



Australian Government

Department of Home Affairs

ABN: 33 380 054 835

REQUEST FOR TENDER (RFT)

FOR

PERMISSIONS CAPABILITY

HOMEAFFAIRS/2054/RFT

ATTACHMENT F – DEED OF CONFIDENTIALITY

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THIS DEED POLL (Deed) is made on the _____ day of _____ 2020
by _____

Name

ACN/ABN/ARBN

Short form name **Tenderer**

Recitals:

- (a) The Tenderer is interested in submitting a response to the Commonwealth of Australia as represented by the Department of Home Affairs (**Department**) Request for Tender for a Permissions Capability RFT HOMEAFFAIRS/2054/RFT (**RFT**), or is a proposed subcontractor or consortium member of an entity that is intending to respond to the RFT.
- (b) The Department may provide the Tenderer with information, including in a Data Room, pertaining to, or in connection with, the RFT process which is Confidential Information.
- (c) The Department requires, and the Tenderer agrees, that it is necessary to take all reasonable steps (including the execution of this Deed) to ensure that Confidential Information is kept confidential.

1. Interpretation

1.1. Definitions

The following definitions apply in this Deed.

Authorised User	means a natural person who is listed in a Data Room Access Form and who is approved by the Department, by notice in writing to the Tenderer, as an Authorised User for the purposes of this Deed.
Confidential Information	means information (whether or not owned by the Department) that: <ul style="list-style-type: none">(a) is by its nature confidential;(b) is designated by the Department as confidential;(c) the Tenderer knows or ought to know is confidential; or(d) is comprised in or relates to Department Material, but does not include information which: <ul style="list-style-type: none">(e) is or becomes public knowledge other than by breach of the conditions of the RFT or this Deed;(f) is in the possession of the Tenderer without restriction in relation to disclosure before the date of receipt from the Department; or

	(g) has been independently developed or acquired by the receiving party.
Data Room	means a collection of Documents, material and information, either in physical or electronic form, which is made available or provided to Tenderers by or on behalf of the Department in connection with the RFT process.
Data Room Access Form	means the form set out in Appendix B to this Deed.
Data Room Protocol	means the protocol governing access to the Data Room by the Tenderer and its Authorised Users as provided at Appendix A of this Deed, and includes any amendments or variations to it.
Department	means the Commonwealth of Australia as represented by the Department of Home Affairs ABN 33 380 054 835.
Department Material	means any material provided by the Department to the Tenderer or its Authorised Users (including, where the Tenderer is a proposed subcontractor or proposed consortium member, material on-provided to the Tenderer by an entity that intends to respond to the RFT), including information made available through the Data Room or as part of participating in the RFT process, for the purposes of responding to, or considering whether to respond to, the RFT or which is copied or derived from material so provided, including Documents, equipment, information and data stored by any means.
Documents	include: (a) any paper or other materials on which there are writing, marks, figures, symbols or perforations having meaning for persons qualified to interpret them; and (b) any article or material from which sound, images or writings are capable of being reproduced with or without the aid of any other article or device.
Permitted Purpose	means the purpose of considering whether to submit a response to the RFT, preparing a response to the RFT, lodgement of a response to the RFT, and otherwise participating in the RFT process.

1.2. Terms defined in the RFT

Words and expressions used but not defined in this Deed have the meaning given in the RFT.

1.3. Interpretation

In this Deed, unless the contrary intention appears:

- (a) headings are for the purpose of convenient reference only and do not form part of the Deed;
- (b) the singular includes the plural and vice versa;
- (c) a reference to one gender includes the others;
- (d) a reference to a person includes a body politic, body corporate or a partnership;
- (e) a reference to a clause includes a reference to a subclause of that clause;
- (f) a reference to an Act is a reference to an Act of the Commonwealth, State or Territory of Australia, as amended or repealed from time to time, and includes a reference to any subordinate legislation made under the Act;

- (g) a reference to a law is a reference to any legislation (including subordinate or delegated legislation or statutory instruments of any kind), regulation, by-law, ordinance, judgment or other law for the time being in force;
- (h) the word 'includes' in any form is not a word of limitation; and
- (i) a reference to a party includes that party's administrators, successors, and permitted assigns.

2. Benefit of this Deed

The Tenderer acknowledges and agrees that the undertakings in this Deed are given for the benefit of, and may be relied on and enforced by, the Department and any other person whose Confidential Information is disclosed in connection with the RFT process, including through the Data Room.

3. Data Room

The Tenderer acknowledges and agrees that:

- (a) in the Department's discretion it, and its Authorised Users, may be provided with access to the Data Room;
- (b) the terms of access to the Data Room will be governed by this Deed and the Data Room Protocol;
- (c) the information contained in the Data Room is Confidential Information;
- (d) if the Tenderer is provided with access to the Data Room, the Tenderer agrees to be bound by the Data Room Protocol and must ensure that its Authorised Users comply with the Data Room Protocols at all times; and
- (e) the Department:
 - (i) does not represent that access to the Data Room will always be available; and
 - (ii) is not responsible for the operation of any computer system, communication system, software or ancillary equipment used to access the Data Room.

4. Authorised Users

4.1. Request and approval of Authorised Users

The Tenderer may request the Department to approve, as an Authorised User, any of its officers, employees, agents, advisers or independent contractors who have a need to know the Confidential Information in order for the Tenderer to carry out the Permitted Purposes by submitting a completed Data Room Access Form to the Department.

4.2. Undertakings by Authorised Users

Prior to approving a person as an Authorised User, or at any time following approval, the Department may require the Tenderer to arrange for the execution of a similar undertaking to this Deed in favour of the Department by a person the Tenderer has requested is approved as an Authorised User or by an approved Authorised User. If the Tenderer receives such a request in respect of an approved Authorised User, it must promptly arrange for all such undertakings to be given.

4.3. Tenderer must ensure Authorised Users do not breach

The Tenderer must ensure that Authorised Users (whether or not still employed or engaged in the capacity they were in when approved as Authorised Users) do not do or omit to do anything which, if done or omitted to be done by the Tenderer, would be a breach of the Tenderer's obligations under this Deed.

4.4. Assistance following breach

The Tenderer will give the Department all assistance it reasonably requires to take any action or bring any proceedings for breach of the undertaking contained in clause 4.3.

5. Undertakings

The Tenderer undertakes and warrants that it and each of its Authorised Users will:

- (a) take all reasonable steps to ensure that such Confidential Information is kept confidential in accordance with this Deed;
- (b) only use the Confidential Information for the Permitted Purposes;
- (c) not use, or cause or permit to be used, any Confidential Information to the current or potential disadvantage of the Department;
- (d) not, without the prior written consent of the Department, disclose or permit any person to disclose any of the Confidential Information to any person other than an Authorised User and acknowledges that the Department may grant or withhold its consent, or impose conditions on any consent granted;
- (e) not reproduce, record, or cause to permit any reproduction or recording of, any Confidential Information except to the extent necessary for the Permitted Purpose;
- (f) not make, or cause or permit to be made, any Documents based on or related to any Confidential Information except to the extent necessary for the Permitted Purpose;
- (g) not introduce any Confidential Information into any computer system or other device operated, controlled or which may be accessed to any extent by a person other than the Department or the Tenderer or any of its Authorised Users and only to the extent necessary for the Permitted Purpose; and
- (h) must comply with instructions given to it from time to time by the Department regarding protection of the Confidential Information, including any new Data Room Protocols.

6. Storage of Confidential Information

The Tenderer must keep all Confidential Information within its control and ensure that the Confidential Information is properly secured and stored.

7. Acknowledgement

The Tenderer acknowledges and agrees that improper use, or disclosure of any Confidential Information provided to the Tenderer pursuant to or in connection with the RFT would be detrimental to the Department in the performance of its functions.

8. Return of Confidential Information

8.1. Delivery of Confidential Information

The Tenderer agrees to deliver to the Department all Documents in its possession, power or control which contain or relate to any Confidential Information on the earlier of:

- (a) demand by the Department; or
- (b) the time the Documents are no longer required for the Permitted Purpose.

8.2. Documents beyond possession or control

If the Department makes a demand under clause 8.1(a), and the Tenderer has placed or is aware that Documents containing the Confidential Information are beyond its possession or control, then the Tenderer must provide full particulars of the whereabouts of the Documents

containing the Confidential Information, and the identity of the person in whose custody or control they are held.

8.3. Destruction of Confidential Information on request

The Tenderer, when directed by the Department in writing, agrees to destroy any Document in its possession, power or control which contains or relates to any Confidential Information.

8.4. Return or destruction does not release

Return or destruction of the Document referred to in this clause does not release the Tenderer from its obligations under this Deed.

9. Breach of obligations

9.1. Obligation to notify

The Tenderer must immediately notify the Department and take all steps necessary to prevent:

- (a) any actual, threatened or suspected breach of this Deed by the Tenderer; or
- (b) any unauthorised use or disclosure of the Confidential Information by the Tenderer, and must comply with any directions issued by the Department regarding such breach or unauthorised use or disclosure.

9.2. Provision of assistance

The Tenderer must provide such assistance as may be reasonably required by the Department in relation to any claim or proceedings that the Department may take against any third party for unauthorised use or disclosure of the Confidential Information.

9.3. Acknowledgement

Without limiting the Department's rights under the RFT, this Deed or at law, the Tenderer acknowledges that if it breaches its obligations under this Deed, the Department may:

- (a) remove its access, or the access of its Authorised Users, to the Data Room;
- (b) exclude the Tenderer from consideration, or further consideration, in the RFT process; and
- (c) exclude from consideration, or further consideration, any response to the RFT which nominates the Tenderer as a subcontractor or consortium member.

10. Reliance on Confidential Information

10.1. No right or title

The Tenderer acknowledges that it will obtain no right (including intellectual property rights), title or interest in the Confidential Information.

10.2. Acknowledgement

The Tenderer acknowledges and agrees that:

- (a) the Department does not make any warranty, express or implied, that the Confidential Information provided to Tenderers is complete, accurate or up-to-date;
- (b) the Department does not accept any responsibility to inform, or to provide any further information, to the Tenderer if the Department becomes aware of any inaccuracy, incompleteness or change in the Confidential Information;

- (c) it must make its own independent assessment of the Confidential Information and satisfy itself as to the accuracy, completeness and currency of that information;
- (d) nothing in the Confidential Information constitutes a recommendation with respect to the RFT or an offer by the Department in respect of the RFT or the Services; and
- (e) it will conduct its own independent inquiries and assessment and will form, and rely upon, its own opinions in relation to the Confidential Information, the RFT and the Permitted Purpose.

11. Personal Information

The Tenderer agrees to abide by the provisions of the *Privacy Act 1988* (Cth), including the Australian Privacy Principles set out in that Act, in respect of the Confidential Information, whether or not the Tenderer is legally bound to comply with that Act and as if the definition of 'personal information' in that Act includes Confidential Information.

12. General

12.1. Survival

The obligations in this Deed are perpetual.

12.2. Injunctive Relief

The Tenderer acknowledges that damages may not be a sufficient remedy for the Department for any breach of this Deed and that the Department is entitled to injunctive relief (as appropriate) as a remedy for any breach or suspected or threatened breach by the Tenderer, in addition to any other remedies available at law or in equity.

12.3. No Exclusion of Law or Equity

This Deed must not be construed to exclude the operation of any principle of law or equity intended to protect and preserve the confidentiality of the Confidential Information.

12.4. Remedies Cumulative

The rights and remedies provided under this Deed are cumulative and not exclusive of any rights or remedies provided by law or any other such right or remedy.

12.5. Other Instruments

Subject to the other covenants of this Deed, the rights and obligations of the parties pursuant to this Deed are in addition to and not in derogation of any other right or obligation between the parties under any other deed or agreement to which they are parties.

12.6. Applicable Law

The laws of the Australian Capital Territory apply to the Deed. The courts of the Australian Capital Territory have non-exclusive jurisdiction to decide any matter arising out of the Deed.

12.7. Jurisdiction

The Tenderer irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory and any courts that have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts, including by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

12.8. Notices

Any notice or other communication required to be given under this Deed is deemed to have been duly served on the Department when notified to the Contact Officer and if served on the Tenderer at an address for service nominated by the Tenderer in this Deed.

12.9. Waiver

Failure by the Department to enforce a provision of this Deed will not be construed as in any way affecting the enforceability of that provision or the Deed as a whole.

EXECUTED AS A DEED POLL

Execution by a company incorporated in Australia

The following execution block should be used by a Tenderer that is a company incorporated in Australia.

Executed by **[name of company]** in accordance with Section 127 of the *Corporations Act 2001* (Cth)

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

Execution by an attorney

Where the Deed of Confidentiality is executed by an attorney under a power of attorney on behalf of a company incorporated in Australia, the Tenderer should submit with its executed Deed of Confidentiality a copy of the relevant power of attorney. Powers of attorney must be in the form of a Deed executed in accordance with section 127 of the *Corporations Act 2001* (Cth).

Signed sealed and delivered by **[company name]** by its attorney under power of attorney dated **[date of power of attorney]** registered number **[registered number]** book number **[book number]**, who warrants that, as at the date of this Deed, they have had no notice of revocation of the power of attorney

Signature of attorney

Signature of witness

Name of attorney (print)

Name of witness (print)

Execution by a company not incorporated in Australia

Where this Deed is completed by a company not incorporated in Australia, the company should:

- (a) if registered in Australia, include the company's ABN or ARBN (or if not registered in Australia, include any equivalent registration number in its jurisdiction of incorporation, in the place of the ABN or ARBN);
- (b) use an appropriate execution block (such as the example block provided below);
- (c) state the company's jurisdiction of incorporation;
- (d) execute this Deed in accordance with the relevant requirements of the jurisdiction of its incorporation; and
- (e) on request from the Department, and at the expense of the Respondent, provide a legal opinion from:
 - (i) a legal practitioner registered to practise in the relevant jurisdiction confirming that the Deed has been executed in accordance with the relevant requirements of the jurisdiction in which it has been executed, and is valid and legally binding on the relevant company; and
 - (ii) a legal practitioner registered to practise in Australia, confirming that the Deed is enforceable in the Australian Capital Territory.

The legal opinions should also confirm that the relevant company has validly and irrevocably appointed an Australian based law firm as its agent for acceptance of service of proceedings by the department for breach of the Deed.

Signed sealed and delivered by **[foreign corporation company name]** in the presence of

Signature of witness

Signature of authorised signatory

Name of witness (print)

Name of authorised signatory (print)

Execution by an entity other than a company

The following execution block is should be used by a Tenderer that is not a company.

Signed sealed and delivered by and on behalf of **[insert name]** by a duly authorised representative

Signature of authorised signatory

Signature of witness

Name of authorised signatory (print)

Name of witness (print)

1. This Protocol

1.1. Introduction

This Data Room Protocol sets out the rules under, and procedures by, which the Tenderer and its Authorised Users will be given access to the Data Room.

1.2. Contact points

All communications in relation to the Data Room, including in relation to any information made available in the Data Room, should be referred to the Contact Officer in accordance with the RFT.

2. Access to the Data Room

2.1. Initial access

Tenderers seeking access to the Data Room must submit to the Contact Officer:

(a) an executed Deed of Confidentiality; and

(b) a completed Data Room Access Form,

no later than 2:00 pm (local time in Canberra, Australian Capital Territory (AEDT)) on the fifth Business Day before the Closing Time.

2.2. Access for additional persons

The Tenderer may at any time but no later than 2:00 pm (local time in Canberra, Australian Capital Territory (AEDT)) on the fifth Business Day before the Closing Time forward further completed Data Room Access Forms to the Contact Officer requesting the substitution or addition of Authorised Users.

2.3. Invitation email

Following the receipt of the executed Deed of Confidentiality and the completed Data Room Access Form and subject to approval by the Department, the Department will send each user identified in a Data Room Access Form an invitation email to the Data Room.

2.4. User limit

Each Tenderer may have no more than 10 Authorised Users at any one time.

2.5. Keeping information current

If the information provided in a Data Room Access Form in respect of any Authorised User changes or is no longer accurate, the Tenderer must notify the Department immediately.

2.6. Usernames and passwords must not be shared

Usernames and passwords are personal and must not be provided to any other person, including other members of the Tenderer's team or any subcontractor personnel or consortium member personnel.

2.7. Storage of usernames and passwords

Authorised Users must ensure that they store all access instructions, usernames and passwords for the Data Room in a secure location.

2.8. Misuse of usernames and passwords

Misuse of a username or password may result in the suspension of the Data Room access, the exclusion of the Tenderer from the RFT process and may constitute an offence against the *Criminal Code Act 1995* (Cth).

3. Availability

3.1. Usual availability

The Data Room is intended to be available 24 hours a day, seven days a week, (except for any scheduled maintenance) until the Department determines that access is no longer required to facilitate participation in the RFT. However, the operation and availability of the Data Room is dependent on the availability and functioning of services such as telecommunications. The Department does not control these services and is not responsible for them or their effect on the Data Room.

3.2. The Department's rights

Access to the Data Room is with the consent of the Department. That consent may be withdrawn or altered or conditions imposed on that consent, and the Data Room or any part of it rendered inaccessible in whole or in part to any person or Tenderer, at any time without prior notice and without reason or explanation.

4. Content of the Data Room

4.1. Changes to materials

The Department may, from time to time, change, supplement, supersede, withdraw or replace all or any part of the materials in the Data Room. Authorised Users may be notified when any new material is included in the Data Room.

4.2. Downloaded and printed materials

Unless otherwise specified, Authorised Users will not be permitted to download, save or print any material in the Data Room.

5. General

5.1. Changes to this Data Room Protocol

The Department may change, supplement or substitute this Data Room Protocol at any time by notice to the Tenderer given in any manner.

5.2. Waiver

A waiver by the Department of this Data Room Protocol must be in writing and is effective only to the extent set out in the waiver.

Appendix B: Data Room Access Form

Personal Data							
Surname	Given Names	Date of Birth dd/mm/yyyy	Organisation	Position	Email Address	Contact Phone Number	Logon ID (for office use only)
1.							
2.							
3.							
4.							
5.							
6.							
7.							
8.							
9.							
10.							