**Sample contract clause to support the Aboriginal Procurement Policy**

**Note to NSW Government Agencies**

To support Agencies in the implementation of the Aboriginal Procurement Policy, a sample contract clause regarding the Aboriginal Procurement Policy has been developed.

Agencies may include this clause in contracts however, it is not mandatory. Agencies with their legal team should review this sample clause carefully and consider whether the proposed clause is appropriate for the relevant procurement, and re-frame as necessary on a case-by-case basis in accordance with the Aboriginal Procurement Policy.

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

**[X]. Aboriginal Procurement Policy**

**[X].1 Definitions**

In this clause [X] (*Aboriginal Procurement Policy*):

**[Drafting note: the terms “Supplier” and “Customer” are used in the sample clause to refer to “Suppliers”/“Contractors” and “Agencies” respectively. Definitions of these terms have not been included in this clause as it is assumed these are already captured in the main Definitions clause within the proposed contract.]**

**Aboriginal Business** means a business that has at least 50 per cent Aboriginal or Torres Strait Islander ownership and that is recognised as such through an appropriate indigenous business verification organisation, including Supply Nation or the NSW Indigenous Chamber of Commerce.

**Aboriginal Employees** means employees of the Supplier or its subcontractor, who are people of Aboriginal or Torres Strait Islander descent as verified by the Supplier in accordance with guidance provided under the Aboriginal Procurement Policy.

**Aboriginal Participation Fund** means the “Aboriginal Participation Fund” (or its successors managed by the Department of Education. This fund is designed to target skills and capacity gaps for Aboriginal people and businesses and to build the capacity and capability of Aboriginal businesses in NSW.

**Aboriginal Participation Plan** means the “Aboriginal Participation Plan” submitted by the Supplier and approved by the Customer, setting out how the Supplier will meet the Aboriginal Participation Requirements in respect of the Project and this agreement.

**Aboriginal Participation Requirement** means the mandatory minimum requirement for Aboriginal participation in the Project as determined by:

1. [at least [1.5%] of the APP Contract Value is subcontracted to Aboriginal Businesses; or]
2. [at least [1.5%] of the full time equivalent Australian based workforce deployed on the Project are Aboriginal Employees, on average over the term of the Project; or]
3. [at least [1.5%] of the APP Contract Value is applied to the cost of education, training or capability building for Aboriginal Employees or Aboriginal Businesses directly contributing to the Project; or]
4. [any combination of the following, such that the combined percentages add up to at least [1.5%]:
	1. a percentage of the APP Contract Value is subcontracted to Aboriginal Businesses;
	2. a percentage of the full time equivalent Australian based workforce deployed on the Project are Aboriginal Employees, on average over the term of the Project; and
	3. a percentage of the APP Contract Value is applied to the cost of education, training or capability building for Aboriginal Employees or Aboriginal Businesses directly contributing to the Project.]

**[Drafting note: In accordance with the Aboriginal Procurement Policy, Agencies may at their discretion, require an Aboriginal participation percentage higher than 1.5%, in which case, the square bracketed % should be updated. In addition, Agencies should consider whether this Aboriginal Participation Requirement definition needs to be tailored to reflect the specific participation requirements of the Project in compliance with the Aboriginal Procurement Policy. If the Aboriginal Participation Requirement definition is tailored, the Agency should also consider whether the definition of Actual Aboriginal Participation below needs to be tailored accordingly also.]**

**Aboriginal Procurement Policy** means the NSW government’s “Aboriginal Procurement Policy” and published at <https://buy.nsw.gov.au/policy-library/policies/aboriginal-procurement-policy> (as updated, amended or varied from time to time).

**Actual Aboriginal Participation** means the percentage of actual Aboriginal participation in the Project, as determined by combining:

1. [the percentage of the APP Contract Value that is subcontracted to Aboriginal Businesses;]
2. [the percentage of the full time equivalent Australian based workforce deployed on the Project who are Aboriginal Employees, on average over the term of the Project; and]
3. [the percentage of the APP Contract Value that is applied to the cost of education, training or capability building for Aboriginal Employees or Aboriginal Businesses directly contributing to the Project.]

**APP Contract Value** means the total amount payable by the Customer under this agreement [minus **[Drafting note: Insert specific details of any exclusions agreed between the Supplier and the Customer in compliance with the Aboriginal Procurement Policy and guidelines. If no exclusions, delete the square bracketed items from this definition]**].

**Project** means the [Insert project name and description]projectto which this agreement relates.**[Drafting note: This definition may be already captured in the main Definitions clause within the proposed contract.]**

**Unmet Percentage** means the difference between the [1.5%] Aboriginal Participation Requirement and the Actual Aboriginal Participation in the Project.

**X.2 Aboriginal Participation Requirements**

1. The Supplier must at all times, comply with, and perform its obligations under this agreement in compliance with the requirements of the Aboriginal Participation Plan and the Aboriginal Participation Requirements.
2. The Supplier:
3. agrees to:
4. provide to the Customer, the Aboriginal Participation Plan on commencement of this agreement;
5. report every calendar quarter to the Customer, in the format reasonably requested by the Customer, on the Supplier’s progress towards meeting its commitment on the Aboriginal Participation Requirements in accordance with the Aboriginal Participation Plan; and
6. submit a final report on or before expiry or termination of this agreement and in the format reasonably requested by the Customer, confirming its compliance with the Aboriginal Participation Plan and the Aboriginal Participation Requirements. If the Supplier is unable to confirm compliance with the Aboriginal Participation Plan and the Aboriginal Participation Requirements in the final report, the report must include a statement setting out (in reasonable detail) its computations in determining the Actual Aboriginal Participation and Unmet Percentage.
7. represents and warrants that any report or information it provides to the Customer in relation to its compliance with the Aboriginal Participation Requirements and the Aboriginal Participation Plan is, to the best of its knowledge, complete and accurate.
8. If at the time of termination or expiry of this agreement, the Supplier does not meet the Aboriginal Participation Requirements, the Supplier must within 30 days of providing the final report under clause [X.2(b)(i)(C)] pay to the Customer, for the Customer to transfer into the Aboriginal Participation Fund, an amount equal to the Unmet Percentage multiplied by the APP Contract Value. If any amounts are not paid by the Supplier in accordance with this clause [X.2(c)], it will constitute a debt due and owing by the Supplier to the Customer. The Customer may set off any amounts due and owing by the Supplier to the Customer under this clause [X.2(c)] against any amounts due and owing by the Customer to the Supplier under this agreement.
9. The Crown in right of the State of New South Wales, [the Customer] or an auditor engaged by the Crown in right of the State of New South Wales or [the Customer], may at any time conduct an audit of the Supplier’s compliance with the Aboriginal Participation Requirements or the Supplier’s processes and reporting standards in relation to reports provided under clause [X.2(b)]. The Supplier will, and procures that its subcontractors will, assist and cooperate with the audit in good faith and provide all the necessary information as requested by the NSW Government, the Customer or the auditor.
10. The Supplier must provide to the Customer any information or other assistance, as reasonably requested by the Customer, to enable the Customer to meet its obligations under the Aboriginal Procurement Policy.
11. The obligations of the Supplier under this clause [X] survive termination of this agreement.