



GENERAL PROVISIONS REFERENCE GUIDE

A Capacity Building Project Supported by WAAMH & Mental Health Commission





DISCLAIMER: No part of this Summary can be regarded as legal advice and this Summary is a general overview of the General Provisions only. Although all care has been taken in preparing this Summary, readers must not alter their position or refrain from doing so in reliance on this Summary. Neither Midland Women's Health Care Place Inc, the author of this Summary or its legal advisors accepts or undertakes any duty of care relating to any part of this Summary.



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FOREWORD

In July 2011 the WA government produced the document “Delivering Community Service in Partnership Policy” to provide direction on key aspects of government procurement (the purchasing of government services). This heralds a new arrangement between the WA State government and all agencies delivering services to the public of Western Australia.

State government departments began working through the process of standardizing the legal arrangements for services to be delivered, and held workshops to encourage service providers to examine their own costs and begin a new business orientated focus on quality management, reporting, and sustainability. The focus is on outcomes for the vulnerable and reducing the administrative burden on not-for-profit agencies in delivering services.

Its stated aims were:

- rebalancing the nature of the relationship between the public and not-for-profit sectors;
- focusing on the achievement of outcomes and improving services and support for vulnerable and disadvantaged Western Australians;
- acknowledging the importance of partnering with the not-for-profit sector in the planning, design and delivery of human services;
- reducing the administrative burden imposed on not-for-profit organisations engaged to deliver services; and
- ensuring services are funded and procured in a sustainable manner.

This Reference Guide is intended to outline some of the questions that might arise as an organization works through these changes. It will not fulfill every need for every organization but is intended to provide information and checklists to assist the service provider in successfully navigating the process of tendering for services and successfully fulfilling their obligations to provide services effectively and efficiently in partnership with the government sector.

Thank you.

Patsy Molloy
General Manager
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1. PARTIES

The Parties	Obligation <p>The General Provisions will be a binding agreement between:</p> <ul style="list-style-type: none"> (a) the relevant 'State Party', who will generally be the government body who issues a 'Request' document (being the tender document); and (b) the 'Service Provider', being you, the successful respondent to the Request. 	Comments & Analysis <p>The General Provisions combines all of the elements of the contractual agreement between the Service Provider and the State Party. The General Provisions also set out a number of rights and obligations that will apply to the 'Services' that are to be provided by you as the Service Provider.</p>
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2. DEFINITIONS & INTERPRETATION

Definitions and Interpretation (cl. 1)	Obligation <p>This provision outlines the defined terms used throughout the General Provisions (Definitions).</p> <p>In addition, when interpreting the General Provisions, it should be noted that the words/expressions which are defined in the Request carry the same meaning in the General Provisions as in that Request (cl. 1.1).</p>	Comments & Analysis <p>There are a number of words/expressions commencing with a capital letter which are not defined. With these, check the relevant Request to see whether the meaning of such words/expressions is explained in the Request for services.</p> <p>Note also that there are various other key defined terms which we have explained further down in this table alongside the provision in which the word/expression arises.</p>
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3. FORMATION & CONTENTS OF SERVICE AGREEMENT

<p>Formation & Contents of Service Agreement</p> <p>(cl. 2)</p>	<p>Obligation</p> <p>Clause 2 sets out:</p> <p>(a) firstly, when the General Provisions will come into effect, The Service Agreement comes into effect when the you receive a 'Letter'. A 'Letter' is defined in the Definitions as a letter from the State Party which accepts your 'Offer' (the offer submitted by you) and specifies any other amendments to the General Provisions in it;</p> <p>(b) secondly, the documents that together will constitute the entire 'Service Agreement' between you and the State Party. The documents include:</p> <p>(i) each Agreed Order (this applies to 'Panel Agreements' (see paragraph 4 below);</p> <p>(ii) the Letter;</p> <p>(iii) the Offer;</p> <p>(iv) the Request; and</p> <p>(v) the General Provisions,(together, the Service Agreement); and</p> <p>(c) thirdly, the precedence of the documents. The documents will take precedence in the order as above.</p>	<p>Comments & Analysis</p> <p>The Service Provider should carefully read and ensure it understands the terms and conditions contained in the Agreed Order, Letter and Request given that these documents (alongside the General Provisions) form part of the entire contract with the State Party.</p> <p>When interpreting what terms and conditions apply to the Service Provider, the precedence of the documents is very important, so the Service Provider should use the precedence of documents list to guide you each time you are considering a Service Agreement issue.</p>
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4. TERM & FURTHER TERM

Term and Further Term

(cl. 3.1 & 3.2)

Obligation

Under clauses 3.1 and 3.2, the Service Provider agrees to provide the Services for the Term. The Term will be a period of time that will likely be specified in the Letter or other documents that form part of the Service Agreement.

If the State Party has an option under the Service Agreement to extend the Term, it may do so by providing notice to the Service Provider in accordance with any notice provisions agreed to. If there are no notice provisions, then the State Party must provide 20 Business Days' notice, prior to the expiry of the Term that it wishes to extend the Service Agreement.

Comments & Analysis

The Service Provider should carefully check whether a specific 'Term' or 'Further Term' has been included in the Letter or other documentation to ensure it knows if and when the Service Agreement can be extended.



5. PANEL AGREEMENT

Panel Agreement	Obligation	Comments & Analysis
(cl. 3.3 & 3.4)	<p>The Service Provider may enter into the Service Agreement as a 'Panel Member' under a 'Panel Arrangement'. A Panel Arrangement will exist where a group of other service providers (or 'Panel Members') are appointed to provide services to the State Party. If this is the case, the Service Agreement will be a 'Panel Agreement'.</p> <p>There are some specific requirements that apply where the Service Agreement is a Panel Agreement:</p> <p>Ordering Services</p> <ul style="list-style-type: none"> (a) the Service Provider will only be required to provide Services where the State Party gives them an Order; (b) the Order will specify the Services required, the date, time and place for performance of the Services and any additional requirements or specifications; (c) the Service Provider may negotiate the terms of the Order; (d) once the Service Provider accepts an Order or agrees to an amended Order, it will become an 'Agreed Order' and the Service Provider must provide the Services in accordance with that Order. An Order may be accepted in writing or by 'conduct', whereby the Service Provider begins providing the Services (but without having accepted the Order in writing); (e) an Order can be varied by only by agreement between the Service Provider and the State Party; <p>Other Important Factors</p> <ul style="list-style-type: none"> (f) where a Panel Arrangement exists, this does not give the Service Provider an exclusive right to provide Services to the State Party and the State Party may seek Services from any other Panel Member; 	<p>The Service Provider should check to see whether it has been appointed by the State Party as a 'Panel Member' and subject to a 'Panel Arrangement'.</p> <p>It is important that the Service Provider carefully reviews each Order provided by the State Party to ensure that:</p> <ul style="list-style-type: none"> (a) it has the capability to perform the particular Services required; (b) it can comply with the time limits specified in the Order (if any); and (c) there are no specific requirements in the Order that the Service Provider cannot or is unable to comply with.



6. PAYMENT

Payment

(cl. 3.5 – 3.16)

Obligation

There are a number of important provisions in the General Conditions which deal with payment to the Service Provider.

Invoicing

Before a Service Provider can be paid, it must provide to the State Party an invoice at times specified in the Service Agreement or if no such times are specified, at intervals agreed between the Service Provider and the State Party.

Each invoice issued must set out clearly the Services provided and the amount of the Service Payment payable for those Services.

Payment of an Invoice

As long as the Service Provider has complied with its obligations preparing an invoice and subject to the dispute provisions below, each invoice is payable within 30 days after the invoice is received and is payable by cash, cheque, EFT or credit card.

Disputes and adjustments

The State Party may request additional information from the Service Provider with respect to a particular invoice. If an invoice is incorrectly issued then an adjustment notice may be required.

Interest

Interest is payable on payments not made by the State Party at the rate of 6%. However, interest is not payable unless the Service Provider demands interest on the payment.

Comments & Analysis

It is important that the Service Provider issues invoices and that the invoices comply with the requirements in the General Conditions, given the State Party is not obligated to pay the Service Provider if it does not do so.

If the Service Provider is not familiar with adjustments and adjustment notes relating to GST, it should seek advice from its accountant or tax advisors.

If the Service Provider wishes to charge interest for unpaid invoices, it is important that a separate, written demand for payment of interest on an unpaid invoice is first issued to the State Party by the Service Provider.



7. SERVICE PROVIDER OBLIGATIONS

Service Provider Obligations (cl. 4)	Obligation	Comments & Analysis
	<p>The general obligations of the Service Provider include:</p> <ul style="list-style-type: none">(a) to comply with the ‘Quality Standards’ (being the quality standards agreed by the parties in the Service Agreement, most likely to be in the Request, Offer and Letter);(b) the reporting, meeting and management obligations under the Service Agreement (which again, will likely be outlined in the Request, Offer and Letter); and(c) assisting the State Party should it exercise its right to carry out evaluations relating to the Services.	<p>The Service Provider should familiarise itself with all such obligations under a Letter, Offer and Request.</p>



8. INSURANCE

Insurance	Obligation	Comments & Analysis
(cl. 5)	<p>The Service Provider must maintain the insurances detailed in the Service Agreement. The Service Provider's general obligations as to insurances are:</p> <ul style="list-style-type: none"> (a) the insurances required must be for a period of time as required under the Service Agreement and maintained for the Term; (b) the policy of insurance must be taken out with a reputable and solvent insurer carrying on business in Australia; (c) the Service Provider must provide the State Party with sufficient evidence of insurance policies if requested (including copies of the policy); (d) the State Party may withhold payment to the Service Provider if it does not comply with its insurance obligations; and (e) the Service Provider must notify the State Party immediately where any event or incident occurs that may give rise to a claim under the insurance policies. 	<p>Prior to making an Offer, the Service Provider should consider whether it will be able to obtain the insurances required under the Service Agreement.</p> <p>The obligation to report to the State Party any claimable event or incident for insurance purposes is an onerous one and Service Providers should err on the side of caution.</p> <p>Check if your Insurer requires notification of potential claims, and under what conditions.</p>

9. PUBLIC DISCLOSURE & CONFIDENTIALITY

Public Disclosure and Confidentiality	Obligation	Comments & Analysis
(cl. 6)	<p>Under Clause 6 of the General Provisions, there are a number of provisions which deal with the disclosure and confidentiality of information.</p> <p>The provisions of clause 6 continue to apply after the Service Agreement comes to an end.</p>	<p>Please refer to paragraph 9.1 – 9.3 for commentary.</p>



9.1 DISCLOSURE

Disclosure (cls 6.1 and 6.4)	Obligation <p>The Service Provider is required to disclose to the State Party any information for the purpose of the Service Agreement (that is, information relating to the Services or the Service Agreement generally).</p> <p>In addition, the State Party has certain public disclosure obligations (such as reporting to parliament or fulfilling its own annual reporting requirements). Under the General Provisions, the Service Provider consents to the State Party disclosing information about the Service Provider in order to fulfil its own disclosure requirements.</p> <p>Under the General Provisions, where such disclosure by the State Party of information about the Service Provider results in any kind of harm (e.g. loss/expense) to the Service Provider, the State Party will not be held liable in any way.</p>	Comments & Analysis <p>The disclosure requirements are quite broad. It should be noted that the exclusion of liability sub-clause provides the Service Provider little recourse where its information is disclosed to a third party by the State Party.</p>
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9.2 FREEDOM OF INFORMATION

Freedom of Information ("FOI") (cls 6.2 and 6.4)	Obligation <p>The Service Provider agrees that the Service Agreement and any information relating to the Service Agreement will be subject to the freedom of information (FOI) laws.</p> <p>Where the disclosure of information about the Service Provider for the purposes of FOI results in any kind of harm (e.g. loss/expense) to the Service Provider, the State Party will not be held liable in any way.</p>	Comments & Analysis <p>The FOI laws give a person certain rights to access/obtain information involving that person. The Service Provider should seek specific legal advice with respect to FOI laws, if required.</p> <p>There is also some useful information available online at: http://www.foi.wa.gov.au/dnn/home.aspx with regard to FOI obligations and compliance.</p>
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9.3 CONFIDENTIALITY

<p>Confidentiality</p> <p>(cls 6.5 and 6.6)</p>	<p>Obligation</p> <p>The Service Provider must not disclose, use, reproduce or distribute ‘Confidential Information’ except in limited circumstances which are authorised under the General Provisions, specifically where:</p> <ul style="list-style-type: none"> (a) necessary to provide the Services (but only to the extent necessary for that purpose); (b) authorised in writing by the State Party; (c) the Confidential Information is public knowledge (except if it is public knowledge due to non-authorised disclosure by the Service Provider); (d) required by law, or a court, tribunal, parliamentary body or government agency; or (e) required by the Service Provider’s professional advisors (but only to the extent necessary to fulfil that requirement and the Service Provider must ensure that those professional advisors are bound by these same restrictions regarding Confidential Information. <p>If a <u>suspected or actual</u> unauthorised disclosure, copying or use of Confidential Information occurs, the Service Provider must immediately notify the State Party.</p> <p>Where the Service Provider is in possession of the State Party’s Confidential Information, it must return the Records containing that information to the State Party immediately when the Service Agreement ends.</p> <p>The Service Provider is required to ensure that any third party who is provided with any Confidential Information complies with the Service Provider’s obligations under clause 6.</p>	<p>Comments & Analysis</p> <p>‘Confidential Information’ means information relating to the Service Agreement that:</p> <ul style="list-style-type: none"> (a) is of a confidential nature; (b) is described as confidential by the State Party or Service Agreement; or (c) the Service Provider knows or ought to know is confidential. <p>The obligations with respect to Confidential Information relate to the State Party’s Confidential Information only and the State Party does not have any particular obligation to keep the Service Provider’s Confidential Information confidential.</p> <p>Generally, in order to ensure that a third party complies with the Service Provider’s obligations, the Service Provider should require the third party to enter into an agreement to be bound by such provisions. The Service Provider should seek its own independent legal advice about the best way to do this in instances where a third party is likely to have access to Confidential Information.</p> <p>Examples of such third parties include volunteers, IT/data contractors or even co-tenants.</p>
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10. INTELLECTUAL PROPERTY RIGHTS TO BE OWNED BY THE STATE PARTY

<p>Intellectual Property Rights to be owned by State Party</p> <p>(cl. 7)</p>	<p>Obligation</p> <p>Clause 7 provides for the ownership of intellectual property rights that will be owned by the State Party. The provisions under clause 7 of the General Provisions <u>do not</u> apply if the Service Agreement (most notably, the Pre-Contractual Documents) states that the Service Provider will own the Intellectual Property Rights in New Material. If so, clause 8 applies to Intellectual Property Rights in New Material.</p> <p>The provisions of clause 7 continue to apply after the Service Agreement comes to an end.</p>	<p>Comments & Analysis</p> <p>When considering matters involving intellectual property rights, Service Providers should review the Pre-Contractual Documents carefully to check whether the Service Provider will own the Intellectual Property Rights in New Material.</p> <p>For the purposes of cl. 7, and in particular the meaning of “Existing Material”, the term “work” carries the meaning it is given in the Copyright Act i.e. a literary, dramatic, musical or artistic work.</p>
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10.1 NEW MATERIAL

<p>New Material</p> <p>(cl. 7.2)</p>	<p>Obligation</p> <p>All future Intellectual Property Rights in all New Material are owned by and assigned to the State Party.</p>	<p>Comments & Analysis</p> <p>For example, if a new type of mental health program was developed by the Service Provider which contains certain Intellectual Property Rights, these rights would be owned by and assigned to the State Party.</p>
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10.2 EXISTING MATERIAL

Existing Material	Obligation	Comments & Analysis
(cl. 7.3)	<p>Grant of licence to State Party The Service Provider retains ownership of Existing Material under the General Provisions.</p> <p>However, under Clause 7.3(a) the Service Provider grants a licence (being a 'contractual right') to the State Party allowing the State/State Party to exercise all of the rights of the owner of the Intellectual Property Rights in the Existing Material. The Service Provider must therefore ensure that any other owner of any Intellectual Property Rights in Existing Material grants a licence to the State Party to the same effect <u>in writing</u>.</p> <p>Third Parties - Waiver of Moral Rights Under Clause 7.3(b) if a third party owns Moral Rights in any Existing Material, the Service Provider must obtain the written consent and waiver from that third party so as to enable the State Party to use the Existing Material (under licence) without regard to the third party's Moral Rights.</p>	<p>The obligations arising out of cl. 7.3 can be burdensome and Service Providers may find it difficult to strictly adhere to these obligations. If the Service Provider requires flexibility in ownership of New Material, it should negotiate these terms with the State Party and ensure any such negotiations are reflected in the Pre-Contractual Documents.</p> <p>Third Parties A third party owner of Intellectual Property Rights and/or Moral Rights in Existing Material may not be willing to give up these rights. The Service Provider will need to consider these issues when collaborating with third parties to produce materials and where possible ensure that the third party is prepared to (in the case of Intellectual Property Rights) grant a licence or (in the case of Moral Rights) a consent and waiver in relation to such rights to ensure that the Service Provider is able to comply with its obligations under clause 7.3.</p> <p>The licence or the consent and waiver will need to be <u>in writing</u> and signed by the third party.</p>



10.3 WARRANTY

Warranty (cl. 7.4)	Obligation	Comments & Analysis
	<p>Under clause 7.4 of the General Provisions, the Service Provider provides certain warranties to the State Party. A warranty is a promise or representation that certain facts are true.</p> <p>The Service Provider provides the following warranties:</p> <ul style="list-style-type: none">(a) the Service Provider has the right to grant the licences required to be granted under cl. 7.3;(b) no Intellectual Property Rights or Moral Rights in any Material are or will be owned by third parties unless the Service Provider has received certain licences or consents;(c) if a third party owns any Intellectual Property Rights in the Material, a licence is granted by the third party in accordance with clause 7.3;(d) the Material will not infringe the Intellectual Property Rights or Moral Rights of any third party;(e) if a third party owns Moral Rights in the Material, the Service Provider has the written consent and waiver of the relevant third party in relation to those Moral Rights to enable the State/State Party to use the Material without regard to those Moral Rights.	<p>A breach of a warranty generally gives the party benefitting from the warranty (the State Party) the right to recover damages from the provider of the warranty (the Service Provider). A breach of a warranty does not usually give the non-breaching party the right to terminate the contract. However, the General Provisions provide that an Event of Default (which may result in termination or suspension of the Service Agreement) includes an event where a material representation or warranty made by the Service Provider is or becomes untrue or is breached.</p> <p>Therefore, under the Service Agreement, the breach of a warranty by the Service Provider <u>may</u> allow the State Party to terminate the Service Agreement and/or seek damages from the Service Provider.</p>



10.4 INDEMNITY

Indemnity (cl. 7.5)	Obligation <p>An indemnity is the provision by one party to the other party of security or protection against loss or injury. Clause 7.5 establishes an indemnity whereby the Service Provider ‘indemnifies’ (or in other words, agrees to compensate) the State Party for any costs, losses, expenses, actions, suits, demands, claims, damages and other liabilities resulting from:</p> <ul style="list-style-type: none"> (a) a non-compliance of the Service Provider with its obligations in respect of Intellectual Property Rights under clause 7; or (b) an actual or alleged infringement of the Intellectual Property Rights or Moral Rights of any third party by the Service Provider. 	Comments & Analysis <p>The provision of an indemnity is not to be taken lightly as the indemnifier (in this case, the Service Provider) could be held liable for significant costs resulting from any loss incurred by the indemnified party (in this case, the State Party) relating to a breach of the Service Provider’s obligations with respect to intellectual property.</p> <p>It is very important that the Service Provider complies with clause 7 and, in particular, obtains:</p> <ul style="list-style-type: none"> (a) a grant of licence from any third parties who own Intellectual Property Rights in any Existing Material; and (b) the written consent and waiver of any third parties who own Moral Rights in any Material.
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11. INTELLECTUAL PROPERTY RIGHTS TO BE OWNED BY SERVICE PROVIDER

Intellectual Property Rights to be owned by Service Provider (cl. 8)	Obligation <p>The provisions of clause 8 will apply where the Service Agreement (most notably, the Pre-Contractual Documents) states that Intellectual Property Rights in New Material will be owned by the Service Provider.</p>	Comments & Analysis <p>Even though the Service Provider retains ownership of Intellectual Property Rights in New Material, the Service Provider must still grant a licence to the State Party so that the State Party can exercise rights in the New Material.</p>
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11.1 NEW MATERIAL

New Material (cl. 8.3)	Obligation	Comments & Analysis
	<p>Notwithstanding that the Service Provider owns the New Material, the Service Provider:</p> <ul style="list-style-type: none">(a) grants to the State Party an irrevocable (i.e. the licence cannot be revoked by the Service Provider), perpetual (everlasting), royalty-free licence to exercise any or all of the rights of the owner of the Intellectual Property Rights in the New Material; and(b) must obtain written consent and a waiver from any third party that owns Moral Rights in the New Material so that the State Party may use the New Material without regard to those Moral Rights.	<p>Please see the comments in paragraph 10.2 above.</p>

11.2 EXISTING MATERIAL

Existing Material (cl. 8.4)	Obligation	Comments & Analysis
	<p>The Service Provider provides a licence to the State Party to use all Existing Material even when the Service Provider owns the New Material.</p> <p>In addition:</p> <ul style="list-style-type: none">(a) if a third party owns any Intellectual Property Rights in the Existing Material, the Service Provider must also grant a licence in writing;(b) if a third party owns any Intellectual Property Rights in the Existing Material, the Service Provider must obtain a written consent and waiver by that third party.	<p>Please see the comments in paragraph 10.2 above.</p>



11.3 WARRANTY

Warranty	Obligation	Comments & Analysis
(cl. 8.5)	<p>The Service Provider provides a warranty under clause 8.5 on the same terms as under the warranty given under clause 7.4 .</p>	<p>Please refer to paragraph 10.3 above.</p>

12. PUBLICITY

Publicity	Obligation	Comments & Analysis
(cl. 9)	<p>The Service Provider must not use the logo of the State Party, the State or any Public Authority unless:</p> <ul style="list-style-type: none">(a) the State Party gives written consent in advance; or(b) the Service Agreement Details specify a Public Authority; or(c) the Service Provider is required by law to do so. <p>The State Party is permitted to use the Service Provider's name and logo for reasonable promotional or publicity purposes but it must acknowledge the role of the Service Provider to a degree that is reasonable in the circumstances.</p>	<p>It is important for the service provider to obtain permission before using the logo of the state party.</p>



13. PRIVACY

Privacy	Obligation	Comments & Analysis
(cl. 10)	<p>To the extent relevant to the Service Agreement, the Service Provider must comply with:</p> <ul style="list-style-type: none">(a) any requirements which are applicable to it under the <i>Privacy Act 1988</i> (Cth);(b) any other Commonwealth or State laws involving privacy;(c) any directions made by a Privacy Commissioner;(d) any privacy procedures outlined in the Service Agreement; and(e) any other reasonable direction given by the State Party in relation to privacy.	<p>Note that the <i>Privacy Act 1988</i> (Cth) does <u>not</u> apply to organisations if the annual turnover of those organisations is less than a certain amount (as set by parliament by way of regulations). However, the General Provisions provide that if this exception applies to the Service Provider, the Service Provider will still have to comply with the <i>Privacy Act 1988</i> (Cth) as if the exception did not apply.</p>



14. USE OF LOBBYISTS

Use of Lobbyists	Obligation	Comments & Analysis
(cl. 11)	<p>The Service Provider warrants and represents that:</p> <ul style="list-style-type: none"> (a) any 'Lobbyist', (b) directly or indirectly, (c) employed, engaged or involved in some other way, (d) with the Service Provider or any of the Service Provider's officers, employees, agents or sub-contractors, (e) in connection with the Service Agreement, is registered as a 'Lobbyist' and complies with the obligations attached to that registration. <p>This warranty effectively creates an obligation on the Service Provider to ensure that any Lobbyist connected with the Service Agreement is registered and complies with its obligations. For the purposes of complying with cl. 11, Service Providers should note that a person will be a Lobbyist if that person: <i>'... is a person or organisation who represents the interests of a third party to the Government. There are a number of exclusions from this definition:</i></p> <ul style="list-style-type: none"> - <i>people who work to promote the interests of their own employer to government, such as government affairs and external relations employees of companies;</i> - <i>peak industry bodies and professional organisations who represent the interests of their members;</i> - <i>trade unions;</i> - <i>charitable and religious organisations; and</i> - <i>professionals such as lawyers, accountants and town planners, where contact with government on behalf of a client may be an incidental but necessary part of their day to day work.'</i> 	<p>Service Providers should be careful to only undertake lobbying type activity allowed by this clause.</p> <p>For more information as to the registration of lobbyists and their obligations in Western Australia, please see https://www.lobbyists.wa.gov.au/Pages/Default.aspx</p>



15. COOPERATION WITH OTHER SERVICE PROVIDERS

Cooperation with other Service Providers

(cl. 12)

Obligation

Service Providers must cooperate with third party service providers appointed by the State Party and provide reasonable assistance to those service providers as requested by the State Party.

Service Providers are entitled to establish a prior agreement with the State Party under which they may charge for costs incurred as a result of such cooperation.

Comments & Analysis

Service Providers should ask for any such request to be in writing to ensure the extent of cooperation required by the State Party is clear.



16. ACCESS & RECORDS

<p>Access and Records</p> <p>(cl. 13)</p>	<p>Obligation</p> <p>Clause 13 deals with certain access to the Service Provider's premises and 'Records'.</p> <p>Access The Service Provider must allow the State Party reasonable access to its premises used in connection with the Services and Records (which are defined to include documents relating to the Services). Also, the Service Provider must allow the State Party to examine copy and audit such Records and to photograph, film or record anything done by the Service Provider in connection with the provision of the Services (though such photographing/recording must be <u>reasonably</u> required by the State Party). In order to exercise these rights, the State Party must give the Service Provider reasonable prior notice and it must comply with the Service Provider's directions and procedures which relate to occupational health and safety, security and confidentiality.</p> <p>Records The Service Provider must keep "accurate, complete and written" Records in relation to the Service Agreement. Such Records must include:</p> <ul style="list-style-type: none"> (a) the type of Services (including separate tasks) provided to the State Party on each day; (b) the time spent providing the Services on each day; and (c) the name and title of those who provided or supervised the provision of the Services. <p>The Service Provider must also:</p> <ul style="list-style-type: none"> (a) adhere to the directions of the State Party regarding the keeping of the Records (before, during and after the Term of the Service Agreement); and (b) keep the Records for at least 7 years after the Service Agreement comes to end. 	<p>Comments & Analysis</p> <p>If the Service Provider is concerned that photographing/recording is not reasonably required, legal advice should be obtained.</p> <p>Service Providers will need to ensure that their record keeping procedures are up to date in order to comply with these provisions.</p> <p>Service Providers should carefully review record-keeping requirements under the Service Agreement before the destruction of any records.</p> <p>Where more than one Service Agreement creates obligations with respect to the same records, the Service Provider should apply the most onerous of the obligations.</p>
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17. ASSOCIATES

Associates	Obligation	Comments & Analysis
(cl. 14)	<p>Associates and Specified Personnel</p> <p>The Service Provider's 'Associates' includes their officers (directors and secretaries of a company), agents, advisers, consultants, contractors, nominees, licensees and employees and volunteers used by the Service Provider in carrying out the Services.</p> <p>The Service Provider must ensure that the Associates are properly qualified, hold any required permits or licences and conduct themselves at all times in a fit and proper manner.</p> <p>The Service Provider may also use 'Specified Personnel' for the performance of the Services and must notify the State Party if a particular Specified Personnel cannot undertake work and suggest substitute personnel.</p> <p>Awards and Workplace Agreements</p> <p>It is an obligation of the Service Provider that all Associates are paid and engaged/employed on terms in accordance with all relevant awards (if applicable) and laws (namely, employment laws such as the <i>Fair Work Act 2009</i>).</p>	<p>The Service Provider should carefully assess its employment arrangements with its employees and ensure that other contractors are engaged with appropriate written agreements (preferably).</p> <p>The Service Provider should seek independent legal advice as to such obligations, if required.</p>



18. GENERAL REPRESENTATIONS & WARRANTIES

<p>General Representations and Warranties</p> <p>(cl. 15 & 16)</p>	<p>Obligation</p> <p>The Service Provider provides a number of general warranties under clause 15.</p> <p>Some of the more significant warranties include:</p> <ul style="list-style-type: none"> (a) the Service Provider has no conflict of interest arising out of the Service Agreement (note that conflicts of interest that do arise are to be dealt with pursuant to clause 20); and (b) the Service Provider and any person responsible for the performance of key roles or tasks in the provision of the Services has not been convicted of a criminal or statutory offence punishable by a fine or penalty of \$10,000.00 or more. 	<p>Comments & Analysis</p> <p>The Service Provider should review the warranties under clause 15 carefully.</p>
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19. SERVICE PROVIDER'S UNDERTAKINGS AND OBLIGATIONS

<p>Service Provider's Undertakings and Obligations</p> <p>(cl. 16)</p>	<p>Obligation</p> <p>The Service Provider is under a number of general obligations including the obligations to act ethically, abide by laws and to provide for the safety and security of all property supplied by the State Party in connection with the Service Agreement.</p>	<p>Comments & Analysis</p> <p>The Service Provider should review its obligations under clause 16 carefully.</p>
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20. NOTIFIABLE INCIDENT

Notifiable Incident (cl. 17)	Obligation If a Notifiable Incident occurs, the Service Provider must notify the State Party as soon as possible and provide details of the incident. All of the following constitute a Notifiable Incident: <ul style="list-style-type: none">(a) a Serious Incident (i.e. an event which causes or is likely to cause injury, illness or death or compromises or causes a serious risk to the health, safety or welfare of a Service User of Other Service Recipient);(b) where a Service User causes or contributes to injury, illness or death or poses a serious risk to the health, safety or welfare of any person;(c) the referral to a regulatory or investigative body of any complaint regarding any Service User, the Services or the Service Provider;(d) where the Service Provider or an Associate is charged with a criminal offence involving a sexual offence, dishonesty, breach of trust or any offence that may be punished by imprisonment;(e) where a serious verbal or written complaint is received about the Services or the Service Provider; and(f) where any event which may result in adverse publicity occurs (including where the Service Provider is contacted by the media to comment on any matter relating to the Services or a Service User).	Comments & Analysis As discussed, any notification should be done in accordance with clause 26 (which contains provisions on how to notify where notification is required under the Service Agreement). All notifications should be in writing or confirmed in writing.
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21. INDEMNITY

Indemnity	Obligation	Comments & Analysis
(cl. 19)	<p>Clause 18 contains an indemnity in favour of the State Party with respect to losses suffered by the State Party arising from or in connection with:</p> <ul style="list-style-type: none"> (a) a breach of the Service Agreement by the Service Provider; (b) a wilful, tortious or unlawful act or omission of the Service Provider; or (c) a breach of the law by the Service Provider. <p>The Service Provider's liability under clause 18 will be reduced proportionally to the extent that any loss results from the negligence of the State Party or the State or their respective officers, employees or agents.</p>	<p>For an explanation of indemnities and their importance please see paragraph 10.4 above.</p>

22. CONFLICT OF INTEREST

Conflict of Interest	Obligation	Comments & Analysis
(cl. 20)	<p>If a conflict of interest arises involving the Service Provider, the Service Provider must promptly notify the State Party and take reasonable steps in consultation with the State Party to handle the situation.</p>	<p>A conflict of interest would arise where, for example:</p> <ul style="list-style-type: none"> (a) the Service Provider (or an Associate) has a personal interest in a matter which involves a duty of the Service Provider; or (b) a situation where the interest, right, advantage or position of the Service Provider (or an Associate) comes into dispute or challenge with those of another in connection with the provision of the Services.



23. DISABILITY ACCESS & INCLUSION PLANS

Disability Access and Inclusion Plans

(cl. 21)

Obligation

The Service Provider must:

- implement the State Party's Disability Access and Inclusion Plan prepared under the *Disability Services Act 1993* 'to the extent practicable'; and
- provide an annual report to the State Party on the date specified in the Service Agreement for this purpose.

Comments & Analysis

The Service Provider should request a copy of this Plan from the State Party and review its protocols and procedures in order to comply with the Plan.



24. DEFAULT & SUSPENSION

Default and Suspension

(cl. 23)

Obligation

This clause sets out the instances that will be regarded as '**Events of Default**' under or '**breach events**' of the Service Agreement and the terms on which the Service Agreement may be terminated. An Event of Default is the occurrence of one of the following events:

- (a) a Serious Incident (i.e. an event which causes or is likely to cause injury, illness or death or compromises or causes a serious risk to the health, safety or welfare of a Service User of Other Service Recipient);
- (b) a material breach by the Service Provider;
- (c) 3 breaches by the Service Provider over a 12 month period;
- (d) a material representation or warranty becomes untrue or is breached by the Service Provider;
- (e) an Insolvency Event occurs in relation to the Service Provider (please refer to the detailed definition of 'Insolvency Event' in clause 1 of the General Provisions);
- (f) the provision of the Services becomes unlawful;
- (g) the Service Provider or any person responsible for the performance of key roles or tasks in the provision of the Services is convicted of a criminal or statutory offence punishable by a fine or penalty of \$10,000.00 or more; or
- (h) if in the reasonable opinion of the State Party or the State, the reputation of the State Party, the State or the State government is or is likely to be damaged as a result of any act or omission of the Service Provider.

Where such an event occurs, the State Party may (after giving notice to the Service Provider) withhold payment from the Service Provider (which will be reinstated when the default is remedied) or terminate the Service Agreement.

If the Service Agreement is terminated, the State Party may still require the Service Provider to continue to provide the Services for up to 120 days from termination.

Comments & Analysis

The Events of Default are, as can be seen, referable only to defaults of the Service Provider (and not the State Party) and the rights to terminate the Service Agreement are exclusive to the State Party. The Service Provider has no contractual right to terminate the Service Agreement except for the limited circumstance of a Force Majeure event existing beyond 120 days (see below).



25. FORCE MAJEURE

Force Majeure (cl. 24)	Obligation	Comments & Analysis
	<p>Should any of the events within the definition of 'Force Majeure' in clause 1.2 occur (e.g. flood, fire, civil unrest etc.), the Service Provider must notify the State Party within 5 Business Days of the first occurrence of the event.</p> <p>If a party can no longer perform its obligations or receive the benefit of the other party's obligations due to the event, the obligations will be suspended. If such suspension continues for more than 120 days, the Service Agreement may be terminated by either party by notice in writing.</p>	<p>The force Majeure provision is the relevant provision in the event of emergency and disaster preventing service delivery.</p>



26. NOTICES

Notices	Obligation	Comments & Analysis
(cl. 26)	<p>Where notice is required to be given of some event or matter, the notice may be given by an authorised officer or solicitor of the State Party or the Service Provider and must be in writing.</p> <p>In addition, the notice must be:</p> <ul style="list-style-type: none"> (a) hand delivered or sent by prepaid post; or (b) emailed (in which case an automatic receipt notification must be sent); or (c) sent by facsimile. <p>The postal address, email address or facsimile number to be used for delivery must be the recipient's address or number as specified in the Service Agreement.</p> <p>Where a notice must be given within a designated timeframe, the date of receipt is:</p> <ul style="list-style-type: none"> (a) where delivered by hand, on the date of delivery; or (b) where delivered by post, on the third Business Day after posting; or (c) where delivered by email, at the time shown on the automatic receipt notification received by the sender; or (d) where delivered by facsimile, on the date of the record from the relevant facsimile machine showing that the facsimile was successfully sent. <p>If a notice is to be sent by email, the notice must be given as a 'PDF format' as an attachment unless another format is agreed between the parties.</p>	<p>Service Providers should ensure that all notices given under the Service Agreement comply with these requirements otherwise they may be in breach for not giving notice.</p> <p>Do not accept or give oral notification without receiving or giving written confirmation in accordance with this Clause.</p> <p>The Service Provider should also notify the State Party of any changes to its contact details and request that the State Party do the same for the purposes of these notice provisions.</p>



27. ASSIGNMENT & NOVATION

Assignment and Novation (cl. 27.1)	Obligation <p>The Service Provider cannot dispose or deal in any way with its rights and obligations under the Service Agreement without having first obtained the consent of the State Party (cl. 27.1).</p> <p>For instance, the Service Provider cannot sell, transfer or mortgage its rights or obligations under the relevant Service Agreement. This restriction also prevents a Service Provider from substituting itself as a party to the Service Agreement (whether by assignment or novation) without the State Party's consent.</p> <p>Cl. 27.1(b) extends this restriction so that a Service Provider which is a corporation other than a public company (for instance an incorporated association which is not uncommon in non-for-profit organisations) may not change the control or management of the Service Provider without first obtaining the State Party's consent.</p>	Comments & Analysis <p>The effect of cl. 27.1 is that should a Service Provider need to contract with a third party in order to provide the Services or otherwise fulfil its obligations under a Service Agreement, it will first need to obtain the consent of the State Party.</p> <p>There is no requirement that the State Party cannot unreasonably refuse consent. Cl. 27.1 should therefore be kept in mind if it is likely that a Service Provider will need to engage a third party.</p> <p>Cl. 27.1(b) is onerous. For example, the Service Provider could breach the General Provisions if there is a change in management and no consent was first obtained from the State Party providing the funding.</p> <p>If the Service Provider proposes to change its corporate structure it should seek legal advice about the effect of this on its Service Agreement obligations before doing so.</p>
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GLOSSARY

All capitalised terms in this Summary have the same meaning as defined in the General Provisions unless otherwise defined below:

Existing Material has the same meaning as in the General Provisions and means a work, product or any other material which satisfies all of the following criteria:

1. the work, product or other material:
 - was created before the Service Agreement Commencement Date; or
 - is to be created during the Term (of the Service Agreement) outside the scope of the Service Agreement; and
2. the Intellectual Property Rights in the work, product or other material are not owned by the State or the State Party; and
3. the work, product or other material is required specifically for, or in connection with, the Services or Records.

Intellectual Property Rights has the same meaning as in the General Provisions and means patents, copyright, rights in circuit layouts, registered designs, trademarks and the right to have confidential information (being information which is capable of being protected by way of an action for breach of confidence) kept confidential.

Moral Rights has the same meaning as set out in the *Copyright Act 1968* and generally refers to personal rights that connect authors to their work.

New Material has the same meaning as in the General Provisions and means anything created by the Service Provider under the Service Agreement in which Intellectual Property Rights subsist.

Pre-Contractual Documents means the Letter, Offer, Request and Agreed Order which are the formative tender documents and included as part of the Service Agreement together with the General Conditions.

Procurement Glossary available at : <http://www.finance.wa.gov.au/cms/content.aspx?id=3992>.
Accessed 18.03.2014



DEFINITIONS

Available at

http://www.finance.wa.gov.au/cms/uploadedFiles/Government_Procurement/Guidelines_and_templates/community_services_process_terms_and_conditions_and_definitions_request_for_offers.pdf?n=8259.

Addendum means modifications or clarifications to the Request issued by the State Party pursuant to clause 7 which, by virtue of clause 7, are deemed to form part of the Request.

Business Day means any day except Saturday, Sunday or a public holiday in Perth, Western Australia.

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

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

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

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

- is by its nature confidential; or
- is specified by the State Party to be confidential, including any information specified to be confidential in the Request; or
- the Respondent knows or ought to know is confidential.

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

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

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

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

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

General Provisions means the *Delivering Community Services in Partnership – General Provisions for the Purchase of Community Services by Public Authorities* – published by the Western Australian Department of Finance at www.finance.wa.gov.au.

Mandatory Requirements means the requirement (if any) referred to as such in the Response Form.

Offer means an offer lodged in response to the Request.

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



FOR FURTHER GLOSSARIES AND DEFINITIONS

Procurement Glossary available at : <http://www.finance.wa.gov.au/cms/content.aspx?id=3992>. Accessed 18.03.2014.

Procurement Practice Guide (Glossary of terms) Appendix, p63 January 2013 available at : https://www.finance.wa.gov.au/cms/uploadedFiles/Government_Procurement/Guidelines_and_templates/Goods_and_service_procurement_practice_guide.pdf?n=4198

Useful links:

Guide to Tendering for Service Providers:

https://www.finance.wa.gov.au/cms/uploadedFiles/Government_Procurement/Guidelines_and_templates/community_services_tendering_for_service_providers.pdf?

Privacy Act: (updated March 2014) Fact Sheet 7;10 Steps to Protect other peoples personal information (WA Office of the Information Commissioner)

Freedom of Information Process. Available at : <http://www.foi.wa.gov.au/dnn/en-au/aboutfoi/foiprocess.aspx>

Role of Contract Manager:

http://www.finance.wa.gov.au/cms/uploadedFiles/Government_Procurement/Contract_manager/contract_manager_roles.pdf?

Risk Management:

Risk workbook is available at <http://www.finance.wa.gov.au/cms/content.aspx?id=12652>

Risk Management Policy documents available at <http://www.ourcommunity.com.au>

Midland Women's Health Care Place <http://www.mwhcp.org.au>

WACOSS <http://www.wacoss.org.au/home.aspx>

WAAMH <http://waamh.org.au/>

Department of Finance <https://www.finance.wa.gov.au/cms/index.aspx>



CHECKLISTS

Preparation for Tendering:

- ☐ Know your organisation – how much it costs and how to “sell” it.
- ☐ Calculate pricing to provide minimum service needed: “must have” and “ would be good to have”
- ☐ Market your organisation
- ☐ Contact your Contract Manager
- ☐ Be competitive – professional and sustainable
- ☐ Include risk management considerations

Tendering Process Checklist:

- ☐ Register with Tenders WA
- ☐ Check Tenders WA (relevant categories)
- ☐ Plan your response timeline
- ☐ Ask questions (especially if the specifications could be improved)
- ☐ Know the closing time and address
- ☐ Use selection criteria as headings (use the weighting to inform your response)
- ☐ Evaluate the tender application yourself before submission
- ☐ Get feedback
- ☐ Proof read

Areas Often Overlooked:

- ☐ Using demonstrated experience by listing projects rather than addressing selection criteria
- ☐ Leaving the Draft mark on submitted documents
- ☐ Missing deadlines for submission
- ☐ Using jargon and acronyms
- ☐ Overly decorating and binding – the document will be pulled apart
- ☐ Not responding to Selection Criteria – or using generic appendices
- ☐ Not providing explanation of scope, outcomes and similarities in what is being provided and the tender
- ☐ Not having a logical sequence
- ☐ Not seeking feedback (whether successful or not)



Contract Includes:

All these documents constitute the **Service Agreement**.

- ☐ **Agreed Order** – Specifies the Services which the State Party requires including the date, time and place for the performance of the Services and any additional requirement, specifications or provisions applicable.
- ☐ **Letter** – words commencing with a capital letter match those used in the Request and match those in the General Provisions; The Letter may amend the General Provisions or contain terms and conditions which form part of the Service Agreement.
- ☐ **Offer** – The offer submitted by the Service Provider in response to the Request.
- ☐ **Request** – means the request issued by the State Party in respect of the Services.
- ☐ **General Provisions** – (Delivering Community Service in Partnership. General Provisions for the Delivery Community Services by Public Authorities. February 2012 Edition).

REFERENCES:

Material obtained from:

Understanding the Tendering Process for NFPs Summary for WANADA Members. Feb 2012

<https://www.tenders.wa.gov.au>

http://www.finance.wa.gov.au/cms/uploadedFiles/Government_Procurement/Policies/dcspp.pdf?n=1765

