Indigenous Procurement Policy Model clauses
Transitional Arrangements for Indigenous Joint Ventures

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1. **How to use Joint Venture Transitional model clause.**

1.1 **Introduction**

The Australian Government announced changes to the Indigenous Procurement Policy (IPP) to strengthen the requirements for Incorporated Indigenous Joint Venture entities when tendering for certain Commonwealth contracts. These changes require Incorporated Indigenous Joint Ventures tendering for the Commonwealth contract meet the following requirements:

(a) That the Incorporated Indigenous Joint Venture is registered on Supply Nation's Indigenous Business Directory as an Incorporated Indigenous Joint Venture.

(b) That the Incorporated Indigenous Joint Venture meets a 50 percent Indigenous ownership and control test.

(c) That the Incorporated Indigenous Joint Venture has in place an approved Skills and Capability Transfer Plan setting out the joint venture's approach to building the capability of its Indigenous partner, and

(d) that the Incorporated Indigenous Joint Venture has in place an Indigenous Workforce Plan, setting out the joint venture's approach to building its Indigenous workforce.

The new tendering requirements for Incorporated Indigenous Joint Ventures come into effect on and from 1 January 2019. However, to provide Incorporated Indigenous Joint Ventures with sufficient time to implement the changes described above, transitional arrangements apply from between 1 January 2019 until 30 June 2019 (inclusive) (the "transitional phase"). To support the transitional arrangements, model clauses for inclusion in your relevant Approach to Market and contract documentation are set out below.

1.2 **Using the model clauses in your Approach to Market documentation during the 1 January to 30 June 2019 (inclusive) transitional phase**

Section 2 of this document contains model clauses that should be inserted into the terms and conditions of your Approach to Market (ATM) documentation during the transitional phase.

You should include the section 2 (Approach to Market - transitional phase model clauses) in ATM documents for procurements that:

(a) Are undertaken pursuant to exemption 16 to Appendix A of the CPRs; and

(b) that commence during the transitional phase.

1.3 **Using the model clauses in Contracts awarded during the transitional phase**

Section 3 of this document contains model clauses that should be inserted into the terms and conditions of your contract documents for contracts awarded as a result of procurements:

(a) That are undertaken pursuant to exemption 16 to Appendix A of the CPRs.

(b) Where the successful Tenderer is an Incorporated Indigenous Joint Venture that meets the requirements specified in paragraphs 1.1(a) - (d) above, and

(c) where the contract is entered into during the transitional phase (even if your ATM documents did not include these clauses).
2. **Approach to Market documentation - model clauses**

2.1 **Indigenous Procurement Policy**

*Note to drafters: It is strongly recommended that the clauses listed below are incorporated into all ATM documentation terms and conditions for procurements from an Indigenous enterprise pursuant to the Indigenous Procurement Policy.*


(b) In particular, Tenderers should note that the purpose of the Indigenous Procurement Policy is to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy (see Indigenous Procurement Policy for further information).

(c) The Australian Government has announced changes to the Indigenous Procurement Policy to strengthen the requirements for Incorporated Indigenous Joint Venture entities when tendering for certain Commonwealth contracts. From 1 January 2019, Incorporated Indigenous Joint Ventures will need to meet new requirements in order to tender for Commonwealth contracts under the Indigenous Procurement Policy. Transitional arrangements apply from 1 January 2019 to 30 June 2019 (inclusive) to provide affected Incorporated Indigenous Joint Ventures with sufficient time to comply with the new requirements.

(d) The transitional arrangements apply to Tenderers that are Incorporated Indigenous Joint Ventures, and impose additional requirements on those Tenderers.

*Note to drafters: In applying, the IPP the enterprise must at a minimum meet the definition of an 'Indigenous enterprise'. Ensure that clause 2.1(e) is added to the tenders 'Conditions for Participation'.

Supply Nation maintains a list of enterprises that meet the definition of "Indigenous enterprises" (see [www.supplynation.org.au](http://www.supplynation.org.au)). If an enterprise is not listed with Supply Nation refer to section 1.8.1 of the IPP for ways of ensuring an enterprise is an Indigenous enterprise.*

(e) It is a mandatory condition for participation for all Tenderers to be an Indigenous enterprise at the time of lodging their Tender. The [Customer] must exclude a Tender from further consideration if the [Customer] considers that the [Tenderer] does not meet the mandatory condition for participation of being an Indigenous enterprise at the time of lodging its Tender.

(f) The [Tenderer] must provide the [Customer] with Notice in writing immediately if at any time prior to entering into the Contract:

(i) the [Tenderer] does not meet Supply Nation IPP Joint Venture registration requirements by 1 July 2019, or

(ii) there is an adverse change to the status of the [Tenderer's] Indigenous ownership or control, or

(iii) the [Tenderer] is removed or suspended from the list of registered
Indigenous businesses, including as an Incorporated Indigenous Joint Venture, as maintained by Supply Nation.

(g) The [Customer] must exclude the [Tenderer] from further consideration if, at any time prior to entering into the Contract, the [Customer] becomes aware that:

(i) the [Tenderer] does not meet Supply Nation IPP Joint Venture registration requirements by 1 July 2019, or

(ii) there is an adverse change to the status of the [Tenderer's] Indigenous ownership or control, unless the adverse change to the [Tenderer's] status is rectified prior to entering into the Contract, or

(iii) the [Tenderer] has been removed or suspended from the list of registered Indigenous businesses, including as an Incorporated Indigenous Joint Venture as maintained by Supply Nation.

(h) The [Tenderer] acknowledges and agrees that if it is a successful [Tenderer], it will be a condition of the resulting Contract that the [Contractor/Tenderer] declares that it is an Indigenous enterprise at the commencement of the Contract. The [Contractor/Tenderer] must provide Notice to the [Customer] if, at any time during the term of the Contract:

(i) the [Contractor/Tenderer] does not at the [Commencement Date] meet Supply Nation IPP Joint Venture registration requirements but will do so by 1 July 2019, or

(ii) the [Contractor/Tenderer] did not meet the Supply Nation IPP Joint Venture registration requirements by 1 July 2019,

(iii) there is an adverse change to the status of the [Contractor's/Tenderer's] Indigenous ownership, management or control, or

(iv) the [Contractor/Tenderer] is removed or suspended from the list of registered Indigenous businesses including as an Incorporated Indigenous Joint Venture, as maintained by Supply Nation.

2.2 Definitions

(a) In this clause:

(i) “Indigenous enterprise” means:

A. in relation to a business not formed through the incorporation of an Indigenous and non-Indigenous business, a business that is 50 percent or more owned by Indigenous Australians; and

B. in relation to a business formed through the incorporation of an Indigenous and non-Indigenous business, an Incorporated Indigenous Joint Venture.

(ii) “Incorporated Indigenous Joint Venture” means an entity that is a joint venture that:
A. [on and from 1 July 2019] is fully registered as an Indigenous Joint Venture in accordance with Supply Nation’s IPP Joint Venture registration requirements, or

B. [before 1 July 2019] is formed through the incorporation of an Indigenous business and a non-Indigenous business, is 50 percent or more owned by Indigenous Australians; has, or intends to have, 50 percent Indigenous control of the joint venture; and has demonstrated its intention to register with Supply Nation in accordance with Supply Nation’s IPP Joint Venture registration requirements.

(iii) "Indigenous Workforce Plan" means, in relation to an Indigenous Joint Venture:

A. [on or after 1 July 2019] the approved Indigenous Workforce Plan; or

B. [before 1 July 2019] the proposed draft Indigenous Workforce Plan submitted with the [Tenderer’s] Tender.

Note to drafter: The templates for the Indigenous Workforce Plan are available through Supply Nation www.supplynation.org.au. Approval of the plan during the transitional period is by the contracting agency.

(iv) “Notice” means a written notice sent from one party to another party at the address, or email address, [or facsimile number] set out in the Tender. A Notice is taken to be received:

A. if hand delivered, on delivery;

B. if sent by pre-paid post, five (5) [Business Days] after the date of posting; or

C. if sent by Electronic Communication, at the time that would be the time of receipt under the Electronic Transactions Act 1999 (Cth) as if the Notice was being given under a law of the Commonwealth.

(v) "Skills and Capability Transfer Plan" means:

A. [on or after 1 July 2019] the approved Skills and Capability Transfer Plan; or

B. [before 1 July 2019] the proposed draft Skills and Capability Transfer Plan submitted with the [Tenderer’s] Tender.

Note to drafter: The templates for the Skills and Capability Transfer Plan are available through Supply Nation www.supplynation.org.au. Approval of the plan during the transitional period is by the contracting agency.

2.3 Tender's Declaration

(a) I confirm that at the [Closing Time] my organisation is an Indigenous enterprise as defined in clause 2.2 of this Approach to Market.

Note to Tenderers: [Tenderers] who are Indigenous Incorporated Joint
Ventures that are not yet registered with Supply Nation are required to make the additional declaration.

(b) I confirm that at the [Closing Time] my organisation has Notified Supply Nation in writing of its intention to commence registration in accordance with Supply Nation’s IPP Joint Venture registration requirements.

2.4 Additional documents to be lodged by an Incorporated Indigenous Joint Ventures

[Tenderers] that are an Incorporated Indigenous Joint Ventures should lodge the following documents with their Tender:

(a) a copy of the organisation’s written Notification to Supply Nation informing of its intention to commence the IPP Joint Venture registration requirements or a copy of the organisation’s evidence of registration by Supply Nation as an Incorporated Indigenous Joint Venture, as relevant

(b) a copy of the organisation’s intended Skills and Capability Transfer Plan or its approved Skills and Capability Transfer Plan, as relevant, and

(c) a copy of the organisation’s intended Indigenous Workforce Plan or its approved Indigenous Workforce Plan, as relevant.

2.5 Evaluation criteria

(a) In evaluating Tenders, the [Customer] will take into consideration:

(i) If the [Tenderer] is an Incorporated Indigenous Joint Venture, the [Tenderer’s] proposed approach to:

A. building the capability of its Indigenous joint venture partner, as detailed in its Skills and Capability Transfer Plan, and

B. building its Indigenous workforce, as detailed in its Indigenous Workforce Plan.

[Tenderers] should note that [Customer’s] review and assessment of the Skills and Capability Transfer Plan and Indigenous Workforce Plan is for the purposes of this Tender only. This will have no bearing on the Supply Nation’s IPP Joint Venture registration requirements for incorporated joint venture arrangements.

3. Contracting during the transitional phase

Note to drafters: It is strongly recommended that the clauses listed below are incorporated into all contracts with an Incorporated Indigenous Joint Venture which are entered into during the transition phase, and which are entered into as a result of a procurement conducted pursuant to the Indigenous Procurement Policy.

3.1 Indigenous Procurement Policy

(a) It is Commonwealth policy to stimulate Indigenous entrepreneurship and business development, providing Indigenous Australians with more opportunities to participate in the economy (see Indigenous Procurement Policy for further information, available on http://www.pmc.gov.au/ipp)
You should include compliance with the [Tenderer's] Skills and Capability Transfer Plan and Indigenous Workforce Plan as an obligation in the Contract terms or Statement of Work/Statement of Requirements if the successful Tenderer is a Incorporated Indigenous Joint Venture

(b) The [Contractor] must comply with the approved Skills and Capability Transfer Plan and the approved Indigenous Workforce Plan from the commencement of the contract. Where the Skills and Capability Transfer Plan and Indigenous Workforce Plan is a draft plan at the commencement of the contract, the [Contractor] must comply with the draft versions of these plans as submitted with its Tender until the plans are approved, at which time the [Contractor] must comply with the approved plans.

Note to drafters: You should include an obligation to report on this obligation in your Contract. The following clause is optional in this regard.

(c) The [Contractor] must provide one written report and evidence of its compliance with this clause 3.1 during the transitional phase by 1 July 2019.

Note to drafters: You may wish to include the following clauses if there is some possibility that the Contract will become a High Value Contract during its Term. This will depend upon both the value and the industry sectors that are relevant to the Contract (see the IPP for further information).

(d) If during the Term the value of this Contract exceeds $7.5 million, then this Contract will become a High Value Contract for the purposes of the Indigenous Procurement Policy, in which case the Contractor must:

(i) within [x] [Business days] after the $7.5 million value is reached, develop an Indigenous Participation Plan that addresses:

   A. how the Contractor intends on meeting the mandatory minimum requirements for the Indigenous Procurement Policy,

   B. the Contractor's current rate of Indigenous employment Indigenous supplier use,

   C. the Contractor's commitment to Indigenous participation, and

   D. if any part of the Contract is being or will be delivered in a Remote Area, how the Contractor will ensure that its provision of Goods and/or Services will deliver significant Indigenous employment or Indigenous supplier use outcomes in that Remote Area, and

(ii) submit the draft Indigenous Participation Plan to the [Customer] for its review and, if appropriate, approval.

(e) Upon approval of the draft Indigenous Participation Plan under clause 3.1(g), the Contractor must:

   (i) comply with the Indigenous Participation Plan (which will by contract amendment become an attachment to the Contract), and

   (ii) report against its compliance with the Indigenous Participation Plan quarterly during the Term, and

   (iii) comply with any directions issued by the [Customer]
3.2 Warranty

(a) The Contractor warrants that:

(i) where the [Commencement Date] of the Contract is before 1 July 2019, the Contractor has notified Supply Nation of its intention to register as an Incorporated Indigenous Joint Venture in accordance with Supply Nation’s IPP Joint Venture registration requirements,

Note to Tenderer: Where the Commencement Date is near 1 July 2019, please have regard to 3.2(a)(ii) and 3.2(a)(iii).

(ii) where the [Commencement Date] of the Contract is on or after 1 July 2019, the Contractor is an Incorporated Indigenous Joint Venture which is fully registered as an Incorporated Indigenous Joint Venture in accordance with Supply Nation’s IPP Joint Venture registration requirements, and

(iii) it will, at all times on or after 1 July 2019 remain registered as an Incorporated Indigenous Joint Venture for the remainder of the term.

Note to drafters: If you do not have a definition of [Business Day] in your Contract terms and conditions, you should insert the following definition into your Contract glossary:

[Business Day] means a day that is not a Saturday, a Sunday or a public holiday, special holiday or bank holiday in the place where the services are being performed.”

3.3 Notifiable Event

(a) The Contractor must provide the [Customer] with Notice if any of the following events occur during the term of the Contract:

(i) there is an adverse change in the Contractor’s status as an Incorporated Indigenous Joint Venture, including any change in the Contractor’s ownership, management or control,

(ii) the Contractor does not achieve registration as an Incorporated Indigenous Joint Venture in accordance with Supply Nation’s IPP Joint Venture registration requirements by 1 July 2019,

(iii) the Contractor is suspended, removed or no longer registered by Supply Nation as an Incorporated Indigenous Joint Venture, before 1 July 2019, or

(iv) the Contractor is suspended, removed or no longer registered by Supply Nation as an Incorporated Indigenous Joint Venture at any other time during the term.

(each an IPP Notifiable Event).

(b) The Contractor must provide the [Customer] with the Notice regarding an IPP Notifiable Event no later than 20 [Business Days] after the occurrence of each IPP Notifiable Event.

3.4 Change in Indigenous Joint Venture
Note to drafters: insert references to your relevant termination clause into clause 3.4(b) (i) below.

(a) Where the [Customer] becomes aware, through any means whatsoever, of any IPP Notifiable Event, the [Customer] may, by providing Notice to the Contractor:

(i) require the Contractor to provide information as reasonably required by the [Customer] in relation to the IPP Notifiable Event, and/or

(ii) request that the Contractor rectify the IPP Notifiable Event within 20 [Business Days] after the date of the [Customer’s] Notice to the Contractor, and

(iii) request that the Contractor provide proof to the satisfaction of the [Customer] that the IPP Notifiable Event has been rectified.

(b) Where the Contractor fails to rectify the IPP Notifiable Event in accordance with clause 3.4(a), the [Customer] may, at its sole and absolute discretion:

(i) take any other action as the [Customer] considers appropriate in the circumstances, including, without limitation, terminating the Contract for cause, in whole or in part [in accordance with clause xx].

(c) Where the Contractor fails to provide the [Customer] with Notice of an IPP Notifiable Event in accordance with clause 3.3, the [Customer] may, at its sole and absolute discretion:

(i) request that the Contractor provides Notice in accordance with clause 3.3, including any additional information as reasonably required by the [Customer], and

(ii) take any action specified in clause 3.4.

Note to drafters: this Notice clause should reflect the terms of the general notice clause in your Contract template.

3.5 Definitions:

(a) In this clause:

(i) "Incorporated Indigenous Joint Venture" means an incorporated joint venture that:

A. [on and from 1 July 2019] is fully registered as an Indigenous Joint Venture in accordance with Supply Nation’s IPP Joint Venture registration requirements, or

B. [before 1 July 2019] is formed through the incorporation of an Indigenous business and a non-Indigenous business, is 50 percent or more owned by Indigenous Australians; has, or intends to have, 50 percent Indigenous control of the joint venture; and has demonstrated its intention to register with Supply Nation in accordance with Supply Nation’s IPP Joint Venture registration requirements.

(ii) "Indigenous Workforce Plan" means:

A. [on or after 1 July 2019] the approved Indigenous Workforce Plan, or

B. [before 1 July 2019] the proposed draft Indigenous Workforce Plan submitted with the [Contractor’s] Tender.
(iii) “Notice” means a written notice sent from one party to another party at the address, or email address, [or facsimile number] set out in the [Contract]. A Notice is taken to be received:

A. if hand delivered, on delivery,
B. if sent by pre-paid post, five (5) [Business Days] after the date of posting, or
C. if sent by Electronic Communication, at the time that would be the time of receipt under the *Electronic Transactions Act 1999* (Cth) as if the Notice was being given under a law of the Commonwealth.

(iv) "Skills and Capability Transfer Plan" means:

C. [on or after 1 July 2019] the approved Skills and Capability Transfer Plan, or
D. [before 1 July 2019] the proposed draft Skills and Capability Transfer Plan submitted with the [Contractor’s] Tender.