

DEED OF CONFIDENTIALITY TEMPLATE

DATED**DAY OF****INSTRUCTIONS FOR USING THIS DEED OF CONFIDENTIALITY**

This Deed of Confidentiality is intended to be used in procurements where respondents (or other external parties) are provided with sensitive information. **(please delete these instructions)**

DEED OF CONFIDENTIALITY

BY**[INSERT CONFIDANT COMPANY NAME]****(ABN)****("Confidant")****- IN FAVOUR OF -****THE CROWN IN RIGHT OF THE STATE OF SOUTH AUSTRALIA****("Crown")**

[This document is a DRAFT provided only for the purposes of furthering negotiations between the parties. No party will be legally bound unless and until this document is executed by the parties and any actions taken in anticipation of such formal execution is at the risk of the person taking them.]

Further information: Procurement SA
Contact Email: procurement@sa.gov.au

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**Value for
money****Creating
jobs****Innovation and
new business****Climate smart
economy**



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SCHEDULE



DEED OF CONFIDENTIALITY TEMPLATE

DEED dated _____ day of _____

BY:

[****name of Confidant company / individual person***] of [****address*****] ("**Confidant**")

IN FAVOUR OF

THE CROWN IN RIGHT OF THE STATE OF SOUTH AUSTRALIA ("Crown")

BACKGROUND:

- A. The Confidant is involved in the [insert name of the procurement project] ("the Tender Project").
- B. The Confidant may have access to Confidential Information by participating in the Tender Project.
- C. The Confidant agrees that the Crown will allow the Confidant to access Confidential Information for the Specified Purpose strictly in accordance with this Deed.

IT IS AGREED:

1. **BACKGROUND**

The Confidant acknowledges the truth and accuracy of the matters set out in the Background in every particular.

2. **INTERPRETATION**

2.1 **Definitions**

- 2.1.1 "**Business Day**" means any day that is not a Saturday or Sunday or a public holiday in South Australia under the *Holidays Act 1910*;
- 2.1.2 "**Confidant**" means the Party named at Item 1 of the Schedule and includes all the Confidant's employees, advisers, consultants, agents and subcontractors involved in the Tender Project;
- 2.1.3 "**Confidant's Representative**" means the person specified at Item 3 of the Schedule;
- 2.1.4 "**Confidential Information**" means information embodied in any form and howsoever recorded that:
 - (a) is by its nature confidential;

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- (b) is designated as confidential by the Crown;
 - (c) the Confidant knows or ought to know is confidential;
 - (d) is confidential by virtue of the circumstances in which a third party may have submitted that information to the Crown; or
 - (e) relates to the tenderers or respondents to the Tender Project;
- 2.1.5 **“Crown”** means the Crown in right of the State of South Australia.
- 2.1.6 **“Crown’s Representative”** means the person specified at Item 4 of the Schedule;
- 2.1.7 **“Deed”** means this Deed between the Parties, as amended in writing from time to time;
- 2.1.8 **“disclosure”** means providing any kind of direct or indirect access to original or duplicates of Confidential Information, and includes disclosing the fact that the Confidant has access to Confidential Information, and ‘disclose’ has a corresponding meaning where the context permits;
- 2.1.9 **“Intellectual Property Rights”** includes copyright, trade mark, design, patent, semiconductor, or circuit board layout rights, trade, business or company names, confidential or other proprietary rights, or any rights to registration of such rights, whether created before or after the date of this Deed and whether created in Australia or elsewhere;
- 2.1.10 **“Notice”** means:
- (a) any notice in writing; or
 - (b) a consent, approval or other communication required to be in writing under this Deed;
- 2.1.11 **“Party”** means either the Crown or the Confidant as the context requires or permits, and **“Parties”** means both of them;
- 2.1.12 **“Specified Purpose”** means the authorised use of the Confidential Information as detailed in Item 2 of the Schedule; and
- 2.1.13 **“Tender Project”** means the tender project as specified in Item 5 of the Schedule;

2.2 Interpretation

The following rules of construction apply in the interpretation of this Deed:

- 2.2.1 a reference to this Deed is a reference to this Deed as amended, varied, novated or substituted from time to time;
- 2.2.2 a reference to any legislation or to any provision of any legislation includes all legislation, regulations, proclamations, ordinances, by-laws and instruments issued under that legislation or provision, and any modification, consolidation, amendment, re-enactment or substitution of that legislation or provision;
- 2.2.3 any reference to:
 - (a) the singular includes the plural, and vice versa; and

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- (b) a gender includes every other gender;
- (c) individuals includes corporations, unincorporated associations, partnerships, trusts and joint ventures;
- (d) a Party in this Deed includes its administrators, successors and permitted assigns
- (e) two or more persons is a reference to those persons jointly and severally;
- (f) a clause or schedule is a reference to a clause of, or a schedule to, this Deed;
- (g) a clause number includes a reference to all of its subclauses;
- (h) the word 'or' is not exclusive;

- 2.2.4 clause headings are for convenience only and do not affect interpretation or form part of this Deed;
- 2.2.5 If any act pursuant to this Deed would otherwise be required to be done on a day which is not a Business Day then that act may be done on the next Business Day;
- 2.2.6 where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of that word or phrase has corresponding meaning;
- 2.2.7 where general words are associated with specific words that define a class, the general words are not limited by reference to that class;

3. USE OF CONFIDENTIAL INFORMATION

- 3.1 The Confidant must only use Confidential Information for the Specified Purpose.
- 3.2 The Confidant acknowledges and agrees that the Crown may at any time:
 - 3.2.1 deny the Confidant access to any Confidential Information; and/or
 - 3.2.2 require the Confidant to cease to use any Confidential Information; and/or
 - 3.2.3 require the Confidant to return any Confidential Information pursuant to clause 9 of this Deed.

4. NON-DISCLOSURE

- 4.1 The Confidant must take all reasonable steps to ensure that the confidentiality of Confidential Information is preserved.
- 4.2 Subject to this clause, the Confidant must not directly or indirectly disclose the Confidential Information to any other person without the prior written consent of the Crown.
- 4.3 The Confidant must not use any Confidential Information otherwise than for the Specified Purpose, without the prior written consent of the Crown.
- 4.4 The Crown may grant or withhold its consent in its absolute and unfettered discretion, and any consent, if granted, may be conditional.

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5. AUTHORISED DISCLOSURE

- 5.1 The Confidant may disclose Confidential Information to any of its employees, advisers, consultants, agents and subcontractors ("Authorised Person"), but only:
- 5.1.1 to the extent that, and for so long as, is necessary for the Specified Purpose; and
 - 5.1.2 if prior to disclosure, the Confidant has informed the Authorised Person that the Confidential Information is confidential and has required the Authorised Person to treat it confidentially; and
 - 5.1.3 if the Confidant provides prior written notice to the Crown of the disclosure of Confidential Information to Authorised Persons.
 - 5.1.4 if prior to disclosure, the Authorised Person has executed a deed of confidentiality in the form prescribed by the Crown relating to the non-disclosure of Confidential Information and the deed has been delivered to the Crown.
- 5.2 The Confidant may disclose Confidential Information if it is permitted to be disclosed by this Deed or it is required to be disclosed by operation of law.
- 5.3 The obligations of the Confidant under this Deed will not be taken to have been breached where the Confidential Information is legally required to be disclosed.

6. UNCERTAINTY

If at any time during the course of this Deed, the Confidant is uncertain whether information is Confidential Information, the Confidant must treat the information as Confidential Information unless and until the Crown agrees in writing that the information is not Confidential Information.

7. UNAUTHORISED DISCLOSURE OR USE OF CONFIDENTIAL INFORMATION

- 7.1 The Confidant must immediately notify the Crown of any unauthorised disclosure or use of Confidential Information that the Confidant becomes aware of and must take any and all reasonable steps required by the Crown, in relation to the unauthorised disclosure or use.
- 7.2 The Confidant must immediately notify the Crown of any suspected or potential unauthorised disclosure or use of the Confidential Information and must take any and all reasonable steps required by the Crown, in relation to the suspected or potential unauthorised disclosure or use.
- 7.3 When the Confidant is aware of any proceedings being issued by a third party to compel the Confidant to disclose Confidential Information, the Confidant must:
- 7.3.1 promptly notify the Crown; and
 - 7.3.2 to the extent legally permitted, defer and limit the disclosure with a view to preserving the confidentiality of the Confidential Information as much as possible; and

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- 7.3.3 do anything reasonably required by the Crown to oppose or restrict that disclosure, including the institution and conduct or defence of legal proceedings at the Crown's direction and expense.

8. STORAGE AND HANDLING OF CONFIDENTIAL INFORMATION

- 8.1 The Confidant must take all reasonable precautions in all its dealings with the Confidential Information and in particular, must at all times:
- 8.1.1 ensure that the Confidential Information is stored in a manner such that access is restricted to the Confidant or any other person who has been granted authorised access to the Confidential Information by the Crown pursuant to this Deed; and
 - 8.1.2 comply with all other procedures and directions issued by the Crown in relation to the Confidential Information.
- 8.2 The Confidant must ensure that Confidential Information is stored in a manner such that access is restricted to the Confidant and/or any Approved Person, that each item is clearly identified and marked as "CONFIDENTIAL", and that its use does not infringe the Intellectual Property Rights of any person.
- 8.3 The Confidant must maintain complete, accurate and up-to-date records of all use, copying (including number of copies made and destroyed or erased), and disclosure of Confidential Information, and must immediately produce those records to the Crown on request.
- 8.4 The Confidant must not effect an electronic transfer of Confidential Information (for example, by email).
- 8.5 The Confidant must ensure that any Confidential Information is kept:
- 8.5.1 at all times under its control;
 - 8.5.2 in a physically secure environment; and
 - 8.5.3 in a locked cabinet or other container when required.
 - 8.5.4 If the Confidant needs to move a physical embodiment of Confidential Information from one location to another otherwise than in the continuous custody of the Confidant, the Confidential Information must:
 - (a) be enclosed in a secure and robust envelope;
 - (b) be sent by either reputable courier or registered post; and
 - (c) not be sent by ordinary post.

9. RETURN OF CONFIDENTIAL INFORMATION

- 9.1 The Crown may, at any time, demand (without needing to reduce the demand to writing) the delivery to the Crown of all materials containing Confidential Information that are in the possession or control of the Confidant and any person to whom the Confidant has disclosed the Confidential Information (whether or not with the consent of the Crown).
- 9.2 Without limiting the application of clause 9.1, at the conclusion of the Specified Purpose, the Confidant must immediately deliver to the Crown all materials

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containing Confidential Information that are in the possession or control of the Confidant, and any person to whom the Confidant has disclosed Confidential Information (whether or not with the consent of the Crown).

- 9.3 If an Authorised Person ceases to be a person within the category of Authorised Persons or it is no longer necessary for the person to have access to Confidential Information for the Specified Purpose, the Confidant must immediately retrieve all materials containing Confidential Information held by that person.
- 9.4 The Confidant must immediately comply with a demand under this clause 9.
- 9.5 If the Crown makes a demand under this clause 9, and the Confidant has placed or is aware that originals or copies of materials containing Confidential Information are beyond the Confidant's possession or control, then the Confidant must provide full particulars of the whereabouts of the materials containing the Confidential Information, and the identity of the person in whose custody or control they lie.
- 9.6 In this clause 9, "materials" includes all materials, records and documents, stored in any form whether visible to the eye or not.

10. DEED IS RETROSPECTIVE

The obligations and responsibilities that arise under this Deed apply to Confidential Information that has been received by the Confidant or any other person to whom the Confidant is permitted to disclose Confidential Information prior to the execution of this Deed.

11. INTELLECTUAL PROPERTY RIGHTS

Any Intellectual Property Rights of the Crown in the Confidential Information are retained by the Crown despite any disclosure to the Confidant.

12. DURATION

This Deed will continue in full force and effect until the Crown notifies the Confidant in writing that the obligations of the Confidant under this Deed cease to bind the Confidant.

13. REMEDIES

- 13.1 The Confidant acknowledges and accepts that the Crown may take legal proceedings against the Confidant or third parties if there is any actual, threatened or suspected breach of this Deed, including proceedings for an injunction to restrain such breach.
- 13.2 The Confidant acknowledges and accepts that in addition to any other remedy which may be available to the Crown in law or equity, the Crown is entitled to injunctive relief to prevent a breach of this Deed and to compel specific performance of this Deed by the Confidant.
- 13.3 The Confidant must immediately reimburse the Crown for all costs and expenses (including legal costs and disbursements on a full indemnity basis) incurred in enforcing the obligations of the Confidant under this Deed.

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13.4 The rights and remedies provided under this Deed are in addition to, and do not derogate from, any rights and remedies available in law or equity.

14. INDEMNITY

The Confidant indemnifies the Crown against all losses, costs, expenses, actions or claims directly or indirectly incurred by the Crown as a result of:

- 14.1 any disclosure or use of Confidential Information by the Confidant in breach of the Deed; or
- 14.2 any unauthorised disclosure or use by an Authorised Person of Confidential Information.

15. RELEASE

The Confidant releases the Crown in respect of any liability which may arise, from or in connection with, the provision or use of Confidential Information to the fullest extent that the law permits such a release to be given.

16. NO EXCLUSION OF LAW OR EQUITY

This Deed must not be construed to exclude the operation of any principle of law or equity intended to protect and preserve the confidentiality of the Confidential Information.

17. NOTICES

17.1 A “notice” means:

- 17.1.1 a notice in writing; or
- 17.1.2 a consent, approval or other communication required to be in writing under this Deed.

17.2 A notice must be signed by or on behalf of the sender addressed to the recipient and:

- 17.2.1 delivered to the recipient’s address;
- 17.2.2 sent by pre-paid mail to the recipient’s address;
- 17.2.3 transmitted by facsimile to the recipient’s address; or
- 17.2.4 transmitted by email to the recipient’s address.

17.3 A notice given to a Party in accordance with this clause 17 is treated as having been given and received:

- 17.3.1 on the day of delivery if delivered before 5.00 pm on a Business Day, otherwise on the next Business Day;
- 17.3.2 if sent by pre-paid mail, on the third Business Day after posting;
- 17.3.3 if sent by email, upon delivery of the sender delivery receipt to the receiver by way of email or other agreed method; or
- 17.3.4 if transmitted by facsimile and a correct and complete transmission report is received on the day of transmission: on that day if the report

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states that transmission was completed before 5.00 pm on a Business Day, otherwise on the next Business Day, provided that:

- 17.3.5 if the recipient receives by facsimile transmission a notice that is illegible, the recipient must notify the sender immediately and the sender must continue to retransmit the notice until the recipient confirms that it has received a legible notice. The rules in relation to transmission reports as stated above apply.
- 17.4 The address and facsimile number of a Party are those set out in the Schedule.
- 17.5 A Party may from time to time notify its change of address or facsimile number by written notice to the other Party.
- 17.6 A notice or other communication intended for the Crown under this Deed is deemed to be duly given or served if it is received by the Crown's Representative.
- 17.7 A notice or other communication intended for the Confidant under this Deed is deemed to be duly given or served if it is received by the Confidant's Representative.
- 17.8 Either Party may change their nominated representative from time to time by written notice to the other Party. .
- 17.9 Either Party may change their address for the receipt of notices from time to time by written notice to the other Party.

18. MISCELLANEOUS**18.1 No Waiver**

- 18.1.1 Any waiver of any provision of this Agreement is ineffective unless it is in writing and signed by the party waiving its rights.
- 18.1.2 A waiver by either party in respect of a breach of a provision of this Agreement by the other party is not a waiver in respect of any other breach of that or any other provision.
- 18.1.3 The failure of either party to enforce at any time any of the provisions of this Agreement must not be interpreted as a waiver of that provision.

18.2 Modification

Any modification or variation of this Deed must be made in writing and signed by the Parties.

18.3 Severance

If any provision of this Deed is void or unenforceable the remaining provisions will continue in full force and effect.

18.4 Governing Law and Jurisdiction

- 18.4.1 This Deed is governed by and is to be construed in accordance with the laws in force in South Australia, and the Parties submit to the jurisdiction of its courts.



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- 18.4.2 The Parties agree that the Courts of South Australia will have exclusive jurisdiction to determine any proceedings in relation to this Deed.
- 18.4.3 Any proceeding brought in a Federal Court must be instituted in the Adelaide Registry of that Federal Court.
- 18.4.4 The Confidant undertakes not to apply to transfer any proceedings to another registry of the Federal Court.

Example Only

**DEED OF CONFIDENTIALITY TEMPLATE**

EXECUTED AS A DEED POLL

THE COMMON SEAL of)
)
was hereunto affixed)
in the presence of:)

.....
Director
[Print Name:]

.....
Director/Secretary*
[Print Name:]

*Delete the inapplicable

SCHEDULE

ITEM 1: Confidant

ITEM 2: Specified Purpose

The Confidential Information is to be used for the following purposes only:

ITEM 3: Confidant's Representative

ITEM 4: Crown's Representative

ITEM 5: Tender Project Details