Model Clauses for Black Economy – increasing the integrity of government procurement

The model clauses contained in this document can be included by Commonwealth entities in approach to market, contract or panel arrangement documentation, as relevant, to give effect to the requirements of the *Black economy – increasing the integrity of government procurement: Procurement connected policy guidelines* March 2019 (Black Economy Procurement Connected Policy).

Some of the model clauses have been drafted for the purposes of meeting the mandatory requirements for non-corporate Commonwealth entities set out in the Black Economy Procurement Connected Policy. The explanatory text in relation to these model clauses notes that they ‘are required to be used by non-corporate Commonwealth entities’ in certain circumstances. Other model clauses have been drafted to address optional matters set out in the Black Economy Procurement Connected Policy. The explanatory text in relation to these model clauses notes that they are ‘optional clauses’ and ‘may be used’.

Commonwealth entities are able to modify and adapt these clauses to ensure consistency with their approach to market, contract or panel arrangement documentation, provided that the requirements of the Black Economy Procurement Connected Policy are met. Commonwealth entities should not otherwise modify and adapt the model clauses that have been drafted for the purposes of meeting the mandatory requirements set out in the Black Economy Procurement Connected Policy.

For a copy of and information about the Black Economy Procurement Connected Policy, including Frequently Asked Questions materials, go to: <http://treasury.gov.au/review/black-economy-taskforce/procurement-connected-policy>.

For information about how to apply for a Statement of Tax Record go to: <https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/>

Commonwealth entities and tenderers should refer to the Black Economy Procurement Connected Policy and Frequently Asked Questions materials to ensure that all requirements of that policy are met and for further information on how the policy applies.

# 1. Approach to market clauses for a contract

Clauses substantially in the same form as clauses A, B, C and D below are required to be used by non-corporate Commonwealth entities for new approaches to market on or after 1 July 2019 for procurements of all goods and/or services (including for construction services) valued over $4 million (GST inclusive) in order to meet the requirements of the Black Economy Procurement Connected Policy. Clause D is required to be included in a declaration that is required to be given by tenderers as part of their response.

Corporate Commonwealth entities and Commonwealth companies are encouraged to use these clauses in their approaches to market.

A. Definitions

|  |  |
| --- | --- |
| Black Economy Procurement Connected Policy | means the *Black economy – increasing the integrity of government procurement*: *Procurement connected policy guidelines March 2019* available at <https://treasury.gov.au/publication/p2019-t369466>. |
| Satisfactory | means meets the conditions set out in Part 6.b of the Black Economy Procurement Connected Policy or, if the circumstances in Part 6.c of the Black Economy Procurement Connected Policy apply, the conditions set out in Part 8.b of the Black Economy Procurement Connected Policy. |
| Statement of Tax Record | means a statement of tax record issued by the Australian Taxation Office following an application made in accordance with the process set out at <https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting_an_STR>. |
| Valid | means valid in accordance with Part 7.e of the Black Economy Procurement Connected Policy. |

**Notes:** These definitions address clauses 6.b, 7.e and 8.b of the Black Economy Procurement Connected Policy.

B. Conditions for participation

B.1 The customer will exclude a response from further consideration if the tenderer does not meet the following conditions for participation:

a. the tenderer either:

i. holds a Valid and Satisfactory Statement of Tax Record by the closing time; or

ii. has a receipt demonstrating that a Statement of Tax Record has been requested from the Australian Taxation Office by the closing time, and holds a Valid and Satisfactory Statement of Tax Record no later than 4 business days from the closing time; and

b. the tenderer holds a Valid and Satisfactory Statement of Tax Record for any first tier subcontractor that it proposes, as part of its response, to engage to deliver goods or services with an estimated value of over $4 million (GST inclusive).

**Note to tenderers**: Tenderers should apply for a Statement of Tax Record and should ensure that their subcontractors apply for a Statement of Tax Record within sufficient time to meet these conditions for participation.

**Notes:** This clause addresses clauses 6.a.i, 6.a.ii, 6.a.iii, 6.d, 9.a and 13.a.i of the Black Economy Procurement Connected Policy.

C. Minimum content and format requirements

C.1 The customer will exclude a response from further consideration if the response does not include either:

a. a Valid and Satisfactory Statement of Tax Record for the tenderer; or

b. a receipt demonstrating that a Statement of Tax Record has been requested from the Australian Taxation Office for the tenderer and the tenderer then provides a Valid and Satisfactory Statement of Tax Record within 4 business days from the closing time.

**Notes:** This clause addresses clauses 6.a.i, 6.a.ii, 6.d and 13.a.i of the Black Economy Procurement Connected Policy.

D. Tenderer declaration

D.1 The tenderer represents that if it is the successful tenderer it will ensure that any first tier subcontractor not included in its response that it subsequently engages to deliver goods or services with an estimated value of over $4 million (GST inclusive) provides it with a Satisfactory Statement of Tax Record that is Valid at the time of entry into the subcontract.

**Notes:** This clause addresses clause 6.a.iv of the Black Economy Procurement Connected Policy.

**Optional clauses for approach to market for a contract**

Any one or more of the following clauses may be used by non-corporate Commonwealth entities, corporate Commonwealth entities and Commonwealth companies for new approaches to market on or after 1 July 2019 for procurements of all goods and/or services (including for construction services) valued over $4 million (GST inclusive) for the purposes of the Black Economy Procurement Connected Policy. They can be included in a declaration that is required to be given by tenderers as part of their response.

If clause E.2.a is included then the consequence of failing to comply with this clause should also be set out in the approach to market. Clause E.3 is an example clause, setting out such a consequence. This should be reviewed to ensure it is consistent with the draft contract.

If clause E.2.b is included then clause E.2.c should also be included and vice versa.

E. Tenderer declaration

E.1 The tenderer represents that if it is the successful tenderer and its Satisfactory Statement of Tax Record is or will be no longer Valid at the time any contract will be entered into with the customer, it will, if requested by the customer, provide the customer with a renewed Valid and Satisfactory Statement of Tax Record prior to the contract being entered into.

E.2 The tenderer acknowledges that if it is the successful tenderer it will be required to:

a. hold a Valid and Satisfactory Statement of Tax Record for the duration of any contract entered into with the customer and, on request by the customer, provide to the customer a copy of any such Statement of Tax Records;

b. ensure that any first tier subcontractor it engages to deliver goods or services with an estimated value of over $4 million (GST inclusive) holds a Valid and Satisfactory Statement of Tax Record for the duration of any subcontract in relation to those goods or services; and

c. retain a copy of all Statement of Tax Records held by any first tier subcontractor in accordance with clause E.2.c and, on request by the customer, provide to the customer a copy of any such Statement of Tax Records.

E.3 The tenderer acknowledges that if it is the successful tenderer and it does not comply with the requirements outlined in clause E.2.a that it will be a breach of the contract.

**Notes:** These clauses address clauses 6.d, 6.e, 9.c, 13.a.ii and 13.a.iii of the Black Economy Procurement Connected Policy.

# 2. Approach to market clauses for a panel arrangement

Clauses substantially in the same form as clauses F, G and H below are required to be used by non-corporate Commonwealth entities for any process to establish a panel arrangement from 1 July 2019 (or to refresh a panel arrangement established after that date) when the total value of orders under the arrangement is collectively estimated to be over $4 million (GST inclusive) in order to meet the requirements of the Black Economy Procurement Connected Policy. Corporate Commonwealth entities and Commonwealth companies are able to use these clauses in these circumstances.

**Notes:** These clauses address clause 11.a of the Black Economy Procurement Connected Policy.

F. Definitions

|  |  |
| --- | --- |
| Black Economy Procurement Connected Policy | means the *Black economy – increasing the integrity of government procurement*: *Procurement connected policy guidelines March 2019* available at <https://treasury.gov.au/publication/p2019-t369466>. |
| Satisfactory | means meets the conditions set out in Part 6.b of the Black Economy Procurement Connected Policy or, if the circumstances in Part 6.c of the Black Economy Procurement Connected Policy apply, the conditions set out in Part 8.b of the Black Economy Procurement Connected Policy. |
| Statement of Tax Record | means a statement of tax record issued by the Australian Taxation Office following an application made in accordance with the process set out at <https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting_an_STR>. |
| Valid | means valid in accordance with Part 7.e of the Black Economy Procurement Connected Policy. |

**Notes:** These definitions address clauses 6.b, 7.e and 8.b of the Black Economy Procurement Connected Policy.

G. Condition for participation

G.1 The customer will exclude a response from further consideration if the tenderer does not meet the following condition for participation:

a. the tenderer either:

i. holds a Valid and Satisfactory Statement of Tax Record by the closing time; or

ii. has a receipt demonstrating that a Statement of Tax Record has been requested from the Australian Taxation Office by the closing time, and holds a Valid and Satisfactory Statement of Tax Record no later than 4 business days from the closing time.

**Note to tenderers**: Tenderers should apply for a Statement of Tax Record within sufficient time to meet this condition for participation.

**Notes:** This clause addresses clauses 6.a.i, 6.a.ii, 6.d and 13.a.i of the Black Economy Procurement Connected Policy.

H. Minimum content and format requirements

H.1 The customer will exclude a response from further consideration if the response does not include either:

a. a Valid and Satisfactory Statement of Tax Record for the tenderer; or

b. a receipt demonstrating that a Statement of Tax Record has been requested from the Australian Taxation Office for the tenderer and the tenderer does not provide a Valid and Satisfactory Statement of Tax Record within 4 business days from the closing time.

**Notes:** This clause addresses clauses 6.a.i, 6.a.ii, 6.d and 13.a.i of the Black Economy Procurement Connected Policy.

**Optional clauses for approach to market for a panel arrangement**

Any one or more of the following clauses may be used by non-corporate Commonwealth entities, corporate Commonwealth entities and Commonwealth companies for any process to establish a panel arrangement from 1 July 2019 (or to refresh a panel arrangement established after that date) when the total value of orders under the arrangement is collectively estimated to be over $4 million (GST inclusive) for the purposes of the Black Economy Procurement Connected Policy. They can be included in a declaration that is required to be given by tenderers as part of their response.

If clause I.2.a is included then the consequence of failing to comply with this clause should also be set out in the approach to market. Clause I.3 is an example clause, setting out such a consequence. This should be reviewed to ensure it is consistent with the draft deed of standing offer.

If clause I.2.b is included then clause 1.2.c should also be included and vice versa.

I. Tenderer declaration

I.1 The tenderer represents that if it is successful and its Satisfactory Statement of Tax Record is or will be no longer Valid at the time any deed of standing offer will be entered into with the customer, it will, if requested by the customer, provide the customer with a renewed Valid and Satisfactory Statement of Tax Record prior to the deed of standing offer being entered into.

I.2 The tenderer acknowledges that if it is successful it will be required to:

a. hold a Valid and Satisfactory Statement of Tax Record for the duration of any standing offer arrangement entered into with the customer and, on request by the customer, provide to the customer a copy of any such Statement of Tax Record;

b. ensure that any first tier subcontractor it engages to deliver goods or services with an estimated value of over $4 million (GST inclusive) holds a Valid and Satisfactory Statement of Tax Record for the duration of any subcontract in relation to those goods or services; and

c. retain a copy of all Statement of Tax Records held by any first tier subcontractor in accordance with clause I.2.c and, on request by the customer, provide to the customer a copy of any such Statement of Tax Record.

I.3 The tenderer acknowledges that if it is successful and it does not comply with the requirements outlined in clause I.2.a that it will be a breach of the deed of standing offer.

**Notes:** These clauses address clauses 6.d, 6.e, 9.c, 13.a.ii and 13.a.iii of the Black Economy Procurement Connected Policy.

# 3. Contract clauses

A clause substantially in the same form as clause J below is required to be used by non-corporate Commonwealth entities for contracts entered into following an approach to market on or after 1 July 2019 for goods and/or services (including for construction services) valued over $4 million (GST inclusive) in order to meet the requirements of the Black Economy Procurement Connected Policy. Corporate Commonwealth entities and Commonwealth companies are encouraged to use these clauses for contracts entered into following their approaches to market. Clause J.3 is only required to be included to the extent the supplier is a partnership.

J. Black economy

J.1 In this clause J:

|  |  |
| --- | --- |
| Black Economy Procurement Connected Policy | means the *Black economy – increasing the integrity of government procurement*: *Procurement connected policy guidelines March 2019* available at <https://treasury.gov.au/publication/p2019-t369466>. |
| Satisfactory | means meets the conditions set out in Part 6.b of the Black Economy Procurement Connected Policy or, if the circumstances in Part 6.c of the Black Economy Procurement Connected Policy apply, the conditions set out in Part 8.b of the Black Economy Procurement Connected Policy. |
| Statement of Tax Record | means a statement of tax record issued by the Australian Taxation Office following an application made in accordance with the process set out at <https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting_an_STR>. |
| Valid | means valid in accordance with Part 7.e of the Black Economy Procurement Connected Policy. |

J.2 The supplier warrants in relation to any first tier subcontractor it has engaged to deliver goods and/or services with an estimated value of over $4 million (GST inclusive) that the supplier either:

a. provided a Valid and Satisfactory Statement of Tax Record for the subcontractor as part of its response for the approach to market that resulted in the entry of this contract; or

b. holds a Satisfactory Statement of Tax Record for the Subcontractor that was Valid at the time of entry into the subcontract by the supplier and the subcontractor.

J.3 If the supplier, is a partnership, the supplier will ensure that if a new partner joins the partnership that a Valid and Satisfactory Statement of Tax Record for the partner is provided to the customer as soon as possible after they become a partner to the partnership.

**Notes:** These clauses address clauses 6.b, 6.a.iii, 6.a.iv, 7.e, 8.b, 9.a, 10.b and 13.a.iii of the Black Economy Procurement Connected Policy.

**Optional clauses**

Any one or more of the following clauses may be used, together with the above mandatory clauses, by non-corporate Commonwealth entities, corporate Commonwealth entities and Commonwealth companies for contracts following an approach to market on or after 1 July 2019 for a procurement of goods and/or services (including for construction services) valued over $4 million (GST inclusive) for the purposes of the Black Economy Procurement Connected Policy.

If clauses E.2.a and E.3 of the approach to market clauses are included in the approach to market then clauses J.4, J.5 and J.6 should also be included in the subsequent contract, together with the above mandatory clauses. Clause J.6 is an example clause, setting out the consequences of the failure to comply with clauses J.4 and J.5. It should be amended as appropriate to link with the other clauses in the contract that deal with default, rectification and termination.

If clauses E.2.b and E.2.c of the approach to market clauses are included in the approach to market then clauses J.7 and J.8 should also be is included in the subsequent contract, together with the above mandatory clauses.

J. Black Economy

J.4 The supplier warrants that at the contract start date it holds a Valid and Satisfactory Statement of Tax Record.

J.5 The supplier must hold a Valid and Satisfactory Statement of Tax Record at all times during the contract term (including any extension) and, on request by the customer, provide to the customer a copy of any such Statement of Tax Record.

J.6 Without limiting its other rights under this contract or at law, any failure by the supplier to comply with the requirements outlined in clauses J.4 and J.5 will be a breach of this contract.

J.7 The supplier must ensure that any first tier subcontractor engaged to deliver goods and/or services with an estimated value of over $4 million (GST inclusive) holds a Valid and Satisfactory Statement of Tax Record at all times during the term of the relevant subcontract.

J.8 The supplier must retain a copy of any Statement of Tax Record held by any first tier subcontractor in accordance with clause J.7 and must, on request by the customer, provide to the customer a copy of any such Statement of Tax Record.

**Notes:** These clauses address clauses 6.d, 13.a.ii and 13.a.iii of the Black Economy Procurement Connected Policy.

# 4. Panel arrangement clauses

A clause substantially in the same form as clause K below is required to be used by non-corporate Commonwealth entities for contracts entered into under a panel arrangement that was established from 1 July 2019 (or under a panel arrangement established after that date that is subsequently refreshed) where the supplier has engaged a first tier subcontractor to deliver goods and/or services (including construction services) with an estimated value of over $4 million (GST inclusive) in order to meet the requirements of the Black Economy Procurement Connected Policy. Corporate Commonwealth entities and Commonwealth companies are encouraged to use these clauses in these circumstances.

**Notes:** These clauses address clause 11.a of the Black Economy Procurement Connected Policy.

K. Black economy

K.1 In this clause K:

|  |  |
| --- | --- |
| Black Economy Procurement Connected Policy | means the *Black economy – increasing the integrity of government procurement*: *Procurement connected policy guidelines March 2019* available at <https://treasury.gov.au/publication/p2019-t369466>. |
| Satisfactory | means meets the conditions set out in Part 6.b of the Black Economy Procurement Connected Policy or, if the circumstances in Part 6.c of the Black Economy Procurement Connected Policy apply, the conditions set out in Part 8.b of the Black Economy Procurement Connected Policy. |
| Statement of Tax Record | means a statement of tax record issued by the Australian Taxation Office following an application made in accordance with the process set out at <https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting_an_STR>. |
| Valid | means valid in accordance with Part 7.e of the Black Economy Procurement Connected Policy. |

K.2 The supplier warrants in relation to any first tier subcontractor it has engaged to deliver goods and/or services with an estimated value of over $4 million (GST inclusive) that the supplier holds a Satisfactory Statement of Tax Record for the subcontractor that was Valid at the time of entry into the subcontract by the supplier and the subcontractor.

**Notes:** These clauses address clauses 6.b, 6.a.iv, 7.e, 8.b, 9.a and 13.a.iii of the Black Economy Procurement Connected Policy.

A clause substantially in the same form as clause L below is required to be used by non-corporate Commonwealth entities for deeds of standing offer with a supplier that is a partnership entered into under a panel arrangement established from 1 July 2019 (or under a panel arrangement established after that date that is subsequently refreshed) when the total value of orders under the arrangement is collectively estimated to be over $4 million (GST inclusive) in order to meet the requirements of the Black Economy Procurement Connected Policy. Corporate Commonwealth entities and Commonwealth companies are encouraged to use these clauses in these circumstances.

L. Black economy

L.1 In this clause L:

|  |  |
| --- | --- |
| Black Economy Procurement Connected Policy | means the *Black economy – increasing the integrity of government procurement*: *Procurement connected policy guidelines March 2019* available at <https://treasury.gov.au/publication/p2019-t369466>. |
| Satisfactory | means meets the conditions set out in Part 6.b of the Black Economy Procurement Connected Policy or, if the circumstances in Part 6.c of the Black Economy Procurement Connected Policy apply, the conditions set out in Part 8.b of the Black Economy Procurement Connected Policy. |
| Statement of Tax Record | means a statement of tax record issued by the Australian Taxation Office following an application made in accordance with the process set out at <https://www.ato.gov.au/Business/Bus/Statement-of-tax-record/?page=1#Requesting_an_STR>. |
| Valid | means valid in accordance with Part 7.e of the Black Economy Procurement Connected Policy. |

L.2 If the supplier, is a partnership, the supplier will ensure that if a new partner joins the partnership that a Valid and Satisfactory Statement of Tax Record for the partner is provided to the customer as soon as possible after they become a partner to the partnership.

**Notes:** These clauses address clauses 6.b, 7.e, 8.b and 10.b of the Black Economy Procurement Connected Policy.

**Optional clauses**

Any one or more of the following clauses may be used, together with the above mandatory clause, by non-corporate Commonwealth entities, corporate Commonwealth entities and Commonwealth companies for deeds of standing offer entered into under a panel arrangement established from 1 July 2019 (or under a panel arrangement established after that date that is subsequently refreshed) when the total value of orders under the arrangement is collectively estimated to be over $4 million (GST inclusive) for the purposes of the Black Economy Procurement Connected Policy.

If clauses I.2.a and I.3 of the approach to market clauses are included in the approach to market then clauses L.3, L.4 and L.5 should also be included in the subsequent deed of standing offer, together with the above mandatory clauses. Clause L.5 is an example clause, setting out the consequences of the failure to comply with clauses L.3 and L.4. It should be amended as appropriate to link with the other clauses in the deed of standing offer that deal with default, rectification and termination.

If clauses I.2.b and I.2.c of the approach to market clauses are included in the approach to market then clauses L.6 and L.7 should also be is included in the subsequent deed of standing offer, together with the above mandatory clauses.

L. Black Economy

L.3 The supplier warrants that at the commencement of the deed of standing offer it holds a Valid and Satisfactory Statement of Tax Record.

L.4 The supplier must hold a Valid and Satisfactory Statement of Tax Record at all times during the term of the standing offer arrangement (including any extension) and, on request by the customer, provide to the customer a copy of any such Statement of Tax Record.

L.5 Without limiting its other rights under this standing offer arrangement or at law, any failure by the supplier to comply with the requirements outlined in clauses L.3 and L.4 will be a breach of the deed of standing offer.

L.6 The supplier must ensure that any first tier subcontractor engaged under a contract to deliver goods and/or services with an estimated value of over $4 million (GST inclusive) holds a Valid and Satisfactory Statement of Tax Record at all times during the term of the relevant subcontract.

L.7 The supplier must retain a copy of any Statement of Tax Record held by any first tier subcontractor in accordance with clause L.6 and must, on request by the customer, provide to the customer a copy of any such Statement of Tax Record.

**Notes:** These clauses address clauses 6.d, 13.a.ii and 13.a.iii of the Black Economy Procurement Connected Policy.