

## CONTEXT

These Terms and Conditions of Responding shall be read in conjunction with Mid West Ports Authority (MWPA) Request for Tender documentation and forms part of such Requests.

## GENERAL DEFINITIONS

<b>Agreement</b>	means the agreement annexed to the Request which forms the basis of the final agreement between MWPA and the Successful Respondent for the Services.
<b>Closing Time</b>	means the time and date specified on the front of the Request, or subsequently amended by MWPA, as the closing time for the submission of Responses.
<b>MWPA</b>	means Mid West Ports Authority.
<b>Preferred Respondent</b>	is described in clause 8 of these Terms and Conditions of Responding.
<b>Request</b>	means the Request for Tender issued by MWPA, and the schedules, appendices and documents therein referenced.
<b>Respondent</b>	means any person who submits a Response.
<b>Response</b>	means the proposal or tender submitted by the Respondent in response to the Request.
<b>Response Information</b>	means all information, other than the Respondent's Response, submitted by the Respondent in response to, or in connection with, the Request.
<b>Scope of Works (or SoW)</b>	means the goods or services specified in the Request or referred to in the Agreement which are required to be provided by the Successful Respondent.
<b>Services</b>	means the services described in the Scope of Works.
<b>Successful Respondent</b>	is the party selected by MWPA in accordance with the requirements of the Request to provide the Services.

## 1 LODGEMENT REQUIREMENTS

- (a) The Respondent shall submit the Response electronically by uploading at: [www.tenders.wa.gov.au](http://www.tenders.wa.gov.au).
- (b) The Response can only be submitted to: [www.tenders.wa.gov.au](http://www.tenders.wa.gov.au) if the size of the Response is equal to or less than 20 megabytes; and the title of the submission is less than 100 characters and contains no character symbols. The Respondent must be registered as a supplier on Tenders WA to submit its Response electronically.
- (c) Responses must not be submitted by email or facsimile.
- (d) Responses must not be submitted by hard copy.
- (e) Conditions regarding the submission of Responses (including late lodgement and mishandling) are provided in clause 2 below.
- (f) Responses are to be submitted in a Microsoft Office 2007 or later format; or Adobe Reader format. Zipped files are acceptable.

## 2 SUBMISSION OF RESPONSE

Any Response which:

- (a) is not submitted before the Closing Time;
- (b) is incomplete at the Closing Time; or
- (c) is not submitted in accordance with the provisions of clause 1.

may be excluded from consideration, unless the Respondent can provide conclusive evidence of mishandling of the Response.

Tenders WA is administrated by the Western Australian Department of Finance (WADoF). By submitting its Response electronically, the Respondent agrees that:

- (d) receipt of the Response will be determined by the date and time shown on the electronic tender lodgement service receipt issued or, if no receipt is issued, the date and time which the WADoF's computer records that the Response was received;
- (e) if the electronic copy of the Response contains a virus then, notwithstanding any disclaimer made by the Respondent in respect of viruses, the Respondent must pay to WADoF or MWPA all costs incurred by MWPA arising from, or in connection with the virus;
- (f) lodgement of electronic files may take time and the Respondent must make its own assessment of the time required for full transmission of its Response;
- (g) neither WADoF nor MWPA will be responsible in any way for any loss, damage or corruption of the electronic copy of the Response;
- (h) if the electronic copy of the Response becomes corrupted, illegible or incomplete as a result of transmission, storage, encryption or decryption, then MWPA may request the Respondent to provide another copy of the Response either electronically or in hard copy or both;
- (i) if WADoF or MWPA requests the provision of another copy of the Response, then the Respondent must;
  - i. provide the copy in the form or forms requested within the period specified by MWPA;
  - ii. provide a statutory declaration that the copy is a true copy of the Response which was electronically submitted by the Respondent and that no changes to the Response have been made after the initial attempted electronic submission; and

- iii. provide a copy of the electronic tender lodgement service receipt for the initial attempted electronic submission.

A Response is not assignable by the Respondent without the prior written consent of MWPA.

If a Response is submitted by a consortium of two (2) or more persons, either by way of joint venture, partnership or otherwise, the Response is binding on those persons jointly and severally.

### **3 OWNERSHIP OF RESPONSE**

All documents, materials, articles and information submitted by the Respondent as part of, or in support of its Response shall become, upon submission, the absolute property of MWPA and will not be returned to the Respondent at the end of the Request process provided that the Respondent will be entitled to retain copyright and other intellectual property rights therein.

### **4 NO MASQUERADES**

If the Respondent is acting as agent or trustee for or jointly with another Party, this shall be fully disclosed by the Respondent in its Response. If the Respondent fails to fully disclose the identity of all participants and the nature of its relationship to those participants, the Response may be deemed null and void, at the option of MWPA. No claims by undisclosed parties will be recognised by MWPA as having any right, title or interest in the Response whatsoever.

### **5 SUB-CONTRACTORS**

Where a Respondent intends to use a sub-contractor(s), and the Respondent requires the assistance of the sub-contractor(s) to complete the Response, it will be the responsibility of the Respondent to provide the sub-contractor(s) with all the necessary information (and to ensure the provisions relating to confidentiality in the Request are strictly complied with by the sub-contractor(s)).

Where information about a Respondent is requested in response to the Request or in subsequent negotiations, and the identity of the Respondent's sub-contractor(s) is known to the Respondent at that time, the Respondent shall also provide such information with regard to its sub-contractor(s).

### **6 CANCELLATION AND VARIATION**

MWPA reserves the right, at any time and from time to time, to cancel, vary, supplement, supersede or replace the Request or any part of the Request. If MWPA cancels, varies supplements, supersedes or replaces the Request, then:

- (a) MWPA will advise each Respondent that the Request has been cancelled, varied, supplemented, superseded or replaced; and
- (b) the Respondent shall not have any recourse against MWPA whatsoever including for claims for any costs or expenses incurred up to and including the date that the Request or any part of the Request is cancelled, varied, supplemented, superseded or replaced.

### **7 MWPA'S RIGHTS**

MWPA is not obliged to accept the Response containing the lowest price. Nor is MWPA under any obligation to accept any Response and may reject any Response or all Responses, in MWPA's discretion, including:

- (a) Failure to comply with Request Conditions - If a Response fails to comply with these Terms and Conditions of Responding;

- (b) Failure to comply with requirements - If a Response fails to comply with any of the requirements set out in the Request and the schedules, appendices and documents therein referenced;
- (c) False or misleading - if a Response contains information or representations that are false or misleading;
- (d) Change of control - if anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Respondent to another person, including in respect of a Respondent which is a body corporate, if there is a change in control of the Respondent within the meaning of the *Corporations Act 2001 (Cwlth)*;
- (e) Change of consortium membership - in respect of a Respondent which consists of a consortium, if there is a change of membership of the consortium members; or
- (f) Change of policy or commercial reasons - if MWPA decides to cancel the Request due to changes of policy or for commercial reasons.

After the Closing Time, MWPA may request additional information from the Respondent in relation to the content of the Response for the sole purpose of clarifying the Response and if so requested, the Respondent must promptly provide such information to MWPA.

In evaluating a Response, MWPA may take into account any information regarding the Respondent that MWPA has in its possession or receives from any source, including information about the past or current performance of the Respondent under any other contract, arrangement or dealing.

## **8 SELECTION OF PREFERRED RESPONDENT**

MWPA may select, but is not obliged to select, one or more Respondents as a “Preferred Respondent”. Selection as a Preferred Respondent does not confer any rights on a Preferred Respondent and the Request Conditions continue to apply until such time as a contract is awarded or the Request is terminated.

The Respondent agrees that, if it is selected as a Preferred Respondent, then:

- (a) its Response will remain open for acceptance by MWPA at any time prior to the expiry of the Response Validity Period;
- (b) MWPA may choose to negotiate any aspect of the Response; and
- (c) MWPA may request the Respondent to provide a performance guarantee(s), a bank guarantee(s) or some other form of security on terms and conditions acceptable to MWPA.

At any time during the negotiations either MWPA or a Preferred Respondent may terminate the negotiations for any reason. If MWPA does terminate negotiations, MWPA may:

- (d) accept the Respondent’s original Response; or
- (e) select and then negotiate with any other Respondent as a Preferred Respondent in accordance with this clause 8; or
- (f) terminate the Request.

## **9 DISCRETION**

Whenever the consent of MWPA is required under the Request, that consent may be given or withheld by MWPA in MWPA’s absolute discretion and may be given subject to such conditions as MWPA may determine.

## 10 DISCLAIMER

MWPA is not committed contractually in any way to those Respondents whose applications are accepted. The issue of the Request does not commit, or otherwise oblige, MWPA to proceed with any part or steps of the process.

Whilst the information contained in the Request has been formulated with all due care, MWPA does not warrant or represent that the information is free from errors or omissions. The information is made available on the understanding that MWPA and its respective employees and agents, shall have no liability (including liability by reason of negligence) for any loss, damage, cost or expense incurred or arising by reason of any person using or relying on the information and whether caused by reason of any error, omission or misrepresentation in the information or otherwise.

Furthermore, MWPA takes no responsibility for the accuracy, currency, reliability and correctness of any information included in the Request.

## 11 AGREEMENT BY RESPONDENT

In submitting a Response, the Respondent agrees that:

- (a) Information true and correct - All information in its Response and all Response Information is true and correct at the time of its submission;
- (b) Relies on own enquiries - Other than in respect of information provided by MWPA to the Respondent in writing, it relies entirely on its own enquiries in relation to all matters in respect of the Request including all schedules and documents therein referenced, the Terms and Conditions of Responding and the Agreements;
- (c) Understood Request - It has examined and understood the Request, each addendum issued under the Request including all schedules and documents therein referenced, the Terms and Conditions of Responding, the Agreements and any other information available to the Respondent in respect of the Request;
- (d) Made reasonable enquiries - It has examined all information relevant to the risks, contingencies and other circumstances having an effect on its Response which is obtainable by the making of reasonable enquiries, which enquiries the Respondent has made;
- (e) Does not rely on warranties - Other than in respect of information provided by MWPA to the Respondent in writing, it does not rely on any warranty or representation of MWPA or any person actually or ostensibly acting on behalf of MWPA;
- (f) No secret commission - it has not paid or received and will not pay or receive any secret commission in respect of the Request;
- (g) No collusion - It has not colluded and will not collude with any other person in respect of the Request;
- (h) No inflation or deflation of price - Its price is not inflated or deflated to advantage another Respondent;
- (i) No unlawful arrangement - It has not entered and will not enter into any unlawful arrangement with any other person in respect of the Request;
- (j) No improper influence - It has not sought and will not seek to influence any decision in respect of the Request by improper means; and
- (k) Own cost and expenses - It will pay its own costs and expenses in connection with:
  - i. the preparation and submission of its Response; and
  - ii. any discussions, enquiries or negotiations with, or provision or consideration of further information to MWPA, whether before or after the submission of any Response, irrespective of whether its Response is accepted or not.

## 12 RELEASE

The Respondent releases MWPA and its officers, employees, consultants, contractors and agents from all liability for any loss, cost or expense of any kind suffered or which may be suffered by the Respondent arising directly or indirectly from any error, ambiguity, discrepancy, inconsistency or omission in the Request.

## 13 WITHDRAWAL OF RESPONSE

The Respondent may withdraw its Response at any time prior to acceptance of its Response, by notifying MWPA in writing.

Unless the Respondent withdraws its Response under this section, the Respondent agrees that its Response will remain open for acceptance by MWPA for the Response Validity Period.

## 14 DISCLOSURE OF RESPONSE INFORMATION

- (a) The Respondent agrees and acknowledges that its Response, Response Information and other information relevant to the Request are subject to the *Freedom of Information Act 1992 (WA)* and may also be disclosed by MWPA or the State under a court order or upon request by Parliament or any committee of Parliament or if otherwise required by law.
- (b) By submitting a Response, the Respondent releases MWPA and the State from all liability whatsoever for any loss, injury, damage, liability, costs or expense resulting from the disclosure of its Response and its Response Information under this section by MWPA or the State.
- (c) The Respondent agrees and acknowledges that the powers and responsibilities of the Auditor General for the State under the *Financial Management Act 2006* and the *Auditor General's Act 2006* are not affected in any way by the Request.
- (d) Subject to this section and to the provisions of the *Financial Management Act 2006* and the *Auditor General's Act 2006*, MWPA will not make public any part of the Response or any Response Information that the Respondent expressly and reasonably nominates in its Response as confidential. However, MWPA may require the Respondent to withdraw any claim to confidentiality in respect of any part of the Response or any Response Information as a condition of acceptance of the Response.

## 15 CONTRADICTIONS

Where a conflict or contradiction exists between the Request and the Agreement or the SoW document, clarification shall be sought by way of submission of a tender query (refer 'Technical Query and Request For Information Form' included in the Request documentation).

## 16 CHANGE IN CIRCUMSTANCE

Respondents must advise MWPA immediately in writing of any material change to the information contained in their Response, including any substantial change in their ownership or their financial or technical capacity. Copies of relevant documents must be submitted with the advice. This requirement applies until a contract is awarded as a result of the tendering process.

## 17 PUBLICITY

Pre-registered Respondents must not advertise or publish their pre-registration, resulting from the Request process, in any form without the prior written consent of MWPA.

## 18 PROTECTION OF PRIVACY

The Respondent warrants that information provided in the Response is accurate, up to date and complete, and that nominated individuals authorise its collection and are aware:

- (a) that the information is being collected for the purpose of evaluating Responses and may be made available to MWPA and its agents for that purpose;
- (b) of any consequences for the individual if the information (or any part of it) is not provided;
- (c) if the supply of information by the individual is required by law or is voluntary; and
- (d) of the existence of any right to access or correct the information.

## 19 CONFLICT OF INTEREST

The Respondent must, prior to any acceptance of its Response by MWPA, disclose to MWPA any information that is or might be relevant to determining whether an actual, potential or perceived conflict of interest exists or might exist in relation to the Request or the performance of the Agreement (if awarded) by the Respondent.

MWPA may, in its discretion, accept or reject the Respondent's Response if MWPA considers that the Respondent has, or could reasonably be considered to have, an actual, potential or perceived conflict of interest in relation to the Request or the performance of the Agreement (if awarded) by the Respondent.

## 20 NO BRIBE, INDUCEMENT OR OFFER OF EMPLOYMENT

The Respondent must not, without the prior written consent of MWPA, directly or indirectly approach or communicate with any officer or employee of MWPA having any connection or involvement with the Request, with respect to:

- (a) an offer of employment; or
- (b) availability of employment,

with the Respondent or any related entity.

The Respondent must not directly or indirectly offer a bribe, gift or inducement to any officer or employee of MWPA in connection with the Request.

## 21 USE OF LOBBYISTS

The Respondent warrants and represents to MWPA that any "Lobbyist", (as defined by Public Sector Commission which can be found at the link below):

<https://publicsector.wa.gov.au/conduct-integrity/promoting-integrity/lobbyists-and-register-lobbyists>

or any of its officers, employees, agents or sub-contractors has employed, engaged or has otherwise involved, directly or indirectly, in connection with the Request, is duly registered as a "Lobbyist" in terms of the Public Sector Commission and has fully complied with its obligations under it.

## 22 RESPONDENTS AUTHORISATION

The Response must be lodged by a person authorised to do so on behalf of the Respondent. By lodging the Response Form, the authorised representative of the Respondent agrees:

- (a) it has fully informed itself as required by the Request;
- (b) that MWPA is not liable to the Respondent in respect of any error in or omission from or the adequacy of any information supplied to the Respondent by MWPA or its agents in any way relating to the Request;

- (c) to release MWPA from any claim by the Respondent and indemnify MWPA against any claim by any person claiming through the Respondent in any way relating to the Request;
- (d) that paragraphs (b) and (c) above continue in full force and effect until the expiration by operation of law of the time limits which apply to the making of a claim against MWPA in any way relating to the Request;
- (e) to abide by the terms and conditions of the Request; and
- (f) that it has examined and understood the Request, including each addendum issued under the Request and other information available to the Respondent in respect to the Request.