

SPECIAL CONDITIONS CLAUSE BANK

PLEASE NOTE: THIS IS NOT AN EXHAUSTIVE LIST OF SPECIAL CONDITIONS. PLEASE CONTACT YOUR AGENCY'S PROCUREMENT BRANCH IF ADDITIONAL AGENCY SPECIFIC CLAUSES ARE REQUIRED.

*Is the procurement for Across Government Goods and/or Services? If **Yes** contact the Crown Solicitor's Office. If **No** proceed to next question.*

*Is this a procurement of Information and Communication Technology (ICT) products or Services? If **Yes** contact the Crown Solicitor's Office. If **No** proceed to next question.*

*Is this a high risk and/or complex (e.g. complicated) procurement? If **Yes** contact the Crown Solicitor's Office. If **No** proceed to next question.*

*Is the contract in the form of a standing offer, either as a sole supplier arrangement or as part of a panel? If **Yes** insert the following clauses as Special Conditions in Attachment 4. If **No** proceed to next question.*

S1. PURCHASE ORDERS

- S1.1 The Government Party may purchase Goods and Services under this Agreement by issuing a Purchase Order to the Supplier.
- S1.2 The Parties agree that the engagement of the Supplier by the Government Party as a preferred supplier and the offer by the Supplier to supply Goods and Services at the Price and on the terms of the Agreement, is good and sufficient legal consideration.
- S1.3 A Purchase Order must be in writing, be approved by the Government Party, and contain as a minimum:
 - S1.3.1 Purchase Order Number;
 - S1.3.2 Date of Issue;
 - S1.3.3 Description of Goods and/or Services;
 - S1.3.4 Quantity of Goods (if any);
 - S1.3.5 Delivery Point for Goods (if required);
 - S1.3.6 Installation Date for Goods (if required);
 - S1.3.7 Reports and other materials (if any); and
 - S1.3.8 Unit Price and total Price.
- S1.4 The Supplier must supply the Goods and the Services ordered by the Government Party under a Purchase Order in accordance with the terms of this Agreement.
- S1.5 The terms of the Standard Goods and Services Agreement will take priority over any purchase order terms and conditions that may be included with a Purchase Order.

S2. NO MINIMUM PURCHASE

- S2.1 The Government Party is under no obligation to purchase a minimum quantity of Goods or Services from the Supplier during the Term.

S3. NON-EXCLUSIVITY

- S3.1 This Agreement is entered into on a non-exclusive basis.

- S3.2 The Government Party may purchase other goods and services similar to the Goods and Services from other providers.

*Is this a procurement of consultancy services (e.g. auditing, accounting, financial analysis)? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S4. CONSULTANCY

- S4.1 All references to “the Supplier” are replaced by “Consultant” and all references to “Price” are replaced by “Fees” in the Agreement.
- S4.2 The Services must be performed personally by the Named Persons.
- S4.3 The Government Party may give reasonable instructions to the Consultant about the performance of the Services and the Consultant must comply with those instructions, including provision of additional reports, attendance at meetings and the making of presentations.
- S4.4 The Consultant must effect and maintain professional indemnity insurance during the Agreement at the minimum level of cover required in the ordinary course of the Consultant’s business and such cover must continue for three years after the expiry of the Agreement.
- S4.5 The following paragraphs replace the second subclause of the Intellectual Property Rights clause in the Agreement:
- S4.5.1 Subject to the first subclause of the Intellectual Property Rights clause in the Agreement, title and all Intellectual Property Rights in the reports and other materials vests in the Government Party on creation.
 - S4.5.2 The Consultant must do anything necessary to vest all Intellectual Property Rights in the reports and other materials in the Government Party.
 - S4.5.3 The Consultant grants to the Government Party a perpetual, irrevocable, royalty free, fee free licence to use those of the Consultant’s Intellectual Property Rights as necessary for the purpose of using the reports and other materials.
 - S4.5.4 The Government Party grants to the Supplier the right to access and use the reports and other materials solely for the purpose of providing the Consultancy Services to the Government Party and **<insert purpose>**.
 - S4.5.5 Each party grants the other only the licences and rights specified. No other licenses or rights (including licences or rights under patents) are granted.

*Is the Consultant a member of an occupational association that has a scheme for limiting the occupational liability of members approved under the Professional Standards Act 2004 (SA)? Is the limitation of liability under that scheme more favourable to the Consultant than the Cabinet approved global liability cap? If **Yes to both questions** insert the following clauses as Special Conditions in Attachment 4. If **No** proceed to next question.*

S5. LIABILITY

- S5.1 Where a scheme approved under the *Professional Standards Act 2004* (SA) applies, the Consultant’s liability to the Government Party for any loss or causes of action arising in relation to the provision of Services is limited in the manner provided by the scheme.

*Is (a) the value of the contract >\$500,000 (inc. GST) or (b) a consultancy of any value? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S6. CONTRACT DISCLOSURE

- S6.1 The Government Party may disclose this Agreement and/or information in relation to this Agreement in either printed or electronic form and either generally to the public or to a particular person as a result of a specific request.
- S6.2 Nothing in this clause derogates from:
- S6.2.1 the Supplier's obligations under any provisions of this Agreement; or
 - S6.2.2 the provisions of the *Freedom of Information Act 1991* (SA).

*Will the Supplier have access to the personal information of any person? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S7. PRIVACY

- S7.1 The Supplier must:
- S7.1.1 comply with the South Australian Government Information Privacy Principles (a copy of which can be found at <http://www.dpc.sa.gov.au/documents/rendition/B17711#sthash.s76QhRX6.dpuf>) ("IPPs") as if the Supplier were an "agency" for the purposes of the IPPs, in undertaking its obligations under this Agreement including in relation to all Personal Information received, created or held by it for the purposes of this Agreement; and
 - S7.1.2 allow the Government Party to undertake, and cooperate with any audit or investigation which the Government Party deems necessary to verify that the Supplier is complying with the IPPs.
- S7.2 The Supplier must promptly notify the Government Party if it fails to comply with this clause or if it becomes aware of any actual or threatened disclosure of or unauthorised access to Personal Information.

*Is this a procurement with a trustee of a trust? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S8. SUPPLIER AS TRUSTEE

- S8.1 If the Supplier is acting as trustee of a trust, then in relation to this Agreement:
- S8.1.1 the Supplier is liable both personally and in its capacity as a trustee of that trust;
 - S8.1.2 it must not assign, transfer, mortgage, charge, release, waive, encumber or compromise its right of indemnity out of the assets of that trust (but, for the avoidance of doubt, may apply its right of indemnity out of the assets of the trust to any of its liabilities including those arising in relation to this Agreement);
 - S8.1.3 it must not retire, resign nor by act or omission effect or facilitate a change to its status as the sole trustee of that trust; and
 - S8.1.4 it represents and warrants that:
 - (a) such trust has been duly established and currently exists;
 - (b) it is the duly appointed, current and only trustee of that trust;
 - (c) as trustee it has the power to enter into and perform its obligations under this Agreement;
 - (d) it has an unqualified right of indemnity out of the assets of that trust in respect of its obligations;

- (e) it either has no conflict of interest affecting it as trustee (and/or its directors, if any) or such conflict is otherwise overcome by the terms of the relevant trust Agreement; and
- (f) no breach of the relevant trust Agreement exists or would arise.

*Does an Industry Participation Plan (Standard or Tailored) apply to this contract? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S9. INDUSTRY PARTICIPATION POLICY

- S9.1 The Supplier must implement the Supplier's Industry Participation Plan ("**IPP**") approved by the Industry Advocate ("**IA**").
- S9.2 The Supplier must provide an Industry Participation Report ("**IPP Report**") in respect of each Industry Participation Reporting Period within two weeks of the end of each period.
- S9.3 An Industry Participation Reporting Period is:
 - S9.3.1 the period between the Commencement Date and the date six (6) months after the Commencement Date;
 - S9.3.2 each subsequent six (6) month period during the Term;
 - S9.3.3 if the Agreement ends on a date that is not an anniversary of the Commencement Date or an anniversary of the date in Special Condition S9.3.2, the period from the conclusion of the preceding Industry Participation Reporting Period until the date of termination or expiry of the Agreement;
 - S9.3.4 for short-term projects of strategic importance to the State the period notified by the IA to the Supplier in writing; and
 - S9.3.5 where the Term is for a period less than six (6) months, the entire Term.
- S9.4 The Supplier must attend any meeting scheduled by the IA during the Term to review how the IPP is being implemented and advanced, and for this purpose, the Supplier must provide all information reasonably requested by the IA. The IA must give the Supplier not less than ten (10) Business Days' notice of any such meeting.
- S9.5 The IA may, by written notice require that the Supplier within a reasonable time specified in the notice, provide information or documents to enable the Industry Advocate to assess the Supplier's compliance with this special condition.
- S9.6 If the IA reasonably believes that the Supplier is not complying with the requirements of this special condition, the IA may by notice in writing direct that the supply comply with those requirements.
- S9.7 Upon receipt of the notice, if the Supplier is of the opinion that its noncompliance is reasonable and justified, the Supplier may provide a response to the Industry Advocate outlining that opinion and the reasons for it.
- S9.8 The Supplier's failure to comply, in whole or in part, with the commitments contained within the IPP will be a factor taken into account in the award of future contracts for the Government of South Australia.
- S9.9 In this clause, "Industry Advocate" or "IA" means the person from time to time appointed to the position of Industry Advocate under s. 5 of the *Industry Advocate Act 2017*.

*Is a parent company guarantee required to secure the obligations of the Supplier under the Agreement? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S10. PERFORMANCE GUARANTEE

- S10.1 The Supplier must provide a performance guarantee from **<insert name of related corporation of the Supplier>** ("**Guarantor**"), pursuant to which the Guarantor undertakes to fulfil the Supplier's obligations under this Agreement in the event of default by the Supplier.

*Is a bank guarantee required to secure the obligations of the Supplier under the Agreement? If **Yes** insert the following clause as a Special Condition in Attachment 4. If **No** proceed to next question.*

S11. BANK GUARANTEE

- S11.1 The Supplier must arrange for a bank or financial institution acceptable to the Government Party, and with a branch in Adelaide, to give the Government Party an undertaking in the form of an unconditional and irrevocable financial undertaking for **<insert amount>** ("**Financial Undertaking**").
- S11.2 All charges incurred in obtaining and maintaining the Financial Undertaking must be borne by the Supplier.
- S11.3 The Supplier must advise the Government Party (as soon as practicable and in any event within five (5) Business Days), if at any time during the Term, the Financial Undertaking required by this clause ceases to have effect for any reason.
- S11.4 Subject to its rights to have recourse to the Financial Undertaking, the Government Party must release the balance of the Financial Undertaking then held within three (3) months after the expiration of the Agreement.
- S11.5 If the Supplier commits any breach of this Agreement or the Government Party is otherwise entitled to terminate this Agreement, then the Government Party is entitled to exercise its rights in relation to the Financial Undertaking and require payment under the Financial Undertaking to the extent it considers necessary to rectify the relevant breach and to cover any liability of the Supplier to the Government Party in respect of that breach.
- S11.6 The Government Party's entitlement to exercise its rights in relation to the Financial Undertaking is not subject to any impediment by reason of the fact that the Parties are engaged in a dispute resolution procedure.
- S11.7 The provision of a Financial Undertaking for the Government Party in accordance with this clause is a condition precedent to this Agreement, and the parties have no rights or obligations under this Agreement unless that condition has been either satisfied, or waived by the Government Party, within one (1) month of the execution of this Agreement or such later date as determined by the Government Party. Immediately on satisfaction of this condition precedent, the Agreement comes into full force and effect and binds the Parties.
- S11.8 This condition precedent is for the sole benefit of the Government Party.

*Are the Services to be provided to children? If **Yes** the following clauses may be inserted as special conditions in Attachment 4. If **No** proceed to next question.*

S12. CHILD SAFETY

S12.1 Additional Definitions

S12.1.1 **Child Safety Act** means the *Children and Young People Safety Act 2017* (SA);

S12.1.2 **Prescribed Offence** has the meaning given in the Prohibited Persons Act;

- S12.1.3 **Prescribed Position** has the meaning given in the Prohibited Persons Act;
- S12.1.4 **Presumptive Disqualification Offence** has the meaning given in the Prohibited Persons Act;
- S12.1.5 **Prohibited Person** has the meaning given in the Prohibited Persons Act;
- S12.1.6 **Prohibited Persons Act** means the *Child Safety (Prohibited Persons) Act 2016 (SA)*;
- S12.1.7 **Prohibition Notice** has the meaning given in the Prohibited Persons Act;
- S12.1.8 **Working with Children Check** has the meaning given in the Prohibited Persons Act.

S12.2 Fundamental Term

Despite any other clause, the Parties acknowledge that the rights and obligations under this clause are fundamental to this Agreement.

S12.3 No Prohibited Persons

S12.3.1 The Supplier must:

- (a) comply with the obligations of employers under Division 2 Part 4 of Prohibited Persons Act in relation to Supplier Personnel that are employed in Prescribed Positions and delivering Services;
- (b) as required by the Government Party's Contract Manager, verify that a Working with Children Check has been conducted in relation to the Supplier Personnel in Prescribed Positions that are delivering Services; and
- (c) subject to clause S12.3.3, immediately procure the ongoing exclusion of any Supplier Personnel that are employed in Prescribed Positions from involvement in delivery of the Services, if they are found to be a Prohibited Person.

S12.3.2 Unless such notification causes the Supplier to be in breach of the Prohibited Persons Act the Supplier must promptly notify the Government Party's Contract Manager if it becomes aware that Supplier Personnel who are involved in the delivery of the Services:

- (a) is a Prohibited Person; or
- (b) is the subject of any allegation, arrest, charge or conviction for a Prescribed Offence or a Presumptive Disqualification Offence (whilst not being the subject of a Prohibition Notice),

S12.3.3 The Supplier will not be in breach of its obligation under clause S12.3.1(c) where the Supplier has complied with its obligations under the Prohibited Persons Act and the central assessment unit has failed to provide notification to the Supplier in accordance with section 41(1) of the Prohibited Persons Act.

S12.3.4 As often as reasonably requested by the Government Party, The Supplier must give the State evidence satisfactory to the State of The Supplier's compliance with the obligations of employers under Division 2 Part 4 of Prohibited Persons Act.

S12.4 Imposing Obligations on Supplier Personnel

The Supplier must ensure that:

S12.4.1 Supplier Personnel involved in the delivery of Services are aware of and act in a manner consistent with the provisions of this clause at all times; and

S12.4.2 Supplier Personnel (not being The Supplier) immediately inform the Supplier if the Supplier Personnel is the subject of any allegation, arrest, charge or conviction for a Prescribed Offence.

S12.5 Child Safe Environment

In addition to all other obligations under this Agreement, where the Supplier is an organisation to which section 114 of the Child Safety Act applies, the Supplier must:

- S12.5.1 (**policies and procedures**): have in place appropriate policies and procedures to ensure that, as required by the Child Safety Act:
- (a) safe environments for children and young people are established and maintained; and
 - (b) appropriate reports of child abuse and neglect are made;
- S12.5.2 (**lodge statement**): lodge the statement required by section 114 of the Child Safety Act about the Supplier's child safe policies and procedures with the Chief Executive of the Department for Child Protection, or such other government agency as the State or South Australian Government publicly notifies (**Successor Children's Protection Agency**), within 10 Business Days after putting in place those policies and procedures; and
- S12.5.3 (**response**): respond, as soon as reasonably practicable (and in any event within 10 Business Days), to any written request by Department for Child Protection, Successor Children's Protection Agency or the Government party for information relating to the Supplier's compliance with the requirements of this clause S13.

S12.6 Compliance with Child Safety Practices and Procedures

The Supplier must at all times comply with any practices, policies and procedures in relation to child safe environments notified in writing by the Government Party's Contract Manager.

S12.7 Effect of Non-Compliance

If the Supplier does not strictly, fully and immediately comply with any or all of its obligations under clauses S13.3.1 and S13.3.2, then such failure to comply will constitute a fundamental breach of the Agreement entitling the Government Party to terminate the agreement immediately upon giving notice in writing to the Supplier.

*Are Services to be provided and does your agency have a respectful behaviours policy? If **Yes** insert the following clauses as special conditions in Attachment 4.*

S13. RESPECTFUL BEHAVIOURS

- S13.1 The Supplier acknowledges the Government Party's zero tolerance towards men's violence against women in the workplace and the broader community.
- S13.2 The Supplier agrees that, in performing the Services, the Supplier's Personnel will at all times:
- S13.2.1 act in a manner that is non-threatening, courteous and respectful; and
 - S13.2.2 comply with any instructions, policies, procedures or guidelines issued by the Government Party regarding acceptable workplace behaviour.
- S13.3 If the Government Party believes that the Supplier's Personnel are failing to comply with the behavioural standards specified in this clause, then the Government Party may in its absolute discretion:
- S13.3.1 prohibit access by the relevant Supplier's Personnel to the Government Party's premises; and
 - S13.3.2 direct the Supplier to withdraw the relevant Supplier's Personnel from providing the Services.

*Does this procurement involve the delivery of services where the sharing of information may assist in preventing harm or threats to the safety and wellbeing of vulnerable people (including children) and where such sharing is permitted by PC012 Information Privacy Principles (IPPS) Instructions? If **Yes** insert the following clause as a Special Condition in Attachment 4.*



S14. **INFORMATION SHARING**

- S14.1 "ISG" means the Government of South Australia's updated Information Sharing Guidelines for Promoting Safety and Wellbeing strategy endorsed by Cabinet in 2008 and 2013, as amended from time to time.
- S14.2 To the full extent permitted by law the Supplier agrees to share information in accordance with the ISG.
- S14.3 The Supplier will, in consultation with a representative from the Department of the Premier and Cabinet, develop an ISG appendix for the Supplier ("Supplier's ISG Appendix"), as prescribed by the ISG (<https://www.dpc.sa.gov.au/responsibilities/information-sharing-guidelines/about-the-information-sharing-guidelines>).
- S14.4 If requested by the Minister, the Supplier will provide written information detailing the Supplier's compliance with the ISG including details of the Supplier's progress in developing and implementing the Supplier's ISG Appendix.
- S14.5 The Parties acknowledge that this Agreement constitutes a 'State contract' for the purpose of the Privacy Act 1998 (Commonwealth).

Has a supplier requested that the contract includes a Force Majeure clause or is there a genuine possibility that the supply will be affected by a Force Majeure event such as COVID-19? If Yes insert the following clause as a Special Condition in Attachment 4. If No proceed to next question.

Please note that as this clause has the effect of suspending performance of a party's obligations under a contract, a party must be genuinely unable to perform its obligations and must have done everything possible to mitigate the effects of the Force Majeure. If you are uncertain as to whether or not to include a Force Majeure clause in a contract please contact the Crown Solicitor's Office.

S15. FORCE MAJEURE

S15.1 "Force Majeure" means the following events or circumstances:

S15.1.1 fire, flood, earthquake, elements of nature, acts of God, malicious damage, epidemic, explosion, sabotage, riot, civil disorder, rebellion or revolution; or

S15.1.2 any change of law, executive or administrative order or act of either general or particular application of any government, or of any official acting under the authority of that government, prohibition or restriction by domestic or foreign laws, regulations or policies, quarantine or customs restrictions,

which the affected party:

S15.1.3 did not cause; and

S15.1.4 cannot prevent, control or influence; and

S15.1.5 the effect of which prevents that party from complying with any of its material obligations under this Agreement.

S15.2 The affected party's obligations directly affected by a Force Majeure and any corresponding entitlement of the other party will be suspended to the extent and for so long as the performance of the affected party's obligations are prevented by the Force Majeure.

S15.3 The affected party must as soon as it becomes aware of the Force Majeure notify the other party in writing providing details of:

S15.3.1 the nature and extent of the obligations affected;

S15.3.2 if known, the expected effect of the Force Majeure on the other party;

S15.3.3 action that the affected party has taken or will take to avoid or mitigate the expected effect of the Force Majeure; and

S15.3.4 details of insurance policies on which the party may be able to rely to compensate or mitigate the financial effect of the Force Majeure.

S15.4 The affected party must:

S15.4.1 use its best endeavours to prevent, avoid, remedy, work around or overcome the effect of the Force Majeure as quickly as possible through prudent management processes, policies and precautions, including the use of alternative resources, the procuring of goods or services from another source, and work around plans;

S15.4.2 keep the other party informed of the continuation and expected duration of the Force Majeure and of measures taken to comply with this clause; and

S15.4.3 recommence performance of its obligations as soon as possible without delay after the Force Majeure ceases to affect the affected party's performance under this Agreement.

S15.5 If a Force Majeure causes the affected party to allocate limited resources between or among its other customers, the affected party must not place the other party lower in priority to any other similarly affected customer of the affected party.

S15.6 During any period in which the affected party is not performing obligations because of a claimed Force Majeure, the other party may (but need not) make alternative arrangements for the performance, whether by another person or otherwise, of any obligation which the affected party is not performing without incurring any liability to the affected party.



- S15.7 If the affected party is materially unable to perform its obligations under this Agreement by reason of a Force Majeure for a continuous period of [*insert months*] or a cumulative period of [*insert months*], then the other party may terminate this Agreement by written notice without prejudice to the terminating party.

Example Only