Tender Commercial Review

(long form)

(Internal only)

Quote No.	[redacted]
Client	[redacted]
Contract Name	Amrun Project – Process Facility E&I
Client Tender ID	[redacted]
Location/ Site	Amrun Project, between Weipa and Aurukun QLD
EPCM	N/A
Estimated Tender Value	AUD$[redacted]M
Anticipated Award Date	TBA
Submission Due Date	25/07/2016
Review Date	21/07/2016
On Site Duration	7 Months
[redacted] Department	Infrastructure, QLD
Reviewer	[redacted]
Lead Estimator	[redacted]
Contract Type	Unit Rates and Lump Sum
Project Type	Construct only

Table of Contents

1 Executive Summary 3
2 Parties 3
3 Documents reviewed 3
4 Value and type 4
5 Consequential losses and limitation of liability 4
6 Liquidated damages 4
7 Insurance 4
8 Indemnity obligations 5
9 Defects liability 5
10 Security and retention 5
11 Payment 5
12 Rights and liabilities upon termination 5
13 Delay, disruption and acceleration time and costs 5
14 Variation 6
15 Design responsibility 7
16 Intellectual property rights 7
17 Changes in law 7
18 Drawings 7
19 Subcontractors and suppliers 7
20 Dates and durations 7
21 Dispute resolution 8
22 Other Commercial Observations and Recommendations 8

1 Executive Summary

[redacted] have been invited by [redacted] to tender two packages for the Amrun Project (Previously South of Embley Project), one for design and construction of a 22kV overhead powerline and the other as detailed in this review for Process Facility Electrical and instrumentation works.

The Amrun Project, owned by [redacted] subsidiary [redacted], is located between Weipa and Aurukun in the far north of Queensland.

The Electrical and Instrumentation works for the Process Facility are estimated to be worth between $[redacted]m and be for a period of 12 months.

All Packages are provided in the one scope of work, with SP3 detailing the Process Plant requirements:
SP1 – HV Distribution to Camp
SP2 – Process Water Distribution Infrastructure and parts of HV Distribution
SP3 – Process Plant and all Remaining Facilities
SP4 – Option Works – Reclaim Conveyor and Transfer Tower.

The intention is for the two packages to be issued separately; however we will offer Civmec a discount for the award of both packages.

In the absence of a proposed form of Subcontract, the provided Head Contract has been reviewed on the assumption that the Subcontract will be on back to back terms. The following items have been clarified:

- *Liquidated Damages are as per Separable Portions, [redacted] has assumed SP's won't apply to [redacted] Scope. LD's of [redacted]% per week, [redacted]% cap. Additionally predetermined LD's to be sole entitlement for delay to Mechanical Completion.*
- *Insurances are subject to insurance review.*
- *Defects Liability Period excessive, 12 months requested.*
- *Payment terms excessive, request payment within 45 days of issuance of the Payment Claim.*
- *Request amendment to Clause 35.2 and 32, which relieves the Company of any responsibility for documentation provided and notes that [redacted] are to treat such information as preliminary.*
- *Intellectual Property Rights unreasonable, request amendment to Clause 13.2 to be in accordance with Clause 13.1*
- *Clause 42.4 – Request amendment*
- *Clause 46 (g) and (h) – Request amendment*

2 Parties

[redacted] - ABN [redacted] – Principal / Owner
[redacted] – ABN [redacted] – Principal Contractor / EPCM
[redacted] – ABN [redacted] – Contractor
[redacted] – ABN [redacted] - Subcontractor

3 Documents reviewed

The documents reviewed as part of this commercial review were:

i) [redacted] Project Design and Construct Contract Formal Agreement [redacted]

[redacted] – Process Facility. Version 0A, 7 July 2016 (QLD).

ii) [redacted] Project General Conditions of Contract – Design and Construct Contract – Rates Based – Process Facility. [redacted], Version 4A, 7 July 2016 (QLD).

iii) Schedule A.99 Method of Measurement Matrix (34 Pages)

The above are Head Contract Documents, the tender review is based on the assumption that terms will be back to back with the provided Head Contract.

4 Value and type

The Process Plant is to be priced using lump sum preliminaries and applying unit rates to the provided Bill of Quantities. Supply and Install has been separated with the requirement to provide unit rates for each component.

The Process Plant is estimated to be worth $[redacted]m.

5 Consequential losses and limitation of liability

Clause 84.2 of the Head Contract provides a mutual exclusion for consequential loss.

Clause 84.1 of the Head Contract provides a total aggregate cap on liability of [redacted]% of the Contract Price.

6 Liquidated damages

Item 14 and Clause 58 of the Head Contract Agreement provides that the following Liquidated Damages will apply for failure to reach Mechanical Completion:

	Mechanical Completion	LD's per Day	Cap
The Whole of the Works	15 August 2018	$[redacted]	[redacted]%
SP1 – HV Distribution to Camp	20 December 2017	$[redacted]	-
SP2 – HV Distribution Process Water Infra.	30 April 2018	$[redacted]	-
SP3 – Process Plant and All remaining Facilities	15 August 2018	$[redacted]	-
SP4 – Reclaim Conveyor & Transfer Tower	30 June 2018	$[redacted]	-

Recommendation:

Confirm that [redacted] scope will not be in separable portions and request LD's of [redacted]% per week with a cap of [redacted]%.

Additionally delete Clause 58(c) and note that the pre-determined LD's will be the Company's sole entitlement for failure to achieve Mechanical Completion.

7 Insurance

Item 17 of the Head Contract Agreement notes the following Insurances are required:

- Commercial Motor Vehicle and Contractor's Plant to the value of its replacement value.
- Third Party Legal Liability to the value of $[redacted]m
- Workers Compensation and Employers Liability to the value required by law.
- Professional indemnity including principal's extension to the value of $[redacted]m
- Goods Insurance to the value of all goods and components until Practical Completion
- Goods in transit to the value of the goods that will be in transit.

- Motor Vehicle Third Party to the value required under the law.

Recommendation: Subject to insurance review by [redacted] insurance advisors.

8 Indemnity obligations

Clauses 13.5 and 25 of the Head Contract provides standard indemnity obligations including breach of Intellectual Property rights, breach of contract, negligent, wilful or unlawful conduct, illness, injury, death, environmental damage, tax breaches or penalties.

[redacted] will not be liable where damage is caused by sole negligence of wilful misconduct of Company.

9 Defects liability

Clause 1.1 of the Head Contract provides that the Defects Liability Period is 24 months after the date in which Completion is achieved.

Recommendation: Request a Defects Liability Period of 12 months.

10 Security and retention

Clause 62 of the Head Contract notes that we are to provide two bank guarantees equal to [redacted]% each of the Contract Price Estimate.

Should there be an increase in the Contract Price of more than [redacted]%, we are to provide additional security to ensuring the security held is equal to [redacted]% of the revised Contract Price Estimate.

1 bank guarantee will be returned on Practical Completion and the other on Final Completion.

11 Payment

Clause 14 of the Head Contract provides the following payment process.

Payment Claim	→ Payment Claim approval	→ Invoice	→ Payment
1st Day of Each Month	*10 Working Days*	*2 Working Days*	*45 days from EOM in which invoice received*

The payment cycle is approximately 80-85 days from issuance of the Payment Claim.

Recommendation: Request payment within 45 days of issuance of the Payment Claim.

12 Rights and liabilities upon termination

Termination is detailed under Clauses 19, 59 and 60 of the Head Contract. Where [redacted] is terminated for convenience of due to Company Default, Clause 60(b) provides that [redacted] will be compensated for the value of works performed, the reasonable costs associated with demob, reasonable costs associated with compliance with directions and any other costs reasonably incurred by [redacted].

13 Delay, disruption and acceleration time and costs

Clause 57 of the Head Contract details [redacted] entitlement to an EOT.

The requisite periods for notice of a delay or similar are:

- Prompt Notification - Initially *Clause 57.1(a)*
- 5 Working Days – First Notice *Clause 57.2(a)*
- 10 Working Days – Full EOT Claim *Clause 57.3(a)*
- Ongoing Delay – Weekly, 10 Working Days when duration can be ascertained. *Clause 57.3(b)*

See below delay entitlements:

Delay Entitlement	Time	Cost	Clause	Agree / Depart
Delays in Access by client	✓	✓ **If a breach**	GC 66.3	Delay Event (a) Comp. Event (a)
Suspension by client	✓	✓	GC 52	Delay Event (e)
Cyclones	✓	×	GC 20	Delay Event (g)
Force Majeure	✓	×	GC 20	Delay Event (g)
Inclement Weather	×	×		
Latent Conditions (site only)	✓	✓	GC 65	Delay Event (d) Comp. Event (d)
Errors/ delays in client's documents	✓	✓ **Setting Out**	GC 39.4	Delay Event (a)
Delays by client's other contractors	✓	×		Delay Event (a)
Delays in client's free issued equipment	✓	✓ **If a breach**		Delay Event (a) Comp. Event (a)
Acceleration	✓	✓	GC 48	
Disruption	✓	✓ **If a breach**		Delay Event (a) Comp. Event (a)
Variations	✓	✓		Delay Event (d) Comp. Event (d)
Contaminated Material	✓	×		FM Event Delay Event (g)
Minerals, fossils and relics	✓	✓	Part C Clause 65	

14 Variation

Clause 9 of the Head Contract provides the process for variations. Where a variation is claimable as a result of a delay the time and cost entitlements need to be claimed under Clause 57 as provided by Clause 9.5.

The requisite periods for notice of a variation are:

- 5 Working Days - first notice *Clause* 9.3(a)
- 10 Working Days detailed quote / claim *Clause* 9.3(b)

15 Design responsibility

[redacted] won't be responsible for design of the Process Plant.

16 Intellectual property rights

Clause 13 of the Head Contract provides unreasonable Intellectual Property Rights, noting that all Contract IP is vested in the Company. Although Clause 13.1 notes that the Contractor retains ownership, this is contradicted by Clause 13.2 (a).

Recommendation: Request amendment to Clause 13.2 to be in accordance with Clause 13.1.

17 Changes in law

Clause 86(a)(iv) of the Head Contract provides entitlement for time and cost where a change in law necessitates a change to the method of carrying out the works or an increase or decrease to the cost of performing the works.

18 Drawings

Drawings provided are still at review stage. Additionally Clause 35.2 and 3.2 relieve the Company of any responsibility for documentation provided and notes that [redacted] are to treat such information as preliminary.

Recommendation: Request deletion of Clauses 35.2 and 3.2

19 Subcontractors and suppliers

Clause 7.2 of the Head Contract provides that written permission is required prior to engaging Subcontractors. Additionally Clause 7.3 provides that terms and conditions are to be the same as the Head Contract.
There is no intention at this stage to engage subcontractors for the Process Plant.

20 Dates and durations

The agreement notes a commencement date for the Head Contract of 26 October 2016, additionally the following access dates are provided in Item 12 of the Head Contract Agreement:

Area 1 – Powerline – Camp to MIA	1 June 2017
Area 2 – Process Water Pond	1 June 2017
Area 3 – Beneficiation Plant	1 July 2017
Area 4 – Stockyard	1 August 2017
Area 5 – Dump Station	1 September 2017
Area 6 – Infrastructure Corridor	1 September 2017
Area 7-1 – Tailings Section 1	24 December 2017
Area 7-2 – Tailings Section 2	30 July 2018

Area 7-3 – Tailings Section 3	30 August 2018

Items 13 of the Head Contract Agreement provide the following Mechanical and Practical Completion Dates:

	Mechanical Completion	Practical Completion
The Whole of the Works	15 August 2018	15 September 2018
SP1 – HV Distribution to Camp	20 December 2017	15 February 2018
SP2 – HV Distribution Process Water Infra.	30 April 2018	30 May 2018
SP3 – Process Plant and All remaining Facilities	15 August 2018	15 September 2018
SP4 – Reclaim Conveyor & Transfer Tower	30 June 2018	30 July 2018

Recommendation: Clarify that [redacted] works won't be in Separable Portions. Confirm dates that will be applicable to our works.

21 Dispute resolution

Clause 22 of the Head Contract provides the following Dispute Resolution process:

- Notice
- Senior Representative meeting within 10 Working days of notice
- If unresolved within 20 Working Days of the notice, either party may pursue arbitration/litigation.

22 Other Commercial Observations and Recommendations

- Clause 48.3 provides that even if [redacted] are directed to accelerate they may still be liable for liquidated damages or damages at common law. LD's only applicable to Mechanical Completion.
- Clause 37 poses a risk.
- Clause 42.4 – Request amendment
- Clause 44.15 poses a risk
- Clause 46 (g) and (h) – Request amendment
- Clause 82 excludes proportionate liability legislation

Contracts Department Signoff		
Reviewer's Name	**Reviewer's Signature**	**Date**
[redacted]		22/07/2016
Senior Contracts Specialist Name	**Senior Contracts Specialist Signature**	**Date**
[redacted]		
Chief Operating Officer Name	**Commercial Manager Signature**	**Date**
[redacted]		