

Advice

Approach to Market in relation to the Establishment of a Panel of Regional Delivery Partners for Environmental protection, Sustainable Agriculture and Natural Resource Management Services

30 January 2023

1 PURPOSE

- 1.1 The purpose of this document is to provide advice to NRM Regions Australia (**NRMRA**) and NRM Regions Queensland (**NRMQR**) for the benefit of NRM Regional Bodies who wish to tender as a Regional Delivery Partner (**RDP**) in relation to the Approach to Market ID 22-23 BCD 01 (**ATM**) to establish a Panel of Regional Delivery Partners for Environmental Protection, Sustainable Agriculture and Natural Resource Management Services.
- 1.2 The Commonwealth of Australia as represented by the Department of Climate Change, Energy, the Environment and Water (the **Department**) will contract with a RDP through a Deed for each management unit to provide:
- (a) Regional Capacity Services; and
 - (b) Project Services,

2 BACKGROUND

- 2.1 The ATM is part of the Commonwealth Contracting Suite (**CCS**) and comprises:
- (a) the Commonwealth ATM Terms (**ATM Terms**);
 - (b) the CCS ATM terms including Statement of Requirement (**ATM Requirements**);
 - (c) the CCS ATM Response Form (**Response Form**);
 - (d) the draft Commonwealth Deed of Standing Offer (**Standard Deed**);
 - (e) the CCS Glossary and Interpretation (**Glossary**);

- (f) the CCS Guidance on Statement of Tax Records (**Guidance**).

3 GENERAL COMMENTS AND KEY ISSUES

3.1 Independent legal advice

This advice is provided for guidance for the benefit of a NRM Regional Body considering submitting a tender. However, it does not take into consideration the requirements specific to an individual NRM Regional Body and its participation in the ATM process, or its risks associated with ongoing services delivered under the Standard Deed, or its ability to maintain capability and capacity to deliver project services. Each NRM Regional Body should assess its particular risks.

Pursuant to clause 3.2, in submitting a response, an NRM Regional Body acknowledges the requirements of the ATM process and documentation and is deemed to have:

- (a) examined the ATM Terms and associated documents;
- (b) made reasonable enquires relevant to the risks, contingencies and other circumstances which may have an effect on the NRM Regional Body;
- (c) satisfied itself as to the correctness and sufficiency of its tender;
- (d) obtained independent advice on the effect of all relevant legislation in relation to the NRM Regional Body's participation in the ATM process; and
- (e) examined the AusTender Terms of Use.

3.2 Services

Regional Capacity Services

A RDP for a Management Unit will provide the ongoing Regional Capacity Services, which are outlined in Schedule 1 of the ATM Requirements for the benefit of the Department and the Department of Agriculture, Fisheries and Forestry (**DAFF**) under the terms of a Standing Deed.

A RDP may not be the exclusive provider of Regional Capacity Services within a Management Unit.

A RDP may cover more than one Management Unit, however there must be one primary Management Unit (selected when lodging the Tender Response).

Project Services

In addition to the above, the RDPs must maintain the capacity and capability to deliver Project Services, from time to time, also under the terms of the Standing Deed.

A Customer will issue a request for a Project Design and if accepted the RDP and the Customer will execute a Work Order, forming a separate Contract for delivery of the Project Services. The terms of the Standing Deed are akin to a head agreement with the Work Order setting out the details.

A Customer is either the Department, DAFF, or any Government Agency.

There is no guarantee that a RDP will receive a request for a Project Design or that a request for a Project Design will translate into a Work Order.

There is some provision for payment of work undertaken by the RDP in developing the Project Design.

3.3 Effect of response

For noting: In submitting a response, pursuant to clause 2.9(b) and 3.10 of the ATM Terms:

- (a) A NRM Regional Body's response will remain open for 12 months from ATM closing date of 7 March 2023; and
- (b) A NRM Regional Body agrees to enter into a contract which incorporates the terms set out in the Standard Deed.

However, no contract will exist until a Deed is executed by the Department (see clause 2.9(a) and 3.10(b) of the ATM terms). However note, our comments in relation to the Tender Response Deed Poll below.

3.4 Non-negotiable documents

Generally, the ATM Terms, ATM Requirements and Glossary are non-negotiable. Pursuant to clause 3.11 of the ATM Terms the Department retains the unilateral right to amend any part of the ATM.

Lodging a Tender constitutes an offer in accordance with the ATM Terms by the NRM Regional Body that lodges a Tender Response.

Pursuant to clause 2.10(c) and (d), it is contemplated that there will be some negotiations with Tenders in relation to the terms of the Standing Deed. However, the Department prefers that it enter into the same terms with each RDP and significant negotiation will not be undertaken.

It is imperative that each NRM Regional Body review clause 4 and 5 of the ATM Requirements as these will form the Statement of Work and/or Work Order.

Separately, a Tender may request amendments to the Tenderer's Deed, set out in Attachment 2 of the Tender response.

For the purposes of clarity, whilst a successfully NRM Regional Body may negotiate the Standing Deed, the unconditional offer on lodgement of the Tender Response would allow the Department to argue that a contract has been agreed but for the final terms (ie final Standing Deed) and accordingly by signing the Tender's Deed Poll the NRM Regional Body enters into a legally binding document.

3.5 Discussion between NRM Regional Bodies seek to independent lodge a Tender Response

Confidential information

The Department may disclose information provided by an NRM Regional Body in certain circumstances (set out in clause 4.2(b) of the ATM Terms). A NRM Regional Body must not, and ensure that their officers, employees, advisers and contractor do not, divulge or communicate to any person confidential information of the Department. Therefore, when NRM Regional Bodies (and their representatives) are discussing the tender, a NRM Regional Body should be mindful of information that may be disclosed to that NRM Regional Body and before disclosing to other NRM Regional Bodies assess whether clause 4.1 applies to the relevant information.

Ethical dealing

A NRM Regional Body must not engage in any collusive tendering, anti-competitive conduct, or any other unlawful or unethical conduct with any other Tenderer or any other person.

Collusive tendering arises when some or all of the tenderers in a competitive tender attempt to frustrate the purpose of the competitive tender by limiting the degree of competition in it. For example, they might agree between themselves not to submit tenders below a certain price; or inform each other of the prices at which they intend to submit; or engage in “market-sharing” by agreeing which of them will submit “winning” (ie competitively-priced) tenders for particular contracts, so the range of contracts over a period is effectively carved up between them.

Generally, it is acceptable for the NRM Regional Bodies to discuss and collectively agree on proposed amendments/ changes to the Standing Deed. Clause 2.10(c) of the ATM Terms states that the Department intends to enter into the same Standing Deed with consistent terms for all RDP. Accordingly, a collective approach would be encouraged.

In relation to the Tender Response the details of each NRM Regional Body are more specific in relation to their participation. The NRM Regional Bodies may discuss, compare and share various plans, for example a MERI Plan or NRM Plan. However, to the extent that any information would frustrate the purpose of the competitive tender process, such as the NRM Regional Bodies agreeing or setting prices for services the NRM Regional Bodies should refrain from disclosing or discussing such information.

Notwithstanding the above we recommend that the Tenderer’s Deed Poll, clause 3.1(d) is omitted to allow discussion and ensure any Tenderer do not breach a warranty.

3.6 Precedence of Contract Components

If n NRM Regional Body submits a Response Form and its response is accepted, then clause 2.1(b) of the Standard Terms provides that the Contract will comprise the following in order of precedence:

- (a) the ATM Terms;
- (b) the Glossary;
- (c) Guidance on Statement of Tax Records;
- (d) Tender Response;

- (e) Statement of Requirement; and
- (f) the Standard Deed Terms.

This is the standard approach for Australian Government procurement contracts and a Standard risk for such contracts.

If a NRM Regional Body proposes any annexures that are to form part of the Contract and should take precedence over any of the other Contract components listed above, such annexures should form part of the Tender Response. Failure to do so could pose a medium or high risk to a NRM Regional Body depending on the nature of the annexure.

3.7 **Commencement Date**

The RDP must commence provision of the Regional Capacity Services on and from the later of 1 July 2023 and the date the Deed is executed (ie Deed Commencement Date).

If the Deed is executed before 1 July 2023, a Customer may issue a request for Project Design (in accordance with the Standing Deed), however payment for any Regional Capacity Services will not commence until 1 July 2023.

3.8 **Joint or part tenders**

Each Standing Deed must be entered into by a single legal entity, who will be responsible for the performance of the Standing Deed.

If the Tender is to be made by an unincorporated group, one of the entities will be required to enter into the Standing Deed (as administrating entity) and subcontract to the other entities in the group. Alternately, a new legal entity is created.

A RDP may subcontract some of its Regional Capacity Services and all of its Project Services.

3.9 **Subcontracting**

Clause 20.9(b) of the Standard Deed requires a RDP to ensure that subcontracts contain provisions specified in that clause (a **specified provision**). This is common in Commonwealth contracts and many NRM Regional Bodies will be familiar with the terms for the RLP Commonwealth contacts.

These obligations apply to all Subcontractors of RDP regardless of value or work type. While these clauses do not specify that RDP must include a provision in the subcontract in relation to the specified action, unless the specified action is included as a Subcontractor obligation in the Sub Contract, RDP is in no position to ensure that its Subcontractors take the specified action.

Due to the terms of clause 56.2 of the Standard Deed, even if a specified action is a minor one, RDP will be in breach of the provisions of the Standard Deed and will risk the Standard Deed being terminated or reduced, if it is unable to ensure that a Subcontractor takes the specified action. The practical effect is that in order to comply with its obligations in the Standard Deed, each such obligation imposed on RDP in the Standard Deed must be reflected in a similar obligation on the Subcontractor in the Subcontract. Arguably, if there is no mirror provision in its Subcontract, RDP would be in breach of its obligation from the time when it enters into the Subcontract, not just at a time when the specified action is required (if at all) and the Subcontractor fails to do it, because it has put itself in the position of being unable to ensure the specified action.

The language of the Standard Deed effectively rules out RDP making a commercial risk assessment not to include any of the provisions relating to specified actions in Subcontractors of lower value or for less risky work types in order to reduce the complexity of the document, without the approval of the Department.

We **recommend** that collectively the NRM Regional Bodies negotiate with the Department around the obligations required to be placed on subcontractors. This negotiation may occur after the Tender lodgement.

3.10 Invoicing

The process for payment of invoices poses a cash flow risk to the RDP. This is particularly the case as payment is for services performed in arrears.

Generally, the Department will pay the Service Charges that a RDP has set out in the Schedule 3 of the Standing Deed and/or Work Order. All payments are subject to the RDP performing the services set out in the invoice and required to be performed by the due date.

If the services are subject to acceptance (the RDP will be notified earlier under clause 18.1 of the Standing Deed) the service are assessed by the Customer and either approve or does not approve the invoice. The services may need to be performed again and reassessed.

An invoice is only paid 20 days after approval.

The assessment process is set out in the Standing Deed however the Standing Deed is silent on timeframes in which an assessment must occur. We have recommended that the Department amend the Standing Deed to reduce the risk to the RDPs, however in the absence of the Department amending the Standing Deed we recommend that each NRM Regional Body consider its cash flow and allow a buffering of monies to cover payment of employees and subcontractors whilst waiting for an invoice to be paid by the Department.

4 DETAILED COMMENTS

4.1 ATM Terms and Requirements

The ATM Terms and Requirements are not negotiable. In the table below, we mention some of those terms that may pose some risk to a NRM Regional Body. There may be others which are specific to a NRM Regional Body. A NRM Regional Body should familiarise itself with all the Requirements and ATM Terms

Item	Reference	Issue	Provision	NFP Lawyers' comments
Approach to Market Terms (ATM Terms)				
1	Clause 6.2	Minimum Content and Format Requirements	<p>A tender application must be written in English and include the following:</p> <ul style="list-style-type: none"> • an Indigenous Participation Plan (IPP) – template Attachment 7 of Schedule 2 – Tender Response Form) <p>The IPP details how the NRM Regional Body will meet the mandatory requirement for the Indigenous Procurement Policy of the Commonwealth. Mandatory requirements (which may be met at either level):</p> <ul style="list-style-type: none"> ○ at Standing Deed level: <ul style="list-style-type: none"> ▪ 4% of NRM Regional Body FTE workforce on services under the Standing Deed must be First Nationals people over the period 1 July 2023 to 30 June 2028; <u>and</u> ▪ 4% of the value of the work performed under the Standing Deed and any Contracts will be 	If the NRM Regional Body does not comply with any one of the Minimum Content and Format Requirements the tender will be excluded.

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			<p>subcontract to Indigenous Enterprises (an organisation that is 50% or more Indigenous owned that is operating a business; www.supplynation.org.au) over the period 1 July 2023 to 30 June 2028.</p> <ul style="list-style-type: none"> ○ at organisational level: <ul style="list-style-type: none"> ▪ 4% of NRM Regional Body FTE workforce will be First Nationals people over the period 1 July 2023 to 30 June 2028; <u>and</u> ▪ 4% of the value of the Australian supply chain will be subcontracted to Indigenous Enterprises over the period 1 July 2023 to 30 June 2028. ● An executed Tenderer's Deed - - Attachment 2 of Schedule 2 – Tender Response Form) The Tender's Deed is in the form of a Deed Poll for the benefit of the Commonwealth, whereby the NRM Regional Body acknowledges certain rights and obligations and provide warranties. These are discussed under the Tender Response Form later in this Table. ● The submission of at least 2 Investment Concepts – Attachment 13 of Schedule 2 – Tender Response Form. ● All Valid (in accordance with Part 7.e of the Shadow Economy Procurement Connected Policy) and Satisfactory (in accordance with Part 6.b of the 	

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			Shadow Economy Procurement Connected Policy or if Part 6.c applies the conditions set out in Part 8.b of that Policy) Statement of Tax Records – Attachment 11 of Schedule 2 – Tender Response Form	
2	Clause 3.4	Joint or part Tenders	Each Standing Deed must be entered into by a single legal entity, who will be responsible for the performance of the Standing Deed.	If the Tender is to be made by an unincorporated group, one of the entities will be required to enter into the Standing Deed (as administrating entity) and subcontract to the other entities in the group. Alternately, a new legal entity is created.
3	Clause 3.4(c)	Part Tenders	A NRM Regional Body may make an application for more than one Management Unit (indicating with primary unit) but it cannot make an application for part of a Management Unit.	
4	Clause 3.11(a)(i)	Department rights	The Department have the right to amend any part of the ATM.	The Department has a unilateral right which allows the Department to change the terms and conditions under the ATM. Given a NRM Regional Body is making an offer, which remains open for 12 months, this unilateral right creates a risk of imposing a provision which is onerous and the NRM Regional Body cannot oppose.
5	Clause 3.12	Australian National Audit Office	The Auditor-General, or an authorised person is granted rights of access to information documents and records of the Tenderer.	Clause 3.12(a) provides a wide discretion for the Auditor-General, that is there is a risk that information

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				collected will be outside that <i>directly related to the Tenderer's participation in the ATM</i> .
6	Clause 4.1	Confidential information	A NRM Regional Body must not, and ensure that their officers, employees, advisers and contractor do not, divulge or communicate to any person confidential information of the Department. The Department may disclose information provided by an NRM Regional Body in certain circumstances (set out in clause 4.2(b)).	A NRM Regional Body should be mindful of information that may be disclosed to that NRM Regional Body and before disclosing to other NRM Regional Bodies assess whether clause 4.1 applies to the relevant information.
7	Clause 4.4	Public statements	A NRM Regional Body must not make a statement or provide another information for publication in any media concerning the ATM process include commencement of negotiations, notification the NRM Regional Body is a preferred Tenderer, or acceptance of a Tender.	A NRM Regional Body may disclose such information to other NRM Regional Bodies but not disclose in a public forum.
8	Clause 5.1(c)(ii)	Ethical dealing	A NRM Regional Body must not engage in any collusive tendering, anti-competitive conduct, or any other unlawful or unethical conduct with any other Tenderer or any other person. Collusive tendering arises when some or all of the tenderers in a competitive tender attempt to frustrate the purpose of the competitive tender by limiting the degree of competition in it. For example, they might agree between themselves not to submit tenders below a certain price; or inform each other of the prices at which they intend to submit; or engage in "market-sharing" by agreeing which of them will submit "winning" (ie competitively-priced) tenders for particular contracts, so the range of contracts over a period is effectively carved up between them.	Generally, it is acceptable for the NRM Regional Bodies to discuss and collectively agree on proposed amendments/ changes to the Contract. Clause 2.10(c) of the ATM Terms states that DCCEEW intends to enter into the same Standing Deed with consistent terms for all RDP. Accordingly, a collective approach would be encouraged. In relation to the Tender Response the details of each NRM Regional Body are more specific in relation to their participation. The NRM Regional Bodies

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				may discuss, compare and share various plans, for example a MERI Plan or NRM Plan. However, to the extent that any information would frustrate the purpose of the competitive tender process, such as the NRM Regional Bodies agreeing or setting prices for services the NRM Regional Bodies should refrain from disclosing or discussing such information.
9	Clause 5.1(c)	Ethical dealing	A NRM Regional Body must not permit any current or former officers, employees, advisers or contractors of the Departments to contribute to the Tender or participate in any activity relating to the ATM process (if that person was involved at any time in planning or managing the ATM process)	A NRM Regional Body should consider who is involved in its tender and if any person (who is working or worked for the Department) was involved at any time in planning or managing the ATM process then seek consent from the Department for their involvement.
10	Clause 5.2	Conflicts of Interest	A NRM Regional Body must include in their tender details of any actual, potential or perceived conflict of interest that exists or might arise. A conflict is any matter which could prejudice the impartial conduct of the ATM process or prevent the NRM Regional Body from performing the Standing Deed diligently and independently.	A NRM Regional Body should consider the relationship any of its officers or employees have with respect to the Department and the ATM. For example, a NRM Regional Body has a director who sits on an advisory board related to DCCEEW or DAFF. The NRM Regional Body should disclose the relationship to the Department.
11	Clause 5.4(c)	Indigenous participation	The Departments must report on Indigenous participation to the Department of the Prime Minister and Cabinet biannually.	For noting: it is likely that a NRM Regional Body will be required to report

Item	Reference	Issue	Provision	NFP Lawyers' comments
			The Standing Deed contains a requirement that the RDP must report information on Indigenous participation when requested by the Department.	information on Indigenous participation biannually.
12	Clause 5.4(e)	Remote Area – Indigenous participation	If a Contract/ Work Order will be delivered in a Remote Area the RDP must review and update its IPP on how it will ensure the provision of Services will delivery significant Indigenous employment or supplier use outcomes in the Remote Area. The Management Units set out in the Statement of Requirements (clause 3.5 at page 10) are considered Remote Areas.	For noting: Consideration should be given to the Mandatory Set-Aside arrangements for Indigenous Small to Medium Enterprises.
13	Clause 5.5	Workplace Gender Equality Act (WGEA) Compliance	<p>A NRM Regional Body must identify at Attachment 2: Tender's Deed (clause 9) whether they are a 'relevant employer' under the WGEA.</p> <p>Pursuant to section 4 [Meaning of relevant employer] under the WGEA, a relevant employer means a natural person, or a body or association (whether incorporated or not), that is an employer of 100 or more employees in Australia.</p> <p>However, a relevant employer does not include:</p> <ul style="list-style-type: none"> • a body (whether incorporated or not) established for a public purpose by or under a law of a State or Territory; or • an incorporated company over which a State, a Territory or a body referred to above is in a position to exercise control. <p>If, at any time, an employer ceases to be a relevant employer because the number of employees of the employer falls below 100, this Act continues to apply to the</p>	If an NRM Regional Body is a ' <i>relevant employer</i> ' under the WGEA it must provide a letter of compliance issued by the Workplace Gender Equality Agency either as part of the tender or before entering into the Standing Deed.

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			employer as if the employer were a relevant employer unless and until the number of employees falls below 80.	
14	Clause 5.6(b)	Shadow Economy Procurement Connected Policy	<p>The Policy requires businesses seeking to tender for Australian Government procurement contracts over \$4 million (including GST) are required provide a statement from the Australian Taxation Office showing they have a satisfactory tax record.</p> <p>If the Tender is over \$4million the NRM Regional Body must hold all Satisfactory and Valid STRs (required under Schedule 2 – Attachment 11) for itself and any first-tier subcontractor it engage where the total value of the work under the subcontract is over \$4 million.</p> <p>If the above does not apply then the NRM Regional Body must include an STR receipt in the Tender documents and within 4 Business Days after 7 March 2023 provide all the STRs to the Contact officer by email (with a read receipt)</p>	A NRM Regional Body should assess the value of the Tender then provide the necessary STRs when required.
15	Clause 5.7	Modern Slavery Act	<p>The Department is required to comply with the Modern Slavery Act 2018.</p> <p>If the Department requests information (for compliance with the Act) from a NRM Regional Body the NRM Regional Body must do so within 10 Business Days.</p>	
16	Clause 5.8	Payment Times Procurement Connected Policy	<p>The Payment Times Procurement Connected Policy will apply to NRM Regional Bodies that have annual income above \$100 million and government contracts worth \$4 million or more.</p> <p>A NRM Regional Body must identify whether or not they are a 'Reporting Entity' for the purposes of the policy.</p>	An NRM Regional Body should assess whether or not they are a reporting entity and identify this in the Tender Response Deed.

Item	Reference	Issue	Provision	NFP Lawyers' comments
			<p>A reporting entity has the meaning set out in Section 7 of the Payment Times Reporting Act 2020 and includes entities:</p> <ul style="list-style-type: none"> • that carry on an enterprises in Australia; and • income is more than \$100 million in a year; and • the entity is not an ACNC registered charity. 	
17	Clause 5.9	Small and Medium enterprises	A NRM Regional Body should identify if it is an SME (ie has fewer than 200 FTE employees) and <i>may</i> include the participation of SMEs in the Tender.	
18	Clause 6.1 and 6.7	Evaluation Criteria	Tenders are evaluated on the basis of best value for money in accordance with the Evaluation Criteria set out at clause 6.8	Review Table 3 (page 28) [Tender Evaluation Criteria]
Statement of Requirement (Schedule 1) – ATM Requirements				
19	Clause 4.1	Regional Capacity Services	A RDP must deliver the Regional Capacity Services (set out in Table 4 on page 12) as ongoing Services over 5 year Deed Period.	Set out in Annexure A to this Advice is a summary of the deliverables and the frequency/due date.
20	RCS2.7; RCS3.5; RCS5.2	Review and update of Plans	The Community Participation Plan, Communications Plan, and Relationship Management Plan must be reviewed and updated on the anniversary of the Deed Commencement Date.	It is unclear whether the review must occur on the anniversary each year or only on the first anniversary. We recommend that further clarification is sought as to when the review and update of the Plan is needed as this requires internal administrative resources.
21	RCS5.1 and RCS5.3	Quarterly meetings	A RDP must attend a meeting with the Department on a quarterly basis, unless otherwise agreed with the	It is likely such meetings will not be time intensive as the Department must

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			<p>Department. The high-level purpose of the meeting is to maintain a productive, cooperative and ongoing relationship with the Department, however the items discussed are related to progress on Regional Capacity Services and Project Service delivery (amongst other things).</p>	<p>meet with RDPs from all Management Units, throughout Australia. However, a NRM Regional Body should take into account the preparation of information to provide to the Department for the meeting. Given the period of the Contract, the two levels of services (ie Capacity and Project) and the progress reports (biannual) we recommend a more reasonable schedule for meetings would be biannually.</p>
22	RCS6.1	Physical presence	<p>A RDP must maintain a physical presence in the Management Unit for which they are contracted to deliver Regional Capacity Services. If the RDP does already maintain a physical presence in the Management Unit then it must be established as soon as practicable or before 1 October 2023.</p>	<p>A NRM Regional Body should consider how it will satisfy this requirement, particular if it maintains more than one Management Unit. It is unable or it is not practicable to maintain a physical presence consent must be obtained by the Department for the alternative.</p>
23	RCS7.4	Invoice	<p>The RDP must invoice the Department for services rendered in accordance with the Standing Deed</p>	<p>A NRM Regional Body will need to consider its cash flow when an invoice lodged is being assessed for payment by the Department and/or Customer.</p>
24	RCS8.3	WHS Plan	<p>Before 1 August 2023 the RDP must submit a WHS Plan to the Department.</p>	<p>Cross referencing error – item (k) should refer to clause 41 of the Deed of Standing Offer.</p>

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Tender Response Form (Schedule 2)				
25	General	Deed Poll	It is a Minimum Content and Format Requirement that Tenders must include an executed Tenderer's Deed substantially in the form set out in Attachment 2.	A NRM Regional Body may negotiate the terms of the Deed Poll. The Deed Poll survives termination or expiry of the ATM Process. Therefore, we have recommended some amendments to ensure the obligations set out in the Deed Poll only apply to the ATM process and not the Services under the Standing Deed.
26	Deed Poll (Cl2.1(c))		<i>"that subject to any liability arising under the Government Procurement (Judicial Review) Act 2018 (Cth), the Departments will not be responsible for any costs or expenses incurred by the Tenderer in complying with the requirements of this ATM"</i>	Correction: "this ATM" replace with "the ATM"
27	Deed Poll (Cl3.1)			We recommend that the representation and warranties are defined in time, otherwise the NRM Regional Body will need to provide the warranties until the Statute of limitation period for the Deed Poll expires. Clause 3.1(a) – <i>"At the date of this Deed, it is not subject to a judicial decision...."</i> Clause 3.1(b) – <i>"At the date of this Deed, it is not named in the consolidated...."</i>

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28	Deed Poll (Cl3.1(d))		<p><i>"it has not prepared its Tender with any consultation, communication, contract, arrangement or understanding with any competitor, other than where:</i></p> <p><i>(a) the Tenderer and the competitor have an agreement that has been authorised by the Australian Competition and Consumer Commission (ACCC); or</i></p> <p><i>(b) the Tenderer has communicated with a competitor for the purpose of subcontracting a portion of the Services, and where the communication with that competitor is limited to the information required to facilitate that particular subcontract;"</i></p>	<p>A RDP will cover one or more Management Units and is on the panel to deliver Project Services that other RDPs may deliver.</p> <p>Therefore, it is likely that the RDPs are competitors and accordingly communicated in respect of the Tender documents.</p> <p>Given that the Department wishes to enter into a Standing Deed with consistent terms for all RDPs it is contemplated that there would be communication with regard to those documents. A collective arrangement would likely be encouraged.</p> <p>We recommend that clause 3.1(d) is omitted as clause 3.1(e)(i) would cover any unethical conduct.</p>
29	Deed Poll (Cl6.1)		<p><i>"The Tenderer acknowledges and agrees:</i></p> <p><i>(a) that the Tender constitutes an unconditional offer and accordingly is capable of immediate acceptance by DCCEEW so as to form a binding contract;</i></p> <p><i>(b) that the Tender remains open for acceptance by DCCEEW for the Tender Offer Period; and</i></p> <p><i>(c) not to withdraw, vary or otherwise compromise the Tender during the Tender Offer Period."</i></p>	<p>For noting.</p> <p>For the purposes of clarity, whilst a successfully NRM Regional Body may negotiate the Standing Deed, the unconditional offer on lodgement of the Tender Response would allow the Department to argue that a contract has been agree but for the final terms (ie final standing deed) and accordingly by signing the Tender's Deed Poll the</p>

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				NRM Regional Body enters into a legally binding document.
30	Deed Poll (cl7.2)		<i>"The Tenderer undertakes to advise the Departments in writing immediately upon becoming aware of any actual, potential or perceived conflicts of interest in respect of the ATM process, its Tender or any resulting Deed of Standing Offer."</i>	We recommend that the obligation to notify the Department is limited to the ATM Process and Tender. Clause 45.2 of the Standing Deed places and obligation on the RDP to notify of conflicts of interest. Clause 7.2 – omit the reference to "or any resulting Deed of Standing Offer"
31	Deed Poll (Cl 14)		<i>"The Tenderer: consents to and authorises the Departments to undertake any security, probity, referee and/or financial investigations as the Departments consider necessary in relation to the Tenderer, its related entities, its officers, employees, partners, associated entities, advisors or subcontractors of the Tenderer"</i>	The proposed consent is wide and allows the Department to undertake probity in relation to the NRM Regional Body's employees. We recommend limiting the scope of the consent by omitting employees and separately limiting to " <i>directly related to assessment of the Tender</i> under the ATM Process."

4.2 Standard Deed

The terms set out in the Standard Deed are negotiable. In the table below, we mention some of those terms that may pose some risk to a NRM Regional Body. There may be others, depending on the specific requirements of a NRM Regional Body. A NRM Regional Body should familiarise itself with all the Standard Terms.

Item	Reference	Issue	Provision	NFP Lawyers' comments
32	3.2(a)	No exclusivity	<i>"it is not the exclusive provider of the Regional Capacity Services, the Project Services or any other services of the type provided under this Deed (whether within the Management Unit or otherwise);"</i>	The Department intends to have establish a panel of Regional Delivery Partners that have the capacity to provide services with one or more Management Units. Therefore, it is contemplated that more than one RDP may service one Management Unit. It is in this regard that the Department incorporates a provision whereby the RDP agrees that it is not the exclusive provider of the services.
33	4.1	Precedence of Deed documents	<i>"The following documents form part of this Deed: (a) Agreed Terms; (b) Statement of Work; (c) Schedules (other than the Statement of Work); (d) any Attachments or annexures to the Schedules; and (e) any other documents incorporated by reference in this Deed."</i>	Under the Deed, the Agreed Terms take priority over the Statement of Work (SOW) which in turn takes priority over any other annexures, attachments or referenced documents. However, the SOW contains the description of the services that are to be performed and, while the description of the services in the SOW cannot be inconsistent with the Agreed Terms, the description of the services in the SOW can have the practical effect of limiting a NRM Regional Body's obligations. When negotiating the Deed, it will be important to keep in mind the priority of the Agreed Terms over the SOW (which is often not the case for other template government grant agreements) and ensure that the description of the services is tightly framed.

Item	Reference	Issue	Provision	NFP Lawyers' comments
34	5.1	Initial Deed period	<i>"This Deed begins on the Deed Commencement Date and continues for the duration of the Initial Deed Period unless terminated earlier."</i>	The Deed is executed on the date the last party signs, however 1 July 2023. The term expires 30 June 2028, however any Contracts with expiry dates after 30 June 2028 will continue until the Contract expiry date.
35	5.2	Extension of Deed Period	<i>"The Initial Deed Period may be extended by the Department for further period(s), specified in item 5 of the Deed Details (each an Extension Period), on the terms and conditions then in effect, by giving written notice to the Regional Delivery Partner at least 30 calendar days before the end of the current Deed Period. Any extension in accordance with this clause 5.2 takes effect from the end of the then current Deed Period."</i>	The Department may, by giving 30 days notice, extend the term for an additional 2 x one year terms.
36	6.1	Standing Offer	<i>"The Regional Delivery Partner makes an irrevocable standing offer to supply the Project Services to the Customers on the terms and conditions in this Deed."</i>	Under the ATM the NRM Regional Body represents that it has the capacity to deliver Projects in the Management Unit. Whilst clause 6.1 states that the standing offer is "irrevocable" this does not obligate the RDP to undertake all Projects that the Department requests (under clause 7.1). Pursuant to clause 7.1(b) the RDP may decline to provide a Project Design proposal. It is unclear the Department's intention to utilise the word "Irrevocable", particular when read together with clause 7.1. It is possible that the intention is to

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>recognise that the Deed does not afford the RDP a right to terminate.</p> <p>In any event, for the purposes of ensuring certainty we recommend requesting clarity from the Department.</p>
37	7.3	Work Order	<p><i>“Once a Project Design Proposal has been provided by the Regional Delivery Partner in accordance with clause 7.1, the Customer may:</i></p> <p><i>(a) accept the Project Design Proposal, in which case the Customer may complete or request that the Regional Delivery Partner complete any outstanding details of a work order substantially in the form of Schedule 5;</i></p> <p><i>(b) reject the Project Design Proposal; or</i></p> <p><i>(c) require the Regional Delivery Partner to prepare a revised Project Design Proposal in which case the Regional Delivery Partner must prepare and resubmit a revised Project Design Proposal for the Customer's consideration and this clause 7.3(a), applies to the revised Project Design Proposal.”</i></p>	<p>If the RDP agrees to provide a Project Design Proposal, following submission to the Department for review, the Department may then accept, reject or seek a revision. If the Project Design Proposal is accepted the Department may complete/ request a Work Order. If the Work Order is executed a Contract is formed. Further details on the requirements and process for Project Design Services is set out in cl 5 of the Statement of Requirement which will form the finalised SOW.</p> <p>A considerable amount of resources (and time) will be incorporated into the Project Design Process. Pursuant to clause 7.3(ii) the Department will pay for Project Designs where a Work Order has been executed. If the Department has accepted a Project Design Proposal (cl7.3(a)) but decided to not perform the Project the RDP will be paid for the Project Design Proposal (Cl 7.3(f)(i)).</p> <p>In all other cases, the RDP will need to absorb the resources invested in preparing the Project Design Proposal.</p> <p>Taking into consideration the RDP is expected to participate in the Co-Design process and develop a Project Design following a request from the Department</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
				we recommend canvassing a flat fee for Project Proposal Designs that are not accepted or not covered by 7.3(f).
38	8.3	Precedence of Contract documents	<i>“Where a Work Order seeks to modify the terms of this Deed that would apply to a Contract through Special Terms and Conditions or otherwise, the terms that seek to modify the Deed have no legal effect and do not apply, irrespective of whether the Work Order has been executed by the Customer and Regional Delivery Partner.”</i>	<p>The terms and conditions of the Deed take priority over the Work Order and any Special Terms. Clause 8.3 states that the terms [of the Special Terms] that seek to modify the Deed have no legal effect and do not apply.</p> <p>It is unclear the Department’s intention with regard to this provision, as it is usual practice to have a mechanism for detailed documents to modify the standard terms, for example intellectual property provisions may change or other circumstances particular to a project, rather than general terms applying to the capability services.</p> <p>We recommend requesting further information from the Department to ensure certainty of contract.</p>
39	9(c)	Panel review	<p><i>“A Panel refresh may result in one or more of the following:</i></p> <ul style="list-style-type: none"> <i>(i) adding an additional geographical area to the scope of an existing Panel Member’s management unit;</i> <i>(ii) removing a geographical area from the scope of an existing Panel Member’s management unit;</i> <i>(iii) adding Panel Members; or</i> 	<p>The Department may undertake a Panel refresh, which may result in adding an additional geographical area to a RDP’s Management Unit or addition a new Category of Services.</p> <p>Pursuant to clause 9(d) the RDP would execute a Change Order to agree to such changes.</p> <p>If the RDP does not agree with the changes and accordingly decides that it does not have the capacity to provide the Services it has no mechanism to terminate the Deed.</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
			<i>(iv) adding a new Category of Services or additional Project Services to the Panel."</i>	We recommend incorporating a right for the RDP to terminate the Deed, similar to the Department under clause 56.
40	10.1	Deed review	<i>"it will assist the Department in carrying out any review under clause 10.1(a), and that it will fully cooperate and participate in any review undertaken by the Department, or on behalf of the Department under clause 10.1(a); and"</i>	The RDP is required to assist the Department in carrying out a Department initiated review. Clause 10.1 contemplates that the RDP may carry out the review on behalf of the Department. Such reviews take time and resources to complete, which is not part of the Services charge. We recommend that a provision is incorporated which provides for the Department to pay the reasonable expenses of the RDP in any review carried out by the RDP on behalf of the Department.
41	10.2	Project Services review	<i>"it will assist the Customer in carrying out any review under clause 10.2(a) or 10.2(b), and that it will fully cooperate and participate in any review undertaken by the Customer, or on behalf of the Customer under clause 10.2(a) or 10.2(b); and"</i>	Similar to clause 10.1, we recommend that a provision is incorporated which provides for the Department to pay the reasonable expenses of the RDP in any review carried out by the RDP on behalf of the Customer.
42	11.3(c)(ii) 11.4(d)(ii)	Department Deed Representative Regional Delivery Partner Deed Representative	<i>"may be undertaken by the Department Deed Representative or their delegate by means of electronic mail"</i>	It is common practice for representatives to discuss day to day management of matter via telephone. For the purposes of clarity, we recommend that a reference is made to telephone communication and such communication is subsequently confirmed by electronic mail.

Item	Reference	Issue	Provision	NFP Lawyers' comments
43	13(f) and (g)	Reporting	<i>"To avoid doubt, and without limiting the Customer's rights under this Deed or at Law, if the Regional Delivery Partner fails to provide a Report to the Customer within the timeframe or by any specified deadline, then the Customer may withhold or suspend payments of the Service Charges under clause 28.3"</i>	Without a timeframe on when a Customer may specify requirements for a Report, clause 13(g) has the potential to cause the RDP to fail to deliver the Report by the specified deadline (which is set out in the SOW or Contract). We recommend that the Customer be required to set out the requirements under the Deed or in the Contract rather than issue the direction.
44	13(i)	Reporting	<i>"the Regional Delivery Partner must notify the Department of any event referred to in clauses 13(i)(i) and 13(i)(ii), as soon as possible but no later than 5 Business Days of the event occurring."</i>	Compliance with clause 13(i) requires the identification of an "event", however clause 13(i)(i) and (ii). To ensure the Deed is clear on the RDP's obligations, we recommend that the "event" is limited to the RDP's directors (or equivalent governing body) passing a resolution do the items set out in (i) or (ii).
45	15.2	Warranties	<i>"no litigation, arbitration, mediation, conciliation or proceedings including any investigations, are taking place, pending, or are threatened against the Regional Delivery Partner which could have an adverse effect upon either the Regional Delivery Partner's capacity to perform its obligations under this Deed or any Contract, or the Regional Delivery Partner's reputation"</i>	A breach of any warranty set out in clause 15.2 is considered a material provision of the Deed and not capable of remedy. Pursuant to clause 15.2(v) the RDP warrants that no litigation, arbitration, mediation, conciliation or proceedings including any investigations are taking place, pending or are threatened against the RDP which could have an adverse effect upon the RDP's reputation. This provision is very broad and does not set any parameters around whose opinion. Accordingly, we recommend that the words "or the Regional Delivery Partner's reputation" be omitted. If the Department is concerned about maintaining a high

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>reputation for the Services and the program we recommend that the Department include a provision under clause 56.2 which allows the Department to terminate the Deed if, in the opinion of the Department, the RDP actions bought or are likely to bring the Department or the Services into disrepute.</p>
46	15.10	Responsibility for provision of labour, materials, consumables and equipment	<p><i>“Except as otherwise specified in this Deed and any Contract and only to the extent so specified, the Regional Delivery Partner is responsible for providing at its own expense all labour, equipment, vehicles, plant and Administrative Consumables required for the proper performance of this Deed and each Contract.”</i></p>	<p>For noting: Administrative consumables mean general overhead items (including office consumables) required to perform activities related with the Services.</p>
47	18.1(e) and 28.5(d)	Acceptance of Services	<p><i>“Where applicable, the Customer will assess, including against the Assurance Framework, whether the Regional Delivery Partner has performed the Services as described in the Statement of Work or a Work Order by:</i></p> <p><i>(a) reviewing any information provided by the Regional Delivery Partner in relation to the Services (including any additional information requested by the Customer);</i> <i>or</i></p> <p><i>(b) attending a site where the Services were performed or related to the performance of the Services.</i></p>	<p>The Deed is silent on timeframes in which the Department will assess the services set out in an invoice. This creates a risk for cash flow particular in the case of payment of staff or subcontractors. We recommend incorporating timeframes in which the Department will assess an invoice and if relevant time period in which the Department will set a new date for repeating an assessment. Once the approval phase is completed the Department or Customer will make payment within 20 calendar days after acknowledgement of the satisfactory delivery of the Services.</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
			<p><i>If the Customer's assessment reveals that:</i></p> <p>(a) <i>all of the Services subject of the assessment were properly performed, the Customer will pay the amounts for those Services properly invoiced in accordance with clause 28; or</i></p> <p>(b) <i>one or more aspects of the Services subject of the assessment were not properly performed, the Regional Delivery Partner must, at no cost to the Customer, do all things necessary to rectify any deficiencies and the Customer will repeat the assessment."</i></p>	
48	Clause 19.4	Right to terminate	<p><i>"If all or any part of the Services do not meet the Performance Criteria on 2 or more occasions, the Customer may terminate the Contract immediately under clause 56.2 by giving the Regional Delivery Partner a notice."</i></p>	<p>The Performance Criteria are those set out in the Statement of Work and/or Work Order and if none are set out the requirements set out in clause 15.1(a)(ii) and 15.1(a)(vii).</p> <p>To reduce the risk to the NRM Regional Body of non-performance, we recommend that the Performance Criteria are clearly set out in the Statement of Work and/or Work Order.</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
49	Part D	Subcontracting	<p>Under the Standard Deeds, "Subcontractor" is defined as "any person (not the Customer) that, for the purposes of the Deed of a Contract, provides items or services directly or indirectly to the Regional Delivery Partner". "Subcontract" is defined as "the contractual or other arrangements (however describe with a Subcontractor).</p> <p>Unless otherwise approved by the Department, any Subcontractor who:</p> <ul style="list-style-type: none"> (a) will deliver services which comprise 20% or more to the total value of the Standard Deed; or (b) will deliver services which comprise 20% or more of the total value of any Contract; or (c) are critical to the delivery of the services which if not deliver will compromise the delivery of the Regional Capacity Services and/or Projects; or (d) are critical to the delivery of the services which are not 	<p>A NRM Regional Body's right to subcontract its obligations under the Deed is limited as set out in clause 20.1(a) of the Standard Deed.</p> <p>The RDP's right to terminate some subcontracts is limited as set out in clauses 20.4 of the Standard Deed. To the extent that the Department's consent for a RDP to terminate a subcontract is required, that consent is a pre-condition to the RDP exercising a power to terminate the particular Subcontract.</p> <p>Under the Standard Deed, "Personnel" of a Party is defined as "any natural person who carries out work in any capacity for the Party, including work as an officer, employee, contractor, subcontractor, labour hire employee, agent or representative (including a Volunteer) of that Party, or in the case of the Regional Delivery Partner, of a Subcontractor...". Therefore, provisions imposing obligations on the RDP in relation to its Personnel also apply to the Subcontractor's personnel who are natural persons and also to the Subcontractor itself if the Subcontractor is a natural person.</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
			<p>able to be delivered by any other contactor; or</p> <p>(e) are listed in the Deed details;</p> <p>(f) are listed in a Work Order,</p> <p>if defined as a "Key Subcontractor" and unless already notified to the Department the RDP must do so at least 20 Business Days before engaging the Key Subcontractor (clause 20.2(a)). Any change to the Key Sub Contractor must be notified at least 20 Business Days before the change (Clause 20.2(b)).</p>	
50	Clause 20.9(b)	Standard Deed requirements for terms of subcontracts	Clause 20.9(b) of the Standard Deed requires a RDP to ensure that subcontracts contain provisions specified in that clause (a specified provision).	<p>Under clause 56.2 of the Standard Deed, if a RDP breaches a material provision of the Standard Deed where the breach is not capable of remedy or breaches any provision of the Standard Deed and fails to remedy the breach within 5 Business Days (or such longer period as advised by the Department) after receiving notice requiring it to do so, the Department may at any time terminate, suspend or reduce the scope of the Standard Deed.</p> <p>Therefore, even if, in the context of the Standard Deed as a whole or a particular subcontract, a specified provision is a minor one or is inapplicable or unlikely ever to apply, the RDP will be in breach of its obligation in the Standard Deed and will, theoretically at least, be</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>at risk of the Standard Deed being terminated or reduced, if the specified provision is not included in each subcontract.</p> <p>The Department will not necessarily adopt a commercial or practical approach in reviewing subcontracts for compliance with the Standard Deed.</p> <p>It would be a risk for a RDP to take a commercial or practical risk assessment approach and decide not to include any of the specified provisions in Subcontracts of lower value or for less risky work types in order to reduce the complexity of the document.</p> <p>It appears that Department may be open to negotiation in relation to clause 20.9(b), however at this stage we are unable to assess which specified provisions, if any, the Department would accept could be left out of any particular type of subcontract or particular subcontract.</p> <p>We recommend seeking from the Department, the mechanism to submit to the Department a draft document which has reduced provisions for their guidance.</p>
51		RDP obligations to ensure Subcontractor actions	A number of clauses in the Standard Deed require RDP to ensure that each Subcontractor does, or does not do, specified actions (a specified action).	These obligations apply to all Subcontractors of RDP regardless of value or work type. While these clauses do not specify that RDP must include a provision in the subcontract in relation to the specified action, unless the specified action is included as a Subcontractor

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>obligation in the Sub Contract, RDP is in no position to ensure that its Subcontractors take the specified action.</p> <p>Due to the terms of clause 56.2, even if a specified action is a minor one, RDP will be in breach of the provisions of the Standard Deed and will risk the Standard Deed being terminated or reduced, if it is unable to ensure that a Subcontractor takes the specified action. The practical effect is that in order to comply with its obligations in the Standard Deed, each such obligation imposed on RDP in the Standard Deed must be reflected in a similar obligation on the Subcontractor in the Subcontract. Arguably, if there is no mirror provision in its Subcontract, RDP would be in breach of its obligation from the time when it enters into the Subcontract, not just at a time when the specified action is required (if at all) and the Subcontractor fails to do it, because it has put itself in the position of being unable to ensure the specified action.</p> <p>The language of the Standard Deed effectively rules out RDP making a commercial risk assessment not to include any of the provisions relating to specified actions in Subcontractors of lower value or for less risky work types in order to reduce the complexity of the document, without the approval of the Department.</p>
52		RDP obligations to ensure Personnel actions	A number of clauses in the Standard Deed require RDP to ensure that its Personnel, do or do not do, specified actions (a specified action).	As discussed above, RDP's Personnel includes the Subcontractor's personnel who are natural persons and

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>also the Subcontractor itself if the Subcontractor is a natural person.</p> <p>The issue for RDP in relation to these obligations is the same as for RDP's obligations in relation to Subcontractors as discussed above.</p>
53	20.8	Payment of Subcontractors	The Service Provider must pay its Subcontractors in accordance with the terms of the relevant subcontract, and such payment terms must be substantially similar to the payment terms under this Deed and any Contract.	The general payment terms are in clause 28 of the Standard Deed and the specific payment obligations will be in Schedule 3 of the finalised Standard Deed. On a case-by-case basis, RDP will have to ensure that specific contractor payment terms that are included in schedule 3 of each Subcontractor are substantially similar (to the extent applicable) to the payment terms that are set out in the finalised Schedule 3 of the Standard Deed.
54	20.6	Removal and replacement of subcontractors	The Regional Delivery Partner must at all times continue to perform its obligations under this Deed and any Contract, notwithstanding the default, or the removal, of the Subcontractor.	<p>If the removal is of a Key Subcontractor the RDP will be unable to continue to perform its obligations with respect to that part of the services performed by the Key Subcontractor.</p> <p>We recommend that clause 20.6 is amendment to accommodate this circumstance.</p>
55	22.2	Certain changes do not require a Change Order	<i>"adjustments between units and Services within a Financial Year to a culmulative limit of up to 10% of the Annual Not-to-Exceed Amount for the relevant Financial Year (including amounts for Project Design and</i>	<p>For noting:</p> <p>The Statement or Work and Work Orders set a "Annual Not-to-Exceed Amount" and the RDP may by notice to the Department make adjustment of 10% of the total Annual Not-to-Exceed Amount.</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
			<i>Project Supports and Overheads for that Financial Year);"</i>	
56	23	Unforeseen Events	<i>"If non-performance or diminished performance by the Affected Party due to an Unforeseen Event continues for a period of more than 30 calendar days, the Customer may either suspend or reduce the scope of the Services or terminate this Deed and/or any Contract immediately, as it deems appropriate in the circumstances, by giving the Regional Delivery Partner written notice."</i>	We recommend that the RDP be given a reciprocal right to terminate the Deed.
57	25.1	Pre-existing Material	<i>"The Regional Delivery Partner grants to the Customer a perpetual, irrevocable, world-wide, royalty-free, non-exclusive licence (including the right to novate or assign the licence, and to sublicense, including under any form of creative commons licence (available at creativecommons.org.au) that the Customer considers appropriate) to use, reproduce, adapt, modify, communicate, broadcast, distribute and publish the Pre-existing Material for any Customer or Commonwealth purpose."</i>	<p>The licence rights to use the Pre-existing Material are considerably broad and do not take into account the Pre-existing Material's proprietary value. If the RDP makes available, the Pre-existing Material it grants a perpetual licence (and sublicense) to any Department (that becomes a Customer) even if the Department did not engage the RDP to perform the services.</p> <p>We recommend limiting the licence rights as follows: <i>If Contract Material is developed using Pre-Existing Material and the Pre-Existing Material is reasonably required for the utilisation of the Contract Material by any Customer or Commonwealth then the Regional Delivery Partner grants to the Customer a perpetual, irrevocable, world-wide, royalty-free, non-exclusive licence (including the right to novate or assign the</i></p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p><i>licence, and to sublicense, including under any form of creative commons licence (available at creativecommons.org.au) that the Customer considers appropriate) to use, reproduce, adapt, modify, communicate, broadcast, distribute and publish the Pre-existing Material to the extent it is reasonably required to utilise the Contract Material for any Customer or Commonwealth purpose.</i></p>
58	27.5, 30.9, 32.1, 35.6	Indemnities		<p>We recommend consulting with the NRM Regional Body's insurer to ensure their insurance policy covers the indemnity. It is common for insurance policy to void an indemnity provided by way of contract.</p> <p>In relation to the general indemnity this is too wide and it is likely that the NRM Regional Body will not be able to obtain such indemnity. "Those indemnified" are undefinable.</p> <p>Clause 32.1 requires the RDP to indemnify the Customer (which includes "any other Government Agency"), each of their officers, employees and agents and "any other entity that receives the benefit of the Services".</p> <p>The loss or liability is in connection or arising out of the performance of the Services, including advice, opinion, Material or information the RDP, its officers, employees</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>agents, and the subcontractors officers, employees and agents.</p> <p>We strongly recommend limiting the scope of the indemnity to the Customer, its officers, employees and agents.</p>
59	28.6	No double payments	<i>“The Regional Delivery Partner acknowledges it is not entitled to payment from the Customers, other Commonwealth sources or state, territory or local government bodies for providing the same or similar services as provided under this Deed or any Contract, and the Customer may require the Regional Delivery Partner to provide evidence, in a form acceptable to the Customer, which proves that the Regional Delivery Partner is not so entitled.”</i>	We recommend that the NRM Regional Body undertake an audit of its funding sources for any services that are the same or similar to that proposed under the Statement of Works and/or a Work Order.
60	31.1	Change in control	<i>“any event or occurrence, actual or threatened which may materially affect the Regional Delivery Partner's ability to perform any of its obligations under this Deed, any Contract, or the Services or how the Services are perceived publicly.”</i>	<p>The RDP must notify the Department/Customer of any event or occurrence, actual or threatened which may materially affect how the Services are perceived publicly.</p> <p>It is unclear what events or occurrence the Department has in mind. We recommend seeking clarity around this provision so the RDP does not inadvertently breach the provision.</p>

Item	Reference	Issue	Provision	NFP Lawyers' comments
61	33.1	Insurance	<i>"other than professional indemnity insurance, name the Customer and its Personnel as additional insured persons."</i>	We recommend that the NRM Regional Body confirm with its insurer whether it will add the Customer and its Personnel as additional insured persons. This is likely to be an issue for some NRM Regional Bodies.
62	35.3	Personal Information	<i>"The Regional Delivery Partner acknowledges that it is a 'contracted Regional Delivery Partner' within the meaning of section 6 of the Privacy Act, and agrees in respect of the performance of the Services:"</i>	The affect of this provision is that the RDP must comply with the <i>Privacy Act 1988</i> (Cth) as if it is a government agency. In additional it must comply with the contractual requirements set out in clause 35. We recommend reviewing the Privacy Act, and in particular the APPs with regard to government agencies, and implement policies and procedures to deal with any personal information collected under the Services.
63	37.1(c)(ii)	Acknowledgement	<i>"acknowledge and ensure its Subcontractors acknowledge the financial and other support the Regional Delivery Partner has received from the Customer by using such attribution as notified by the Customer to the Regional Delivery Partner from time to time"</i>	For noting: The RDP must in all publications acknowledge and ensure its subcontractors acknowledge the financial and other support the RDP has received from the Customer.
64	42	WHS Plan		The obligations of RDP under clause 42 (Work health and safety) of the Standard Deed, apply to the contractor on the same basis that they apply to a RDP. Clause 42.2(f)(ii) requires RDP to comply with the Work Health and Safety Plan which will be referred to in the finalised of the SOW. RCS8.2 of the Statement of Requirement (which will be incorporated in the finalised

Item	Reference	Issue	Provision	NFP Lawyers' comments
				<p>SOW), requires RDP to develop and implement a Work Health and Safety Plan for Regional Capacity Services and for each Project, to be provided to the Department within one month from the Commencement Date (for Regional Capacity Services) or the execution of the Project Work Order (for each Project). The Subcontractor will be required to comply with the relevant Work Health and Safety Plan.</p> <p>We understand that depending on the nature of the subcontractor services required under a Subcontract, RDP's Work Health and Safety Plan under the Standard Deed may suffice and there would be no need for the subcontractor to develop its own WHS Plan. This could be the case if the subcontractor services are only a part of a larger project being run by RDP and for which RDP has a Work Health and Safety Plan and the subcontractor services are low risk from a WHS perspective.</p>
65	42.3(a)	Notifying the Customer	<i>"The Regional Delivery Partner must notify the Customer as soon as practicable of any concern the Regional Delivery Partner has regarding WHS in relation to the Services."</i>	<p>It is unclear what would be or the threshold for a 'concern' in relation to WHS.</p> <p>To reduce the risk to the RDP in breaching this provision we recommend that the provision is amended from 'concern' to 'material concern'.</p>
66	42.3(c)	Notifying the Customer	In respect of each item referred to in clause 42.3(b), if required by the Customer, the Regional Delivery Partner must provide the	The timeframe to provide the information set out in clause 42.3(c) is unreasonable.

Item	Reference	Issue	Provision	NFP Lawyers' comments
			Customer with the following information in writing in the timeframe specified by the Customer, and if no timeframe is specified, within 2 Business Days	We recommend that clause 42.3(c) be amended to <i>"within 5 Business Days"</i> .
67	50.1(b)	Compliance with policies and Law	<i>"The Regional Delivery Partner must, in relation to this Deed and any Contract, at all times, act in a manner that maintains the good reputation of the Services."</i>	The reputation of Services will develop over time and can whether the RDP has breached this provision will depended on an established reputation and that being measurable. We recommend requesting an amendment and omitting this provision. However if there is push back seeking guidance from the Department with respect to this provision and what measures will it implement to measure the reputation.
68	56.1(b)	Termination and reduction for convenience	<i>"In addition to any other rights it has under this Deed or any Contract, the Customer may, at its absolute discretion and at any time, terminate this Deed or any Contract in whole or in part, or reduce the scope of this Deed or any Contract by notifying the Regional Delivery Partner in writing."</i>	Whilst the Term of the Deed is initially 5 years, this provision allows the Department to terminate (or reduce in scope) at any stage. Clause 56.1(d)(i) does recognise that any payments that are due before the termination date (or reduction date) the Department will be liable and separately any reasonable costs unavoidably incurred directly attributable to the termination (or reduction). It is unclear whether or not services performed but not included in invoices (ie payments that are due) that were issued on notice of termination (or reduction) are payable. ie can the RDP issue an invoice after notice for services performed up to the termination date (or reduction date). We recommend seeking an amendment to ensure the provision is clear.

Item	Reference	Issue	Provision	NFP Lawyers' comments
69	58.1	Transition Out Plan	The Regional Delivery Partner must, on request by the Customer, submit to the Customer a Transition Out Plan that sets out all of the activities required for a smooth and orderly Transition Out.	The preparation of the Transition Out Plan will require additional resources. We recommend that an additional provision be included where it is acknowledged that the Department and/or Customer will pay reasonable expense for the preparation of the Transition Out Plan.

Annexure A

Item	Document Service Required	Frequency/Due Date
1.	Indigenous Participation Plan	Lodged with ATM Then, maintained and updated from time to time (submit to Department on request)
2.	Revise the existing Natural Resource Management Plan (NRM Plan); or Develop a new NRM Plan for the Management Unit(s)	Before 1 July 2027 (unless requested earlier by Department)
3.	Community Participation Plan (submit to Department on request)	Before 31 December 2023 Then on 1 July each year review and update
4.	Communications Plan (submit to Department on request)	Before 31 December 2023 Then on 1 July each year review and update
5.	Regional Capacity Services Report (in MERIT)	On a quarterly basis during the Deed Period
6.	Progress Reports on Regional Capacity Services	Provide to Department a minimum of two each financial year
7.	Provide an Annual Regional Capacity Service Report	On an annual basis during the Deed Period
		Before 1 August 2023 (submit to Department) Then, on 1 July each year review and update (submit to Department on request)
8.	WHS Plan	Provide to Department before 1 August 2023
9.	MERI Plan	Submitted as part of the Project Design Process