

## BHP TENDER TERMS AND CONDITIONS

### 1 INTERPRETATION

1.1 In these Tender Conditions (unless the context otherwise requires):

- (a) **Company** is the BHP Billiton entity or Business referred to in the Invitation to Tender;
- (b) **Company Representative** means the person nominated as such in the Invitation to Tender, or such other person that the Company may subsequently nominate in writing to the Tenderer;
- (c) **Company-Supplied Information** means information (whether written, oral, electronic or in any other form) provided or made available by or on behalf of the Company to any Tenderer in relation to the Tender Documents or any of the matters contemplated by those documents;
- (d) **Contract** means the contract to be entered into between the Company and the successful Tenderer as a consequence of this Tender process;
- (e) **Contract Obligations** means the obligations that the successful Tenderer (if any) is required to carry out under and in respect of the Contract;
- (f) **Invitation to Tender** means the document designated as such which has been issued to the Tenderer manually or electronically in conjunction with the other Tender Documents;
- (g) **Site** means the premises of the Company where the Tendered goods are to be delivered together with the premises where the Tendered work is to be performed and any other premises identified in the Tender Documentation as forming part of the Site;
- (h) **Tender** means the Tender that the Tenderer submits to the Company in response to the Invitation to Tender and which is comprised of the documents specified in the Invitation to Tender;
- (i) **Tenderer** is the Company which has been invited to submit a Tender;
- (j) **Tender Documents** means these Tender Conditions, the Invitation to Tender and each of the documents named as Tender Documents in the Invitation to Tender;
- (k) **Tender Submission Date** means the date referred to as such in the Invitation to Tender.

1.2 In these Tender Conditions (unless the context otherwise requires):

- (a) a reference to these Tender Conditions means these Tender Conditions as amended or supplemented in accordance with clause 9.1;
- (b) a reference to 'including', 'includes' or 'include' must be read as if it is followed by '(without limitation)';
- (c) where a word or an expression is defined, any other part of speech or grammatical form of that word or expression has a corresponding meaning;
- (d) words in the singular include the plural and vice-versa; and
- (e) headings are for convenience only and do not affect interpretation of these Tender Conditions.

## 2 CONTENTS AND REQUIREMENTS FOR SUBMISSION OF A TENDER

### 2.1 The Tenderer must:

- (a) prepare and submit the Tender strictly in accordance with the requirements set out in the Invitation to Tender and the Tender Documents;
- (b) complete and include as part of its Tender all the schedules, annexure, appendices, and other information required by the Tender Documents;
- (c) inform the Company in writing manually or electronically by the date specified in the Invitation to Tender whether it intends to submit a Tender; and
- (d) submit the Tender by the date and time specified in the Invitation to Tender.

2.2 The Tenderer must provide a list of subcontractors proposed to be engaged in respect of the Contract for approval by the Company. However, the Company reserves the right to refuse approval of any proposed subcontractor in accordance with the relevant provisions of the Contract.

2.3 By submitting a Tender to the Company, the Tenderer agrees to the terms of the Tender Documents (including these Tender Conditions).

## 3 CONFIDENTIAL INFORMATION AND PUBLICITY

3.1 The fact that the Company is seeking proposals for the supply of the goods and/or services, together with the Company-Supplied Information and all information (whether oral, written or in electronic form) contained in the Tender Documents or disclosed to the Tenderer in connection with the Tender process including drawings, specifications and technical and other information supplied to Tenderers is confidential. Except with the prior written approval of the Company Representative, the Tenderer shall not disclose such information to any third party, or permit it to be used, copied, reproduced or distributed in whole or part for any purpose other than for the preparation of the Tender. The obligations created by this clause 3.1 do not apply in relation to any particular item of information that is or becomes public knowledge other than by a breach of these Tender Conditions.

3.2 The Tenderer must not advertise or issue any information, publication, document or article (including photographs or film) for publication or media release or other publicity in relation to the Tender. Where the Tenderer receives an enquiry relating to the Tender from the media, the Tenderer must refer the person making the enquiry to the Company's Representative and must immediately notify the Company's Representative of the fact that an enquiry was made. The Tenderer must not make any other comment in response to such an enquiry.

3.3 The Company may require the Tenderer to execute a confidentiality agreement at any time during the Tender process. The Company may exclude from consideration any Tenderer that fails to sign such an agreement.

3.4 Without limiting the Tenderer's obligations under clause 3.1 above, the Tenderer shall ensure that all employees, agents, contractors and subcontractors of the Tenderer and any other person to whom it discloses any of the information contemplated by clause 3.1 will in each case comply with the provisions of this clause 3 to the same extent as if such person had been named in this clause in the place of the Tenderer.

3.5 By submitting a Tender, the Tenderer agrees that the Company may, for the purpose of carrying out the Tender evaluation, copy, use and disclose any documentation or information (whether in written, oral or electronic form) provided by the Tenderer.

## 4 INTELLECTUAL PROPERTY

- 4.1 All rights of intellectual property, including copyright in the Tender Documents, drawings, data and technical and other pictorial and written information supplied to the Tenderer by the Company or any person or body for or on behalf of the Company, shall be and at all times remain the property of the Company.
- 4.2 The Company may, in its sole discretion and at any stage before or after completion of the Tender process, require that all written information (whether confidential or otherwise and without regard to the type of media on which such information was provided to any Tenderer including all copies of such information) be:
- (a) returned to the Company, in which case the Tenderer must promptly return all such information to the address identified by the Company; or
  - (b) destroyed by the Tenderer, in which case the Tenderer must promptly destroy all such information.
- 4.3 Without affecting any intellectual property rights which may exist in a Tender, all Tenders submitted in relation to the Invitation to Tender shall be the property of the Company.

## 5 PRIVACY

- 5.1 The Tenderer agrees to be bound by applicable privacy and data protection Laws with respect to any act done or practice engaged in by the Tenderer for the purposes of this Tender in the same way and to the same extent as the Company would have been bound in respect of that act or practice had it been directly done or engaged in by the Company.

## 6 ANTI-COMPETITIVE BEHAVIOUR

- 6.1 In consideration of the Company accepting the submission of the Tender, the Tenderer represents and warrants to the Company that:
- (a) it has no knowledge of the Tender price or terms of any other Tenderer;
  - (b) except where it has notified the Company in writing prior to the submission of its Tender, the Tenderer has not entered into any contract, arrangement or understanding with any other Tenderer or any recipient of an Invitation to Tender:
    - (i) as to who should be the successful Tenderer; or
    - (ii) relating to the pricing or terms offered in the Tenders;
  - (c) it has not participated in any meetings with any other Tenderers or been involved in an exchange of information with any other Tenderers which, in either case, related to the Tender process or the Tenders themselves; and
  - (d) it has not submitted a Tender to the Company which has deliberately inflated pricing in order not to be the successful tenderer.
- 6.2 The Tenderer acknowledges and agrees that the Company is relying on the representations and warranties in clause 6.1 when considering the Tenders and entering into the Contract. If the Tenderer breached any of the representations and warranties in clause 6.1 then:
- (a) the Company may refuse to consider the Tenderer's Tender;
  - (b) the Company may take any other action that it is entitled to take at law; and
  - (c) in the event that the Company becomes aware of the breach of warranty after the Contract is entered into, withhold from any payments due under the Contract an amount equal to the Company's estimation of the losses suffered by it from the breach of clause 6.1.

## 7 CONFLICT OF INTEREST

7.1 The Tenderer must disclose to the Company any circumstances, arrangements or relationships which constitute, or might reasonably be considered to constitute, an actual or potential conflict of interest with the Tenderer's obligations under the Tender Documents or under any Contract that might be entered into. The Tenderer shall make this disclosure to the Company as soon as becoming aware of it and, in any event, prior to submitting any Tender.

## 8 TENDERER TO INFORM ITSELF FULLY

8.1 The Tenderer must acquaint itself fully with scope of the Tender, all conditions, contingencies and risks contained in the Tender Documents that might affect its Tender or its performance of the Contract.

8.2 By submitting its Tender, the Tenderer represents and warrants to the Company that it has:

- (a) prepared the Tender and would enter into the Contract with the Company based on its own investigations, interpretations, deductions, information and determinations and has not relied and will not rely upon, any Company-Supplied Information for any purpose (including, but without limitation, determining whether or not to lodge a Tender, preparing its Tender, entering into the Contract or performing its obligations under the Contract);
- (b) examined all information relevant to the risks, contingencies and other circumstances having an effect on the Tender and which is obtainable by the making of reasonable enquiries including (without limitation), the material contained in the Tender Documents, any relevant technical advice made available by the Company and any applicable statutory requirements;
- (c) not relied on information provided, or represented to be provided, by or on behalf of the Company (other than information contained in the Tender Documents) without independently verifying that information and independently satisfying itself of the adequacy, accuracy and correctness of the information;
- (d) calculated its Tender price, including all taxes, duties, charges, licences and other costs, in addition to taking into account all other obligations under the Contract (and the other specific matters referred to in the Tender Documents), on the basis of the Tenderer assuming the risk position allocated under the proposed Contract;
- (e) satisfied itself as to the accuracy, correctness and sufficiency of the Tender for the Contract Obligations and that the Tender price covers the cost of complying with all of the Contractor's obligations under the Contract;
- (f) where appropriate, examined the Site together with its surroundings, conditions and characteristics and made an appropriate allowance in the Tender for any effect thereon; and
- (g) assessed and understood all applicable statutory requirements relevant to the Contract Obligations and that it is able to fully perform the Contract without breaching those statutory requirements.

8.3 The Tenderer acknowledges and agrees that it has been provided with information (including information contained in the Tender Documents) by the Company only for the Tenderer's convenience and accordingly:

- (a) the Company does not assume any responsibility or duty of care in respect of, give any warranty or make any representations in respect of any such information (including as to its accuracy or adequacy); and
- (b) the Tenderer agrees that it shall have no claim against the Company or any employee, agent or contractor of the Company (whether in contract, tort (including

negligence), equity, under statute or otherwise) in connection with any such information.

#### 8.4 Site inspection and Tender Meeting

- (a) If specified in the Invitation to Tender, each recipient of the Tender Documents who intends to submit a Tender must attend a combined Site inspection and Tender meeting.
- (b) The purpose of such a Site inspection and Tender meeting is for Tenderers to familiarise themselves with the accessibility of the Site, the Site conditions, the extent of the Contract Obligations and to have the opportunity to seek clarification on any matter concerning the Tender, the Tender Documents or the Contract.
- (c) Any failure by the Tenderer to attend a Site inspection and Tender meeting will not limit or affect any liability the Tenderer might subsequently have to perform the Contract Obligations in full.

#### 8.5 Discussions with any employees or others

The Tenderer must not communicate with any employee, agent, consultant or supplier of the Company in relation to the Tender or the proposed Contract Obligations without the prior written approval of the Company Representative. If such approval is given by the Company Representative then:

- (a) the Tenderer may only engage in any oral discussions with the relevant employee, agent, consultant or supplier in the presence of the Company Representative; and
- (b) any written communication (whether by letter, email or otherwise) from the Tenderer must first be sent to the Company Representative before being sent to the relevant employee, agent, consultant or supplier.

### 9 AMENDMENT OF TENDER DOCUMENTS

- 9.1 The Company may, at any time or times prior to the Tender Submission Date, issue to the Tenderer any amendment, annexure or addendum to the Tender Documents. No amendment, annexure or addendum will form part of the Tender Documents unless it is in writing and expressly states that it shall form part of the Tender Documents.

### 10 REQUEST FOR FURTHER INFORMATION

- 10.1 The Tenderer may request further information from the Company in relation to the Tender process or the goods or services that are the subject of the Tender. Any such request shall be addressed to the Company Representative listed in the Invitation to Tender and must be received by the Company at least seven days before the Tender Submission Date.
- 10.2 At any time after the submission of Tenders, the Company or the Company Representative shall be entitled to request such further information as the Company or the Company's Representative may require from the Tenderer or to obtain clarification of any details included in a Tender. The Tenderer shall promptly comply with such requests.

### 11 SUBMISSION OF TENDERS

- 11.1 The Tenderer may seek an extension of the Tender Submission Date only by submitting a written request for extension to the Company Representative. Any such request should set out the reasons for the extension and must be received by the Company Representative at least two business days before the Tender Submission Date. The Company may, in its absolute discretion, grant or refuse any request for the extension of the Tender Submission Date.

11.2 It is the Tenderer's sole responsibility to ensure that the Company receives the Tender on or before the Tender Submission Date. The Company may, in its absolute discretion, consider or refuse to consider any late Tender response and negotiate or execute a contract with a Tenderer that has submitted a late Tender response.

11.3 Should the Tenderer discover any discrepancy, error or omission in its Tender response, the Tenderer shall immediately notify the Company Representative in writing, of the nature of the discrepancy, error or omission.

## **12 TENDERS SUBMITTED BY JOINT VENTURES OR CONSORTIA**

12.1 Where a Tenderer is comprised of more than one entity:

- (a) any Tender submitted must include all details relevant to each entity and the structure of the joint venture or consortium submitting the Tender, and the Tender must be executed by each such entity;
- (b) the liability of all such entities shall be joint and several in accordance with the provisions of the Contract; and
- (c) the Company may require a copy of any joint venture agreement or other contractual arrangement relating to the Tenderer's composition to be provided to the Company before considering any such Tender.

## **13 WITHDRAWAL OF TENDER RESPONSES**

13.1 The Tenderer may, without prejudice, withdraw its Tender at any time before the Tender Submission Date.

## **14 TENDER VALIDITY**

14.1 Tenders shall remain valid for acceptance by the Company for the period specified in the Invitation to Tender. In the event that the Invitation to Tender does not specify a period then the Tenders shall remain valid for acceptance by the Company for a period of ninety (90) days commencing on the Tender Submission Date.

14.2 By submitting its Tender and in consideration of the Company agreeing to evaluate that Tender, the Tenderer agrees not to amend or withdraw its Tender before the expiry of the period contemplated by clause 14.1 except (i) in accordance with clause 13.1, or (ii) with the prior written consent of the Company.

## **15 ACCEPTANCE OF TENDER RESPONSES**

15.1 A Tender will not be deemed to have been accepted and no contract will arise between the Company and the Tenderer in respect of the Tendered goods and/or services until a formal written Contract is executed by the successful Tenderer and the Company.

15.2 Should a Tender be successful, the Tenderer acknowledges and agrees that the Company may incorporate all or any part of the Tender into the Contract.

15.3 The Company may use its absolute discretion in prioritising the Tender responses and in selecting the successful Tenderer. The Company will not necessarily accept the lowest price Tender as the successful Tender.

## 16 ALTERNATE GOODS OR SERVICES OFFERED BY TENDERER

- 16.1 If the Tenderer submits a Tender that complies with all the requirements of the Tender Documents then it may also submit a second Tender which:
- (a) does not comply with the requirements of the Tender Documents;
  - (b) clearly identifies the items in the Tender that depart from the requirements of the Tender Documents; and
  - (c) is clearly marked "NON-CONFORMING TENDER" on each page.
- 16.2 Where the Tenderer has satisfied the requirements of clause 16.1 then the Company may elect to consider a non-conforming Tender that has been submitted under that clause. However the Company may in its absolute discretion elect not to consider or not to accept any non-conforming Tender.
- 16.3 If the Tenderer is aware that any material specified in the Tender Documents is not available then the Tenderer should include in its Tender:
- (a) advice of that fact; and
  - (b) a proposed alternative material and price.

## 17 UNSUCCESSFUL TENDERERS

- 17.1 At the completion of the Tender process, the unsuccessful Tenderers will be advised in writing that their Tender has been unsuccessful. The Company is not obliged to disclose reasons for the acceptance or non-acceptance of any Tender and no further correspondence in connection with the Tender Documents or the Tenders will be entered into.

## 18 LIMITATION OF LIABILITY

- 18.1 The Company makes no representation or warranty whatsoever (whether express or implied, written or oral) to the Tenderer and makes no undertakings to the Tenderer, other than to invite the Tenderer to submit a Tender in the manner contemplated by the Invitation to Tender.
- 18.2 The Tender Documents constitute an invitation to potential suppliers to make an offer to the Company for the provision of goods and/or services to the Company. The Tender Documents should not be construed or relied upon as an offer capable of acceptance.
- 18.3 The Tenderer participates in the Tender process contemplated by the Tender Documents at its own risk and expense. The Tenderer is not entitled to be reimbursed or compensated for any expense or loss incurred in connection with preparing or submitting the Tender or otherwise in connection with the Tender Documents.
- 18.4 To the maximum extent permitted by law, the Company, its affiliates, directors, employees, officers and agents shall have no liability or responsibility whatsoever to the Tenderer (whether based in contract, promissory estoppel, restitution, quantum meruit, quasi-contract, tort, statute or otherwise) in connection with or in relation to the Tender Documents, or the Tenderer's participation in the Tender process. Without limiting the foregoing, Company will not be liable or responsible to the Tenderer in circumstances where:
- (a) the Company elects not to acquire (in whole or in Part) the goods and/or services that are the subject of the Tender Documents;
  - (b) the Company conducts negotiations with any third party in parallel with any negotiations that it conducts with the Tenderer;

- (c) the Company terminates the Tender process or any negotiations with the Tenderer;
- (d) the Tenderer is not selected to supply the goods and/or services that are the subject of the Tender Documents;
- (e) the Company selects a non-conforming Tender as the successful Tender;
- (f) the Company waives any non-compliance with the Tender Documents in respect of any Tender submitted as part of the Tender process;
- (g) any information or data forming part of the Tender is lost, corrupted or not received;  
or
- (h) the Company exercises any of its rights or discretions under or in connection with the Tender Documents.

## 19 COMPANYS DISCRETION

19.1 The Company may in its absolute discretion (but shall be under no obligation to):

- (a) cancel the Tender process at any time (either in whole or in part and whether before or after the Tender Submission Date);
- (b) provide to all Tenderers any further information or addenda that has been provided to a particular Tenderer;
- (c) change the Tender Submission Date;
- (d) refuse to consider any Tender which:
  - (i) is lodged by any means other than in accordance with the Tender Documents;
  - (ii) is lodged after the Tender Submission Date; or
  - (iii) has been lodged by a Tenderer who has not complied with the requirements of the Tender Documents;
- (e) in its evaluation and assessment of Tenders:
  - (i) apply such criteria as the Company sees fit and give such weighting to that selection criteria as may be determined by the Company (in its absolute discretion);
  - (ii) if the Company considers any Tender to be ambiguous, erroneous or incomplete, then to:
    - (A) refuse to consider the relevant Tender;
    - (B) request further information from the relevant Tenderer; or
    - (C) request the relevant tenderer to amend its Tender,as the Company sees fit;
- (f) decide to:
  - (i) accept a Tenderer's Tender for;
  - (ii) not proceed with;
  - (iii) carry out itself; or
  - (iii) have any other person or persons (whether or not a Tenderer who has submitted a Tender) carry out,all or any part of the Contract Obligations;
- (g) negotiate with one or more Tenderers in relation to the terms of their Tenders;
- (h) appoint a preferred Tenderer, but continue discussions with other Tenderers and

- suppliers;
- (i) select a non-conforming Tender as the successful Tender;
- (j) at any time:
  - (i) retender the Contract Obligations after the Tender Submission Date with all or any of the Tenderers who have submitted a Tender, or any other person (whether or not they initially submitted Tenders); or
  - (ii) invite any other person to participate as a Tenderer in the Tender process;
- (k) at any time pre-qualify, shortlist or enter into direct negotiations with any one or more persons (whether or not any such person submitted a Tender);
- (l) divide the Tendered goods and/or services into two or more bundles and award contracts for those bundles to different tenderers;
- (m) require changes to the terms of Contract, Contract Obligations, any technical specifications or otherwise engage any Tenderer in connection with the Contract Obligations; or
- (n) propose alternative terms of Contract to a particular Tenderer (and not all other Tenderers) where the Company considers it appropriate in the circumstances.