



VET (WA) MINISTERIAL CORPORATION

PURCHASE OF TRAINING SERVICES

PROCESS TERMS AND CONDITIONS

July 2019 (Version 1.1)

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1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

Terms not otherwise defined but which have a defined meaning in the General Provisions, shall have the same meaning when used in the Request unless the context requires otherwise.

In the Request, unless the context otherwise requires:

Addendum means modifications or clarifications to the Request as issued by the Corporation pursuant to clause 7 and which by virtue of clause 7 are deemed to form part of the Request.

Business Day means working day but not a weekend or public holiday in Perth, Western Australia.

Change in Control means, in respect of the Respondent, a change in the person or persons who, directly or indirectly, ultimately Control the Respondent.

Claim means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity).

Closing Time means the date and time set out as the closing time on the front page of the Request.

Confidential Information means information in the Request or otherwise in connection with the Procurement Process that:

- a) is by its nature confidential; or
- b) is specified by the Corporation to be confidential, including any information specified to be confidential in the Request; or
- c) the Respondent knows or ought to know is confidential

Consequential Loss means indirect or special loss, loss not likely to arise naturally or in the usual course of things, the cost of capital or other financing costs, all loss of profit, income, business opportunity, goodwill or reputation, and any other loss or liability which would fall within the second limb of losses referred to in *Hadley v Baxendale* (1854) 9 Ex 341.

Contract refers to the Contract between the Corporation and the Service Provider that comprises of the documents listed in clause 2.2 of the General Provisions.

Contract Award means the date on which the Corporation and the successful Respondent enter into the Contract

Contract Details means the contract details identified as such in the Request and for the avoidance of doubt includes the schedules to those contract details.

Control means with regard to an entity:

- a) the legal, financial or equitable ownership, directly or indirectly, of 50 percent or more of the share capital (or other ownership interest, if not a corporation limited by shares) of the entity;
- b) control or influence of, or having the capacity to control or influence, the composition of the board or other decision-making body of the entity, or of decision making (directly or indirectly) in relation to the financial and operating policies of the entity, whether or not the control or influence is based on statutory, legal or equitable rights and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock of that entity or otherwise; or
- c) effective control of the entity.

Corporation Representative means a person described as such in the Request or, if a Corporation Representative has been replaced under clause 15.4.

Cost includes loss, cost, expense and liability.

Director has the meaning given in the *Corporations Act 2001* (Cth).

Disclosure Requirements means the requirements (if any) referred to as such in the Request.

Evaluation Criteria means the criteria for evaluation of Responses set out in the Request.

General Provisions means the General Provisions (Conditions of Contract) for the Purchase of Training Services, January 2020 (Version 1.1)

Mandatory Requirements means the requirements (if any) referred to as such in the Request.

Offer Validity Period means the period specified as such in the Request, commencing from the Closing Time.

Offered Service Payment means the proposed service payment specified in the contract Schedule(s).

Officer has the meaning given in the *Corporations Act 2001* (Cth).

Preferred Respondent means a Respondent selected by the Corporation as a preferred Respondent.

Price Schedule means the service pricing information submitted by the Respondent (where applicable) as part of its offer in the online Response.

Process Terms and Conditions means the terms and conditions for the Procurement Process set out in the Request (including, for the avoidance of doubt, in this Process Terms and Conditions Document).

Process Terms and Conditions Document means this document.

Procurement Process means the procurement process set out in the Request, or as varied by the Corporation.

Public Authority means any Commonwealth or State government department, authority or agency, statutory body, or regulatory or investigative body or agency (whether any of the above is a corporation or not).

Registered Training Organisation (RTO) means a Training Provider registered with the Australian Skills Quality Authority (ASQA), Training Accreditation Council (TAC), or Victorian Registration and Qualifications Authority (VRQA).

Requirement means the requirement for services the subject of the Request.

Respondent means the entity named as the Respondent in the Response and where the context permits or requires reference to the Respondent includes the Respondent's Officers, agents, advisers, consultants, contractors, nominees, licensees and employees and volunteers used by the Respondent.

Response means online Response to the Request which contains details of the Training Services offered by the Respondent.

RTONet means the electronic system that can be accessed by an RTO to gain information, which includes Registration scope, training product information and lodge applications.

Selection Criteria means the criteria (if any) referred to as such in the Request.

Service Provider's Obligations means the obligations that will be owed by the successful Respondent (if Contract Award is achieved) under or in connection with the Contract.

Site means the proposed site (if any) for the Requirement.

Specified Personnel means any individual named by the Respondent in responding to the Selection Criteria.

State means the State of Western Australia.

Tenders WA means the Western Australian Government electronic tender lodgement system maintained at www.tenders.wa.gov.au.

Term means, subject to clauses 3.2 and 25 of the General Provisions, the period specified as such in the Contract, commencing on the Contract Commencement Date, and includes any extension thereof.

Workshop means a workshop, interview, meeting, question and answer session or briefing between the Corporation and one or more Respondents.

1.2 Interpretation

Clause 1.3 of the General Provisions applies.

1.3 Exclusions

If any of the Process Terms and Conditions purports to exclude liability for a particular matter, such exclusion only operates to the extent permitted by law.

1.4 Status of this document

This Process Terms and Conditions Document is deemed to be incorporated in, and to form and to be read as part of, the Request and to bind the Corporation and the Respondent.

2 RESPONDENT'S PARTICIPATION IN THE PROCUREMENT PROCESS

By lodging a Response, the Respondent agrees:

- a) To comply with the Request (including the Process Terms and Conditions) for the duration of the Procurement Process.
- b) That it participates in the Procurement Process at its own risk.

3 GENERAL

3.1 Corporation

The Corporation means VET (WA) Ministerial Corporation.

3.2 Lodgement of the Response

If the Respondent lodges a Response through RTONet, the Respondent agrees that:

- a) In respect of a lodged Response:
 - i. Receipt of the Response will be determined by the date and time shown as recorded in the RTONet database; and
 - ii. Lodgement of electronic files may take time and the Respondent must make its own assessment of the time required for full transmission of the Response.
- b) If the electronic copy of the Response contains a virus then, despite any disclaimer made by the Respondent in respect of viruses, the Respondent must pay to the Corporation all Costs incurred by the Corporation arising from, or in connection with, the virus.
- c) The Corporation will not be responsible in any way for any loss, damage or corruption of the electronic copy of the Response.
- d) If the electronic copy of the Response becomes corrupted, illegible or incomplete as a result of transmission or storage, then the Corporation may request the Respondent to provide another copy electronically.
- e) If the Corporation 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 the Corporation;
 - ii. provide a statutory declaration that the copy is a true copy of the Response which was originally submitted by the Respondent and that no changes to the Response have been made.

3.3 Late Lodgement

Any Response which is not lodged before the Closing Time will be excluded from consideration unless the Respondent can provide conclusive evidence of mishandling of its Response.

4 CORPORATION'S RIGHTS

4.1 Rights

The Respondent acknowledges and agrees that the Corporation reserves the right at any time to:

- a) Cancel, suspend or change the Request or any aspect of the Procurement Process or to take such other action as the Corporation considers appropriate in relation to the Procurement Process or the Request.
- b) Require additional information from the Respondent in which case the Respondent must provide such information within a reasonable time of the Corporation's request.
- c) Refuse to consider or evaluate the Response or terminate the Respondent's participation in the Procurement Process if:
 - i. the Respondent breaches the Process Terms and Conditions; or
 - ii. the Respondent's Response is materially incomplete or fails to properly address or meet to the Corporation's satisfaction the Evaluation Criteria or any other requirement contained in the Request; or
 - iii. the Respondent fails to comply with a direction or requirement of the Corporation under the Request.
- d) Decline all Responses.
- e) In evaluating the Response have regard to:
 - i. the Corporation's knowledge of, previous experience and dealings with the Respondent;
 - ii. without limiting clause 4.1(e)(i), information about the past or current performance of the Respondent under any other contract, arrangement or dealing between the Respondent and a Public Authority; and
 - iii. information concerning the Respondent which is in the public domain or which is obtained by the Corporation through investigations or howsoever.
- f) Consider and accept any Response that does not comply with the requirements of the Request, other than a Response which:
 - i. is not lodged before the Closing Time; or
 - ii. fails to satisfy Mandatory Requirements; or
 - iii. fails to meet any requirement when the Request expressly states that a Response which fails to fulfill or meet that requirement will be excluded from further consideration.

- g) Change the identity of the entity or person entering into the Contract on behalf of the Corporation.
- h) Allow a Respondent to undergo a Change of Control or other change in structure with or without notifying the other Respondents.
- i) Publish the names of the Respondent and any Preferred Respondent.
- j) Waive any requirement or obligation under the Request.

The Corporation is not required to give reasons for the exercise of any of the Corporation's rights in accordance with this clause 4.1.

4.2 Preferred Respondent

The Respondent acknowledges and agrees that:

- a) The Corporation may select, but is not obliged to select, one or more Respondents as a Preferred Respondent.
- b) The selection of a Preferred Respondent does not constitute an acceptance of the Response submitted by the Preferred Respondent or otherwise confer any rights on a Preferred Respondent and is without prejudice to the right of the Corporation to decline to enter into the Contract, or to enter into the Contract with the Respondent or a competing Respondent.
- c) the Corporation may:
 - i. choose to negotiate any aspect of a Preferred Respondent's Response or another Respondent's Response; or
 - ii. request a Preferred Respondent or another Respondent to provide a performance guarantee or some other form of security in connection with the Contract.
- d) The Corporation may at any time and for any reason terminate or suspend any negotiations with a Preferred Respondent and, without limiting its rights under the Process Terms and Conditions, accept that Respondent's original Response, or commence negotiations with any other Respondent or appoint any other Respondent as a Preferred Respondent.

4.3 The Corporation's Discretion

- a) Whenever the Corporation (including when acting through the Corporation Representative) has any rights or powers under the Request, including the provision of consents and approvals, the Corporation:
 - i. may exercise its right or power in its sole and absolute discretion;
 - ii. is not obliged to give reasons; and
 - iii. may impose such conditions as it determines.
- b) The Respondent agrees that any failure by it to comply with or perform a condition imposed will constitute a breach of the Procurement Process.

5 LEGAL RELATIONSHIP

The Corporation and the Respondent acknowledge and agree that:

- a) The Request does not constitute an offer to enter into a Contract.
- b) The Request constitutes the entire agreement of the parties in respect of the Procurement Process.
- c) To the maximum extent permitted at law any obligations and liabilities which may otherwise be implied or imposed on the Corporation and the Respondent under contract or otherwise at law, in equity, by statute or otherwise are excluded.
- d) Subject to clause 5(f) only, neither party is liable to the other in respect of any Consequential Loss arising out of or in connection with a breach of the Request or the Procurement Process.
- e) Subject to clause 5(f) only, and without limiting clause 5(d), to the maximum extent permitted at law:
 - i. the liability of the Corporation to the Respondent arising out of or in connection with a breach by the Corporation of the Request, the Procurement Process is limited to the reasonable [legal and other] professional costs (excluding internal costs) directly incurred by the Respondent in preparing and submitting its Response; and
 - ii. the liability of the Respondent to the Corporation arising out of or in connection with a breach by the Respondent of the Request or the Procurement Process generally is limited to the reasonable professional costs (legal or other, but excluding internal costs) directly incurred by the Corporation in conducting the Procurement Process.
- f) The limitations in clauses 5(d) and 5(e) do not apply to a breach of clause 11 or the operation of clause 15.1.

6 INFORMATION FROM THE CORPORATION

No statement or representation made by or on behalf of the Corporation (whether at a Workshop or otherwise) may be relied upon by the Respondent unless the statement or representation is confirmed in writing and it is reasonable for the Respondent to so rely.

7 ADDENDA

7.1 Issue of Addenda

The Respondent agrees that:

- a) At any time during the Procurement Process the Corporation may, for any reason (but without being obliged to do so), amend the Request by issuing an Addendum.
- b) Any Addenda issued shall be deemed to be incorporated in, and to form and to be read as part of, the Request.

- c) The Corporation will not be liable for any Costs incurred by the Respondent as a consequence of any such Addenda.
- d) The Respondent must prepare its Response to take into account and reflect the content of any Addendum.

7.2 Request Only Amended or Supplemented by Addenda

The Respondent agrees that the Request may only be amended or supplemented by Addenda issued under clause 7.1.

8 PROTOCOL FOR ENQUIRIES, CLARIFICATION QUESTIONS

8.1 Disclosure of Information

- a) Subject to clause 8.1(b), the Corporation reserves the right to disclose:
 - i. enquiries or clarification questions made or asked by the Respondent;
 - ii. information provided by the Corporation to the Respondent, to other Respondents in any manner the Corporation considers appropriate, including circulating written enquires or clarification questions of a general nature, together with the Corporation's response, to the Respondent and all competing Respondents.
- b) If the Respondent is of the view that an enquiry or clarification question it proposes to make or ask (whether during a Workshop or otherwise) is not of a general nature, but relates to proprietary aspects of its Response, the Respondent must identify that enquiry or question as such when making or asking it. If, in the opinion of the Corporation:
 - i. the enquiry or question is not proprietary; the Corporation Representative will advise the Respondent who has the option to withdraw the enquiry or question. If the Respondent continues to request a response to the enquiry or question, the enquiry or question and the Corporation's response may be disclosed to all competing Respondents in accordance with clause 8.1(a) above; or
 - ii. the enquiry or question does relate to proprietary aspects of the Response, the Corporation's response to the enquiry or question will be provided only to the Respondent.

8.2 Corporation requests clarification

The Corporation may, but is not obliged to:

- a) Request that the Respondent provide written clarification in respect of any aspect of its Response.
- b) Conduct Workshops with the Respondent, either alone or with other Respondents, to discuss the Request or the Response or prospective Response or to otherwise request clarification or other information.

9 RESPONDENT'S REPRESENTATIONS AND WARRANTIES

By lodging a Response the Respondent represents and warrants that:

- a) Its Response and any subsequent information submitted to the Corporation pursuant to the Request is true and correct and in no way misleading or deceptive.
- b) It has examined all information and documents which are relevant to the Request.
- c) It has not paid or received and will not pay or receive any secret commission in respect of the Request.
- d) It has not entered and will not enter into any unlawful arrangement with any other person in respect of the Request.
- e) It has not sought and will not seek to influence any decision in respect of the Request by improper means.

10 STATUS OF THE REQUEST, RESPONSE AND RESPONDENT

10.1 Material changes in circumstances or status of the Respondent

- a) The Respondent must notify the Corporation promptly in writing, providing details:
 - i. of any material change;
 - to any of the information contained in its Response; or
 - to any additional information submitted to the Corporation pursuant to the Request;
 - ii. of any event which may affect or have a material impact on its financial position or capacity to perform its obligations;
 - iii. of any circumstances which may affect the truth, completeness or accuracy of any of the information provided in, or in connection with, the Request; or
 - iv. if, after Lodgement of its Response:
 - there is a change in the structure of the Respondent or there is otherwise a Change in Control of the Respondent; or
 - in respect of a Respondent which consists of a consortium, there is a change of membership of the consortium.
- b) Upon receipt of any written notification pursuant to clauses 10.1(a) (i) to (iv), the Corporation reserves the right to assess the change and terminate the Respondent's further participation in the Procurement Process, or to invite the Respondent to amend its Response accordingly.

10.2 No Amendment

- a) The Respondent may not amend a Response (unless invited or requested to do so by the Corporation) after the Closing Time.
- b) Without limiting the Corporation's rights to invite or request the Respondent or a competing Respondent to amend its Response, the Respondent acknowledges that the Corporation reserves the right to:
 - i. require the Respondent or a competing Respondent to withdraw any part of its Response which specifies or results in a departure from the requirements set out in the Request at any time (including prior to the appointment of any Preferred Respondent); and
 - ii. allow the Respondent or a competing Respondent to correct patent, typographical or arithmetic errors in a Response at any time (including prior to the appointment of any preferred Respondent),

without allowing or requiring any other Respondent to do so.

10.3 No requirements to return

- a) The Respondent agrees that:
 - i. each Response is the absolute property of the Corporation; and
 - ii. the Corporation will not be required to return the Response or any documents, materials, articles or information lodged by the Respondent as part of, or in support of, the Response.
- b) The Respondent agrees to grant the Corporation an irrevocable, perpetual, royalty free, non-exclusive licence to disclose, copy, use, adapt, modify, sublicense or reproduce the whole or any portion of the Response for the purposes of evaluation and clarification of the Response and in respect of a Preferred Respondent for the finalisation of the Contract.

11 CONFIDENTIALITY AND DISCLOSURE BY RESPONDENT

11.1 Confidential Information

- a) The Respondent must keep Confidential Information confidential. The Respondent must not disclose, use, reproduce or distribute to any person the Confidential Information except:
 - i. where necessary and only to the extent necessary for the purpose of preparing and lodging a Response and otherwise participating in the Procurement Process;
 - ii. as authorised in writing by the Corporation;
 - iii. to the extent that the Confidential Information is public knowledge, other than because of a breach of any obligation by the Respondent;
 - iv. as required by any law, judicial or parliamentary body or public authority; or

- v. when required and only to the extent required, to the Respondent's professional advisers, and the Respondent must ensure that professional advisers are bound by the confidentially obligations imposed on the Respondent under this clause 11.1(a).
- b) The Respondent must immediately notify the Corporation if it becomes aware of a suspected or actual unauthorised disclosure, copying or use of the Confidential Information.

The Respondent must ensure that each person to whom it discloses the Confidential Information (except a person to whom disclosure is legally required) including any Officers, agents, advisers, consultants, contractors, nominees, licensees, employees and volunteers of the Respondent, complies with the obligations in clauses 11.1(a) and 11.1(b).

11.2 Survives Termination

The obligations in clause 11.1 are continuing obligations and survive expiration or termination of the Respondent's participation in the Procurement Process.

12 CORPORATION'S PUBLIC DISCLOSURE AND FREEDOM OF INFORMATION

12.1 Corporation's public disclosure obligations

The Respondent agrees to:

- a) The disclosure by any person to the Corporation of information concerning the Response, or the Respondent, for the purpose of the Corporation exercising its rights set out in the Request or at law.
- b) The Corporation disclosing any aspect of the Response or any other information provided by the Respondent to the Corporation during the Procurement Process to enable the Corporation to meet public disclosure obligations the Corporation or the Western Australian Minister for Training ("Minister") may have;
 - i. under any current or future legislation;
 - ii. under any current or future policy of the State or the Corporation;
 - iii. in the course of official duties of the Minister responsible for the Corporation;
 - iv. to satisfy requirements of parliamentary accountability;
 - v. under annual reporting obligations of the Corporation; and
 - vi. to satisfy any other recognised public requirement.
- c) The Corporation publicly disclosing information in relation to the Procurement Process, the Request or the details of the Respondent, including the terms and conditions of the Contract.

12.2 Freedom of Information Act and other legislation

- a) The Respondent agrees and acknowledges that its Response or information are subject to the *Freedom of Information Act 1992 (WA)* and may also be disclosed by the Corporation or the State under a court order or upon request by Parliament or any committee of Parliament or if otherwise required by law.
- b) The Respondent releases the Corporation and the State from all liability whatsoever for any loss, injury, damage, liability, costs or expense resulting from the disclosure of its Response or information, other than the Response, submitted by the Respondent in response to, or in connection with, the Request, under clause 12 by the Corporation.
- c) The Respondent agrees and acknowledges that the powers and responsibilities of the Auditor General for the State under the *Financial Management Act 2006 (WA)* and the *Auditor General Act 2006 (WA)* are not limited or otherwise affected by the Request.
- d) The Respondent releases the Corporation from all liability whatsoever for any loss, injury, damage, liability, costs or expense resulting from the disclosure of its Response or information, other than the Response, submitted by the Respondent in response to, or in connection with, the Request, under clause 12 by the Corporation.

13 PROBITY

13.1 Inducement

The Respondent must not offer any incentive to, or otherwise attempt to, influence any of the persons who are either directly or indirectly involved in the Procurement Process, or in the awarding of any subsequent contract. Without limiting the generality of this obligation, the Respondent must not:

- a) Without prior written consent of the Corporation directly or indirectly approach or communicate with any officer or employee of the Corporation or the State having any connection or involvement with the Request, with respect to:
 - i. an offer of employment; or
 - ii. availability of employment;

with the Respondent or any related entity; or

- b) Directly or indirectly offer a bribe, gift or inducement to any officer or employee of the Corporation in connection with the Request.

13.2 Probity checks

Without limiting the Corporation's rights pursuant to clause 4.1, the Respondent consents to the Corporation undertaking probity checks in respect of the Respondent which may include:

- a) Investigations into organisational structure, business and credit history.
- b) Prior contract compliance in respect of other supplies of services.
- c) Police checks or any checks for any criminal records or pending charges.

- d) Research into any relevant activity that is, or might reasonably be expected to be, the subject of regulatory investigation.
- e) Investigations into other Government contracts for publically funded services currently or previously held by the Respondent.

13.3 Conflict of Interest

The Respondent must:

- a) Disclose in the Response submitted by the Respondent any circumstances, arrangements or understandings which constitute, or may reasonably be perceived to constitute, an actual or potential or perceived conflict of interest with either the Respondent's obligations under the Request or the performance of the Contract (if awarded) by the Respondent.
- b) Provide details of its proposed strategy for managing any actual, potential or perceived conflict of interest disclosed in its Response pursuant to clause 13.3(a).
- c) Not place itself in a position which may, or will give rise to an actual, or a potential or perceived conflict of interest during the Procurement Process.
- d) Otherwise notify the Corporation promptly in writing upon becoming aware of any actual or perceived circumstances, arrangements or understandings which constitute, or may reasonably be considered to constitute, an actual or potential or perceived conflict of interest with the Respondent's obligations under the Request (including in respect to the Contract, if awarded).

To the extent that the Corporation directs the Respondent to take particular action in respect to an actual or potential or perceived conflict of interest, the Respondent must comply with such a direction. If the Respondent is unable or unwilling to comply with any such direction, the Corporation may exclude the Respondent from further participation in the Procurement Process.

14 COLLUSION

The Respondent must not engage in any collusive tendering, anti-competitive conduct or any other similar conduct with any competing Respondent or other person in relation to the Procurement Process.

15 MISCELLANEOUS

15.1 Site inspections

- a) The Corporation Representative may give permission for the Respondent to attend the Site inspection.
- b) The Respondent must comply with any protocols, procedures and requirements notified by the Corporation prior to or during any inspection.
- c) The Respondent releases the Corporation from any Claim in negligence or howsoever, that the Respondent may have arising out of or relating to any Site.

- d) The Respondent indemnifies the Corporation from and against any Costs incurred by the Corporation arising out of or relating to any Site inspection to the extent caused by any act or omission, including any negligence, of the Respondent.

15.2 Waiver

- a) Subject to the express provisions of the Request, if the Corporation fails or delays in exercising or enforcing any right or remedy under the Request, it will not preclude or amount to a waiver of any further exercise or enforcement of that right or remedy, or of any other right or remedy under the Request or provided by law.
- b) If the Corporation fails or delays in exercising or enforcing any right or remedy under a similar document to the Request against any member of a competing Respondent, the Respondent will not have or make any Claim against the Corporation in respect of such failure or delay.

15.3 Actions of Corporation

Any matter which may be done by the Corporation may be done by an authorised officer of the Corporation, including the Corporation Representative.

15.4 Replacement of Corporation Representative

The Corporation may at any time:

- a) Replace one or more of the persons listed as the Corporation Representative.
- b) Vary or terminate the appointment of the Corporation Representative.
- c) Appoint any other person to act as the Corporation Representative.

END OF PROCESS TERMS AND CONDITIONS