

Defence Infrastructure Panel - Major Construction 2025 - 2030

DISCLAIMER AND CONFIDENTIALITY AGREEMENT

This agreement is made on day of

BETWEEN THE COMMONWEALTH OF AUSTRALIA (Commonwealth)

AND THE PERSON OR ENTITY SPECIFIED IN ITEM 1 OF THE SCHEDULE (Panel Contractor)

RECITALS

1. This Disclaimer and Confidentiality Agreement issued by the Commonwealth in connection with a potential Engagement under the Defence Infrastructure Panel - Major Construction 2025 - 2030.
2. The Commonwealth proposes, subject to the Panel Contractor's due execution of, and compliance with, this Disclaimer and Confidentiality Agreement, to invite the Panel Contractor to lodge a tender (**Tender**) for the Works and the project described in Item 2 of the Schedule (**Project**) and will issue either itself or through the tender administrator named in Item 3 of the Schedule (**Tender Administrator**), the documents which set out, among other things, the conditions and requirements in relation to the Tender (**Tender Documents**).
3. In consideration of the Commonwealth agreeing to pay the sum of $1.00, the Panel Contractor has agreed to make the acknowledgements, agreements and warranties and undertake the obligations set out in this Disclaimer and Confidentiality Agreement.

**OPERATIVE**

1. The Commonwealth agrees to pay the Panel Contractor the sum of $1.00.
2. The Commonwealth may give any notice or undertake any written communication contemplated by this Disclaimer and Confidentiality Agreement by publication on AusTender or otherwise through the Tender Administrator by email, other electronic means, post or hand.
3. The Panel Contractor acknowledges and agrees that it must duly complete, execute and return this Disclaimer and Confidentiality Agreement by email to the Tender Administrator at the email address in Item 4 of the Schedule prior to the Tender Administrator issuing the Tender Documents.
4. Nothing in this Disclaimer and Confidentiality Agreement operates to limit the Panel Contractor's obligations, or the Commonwealth's rights, under the Panel Agreement.

TENDER PROCESS

1. The Panel Contractor:
	* 1. acknowledges that the entire tender process contemplated in Recital B (including the process for any industry briefing or meeting with any of the Panel Contractors and then obtaining, evaluating and (if applicable) negotiating Tenders) (**Process**) is being conducted solely for the benefit of the Commonwealth;
		2. acknowledges that, to the extent permitted by law:
			1. without limiting the legal effect of a preferred Panel Contractor's obligations under any preferred Panel Contractor negotiation protocol provided for under the Tender Documents, the Commonwealth does not intend to create any contract or other relationship under which the Commonwealth is legally obliged to conduct the Process in any manner or at all (whether in accordance with the terms of the Tender Documents, the Panel Conditions or otherwise) and that there is in fact no such contract or other relationship in existence;
			2. there will be no procedural or substantive limitation upon the manner in which the Commonwealth may (in its absolute discretion) conduct the Process; and
			3. the Commonwealth does not make any warranty, guarantee or representation about the Tender or the Commonwealth's requirements for the Project;
		3. acknowledges that the Commonwealth may vary, suspend, discontinue or terminate the Process at any time and for any reason;
		4. acknowledges that, notwithstanding paragraphs (a) – (c), the Panel Contractor is submitting to the Process because it considers that this represents a valuable commercial opportunity for the Panel Contractor;
		5. releases the Commonwealth in respect of any costs, expenses, losses, damages or liabilities suffered or incurred by the Panel Contractor or any other person or entity arising out of or in connection with the Process, the rejection of, failure to evaluate or failure to accept the Tender, any failure to comply with the Tender Documents, any debrief, any variation or suspension of the Process or any discontinuance or termination of the Process;
		6. acknowledges and agrees that its participation in the Process will be governed by and is subject to, and that it must comply with:
			1. the Tender Documents upon the Panel Contractor receiving those Tender Documents; and
			2. the Panel Conditions;
		7. warrants that it will prepare its Tender and enter into any contract with the Commonwealth for the Project based on its own investigations, interpretations, deductions, information and determinations;
		8. acknowledges that the Commonwealth is proceeding with the Process strictly on the basis of, and in reliance upon, the acknowledgements, warranties and releases set out above;
		9. acknowledges and agrees that the Commonwealth will be entering into any contract for the Project with the Panel Contractor in reliance upon the terms of this Disclaimer and Confidentiality Agreement; and
		10. indemnifies the Commonwealth in respect of all costs, expenses, losses, damages or liabilities suffered or incurred by the Commonwealth arising out of or in connection with any breach of any acknowledgement or release given by the Panel Contractor under this clause 5.

CONFIDENTIALITY AND INFORMATION SECURITY

1. The Panel Contractor acknowledges and agrees that:
	* 1. the Confidential Information is confidential to the Commonwealth and that any unauthorised use or disclosure of the Confidential Information may cause loss or damage to the Commonwealth; and
		2. part of the Confidential Information may be Sensitive and Classified Information.
2. Except as expressly provided in clauses 8 and 9, the Panel Contractor must:
	* 1. hold the Confidential Information in strict confidence and must not disclose, use or deal with it or otherwise make it available to any person; and
		2. ensure all Confidential Information is strictly kept secure and protected from all unauthorised access and use.
3. The Panel Contractor may disclose Confidential Information where such disclosure is required by law provided that the Panel Contractor:
	* 1. only discloses such of the Confidential Information as is strictly required by law to be disclosed, including by taking all reasonable steps in consultation with the recipient (whether by agreed redaction or otherwise) to limit the Confidential Information which is disclosed;
		2. where legally permitted to do so, immediately notifies the Tender Administrator and the Commonwealth in writing of such requirement and provides such details as would enable the Commonwealth to independently seek to protect the confidentiality of the Confidential Information; and
		3. ensures that any recipient is made aware of the confidential status of the Confidential Information and takes all reasonable steps to obtain confidentiality undertakings from the recipient.
4. Subject to clause 10(b), the Panel Contractor may disclose Confidential Information to:
	* 1. an employee, officer, agent, legal adviser, insurer, subcontractor or proposed subcontractor of the Panel Contractor who needs to know the Confidential Information to enable the Panel Contractor to prepare a Tender and, if it is the successful Panel Contractor, perform its obligations under any resultant contract; and
		2. such other persons, provided the Panel Contractor has obtained the prior written approval of the Tender Administrator (including on such conditions as the Tender Administrator may impose in its absolute discretion),

provided that the Panel Contractor must ensure that:

* + 1. all such persons strictly comply with equivalent obligations as are imposed on the Panel Contractor by this Disclaimer and Confidentiality Agreement in respect of all Confidential Information disclosed to them; and
		2. in the case of disclosure to a subcontractor or proposed subcontractor and prior to making any disclosure, the Panel Contractor has entered into a written agreement with the relevant person, which:
			1. imposes equivalent obligations as are imposed on the Panel Contractor by this Disclaimer and Confidentiality Agreement in respect of all Confidential Information disclosed to them; and
			2. is expressed to be made for the benefit of both the Panel Contractor and the Commonwealth.
1. The Panel Contractor must:
	* 1. strictly comply with all:
			1. Information Security Requirements, including as set out in Control 10 of the DSPF; and
			2. additional information security or confidentiality requirements:
				1. specified in Item 5 of the Schedule; or
				2. notified by the Tender Administrator or the Commonwealth, including in respect of any Security or Confidentiality Incident; and
		2. without limiting clause 9 or paragraph (a), ensure that no Sensitive and Classified Information is released to any third party, without the prior written approval of the originator through the Tender Administrator (including on such conditions as the Tender Administrator may impose in its absolute discretion).
2. The Panel Contractor must:
	* 1. detect all actual or potential Security or Confidentiality Incidents;
		2. immediately notify the Tender Administrator and the Commonwealth by email if it becomes aware of any actual or potential Security or Confidentiality Incident; and
		3. take all steps necessary to prevent, end, avoid, mitigate or otherwise manage the adverse effect of any actual or potential Security or Confidentiality Incident, including those directed by the Tender Administrator or the Commonwealth.
3. Within such period as the Tender Administrator or the Commonwealth may direct, the Panel Contractor must return to the Commonwealth or destroy all documents in its possession, power or control which contain any Confidential Information in accordance with the Information Security Requirements, provided that the Panel Contractor may retain Confidential Information in its records if retention is required to comply with the Information Security Requirements or any Statutory Requirement, insurance obligation or otherwise with the prior written approval of the Tender Administrator (including on such conditions as the Tender Administrator may impose in its absolute discretion).
4. If the Panel Contractor is aware that documents containing the Confidential Information are beyond its possession or control, then the Panel Contractor must provide to the Tender Administrator and the Commonwealth full particulars of the whereabouts of the documents containing the Confidential Information, and the identity of the person in whose custody or control they lie and procure compliance by such persons with clause 12 as applicable.
5. Within such period as the Tender Administrator or the Commonwealth may direct, the Panel Contractor must, in accordance with the other terms of the direction, provide:
	* 1. evidence of the Panel Contractor's (including all persons who have been provided with or had access to Confidential Information) compliance with clauses 6 to 13; and
		2. a statutory declaration in a form and from an authorised officer satisfactory to the Commonwealth (acting reasonably) in respect of the Panel Contractor's (including all persons who have been provided with or had access to Confidential Information) compliance with clauses 6 to 13.
6. Without limiting any other provision of this Disclaimer and Confidentiality Agreement, if the Panel Contractor:
	* 1. notifies the Tender Administrator under clause 11(b); or
		2. has failed to strictly comply with:
			1. clauses 6 to 14; or
			2. any other Confidential Information or information security requirements notified by the Tender Administrator or the Commonwealth,

the Commonwealth may (in its absolute discretion) and either itself, or through the Tender Administrator, notify the Panel Contractor that the Panel Contractor:

* + 1. is specifically excluded from participating in the Process and its Tender will not be evaluated (or continue to be evaluated); or
		2. may continue to participate in the Process, whether with or without such conditions as the Commonwealth thinks fit (in its absolute discretion).
1. The Panel Contractor must bear, and releases the Commonwealth in respect of, all costs, expenses, losses, damages or liabilities suffered or incurred by the Panel Contractor or any other person or entity arising out of or in connection with the Security or Confidentiality Incident or the exercise of any of the Tender Administrator's or the Commonwealth's absolute discretions under clause 15.
2. The Panel Contractor indemnifies the Commonwealth in respect of all costs, expenses, losses, damages or liabilities suffered or incurred by the Commonwealth arising out of or in connection with a Security or Confidentiality Incident.

STRATEGIC NOTICE EVENTS

1. The Panel Contractor warrants that, at the time of returning this Disclaimer and Confidentiality Agreement to the Tender Administrator, it is not aware of any Strategic Notice Event.
2. If, at any time after returning this Disclaimer and Confidentiality Agreement to the Tender Administrator and prior to notification of the outcome of the Process after lodging its Tender, the Panel Contractor becomes aware of any Strategic Notice Event, the Panel Contractor must, as soon as reasonably practicable, notify the Tender Administrator by email, providing details, to the extent such details are known by or reasonably available to the Panel Contractor, of:
	* 1. the Strategic Notice Event, including:
			1. whether the Panel Contractor considers that it is a Material Change, Defence Strategic Interest Issue or a Significant Event;
			2. the date or dates on or during which the Strategic Notice Event occurred and the date on which the Panel Contractor became aware of the Strategic Notice Event; and
			3. whether any of the Panel Contractor's key people, other personnel proposed to be engaged in connection with the Project or any officers or employees of any subcontractors were involved; and
		2. the steps which the Panel Contractor has taken (or will take) to prevent, end, avoid, mitigate, resolve or otherwise manage the risk of any adverse effect of the Strategic Notice Event on the interests of the Commonwealth.
3. Without limiting any other provision of this Disclaimer and Confidentiality Agreement, if:
	* 1. the Panel Contractor:
			1. notifies the Tender Administrator under clause 19; or
			2. has given a false warranty in any respect under clause 18 or has failed to strictly comply with clause 19; or
		2. the Commonwealth otherwise considers (in its absolute discretion) that there exists (or is likely to exist) a Strategic Notice Event,

the Commonwealth may (in its absolute discretion) and either itself, or through the Tender Administrator, do any one or more of the following:

* + 1. notify the Panel Contractor that it is required to provide further information, documents or evidence in relation to, and otherwise clarify, the:
			1. nature and extent of the Strategic Notice Event to the extent such information, documents or evidence are known or reasonably available to the Panel Contractor; and
			2. steps which the Panel Contractor has taken (or will take) to prevent, end, avoid, mitigate, resolve or otherwise manage the risk of any adverse effect of the Strategic Notice Event on the interests of the Commonwealth,

within 3 business days of the request (or longer period agreed in writing by the Commonwealth); and

* + 1. regardless of whether or not the Commonwealth has notified the Panel Contractor under paragraph (c), notify the Panel Contractor that the Panel Contractor:
			1. is specifically excluded from participating in the Process and its Tender will not be evaluated (or continue to be evaluated); or
			2. may continue to participate in the Process, whether with or without such conditions as the Commonwealth thinks fit (in its absolute discretion).
1. The Panel Contractor must bear, and releases the Commonwealth in respect of, all costs, expenses, losses, damages or liabilities suffered or incurred by the Panel Contractor or any other person or entity arising out of or in connection with the Strategic Notice Event or the exercise of any of the Tender Administrator's or the Commonwealth's absolute discretions under clause 20.
2. Nothing in clauses 18 to 21 requires the Panel Contractor to act in any manner or disclose any information which would:
	* 1. breach an obligation of confidentiality that existed prior to the date the Strategic Notice Event occurred, that is owed to an unrelated third party;
		2. cause the Panel Contractor to breach any law or regulation or contractual obligation regarding privacy or security (in Australia or outside of Australia);
		3. have the effect of waiving legal professional privilege (or any equivalent privilege in Australia or outside of Australia) in relation to the information; or
		4. breach the rules of a stock exchange or any similar body on which the Panel Contractor, or any Related Body Corporate of the Panel Contractor, is listed, which require the information to be first disclosed to the stock exchange or body. In this case, the Panel Contractor must disclose the information to the Tender Administrator promptly after disclosure is made to the stock exchange or body.
3. Notwithstanding any restriction that may apply in respect of specific information, such as that described in clause 22, the Panel Contractor must use reasonable endeavours to make any disclosures and take reasonable steps to ensure that the overarching intent of clauses 18 to 21 is achieved.

**INTERPRETATION AND MISCELLANEOUS**

1. For the purposes of this Disclaimer and Confidentiality Agreement:
	* 1. all words and expressions will (unless the context otherwise requires) have the meanings assigned to them:
			1. under clauses 1.1 and 1.2 of the Panel Conditions; or
			2. in this Disclaimer and Confidentiality Agreement;
		2. **Confidential Information**:
			1. means, subject to subparagraph (ii):
				1. the Tender Documents;
				2. any "information documents" issued pursuant to the process contemplated in the Tender Documents;
				3. any document, drawing, information or communication (whether in written, oral or electronic form) given to the Panel Contractor by the Commonwealth, the Tender Administrator or anyone on the Commonwealth's behalf, whether or not owned by the Commonwealth, which is in any way connected with the contractor's activities, the Works or the Project which:

by its nature is confidential; or

the Panel Contractor knows or ought to know is confidential;

* + - * 1. everything recording, containing, setting out or making reference to the document, drawing, information or communication (whether in written, oral or electronic form) described in subsubparagraph C, including documents, notes, records, memoranda, materials, software, disks and all other media, articles or things; and
			1. excludes any document, drawing, information or communication (whether in written, oral or electronic form) given to the Panel Contractor by the Commonwealth, the Tender Administrator or anyone on the Commonwealth's behalf, whether or not owned by the Commonwealth, which:
				1. is in the possession of the Panel Contractor without restriction in relation to its disclosure or use before the date of its receipt from the Commonwealth, the Tender Administrator or anyone on the Commonwealth's behalf;
				2. is in the public domain otherwise than due to a breach of clauses 6 - 12; or
				3. has been independently developed or acquired by the Panel Contractor;
		1. **Corruption** means any conduct (whether criminal or non-criminal in nature) that does or could compromise the integrity, accountability or probity of public administration, including:
			1. any conduct of any person (whether or not a staff member of a Commonwealth agency) that adversely affects, or that could adversely affect, either directly or indirectly:
				1. the honest or impartial exercise of any staff member's powers as a staff member of a Commonwealth agency; or
				2. the honest or impartial performance of any public official's functions or duties as a public official;
			2. any conduct of a staff member of a Commonwealth agency that constitutes or involves a breach of public trust;
			3. any conduct of a staff member of a Commonwealth agency that constitutes, involves or is engaged in for the purpose of abuse of the person's office; and
			4. any conduct of a staff member of a Commonwealth agency, or former staff member of a Commonwealth agency, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a staff member of a Commonwealth agency;
		2. **Defence Strategic Interest Issue** means any issue arising out of or in relation to the Tender, the Panel Contractor or any proposed subcontractor (or any Related Body Corporate of the Panel Contractor or any proposed subcontractor) that involves an actual, potential or perceived risk of an adverse effect on the national security interests of the Commonwealth including arising from any breach by the Panel Contractor of its obligations in respect of compliance with all Statutory Requirements and the Information Security Requirements;
		3. **Fraud** means dishonestly obtaining (including attempting to obtain) a gain or benefit, or causing a loss or risk of loss, by deception or other means;
		4. **Joint Bid Basis** means a Tender lodged by an unincorporated joint venture or on any other basis involving more than one party;
		5. **Material Change** means any actual, potential or perceived material change to the circumstances of the Panel Contractor, including any change:
			1. arising out of or in connection with:
				1. a Change of Control;
				2. an Insolvency Event;
				3. if the Panel Contractor lodges its Tender on a Joint Bid Basis, the Panel Contractor's joint bid arrangement; or
				4. the Panel Contractor's financial viability, availability, capacity or ability to meet its obligations under the Contract in Part 4 of the Tender Documents; or
			2. which affects the truth, completeness or accuracy of any information, documents, evidence or clarifications provided by the Panel Contractor to the Commonwealth arising out of or in connection with its Disclaimer and Confidentiality Agreement or the Process;
		6. **Security or Confidentiality Incident** means:
			1. a "Security Incident" as defined in Control 77.1 of the DSPF insofar as the relevant approach, event or action arises out of or in any way in connection with the Process or otherwise relates to the Panel Contractor or any Related Body Corporate of the Panel Contractor; or
			2. any other incident or circumstance involving Confidential Information (including any Sensitive and Classified Information) having been held, disclosed, accessed or used in a way that is inconsistent with the terms of this Disclaimer and Confidentiality Agreement or the Tender Documents;
		7. **Significant Event** means:
			1. any adverse comments or findings made by a court, commission, tribunal or other statutory or professional body regarding the conduct or performance of the Panel Contractor or its subcontractors (or any officers, employees or agents of any of them) that impacts or could be reasonably perceived to impact on their professional capacity, capability, fitness or reputation; or
			2. any other significant matters, including the commencement of legal, regulatory or disciplinary action involving the Panel Contractor or its subcontractors (or any officers, employees or agents of any of them) that may adversely impact on compliance with Commonwealth policy and legislation or the Commonwealth’s reputation,

and, without limiting the foregoing, includes a judicial decision against the Panel Contractor (not including a decision under appeal) relating to employee entitlements where the Panel Contractor has not satisfied any resulting order (e.g. where the entitlement remains unpaid);

* + 1. **Statutory Requirement** means any law, including Acts, ordinances, regulations, by-laws and other subordinate legislation; and
		2. **Strategic Notice Event** means:
			1. a Material Change;
			2. a Defence Strategic Interest Issue;
			3. a Significant Event; or
			4. any known or suspected Fraud or Corruption which is occurring or has occurred in connection with the Process.
1. All obligations under this Disclaimer and Confidentiality Agreement survive the expiration or earlier termination of the Process or the termination of this Disclaimer and Confidentiality Agreement.
2. If the Panel Contractor consists of more than one party, the provisions of this Disclaimer and Confidentiality Agreement jointly and severally bind, and apply to, each such party.
3. This Disclaimer and Confidentiality Agreement is governed by the law of the State or Territory specified in Item 6 of the Schedule.

**Schedule**

|  |  |  |
| --- | --- | --- |
|  | Panel Contractor: | **[INSERT NAME AND ABN AS APPLICABLE BEFORE EXECUTING AGREEMENT]**  |
| 1. (Recital B)
 | ATM ID:  | ***[INSERT ATM ID]*** |
| Project No:  | ***[INSERT PROJECT NUMBER]*** |
| Project Name: | ***[INSERT PROJECT NAME AND DESCRIPTION OF WORKS, AS APPLICABLE]*** |
| Works: | ***[INSERT BRIEF DESCRIPTION OF WORKS]*** |
| 1. (Recital A)
 | 1. Tender Administrator:
 | ***[INSERT NAME OF TENDER ADMINISTRATOR]*** |
| 1. (Clause 3)
 | Email address of Tender Administrator: | ***[INSERT EMAIL ADDRESS OF TENDER ADMINISTRATOR]***  |
| 1. (Clause 10(a)(ii)A)
 | Additional information security or confidentiality requirements:  | 1. ***[INSERT]***
 |
| 1. (Clause 27)
 | Governing Law:  | 1. ***[INSERT]***
2. (If not stated, Australian Capital Territory)
 |

**SIGNED** as an agreement.

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Signed** for and on behalf of the**Commonwealth of Australia** in the presence of: |  |  |  |  |
| Signature of Witness |  |  |  | Signature of Authorised Officer |
| Name of Witness in Full |  |  |  | Name of Authorised Officer in Full |

[S 127 OF CORPORATIONS ACT]

|  |  |  |  |
| --- | --- | --- | --- |
| **Executed** by **[INSERT NAME]** in accordance with section 127 of the *Corporations Act 2001* (Cth): |  |  |  |
|  |  |  |  |
| Signature of director |  |  | Signature of company secretary/director ***[delete position as appropriate]*** |
|  |  |  |  |
| Full name of director who states that they are a director of **[INSERT NAME]** |  |  | Full name of company secretary/director ***[delete position as appropriate]*** who states that they are a company secretary/director ***[delete position as appropriate]*** of **[INSERT NAME]** |

**[OR - AUTHORISED SIGNATORY OF COMPANY]**

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed** for and on behalf of **[INSERT NAME]** by its authorised signatory in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of authorised signatory |
|  |  |  |  |
| Full name of witness |  |  | Full name of authorised signatory |

[THESE ARE EXAMPLE EXECUTION CLAUSES ONLY. IF SUBMITTING ON A JOINT BID BASIS, A SINGLE DISCLAIMER AND CONFIDENTIALITY AGREEMENT SHOULD BE PROVIDED ON BEHALF OF ALL ENTITIES, SEPARATELY EXECUTED BY EACH ENTITY]

[THE PANEL CONTRACTOR IS REQUESTED TO ENSURE THAT THE DISCLAIMER AND CONFIDENTIALITY AGREEMENT (DCA) IS COMPLETE, ACCURATE, DULY EXECUTED AND VALID. IF THE PANEL CONTRACTOR EXECUTES THE DCA BY MEANS OTHER THAN IN ACCORDANCE WITH S 127 OF THE CORPORATIONS ACT 2001 (CTH), THE PANEL CONTRACTOR IS ALSO REQUESTED TO PROVIDE EVIDENCE OF AUTHORITY OF THE 'AUTHORISED SIGNATORY' TO SIGN THE DCA (E.G. A COPY OF A POWER OF ATTORNEY DOCUMENT OR A BOARD RESOLUTION)]