



CEO Performance Review

# Minutes

Wednesday 17 April 2024

**MINUTES**

**Minutes of a meeting of the CEO Performance Review Committee held in the Council Chambers, Administration Building, Southern Drive, Busselton, on Wednesday 17 April 2024 at 11:00 am.**

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## 1 OFFICIAL OPENING

The meeting opened at 11:20am.

The Presiding Member welcomed Councillors, staff, guests and members of the public to the CEO Performance Review Committee Meeting of 17 April 2024.

The Presiding Member acknowledged the Wadandi and Bibbulmun people as the traditional custodians of this region and paid respects to Elders past and present.

This meeting was audio recorded for minute taking purposes.

## 2 ATTENDANCE

PRESIDING MEMBER	MEMBERS
Mayor Phill Cronin	Cr Kate Cox
	Cr Val Kaigg

OFFICERS	
Ms Sarah Pierson	Director Corporate Strategy and Performance
Mrs Shannon Pettengell	Manager People, Culture and Strategy
Ms Jo Barrett-Lennard	Governance Officer

APOLOGIES	
Nil	

PUBLIC	
Nil	

## 3 DISCLOSURES OF INTEREST

### DISCLOSURES OF FINANCIAL INTEREST

Nil

### DISCLOSURES OF IMPARTIALITY INTEREST

Nil

#### **4 PUBLIC QUESTION TIME**

##### **4.1 RESPONSES TO PREVIOUS QUESTIONS TAKEN ON NOTICE**

Nil

##### **4.2 QUESTION TIME FOR PUBLIC**

Nil

## 5 CONFIRMATION AND RECEIPT OF MINUTES

### 5.1 CEO Performance Review Committee meeting 13 March 2024

#### COMMITTEE DECISION

**PR2404/33** Moved Cr Val Kaigg, seconded Cr Kate Cox

**That the minutes of the CEO Performance Review Committee meeting 13 March 2024 be confirmed as a true and correct record.**

**CARRIED 3 / 0**

**FOR: Mayor Phill Cronin, Cr Val Kaigg and Cr Kate Cox**

**AGAINST: Nil**

## 6 REPORTS

### 6.1 Independent Facilitator Recommendation

<b>Strategic Theme:</b>	Key Theme 4: Leadership 4.4 Govern a professional organisation that is healthy, capable and engaged.
<b>Directorate:</b>	Corporate Strategy and Performance
<b>Reporting Officer:</b>	Manager People, Culture and Strategy - Shannon Pettengell
<b>Authorised By:</b>	Director Corporate Strategy and Performance - Sarah Pierson
<b>Nature of Decision:</b>	Contractual: To enter into a contract e.g. a lease or the award of a tender etc.
<b>Voting Requirements:</b>	Simple Majority
<b>Disclosures of Interest:</b>	No officers preparing this item have an interest to declare.
<b>Attachments:</b>	<ol style="list-style-type: none"><li>1. RFQ CEO Perf Review [6.1.1 - 22 pages]</li><li>2. CONFIDENTIAL REDACTED - Strategic Leadership Consultant RFQ Submission 25.03.24 [6.1.2 - 16 pages]</li><li>3. CONFIDENTIAL REDACTED - Price Consulting RFQ Submission 30.03.24 [6.1.3 - 14 pages]</li><li>4. CONFIDENTIAL REDACTED - Hammond Woodhouse Advisory RFQ Submission 4.04.24 [6.1.4 - 2 pages]</li><li>5. CONFIDENTIAL REDACTED - Consultant Assessment Matrix [6.1.5 - 9 pages]</li></ol>

The Presiding Member called on a member to move a motion to close the meeting to the public.

The motion was moved and carried.

#### COMMITTEE DECISION

**PR2404/5** Moved Cr Kate Cox, seconded Cr Val Kaigg

**That the meeting is closed to members of the public to discuss an item which has confidential attachments under section 5.23(2)(c) of the *Local Government Act 1995*.**

**CARRIED 3 / 0**

**FOR: Mayor Phill Cronin, Cr Val Kaigg and Cr Kate Cox**

**AGAINST: Nil**

11:21am: At this time, the meeting was closed to the public.

The Presiding Member called on a member to move a motion to reopen the meeting to the public.

The motion was moved and carried.

**COMMITTEE DECISION**

**PR2404/6** Moved Cr Val Kaigg, seconded Cr Kate Cox

**That the meeting be re-opened to the public.**

**CARRIED 3 / 0**

**FOR: Mayor Phill Cronin, Cr Val Kaigg and Cr Kate Cox**

**AGAINST: Nil**

11:28am: At this time, the meeting was reopened to the public.

**COMMITTEE RECOMMENDATION**

**PR2404/7** Moved Cr Kate Cox, seconded Cr Val Kaigg

**That the Council appoint Strategic Leadership Consulting as the independent facilitator to assist the CEO Performance Review Committee in undertaking the performance review of the CEO.**

**CARRIED 3 / 0**

**FOR: Mayor Phill Cronin, Cr Val Kaigg and Cr Kate Cox**

**AGAINST: Nil**

**OFFICER RECOMMENDATION**

That the Committee resolve to recommend to the Council the appointment of either Price Consulting or Strategic Leadership Consulting as the independent facilitator to assist the CEO Performance Review Committee in undertaking the performance review of the CEO.

**EXECUTIVE SUMMARY**

The CEO Performance Review Committee (the Committee) resolved (PR2403/2) to seek quotations for an independent facilitator to assist the Committee in undertaking the performance review of the CEO. Following this process, this report recommends that the Committee resolve to recommend to the Council the appointment of either Price Consulting or Strategic Leadership Consulting as the independent facilitator, in accordance with the CEO Performance Review Policy (the Policy).

**STRATEGIC CONTEXT**

An effective CEO performance review process is vital for the good governance of the organisation.

## BACKGROUND

The CEO Performance Review Policy (the Policy) sets at point 5.4 that the Committee may, if it does not have the resources and / or expertise to undertake the performance review process to the expected standard, or considers it may otherwise be beneficial, engage (using nominated administrative support) an independent facilitator to assist.

The Committee Terms of Reference states that an objective of the Committee is to provide advice and recommendations to Council in relation to the appointment of an independent facilitator, to assist the committee in conducting the CEO performance review.

Hence, following the Committee's resolution to engage an independent facilitator, a request for quotation (RFQ) process was facilitated by the Manager People, Culture and Strategy, nominated in the Policy as the administrative support for the Committee, with this report recommending that the Committee make a recommendation on appointment of the independent facilitator to the Council.

## OFFICER COMMENT

The independent facilitator is required to facilitate the City's CEO performance review process in accordance with section 5.38 of the *Local Government Act 1995*, the City of Busselton's CEO Standards, CEO Performance Review Policy and CEO Performance Review Committee terms of Reference.

The RFQ provided a scope of requirements, with the facilitator to assist in:

1. Development and review of performance criteria;
2. Preparation of a performance agreement;
3. Collection of performance evidence;
  - a. Including feedback surveys with all Councillors and potentially selected staff (as agreed between CEO and the Council)
  - b. Other evidence as recommended by the Facilitator and agreed between the CEO and the Council
4. Preparation of the performance appraisal report;
5. Facilitating meetings between the Committee and CEO;
6. The provision of feedback to the CEO;
7. Preparation of plans to support improvement (if required); and
8. The provision of an objective view regarding any performance management related matters.

The RFQ (Attachment 1) was sent to 6 consultants. Submissions were received from 3 consultants and are attached confidentially for consideration. In seeking quotations, the CEO was canvassed to ensure that there were no conflicts of interest with any of the consultants being sent the RFQ. The CEO indicated he has not worked with any of the consultants previously and has no conflicts.

Consultants were provided an indicative timeline and requested to provide feedback as part of the quotation process. In addition to this and in response to the quotation, the City requested at a minimum:

1. Evidence of relevant skills and experience; specifically undertaking the role of Independent Facilitator for the purposes of the CEO Performance Review Process, ideally within a local government context and working with the CEO Standards as required under the Act.

2. A detailed performance review process to be followed including associated tools for CEO and Committee consideration, noting agreement is subject to Council endorsement, in accordance with the indicative timeline.
3. Demonstration of ability to work to the indicative timeline, or comment otherwise as to the timeline;
4. An organisational profile.

Submissions were received from the following consultants:

1. Strategic Leadership Consultant – Shayne Silcox (Attachment 2);
2. Price Consulting (Attachment 3); and
3. Hammond Woodhouse Advisory (Attachment 4).

Consultant submissions have been assessed against the listed minimum criteria within the RFQ. An assessment of the responses is attached (Attachment 5). All responses are similar in price and demonstrate suitable experience. The submissions received from Price Consulting and Strategic Consulting Services ranked the equal highest against the qualitative criteria.

Based on this assessment, officers recommend to the Committee that they select one of either Price Consulting or Strategic Consulting Services and recommend to the Council their appointment to the role of independent facilitator. In order to commence the process as soon as possible, it is recommended that a special council meeting be called for by the Mayor for 24 April 2024, for the purpose of appointing the independent facilitator.

Once appointed, the facilitator will be required to develop with the Committee a documented performance review process that will be (on recommendation from the Committee) agreed between the Council and the CEO.

### **Statutory Environment**

Section 5.38 of the *Local Government Act 1995* requires a local government to review the performance of the CEO annually.

Section 5.39B(2), (3), (5) and (6) of the *Local Government Act 1995* relate to adoption of model standards, as contained within Schedule 2 of the Regulations. The City's CEO Standards reflect these model standards.

Further, the Council has established a CEO Performance Review Committee and Terms of Reference (C2310/147), and a CEO Performance Review Policy (C2301/010).

### **Relevant Plans and Policies**

The officer recommendation aligns to the following adopted plan or policy:

Plan:

Not applicable.

Policy:

[Chief Executive Officer Performance Review](#)

Additionally, the CEO Performance Review Committee Terms of Reference is applicable.

**Financial Implications**

The cost to engage an independent facilitator is approximately \$7,500 (ex GST) inclusive of estimated travel and accommodation costs.

**External Stakeholder Consultation**

Not Applicable

**Risk Assessment**

An assessment of the potential implications of implementing the officer recommendation has been undertaken using the City’s risk management framework, with risks assessed taking into account any controls already in place. No risks of a medium or greater level have been identified, with the use of an independent facilitator assisting in the effectiveness of the performance review process.

**Options**

As an alternative to the proposed recommendation the Committee could select an alternative independent facilitator to assist the Committee in undertaking the performance review of the CEO.

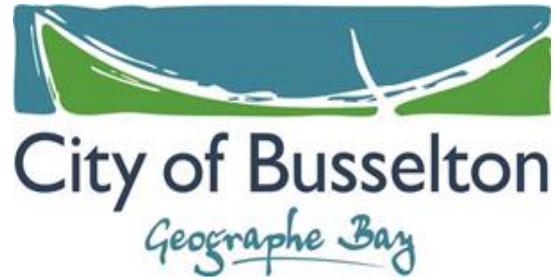
**CONCLUSION**

In accordance with the CEO Performance Review Policy the Committee has determined that use of an independent facilitator would assist them in reviewing the CEO’s performance. Having sought quotations, this report recommends that the Committee recommend to Council that one of either Price Consulting or Strategic Leadership Consulting be recommended to Council for appointment.

**TIMELINE FOR IMPLEMENTATION OF OFFICER RECOMMENDATION**

The officer recommendation will be implemented in full, or in stages as per the following table:

Milestone	Completion Date
Recommendation considered by Council.	24 April 2024
Appointment of independent facilitator	26 April 2024



**REQUEST FOR QUOTATION**

**CEO PERFORMANCE REVIEW**

**Deadline: 9.30am 2 April 2024**

## **SPECIFICATION**

### **Introduction**

The City of Busselton (the **City** or the **Principal**) is inviting quotations for consultant services to facilitate the performance process for the Chief Executive Officer (CEO).

The City's current CEO has been employed in the position since 5 December 2022. His last review, being his probationary review, was undertaken in June 2023.

Following the 2023 Local Government elections, the Council established a CEO Performance Review Committee (the Committee), for the purpose of assisting the Council fulfill its functions in relation to review of the CEO's performance, in accordance with section 5.38 of the *Local Government Act 1995*, the City of Busselton's CEO Standards, CEO Performance Review Policy and CEO Performance Review Committee Terms of Reference.

In accordance with the City's CEO Performance Review Policy, the Committee has determined to give notice to the CEO to commence the performance review process and is seeking to engage an Independent Facilitator, subject to Council endorsement, to assist with the CEO performance review process as per the Scope of Requirements below.

### **Scope of Requirements**

The Independent Facilitator (Facilitator) will be required to facilitate the City's CEO performance review process in accordance with section 5.38 of the *Local Government Act 1995*, the City of Busselton's CEO Standards, CEO Performance Review Policy and CEO Performance Review Committee Terms of Reference.

Specifically, the Facilitator will be required to assist in:

1. Development and review of performance criteria;
2. Preparation of a performance agreement;
3. Collection of performance evidence;
  - a. Including feedback surveys with all Councillors and potentially selected staff (as agreed between CEO and the Council).
  - b. Other evidence as recommended by the Facilitator and agreed between the CEO and the Council.
4. Preparation of the performance appraisal report;
5. Facilitating meetings between the Committee and CEO;
6. The provision of feedback to the CEO;
7. Preparation of plans to support improvement (if required); and
8. The provision of an objective view regarding any performance management related matters.

The Facilitator will be required to work with the City of Busselton:

- CEO
- CEO Performance Review Committee (consisting of 3 Councillors)
- Elected Members (totalling 9 including Councillors and the Mayor)

The Facilitator will be required to develop with the Committee a documented performance review process that will be (on recommendation from the Committee) agreed between the Council and the CEO.

Administrative support to the process will be provided by the City's Manager People, Culture and Strategy and/or Director Corporate Strategy and Performance.

#### Indicative Timeline

To guide your considerations the below indicative timeline is proposed. Facilitator feedback in relation to the timeline is sought as part of the quotation response.

1. CEO self-assessment report due in accordance with Policy.	3 April 2024
2. The Committee to meet (informally) to review the Facilitator quotations and process submissions	10 April 2024
3. The Committee Meeting to formally resolve on recommendation to appoint Independent Facilitator and process.	17 April 2024
4. Report to Council to endorse engagement of Facilitator and performance review process to be followed.	Council Meeting by / on 24 April 2024
5. Facilitator advised of engagement.	26 April 2024
6. CEO Performance Review Process commences.	1 May 2024
7. Performance Report to Council	Council Meeting on or around 12 June 2024

#### Other Information

The Facilitator would need to be available in person to support the performance review process as requested by the CEO and/or CEO Performance Review Committee, with some capacity to conduct aspects via teams / zoom.

#### Price Basis of Quotation

The City seeks a lump sum price for the provision of the Requirements exclusive of Goods and Services Tax (GST). Unless otherwise indicated prices quoted must be all inclusive to provide, perform and complete the Requirements. Any fee, charge or expense not stated in the Response will not be allowed as a charge for any transaction under any resultant Contract.

#### Information to be provided in response to Quotation

At a minimum the City seeks the following:

1. Evidence of relevant skills and experience; specifically undertaking the role of Independent Facilitator for the purposes of the CEO Performance Review Process, ideally within a local government context and working with the CEO Standards as required under the Act.
2. A detailed performance review process to be followed including associated tools for CEO and Committee consideration, noting agreement is subject to Council endorsement, in accordance with the indicative timeline.

3. Demonstration of ability to work to the indicative timeline, or comment otherwise as to the timeline;
4. An organisational profile.

**SCHEDULE OF PRICES**

**PART A – LUMP SUM PRICE**

This is a lump sum contract. The Contract Price payable by the City shall be the lump sum accepted by the City as adjusted in accordance with the Contract.

**Lump sum price**

The Respondent’s proposed total price for completing the Requirements is:

\$..... exclusive of GST

**Breakdown of lump sum price**

Requirement	Price (Ex GST)
Facilitate the City’s CEO performance review process as contained within this request for quotation.	\$
Other requirements	\$
<b>TOTAL</b>	\$

**PART B – RATES FOR VARIATIONS**

Please provide a schedule of rates for variations to the services under the Contract.

Position Within Organisation	Hourly Rate (ex GST) per hour

Travel \$ / Km: _____
Accommodation \$ / night: _____
Other Specify): _____

## **CONDITIONS OF QUOTATION**

1. The terms and conditions contained in this **Part A** of this Request for Quotation apply for the whole of the procurement process contemplated by this Request for Quotation.
2. Submission of quotations
  - (a) Quotations must be submitted before the closing date/time for submission of quotations, as specified in this Request for Quotation (Deadline).
  - (b) Respondents must ensure that their quotations are submitted in entirety before the Deadline.
3. Quotations will be deemed to have been made on the basis of and to incorporate (and respondents will be bound to) all the terms and conditions of this Request for Quotation and prices/costings and documentation submitted by respondents in support of their quotations.
4. Any terms and conditions printed or inserted on respondents' quotations or submitted by or on behalf of respondents as part of their quotations, that are inconsistent with this Request for Quotation will not be binding on the City.
5. The City reserves the right to, in its sole discretion:
  - (a) suspend, end, reinstate or vary this Request for Quotation process;
  - (b) extend the Deadline; and
  - (c) reject a quotation received after the Deadline.
6. No respondent will have any claim for compensation of any kind whatsoever, as a result of participating in or responding to this Request for Quotation.
7. Everything submitted by respondents as part or in support of their quotations (including documents, information and/or goods will become upon submission the absolute property of the City and will not be returned to the respondent PROVIDED that the respondent is entitled to retain any copyright and other intellectual property rights therein, unless otherwise provided under any subsequent contract.
8. All quotations will remain valid and open for acceptance for a minimum period of ninety (90) days from the Deadline.
9. Evaluation:
  - (a) Quotations received will be assessed in accordance with the terms and conditions outlined in this Request for Quotation and applicable City processes and standards.
  - (b) The City will evaluate submissions with a view to selecting the submission/s which is most advantageous to the City.

- (c) Although price will be a consideration, the quotation containing the lowest price will not necessarily be accepted.
- (d) As part of the evaluation process a value judgement of quotations, based on price and respondents' submissions in response to the selection criteria specified in in this Request for Quotation, will be made to determine which quotation would be most advantageous to the City.

10. Acceptance of Quotations

- (a) Subject to clause 10(2) the City may advise a respondent (whether by email, through an online portal or otherwise) (defined as an **Evaluation Update**):
  - (i) that the evaluation process has been completed or finalised;
  - (ii) the outcome of the evaluation process; or
  - (iii) that the Respondent's response or quotation has been selected or accepted.
- (b) Any Evaluation Update:
  - (i) is issued for the purposes of updating the recipient about the Request for Quotation process;
  - (ii) does not constitute an offer to enter into a contract with the City;
  - (iii) does not constitute acceptance by the City of a Response; and
  - (iv) does not constitute entering into a contract with the Respondent.
- (c) A binding contract between the City and the preferred supplier pursuant to this Request for Quotation will only be formed upon the earlier of one of the following events:
  - (i) execution by the parties of a formal instrument of agreement;
  - (ii) written notification by the City to the preferred supplier that a contract has been awarded to the preferred supplier; or
  - (iii) issuing of a purchase order by the City to the preferred supplier for supplying the relevant goods and services.

11. Selection Criteria

For purposes of assessing responses to this RFQ the City may have regard to:

- (a) Price information;
- (b) Respondents' qualifications, experience, resources, key personnel and demonstrated understanding in so far as these relate to or are required for successfully supplying the Goods and Services;
- (c) Such other criteria as specified in this RFQ or reasonably determined by the City.

Therefore respondents must provide as part of their responses to this Request for Quotation, relevant information in relation to the matters listed in sub-paragraph (a) above.

12. The City may in its sole discretion accept any quotation, either wholly or in part or decide not to accept any quotation at all.
13. Respondents, by submitting quotations pursuant to this Request for Quotation, agree to be bound by the General Conditions of Contract For Supply of Goods and Services (see paragraph B below) should they become the Contractor.

## **GENERAL CONDITIONS OF CONTRACT FOR SUPPLY OF GOODS AND SERVICES**

These terms and conditions shall form part of the Contract awarded to the Contractor pursuant to the Request for Quotation:

### **1. DEFINITIONS**

In the Contract, except where the context otherwise requires:

- (1) Headings are used for convenience and do not affect the interpretation of this Contract;
- (2) A reference to a clause is a reference to a clause in this Contract;
- (3) Words importing the singular include the plural (and vice versa), words denoting a given gender include all other genders, and words denoting individuals include corporations (and vice versa);
- (4) References to currency are references to Australian currency unless otherwise specifically provided; and
- (5) The following definitions apply:

**Business Day** means a day other than a Saturday, Sunday or public holiday in Western Australia.

**City** means the City of Busselton, a local government constituted pursuant to the provisions of the *Local Government Act 1995* (WA) and having its municipal offices at 2 Southern Drive, Busselton WA 6280.

**Confidential Information** means all of the City's information which:

- (1) is disclosed or otherwise made available to, or acquired directly or indirectly by, the Contractor at any time (including this Contract);
- (2) relates to the City's or any Local Government's past, existing or future business, strategic plans or operations, finances, or customers (including any information that is derived from such information); and
- (3) is in oral or visual form, or is recorded or stored in a Record,

but does not include information which:

- (4) is or becomes generally and publically available other than as a result of a breach of this Contract;
- (5) is in the possession of the Contractor without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by the Contractor; or
- (6) has been independently developed by the Contractor or acquired from a third party not the subject to a duty of confidence to the City.

**Contamination** means any event that arises in connection with supply of the Goods and Services which has resulted in, or has the potential to result in, land, water or a site becoming 'Contaminated' as that term is defined under the *Contaminated Sites Act 2003* (WA).

**Contract** means all the documents which constitute or evidence the final and concluded agreement between the City and the Contractor which result from the Request for Quotation, including these

*General Conditions of Contract for the Supply of Goods and Services* and relevant sections of the Request for Quotation.

**Contractor** means the successful respondent to whom a contract is awarded pursuant to the Request for Quotation.

**Contractor's Personnel** means the Contractor's employees, agents and subcontractors involved in providing the Goods and/or Services.

**Contract Price** means the monetary consideration stated in the Contract for providing the Goods and Services which:

- (1) If the Contract Price is based on a lump sum, the Contract Price payable by the City shall be the lump sum accepted by the City pursuant to the Request for Quotation and as adjusted in accordance with the Contract; or
- (2) If the Contract Price is based on a schedule of rates, the Contract Price payable by the City shall be the amount ascertained by applying the rates accepted by the City pursuant to the Request for Quotation and adjusted in accordance with the Contract, to the relevant volume/items/quantities/units of the Goods and Services.

**Electronic Communication** has the same meaning as in the *Electronic Transactions Act 1999* (Cth).

**General Conditions of Contract** means the terms and conditions set out in this document, as referenced in the relevant request for quotation issued by the City.

**Expert** means the person whom the Parties agree to determine any dispute in accordance with the provisions of **clause 28** or, alternatively, if the Parties cannot agree, then a suitably qualified person, having regard to the nature of the dispute, referred by the President (at that time) of the Law Society of Western Australia at the request of either Party.

**Goods and Services** means any/all works to be undertaken and/or goods and/or services to be supplied in terms of the Contract and, where the context requires, include:

- (1) Either the relevant goods or services; and/or
- (2) Any part or component of the Goods and Services.

**Intellectual Property Right** means all intellectual property rights, including copyright, patents, trademarks, designs, trade secrets, inventions, know-how, rights in circuit layouts and confidential information, any application for any of the foregoing rights and any rights of a similar nature.

**Party/Parties** means, subject to the context in which it is used, either/or the City and/or the Contractor.

**Records** include documents, information and data stored by any means and all copies and extracts of the same.

**Request for Quotation** means the relevant request for quotation process implemented by the City for procurement of the Goods and Services the subject of this Contract.

**Security** means cash, an unconditional bank guarantee or retention money to be provided for purposes of securing due performance by the Contractor of its obligations under the Contract.

**Term** means the term or period during/over which the Contractor has to supply the Goods and Services.

## **2. EVIDENCE OF CONTRACT**

- (1) The Contract shall be evidenced by the final and concluded agreement between the City and the Contractor which result from the Request for Quotation, including these General Conditions of Contract.
- (2) The precedence of documents in the event of a conflict or inconsistency between the documents that form the Contract shall be as follows:
  - (a) City letter of award of contract (if any).
  - (b) Request for Quotation.
  - (c) Any addendum issued by the City pursuant to the Request for Quotation.
  - (d) General Conditions of Contract.

## **3. NOTICES**

- (1) Notices or other communication to or by a Party must be in writing or by Electronic Communication and addressed to:
  - (a) The Contractor at the address as specified in its response to the request for Quotation;
  - (b) The City at the following address:

City of Busselton  
2 Southern Drive  
BUSSELTON WA 6280  
Email: [city@busselton.wa.gov.au](mailto:city@busselton.wa.gov.au)  
Attention: Chief Executive Officer, or
  - (c) Any other email or physical address within Australia which a Party may nominate by prior written notice to the other Party.
- (2) A notice given is taken to be received:
  - (a) if hand delivered, on the first Business Day following delivery;
  - (b) if sent by pre-paid post, 5 (five) Business Days after the date of posting; or
  - (c) if sent by Electronic Communication, on the first Business Day following the time that would be the time of receipt under the *Electronic Transactions Act 1999* (Cth) (which is currently when the Electronic Communication enters the addressee's information system).

## **4. CONTRACTOR TO HAVE INFORMED ITSELF**

- (1) The Contractor shall be deemed to have:
  - (a) obtained and properly examined all reasonably available information relevant to the risks, contingencies and other circumstances that may have had an effect on its quotation and performance under the Contract; and

- (b) satisfied itself as to the correctness and sufficiency of its quotation and that its price covers the cost of complying with all its obligations under the Contract.
- (2) Failure by the Contractor to do all or any of the things it is deemed to have done under this clause will not relieve the Contractor of its liability of due performance under the Contract.

## **5. COMPLYING WITH STATUTORY REQUIREMENTS AND DIRECTIONS**

The Contractor shall comply with the requirements of all relevant legislation and all reasonable directions given by the City applicable to the Goods and Services or its performance under the Contract.

## **6. ASSIGNMENT AND SUBCONTRACTING**

The Contractor shall not assign or subcontract the Contract or any part thereof or any payment there under without the prior written approval of the City, which the City, in its sole discretion, may refuse or grant subject to conditions.

## **7. RISK, INDEMNITY AND LIMIT OF CITY'S LIABILITY**

- (1) The Contractor shall be solely responsible for the Goods and/or Services it provides and shall bear the sole risk for any loss or damage whether to any person or property caused by or resulting from, directly or indirectly, any act or omission of the Contractor or any default or negligence by the Contractor, irrespective of any negligence, default or breach of statutory duty on the part of the City.
- (2) The Contractor shall indemnify and keep indemnified the City against all loss of or damage to the property of the City and from and against any claim, action or proceeding that may be made or brought by any person against the City or its employees, agents or contractors in respect of personal injury to or the death of any person whomsoever or loss of or damage to any property whatsoever arising out of or as a consequence of provision of the Goods and Services by the Contractor or its employees, agents or subcontractors and also from any costs and expenses that may be incurred in connection with any such claim, action or proceeding.
- (3) Nothing in this clause shall require the Contractor to indemnify the City or its employees, agents or contractors against any claim, loss or damage caused or contributed to (to the extent of that contribution) by the negligence or default of the City or its employees, agents or contractors.
- (4) The City shall not be liable for:
  - (a) any loss, damage or injury to the Contractor or its employees, agents or subcontractors or its/their property, unless caused by the City's wilful or negligent conduct; or
  - (b) any failure to perform and observe any of the City's obligations under the Contract due to any cause beyond the City's control.

## **8. INSURANCE**

- (1) In addition to any other insurances required under the Contract and without limiting the Contractor's obligations and responsibilities under the Contract, the Contractor shall, to the satisfaction of the City and having regard to the Contractor's obligations and responsibilities

pursuant to the Contract, effect and maintain at its cost throughout the duration of the Contract sufficient insurance cover with a reputable insurer including:

- (a) public liability insurance with a minimum limit of not less than ten million dollars (\$10,000,000) for any one occurrence;
- (b) workers compensation insurance in accordance with Western Australian law for all persons engaged by the Contractor to provide the Goods and Services, whether as employees, agents or subcontractors;
- (c) for Goods in transit, transit and material damage insurance to the sum of the Goods' purchase value (including freight and other charges), up until title and risk in the Goods pass to the City; and
- (d) motor vehicle third party injury and property damage with a minimum limit of not less than ten million dollars (\$10,000,000) for any one occurrence.
- (e) where the Contract includes the provision of Services:
  - (i) a cross-liability clause noting the City for its rights and interests; and
  - (ii) a waiver of subrogation in favour of the City.
- (a) Where Services provided include the giving of professional advice or instruction, design, formula or specification, the Contractor shall effect professional indemnity insurance with a minimum cover of not less than two million dollars (\$2,000,000) for any one claim.
- (2) Where the Contractor engages agents or subcontractors to provide the Goods and Services, provided the Contractor has satisfied itself that the agent or subcontractor has the necessary workers compensation insurance in place, and continues to do so at all times, the Contractor shall not be required to effect and maintain worker's compensation insurance for those agents or subcontractors.
- (3) In respect of all insurances required under the Contract, the Contractor must:
  - (a) provide the City, on demand and at the Contractor's cost, with such details as the City may reasonably require, including copies of the certificates of currency; and
  - (b) notify the City as soon as reasonably possible if and when an event occurs which gives rise or might give rise to a claim or could prejudice a policy of insurance or when a policy of insurance is cancelled.

## **9. CONFIDENTIALITY**

- (1) The Contractor shall not advertise, publish or release to the public:
  - (a) any Confidential Information; or
  - (b) other information in relation to the Goods and Services or this Contract, without the prior written approval of the City.
- (2) The Contractor shall not, and shall ensure that the Contractor's employees, agents or contractors do not, without the prior written approval of the City:
  - (a) use Confidential Information except as necessary for the purposes of fulfilling its obligations under this Contract; or
  - (b) disclose the Confidential Information:
    - (i) other than (to the extent they require the information to enable the Contractor to fulfil its obligations under this Contract) to the Contractor's legal advisors, accountants or auditors; or
    - (ii) where disclosure is required by law (including disclosure to any stock exchange).

- (3) The rights and obligations under this clause shall continue to apply after the expiration of the Contract.

#### **10. INTELLECTUAL PROPERTY RIGHTS**

- (1) The Contractor warrants that the Goods and Services and any design, Records or methods of working provided by the Contractor do not infringe Intellectual Property Right.
- (2) The Contractor shall indemnify the City against any loss resulting from any alleged or actual infringement of any Intellectual Property Right.
- (3) All payments and royalties payable in respect of any Intellectual Property Right required in respect of performance of the obligations under this Contract shall be included in the Contract Price and shall be paid by the Contractor to the person to whom they may be due or payable.
- (4) Except as otherwise provided in this Contract, ownership of Intellectual Property Right (other than third party Intellectual Property Rights) associated with the Goods and/or Services and any Records provided by the Contractor pursuant to this Contract vests in and shall remain vested in the City.
- (5) Ownership of the City's Intellectual Property Right (other than third party Intellectual Property Rights) vests in and shall remain vested in the City.
- (6) The Contractor grants to the City an irrevocable, perpetual, worldwide, royalty free and transferrable licence to use and reproduce all Intellectual Property Rights associated with the Goods and/or Services and any Records provided pursuant to this Contract.

#### **11. QUALITY OF GOODS AND SERVICES**

The Contractor will ensure that:

- (1) All Goods conform to the specification and the standards specified in the Contract, are free of defects, fit for purpose, of merchantable quality and are new, and not have been used by any other party, unless otherwise agreed by the City; and
- (2) All Services conform to the specification and the standards specified in the Contract, are of the highest standard, carried out promptly, in a professional manner, with all due skill, care and diligence and performed by competent and trained personnel.
- (3) The Contractor warrants that the Contractor, its subcontractors and their respective employees, have the requisite resources, capacity, experience, professional skills and capabilities to provide the Goods and Services in strict compliance with the requirements under the Contract.

#### **12. TITLE AND RISK FOR THE GOODS**

- (1) Subject to any rights the City may have to reject the Goods or terminate the Contract, title will pass to the City upon delivery of the Goods to the City or its agents.
- (2) Except where specifically otherwise specified in the Contract risk for the Goods will remain with the Contractor until delivery and unloading of the Goods has been effected at the place the City has nominated for delivery.

#### **13. SUPPLY, ACCEPTANCE AND REJECTION OF GOODS AND SERVICES**

- (1) The Contractor must at its cost deliver, supply and/or perform the Goods and Services at/to the locations and as specified in the Contract.
- (2) The Contractor shall, unless the Contract otherwise specifically provides, supply at its cost and expense, all materials, tools, plant, labour, fittings and other resources necessary for the proper execution and completion of its obligations under the Contract.
- (3) Delivery, receipt, performance and completion of the Goods and Services shall not of itself constitute acceptance of the Goods or Services by the City, with acceptance being subject to the City's rights under the Contract in relation to non-compliant Goods and Services and/or breach of the Contract by the Contractor.
- (4) The City shall give the Contractor written notice (**Non-Compliance Notice**) as soon as practicable if it becomes aware of Goods and Services provided by the Contractor which do not comply with the Contract (**Non-Compliant Goods/Services**).
- (5) Without prejudice of any of the City's rights and remedies under the Contract, the City may, in its absolute discretion, under a Non-Compliance Notice, demand from the Contractor to:
  - (a) remove and/or replace and/or rectify the Non-Compliant Goods/Services at the Contractor's cost and risk to a standard consistent with the requirements under the Contract; or
  - (b) refund the Contract Price received for the Non-Compliant Goods/Services and thereupon to remove at the Contractor's cost and risk the Non-Compliant Goods/Services from wherever it may be located within the City's district.
- (6) If the Contractor fails to comply with a Non-Compliance Notice within 7 days of receipt without any reasonable excuse, the City may, either through City resources or by engaging another contractor, have the Non-Compliant Goods/Services removed and/or replaced and/or rectified and/or returned, and shall certify the cost incurred as moneys due from the Contractor to the City.
- (7) A lack of the Contractor's resources will not be accepted as a reasonable excuse for purposes of sub-clause (4) above.
- (8) The risk of any damage, deterioration, theft or loss of Goods/Services after delivery but prior to acceptance by the City shall remain with the Contractor except where the damage, deterioration, theft or loss results from a negligent act or omission of the City or its employees, agents or contractors.

#### **14. TIME FOR DELIVERING/PERFORMING THE GOODS AND SERVICES**

- (1) The Contractor acknowledges and agrees that:
  - (a) The Contractor must provide the Goods and Services within the period or by the date stated in or determined under the Contract;
  - (b) Time is of the essence in performing the Contractor's obligations under the Contract; and
  - (c) Unless extension of time is granted in accordance with **clause 15**, the Contractor bears all risk of delay to the delivery, progress and/or performance of the Goods and Services.
- (2) Without derogating from the generality of the provisions of sub-clause (1), the Contractor will be liable for all and any reasonable costs incurred by the City as a result of the Contractor's failure to meet the contracted time frames for delivery and performance of the Goods and Services.
- (3) Disregarding anything else to the contrary contained in the Contract, where the Contractor is unable or fails (for whatever reason) to supply and provide the Goods and Services at any time or in any place, the City may, without being liable in any way to the Contractor, obtain or acquire such Goods and Services from any other supplier or provider thereof.

- (4) The City's rights under sub-clause (2) and (3) are in addition to and without prejudice of any other rights it may have at law, in equity or otherwise.

**15. CITY MAY GRANT EXTENSION OF TIME**

- (1) Subject to clause 14 the Contractor may apply in writing within seven Business Days after the occurrence of any event not attributable to the act, neglect or default of the Contractor or its servants or agents, for an extension of time for supplying the Goods and Services, clearly stating the reasons. On receipt of such a request, the City shall determine whether an extension of time shall be granted and as soon as practicable advise the Contractor accordingly.
- (2) The City may direct the Contractor to provide the City with further information in support of the Contractor's extension of time request and the Contractor must give that supporting information within five Business Days of that written direction.
- (3) The Contractor will only be allowed to claim delay costs from the City if the cause of the delay is one of the following:
  - (a) Breach of the Contract by the City;
  - (b) Suspension of delivery, progressing and/or performing of the Good and Services by the City for any reason the City may deem fit, unless the decision to suspend delivery, progressing and/or performing of the Good and Services was given as a result of a breach by the Contractor of the Contractor's obligations under the Contract; or
  - (c) Any substantial modification, addition or omission, or other variation to, in or from the scope of the Goods or Services directed by the Superintendent.
- (4) If the Contractor has been granted an extension of time for a delay prescribed under sub-clause (5) and has necessarily and reasonably incurred extra cost as a direct consequence of the delay, the Contractor must, if it seeks delay costs, give the City notice of its claim for delay costs at the same time as the notice referred to in sub-clause (3), including all available particulars and supporting documentation and further information reasonably required by the City.

**16. HOURS OF WORK**

- (1) Unless the City's prior written approval has been obtained, the normal hours for supplying the Goods and Services shall be between 8.30am - 5:00pm on weekdays (i.e. Mondays to Fridays, excluding public holidays).
- (2) Any refusal by the City to approve a request to supply the Goods and Services outside the prescribed hours specified in sub-clause (1) shall not constitute any grounds whatsoever for a claim by the Contractor for additional time or costs.

**17. CONTRACT PRICE AND PAYMENT**

- (1) The Contract Price specified in the Contract is:
  - (a) All-inclusive and includes, but is not limited to, all costs, expenses, overheads, taxes, duties, charges, levies and fees payable on or in respect of the provision of the Goods and/or Services; and

- (b) Unless expressly specified in the Contract, firm and not subject to any rise and fall during/over the Term.
  - (2) The Contractor shall provide the City with no more than one claim/invoice per calendar month in respect of Goods and Services provided under the Contract. Each monthly invoice must:
    - (a) Be submitted by the Contractor before/on the 25th day of each month;
    - (b) Contain such information in relation to the Goods and Services as the City reasonably requires; and
    - (c) Comply with the Australian Tax Office regulations.
- (Compliant Invoice)**
- (3) Where reasonably practical the City shall pay or caused to be paid any/all amounts due and payable in respect of a Compliant Invoice before/on the last day of the second calendar month following the date of receipt of that Compliant Invoices.
  - (4) Failure by the City to pay any amounts due and payable under the Contract will not be grounds to vitiate or avoid the Contract.
  - (5) Without prejudice of any other right or remedy available to the City, the City may withhold payment under the Contract if:
    - (a) The Goods and Services are defective or unsatisfactory to the City; or
    - (b) The Contractor is in breach of the Contract.
  - (6) Unless expressly provided for in the Contract the Contractor shall not be entitled to any interest, credit charge, service fee or any other fee or charge for extending credit or allowing time for the payment of money which is or becomes due under the Contract.

**18. DOCUMENTS AND PLANS TO BE PROVIDED BY CONTRACTOR**

- (1) The Contractor must at its cost obtain and deliver to the City prior to completion of the Contract any/all:
  - (a) warranties specified in the Contract;
  - (b) warranties from any of the Contractor's subcontractors in relation to the Goods and Services;
  - (c) warranties from any manufacturer or supplier of the Goods and Services in relation thereto;
  - (d) operating, maintenance and training manuals, technical data, product brochures, associated drawings and other information issued by the manufacturers of goods, equipment, installations, structures and materials that form part of the Goods and Services; and/or
  - (e) as constructed drawings, in such format as reasonably required by the City, of any designs, structures or installations that form part of the Goods and Services.
- (2) The Contractor must at its cost procure and ensure that the City will have the benefit of any of the warranties specified in sub-clause (1) above.

**19. SET OFF**

Without prejudice or limitation of the City's rights under the Contract, the City may set off against any monies owing to the Contractor:

- (1) any amount due and payable by the Contractor to the City;
- (2) any amount by which, in the reasonable opinion of the City, the value of the Goods and Services that is diminished as a result of the failure of the Contractor to comply with this Contract; and

- (3) any monies due and owing by the Contractor to the City otherwise than in connection with this Contract.

## 20. CONTRACT NOT EXCLUSIVE RIGHT

The Contract does not confer any exclusive right upon the Contractor to provide the Goods and Services to the City. The City shall be free at all times to obtain the Goods and Services or any part of them from any other supplier, except for Goods and Services the subject of an existing order to the Contractor.

## 21. SECURITY

- (1) If under the Contract the Contractor is required to provide Security:
- (a) the City may in its absolute discretion determine the format of the Security;
  - (b) the Contractor must provide the Security in the amount as specified in the Contract and in the format as determined by the City;
  - (c) if Security is required by way of cash or an unconditional bank guarantee:
    - (i) the Contractor must within five Business Days of the award of the Contract provide the City with the Security; and
    - (ii) the provision of the Security is a condition precedent to the Contractor's entitlement to payment under the Contract, and
  - (d) the Contractor must ensure that the Security remains valid and enforceable by the City in the amounts set out in the Contract until it is required to be released under sub-clause (4).
- (2) The City may make demand on and utilise the Security if:
- (a) the City makes a claim for payment from the Contractor under the Contract, or any document contemplated by the Contract and has not been paid that amount by the Contractor by its due date; or
  - (b) Contractor Default, as contemplated under **clause 30**, occurs.
- (3) The City's entitlement to Security ceases once the Contractor has fully complied with and discharged all of its obligations under the Contract.
- (4) Subject to any demands made under sub-clause (2), the City must release the Security within ten Business Days after receipt of a notice from the Contractor requesting release of the Security, provided that the Contractor may only issue such a notice after the City's entitlement to the Security ceased as contemplated under sub-clause (3).

## 22. GOODS AND SERVICES TAX

- (1) For the purposes of this clause:

**GST** means goods and services tax applicable to any taxable supplies as determined under the GST Act.

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and (where the context permits) includes the regulations and the Commissioner of Taxation's Goods and Services Tax Rulings and Determinations made there under and any other written law dealing with GST applying for the time being in the State of Western Australia.

**supply** and **tax invoice** have the same meanings as in the GST Act.

- (2) Unless otherwise indicated, all amounts fixed, determined under or referred to in the Contract or consideration for any supply made under the Contract are exclusive of GST.
- (3) Subject to sub-clause (4) if GST is or becomes payable by a Party (**Supplier**) in relation to any supply that it makes under, in connection with or resulting from the Contract, the Parties agree that, in addition to any consideration provided by a Party (**Recipient**) for that supply, the Recipient must pay to the Supplier the amount of any GST for which the Supplier is liable in relation to that supply (**Additional Amount**) at the same time as the relevant consideration or any part of it is provided.
- (4) The obligation to pay the Additional Amount only arises once the supplier has issued a tax invoice to the Recipient in respect of the Additional Amount.

### **23. SAFETY AND SECURITY**

- (1) For the duration of the Contract, and in performing any obligations under the Contract, the Contractor must adhere to all relevant safety and occupational health laws, regulations and standards (**OSH Requirements**), including, but not limited to:
  - (a) the West Australian Occupational Safety and Health Act 1984, the West Australian Occupational Safety and Health regulations 1996 and all Codes of Practice and or Australian Standards relevant to this legislation; and
  - (b) the City of Busselton OSH policies, procedures and guidelines for contractors (where applicable).
- (2) The Contractor must, at its cost complete and return a City Contractor OSH Obligations form.
- (3) The Contractor must immediately notify the City of any:
  - (a) death, personal injury or serious incident, which occurs when providing the Goods and/or Services, and within 24 hours of occurrence, shall document and report such event, in accordance with the City reasonable requirements; or
  - (b) loss or damage or destruction to any property at a City site arising directly or indirectly from the provision of the Goods and/or Services.

### **24. INDUSTRIAL AWARDS**

- (1) With respect to any Goods and Services supplied in Western Australia, the Contractor must observe, perform and comply in all material respects with all relevant Common Wealth and Western Australian Industrial Awards, Industrial Agreements and orders of competent courts or industrial tribunals applicable to the supply of the Goods Services.
- (2) Failure by the Contractor to comply with sub-clause (1) shall entitle the City, by notice to the Contractor, to forthwith terminate the Contract, without prejudice to any other rights or remedies of the City.

### **25. CONTAMINATION AND POLLUTION**

- (1) If the Contractor becomes aware of any Contamination, the Contractor must:
  - (a) immediately notify the City of the Contamination;

- (b) take any urgent action required to protect people, property, the environment or livestock; and
  - (c) take all reasonable steps to minimise and mitigate any adverse impacts that the Contamination has on the Goods and Services, the City's facilities (if applicable) and surrounding areas.
- (2) During the Term the Contractor is responsible for all and any Contamination caused as a result of supplying the Goods and Services and/or performing its obligations under the Contract.
  - (3) If any Contamination occurs which is caused as a result of the Contractor supplying the Goods and Services or performing its obligations under the Contract and such Contamination poses an imminent risk of harm to people, property, the environment or livestock, the Contractor must at its cost and risk immediately and to the satisfaction of an appointed environmental expert approved by the City, remediate such Contamination such that the affected area does not present a risk of harm to people, property, the environment or livestock and remains suitable for its ordinary use.
  - (4) If the Contractor fails to comply with its obligations under sub-clause (3) the City shall be entitled but not obliged to remediate the affected area.
  - (5) Any reasonable expense incurred by the City pursuant to sub-clause (4) will be owed by the Contractor to the City as a debt due and payable on demand.

## **26. PROTECTION OF PEOPLE AND PROPERTY**

- (1) The Contractor must take all action required to protect both people and property when supplying the Goods and Services, including:
  - (a) avoiding unnecessary interference with the passage of people and vehicles;
  - (b) avoiding damage, obstruction or other interference with any utility service or other similar services;
  - (c) minimising nuisance, including unnecessary noise and disturbance; and
  - (d) preventing unlawful environmental damage or Contamination.
- (2) If the Contractor or the Contractor's Personnel cause damage to any real or personal property, the Contractor must:
  - (a) make good the damage at the Contractor's own cost; and
  - (b) pay any compensation which the Contractor is required to pay under any statutory or common law liability.
- (3) If the Contractor or the Contractor's Personnel cause any personal injury or death to any person, the Contractor must, without limiting its obligation to indemnify under **clause 7**, pay any compensation which the Contractor is required to pay under any statutory or common law liability.
- (4) The Contractor's liability under sub-clauses (2) and (3) is reduced to the extent that the loss, damage, death or injury was contributed to by the negligent act or omission of, or breach of the Contract by, the City.
- (5) If the Contractor does not comply with sub-clauses (2) and (3), the City may, after providing the Contractor with reasonable opportunity to comply and in addition to any other remedy which the City may have, perform that obligation on the Contractor's behalf in a manner determined in the City's absolute discretion. Any cost incurred by the City will be a debt due and payable on demand.

**27. ENTRY BY PRINCIPAL**

The City will during the Term and through its employees, agents or contractors have the power to access the any site where the Goods and Services are supplied for any purpose whatsoever, including and without limitation:

- (1) to ensure compliance with the provisions of the Contract;
- (2) to carry out works required due to a state of emergency; and
- (3) to meet its statutory obligations as a local government.

**28. DISPUTE RESOLUTION**

- (1) The Parties agree to attempt in good faith to resolve through negotiation any dispute regarding the Contract.
- (2) Any Party may, before any dispute is referred to the courts, refer any dispute under the Contract to the Expert for determination under this clause.
- (3) In determining the dispute pursuant to sub-clause (2):
  - (a) either Party may be represented by a legal practitioner;
  - (b) each Party must make a written submission to the Expert as to its contentions in relation to the dispute;
  - (c) each Party must be given an opportunity to make a written response to the submission of the other Party;
  - (d) after receiving the Parties' submissions and responses the Expert may request further submissions or information from the Parties or either of them;
  - (e) the Expert must not accept oral submissions unless both Parties to the dispute are present;
  - (f) the Expert is not bound by the rules of evidence;
  - (g) the Expert may make his or her own enquiries but the Expert must advise the Parties of the results of those enquiries and allow the Parties to make further submissions before making a determination;
  - (h) the Expert must deal with the determination of the dispute as soon as reasonably possible; and
  - (i) the Expert may engage such qualified persons to advise or give an opinion in respect of any particular matter as the Expert sees fit.
- (4) The Expert's determination will be final in relation to the matter in issue and binding on both Parties save and except in matters of law.
- (5) The Parties must each pay an equal share of the Experts costs of making the determination.
- (6) In determining a dispute, the Expert will not act as an arbitrator.

**29. TERMINATION FOR CONVENIENCE**

- (1) The City may, in its absolute discretion, terminate the Contract, or terminate the further performance of the whole or any part of the Goods and Services, at any time by giving at least 14 Business Days' notice to the Contractor.
- (2) In the event of the termination of the Contract under sub-clause (1), the City must pay the Contractor in respect of any portion of the Goods and Services which have been properly supplied and not paid for at the date of termination, as determined by the City (acting reasonably).

### 30. DEFAULT AND TERMINATION

- (1) If the Contractor:
- (a) Fails to fulfil, or is in breach of any of the Contractor's obligations under the Contract and the City, acting reasonably, considers that this failure or breach is not capable of remedy;
  - (b) Fails to fulfil, or is in breach of any of the Contractor's obligations under the Contract and do not rectify the omission or breach within seven Business Days of receiving a notice in writing from the City to do so;
  - (c) Advises the City that it is unable, or unwilling, or will be unable or unwilling to perform any or all of its obligations under the Contract;
  - (d) (If a natural person) becomes bankrupt;
  - (e) (If a corporation, trust or other legal entity) goes into voluntary or compulsory liquidation or goes into receivership or enters into voluntary administration; or makes an assignment of its estate for the benefit of its creditors, or makes an arrangement or composition with its creditors; or
  - (f) Includes any statement, fact, information, representation, or material in its response to the Request for Quotation which is false, untrue or incorrect,

#### **(Contractor Default)**

then the City may without prejudice to its rights under the Contract or otherwise:

- (a) at any time thereafter wholly or partly suspend any payment due to the Contractor under the Contract until the Contractor Default has been remedied to the satisfaction of the City; or
  - (b) terminate the Contract by notice to the Contractor.
- (2) If the City elects to terminate the Contract under sub-clause (1), then the City may recover from the Contractor any and all damages or losses suffered by the City arising out of any, all or any combination of:
- (a) the Contractor Default or non-performance of the Contract; or
  - (b) termination under this **clause 30**,

and the City may, for the purpose of recovering any and all damages or losses suffered by it, have access to the Security.

- (3) The City's rights under this **clause 30** are in addition to and without prejudice of any other rights the City may have under the Contract, at law, in equity or otherwise.

### 31. WAIVER

No forbearance, delay or indulgence by a Party in enforcing the conditions of the Contract shall prejudice, restrict or limit the rights of that Party, nor shall any waiver of those rights operate as a waiver of any subsequent breach.

### 32. ENTIRE AGREEMENT

- (1) The Contract supersedes all prior agreements, arrangements and undertakings between the Parties and constitutes the entire agreement between the Principal and the Contractor relating to the supply of the Goods and Services.
- (2) To the extent permitted by law and to the extent the Contractor's terms and conditions are supplied to the City, whether printed or inserted by or on behalf of the Contractor in the Contractor's response to the Request for Quotation or invoices, delivery notes or other documentation submitted in relation the Contract or otherwise, those terms and conditions will be of no legal effect and will not constitute part of the Contract.

### **33. VARIATION TO CONTRACT TERMS**

None of the terms of the Contract shall be varied, waived, discharged or released either at law or in equity, except by express written agreement between the Parties.

### **34. RELATIONSHIP**

- (1) The Contractor acknowledges and agrees that it is an independent contractor, and not an agent of the City and that the Contractor has no authority to bind the City by contract or otherwise.
- (2) In carrying out their respective obligations under the Contract, each party is acting independently of the other party. Nothing in the Contract creates a partnership, trust or agency between the parties or imposes any fiduciary duties on either party in relation to the other, unless expressly stated.
- (3) The Contractor must not, and must ensure that its, employees, agents or contractors do not, represent the Contractor or themselves as being City employees, agents or contractors.

### **35. SEVERABILITY**

Should any part of the Contract be invalid or unenforceable, that part will be:

- (1) read down, if possible, so as to be valid and enforceable; and
- (2) severed from the Contract to the extent of the invalidity or unenforceability,

and the remainder of the Contract will not be affected by such invalidity or unenforceability.

### **36. RIGHTS AND REMEDIES**

The City may exercise the rights conferred under the Contract in addition to all or any other rights or remedies which the City will or may be entitled to against the Contractor whether under the Contract, at law, equity or otherwise.

### **37. GOVERNING LAW AND JURISDICTION**

- (1) The Contract will be governed by the Laws of the State of Western Australia.
- (2) The Parties irrevocably agree that the courts of the State of Western Australia will have exclusive jurisdiction in respect of any proceedings that arise out of or in connection with the Contract or its subject matter or formation (including non-contractual disputes).

## **7 CONFIDENTIAL MATTERS**

Nil

## **8 NEXT MEETING DATE**

Wednesday 31 July 2024

## **9 CLOSURE**

The Presiding Member closed the meeting at 11:30am.

**These minutes for the CEO Performance Review Committee 17 April 2024 were confirmed as a true and correct record on**

**Date:**

**Presiding Member:**