

SUNSET POWER INTERNATIONAL PTY LTD T/AS DELTA ELECTRICITY CONDITIONS OF TENDERING

NOTE:

All relevant documents **must be** emailed to tenders@de.com.au in accordance with these Conditions of Tendering and in the **original format**. Failure to do so will result in the offer not being accepted. Comments and/or departures to the Principal's Tender Documents including terms and conditions shall marked up with tracked changes.

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DELTA ELECTRICITY
CONDITIONS OF TENDERING

1. Introduction

The Contract documents Parts 1 to 3 is available for an intending Tenderer from the Principal's Website www.de.com.au or www.tenderlink.com/delta.

Except where the context otherwise requires or where otherwise stated in this Clause of these Conditions of Tendering, words and expressions defined in any other part of the Contract shall have the same meaning when used in the Conditions of Tendering.

Closing Date means 1.00pm on the date the Tender Advertising ceases;

Contract is a legally binding agreement between two or more parties by which they acquire rights and owe duties and have obligations in respect of subject matter;

Formal Instrument of Agreement is the means by which the Contract is formalised and provides evidence that a Contract exists;

Principal means Sunset Power International Pty Ltd t/as Delta Electricity;

Purchase Order is a document issued to accept a Quotation for the supply of goods and/or the performance of works and services or to make use of period State Contracts let by the NSW Department of Finance and Services – State Contract Control Board;

Quotation presents the customer with a legally binding offer for delivering a product or providing a service within certain fixed conditions. This offer is legally binding for the company within a specified time period. It is a document detailing the Principal's requirements in relation to the supply of goods and/or the performance of works and services;

Request for Tender means the Principal's invitation for Tenders from Tenderers for performance of the work under the Contract, comprising the Tender Documents;

Contract means the clauses listed in Clause 4.0 of **Part 1 – Particulars of Work and Special Requirements** of the Request for Tender;

Tender means the documents constituting an offer by a Tenderer to carry out the work under the Contract submitted in response to the Request for Tender;

Tender Documents has the meaning given in Clause 3 of these Conditions of Tendering;

Tender Receptacle means the location of where all Tender documentation is to be sent via email.

Tenderer means a person that participates in the Tender Process; and

Tender Process means the process outlined in these Conditions of Tendering.

and like words have a corresponding meaning.

2. General

- 2.1 The Tenderer is invited to submit a Tender in accordance with these Conditions of Tendering. The Request for Tender is an invitation to Tenderers to make offers to the Principal and does not constitute an offer to enter into a Contract. The submission of a Tender by a Tenderer will not result in a binding Contract being formed between the Principal and the Tenderer.

Nothing in the Request for Tender or in any Tender is to be construed as giving rise to any contractual obligation, express or implied on the part of the Principal. Any conduct or

statement, whether prior to or subsequent to the issue of the Request for Tender is not and must not be deemed to be an offer to Contract, or a binding undertaking of any kind.

No binding Contract, arrangement or other understanding (including quasi-contractual rights, promissory estoppel, or rights based on similar legal concepts) will exist between the Principal and a Tenderer unless and until the Principal notifies a Tenderer in writing that its Tender has been accepted (as may have been varied in writing by the Tenderer at the request of the Principal following any post-Tender discussions, clarifications and negotiations) formal acceptance of the offer is via letter of acceptance or purchase order. The Principal has no obligation to enter into a Contract with any Tenderer.

- 2.2 Despite Clause 2.1, by submitting a Tender, a Tenderer will be bound by these Conditions of Tendering and any representations, warranties or statements which it makes in its Tender.

3. Tender Documents

The Tender Documents may be comprised of the following:

- (a) These **Conditions of Tendering**;
- (b) **Part 1 – Particulars of Works and Special Requirements**;
- (c) **Part 2 – General Conditions, Standard Commercial Requirements and Supplementary Commercial Conditions**;
- (d) **Part 3 – Returnable Pricing, Commercial and Technical Schedules**;

This includes the **Form of Tender Form**.

- e) **Quotation Form ‘W’, Form ‘S’ or Form ‘G’**; or
- f) **Part 4 – Technical Specification**.

4. Contract Documents

- 4.1 Notwithstanding that the Contract is arranged in Parts and Clauses. Headings do not form part of the document and are not to be used for interpretation.
- 4.2 If any provision of the Contract or part of any provision of the Contract is in any way unenforceable, invalid or illegal, it is to be read down so as to be enforceable, valid and legal. If this is not possible, the provision (or where possible, the offending part) is to be severed from the Contract without affecting the enforceability, validity or legality of the remaining provisions (or parts of those provisions) which will continue in full force and effect.
- 4.3 Returnable Schedules
- Part 3 Returnable Schedules** comprise of Pricing, Commercial, Technical Schedules and **Form of Tender**. These schedules must be emailed to the Tender Receptacle by the closing date, along with any accompanying attachments to tenders@de.com.au. The Tenderer shall not be required to submit the other parts of the Contract.
- 4.4 Each Tender must contain an address for service of any notices necessary or required to be (or which may be) served on or given to the Tenderer in connection with its Tender.
- 4.5 Each Tender must identify the given name, surname and address of the Tenderer (if the Tenderer is a person). If the Tenderer is a firm or partnership, the Tender must specify the given names, surnames and addresses of each member or partner of the firm or partnership. If the Tenderer is a company, the Tender must identify the name, ACN and street address of the company as well as the address of its registered office.
- 4.6 It is emphasised that the original **Part 3 Returnable Schedules** contained within the Tender Documents are to be fully completed in the manner required by the Tender Documents and

returned with the Tenderer's offer. The Principal may (in its absolute discretion) reject a Tender if the pricing schedules are not fully completed in the manner required by the Tender Documents. Tenderers will be evaluated on their tendered Work Program to meet the Table A dates.

The tendered Work Program shall be the baseline against which all penalties shall be calculated.

- 4.7 The Principal reserves the right at any time prior to the Date of Issue of the Letter of Acceptance, to delete any item(s) included in the Pricing Schedules contained in Part 3 and the Contract Sum will be reduced by the value(s) shown for any such item(s) deleted.

5. Financial Capacity

- 5.1 A Tenderer must upon request of the Principal furnish to it such evidence as the Principal may reasonably require of its ability financially to perform its obligations under the Contract if its Tender is accepted by the Principal.

6. Tenderer to Inform Itself Fully

- 6.1 A Tenderer is required to acquaint itself with all of the Tender Documents and to inspect the Site and fully acquaint itself with the conditions of the Site prior to submitting its Tender. The Tenderer must fully inform itself of the nature of the work and the materials necessary for execution of the work under the Contract.

- 6.2 If a Tenderer has any doubt as to the meaning of any portion of the Tender Documents the Tenderer must either:

- a) Request (in writing) the Principal's clarification, which clarification will be valid only if issued in writing; or
- b) When submitting its Tender include a statement of the interpretation upon which the Tenderer relies and on which its Tender has been prepared.

Any clarification given pursuant to Clause 6.2 a) may also be issued to other prospective Tenderers.

- 6.3 Prior to submitting its Tender, the Tenderer must satisfy itself as to the accuracy and completeness of its Tender.
- 6.4 If a Tenderer wishes to lodge a correction or additional information following submission of a Tender, the correction or additional information must be submitted before the closing date for the submission of Tenders. After the closing date for the submission of Tenders/Quotation, the Principal reserves the right to contact Tenderers and seek additional information for the purpose of clarification of any matter contained in the Tender. This right is not mutual. Any unsolicited information submitted by Tenderers after the closing date for submission of Tenders, either by way of clarification or amendment of a Tender will not be considered.
- 6.6 Tenders must be for the whole of the Works specified and include for the performance of all obligations set out in the Tender Documents.

7. Tender Compliance

Tenders which do not comply with the requirements of this Clause will not be considered. The Tenderer is to warrant that it has made and relied upon all its own investigations.

- a) Tenders must be for the whole of the Works and Services and include for the performance of all obligations set out in the Contract.
- b) The Tenderer and/or the proposed consultative associates and Subcontractors must be both competent and experienced in all aspects of the work covered by this Contract and be capable of advising on and implementing design changes and

repairs within the broad scope of this Contract which may be required by the Principal. Tenderers must provide information with the Tender to support their competence and detail their experience.

- c) Specialist Subcontractors and Consultants nominated by the Tenderer will be to the approval of the Principal in regard to the specialist work for which they will be engaged. The Tenderer must provide such information as is necessary and as required by Part 3 of the Contract, to justify such approval.
- d) The Tenderer must satisfy the Principal that the Tenderer has or will have adequate personnel to complete the Works and the Services in the time allocated. The Tenderer will provide in its Tender full details of proposed shift patterns and manning levels.
- e) Tenderers will inspect the Site and note any special access or other requirements in relation to the Works and the Services, all of which must be allowed for in the Tender.
- f) Parts 1, 2 and 3 of this Contract form a separate combined segment and have been numbered consecutively forming a stand-alone document. Tenderers will check that pages are not missing from any of the parts provided. No claim for reimbursement of the Tenderer's costs which occur as a result of neglect of this provision will be considered by the Principal.

8. Collusive Arrangements

In consideration of being permitted to Tender, the Tenderer warrants and represents that:

- a) It has no knowledge of the Tender Price or any other benefits of any other Tenderer for the work under the Contract;
- b) Except as disclosed in the Tender, it has not entered into any Contract, arrangement or understanding to pay or allow any money directly or indirectly to a trade or industry association (above the published standard fee) or to or on behalf of any other Tenderer in relation to this Tender or any Contract to be entered into consequent thereon, nor paid or allowed any money on that account, nor will it pay or allow any money on that account;
- c) It has not entered into any Contract, arrangement or understanding to receive any money directly or indirectly from or on behalf of any other Tenderer nor received any money or allowance from or on behalf of any other Tenderer in relation to this Tender or any Contract to be entered into consequent thereon, nor will it receive any money as aforesaid;
- d) In the event of the Tenderer receiving any money or allowance from or on behalf of another Tenderer in relation to this Tender, the Tenderer must immediately give the Principal written notice as such an event and such money or the value of any allowance must be held on trust for and become immediately payable to the Principal; and
- e) In the event of the Tenderer paying or allowing to or on behalf of a trade or industry association or another Tenderer any money in breach of these conditions, the Tenderer must immediately give the Principal written notice of such an event and the Principal shall be entitled to withhold from any payment due to the Tenderer on any account an equivalent sum.

By submitting a Tender, a Tenderer will be taken to have agreed to comply with the Code of Practice for NSW Government Procurement. The Code of Practice can be accessed here: <https://www.procurepoint.nsw.gov.au/documents/code-practice-procurement-current-issue-2005.pdf>

9. Occupational Health and Safety

The Principal has determined that Tenderers must submit an Occupational Health and Safety Management System in accordance with AS 4804 "Occupational health and Safety Management systems - Contract with guidance for use" and auditable to AS 4801.

The type and extent of WHS control exercised by the Principal will be dependent upon the category rank of A, B, C incorporating following WHS risk factors; Site Risk, Work activity Risk and Project/Contract complexity.

Category A - Tenders must have an Occupational Health and Safety Management System developed in accordance with AS/NZS 4801 or equivalent. This System will be submitted as part of the Tender Documents.

Category B - A copy of a Site Specific Safety Plan is to be submitted with the Tender Documents. An accredited Site Specific Safety Management Plan must be submitted at least 2 weeks prior to the commencement of Site works.

Category C - The Tenderer must provide evidence of risk assessments and safe work method statements, employee's training knowledge, qualifications and competencies, licences and certifications and adequate Personal Protective Equipment, tools and resources required for the work. To be completed in schedule 3-4 of the Returnable Schedules.

The Tenderer must complete the **Part 3 Returnable Schedules** referencing where their WHS Management System satisfies each criterion. No work shall be undertaken on the Site until these documents have been reviewed by the Principal Safety Manager and approved.

10. Lodgement of Tenders and Clarifications

Please note that it is the Tenderer's sole responsibility to ensure that its Tender including the information required by Clause 11.4 is emailed to the Principal's Tender receptacle by the prescribed time and date.

Any Tender (including the information required by Clause 11.4) which is not emailed to the tender receptacle by the prescribed time and date will be deemed "Post Tender" and may be excluded from consideration.

The prescribed time and date for lodging Tenders is 1.00 pm on the closing date.

Part 3 of the tender must also be submitted electronically as an excel spreadsheet to tenders@de.com.au.

11. Irregular Tenders

11.1 Subject to Clause 11.4, the Tenderer must submit a Tender that is in strict compliance with the Tender Documents. A Tender that is not in strict compliance with the Tender Documents may be rejected by the Principal in its absolute discretion.

11.2 A Tenderer, by submitting a Tender, will be taken to have irrevocably and unconditionally offered to execute the work under the Contract on the basis of its submitted Tender and the terms of the Tender Documents (as amended to include any amendments proposed by the Tenderer pursuant to Clause 11.4 or the Principal pursuant to Clause 11.5). The Principal will not be under any obligation to accept the Tenderer's offer.

11.3 The successful Tenderer will be bound to enter into a Contract on the terms set out in the Tender (which is the Tenderer's offer) (as may be varied in writing by the Tenderer at the request of the Principal following any post-Tender discussions, clarifications and negotiations).

11.4 If a Tenderer does not accept any clause of the Tender Documents, the Tenderer must identify in its Tender in **Part 3 Schedule 3-12**, each clause which is not accepted, provide reasons why it is not accepted and propose specific drafting amendments which are

acceptable to the Tenderer. In proposing any amendments to the Tender Documents, Tenderers should note that:

- a) The willingness and ability of a Tenderer to accept the terms of the Tender Documents with minimal (if any) proposed amendments is an important part of the Tender evaluation criteria; and
- b) Despite the process outlined above, the Principal reserves the right not to consider any Tender which proposes amendments to the Tender Documents.

Any commercial and technical departures from the Tender Documents are to be stated in Schedule 3-12 of the **Part 3 or Part 2 Returnable Schedules**. If no departures are stated in Schedule 3-12 then the Tender Documents will stand as issued.

- 11.5 The Principal may, by notice in writing to a Tenderer, amend or clarify the Tender Documents at any time prior to the date which is 7 days before the closing date for Tenders to be submitted. Tenderers must acknowledge (in writing) the receipt of any such amendments or clarifications. Where appropriate, the Principal may in its absolute discretion, extend the closing date for the submission of Tenders.

12. Alternative Quotations

- a) The Tenderer is permitted to submit alternative offers in addition to a completed complying Tender and shall state specifically in what respect each alternative is not in compliance with the documents referred to in clause 11 above and any advantage to the Principal which the Tenderer's opinion is likely to be derived therefrom. Except in the respects so stated, the alternative offer shall be deemed to comply with the Tender Documents. The Tenderer shall state a separate price for each alternative proposed.
- b) The Tenderer must state a separate price for each alternative proposed. All Tender Prices must be clearly stated. Prices which are qualified by the words "estimate", "approximate" or the like, or stated to be indicative and therefore not capable of precise evaluation may exclude such Tender from further consideration.

13. Withdrawal of Tenders

A Tenderer must not withdraw its Tender except in accordance with the provisions of the Form of Tender Form. The Principal reserves the right to withdraw the Tender Documents, or any part or parts of the Tender Documents, at any time without giving reasons.

14. Evaluation and Acceptance of Tenders

- 14.1 The Principal is not to be bound to accept the lowest or any Tender and no reason will be given for accepting or not accepting any Tender. The receipt of a complying Tender will not be taken to create a binding Contract between the Principal and the Tenderer. There will be no such Contract between the Principal and a Tenderer for the execution of the work under the Contract until a Formal Instrument of Agreement is executed. The Principal reserves the right to accept a Tender on an item by item or portion by portion basis.
- 14.2 The Principal may make copies of a Tender for any purpose related to the evaluation of the Tenders. The Principal may provide part or all of the Tender Documents to a third party for the purposes of assisting the Principal in evaluating the Tenders.
- 14.3 The Principal may (in its absolute discretion) select one or more Tenderers with whom it will enter into negotiations. A Tenderer agrees that by submitting a Tender it will, in good faith, attend and participate in any negotiations with the Principal, provide all information, clarifications and responses required by the Principal and not resile from any representation made by it in its Tender or in communications with the Principal after the closing date for the submission of Tenders.

14.4 By selecting or negotiating with a Tenderer pursuant to Clause 14.3, the Principal is not obliged to enter into or sign a Contract with that Tenderer.

14.5 Tenders will be evaluated based on the information provided by the Tenderers in **Part 3 or Part 2 Returnable Schedules**.

15. Costs

15.1 The Tenderer will be liable for all costs and expenses which it incurs in connection with the preparation and submission of its Tender and any subsequent negotiations and discussions and providing any additional information requested by the Principal.

15.2 The Principal may (in its absolute discretion) discontinue negotiations at any time with a Tenderer, select another Tenderer or enter into discussions with any other parties.

16. Reliance

16.1 By submitting a Tender, the Tenderer acknowledges and agrees that:

- a) Neither the Principal, nor anyone on the Principal's behalf, warrants, guarantees or makes any representation about the accuracy, adequacy, suitability or completeness of any information, data or documents which are contained in the Tender Documents or otherwise made available to the Tenderer;
- b) The Principal does not owe a duty of care to the Tenderer or assume any other responsibility with respect to the accuracy, adequacy, suitability or completeness of any information, data or documents contained in the Tender Documents or otherwise made available to the Tenderer; and
- c) To the extent permitted by law, the Principal will not be liable upon any claim (whether in Contract, tort including negligence pursuant to any other principle of law) by the Tenderer arising out of or in any way in connection with:
 - (i) The provision of, or the Tenderer's reliance upon, or use of, such information, data or documents either contained in the Tender Documents or otherwise made available to the Tenderer or any other person to whom the Tender Documents are disclosed; or
 - (ii) A failure by the Principal to provide any information, data or documents to the Tenderer.

16.2 No statement made by any employee of the Principal to any Tenderer, whether or not in response to any inquiry, is binding on the Principal unless the statement is expressly stated to be so in writing.

17. Negotiations and Submissions

17.1 The Principal may invite a Tenderer to attend negotiations or make further submissions (written or oral) after the closing date. Neither negotiations nor oral submissions will create any contractual or other rights in favour of any Tenderer.

17.2 In addition to its rights to clarify and amend this Request for Tender, the Principal may, in its absolute discretion, do all or any of the following:

- a) Require additional information from the Tenderer;
- b) Change the structure and timing of this Request for Tender, including by developing a staged tender process with opportunities to down select tenderers;
- c) Alter, terminate, suspend or defer the Tender Process or any part of or activity in it;
- d) Negotiate with one or more tenderers, in sequence or parallel;

- e) Consider or accept or reject any Tender which is non-conforming or consider alternative tenders;
- f) Reject any Tender;
- g) Request, attend or conduct any site inspections;
- h) Request, attend or observe any product, plant, equipment or other demonstration, trial or test, provided the Principal acts reasonably in so doing;
- i) Abandon, cancel or otherwise not proceed with the Tender Process at any time and without providing any reason or notice to the Tenderer;
- j) Negotiate separately outside of the Tender Process with any or all of the tenderers or any other party; and/or
- k) Enter into any form of contractual arrangement with any one or more tenderers, without prior notice to any other tenderer or announcement.

17.3 Any decision made by the Principal in relation to any aspect of the Tender Process is final. The Principal is not required to provide any reasons or justification to the Tenderer or the public in respect of any decision made in connection with the Tender Process or otherwise in relation to this Request for Tender.

Without limiting any of the Principal's rights in these Conditions of Tendering, the Principal may, in its discretion:

- a) Seek clarification, or enter into discussions or negotiations with the Tenderer for the purpose of maximising the benefits of its Tender measured against the evaluation criteria and fully understanding the Tenderer's offer;
- b) Require any one or more Tenderers to submit a best and final offer or participate in offer definition activities; and/or
- c) Select one or more Tenderers to conduct negotiations in isolation, in parallel, in sequence or whatever way the Principal determines.

18. Award of Contact

18.1 Purchase Order Issued (Quotations)

When the Tenderer's Quotation is in a form which the Principal is willing to accept, the Principal will so inform the Tenderer by notice in writing with the issue of a Purchase Order.

19. A Contractor's Guide to the Principal Code of Conduct

19.1 The Contractor and its employees must comply with the Principal's Code of Conduct and reference is made to the document "A Contractor's Guide to The Principal Code of Conduct". This document is designed to assist the Contractor and its employees to comply with the requirements of the Code of Conduct. Copies will be made available on request and provided to the Contractor prior to the commencement of work. Breaches of the code will be deemed a default by the Contractor. The code of conduct can be accessed here:
<http://www.de.com.au/ArticleDocuments/155/Delta%20Electricity%20Code%20of%20Conduct.pdf.aspx>

19.2 If the Contractor commits a breach of Contract, the Principal may, by notice in writing to the Contractor, exercise its right to:

- a) Have a defaulting party removed from Site and withheld from carrying out any work under this or any other Contract;
- b) Take out of the hands of the Contractor the whole or part of the work remaining to be completed; or
- c) Terminate the Contract.

19.3 Breaches of Contract include but are not limited to:

- a) Failing to proceed with due expedition and without delay;
- b) Failing to use the materials or standards of workmanship required by the Contract;
- c) Failing to comply with a direction of the Principal;
- d) Failing to provide evidence of insurance; or
- e) Non-compliance with the Code of Conduct.
- f) Act of Insolvency

20. Change in Control

20.1 Consent required for change in control

- a) The Contractor must not:
 - (i) Permit a change in Control to occur (except if it is a Listed Company);
 - (ii) Permit a change in Control of any holding company to occur (except if the holding company is a Listed Company);
 - (iii) Permit the issue or transfer of shares in it or any holding company to a Competitor;
 - (iv) Sell or otherwise dispose of substantially all of its shares, business or assets to any third party except to a Related Body Corporate; or
 - (v) If the Contractor is a trustee of a trust, permit the transfer of any units or beneficial interest in the trust,

Without the prior written consent of the Principal which may be withheld in the Principal's absolute discretion.

- b) For the purposes of this clause, the following terms have the meanings set out below:
 - (i) **Competitor** means a company or person who conducts a business which is substantially similar to the business conducted by the Principal and includes a company or person which operates in the National Electricity Market, is covered by the National Electricity Rules or is regulated by the Australian Energy Market Operator.
 - (ii) **Control** includes the direct or indirect power to directly or indirectly:
 - (A) Direct the management or policies of the Contractor; or
 - (B) Control the membership of the board of directors of the Contractor, whether or not the power has statutory, legal or equitable force or is based on statutory, legal or equitable rights and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership of any interest in shares or stock of the Contractor or otherwise.
 - (iii) **Listed Company** means a company listed on the Australian Stock Exchange.
 - (iv) **Related Body Corporate** has the same meaning as in section 9 of the *Corporations Act*.

21. Confidential Information

- 21.1 The Contractor agrees, that during the course of this Contract it may become acquainted with or have access to confidential information and agrees that both during and after the Contract period to maintain the confidential information and to prevent its unauthorised disclosure to or use by any other person, firm or company, unless or until authorised in writing by the Principal.
- 21.2 The Contractor agrees that it must not:
- a) Use the confidential information for any purpose other than for the benefit of the Principal during or after the Contract;
 - b) Remove the confidential information from the premises of the Principal without the written consent of the Principal; or
 - c) For whatever reason, either for itself or any third party, appropriate, copy, memorise or in any manner reproduce any of the confidential information.
- 21.3 The Contractor must return all confidential information.
- 21.4 The Contractor must not; either during or after the Contract period make improper use of the confidential information acquired under the Contract, to gain directly or indirectly, an advantage for itself or any other person or to cause detriment to the Principal.
- 21.5 Nothing in this Contract must impose an obligation on the Contractor with respect to maintaining confidence regarding information which is generally available by publication, commercial use or otherwise than as a result of a breach by the Contractor.

22. Media and Electronic Releases

The Tenderer shall not issue any information, publication, document or article for publication concerning the project in any media (including social networking) or electronic transmission without prior approval of the Principal, which approval shall not be unreasonably withheld. The Tenderer shall refer to the Principal any enquiries concerning the project from any media or electronic transmission.