitation to Tender, but has not submitted a Tender.

Related Body Corporate has the meaning given in the *Corporations Act 2001* (Cth).

Required Information for the Service means the information and documentation for the Service specified in **Schedule 6**.

Respondent means any person lodging a Tender.

RTI Act means the *Right to Information Act 2009* (Qld).

Service means the services (and, if applicable, goods) to be supplied under the Service Contract.

Service Contract means the contract between Council and the successful Respondent comprising:

- (a) the Invitation to Tender;
- (b) the General Terms and Conditions contained in and referred to in **Schedule 4** of the Invitation to Tender;
- (c) the Service Specification contained in **Schedule 5** of the Invitation to Tender excluding the Supporting Documentation;

- (d) all Schedules to the Invitation to Tender;
- (e) all Notice to Respondents;
- (f) all responses to clarifications and information provided by the successful Respondent;
- (g) the Tender Response Form of the successful Respondent; and
- (h) the Acceptance Notice.

Service Specification means the specification set out in **Schedule 5**.

Supporting Documentation means the documentation set out in **Schedule 5** as Supporting Documentation.

Tender means a tender or tenders (including Alternative Tenders submitted under **clause 5.5**) submitted by the Respondent in response to these Tender Process Terms (as varied in accordance with **clause 8**).

Tender Box means the tender box identified in **item 6** of **Schedule 1**.

Tender Documents means the Tender Process Terms but does not include any Notice to Respondents.

Tender Process Terms means this document titled Tender Process Terms, including its schedules, Notice to Respondents and the Invitation to Tender including its schedules.

Tender Process means the process of Council inviting Tenders (including multi-phase Tenders), the preparation and submission of Tenders by Respondents, the communications and negotiations between Council and Respondents in relation to the process and Tenders, the subsequent consideration and evaluation of Tenders by Council and the negotiation of and entering into Service Contracts.

Tender Response Form means the form set out in **Schedule 6**.

1.2. Undefined terms

In these Tender Process Terms, where a term is not defined in **clause 1.1**, but is defined in the Contract Documents, it has the meaning given in the Contract Documents.

1.3. Construction

Unless expressed to the contrary, in these Tender Process Terms:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) all references to time are to the time in Gympie, Queensland;
- (d) if a word or phrase is defined, its other grammatical forms have corresponding meanings;
- (e) "includes" means includes without limitation;
- (f) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it; and
- (g) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
 - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
 - (iv) an obligation includes a warranty or representation and a reference to a failure to comply

with an obligation includes a breach of warranty or representation.

- (h) Clause, schedule and annexure references in these Tender Process Terms are references to clauses, schedules and annexures of these Tender Process Terms, unless stated otherwise.

1.4. Headings

Headings do not affect the interpretation of these Tender Process Terms.

1.5. Inconsistency

In the event of an inconsistency between the parts of these Tender Process Terms listed in this **clause 1.5**, the document higher in the list shall prevail to the extent of the inconsistency:

- (a) these Tender Process Terms (other than the Information Session, the Contract Documents and the Tender Response Form);
- (b) the Contract Documents; and
- (c) the Tender Response Form.

2. Information Session

2.1. Information Session

- (a) An information session will be held as set out in **Schedule 2** (Information Session).
- (b) Attendance by Prospective Respondents at the Information Session is recommended but is not compulsory.
- (c) Without limiting the rights of Prospective Respondents under **clause 4.3**, Council requires Prospective Respondents to submit questions and requests for clarification in writing to Council prior to the Information Session. Such advance written questions and requests for clarification will be considered by Council and Council will endeavour to respond to them:
 - (i) at the Information Session verbally;
 - (ii) after the Information Session in writing; or
 - (iii) under the process set out in **clause 4.3**.
- (d) Council may, at its discretion, address any questions or requests for clarification that are raised at the Information Session by:
 - (i) responding in whole or in part during the Information Session; or
 - (ii) declining to responding during the Information Session and, instead, issuing a written response after the Information Session, once it has had an opportunity to consider the question or request for clarification.
- (e) If Council provides a verbal response during the Information Session, it may vary or qualify that response by issuing a written response at any time after the Information Session. Any written response issued by Council following the Information Session shall supersede verbal responses provided during the Information Session to the extent of any inconsistency.
- (f) At the Information Session, Council will provide general information about the procurement contemplated by the Tender Documents and will endeavour to answer questions and requests for clarification submitted to Council in accordance with **clause 2.1(c)**.
- (g) Questions and requests for clarification put to Council, together with answers and responses to those questions and requests for clarification, will be issued in writing to all Prospective Respondents, regardless of whether or not they attend the Information Session. In doing so, Council will endeavour not to identify the Prospective Respondent that asked the question or made the request for clarification, unless the question, request for clarification, answer or

response identifies the Prospective Respondent.

- (h) No answers or responses issued by Council under this **clause 2.1** will form part of the terms of these Tender Process Terms unless Council issues them as a Notice to Respondents.
- (i) Any answers or responses issued by Council under this **clause 2.1** are issued subject to terms of these Tender Process Terms.

3. Council Tender Process

3.1. Limited liability of Council

Council's total liability to each Respondent and Prospective Respondent whether in contract, tort (including for negligence or misrepresentation), restitution, under statute (to the extent permitted by law) or otherwise at law or in equity arising in connection with a Respondents or Prospective Respondent's participation in the Tender Process is, to the extent that it is not expressly excluded, limited to an amount of nil.

3.2. Exclusion of Consequential Loss

Council is not liable for any Consequential Loss, howsoever caused (including by the negligence of Council), suffered or incurred by any Respondent or Prospective Respondent, whether or not Council knew or should have known of the possibility of such damage or that such damage was otherwise foreseeable.

3.3. Release and indemnity

- (a) Each Respondent and Prospective Respondent releases and indemnifies Council, its councillors, employees, agents and contractors from and against all claims (including for negligence or misrepresentation by Council) arising out of or in connection with the provision of, or the purported reliance upon, or use of, any information (including in the Tender Documents) provided by or on behalf of Council in connection with the Tender Process.
- (b) For the purpose of obtaining the benefit of the indemnity granted under **clause 3.3(a)**, Council:
 - (i) acts on its own behalf and as the agent for each of Council's councillors, employees, agents and contractors; and
 - (ii) communicates assent by each of its councillors, employees, agents and contractors to the promise of indemnification made by the Respondent and Prospective Respondent under **clause 3.3(a)** in respect of each of those persons.
- (c) It is not necessary for Council, its councillors, employees, agents or contractors to suffer or incur any loss or damage prior to making a claim under the indemnity in **clause 3.3(a)**.
- (d) **Clauses 3.1, 3.2 and 3.3** survive the expiry or termination of any contract that forms between a Prospective Respondent and Council or a Respondent and Council under these Tender Process Terms.

3.4. Variations

- (a) Without limiting any other rights or remedies of Council, it may, in its absolute discretion, at any time by notice to each Prospective Respondent and Respondent, do one or more of the following:
 - (i) vary, suspend or terminate the Tender Process;
 - (ii) vary the terms of the Tender Process Terms;
 - (iii) direct each Respondent (as a result of a variation to the Tender Process Terms) to submit revised pricing and rates; or
 - (iv) extend the Closing Date.
- (b) All variations to the Tender Process Terms will be issued by Council in the form of a written Notice

to Respondents (which must refer to this **clause 3.4**) to these Tender Process Terms (Notice to Respondents), and will form part of the terms of the Tender Process Terms on and from the date specified in the Notice to Respondents, or if no date is specified, immediately.

- (c) The Respondent may not do any of the things that Council is permitted to do under **clause 3.4(a)** without the prior written consent of Council.

3.5. Exclusion from Tender Process

- (a) Council may, in its absolute discretion, without prejudice to any other rights or remedies of Council, exclude a Respondent from continued participation in the Tender Process and may cease to consider any Tender submitted by the Respondent if Council determines that the Respondent or any of its Associates has failed to comply with a material requirement of these Tender Process Terms (but, for the avoidance of doubt, Council is not obliged to do so).
- (b) Council may, in its absolute discretion, waive some or all of the obligations of a Respondent under the Tender Process Terms.

3.6. No joint bids

Each Tender must be submitted by a single Respondent only. Tenders by joint Respondents are not permitted and will not be accepted by Council.

4. Respondent's obligations

4.1. Respondent's warranties

- (a) By lodging a Tender, a Respondent represents and warrants, and it is a condition of these Tender Process Terms, that:
 - (i) each of the matters set out in the Respondent's Tender are true, accurate, complete and not misleading or deceptive;
 - (ii) it has not relied and will not rely upon the Tender Process Terms or any Tender Documents as being accurate, adequate, suitable or complete for the purposes of enabling it to supply the Service;
 - (iii) it has not relied, and will not rely, on information provided by or on behalf of Council without independently verifying such information and independently satisfying itself as to the accuracy, adequacy, suitability or correctness of such information;
 - (iv) it has satisfied itself as to the local conditions, environment and facilities that may impact on its ability to supply the Service;
 - (v) it has examined, and will examine, all information relevant to the risks, contingencies and other circumstances having an effect on its Tender and the supply of the Service;
 - (vi) it has fully informed itself of the nature of the obligations to be performed under the relevant Service Contract, including the labour, plant, materials, mechanical plant and other resources necessary, suitable or desirable to perform the obligations under the relevant Service Contract;
 - (vii) it has satisfied itself as to the correctness and sufficiency of its Tender for the performance of the obligations under the relevant Service Contract and that its rates and prices include compliance with all its obligations under the relevant Service Contract and of all matters and things necessary for the due and proper performance of the relevant Service Contract in accordance with the terms of the relevant Service Contract; and
 - (viii) it has carried out its own investigations as to the feasibility of its Tender and relied on those investigations.
- (b) The Respondent acknowledges and agrees that Council will rely upon the representations made

and warranties given in **clause 4.1(a)** in considering any Tender of the Respondent and in considering whether to enter into the Service Contract with the Respondent.

- (c) Failure by a Respondent to do any or all of the things it represents and/or warrants to have done, or will do, will not relieve the Respondent of its obligations to perform and complete the relevant Service Contract in accordance with its terms.
- (d) Council does not represent or warrant that any of the information provided by Council as Supporting Documentation in **Schedule 5** (Supporting Documentation), or as part of the Tender Process, is complete or accurate.

4.2. Expenditure of money

Each Respondent and Prospective Respondent:

- (a) expends money, makes commitments and incurs liabilities in responding to these Tender Process Terms at its own risk and expense; and
- (b) has no claim against Council for any of the expenses, commitments or liabilities referred to in **clause 4.2(a)**.

4.3. Information or clarification

- (a) Any requests for information or clarification regarding the Tender Process or Contract Documents must, in the first instance, be directed to the Contract Administrator.
- (b) Council will not accept any requests for information or clarification on or after the date specified in Schedule 1 of the Invitation to Tender.
- (c) Responses to any requests for information or clarification will be provided to all Prospective Respondents.
- (d) No response or statement made by the Contract Administrator or any other member of Council should be construed as modifying these Tender Process Terms or any other Tender Documents, unless expressly stated otherwise in a Notice to Respondents.
- (e) Any information provided to the Respondent by or on behalf of Council, including in these Tender Process Terms, is:
 - (i) provided for the convenience of the Respondent only and unless expressly incorporated into the Tender Process Terms, does not form part of the Tender Process Terms; and
 - (ii) not warranted or held out by Council as accurate, adequate, suitable, complete or correct.
- (f) If a Respondent or a Prospective Respondent requests information or clarification from Council on any part of these Tender Process Terms:
 - (i) the Respondent must direct its enquiries in writing to the Contract Administrator;
 - (ii) Council is not bound by any information or clarification provided orally (including at the Information Session) or in writing; and
 - (iii) the Respondent or Prospective Respondent consents to Council disclosing any request for information or clarification made by the Respondent or Prospective Respondent, together with the written response of Council to all other Respondents and Prospective Respondents.
- (g) In addition to the Information Session, Council may decide prior to the Closing Date to hold briefing and clarification sessions for Prospective Respondents (whether separately or together) at times and venues specified by Council.

5. Tenders

5.1. Content of Tenders

- (a) Each Tender must:
 - (i) be in legible English;
 - (ii) be accompanied by a fully completed Tender Response Form properly executed by the Respondent;
 - (iii) include all information and documentation required to be provided by these Tender Process Terms (including the relevant Required Information);
 - (iv) be submitted in the format required by **clause 5.2**; and
 - (v) be lodged in accordance with **clause 5.3**.
- (b) If the Tender Response Form is executed under power of attorney, the Respondent must submit a certified copy of the deed under which the attorney's authority to execute the Tender Response Form is derived.

5.2. Format of Tenders

If a Respondent submits more than one Tender, each Tender must be complete and must not be supplemented by cross-references to information contained in other Tenders or documents.

5.3. Electronic lodgement of Tenders

- (a) The Respondent must lodge one copy of its Tender in the format provided by Council (using the template provided by Council) via the Tender Box.
- (b) Tenders must be:
 - (i) clearly marked with the relevant Contract Number;
 - (ii) lodged in the Tender Box on any Business Day between the hours specified in **item 3 of Schedule 1** by the Closing Date.
- (c) No other method of lodging a Tender is acceptable, and Tenders may not be lodged by post, facsimile or email.
- (d) Council will not accept or consider Tenders which are not lodged on or before the Closing Date.

5.4. Conforming Tenders

- (a) A Conforming Tender is one which:
 - (i) is lodged on or before the Closing Date;
 - (ii) is not lodged on the basis of any condition or qualification;
 - (iii) accepts the terms of the relevant Service Contract to which the Tender relates;
 - (iv) is not a Tender that is determined to be a Non-conforming Tender under **clauses 6.2(e)** and **13.4(d)** or any other term of these Tender Process Terms which allow Council to deem a Tender to be non-conforming, allow Council not to review a Tender or cause a Tender to become non-conforming;
 - (v) supplies all information and responses requested by these Tender Process Terms;
 - (vi) is submitted using the form and format of the Tender Response Form;
 - (vii) complies with requirements, terms and conditions of these Tender Process Terms; and
 - (viii) is submitted by a Respondent.
- (b) A Non-conforming Tender is one that fails to meet the requirements in **clause 5.4(a)**.

5.5. Alternative Tenders

A Respondent may lodge an Alternative Tender for the Service provided that:

- (a) the Alternative Tender is lodged by the Closing Date; and
- (b) the Respondent has lodged a Conforming Tender for the Service.

5.6. No public opening

Tenders will not be publicly opened by Council.

5.7. Validity period

Each Tender submitted for a phase remains valid and is irrevocable:

- (a) for the period of time specified in **item 4 of Schedule 1** of the Invitation to Tender for that phase;
- (b) for ninety (90) days from the Closing Date of any invitation for best and final offers invited in a Notice to Respondents; or
- (c) until Council notifies the Respondent that the Tender has not been accepted, whichever occurs first.

5.8. Licence to use

- (a) The documents comprising each Tender become the property of Council upon being submitted.
- (b) The Respondent grants Council and its councillors, employees, agents and contractors an irrevocable, perpetual, non-exclusive, free of charge licence (including the right to sublicense) to use and exercise all Intellectual Property Rights in the whole or any part of the Respondent's Tender for any purpose related to the Tender Process, including the use, reproduction and modification of the Tender.
- (c) The Respondent represents and warrants, and it is a condition of these Tender Process Terms, that:
 - (i) it owns or has a right to use the Intellectual Property Rights in its Tender for the purposes of the Tender Process;
 - (ii) it has the right and authority to grant the licence in **clause 5.8(b)**; and
 - (iii) Council's exercise of the rights granted by the Respondent under **clause 5.8(b)** will not infringe the Intellectual Property Rights or other rights of any third party.
- (d) This **clause 5.8** survives the expiry or termination of any contract that forms between a Prospective Respondent and Council or a Respondent and Council under these Tender Process Terms.

6. Further information and investigations

6.1. Further information

- (a) Council may seek clarification, amendment and/or improvement of a Tender or require a Respondent to provide additional information concerning any part of its Tender on a case-by-case basis, but is under no obligation to do so, and may decide not to extend such an opportunity to each Respondent.
- (b) The Respondent must respond to a request in accordance with **clause 6.1(a)** within the time specified by Council.
- (c) Without limiting **clause 6.1(a)**, the Respondent must, if requested by Council, give a presentation in relation to the Tender at a time and place specified by Council.

6.2. Investigations

- (a) Council may conduct independent investigations regarding a Respondent and its Tender, including in relation to the Respondent's:

- (i) commercial structure;
 - (ii) financial status;
 - (iii) business and credit history;
 - (iv) prior contract compliance and performance; and
 - (v) criminal records or pending charges of its staff and employees.
- (b) By submitting a Tender, the Respondent:
- (i) consents to such investigations being conducted;
 - (ii) agrees to cooperate with any investigations (including an audit of the Respondent's financial status) by Council or its agent; and
 - (iii) consents to Council or its agent contacting and obtaining information about the Respondent from the Respondent or any third party that Council considers may be able to provide information about the Respondent which is relevant to the evaluation of its Tender.
- (c) Subject to **clause 10**, Council is under no obligation to provide the Respondent with details of the results of any investigations.
- (d) If Council requests that the Respondent provide any information to Council under this **clause 6.2**, the Respondent must provide the information to Council in the time reasonably required by Council (if any).
- (e) Failure to provide any information to Council within the time reasonably required by Council, may result in the Tender being deemed by Council as a Non-conforming Tender by notice to the Respondent.

7. Evaluation of Tenders

7.1. Evaluation

- (a) Council will evaluate Conforming Tenders (and any Non-conforming Tenders it notifies a Respondent that it will evaluate) against the Evaluation Criteria and, to the extent they are relevant and applicable to the evaluation process, having regard to the sound contracting principles of the Local Government Act.
- (b) The evaluation of Tenders will be based primarily upon the information provided in the Tenders (as varied in accordance with these Tender Process Terms).
- (c) In addition to **clause 7.1(b)**, Council may, in its absolute discretion, in evaluating Tenders have regard to:
 - (i) Council's and its advisors' previous experience and dealings with the Respondent;
 - (ii) any information received from any referee in relation to the Respondent;
 - (iii) any information about a Respondent which is in the public domain; and
 - (iv) any information obtained pursuant to investigations carried out in accordance with **clause 6.2** or which comes to the attention of Council or its advisers.
- (d) The Respondent must ensure that its Tender addresses all Evaluation Criteria.

7.2. Short-listing

- (a) Council may short-list Respondents on one or more occasions during the Validity Period. Council has no obligation to notify Respondents of any decision under this **clause 7.2(a)**.

- (b) Notwithstanding that Council has short-listed (or notified Respondents of a decision to short-list) one or more Respondents:
 - (i) all Respondents (including Respondents not short-listed) remain bound by these Tender Process Terms;
 - (ii) Council may continue to evaluate all Tenders (including Tenders of Respondents not short-listed);
 - (iii) Council may include in a short-list one or more Respondents that were previously excluded from the short-list;
 - (iv) no contract forms between Council and any Respondent that has been short-listed or, as a result of a decision (or notification of a decision) by Council to short-list Respondents; and
 - (v) a decision by Council to short-list (or notify Respondents of a decision to short-list) does not amount to a representation by Council that it will not later decide to award one or more Service Contracts to any Respondent that is not included in the short-list.
 - (vi) Council may invite shortlisted Respondents to submit a Tender for a further phase.

7.3. Workshops

- (a) Council may invite up to three of the highest ranked Respondents to participate in facilitated workshops, on an individual basis, involving the evaluation panel and project personnel. There will be no joint workshops completed.
- (b) The workshop/s will focus on contract specific issues including service delivery, scheduling and adjustment of service rates.
- (c) Council may use any information gained from the workshop in the evaluation of Tenders.

7.4. Negotiations

- (a) Council reserves the right to enter into negotiations with one or more Respondents in respect of their Tenders (Negotiations), but is under no obligation to do so, and Council need not extend the opportunity to each Respondent.
- (b) The objective of Negotiations with a Respondent is to agree all commercial issues and completely settle the terms of the relevant Service Contract to which the Respondent's Tender relates.
- (c) If Council wishes to enter into Negotiations with a Respondent, Council may do one or more of the following:
 - (i) issue the Respondent with a program and timetable for negotiations together with:
 - A redrafts of the relevant Service Contract; and
 - B Council's comments on the Service Contract submitted by the Respondent;
 - (ii) meet and negotiate with the Respondent; and
 - (iii) require the Respondent to:
 - A comply with Council's program, timetable, location and format for Negotiations; and
 - B meet and negotiate in good faith with Council to endeavour to finalise the terms of the Service Contract.
- (d) Unless otherwise stated, Council entering into Negotiations with a Respondent does not amount to a rejection of that Respondent's Tender, or the making of a counter offer to that Respondent.
- (e) Council may at any time discontinue Negotiations with a Respondent and exercise any of its other rights under these Tender Process Terms.

8. Variations to Tenders and terms

- (a) Subject to **clause 8(d)**, a Respondent must not vary its Tender unless invited to do so by Council.
- (b) Council may:
 - (i) invite one or more Respondents to vary its Tender but has no obligation to do so and need not extend the same opportunity to each Respondent; and
 - (ii) accept or reject a variation to a Tender in its absolute discretion.
- (c) Any variations to a Tender which are invited by Council (including as a result of a request for clarification, improvement or additional information under **clause 6.1** or as a result of Negotiations) that are accepted in writing by Council, will form part of the Tender as if they were included in the original Tender submitted by the Respondent.
- (d) Council may vary the terms of some or all of the Contract Documents by notice to each Prospective Respondent and Respondent prior to Council accepting a Tender under **clause 9**, provided that each Respondent notified of such a variation will have a period of 5 Business Days (or such longer period specified by Council in its notice) to vary its Tender in response to the variation of Council. Nothing in this **clause 8(d)** obliges Council to issue any notice to Prospective Respondents or Respondents as a result of Negotiations with a Respondent.

9. Acceptance of Tenders

9.1. Acceptance of Tenders

- (a) Council is not bound to accept the lowest price or any Tender.
- (b) Council may accept any Tender in whole or in part.
- (c) Council may (but is not obliged to) consider any Tender which is a Non-conforming Tender.
- (d) Council may invite some or all Respondents to change their Tender in response to a change to the terms of the Tender Process Terms documents or a change to the Tender Process.

9.2. Formation of contract

- (a) Subject to **clause 9.2(b)**, notwithstanding that Council may advise the Respondent that its Tender has been accepted, no contractual relationship exists or will arise between Council and any Respondent in respect of the Service unless and until Council informs the Respondent in writing that it has accepted the Respondent's Tender (Acceptance Notice).
- (b) The Respondent must, if required by Council, execute a Service Contract within 48 hours of receiving the Acceptance Notice.

10. Right to information

- (a) The RTI Act provides members of the public with a legally enforceable right to access documents held by Council.
- (b) The RTI Act requires that documents be disclosed upon request, unless there are valid grounds under the RTI Act for exempting the documents from disclosure.
- (c) Each Respondent acknowledges and agrees that information provided by the Respondent to Council during the Tender Process (including Tenders) is potentially subject to disclosure to third parties under the RTI Act.
- (d) If the disclosure of information provided by a Respondent to Council during the Tender Process (including its Tender) would be of substantial concern to the Respondent, the relevant documents should be stamped "Commercial-in-Confidence", however, Council does not warrant or guarantee that that information or documents will not be disclosed in response to an application under the RTI Act.

- (e) This **clause 10** survives the expiry or termination of any contract that forms between a Prospective Respondent and Council or a Respondent and Council under these Tender Process Terms.

11. Council Confidential Information

11.1. Duty of confidentiality

- (a) The Respondent must:
 - (i) keep confidential all Council Confidential Information; and
 - (ii) not disclose, or allow to be disclosed, any Council Confidential Information to any person except:
 - A as required by law;
 - B if the information is already in the public domain other than as a result of a breach of confidentiality;
 - C with the prior written consent of Council; or
 - D to an Associate of the Respondent if, and to the extent that, it needs to know the information for the purposes of the Tender Process.
- (b) In **clauses 11** and **12**, references to "Respondent" includes a Prospective Respondent.

11.2. Use of Council Confidential Information

The Respondent must ensure that all Council Confidential Information in the possession or control of the Respondent or any of its Associates is only used for the purpose of the Respondent's involvement in the Tender Process and is not used for any other purpose whatsoever.

11.3. Security of confidential information

The Respondent must:

- (a) maintain effective security measures to protect all Council Confidential Information from unauthorised access, use, copying or disclosure;
- (b) notify Council immediately in writing if the Respondent becomes aware of any possible or actual breach of this **clause 11** and take all reasonable steps required to prevent or stop that breach, at the Respondent's own expense; and
- (c) reasonably assist Council in connection with any action or investigation regarding any possible or actual unauthorised disclosure or misuse of Council Confidential Information.

11.4. Disclosure required by law

- (a) Subject to **clause 11.4(b)**, if the Respondent is required to disclose Council Confidential Information under **clause 11.1(a)(ii)A**, the Respondent must:
 - (i) first, to the extent practicable, give reasonable notice to and consult with Council as to the form and content of the disclosure;
 - (ii) disclose only the minimum amount of Council Confidential Information required to comply with the relevant law or stock exchange requirement; and
 - (iii) do whatever is necessary to ensure that the disclosed Council Confidential Information is treated confidentially.
- (b) The Respondent acknowledges and agrees that Council may publish information relating to these Tender Process Terms and the Service Contract that it is required to disclose under the Local Government Act and its regulations without Council complying with any of the requirements set out in **clause 11.4(a)**.

11.5. Disclosure to Associates

- (a) The Respondent must:
- (i) inform each of its Associates to whom Council Confidential Information is disclosed of the Respondent's obligations under this **clause 11**;
 - (ii) ensure that each of its Associates to whom Council Confidential Information is disclosed strictly observes all of the Respondent's obligations under this **clause 11** as if these obligations were imposed directly on that Associate; and
 - (iii) ensure that no Associate to whom Council Confidential Information is disclosed does anything which, if done by the Respondent, would breach this **clause 11**.
- (b) The Respondent is liable to Council for any breaches of the Respondent's obligations under this **clause 11** by its Associates.

11.6. Return or destruction

If requested by Council, the Respondent must immediately return to Council (or if Council requests, destroy) all materials containing any of Council Confidential Information in the Respondent's (or any of its Associates') possession or control.

11.7. Survival

This **clause 11** survives expiry or termination of any contract that forms between a Prospective Respondent and Council or a Respondent and Council under these Tender Process Terms.

12. Respondent confidential information

- (a) The Respondent may identify to Council documents or information that the Respondent considers to be confidential information of the Respondent and may request to Council that such documents or information not be published or disclosed.
- (b) Council will consider any request from the Respondent under **clause 12(a)** but has no obligation not to publish or disclose any document or information referred to it under **clause 12(a)**.
- (c) Where Council has previously accepted that information or documentation referred to it under this **clause 12** will not be published or disclosed, Council can, at any time, amend or alter its decision by notice to the Respondent.
- (d) This **clause 12** survives the expiry or termination of any contract that forms between a Prospective Respondent and Council or a Respondent and Council under these Tender Process Terms.

13. General

13.1. Council's discretion

Unless expressly provided otherwise, any right, power or privilege of Council under these Tender Process Terms and in relation to the Tender Process may be exercised by Council:

- (a) in its absolute discretion;
- (b) without giving reasons; and
- (c) without reference to the Respondent.

13.2. Tendered prices

- (a) All prices included in the Tender must be in Australian dollars and be GST exclusive.
- (b) All prices included in the Tender must be prices that are current as at the Closing Date.

13.3. No advertising

The successful Respondent may not publish any information in relation to the award of the Service Contract without the prior written approval of Council.

13.4. Competitive neutrality

- (a) Subject to **clause 13.4(b)**, a Respondent which:
 - (i) is bound to comply with competitive neutrality principles; or
 - (ii) is a Government Entity, may submit a Tender.
- (b) Any Respondent contemplated by **clause 13.4(a)** that submits a Tender represents and warrants to Council that:
 - (i) the Respondent has undertaken proper processes to consider, assess and evaluate applicable principles of competitive neutrality that are relevant to its Tender;
 - (ii) its Tender has been completed and submitted on the basis that it complies with the applicable competitive neutrality principles; and
 - (iii) if Council awards the Service Contract to the Respondent, the performance of that contract by the Respondent in accordance with its terms will not breach applicable principles of competitive neutrality.
- (c) In addition to any other right Council has under these Tender Process Terms to request information from a Respondent, Council may require a Respondent to provide information and documentation to Council (including after execution of the applicable Service Contract) to demonstrate compliance by the Respondent with the requirements of this **clause 13.4**, including:
 - (i) financial and logistical models;
 - (ii) outcomes of community consultation;
 - (iii) investigations; and
 - (iv) reports.
- (d) The Respondent must promptly comply with any request made by Council under **clause 13.4(c)**. If the Respondent does not comply with a request made by Council under **clause 13.4(c)**, Council may determine that the Tender is a Non-conforming Tender by notice to the Respondent.

13.5. No incentives or contact

- (a) A Respondent (including its officers, employees and agents) must not give or offer to Council or any councillor or employee of Council, or to a parent, spouse, child or associate of a councillor or employee, any inducement, gift or reward, which could in any way tend to influence Council's actions in relation to a Tender.
- (b) Respondents must not contact any councillor or employee of Council, or a parent, spouse, child or associate of a councillor or employee, after the close of tenders.
- (c) If Council discovers at any time that a Respondent has breached **clause 13.5(a) or (b)**, Council may decide not to consider that Tender.

13.6. No collusion

The Respondent represents and warrants that the Tender is in all respects an independent Tender and that no collusion has taken place between the Respondent and any other Respondent, Prospective Respondent or interested party in the preparation of the whole or any part of the Tender.

13.7. Conflicts of Interest

- (a) Each Respondent warrants that to the best of its knowledge, as at the date of the Tender, neither the Respondent nor any of its Associates have, or are likely to have, any Conflict of Interest in

any matters connected with the Tender Process except for those matters nominated by the Respondent in its completed Tender Response Form.

- (b) If a Conflict of Interest or risk of Conflict of Interest arises during the Tender Process, the Respondent must immediately give notice of the Conflict of Interest, or the risk of it, to the Contract Administrator.

13.8. No canvassing

A Respondent must not engage or communicate with Council, its councillors or its employees in connection with the Tender Process or a Tender except:

- (a) as contemplated by this Tender Process;
- (b) when making a request for information or clarification under **clause 4.3(f)**; or
- (c) in response to a request by Council under these Tender Process Terms.
- (d) If Council discovers at any time that a Respondent has breached this **clause 13.8** Council may decide not to consider that Tender.

13.9. Governing law and jurisdiction

- (a) This document is governed by and is to be construed in accordance with the laws applicable in Queensland.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts exercising jurisdiction in Queensland and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

13.10. Severability

- (a) Subject to **clause 13.10(b)**, if any provision or term of these Tender Process Terms is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of these Tender Process Terms.
- (b) **Clause 13.10(a)** does not apply if severing the provision:
 - (i) materially alters the:
 - A scope and nature of these Tender Process Terms;
 - B the relative commercial or financial positions of the parties; or
 - (ii) would be contrary to public policy.

13.11. Waiver and exercise of rights

- (a) A single or partial exercise or waiver by a party of a right relating to these Tender Process Terms does not prevent any other exercise of that right or the exercise of any other right.
- (b) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

13.12. Entire agreement

- (a) The Tender Process Terms constitutes the entire agreement between the parties as to its subject matter and supersedes all prior agreements, arrangements, memorandum of understandings, representations, warranties, promises, statements, negotiations and letters in respect of its subject matter.
- (b) Each Respondent and Prospective Respondent relies entirely on its own independent appraisal

and assessment of all relevant matters and not on any representations or misrepresentations made by Council or its agents prior to the formation of or in connection with the contract constituted by the Tender Process Terms.

- (c) No oral explanation or information provided by any party to another:
 - (i) affects the meaning or interpretation of the Tender Process Terms; or
 - (ii) constitutes any collateral agreement, warranty or understanding between any of the parties.

14. Schedule 1

14.1. Tender Details

The Tender Details are set out in Schedule 1 of the Invitation to Tender.

15. Schedule 2

15.1. Information Session

The Information Session is set out in Schedule 2 of the Invitation to Tender.

16. Schedule 3

16.1. Evaluation Criteria

The Evaluation Criteria is set out in Schedule 3 of the Invitation to Tender.

17. Schedule 4

17.1. General Terms and Conditions

The General Terms and Conditions are set out in Schedule 4 of the Invitation to Tender.

18. Schedule 5

18.1. Service Specification and Supporting Documentation

The Service Specification and Supporting Documentation are set out in Schedule 5 of the Invitation to Tender.

19. Schedule 6

19.1. Tender Response Form

The Tender Response Form is set out in Schedule 6 of the Invitation to Tender.