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| Agreement for the supply of Goods (One-off purchase and Multiple purchase) | | | |
| Relevant clause (one-off purchase) | Relevant clause (multiple purchase) | Amendment/inclusion | Reason for amendment/inclusion |
| Interpreting this Agreement | | | |
| Organisation’s title | Organisation’s title | Removal of the ‘The State of Victoria through’ the Organisation. | Not all Organisations using the template Agreements will be legally considered to be part of the State (the Crown) and therefore will not be entering into the Agreement for and on behalf of the State. |
| 1.1 | 1.1 | New definition of the Australian Dispute Centre (ADC). | The Australian Dispute centre was previously the Australian Commercial Dispute Centre (ACDC). The amendment is a necessary update. |
| 1.1 | 1.1 | New definition of Commissioners. | The definition of Commissioners has been updated the reflect the introduction of the Office of the Victorian Information Commissioner (OVIC).  The *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* amended the *Freedom of Information Act 1982* (Vic) to establish OVIC (Part IA) which commenced operations on 1 September 2017. OVIC is responsible for freedom of information and privacy and data protection. OVIC consists of the Information Commissioner, Public Access Deputy Commissioner and Privacy and Data protection Deputy Commissioner (Commissioners). |
| 1.1 | 1.1 | Included a definition of Milestone and Milestone Date. | The parties may wish to build in Milestone and Milestone Dates for a Milestone for the supply of the Goods. |
| 1.1 | 1.1 | Definition of Victorian Public Entity amended. | The previous definition of Victorian Public Entity included entities which "receives any funding from any of the entities" was too broad. It was amended to refer to entities which receive "the majority" of their funding from State entities (i.e. more than 50%). |
| 1.2(f) and (g) | 1.2(f) and (g) | New clauses included to provide for joint and several liability. | New provision acknowledging the supplier might comprise multiple entities. |
| Requesting the Goods | | | |
| N/A | 3.1 | Amended regime for ordering Goods. | For consistency, and in line with best procurement practices, a request for the supply of Goods must made by issuing a Purchase Order in the form, or substantially the form, of Annexure A (as notified by the Organisation).  A request should not be made orally and paid with by Corporate Transaction Card. |
| N/A | 3.2 | Updated information to be included in a Purchase Order. | A Purchase Order must specify the matters listed in clause 3.2 which includes the Purchase Price, Start Date, Completion Date, any applicable Milestones and Milestone Dates, any invoicing and/or notice requirements, and whether liquidated damages are applicable. |
| Supplying the Goods | | | |
| N/A | 5.1 | New clause outlining when Services start and end under a Purchase Order Contract. | As the Agreement is a standing offer, this clause clarifies when a Supplier must start providing Services under a Purchase Order Contract (being the Start Date) until the completion of the Services (whether this occurs on or before the Completion Date) or termination of the Purchase Order Contract (whichever occurs first). |
| 3.1(a)(i) | 5.1(b)(i) | Amended so that the Supplier must supply the Goods in accordance with any reasonable directions given by the Organisation. | It is reasonable for the Supplier to comply with the State's directions when supplying the Goods. |
| 3.2 and 3.5 | 5.2 and 5.5 | Acceptance procedure amended (one-off purchase) and included (multiple purchase). | If the Goods meet the standards required under this Agreement (including the Specifications), the Organisation should promptly notify the Supplier in writing of its acceptance.  If the Organisation does not give written notification within 20 Business Days of delivery, acceptance of the Goods will be deemed to have occurred on the date of delivery. |
| 3.4 | 5.4 | Clause amended (one-off purchase) and inserted (multiple purchase) to allow for testing of Goods before acceptance. | Before accepting the Goods, the Organisation may test or examine the Goods to determine whether they meet the standards required under the Agreement (including the Specifications). |
| 3.6 | 5.6 | A new clause included which allows the Organisation to reject Non-conforming Goods. | The Organisation may reject any Goods that do not conform with the Agreement, any Purchase Order Contract (multiple purchase) or any Specifications, or are damaged, unfit for purpose and/or not of merchantable quality (**Non-conforming Goods**) by giving written notice, within 20 Business Days of delivery.  If the Organisation does accept Goods and during the Warranty Period becomes aware that some or all of the Goods are Non-conforming Goods, it may still reject the Goods.  The Supplier must collect Non-conforming Goods from the Organisation and either replace them or refund the Organisation in respect of money paid for the Non-conforming Goods. |
| 4.1 | 6.1 | Delay and failure to perform clause expanded. | Following notification of any actual or possible delay in the supply of Goods, including any failure to supply the Goods by the Time for Delivery or meet a Milestone by a Milestone Date, the Organisation may (in its absolute discretion) extend the Milestone Date or Completion Date.  If the Supplier fails to deliver the Goods by the Time for Delivery or meet a Milestone by the Milestone Date (or any revised Time for Delivery or Milestone Date), the Organisation may require the Supplier to pay liquidated damages (if the parties have agreed are applicable) or terminate the Agreement or relevant Purchase Order Contract (multiple purchase). |
| 4.2 | 6.2 | Liquidated damages provisions expanded. | If liquidated damages apply to the Agreement (one-off purchase) or Purchase Order Contracts (multiple purchase), the Organisation may recover an amount of money per day from the Supplier if the Supplier fails to provide the Goods by the Time for Delivery. |
| 5 | 7 | New clause inserted dealing with a variation to the types of Goods or Service Level Requirements. | If either party seeks to vary the types of Goods provided under the Agreement or the Service Level Requirements, the Supplier must provide a written proposal to the Organisation outlining the Unit Price that would apply and detailing any other impacts the change will have on the Supplier’s ability to perform its obligations under the Agreement. Unless and/or until the Organisation accepts the proposal, the Goods must be provided in accordance with the Agreement without variation. |
| 6.2(d) | 8.2(d) | A new clause has been inserted which requires the Supplier to comply with any lawful directions of the Organisation or its Personnel. | It is reasonable for the Supplier to comply with the State's directions when on the premises of the Organisation. |
| N/A | 9.2 | New clause inserted detailing the process for variations to the Specifications. | Under this clause, only the Organisation may propose a variation to the Supplier. The Supplier must provide the Organisation with a written proposal within 5 Business Days if there will be a variation in the Unit Price. The Organisation may accept the proposal by giving written notice to the Supplier. In the absence of such acceptance, the Goods must be supplied in accordance with the Agreement without any variation. |
| Pricing and payments | | | |
| 9.3 | 11.3 | The GST clause has been amended to be reciprocal. | Previously, the GST clause only allowed the Supplier to charge GST to the Organisation.  The clause has been updated so that it operates on a reciprocal basis and also allows the Organisation to charge GST to the Supplier, if applicable.  Reciprocal clauses are standard and it is not uncommon for parties to commercial agreements to make taxable supplies to each other. |
| 9.5 | 11.5 | Additional GST provisions relating to "adjustment events" have been included. | Adjustment events are events that change the GST position of the parties.  For example, if a Supplier delivers goods or services that are defective for $1,100 (including $100 GST), and a refund of $200 becomes due and payable, the refund will be an "adjustment event". In this scenario, the Organisation should also receive a refund of $20 for the GST previously paid. |
| 9.6 | 11.6 | A new clause has been included regarding the impact of any increase in GST on standard price indices. | As the Agreement contains an option for the parties to agree a price review mechanism, the language in this clause seeks to ensure that, if the rate of GST increases, such increase will be discounted for the purpose of applying the agreed price index.  For example, if the parties agree to review the Unit Prices and/or Purchase Price by reference to CPI, an increase in GST may lead to a disproportionate increase in the CPI, which will inflate the cost of the Goods for the State. |
| 9.7 | 11.7 | A new clause has been included which states that the Supplier is responsible for payment of all other taxes and duties (except as specified elsewhere in the Agreement). | This includes any new taxes introduced during the Term of the Agreement. |
| 10.1(a) | 12.1(a) | Payment is linked to acceptance. | The Supplier must invoice the Organisation following the Organisation's acceptance of the relevant Goods. This is subject to any alternative invoicing arrangement identified in Schedule 2. |
| 10.2(c) | 12.2(c) | If requested, the Supplier will withdraw the disputed invoice and issue a replacement invoice for the undisputed amount. | Allows the Organisation to pay any undisputed amount owing under the invoice and prevents non-payment. |
| Governance and relationship management | | | |
| N/A | 13.5 | Contract management review process included. | Updated to give effect to the contract management regime under the Agreement. |
| 11.3 | 13.3 | Consequences of failure to meet Service Level Requirements included. | Where the Supplier fails to meet any of the Service Level Requirements, the Supplier must, at no additional cost to the Organisation, promptly:   1. notify the Organisation of the failure in writing; and 2. arrange all additional resources reasonably necessary to provide the Goods in accordance with the Service Level Requirements as soon as reasonably practicable.   Service credits/abatements may apply for a failure to meet a Service Level Requirement, if specified in Schedule 3. |
| 13.1(b) | 15.1(b) | Amended to require the Supplier to comply with the State's policies and procedures in performing its obligations under the Agreement. | Ensures that the Supplier will comply with any of the State's policies and procedures, not just applicable Laws. |
| 13.2 | 15.2 | A new clause inserted requiring the Supplier, in certain situations, to comply with the Victoria Public Sector Commission Code of Conduct (VPSC). | Where, in the course of providing the Goods, the Supplier or its Personnel supervise or work with Public Sector Employees, undertake work that is of a similar nature to the work undertaken by Public Sector Employees at a public sector workplace or use or have access to public sector resources, the Supplier must comply with the VPSC Code of Conduct. |
| 13.3 | 15.3 | The obligations regarding the Supplier Code of Conduct have been updated. | A substantive obligation for suppliers to comply with the Code has not been included. The clause requires the Supplier to acknowledge that:   1. the Supplier Code of Conduct is an important part of the State's approach to procurement and describes the State's minimum expectations regarding the conduct of its suppliers; 2. it has read the Supplier Code of Conduct; and 3. the expectations set out in the Code are not intended to reduce, alter or supersede any other obligations which may be imposed on the Supplier, whether under the Agreement or Law. |
| 13.5 | 15.5 | Updated Victorian Industry Participation Policy (VIPP) terms and conditions if they are set out in Schedule 4. | To address changes in VIPP. |
| 13.6 | 15.6 | A new clause has been included prohibiting the Supplier from giving unlawful inducements. | The Supplier agrees not to, and to ensure that its Personnel will not, promise to pay, agree to pay, give, accept or solicit anything of value (including to or from any third party) in order to secure any reward or improper benefit other than payment for the performance of their obligations under the Agreement.  This clause gives the Organisation the right to terminate the Agreement immediately on notice to the Supplier if the Supplier or any of its Personnel are found to have engaged in such conduct. |
| 14 | N/A | A new clause included which governs conflicts of interest. | The Supplier warrants to the Organisation that it will not, and will ensure that its Personnel do not, have any duties or interests that would cause a real or apparent conflict of interest with its duties under the Agreement. The Supplier is required to inform the Organisation of any matter which may give rise to an actual or perceived conflict of interest and comply with any reasonable directions given by the Organisation in terms of dealing with that conflict. |
| 15 | 17 | Updated (multiple purchase) and inserted change in control provisions. | The Supplier must notify the Organisation of any change in control. The Organisation may terminate the Agreement following such notice. |
| 17.1 and 17.2 | 19.1 and 19.2 | Amended to include additional delivery methods, including email delivery. | Updated to include additional options for next day delivery services and document exchange (DX).  Email delivery is acceptable only if an email address is included in the relevant Item of Schedule 1. The Guidance Notes explain that delivery is only taken to have occurred when a read-receipt (or similar confirmation) is sent to the sender, which may not always occur, and therefore critical communications should also be delivered by alternative methods in addition to email. |
| Information and intellectual property | | | |
| 18.2 | 20.2 | The Organisation's audit rights have been expanded. | The Organisation:   1. may verify the Supplier's compliance with its obligations under the Agreement generally (not just calculation of the Unit Prices and/or Purchase Price); and 2. is not required to give notice if it is not practicable or appropriate to do so. In some circumstances (for example, suspected fraud), notice may not be appropriate. Otherwise the Organisation must give reasonable notice.   There is also an obligation for the Supplier to co-operate with the Organisation or its auditor regarding the conduct of audits.  If the outcome of an audit does not require any corrective action, each party must bear its own costs associated with any audits. However, under the amended clause, if the audit identifies non-compliance by the Supplier, the Supplier will pay the Organisation's costs in respect of the audit. |
| 19 | 21 | Updated intellectual property provision. | The Supplier’s warranty and indemnity regarding intellectual property is now provided for in the warranty and indemnity clauses respectively. Under this new intellectual property provision, the Supplier is granting to the Organisation an irrevocable and unconditional licence, as well as the right to sub-licence. |
| 20 | 22 | Inserted Data provision. | Under this provision, ownership of Intellectual Property rights in Data will remain vested in the Organisation at all times, and the Supplier may only use the Data for the purposes of performing its obligations under the Agreement or any Purchase Order Contract (multiple-purchase). |
| 21.1(c) | 23.1(c) | New provision regarding public announcements. | The Supplier must not make a public announcement in relation to the Agreement without the prior written consent of the Organisation. |
| 21.1(d) | 23.1(d) | New clause included to provide an obligation for Supplier's Personnel to execute confidentiality undertakings on request by the Organisation. | This clause is limited to the Supplier's Personnel who are involved in providing the Goods and who may have access to the Organisation's Confidential Information. This limitation makes the clause less onerous for Suppliers. |
| 21.2 and 21.4 | 23.2 and 23.4 | New provision regarding exceptions to the Supplier’s obligations of confidentiality and permitted disclosure. | More comprehensive regime around the disclosure of Confidential Information required to ensure that the Organisation’s Confidential Information is kept confidential, to the extent reasonably possible. |
| 21.5 | 23.5 | The circumstances in which the Organisation may disclose information relating to the Supplier have been updated. | Updated to include a more comprehensive list of scenarios where the Organisation may be required to disclose a Supplier’s information.  This amendment ensures all situations in which the Organisation may need to disclose a Supplier’s information are addressed. |
| 21.6 | 23.6 | Included provisions governing the return of the Organisation’s Confidential Information. | This ensures that, upon request/termination/expiry of the Agreement the Organisation’s Confidential Information is dealt with in a manner which will not compromise its confidentiality. If personal information is not returned or destroyed, an Organisation may breach the Information Privacy Principles in the PDP Act. |
| 21.7 | 23.7 | The Supplier's privacy obligations have been expanded.  A reference to the Health Privacy Principles has been included. | The Supplier must agree to comply with privacy related directions provided by the Organisation or an applicable regulator, as well as co-operate with the Organisation regarding breach of an applicable privacy obligation.  A number of specific obligations and restrictions have been placed on the Supplier regarding its use of Personal Information disclosed to it by the Supplier. This addresses specific issues which are necessary to ensure compliance by the Organisation with the Information Privacy Principles and the Health Privacy Principles.  Additional warranties which should be sought where a third party collects personal information on behalf of the State have not been included. The Guidance Notes provide further information about what may be required in these circumstances. |
| 21.8 | 23.8 | The requirements regarding the Protective Data Security Standards have been included. | The Supplier will not do any act or engage in any practice that contravenes a Protective Data Security Standard *or would give rise to a contravention of a Protective Data Security Standard by the Organisation*. This provides a safeguard for the Organisation. |
| Liability | | | |
| 22(a) and (b) | 23(a) and (b) | The indemnities have been updated to address specific issues that are within the Supplier's control. | The previous indemnities were extremely broad and may not have been accepted by some suppliers (particularly if the result was to leave the supplier uninsured for those events under the terms of its insurance policies). The previous indemnities may have also constituted unfair contract terms under the *Australian Consumer Law and Fair Trading Act 2012* (Vic).  The Agreement has been updated to refer to specific types of loss which ought to be at the Supplier's risk.  The Supplier's liability under the indemnity is reduced to the extent that the relevant loss is caused by negligence or other wrongful act or omission of the indemnified parties (i.e. the Organisation and its Personnel). |
| 22(e) and (f) | 24(e) and (f) | A short form clause has been included which allows the Supplier to conduct Intellectual Property Rights (IPR) claims on behalf of the Organisation, subject to compliance with all applicable Government policies (including the model litigant guidelines) and the Organisation's directions. | The new provisions allow Organisations to have the choice to allow the Supplier to conduct IPR claims on its behalf. The Organisation retains control as it may take back control of the claim at any time and the Supplier may not settle the claim without the Organisation's consent.  An IPR claim involves a that the receipt and use of the Goods violates the Intellectual Property Rights, Moral Rights or any other rights of a third party. |
| Representations and warranties | | | |
| 23 | 25 | Updated warranties. | The warranties are more comprehensive, providing increased safeguards for the Organisation. |
| 23(k) | 25(k) | New warranties where the Supplier is entering the Agreement on behalf of a Trust. | Where the Supplier is entering the Agreement on behalf of a Trust (as specified in Item 10 of Schedule 1), these warranties will apply. |
| 24(d) | 26(d) | Amended so that the obligation on the Supplier to provide the Organisation with evidence of the currency of replacement insurance only applies on request by an Organisation. | This amendment makes the term less onerous for Suppliers. Many insurance policies contain a provision which states that the terms of the policy may not be disclosed. |
| 24(e) | 26(e) | Amended so that it only applies if it is selected as an option in Item 12 of Schedule 1 (one-off purchase) or Item 11 of Schedule 1 (multiple purchase) that the insurance must be taken out with an insurer acceptable to the Organisation and on terms acceptable to the Organisation. | This amendment makes the clause less onerous for Suppliers. |
| Term and termination | | | |
| 26 | 28 | A new clause has been included (one-off purchase) and the existing clause has been amended (multiple purchase) setting out the duration of the Agreement and allowing for an extension of the Term. | This allows the Organisation to extend the Term for pre-agreed periods (e.g. 3 years + 1 + 1). Previously, the Term could only be extended following a delay. |
| 27.1 | 29.1 | The clause regarding the Organisation’s rights to terminate for cause have been updated. | The clauses relating to termination for breach have been updated to remove any reference to correcting breaches to the "satisfaction of the Organisation", so than an objective standard applies regarding whether a breach can be remedied.  The termination right regarding "damage to reputation" has been narrowed as follows: *if the Supplier commits any act or does anything that may be prejudicial or otherwise detrimental to the reputation of the State*.  The right to terminate for change in control has been deleted, as this is dealt with in clause 15 (one-off purchase) and clause 17 (multiple purchase). |
| 27.2 | 29.2 | The Organisation will pay early termination costs to the Supplier if it terminates the Agreement for its convenience, to be calculated using the formulation set out in the clause. | Termination will take effect upon receipt of the notice or such later date as specified in the notice.  This provision has been updated to state that early termination costs will be payable by the Organisation if it terminates for convenience. The Organisation must pay the unavoidable and substantiated costs incurred by the Supplier as a direct result of the termination, excluding any loss of profit, but including the cost of any Goods provided up to the date of termination. This is to reduce the risk that the right to terminate for convenience is viewed as an unfair contract term under the *Australian Consumer Law and Fair Trading Act 2012* (Vic).  The Supplier must do everything possible to mitigate its losses arising from termination. |
| 27.3 | 29.3 | The Supplier may terminate the Agreement for non-payment by the Organisation only. | Additional notice requirements are specified in the clause, which the Supplier must comply with before it is able to terminate the Agreement.  Generally, the Organisation's primary obligation is to pay the Purchase Price when due. Other non-compliance by an Organisation should not prevent the Supplier from continuing to provide the Goods, and the Supplier is able to pursue any remedies available to it at law or under the dispute resolution mechanism. |
| 27.4(b) | 29.3(b) | All of the Organisation's Data and Confidential Information must be returned or destroyed (at the Organisation's election) upon termination or expiry. | Materials must be returned to the Organisation in the format in which they were first provided by the Organisation and, in addition, if required by the Organisation, in a non-proprietary and open access file format.  If personal information is not returned or destroyed, an Organisation may breach the Information Privacy Principles in the PDP Act. |
| Other miscellaneous terms | | | |
| 28.11 | 30.11 | An order of precedence has been included. | An order of precedence was included as optional wording in Schedule 2. This has been inserted into the terms and conditions to ensure that it is included in each instance. This changes the position previously set out in Schedule 2, which stated that the Supplier's Offer took precedence over the State's Invitation to Supply.  Ideally, neither the Invitation or the Offer will be attached to, or incorporated by reference into, the agreement. The preferred approach is for the Organisation to create a description of the Goods based upon its requirements in the market approach documentation. The description of the Goods in the market approach documentation should be updated to (a) remove any instructions to tenderers, (b) reflect any non-compliances raised by the preferred tenderer in its Offer and accepted by the Organisation and (c) include any additional Goods offered by the preferred tenderer in its Offer.  Further information is provided in the Guidance Notes regarding how to draft an appropriate Goods description.  If an Organisation does not wish to take this approach and will incorporate the Offer and Invitation, the Invitation should take precedence. Whist the Offer is "later in time", the Offer may not respond to all aspects of the Organisation's requirements in the Invitation. If the Offer takes precedence over the Invitation, this creates a risk that the aspects of the Goods which are not expressly described in the Offer are viewed as out of scope.  This approach also has the effect of overriding Supplier assumptions which are inconsistent with the Invitation. |
| 28.12(b) | 30.12(b) | New clause inserted to state that the Supplier is engaged as an independent contractor. | Ensures it is clear that the Supplier is not engaged as an employee of the Organisation. |
| Schedules | | | |
| Schedule 1 | Schedule 1 | Tick boxes included for optional items. | Allows the Organisation to specify when certain items apply. |
| Schedule 1 | Schedule 1 | Items have been included to reflect new clauses that have been inserted in the Agreement. | New concepts included in the Schedule. |
| Schedule 1, Item 6 | Schedule 1, Item 6 | Amended to remove payment by cheque as an option. | The Guidance Notes state that payment is to be by electronic methods wherever possible. |
| Schedule 3 | Schedule 3 | Amended to provide an optional section for Service Credits. | Service Credits will be payable for failure by the Supplier to meet a Service Level Requirement. This section is optional as not all Organisations will wish to include Service Credits. |