

Indigenous Procurement Policy - Model clauses

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For all procurements for contracts that:

- (a) are not High Value Contracts; and**
 - (b) do not use the Commonwealth Contracting Suite,**
- from 1 July 2015**

Note to drafters: For all Contracts that:

- (a) are not High Value Contracts (as defined in the Indigenous Procurement Policy and in clause 3.1(a) below); and*
- (b) do not use the Commonwealth Contracting Suite,*

the following clauses may be inserted into your Approach to the Market documentation and Contract from 1 July 2015 unless Rule 2.6 of the Commonwealth Procurement Rules applies. These clauses give effect to the requirement in paragraph 4.7 of the Indigenous Procurement Policy.

Commonwealth entities may adapt these clauses to fit into their contracting templates, but must comply with the policy.

Language used in the following model clauses should be aligned with the language used in the procuring entity's template documentation (eg Tenderer v Potential Supplier v Respondent, etc).

1. Approach to the market

1.1 Indigenous Procurement Policy

- (a) [Tenderers] should note that the Indigenous Procurement Policy applies to this procurement. More information on the Indigenous Procurement Policy can be found at www.dpmc.gov.au/indigenouaffairs.
- (b) In particular, [Tenderers] should note 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) In its Tender, each [Tenderer] is requested to detail how it will increase its:
 - (i) purchasing from Indigenous enterprises (being an organisation that is 50 per cent or more Indigenous owned that is operating a business); and
 - (ii) employment of Indigenous Australians,
 in the delivery of any resultant Contract.

Note to drafters: Supply Nation maintains a list of enterprises that meet the definition of "Indigenous enterprises" (see www.supplynation.org.au). If an enterprise is not listed with Supply Nation refer to section 1.8.1 of the Indigenous Procurement Policy for ways of ensuring an enterprise is an Indigenous enterprise.

- (d) Purchases from an Indigenous enterprise may be in the form of engagement of an Indigenous enterprise as a subcontractor, and / or use of Indigenous suppliers in the [Tenderer's] supply chain.

1.2 Evaluation criterion

Note to drafters: Include the following Evaluation Criterion. You may include it as part of another Evaluation Criterion or as a stand-alone Evaluation Criterion as best suits your procurement needs.

- (a) In evaluating Tenders, the [Customer] will take into consideration:
 - (i) the [Tenderer's] proposed approach to:
 - A. using Indigenous enterprises in its supply chain; and
 - B. the employment of Indigenous Australians.

2. Contract

2.1 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).
- (b) The Contractor must use its reasonable endeavours to increase its:
 - (i) purchasing from Indigenous enterprises; and
 - (ii) employment of Indigenous Australians,
 in the delivery of the Goods and/or Services, [including as specified in the Statement of Work/Statement of Requirement].

Note to drafters: If [Tenderers] provide detail in their Tenders in relation to how they will increase purchasing from an Indigenous enterprise, you should consider including this as an obligation in the Statement of Work/Statement of Requirement.

- (c) Purchases from Indigenous enterprises may be in the form of engagement of an Indigenous enterprise as a subcontractor, and use of Indigenous suppliers in the Contractor's supply chain.
- (d) In this clause, "Indigenous enterprise" means an organisation that is 50 per cent or more Indigenous owned that is operating a business.

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

- (e) The Contractor must provide such written reports and evidence of its compliance with this clause 2.1 every [quarter] [6 months] [year] during the Term.

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 Indigenous Procurement Policy for further information).

- (f) 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] 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 and 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 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.
- (g) Upon approval of the draft Indigenous Participation Plan under clause 2.1(f), 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] Contract Manager in relation to the Contractor's implementation of the Indigenous Participation Plan.

For all procurements for contracts that will be High Value Contracts - from 1 July 2015

Note to drafters: The Indigenous Procurement Policy imposes specific obligations on High Value Contracts (as defined in the Indigenous Procurement Policy and in clause 3.1(a) below). For all High Value Contracts, the following clauses may be inserted into your Approach to the Market documentation and Contract from 1 July 2015 unless Rule 2.6 of the Commonwealth Procurement Rules applies. These clauses give effect to the requirements described in section 4 of the Indigenous Procurement Policy.

Language used in the following model clauses should be aligned with the language used in the procuring entity's template documentation (eg Tenderer v Potential Supplier v Respondent, etc).

3. Approach to the Market

3.1 Definitions

Note to drafters: insert the following definitions into your approach to the market documentation.

- (a) "High Value Contract" means a contract where:
- (i) the Goods and/or Services will be delivered in Australia;
 - (ii) the value of the Goods and/or Services is \$7.5 million (GST inclusive) or more; and
 - (iii) more than half the value of the contract is being spent in one or more of the following industry sectors:
 - A. building, construction and maintenance services;
 - B. transportation, storage and mail services;
 - C. education and training services;
 - D. industrial cleaning services;
 - E. farming and fishing and forestry and wildlife contracting services;
 - F. editorial and design and graphic and fine art services;
 - G. travel and food and lodging and entertainment services; or
 - H. politics and civic affairs services.
- (b) "Indigenous enterprise" means an organisation that is 50 per cent or more Indigenous owned that is operating a business.
- (c) "Indigenous Participation Plan" means a plan detailing how the [Tenderer] will meet the minimum mandatory requirements for the Indigenous Procurement Policy (see template at clause 3.7).
- (d) "Indigenous Procurement Policy" means the policy of that name, as amended from time to time, available on the Indigenous Procurement Website.
- (e) "Indigenous Procurement Website" means the website at www.dpmmc.gov.au/ipp

- (f) "Remote Area " means the areas identified in the map on the Indigenous Procurement Website, as updated from time to time.

3.2 Indigenous Procurement Policy

Note to drafters: Include the following general information in relation to the 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).
- (b) If any resultant Contract is a High Value Contract, the mandatory minimum requirements for Indigenous participation will apply.

3.3 Evaluation criterion

Note to drafters: Include the following Evaluation Criterion. You may include it as part of another Evaluation Criterion or as a stand-alone Evaluation Criterion as best suits your procurement needs.

- (a) In evaluating Tenders, the [Customer] will take into consideration:
- (i) the [Tenderer]'s past performance and/or demonstrated commitment in relation to increasing Indigenous participation, including, where relevant, by having regard to the [Tenderer]'s past compliance with any mandatory minimum requirements; and
- (ii) the extent to which the [Tenderer]'s proposed Indigenous Participation Plan will meet the mandatory minimum requirements.

Note to [Tenderers]: A [Tenderer] that has no past experience with any mandatory minimum requirements will not be disadvantaged by this alone. Its response will be assessed on other actions it has taken in the past to increase Indigenous participation and on its proposed Indigenous Participation Plan.

3.4 Minimum content and format requirements

Note to drafters: Include the following Minimum Content and Format requirement.

- (a) The [Customer] will exclude a Tender from further consideration if the [Customer] considers that the Tender does not comply with any one or more of the following minimum content and format requirements:
- (i) the Tender must include a signed [Tenderer] declaration substantially in the form of the document contained at [insert]; and
- (ii) the Tender must include an Indigenous Participation Plan in its Tender.

3.5 [Tenderer] declaration

Note to drafters: Include the following in your [Tenderer] declaration.

Compliance with Indigenous Procurement Policy:

- (a) The [Tenderer] declares the following:

- (i) The [Tenderer] has or has had _____ [NIL OR SPECIFY NUMBER] contracts with the Commonwealth that included the Indigenous Procurement Policy mandatory minimum requirements.
- (ii) For the contracts referred to in clause 3.5(a)(i) of this Declaration (if any), the [Tenderer] has
- fully met /
 - partially met /
 - not met /
 - not applicable as Nil contracts undertaken,

the Indigenous Procurement Policy mandatory minimum requirements.

Note to Tenderers: Strike out the options that do not apply.

- (iii) The Indigenous enterprises referred to in the Indigenous Participation Plan submitted as part of [Tenderer's] Tender are 50 per cent or more Indigenous owned.

[Note to Tenderers: If you are an incorporated joint venture, where the joint venture is at least 25 per cent Indigenous owned, include the following.]

- (iv) The [Tenderer] is a joint venture that is 25 per cent or more Indigenous owned.

Note to drafters: Supply Nation maintains a list of enterprises that meet the definition of "Indigenous enterprises" (see www.supplynation.org.au). If an enterprise is not listed with Supply Nation refer to section 1.8.1 of the Indigenous Procurement Policy for ways of ensuring an enterprise is an Indigenous enterprise.

3.6 Remote Area Contracts

Note to drafters: Include this clause 3.6 if the Contract is a Remote Area Contract.

- (a) If a component of any resultant Contract will be delivered in a Remote Area, this creates an opportunity for that resultant Contract to deliver significant Indigenous employment or supplier use outcomes in that Remote Area.
- (b) In its Indigenous Participation Plan, the [Tenderer] should detail how it will ensure that its provision of the Goods and/or Services will deliver a significant Indigenous employment or supplier use outcomes in the Remote Area.

[Note to [Tenderers]: Refer to section 4.4.1 of the Indigenous Procurement Policy for examples of options available to ensure any resultant Contract will deliver significant Indigenous employment or supplier use outcomes in the Remote Area.]

3.7 Indigenous Participation Plan - Template Tender Response Form

Note to drafters: Include this template Indigenous Participation Plan as part of the Tender Response Form. The text constitutes a note to Tenderers and text for inclusion in a Tender response form. The successful [Tenderer's] Indigenous Participation Plan will form part of its resultant Contract.

Note to [Tenderers]:

- (a) *Each [Tenderer] must submit an Indigenous Participation Plan with its Tender. The Indigenous Participation Plan should address:*
- (i) *how the [Tenderer] intends on meeting the mandatory minimum requirements for the Indigenous Procurement Policy;*
 - (ii) *the [Tenderer's] current rate of Indigenous employment and supplier use;*
 - (iii) *the [Tenderer's] commitment to Indigenous participation. Some examples of the activities an organisation can take to demonstrate its commitment to Indigenous participation are set out in paragraph 4.7.1 of the Indigenous Procurement Policy; and*
 - (iv) *if any part of the Contract will be delivered in a Remote Area, how the [Tenderer] will ensure that its provision of Goods and/or Services will deliver significant Indigenous employment or supplier use outcomes in that Remote Area.*
- (b) *The mandatory minimum requirements can be met at:*
- (i) *the contract-based level (see clause (c) below); or*
 - (ii) *the organisation-based level (see clause (d) below).*
- (c) *To meet the mandatory minimum requirements at the contract-based level, by the end of the Initial Term of the Contract:*
- (i) *at least 4 per cent of the full time equivalent Australian-based workforce deployed on the contracted project must be Indigenous Australians, on average over the Initial Term of the Contract; or*
 - (ii) *at least 4 per cent of the value of the work performed under the Contract must be subcontracted to Indigenous enterprises, on average over the Initial Term of the Contract; or*
 - (iii) *a minimum percentage of the full time equivalent Australian-based workforce deployed on the contracted project must be Indigenous Australians, and a minimum percentage of the value of the work performed under the Contract must be subcontracted to Indigenous enterprises, so that both minimum percentages add up to 4 per cent, on average over the Initial Term of the Contract.*
- (d) *To meet the mandatory minimum requirements at the organisation-based level, by the end of the Initial Term of the Contract:*
- (i) *at least 3 per cent of the full time equivalent Australian-based workforce of the contractor must be Indigenous Australians, on average over the Initial Term of the Contract; or*
 - (ii) *at least 3 per cent of the value of the contractor's Australian supply chain must be subcontracted to Indigenous enterprises, on average over the Initial Term of the Contract; or*
 - (iii) *a minimum percentage of the full time equivalent Australian-based workforce must be Indigenous Australians, and a minimum percentage of the value of the Contractor's supply chain must be subcontracted to*

Indigenous enterprises, such that both minimum percentages add up to 3 per cent on average over the Initial Term of the Contract.

(e) *The mandatory minimum requirements can be met directly or through subcontracts.*

(f) *The successful [Tenderer]'s Indigenous Participation Plan will be attached to the resultant Contract, and the successful [Tenderer] will be required to comply with and report against the Indigenous Participation Plan during the Term.*

INDIGENOUS PARTICIPATION PLAN

[INSERT NAME OF TENDERER]

1. This is an Indigenous Participation Plan submitted as part of the Tender in response to [INSERT RFT NUMBER] (RFT).
2. If selected as the [Contractor/Supplier] following evaluation of Tenders received in response to the RFT, [TENDERER] will meet the mandatory minimum requirements on and from 1 July 2016 for the purposes of the Indigenous Procurement Policy:

at the contract-based level, in which regard at least:

- _____ [INSERT] percentage of [TENDERER'S] full time equivalent Australian-based workforce deployed on the contracted project must be Indigenous Australians over the Initial Term; and
- _____ [INSERT] percentage of the value of the work performed under the Contract will be subcontracted to Indigenous enterprises over the Initial Term; or

at the organisation-based level, in which regard at least:

- _____ [INSERT] percentage of [TENDERER'S] full time equivalent Australian-based workforce will be Indigenous Australians over the Initial Term; and
- _____ [INSERT] percentage of the value of [TENDERER'S] Australian supply chain will be subcontracted to Indigenous enterprises over the Initial Term.

[Note to [Tenderers]: Select which option(s) apply based on the requirements set out in clauses (b), (c) and (d) in the Note to Tenderers above.]

3. To meet the mandatory minimum requirements on and from 1 July 2016 for the purposes of the Indigenous Procurement Policy, [TENDERER] will undertake the following ([Tenderer] to insert details of how it will meet the mandatory minimum requirements (which may include details of its current workforce / supply chain) at either / both the contract / organisation level and how it will go about meeting the requisite percentages to meet the mandatory minimum requirements. [Tenderers] should note that the mandatory minimum requirements are averages over the Initial Term of any resultant Contract, and will accordingly need to detail their approach to achieving the specified targets over the Initial Term):

4. [TENDERER's] rate of Indigenous employment and supplier use as at [Tender Closing Date] is:
5. [TENDERER] demonstrates its commitment to Indigenous participation as follows:
6. [TENDERER] will meet the mandatory minimum requirements: directly; or through subcontracts.
[Tenderer to detail its approach to meeting the mandatory minimum requirements directly or through subcontracts.]

Note to drafters: Include the following where a component of any resultant Contract will be delivered in a Remote Area.

Remote Area Contracts

7. A component of any resultant Contract will be delivered in a Remote Area. [TENDERER] proposes to ensure the Contract will deliver a significant Indigenous employment or supplier use outcome in that Remote Area as follows:

4. Contract

Note to drafters: This section 4 outlines clauses to be included in High Value Contracts.

Language used in the following model clauses should be aligned with the language used in the procuring entity's template documentation (eg Tenderer v Potential Supplier v Respondent, etc).

4.1 Definitions

"Indigenous Participation Plan" means the plan set out at Attachment [x] / Schedule [x].

Note to drafters: The successful [Tenderer]'s Indigenous Participation Plan must be attached to the resultant Contract.

4.2 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, 1 July 2015 for further information). This policy was included in the RFT.

Note to drafters: Include a definition for "RFT" if one is not already included.

- (b) The Contractor must use its reasonable endeavours to increase its:

- (i) purchasing from Indigenous enterprises; and
- (ii) employment of Indigenous Australians,

in the delivery of the Goods and/or Services, [including as specified in the Statement of Work/Statement of Requirement].

Note to drafters: If [Tenderers] provide detail in their Tenders in relation to how they will increase purchasing from an Indigenous enterprise, you should consider including this as an obligation in the Statement of Work/Statement of Requirement.

- (c) Purchases from Indigenous enterprises may be in the form of engagement of an Indigenous enterprise as a subcontractor, and use of Indigenous suppliers in the Tenderer's supply chain.
- (d) Without limiting clause 4.2(b), the Contractor must comply with the Indigenous Participation Plan.
- (e) The Contractor must provide a written report on its compliance with the Indigenous Participation Plan to the [Customer] Contract Manager:
- (i) at least once every quarter during the Term; and
 - (ii) within [5] Business Days after the end of the Term (**End of Term Report**).

The End of Term Report must identify whether the Contractor:

- (iii) met the mandatory minimum requirements; and
- (iv) complied with the Indigenous Participation Plan.

If the Contractor did not comply with the Indigenous Participation Plan it must provide an explanation for its non-compliance.

Note to drafters: Consider including other reporting, provision of documentation, review and auditing rights as you consider necessary to determine whether the Contractor is compliant with the Indigenous Participation Plan.

- (f) If the [Customer] Contract Manager considers, in its absolute discretion at any time during the Term, that it has concerns in relation to the Contractor's:
- (i) compliance with the Indigenous Participation Plan; or
 - (ii) overall ability to meet the mandatory minimum requirements as set out in the Indigenous Participation Plan,

the [Customer] Contract Manager may request the Contractor to provide additional detail in relation to its implementation of and overall ability to comply with the Indigenous Participation Plan. The Contractor must comply with all reasonable directions issued by the [Customer] Contract Manager in relation to the Contractor's implementation of the Indigenous Participation Plan.

- (g) Without limiting its other rights under the Contract or at law, any material failure by the Contractor to:
- (i) implement the Indigenous Participation Plan; or
 - (ii) comply with a direction issued by the [Customer] Contract Manager under clause 4.2(f),

will be a breach of this Contract, and the [Customer] may terminate this Contract in accordance with clause [insert].

Note to drafters: Insert reference to the clause in your Contract that sets out Customer rights in the event of termination for default.

As an alternative, you may wish to amend your existing termination clause to include failure to implement the IPP or comply with directions in relation to the IPP as a specific right of termination (to consolidate all termination rights into the one location, and have the same approach for all termination / default events).

- (h) Notwithstanding any other clause of this Contract, the Contractor acknowledges and agrees that the reports it submits under clause 4.2(e):
- (i) will be recorded in a central database that is able to be accessed by Commonwealth entities and may be made publicly available;
 - (ii) will not be considered to be Contractor Confidential Information; and
 - (iii) may be used by Commonwealth entities for any purpose, including for evaluation of an offer to provide Goods and / or Services to a Commonwealth entity.