**Model tender and contract clause to support the Small Business Shorter Payment Terms Policy**

**Note to NSW Government agencies**

To support agencies in the implementation of the Small Business Shorter Payment Terms Policy, model tender and contract clauses implementing the policy have been developed.

Agencies, with their legal and procurement teams, should review the model clauses carefully and consider whether the proposed clauses are appropriate for the relevant procurement, and re-frame as necessary on a case-by-case basis in accordance with the Small Business Shorter Payment Terms Policy.

Drafting notes for agencies have been included below in [square brackets].

**Model Tender Clauses**

***[Drafting Note: for inclusion in tenders where the contract value is $7.5 million or more]***

**Small Business Shorter Payment Terms Policy**

On 1 July 2021, the NSW Government introduced the *Small Business Shorter Payment Terms Policy* (the **policy**)*.* To determine the applicability of the policy to a potential contract with the Tenderer, the Tenderer must declare in its tender response whether at the time of submitting its tender, it is an entity which:

1. has 200 or more full time equivalent employees (excluding registered charities and not-for-profit organisations); or
2. is a ‘reporting entity’ within the meaning of the *Payment Times Reporting Act 2020* (Cth).

If a Tenderer declares that it meets either of the above conditions, the Tenderer is considered to be a Large Business for the purpose of the policy, and the agency must include in any contract with the Tenderer, the requirements set out in the policy. This includes amongst other things, that the Tenderer must pay small business subcontractors within 20 business days following receipt of a correctly rendered invoice from the small business subcontractor.

**Model Contract Clauses**

***[Drafting note: From 1 July 2021, under the Small Business Shorter Payment Terms Policy, model contract clauses regarding payment times must be included in an agency’s contract with a supplier for the provision of goods or services, if the following two conditions are satisfied:***

1. ***the agency has determined that the total contract value is $7.5 million or above, and***
2. ***the supplier declares it is a Large Business, defined as an entity which:***
   1. ***has 200 or more full time equivalent employees (excluding registered charities and not-for-profit organisations); or***
   2. ***Is a ‘reporting entity’ within the meaning of the Payment Times Reporting Act 2020 (Cth).***

***Terminology should be amended as applicable/required to reflect the relevant contract.]***

**[Clause X]** **Payment to Small Businesses**

1. The Supplier must inform any direct subcontractor that it proposes to engage to provide goods or services for the purposes of this agreement of the [*Small Business Shorter Payment Terms Policy*](https://buy.nsw.gov.au/policy-library/policies/small-business-shorter-payment-terms-policy).
2. In any subcontract between the Supplier and a Small Business that is wholly or partly for the provision of goods or services for the purposes of this agreement (whether or not the subcontract was entered into before or after the date of this agreement), the Supplier must:
3. include in the subcontract a clause which requires the Supplier to pay the Small Business (for goods or services provided for the purposes of this agreement) within 20 Business Days following the receipt by the Supplier of a correctly rendered invoice from the Small Business;
4. pay the Small Business in accordance with the clause included in the subcontract pursuant to clause [X](2)(a) above.

***[Drafting note: agencies to consider whether within the context of the particular procurement and the Large Business/Small Business relationship, if there are any other relevant invoicing conditions (eg, acknowledgment of delivery of goods/services before an invoice is issued, etc). If so, agencies may wish to build such conditions into the concept of “correctly rendered invoice”]***

1. A Supplier must provide periodic reporting to the Principal on the Supplier’s payment performance under clause [X](2)(b) above. The frequency of such periodic reporting will be as directed by the Principal.
2. The Principal may undertake an audit at any time to determine the Supplier’s compliance with this clause [X] and the associated payment terms of the subcontract. The Supplier agrees to provide the Principal with access to persons, records, premises or anything else the Principal reasonably requires to conduct the audit.

***[Drafting note: agencies to only include this sub-clause (4) if there are no existing audit provisions under the relevant agreement with the Large Business]***

1. The Supplier agrees that if it is the subject of a complaint in relation to its compliance with this clause [X] or the associated payment terms of the subcontract, it will not take any prejudicial action against the complainant due to a complaint being made or due to any investigation or inquiry by the Principal in relation to the complaint.
2. For the purpose of this clause:
   1. **Business Day**means a day that is not a Saturday, a Sunday or a public holiday in New South Wales.
   2. **Small Business** means a direct subcontractor entity which is identified as a ‘small business’ on the buy.nsw website.