



Australian Government

Commonwealth Environmental Water Holder

Sale of Water Allocation

Terms of Offer

TERMS OF OFFER IN RELATION TO SALE OF WATER ALLOCATION BY THE
COMMONWEALTH OF AUSTRALIA (**SALE**)

Last updated 13 January 2023

1. Recitals

- 1.1. The Commonwealth (“us”, “we”, or “our”), as represented by and acting through the Commonwealth Environmental Water Holder in the Department of Climate Change, Energy, the Environment and Water, designs and implements the Australian Government’s policies and programmes to protect and conserve the environment, water and heritage, and promote climate action.
- 1.2. To perform our functions, we wish to sell the Water Available.
- 1.3. We approached the market seeking Bids to purchase the Water Available.
- 1.4. You have made a Bid to purchase from us the Bid Volume at the Bid Price.
- 1.5. We have accepted your Bid and provided to you an Acceptance of Bid.
- 1.6. The Parties have agreed to transfer the Agreed Volume in accordance with the Agreement.

2. Formation of Agreement and event of inconsistency

- 2.1. The Parties acknowledge and agree that:
 - a. the Agreement is formed and is enforceable from the point in time at which we send to you the Acceptance of Bid;
 - b. the Agreement comprises these Terms, the Glossary, the Bid Form and the Acceptance of Bid; and
 - c. unless stated otherwise, terms which are capitalised in these Terms and which are also defined in the Glossary have the same meaning.
- 2.2. In the event of any inconsistency or conflict between the documents comprising the Agreement, the following order of priority applies:
 - a. these Terms; then
 - b. the Glossary; then
 - c. the Bid Form; and then
 - d. the Acceptance of Bid.
- 2.3. To the extent that the Acceptance of Bid accepts more than one Bid from you, the Parties agree that references to a Bid (and associated Bid Form, Bid Volume, and Bid Price) throughout the Agreement in the singular form includes each other Bid (and corresponding Bid Form, Bid Volume, and Bid Price) accepted by us in the Acceptance of Bid.

3. Your Acknowledgements and Warranties

Ability to Purchase Agreed Volume

- 3.1. You represent and warrant that at the Agreement Commencement Date:
 - a. you have the right to enter into the Agreement;
 - b. to the best of your knowledge, there are no impediments which would prevent or materially delay the transfer of the Agreed Volume from our Allocation Account to the Allocation Account nominated by you to receive the Agreed Volume; and
 - c. you have complied with all requirements of the Act and any other relevant Laws in relation to the Agreed Volume.

Trading Rules

- 3.2. You represent and warrant that you are familiar with and understand the Trading Rules, including those determined by the Authority responsible for dealings of Water Allocations, including:
- a. restrictions on the transfer of the Agreed Volume out of the Source Jurisdiction and/or the corresponding Trading Zone;
 - b. restrictions on the transfer of the Agreed Volume into the Destination Jurisdiction and/or the corresponding Trading Zone;
 - c. any capacity limits which apply to the Trade or to the total of trades in and out of the relevant Trading Zone; and
 - d. critical dates and time limits which apply in relation to the Trade.

Warranty

- 3.3. You will ensure that the warranties made in clauses 3.1 and 3.2 of these Terms, and those in the Bid Form, remain true until such time as the Trade is approved by the Authority.

Adjustment to Volume

- 3.4. You acknowledge and agree that we are not responsible for any difference between the Agreed Volume and the volume of the Water Allocation you actually receive into your Allocation Account where there is an adjustment by the Authority for any reason to that volume.

Publication of Details of Sale

- 3.5. You:
- a. acknowledge that we are subject to a range of Laws and Australian Government policies which may require us to publish or disclose certain details of the Agreement, and details relating to the Trade (subject to the limitations of the *Privacy Act 1988* (Cth) and without identifying you, unless required by Law); and
 - b. consent to publication or disclosure by us of any information to the extent required under Laws or Australian Government policies (except for information which would identify you, unless required by Law).

Our Enquiries

- 3.6. You:
- a. acknowledge and agree that, to the extent permitted by Law, we may, either before or after the Agreement Commencement Date, conduct enquiries and gather information in relation to you and the information provided by you to us in relation to each Bid; and
 - b. authorise us to use (and to disclose to third parties if reasonably necessary), both before and after the Agreement Commencement Date, all or any part of the information provided by you to us, and to contact any person in order to conduct our enquiries and gather information in relation to each Bid, but only to the extent permitted by Law, including under the *Privacy Act 1988* (Cth).

Breach of Related Agreement to Purchase or Sell Water Allocations

- 3.7. You acknowledge and agree that where any other agreement between you and us relating to the purchase or sale of Water Allocations is terminated as a result of your default, that termination will constitute a Default under the Agreement, which will entitle us to exercise, without limitation, the remedies available to us under clause 9.

We are Not Liable for Your Works or Arrangements

- 3.8. You acknowledge that we are not responsible for:
- a. any works which may be required by the Authority to be carried out on your land, or on land where the Agreed Volume will be delivered after completion of the Trade, or the cost of those works; or
 - b. any arrangements relating to your use or management of the water.

4. Payment of Value, Fees and Costs

Requiring Payment

- 4.1. You acknowledge and agree that we may pay any applicable Trade Approval Lodgement Costs or other registration fees, and if we do so we may require you to:
- a. pay those amounts to us in advance of us paying them to the Authority; or
 - b. reimburse those amounts to us at any time after we have paid them.
- 4.2. You are liable for, and must pay or procure payment of, the following:
- a. the Value;
 - b. the Trade Approval Lodgement Costs;
 - c. any Usage Charges;
 - d. and any other registration fees associated with the Trade; and
 - e. any fees, charges, or costs we require you to reimburse in accordance with clause 4.1.

Payment

- 4.3. You must pay or procure payment of the total of all amounts set out in the Invoice:
- a. within the Payment Period after you receive the Invoice; and
 - b. in accordance with our directions.
- 4.4. You:
- a. acknowledge that the Invoice is issued to the legal entity corresponding to the ABN nominated by you in the Bid Form;
 - b. agree that you are liable for payment of the Invoice; and
 - c. guarantee payment of the Invoice in accordance with the Terms.

Professional Fees

- 4.5. Each Party will bear their own legal and other professional fees in relation to the Agreement.

5. Goods and Services Tax

- 5.1. The Bid Price and Value are GST exclusive amounts.

- 5.2. The Parties believe that the sale of the Water Allocation on these Terms is a supply of water that is GST exempt in accordance with the Australian Taxation Office Ruling GSTR 2000/25 (as amended from time to time).

6. Provision and Lodgement of Trade Form and Electronic Lodgement

Trade Form and any other Additional Documents

- 6.1. Within 3 Business Days after the Agreement Commencement Date, you must provide to us (if you have not already done so):
- a. where applicable, the Trade Form, which:
 - i. has been completed to the extent that the Bid Form directs;
 - ii. without limiting any other information which must be completed, specifies that the Agreed Volume is to be transferred; and
 - iii. (where required) has been validly signed by you or the Account Holder (as applicable); and
 - b. all additional documents required to facilitate the Trade, which may include:
 - i. any form required to be submitted to your or the Account Holder's (as applicable) private irrigation corporation or trust; and
 - ii. any document required to be lodged to confirm the authority of the person(s) who have signed the Trade Form and/or additional documents.
- 6.2. It is your responsibility to ensure that all additional documents which are necessary to facilitate the Trade are provided to us.

Electronic Lodgement

- 6.3. If we elect to electronically submit an application with respect to the Trade to the Authority and a Trade Form is not required to be submitted with that application:
- a. you are not required to provide a Trade Form in accordance with clause 6.1.a;
 - b. we will submit the application to the Authority within 5 Business Days after receiving payment of all amounts payable under the Agreement and additional documents in accordance with clause 6.1.b; and
 - c. you must comply with any of our other reasonable requirements in order to facilitate electronic lodgement of the application.

Lodgement of Trade Form

- 6.4. Within 5 Business Days after we receive:
- a. all Trade Forms and additional documents in accordance with clauses 6.1; and
 - b. full payment of the amount set out in the Invoice,
- we will:
- c. complete any required details relating to us or our Allocation Account;
 - d. amend or complete any of the details in the Trade Forms so that they are consistent with the details of the Agreement;
 - e. execute the Trade Form; and
 - f. lodge the Trade Form and all additional documents with the Authority.

7. Trade Rejected

Where Trade is Rejected

7.1. The Parties agree that:

- a. where the Trade is rejected by the Authority; or
- b. the Authority advises either Party that the Trade Form or additional documents require amendment in order for the Trade to be approved,

then:

- c. the Parties will work together in good faith and do all things reasonably required to (among other things) remedy any errors in the Trade Form or additional documents (if applicable and necessary) and take such other steps as may be required to remove obstacles to the Trade being approved;
- d. if no change to the Agreed Volume is required, then we may resubmit a Trade Form or may submit an application to the Authority electronically, along with any other relevant supporting material without first obtaining your consent or the consent of the Account Holder (if applicable) for resubmission;
- e. if a reduction to the Agreed Volume is required for the Trade to potentially be approved by the Authority, then we may submit an amended Trade Form or may submit an application to the Authority electronically, along with any other supporting material after first obtaining your written consent and the written consent of the Account Holder (if applicable) to reduce the Agreed Volume;
- f. you may be required to provide a new Trade Form (including procuring that it is signed by you or the Account Holder as applicable) for us to lodge or re-lodge (if necessary); and
- g. notwithstanding clause 7.4, we may elect to bear the Trade Approval Lodgement Costs associated with the resubmission of the Trade Form or any application submitted electronically, and if we do we may request reimbursement from you in accordance with clause 4.1.

7.2. Subject to clause 7.3, if the Trade is not approved within 5 Business Days after the initial rejection referred to in clause 7.1.a, or receipt of the advice from the Authority referred to in clause 7.1.b, we may immediately terminate the Agreement by giving written notice.

7.3. If the Trade is rejected because it is not permitted under the Trading Rules (except in circumstances where the Trade may be permitted if the Agreed Volume is changed), then:

- a. either Party may immediately terminate the Agreement by giving written notice to the other Party; and
- b. neither Party is required to comply with clause 7.1.

7.4. Where:

- a. the Trade is rejected; and
- b. the rejection of the Trade has not been caused by:
 - i. our sole delay in lodging the Trade Form or in submitting an application to the Authority electronically; or

- ii. an error made by us in completing the information in the Trade Form or in an application submitted to the Authority electronically,

you are responsible for the Trade Approval Lodgement Costs and any other costs associated with the Trade which has been rejected, and no reimbursement of these costs will be available from us.

8. Indemnity

- 8.1. You agree to indemnify us against any liability, Loss (including Consequential Loss), damage, costs or expenses for which we suffer or incur arising from:
 - a. your Default;
 - b. your negligence;
 - c. breach of any Law by you;
 - d. the provision of false or misleading information by you; or
 - e. any act or omission by you in connection with the Water Allocation or any Trade.
- 8.2. The indemnity given under clause 8.1 does not merge on completion of the Trade, and will continue to survive the expiry or termination of the Agreement.

9. Default & Termination

- 9.1. If you Default, we may immediately serve you a notice:
 - a. describing the Default;
 - b. stating that the Default must be remedied by a date which is not less than 3 Business Days after the date of the notice; and
 - c. stating that if the Default is not remedied by the date specified in the notice, we may immediately terminate the Agreement.
- 9.2. If you fail to comply with a notice served pursuant to clause 9.1, we may terminate the Agreement effective immediately by giving you notice.
- 9.3. If we terminate the Agreement pursuant to clause 9.2 or pursuant to a right of termination arising under another agreement, then, without prejudice to any other rights which we may have:
 - a. we may demand all monies payable by you under the Agreement as a debt immediately due and payable to us; and
 - b. we may:
 - i. resell the Agreed Volume and recover any Loss from you by way of damages; or
 - ii. retain the Agreed Volume and recover damages from you for breach of the Agreement.
- 9.4. If the Agreement is terminated pursuant to clause 9.2, we may also, at our sole and absolute discretion, immediately terminate any or all other agreements between you and us, and our rights set out in clause 9.3 will apply with respect to those terminated agreements.
- 9.5. If we, by our sole actions or omissions, Default under the Agreement prior to but not after the date on which the Trade is approved by the Authority, you may immediately serve us a notice:

- a. describing the Default;
 - b. stating that the Default must be remedied by a date which is not less than 10 Business Days after the date of the notice; and
 - c. stating that if the Default is not remedied by the date specified in the notice, you may immediately terminate the Agreement.
- 9.6. If we fail to comply with a notice served pursuant to clause 9.5, and provided that the Trade is not approved by the Authority, you may terminate the Agreement effective immediately by giving notice to us.

10. Disclaimer

- 10.1. In this clause 10, **Pre-Agreement Information** means information provided or made available by us to you prior to the Agreement Commencement Date, and includes information provided in, in relation to, or in connection with, the Sale Process.
- 10.2. To the maximum extent permitted by Law, the Parties agree that we are not liable (and you waive and release us from any liability) for any actions or rights of action in relation to any Loss (whether foreseeable or not), whether or not the Loss arises in connection with any negligence, Default, lack of care, misrepresentation, or any other cause:
- a. suffered by any person acting on any part of the Pre-Agreement Information;
 - b. in the preparation of your Bid; or
 - c. in connection with the Sale Process.

11. Refund of monies

- 11.1. Where the Agreement is terminated under clause 7.2 or 7.3, and you have already paid to us the Value, we will, within a reasonable amount of time, refund to you the Value and any Trade Approval Lodgement Costs or other fees (without interest) which you have already paid to us, and which have been refunded to us by the Authority.
- 11.2. If you terminate the Agreement pursuant to clause 9.6 then, without prejudice to any other rights which you may have, all monies which have been paid by you will be refunded by us to you as soon as practicably possible.
- 11.3. If a reduction to the Agreed Volume is made in accordance with any term of the Agreement after you have made payment in accordance with clause 4.3, then we will, within a reasonable amount of time, refund to you any difference in the Value.
- 11.4. You acknowledge and agree that if clause 11.1, 11.2 or 11.3 applies:
- a. if you paid the Invoice by credit card, we are not required to refund any credit card surcharge you paid; and
 - b. we may determine, in our discretion, the method for making any refund to you.

12. General Conditions

Time is of the Essence

- 12.1. The Parties agree that time is of the essence in the Agreement.
- 12.2. Without limiting any other provision of the Agreement, the Parties acknowledge that a failure to comply with a stipulation as to time in the Agreement will constitute a Default for the purposes of clause 9.

Good Faith & Co-operation

- 12.3. The Parties agree to act in good faith and to co-operate to facilitate the Trade.

Notices

- 12.4. A notice will be validly served if it is:
- a. signed (or in the case of an email, transmitted electronically) by a Party or by an authorised representative or delegate of a Party; and
 - b. sent by email, sent by facsimile posted or hand delivered to the other Party or the other Party's representative.
- 12.5. A notice will be deemed to be served and received by a Party:
- a. if sent by email, at the time it is sent, unless the sender receives notification that the email has not been delivered;
 - b. if sent by facsimile, when a transmission report indicating that the transmission was received without error is received by the sender;
 - c. if posted, 3 Business Days after the date of being posted; or
 - d. if hand delivered, at the time of delivery.

Severance

- 12.6. If any provision of these Terms does not comply with any applicable Law then:
- a. that provision will be read down so as to give it as much effect as possible;
 - b. where the provision cannot be given any effect, it is treated as severed from the rest of the Terms; and
 - c. the remainder of the Agreement remains in force.

No Merger

- 12.7. No term of the Agreement merges on completion of any transaction contemplated by the Agreement.
- 12.8. Any term of the Agreement which, by its nature, is intended to survive termination or expiry of the Agreement, will do so.

No Waiver

- 12.9. No right, entitlement, power or remedy is waived by a Party by virtue of that Party failing to exercise or delaying its exercise of that right, entitlement, power or remedy.

Governing Law

- 12.10. The Agreement is governed by the Law of the Australian Capital Territory and each Party submits to the non-exclusive jurisdiction of the courts of the Australian Capital Territory.
- 12.11. The Commonwealth will comply with Laws only to the extent that it is bound by them of their own force.