

ESTATE WORKS PROGRAM (EWP) contract templates

2024 SUITE REFRESH

APRIL 2024

Table of Contents

[Updated Structure of the EWP Contract Template Framework 2](#_Toc163226002)

[Overview of Amendments to the Medium Works Tender Documents 3](#_Toc163226003)

[Overview of Amendments to the Medium Works Contract 7](#_Toc163226004)

[Overview of Amendments to the Medium Works Ancillary Documents 12](#_Toc163226005)

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Updated Structure of the EWP Contract Template Framework

The EWP contract template framework has been streamlined such that it will comprise:

1. a revised Medium Works package comprising a Disclaimer and Confidentiality Agreement, Tender Documents, Conditions of Contract, proforma notices and collateral documents; and
2. a revised Minor Works package comprising a Request for Quotation and Contract in a single document.

As further detailed below, the EWP Medium Works package has been the subject of a significant 'refresh'. The templates now, subject to EWP-specific requirements, largely align with the Medium Works templates forming part of the Capital Facilities and Infrastructure (**CFI**) Branch's 'Suite of Facilities Contracts'. As part of the EWP review process, the Commonwealth has incorporated many of the aspects of the CFI Suite template review that was undertaken in 2022/23, including to reflect feedback from industry.

The EWP Minor Works package will also be the subject of a significant refresh, with updated templates to be made available following publication of the revised EWP Medium Works package. This template will comprise a streamlined Request for Quotation and Contract (in a single document) which is intended for use for lower risk projects with an estimated value of less than $4 million. This template is not suitable for projects with a value greater than this as it does not provide for compliance with Government policies which apply at higher values, for example the Shadow Economy Procurement Connected Policy and the specific requirements around the Indigenous Procurement Policy relating to 'High Value Contracts'.

The previous EWP Consultancy Services, Design Services, Major Works and Remediation and Demolition Works packages are no longer being maintained as part of the EWP contract templates.

Where templates are required for higher value projects or design / consultancy services, EWP will have access to the templates maintained as part of the CFI 'Suite of Facilities Contracts', including the Head Contract (HC-1 2021) and Design Services Contract (DSC-1 2021).

Where a template is required for remediation and demolition works, EWP will have access to the Defence Infrastructure Panel - Environment, Heritage and Estate Engineering, noting that this panel offers a number of service categories including Contamination Management and Contamination Remediation Works.

Overview of Amendments to the Medium Works Tender Documents

1. Tender Lodgement

The Tender Documents have been amended to provide for lodgement of Tenders solely via AusTender.

1. Minimum form and content requirements - acceptance of Contract

The Tender Documents provide that acceptance of the Contract (without departure) is a minimum form and content requirement. If such departures are included, and subject to limited specified exceptions, a Tender will be deemed to be non-conforming and will not be evaluated (or continue to be evaluated), unless the departure is lodged as part of the "Alternative Proposal" schedule.

New drafting has been included that allows Tenderers to propose certain departures in respect of their insurance coverage, without requiring an alternative proposal to be lodged.

1. Evaluation Criteria

The evaluation criteria have been amended in a number of respects, including to:

* + 1. insert the following new Tender Schedules:
			1. Tender Schedule A - Project Understanding;
			2. Tender Schedule G - Commonwealth Procurement Rules Compliance; and
			3. Tender Schedule J - Miscellaneous Matters for Evaluation;
		2. streamline the evaluation criteria generally including by deleting the following evaluation criteria:
			1. commercial position - the matters formerly addressed under this evaluation criterion are now addressed in other evaluation criteria;
			2. local industry capability - the Tenderer's commitment to local industry participation in the delivery of the Works is now evaluated under the weighted 'workload and proposed resources' evaluation criterion; and
			3. the extent to which the Project and the Tenderer's approach to the performance of the Contractor's Activities and the Works will directly benefit the Australian economy - this is now evaluated under the weighted 'workload and proposed resources' evaluation criterion.
1. Tender Form

The Tender Form has been streamlined to ensure that there is limited overlap with other parts of the Tender Documents.

The Tender Form now includes items relating to workplace gender equality, employee entitlements and country of tax residency.

1. Other Amendments to the Tender Conditions

Various other amendments to the Tender Documents have been made (including to streamline the template), including in respect of:

* + 1. terminology: the term "Contact Officer" has been replaced with "Tender Administrator";
		2. industry briefings: updated to provide for the delivery of one or more industry briefings (and the delivery of certain materials to prospective Tenderers) in person or by videoconference;
		3. Site inspection: updated to remove option for Tenderer to separately request an inspection of the Site;
		4. Information Documents: updated to reflect that Information Documents will be issued following the issue of the Tender Documents (and not with the Disclaimer and Confidentiality Agreement);
		5. notification and debrief: updated to provide the Commonwealth with a discretion to provide debriefs to Tenderers who have lodged non-conforming Tenders;
		6. meetings and communications: the provisions governing the procedure before and after the ATM Close Date and ATM Close Time (including in relation to meetings and communications between the Commonwealth and Tenderers) have been streamlined and certain acknowledgements by the Tenderer in respect of the tender process have been included;
		7. improper or unlawful conduct: a new clause has been included to specify that Tenderers must not communicate or make any arrangement with any of the other Tenderers concerning the Project and must not engage in collusive tendering or any other conduct which will reduce the competitiveness of the tender process (moved from the Tender Form and Statutory Declaration);
		8. financial viability: updated to streamline the list of information the Tender Administrator may request from Tenderers in respect of their financial viability;
		9. Strategic Notice Events: the Department of Finance's "Notification of Significant Events" policy requirements have been incorporated into the existing "Material Change or Defence Strategic Interest Issue" clause and an acknowledgement by the Tenderer that it will comply with its obligations in the Disclaimer and Confidentiality Agreement in respect of Strategic Notice Events has been included; and
		10. other amendments to reflect updates to relevant legislative and Commonwealth policy, including in respect of workplace gender equality, the WHS Accreditation Scheme and the Shadow Economy Procurement Connected Policy.
1. Tender Schedule A - Project Understanding

Tender Schedule A - Project Understanding, a revised form of the previous Tender Schedule B - Task Appreciation and Methodology, incorporates the former requirements of that Tender Schedule but requires that Tenderers provide a draft Site Management Plan (in addition to a draft Work Health and Safety Plan) at time of Tender.

It is still open for the Tender Particulars to include additional Project Plans for the purposes of Tender Schedule A.

1. Tender Schedule B - Workload and Proposed Resources

This Tender Schedule has been streamlined and recast so that Tenderers are no longer required to provide details of their "Workload", although such details are required to be provided in respect of Tenderers' proposed resources and proposed subcontractors, consultants and material suppliers.

This Tender Schedule also now addresses local industry capability and proposed veteran participation in the carrying out of the Contractor's Activities (with two different options as to the information sought from Tenderers depending on the value of the Contractor's Activities and the Works).

1. Tender Schedule C - Previous Performance

This Tender Schedule has been streamlined to require Tenderers to provide details of a specified number of relevant projects within the specified timeframe from the time of the procurement in respect of previous performance generally and, separately, work health and safety previous performance.

It is also now stated that the maximum number of projects applies to Joint Bid parties cumulatively.

1. Tender Schedule D - Program

This Tender Schedule has been amended to allow the Commonwealth to provide an "assumed Award Date".

The Tender Documents have also been amended to allow the Commonwealth to specify a "nominated Date for Completion".

1. Tender Schedule F - Commonwealth Procurement Rules Compliance

A new Tender Schedule F - Commonwealth Procurement Rules Compliance has been inserted to expressly address requirements set out in the Commonwealth Procurement Rules.

1. Tender Schedule H - Alternative Proposals

This Tender Schedule (formerly Tender Schedule M - Alternative Proposals - Design Documents) has been amended such that:

* + 1. alternative proposals are no longer limited to being in respect of the 'Design Documents' only; and
		2. the structure of the Tender Schedule comprises item 1 and 2 whereby, if submitting an alternative proposal, Tenderers must provide:
			1. in item 1, the requested detail regarding any alternative proposal in the table format provided (excluding pricing and financial information); and
			2. in item 2, the requested pricing/financial information regarding any alternative proposal in the table format provided; and

require items 1 and 2 of this Tender Schedule to be lodged as separate files.

1. Tender Schedule I - Miscellaneous Matters For Evaluation

This is a new Tender Schedule that amalgamates the following former Tender Schedules:

* + 1. Security and Insurance Details (formerly Tender Schedule E);
		2. Tenderer's Commercial-in-Confidence Information (formerly Tender Schedule G); and
		3. Information Security (formerly Tender Schedule H).

Each of these Tender Schedules are evaluated in a similar way, and their amalgamation is intended to streamline the Tender Schedules. As noted above with respect to the "minimum form and content requirements", the drafting in the insurance item has been updated to allow Tenderers to specify certain non-conformances with the insurance requirements set out in the Contract (without needing to lodge an alternative proposal).

1. Tender Schedule K - WHS Accreditation Scheme Accreditation

A new Tender Schedule K - WHS Accreditation Scheme Accreditation has been inserted to reflect the updated requirements of the WHS Accreditation Scheme and the Federal Safety Commissioner. In particular, these amendments clarify the requirement that Tenderers hold WHS accreditation at the Award Date proposed by the Commonwealth and the requirements for accreditation in circumstances where a Joint Bid is lodged.

1. Other Tender Schedules

In addition to the detailed amendments set out above:

* + 1. there have been a number of mechanical updates to:
			1. Tender Schedule E - Indigenous Procurement Policy (formerly Tender Schedule J);
			2. Tender Schedule G - Financial (formerly Tender Schedule L - Contract Price); and
			3. Tender Schedule J - Statement of Tax Record (formerly Tender Schedule K),

in order to address minor changes to Commonwealth Policy, consequential changes from other Tender Schedules and updates to the underlying documentation; and

* + 1. the following former Tender Schedules have been deleted:
			1. Tender Schedule F - Miscellaneous Contract Particulars, noting any necessary information is captured elsewhere in the Tender Documents; and
			2. Tender Schedule I - Local Industry Capability Plan, noting local industry capability is now addressed in Tender Schedule B - Workload and Proposed Resources.

Overview of Amendments to the Medium Works Contract

1. The Contractor's Representative - Clause 2.2

Additional wording has been inserted to clarify that the Contractor must ensure that the Contractor's Representative is present on Site at all times "reasonably necessary to ensure that the Contractor is complying with its obligations under the Contract".

1. Contractor's Monthly Report - Clause 2.6

New requirements for the Contractor to include in its monthly report confirmation of compliance with:

* + 1. local industry participation requirements, including the Local Industry Capability Plan; and
		2. indigenous employment and procurement requirements, including (if required) the Indigenous Procurement Plan.
1. Insurance - Clause 4

Various amendments have been made to the insurance clauses and these are directed at ensuring that contractors effect and maintain appropriate insurances, on appropriate terms, for the life of the Contract. The amendments include:

* + 1. updated Contractor insurance obligations, including around Statutory Requirements, details of insurance policies, evidence of compliance with insurance obligations, records of incidents and the Contractor bearing any excess;
		2. cross liability where the Contract requires insurance to provide cover to more than one insured; and
		3. a new clause where the Commonwealth is not obliged to make any claim against any insurer and the Contractor is not relieved from its obligations under the Contract.
1. Consequential Loss And Limit On Liability - Clause 4.8

An "exclusion of consequential loss" (to apply to each of the Commonwealth and the Contractor) and a contractual "limitation on liability" (to apply to limit the Contractor’s liability) in certain scenarios for certain losses has been included in the Contract.

1. Fitness For Purpose - Clause 5.3

The Contract now includes revised drafting around the contractual "fitness for purpose" warranties provided by the Contractor. In particular, the relevant "purpose" is to be set out in or to be reasonably inferred from the Works Description.

1. Resolution of Ambiguities - Clause 7.2

This clause has been amended so that where:

* + 1. an ambiguity, discrepancy or inconsistency is between the Works Description and any other requirement of the Contract, the greater, higher or more stringent requirement, standard, level of services or scope will prevail; and
		2. the discrepancy is discovered by the Contract Administrator, require the Contract Administrator must promptly give the parties notice in writing with an instruction as to the course that must be adopted.
1. Imported Items - Clause 7.6

The drafting in clause 7.6 (and detail for the same being obtained in Tender Schedule G - Financial of the Tender Documents) has been amended to provide, in relation to specified items, for a tendered exchange rate at the time of tender to be compared against the prevailing rate at the time the item is paid for, and the difference used to adjust the Contract Price.

1. Pandemic Adjustment Event - Clause 7.7

This clause has been amended to:

* + 1. remove the Pandemic Management Plan requirements and clarify that the Contract Administrator's instruction to the Contractor as to the course it must adopt following a Pandemic Adjustment Event may include the preparation and compliance with, a plan satisfactory to the Contract Administrator specifying the steps that the Contractor will implement to avoid, mitigate, resolve and otherwise manage the effects of the Pandemic on the Contractor's Activities and the Works; and
		2. provide that the Site Management Plan must address the procedure for managing the effects of the Pandemic.
1. Non-Conforming Activities Before Completion - Clause 8.4

The contractual defect regime has been amended to specifically allow the Commonwealth to carve out, and set-off, the costs of correcting specified non-conforming Contractor's Activities in the scenario where the Contractor has been instructed, but failed, to correct the non-conformance.

1. Work Health and Safety - Clause 8.9

The work health and safety provisions in the Contract have been amended to:

* + 1. require the Contractor to comply with any direction issued by the Contract Administrator to change its manner of working or to cease working if the Contract Administrator reasonably considers there is a risk to the health and safety of people or damage to property arising from the Contractor's Activities; and
		2. include Contractor obligations in respect of the Asbestos Management Plan and the Defence Asbestos Register.
1. Time - Clause 9

The provisions in the Contract relating to time have been amended, including to:

* + 1. provide that the Contractor must "regularly and diligently progress the Contractor's Activities" (rather than the former requirement to progress the Contractor's Activities in a manner and at a rate of progress satisfactory to the PDS Contractor);
		2. ensure that the initial program prepared by the Contractor under the Contract is "based" on that tendered by it (and which has been evaluated by the Commonwealth);
		3. remove the Commonwealth's ownership of the float (for the purposes of the extension of time regime);
		4. streamline and amend the causes of delay in clause 9.4 by:
			1. incorporating the new term “Act of Prevention” (being former paragraphs (a) and (b)); and
			2. moving the list of causes of delay (being former paragraphs (c) to (m)) to the Contract Particulars;
		5. update the time period for submitting a written claim for an extension of time to the longer period of 28 days after the commencement of the delay (rather than 14 days); and
		6. provide for "delay damages" (formerly agreed damages), which provide a maximum daily cap on the Contractor's entitlement to costs following Commonwealth caused delay, rather than a "day rate".
1. Variation Price Request - Clause 10.1

This clause has been amended to allow the Contract Administrator to agree with the Contractor to a longer period than 14 days for the Contractor to provide written notice setting out the adjustment to the Contract Price and the effect on the program.

1. Payment - Clause 11

In this clause:

* + 1. the "Conditions Precedent to Submission of Payment Claim" clause has been substantially reduced in length and complexity and recast as "Certification to Accompany Submission of Payment Claim";
		2. the clause relating to payment of workers and subcontractors has been simplified and the options removed, such that it now requires the Contractor with each payment claim submitted to provide the Contract Administrator with "a duly completed declaration in the form set out in the Schedule of Collateral Documents for each applicable jurisdiction"; and
		3. the former clauses 11.19 - Quantities in Schedule of Rates and 11.20 - Limits of Accuracy have been deleted as the Contract no longer provides for a Schedule of Rates.

Further amendments have also been made to the definition of "business days" and the Contract Particular for the number of business days for payment in order to better align the contractual payment processes with the requirements of the various security of payment regimes in jurisdictions across Australia.

1. Unilateral Issue of Completion Notice - Clause 13.2

A new clause 13.2 has been inserted permitting the Contract Administrator to issue a Notice of Completion where a notice under clause 13.1 has not been given by the Contractor to the Contract Administrator.

1. Incentive - Clause 13.6

The incentive regime (including the former clause 13.6 and related definitions and Contract Particulars) has been removed.

1. Default - Clause 14

The Contractor default regime has been streamlined and amended, including to allow the Commonwealth to give a notice of default for a "breach" of the Contract by the Contractor.

1. Expert Determination - Clause 15.2

This clause has been amended to state that the dispute or difference must be submitted to expert determination "unless otherwise agreed between the parties".

1. Notices - Clause 16

The references to the "Electronic Document Management System" have been removed from clause 16 and are now addressed in a new Special Condition.

1. Moral Rights - Clause 18.7

This clause has been amended to:

* + 1. remove the requirements relating to Moral Rights Consents in the form prescribed by the Commonwealth;
		2. require the Contractor to ensure that each of the Contractor and subcontractor personnel engaged in the production or creation of Project Documents or the Works gives genuine consent in writing to the use of the Project Document or the Works (as applicable) for the Specified Acts; and
		3. require the Contractor to provide these consents to the Commonwealth on request by the Contractor Administrator.
1. Information Security - Clause 20

There have been a number of amendments to the information security provisions, including to:

* + 1. address all information security provisions in a single clause;
		2. specify updated requirements in respect of the DISP, including that the Contractor must at its cost have obtained as at the Award Date and thereafter maintain the level of DISP membership specified in the Contract Particulars;
		3. confidentiality requirements, including in respect of exceptions to such requirements in specified circumstances;
		4. require the Contractor to comply with all Information Security Requirements including as set out in Control 10 of the Defence Security Principles Framework;
		5. require the Contractor to ensure that persons performing the roles specified in the Contract Particulars hold and maintain a security clearance at or above the level specified in the Contract Particulars;
		6. clarify the provisions relating to anticipated security classification of information and assets available to the Contractor and the consequences of any change in such classifications; and
		7. provide for the notification and management of Security or Confidentiality Incidents.

A number of consequential amendments to defined terms and other clauses have also been made.

1. Strategic Notice Event - Clause 21

The Department of Finance's "Notification of Significant Events" policy requirements have been incorporated into the existing "Material Change or Defence Strategic Interest Issue" clause and consequential amendments to certain defined terms and other clauses.

1. Indemnity - Clause 24.3(f)

The scope of the indemnity has been slightly narrowed to cover losses (etc) "caused by" a breach of the Contract.

1. Estate Information - Annexure 1

Amended to clarify the requirements for submission of Estate Information, including to better align with and reflect the Spatial Data Management Plan and O&MM Instructions. The table of as-constructed drawings and documents in clause 2 of Annexure 1 has been revised accordingly and to clarify that project-specific amendments to this table may be appropriate.

1. Special Conditions - Annexure 2

Amendments to:

* + 1. include the following new clauses:
			1. Clause 16 - Preliminary Design Solution;
			2. Clause 21 - Contract Administrator's Representative;
			3. Clause 22 - Contract Administrator's Office;
			4. Clause 26 - Joint and Several Liability;
			5. Clause 27 - Electronic Document Management System;
			6. Clause 28 - UXO Containing Area - Engagement of UXO Subcontractor; and
		2. deletion of the following historical or now redundant clauses:
			1. Clause 6 - Extra Land Required;
			2. Clause 16 - Construction Contracts Act (Western Australia);
			3. Clause 18 - Interpretation of Technical Documents; and
			4. Clause 24 - Information Security - Sensitive and Classified Information.
1. Other Amendments

In addition to the detailed amendments set out above, there have been a number of mechanical updates including:

* + 1. for consistency with the CFI Suite the concept of:
			1. "Design Documents" has been replaced with "Works Description";
			2. the "PDS Contractor" has been replaced with "Contract Administrator"; and
			3. “Section” has been replaced with Stage”;
		2. the simplification of subparagraph (n) of clause 1.2 (Interpretation) relating to the meaning of "business day" in different Australian jurisdictions;
		3. in clause 1.2 (Interpretation) in relation to the standard required by reference to Standards Australia, being those existing at the date of submission of the design or the Award Date;
		4. the definition of "Project Documents" has been narrowed;
		5. the Contractor's right to "extra costs" has been clarified to expressly include delay costs in the context of assessing extra costs reasonably incurred in relation to delayed access, latent conditions, changes in statutory requirements/variances with contract, valuable, archaeological or special interest items, Pandemic Adjustment Events, costs of inspections and tests and changes to Defence's Security Alert System; and
		6. the Commonwealth's ability to set off claims to money as against the Contractor has been amended so that it is limited to claims made in good faith.

There have also been further amendments to address changes to Commonwealth Policy, consequential changes from other contractual clauses and updates to the underlying documentation.

Overview of Amendments to the Medium Works Ancillary Documents

1. Disclaimer and Confidentiality Agreement

This template has been significantly streamlined, including in respect of information security (with the relevant provisions aligned with the updated provisions in the Tender Documents and Conditions of Contract) and by removing provisions which provided for Information Documents to be issued with the Disclaimer and Confidentiality Agreement.

Additionally, consequential amendments have been made to the capture amendments to terminology, the clause numbering and the structure of the Tender Documents.

1. Schedule of Collateral Documents

Consequential amendments have been made to the Schedule of Collateral Documents to:

* + 1. capture amendments to terminology, clause numbering and the structure of the Contract; and
		2. mirror amendments made to the various contractual regimes, so that the documentation properly captures the contractual position.

Each document in the Schedule of Collateral Document is also now a standalone document available on the Defence website page for the Estate Works Program template contracts (and no longer form part of an annexure to the Conditions of Contract).

1. Proforma Notices

Proforma Notices have been prepared to capture key notices that the parties must provide to one another under the Contract. These notices are designed to assist in efficient and consistent contract administration.

The Proforma Notices are also a standalone document available on the Defence website page for the Estate Works Program template contracts.