

Tender Commercial Review

(long form)

(Internal only)

Quote No.	
Client	
Contract Name	Tender for Beenyup Advanced Water Recycling Plant (Stage 2)
Client Tender ID	
Location/ Site	
EPCM	
Estimated Tender Value	
Anticipated Award Date	
Submission Due Date	
Review Date	2/02/17
On Site Duration	
SCEE Department	
Reviewer	GPC
Lead Estimator	
Contract Type	
Project Type	

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1 Executive Summary

General description of the works

2 Parties

Principal / Owner not stated

██████████ and ██████████
██████████ – Contractor

██████████ – ABN ██████████ - Subcontractor

3 Documents reviewed

The documents reviewed as part of this commercial review were:

- i) Conditions of Tender
- ii) Form of Contract (190 Pages)

The Subcontract agreement references the Head Contract Documents and attempts to impart a back to back arrangement but the Head Contract has not been provided.

4 Value and type

???

5 Lendlease Nominated Contact

The Commercial Manager a person known to the senior management of ██████████ and who is generally fair and reasonable

6 Building Code 2013

Subcontract imparts compliance with BC 2013, while this does not create new obligations it will introduce additional reporting and document control procedures that are the subject of federal government audits.

7 Definitions

- 1 ██████████ Prequalification System

This is mandated by clause 27. In the event ██████████ QA QC system does not align with “██████████ delete and substitute for ██████████ QA QC system.

- 2 Date for Substantial and Practical Completion

Are conditional on the terms of the Head Contract. This is unacceptable as warranties and the return of all security is contingent on the performance of others.

All reference to “*the General Conditions of Contract*” and or “*Head Contract*” should be paired back to be “*the Subcontract conditions of contract*”.

8 Time Bars;

Clause 2.6 & 2.7 provide a “catch all” time bar to claims that are not expressly stated in the subcontract. Note [REDACTED] **DO** apply time bars. Suggest 5 days to too short and this is corrected to say 20 business days.

Clause 19.1(d) + 193(b) imparts a time bar on variations. Suggest 5 days to too short and this is corrected to say 20 business days.

9 Release of Security

Clause 4.2 ties the security back to the provisions of the head contract by reference to 7.2 above (Date for Substantial and Practical Completion) and introduces the requirement for a signed deed of release. Further in the event there is a dispute [REDACTED] can retain the security. This is a complex clause referencing first, second and third performance undertaking. This should be deleted in its entirety and replaced with a process that is simple and manageable, viz

Unless [REDACTED] has a right to recourse, upon the issue of the certificate of Substantial Completion a party's entitlement to security shall be reduced by [REDACTED]%, and the reduction shall be released and returned within 14 days to the other party.

10 Deed of Guarantee.

Clause 4.3 calls for any parent or related [REDACTED] companies to provide a cross guarantee.

No doubt there are multiple companies within the [REDACTED] group so I suggest this clause is deleted in its entirety.

11 Design – Fit for Purpose obligation.

Clause 5.2 and 13.1 imparts a Fit for Purpose obligation. This obligation is extremely broad and must be contained to the intended purpose “stated” so the obligation can be ring-fenced. Include the words “as stated” at end of clause 5.2. At the end of clause 13.1(a)(i) change the word “intended” for “specified”

Clause 19.2 and Schedule F (page 68) imparts the risk of detailed design on [REDACTED]

Detailed design relates to any design work necessary to meet the design intent. It is therefore important to verify the extent of the design and quantify any further work that may be required, or omit this clause.

Refer Schedule F for the full design obligations, Note [REDACTED] are obliged to engage the design consultant.

12 Deed of Novation.

Clause 7.3 is a “collateral warrantee” that creates a contractual link between the Principal and [REDACTED] This will allow the principal direct access to [REDACTED] for any defects of material warranties.

13 Insurances

Clause 11.1 Please check this clause with insurance company, appears expansive and includes libel and slander!!!

If this is required [REDACTED] may need a “top up insurance that for PI will run for a min period of 6 years.

14 Programming

Clause 15.1 extensively deals with programming of the works and give [REDACTED] the right to manipulate the native file. Further a “approved” programme is a condition precedent to any EOT’s, suitable provision should be made for programming these works, it appears extensive.

Note the following clause;

(f) If, in [REDACTED] reasonable opinion, the Subcontractor is not utilising adequate resources or is incapable of complying with this Subcontract then [REDACTED] may from time to time without prejudice to its rights under clause 21 or any of its other rights, do one or more of the following and [REDACTED] is not liable upon any Claim:

(i) instruct the Subcontractor to increase its resources or take such other measures as specified by the [REDACTED] to enable the Subcontractor to comply with its obligations under the Subcontract; and/or

Time and EOT’s will need to be carefully managed.

15 Claim for EOT

Clause 17.3 obliges [REDACTED] to reprogram and reallocate resources to mitigate delays as a condition precedent to a EOT.

If this is a remote site this obligation will be difficult to demonstrate.

Clause 17.4 provides the compensable events for an EOT but it does not include delayed access. I suggest this is included as a minimum.

Clause 17.6 should be omitted as it indirectly restricts compensable events and in the event the EOT relates to a head contract claim [REDACTED] is not obliged to assess the claim until the head contract claim has been assessed. This can impart significant delays in processing compensable claims.

Clause 17.8(a)(iv) at Schedule A is referenced “Does not apply, correct this to “Applies” otherwise [REDACTED] will not get costs for delay events.

16 Conditions Precedent to Payment

Clause 20.5(vii) make the deed of release a condition precedent to payment of the final claim. Suggest this is omitted as the issue becomes circular if there

17 Payments to Sub-subcontractors

Omit the words “allegedly” owing from the second line in clause 20.7 otherwise a recalcitrant Sub-subcontractors could take advance a press a phantom claim on [REDACTED]

18 Release of All Claims

Omit the waiver of all claims at Clause 20.9 i.e. within 15 days of [REDACTED] issuing schedule M.

19 Work Taken out of SCC hands

Clause 21.6(a)(iv) allows [REDACTED] to take the work off [REDACTED] and utilize [REDACTED] material without compensation. Omit clause (iv).

Note Termination for Change in Control. Clause 21.9 allows [REDACTED] to terminate the contract if there is a change in the share structure or ownership of [REDACTED]

20 Dispute resolution

Clause 22.4(a) should be omitted as it allows [REDACTED] to link any sub & head contract dispute. This will mitigate any compensation to [REDACTED] for contributory delays or events by [REDACTED]

21 Other Commercial Observations and Recommendations

Note I have not addressed clause's that offend the SOP act such as pay when if paid such as clause 21.7(c) because they can't be enforced.

Schedule Q Final Statement should be a mutual release where [REDACTED] AND [REDACTED] both release each party from all claims. Currently only [REDACTED] release and waive all rights to future claims.

Contracts Department Signoff		
Reviewer's Name	Reviewer's Signature	Date
C Thompson		2/02/2017
Senior Contracts Specialist Name	Senior Contracts Specialist Signature	Date
[REDACTED]		
Chief Operating Officer Name	Commercial Manager Signature	Date
[REDACTED]		