

**TRANSPORT FOR NSW (TfNSW)  
CONTRACT DOCUMENT C71**

**PROFESSIONAL SERVICES CONTRACT  
(CONSTRUCTION INDUSTRY)**

**REVISION REGISTER**

<b>Ed/Rev Number</b>	<b>Clause Number</b>	<b>Description of Revision</b>	<b>Authorised By</b>	<b>Date</b>
Ed 3/ Rev 0		Initial Issue	Director, Commercial Services	13.11.19
Ed 3/ Rev 1		Reference to TfNSW instead of RMS	Director Commercial Services	01.12.19



Transport  
for NSW

# PROFESSIONAL SERVICES CONTRACT (CONSTRUCTION INDUSTRY)

Transport for NSW (PRINCIPAL)

**[INSERT CONTRACTOR]** (Contractor)

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# Professional Services Contract (Construction Industry) DEED FORM

**[Guidance Notes are provided throughout this deed to assist the parties in completing its details. Guidance Notes are not operative provisions. The contract administrator should remove all Guidance Notes prior to execution by the parties.]**

**Parties:** Transport for NSW (ABN 18 804 239 602) a NSW Government agency constituted under the Transport Administration Act 1988 (NSW) (**TfNSW**) (**Principal**)

[INSERT CONTRACTOR'S FULL LEGAL TITLE] ACN [Insert ACN] ABN [Insert ABN] of [Insert registered business address] (**Contractor**)

**Deed:** The parties agree to enter into and comply with the terms of this Deed.  
This Deed comprises the following documents:

Document description	Where found
This Deed Form	This document
Conditions of Contract Schedule 1 – Reference Schedule Annexure A – Insurances Annexure B – Contractor Statement and Supporting Statement Annexure C – Confidentiality Deed Poll Annexure D – Building Code Annexure E – Rules for the Expert Determination Process & Code of Conduct for an Expert Annexure F – Undertaking Annexure G – Services Annexure H – Fee and other amounts [insert any other document forming part of this Deed] [Guidance Note: insert any other documents (including specifications) that form part of this Deed or delete this row]	Attached to this document

**EXECUTED** by the parties as a deed.

**Executed** for and on behalf of **Transport for NSW (ABN 18 804 239 602)** by its authorised delegate in the presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Signature of [insert position]

\_\_\_\_\_  
Full name of witness

\_\_\_\_\_  
Name of [insert position]

***Guidance Note: Contractor's execution block must be updated to reflect the Contractor's approved signatories eg if it is signing under a power of attorney.***

**SIGNED, SEALED AND DELIVERED** by the **CONTRACTOR**

on...../...../.....

in accordance with section 127 of the Corporations Act

\_\_\_\_\_  
Secretary (or additional Director)

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name printed

\_\_\_\_\_  
Name printed

**Professional Services Contract  
(Construction Industry)  
CONDITIONS OF CONTRACT**

The Conditions of Contract is a Legal Branch precedent document which must only be modified with the approval of the Legal Branch through Commercial Services, Infrastructure and Place Division

# Professional Services Contract (Construction Industry)

## CONDITIONS OF CONTRACT

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### 1. INTERPRETATION

#### 1.1 Definitions

In this Deed:

**APIC Policy** means the NSW Government *Aboriginal Participation in Construction (APIC) Policy* (dated June 2018), as updated from time to time.

**Approvals** includes approvals, authorities, licences, consents and permits issued by an Authority or under any Law.

**Audit** means an audit under clause 25.2(a).

**Auditor** means an independent auditor or the Principal's internal auditor appointed by the Principal for the purposes of clause 25.2(a).

**Authority** means any public or other authority which has jurisdiction in relation to the Services.

**Business Day** means any day other than a Saturday, Sunday or public holiday in New South Wales or 27, 28, 29, 30 or 31 December.

**Commencement Date** means the date specified in Item 1 of the Reference Schedule for the commencement of the Services.

**Completion** means that stage when the Services are completed in accordance with the requirements set out in this Deed.

**Conditions of Contract** means these Conditions of Contract and all Annexures, which are attached to the Deed Form.

**Confidentiality Deed Poll** means the confidentiality deed poll set out in Annexure C (Confidentiality Deed Poll).

**Construction Work** means those Services (if any) which form part of a construction project as defined in the Work Health and Safety Regulation 2017 (NSW).

**Contractor** means the person identified as the Contractor in Item 2 of the Reference Schedule.

**Contractor Arranged Insurances** means the 'Contractor Arranged Insurances' listed in Annexure A (Insurances).

**Contractor's Representative** means the person named as the Contractor's Representative in Item 10 of the Reference Schedule, or any replacement person approved by the Principal in writing.

**Contractor Statement** means a statement in the form set out in and including the details required by Part I of Annexure B (Contractor Statement and Supporting Statement) or such other form and details as are required by the relevant legislation from time to time.

**Date for Completion** means the date for Completion of the Services stated in Item 3 of the Reference Schedule, as may be varied or extended in accordance with clause 12.3 or 13 or otherwise by written agreement of the parties.

**Date of Contract** means the date that this Deed is executed by the last party to do so.

**Deed** means this deed between the Principal and the Contractor comprising the documents specified in the Deed Form.

**Deed Form** means the document of that name to which these Conditions of Contract are attached.

**Deliverable** means any Document or other item provided or required to be provided to the Principal or produced by or on behalf of the Contractor in connection with the Services or this Deed.

**Discrepancy** means an inconsistency, discrepancy, ambiguity, inadequacy, deficiency, error, inaccuracy or omission.

**Documents** means all documents, reports, plans, drawings, layouts, designs, computer disks, specifications and all other materials in both hard and electronic formats.

**Expenses** means the expenses which the Contractor incurs at the express direction of the Principal in respect of the items nominated in Part B of Annexure H (Fee and other amounts), including printing, accommodation and travel if not included in the Fee.

**Fee** means the fee calculated at the rates and / or in the amounts set out in Part A of Annexure H (Fee and other amounts), as increased or decreased by this Deed.

**Fit For Purpose** means fit for their intended purpose having regard to any purpose contemplated in or reasonably ascertainable from:

- (a) this Deed and the Principal's Material; and
- (b) to the extent relevant for determining the purpose in connection with a Variation, any document provided by the Principal to the Contractor specifically in connection with the Variation.

**Good Industry Practice** means the care, skill, diligence, prudence and foresight reasonably expected of a competent, qualified, skilled and experienced professional working in a consultancy firm providing similar services to an organisation like the Principal, seeking to comply with its contractual and legal obligations and having regard to the requirements of the Project and any other circumstances affecting the carrying out of the Services.

**GST** has the same meaning as in the GST Law.

**GST Law** has the meaning given in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Insolvent** means:

- (a) where the Contractor is an individual or partnership including an individual person, being bankrupt; and
- (b) where the Contractor is a company:
  - (i) a liquidator has been appointed;
  - (ii) an administrator has been appointed (voluntarily or otherwise);

- (iii) the Contractor enters into a scheme or other arrangement with its creditors;
- (iv) a winding-up order is made in respect of the Contractor;
- (v) a mortgagee of any property of the Contractor takes possession of that property; or
- (vi) the Contractor enters into any other form of insolvency administration.

**Intellectual Property Rights** means all present and future registered and unregistered rights conferred by statute, common law or equity in, or in relation to, copyright, trademarks, patents, designs, circuit layouts, trade secrets, know how, confidential information, inventions, source code, models, manuals and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

**Item** means an item in the Reference Schedule.

**Law** means statutes, regulations, by-laws, ordinances, rules, subordinate legislation, common law and rules of equity.

**Liability** means any claim, suit, demand, damage, loss, expense, cost (including legal costs) or other liability.

**Nominated Personnel** means the persons named in Item 9 of the Reference Schedule and any other person that the Principal consents to in writing.

**NSW Government Code of Practice for Procurement** means the Code of Practice for Procurement published by the NSW Government from time to time. At the Date of Contract, a copy of the NSW Government Code of Practice for Procurement is available at [https://www.procurepoint.nsw.gov.au/system/files/documents/code\\_of\\_practice\\_for\\_procurement\\_2013\\_ir\\_guidelines\\_0.pdf](https://www.procurepoint.nsw.gov.au/system/files/documents/code_of_practice_for_procurement_2013_ir_guidelines_0.pdf)

**Payment Claim** means a claim for payment submitted in accordance with clause 11.1.

**Payment Claim Date** means the last Business Day of every month unless otherwise specified in Item 16 of the Reference Schedule.

**Payment Schedule** means a payment schedule under clause 11.2.

**Personal Information** has the same meaning as in the *Privacy and Personal Information Protection Act 1998* (NSW).

**Personnel** means the Subcontractors and officers, employees and agents of the Contractor and the Subcontractors (and, if the Contractor is a partnership, includes partners).

**Principal** means Transport for NSW (ABN 18 804 239 602) a NSW Government agency constituted under the *Transport Administration Act 1988* (NSW).

**Principal Arranged Insurance** means the 'Principal Arranged Insurance' specified in Annexure A (Insurances).

**Principal Contractor** means a principal contractor as defined in the *Work Health and Safety Regulation 2017* (NSW).

**Principal's Customer Charter** means the customer charter published by the Principal from time to time. At the Date of Contract, a copy of the Principal's Customer Charter is available at <http://www.rms.nsw.gov.au/customercharter/index.html>.



**Principal's Insurer** means the Principal's external insurer from time to time, whose contact details at the Date of Contract are set out in Annexure A (Insurances) or such other insurer as is nominated by the Principal in writing from time to time.

**Principal's IP** means any Intellectual Property Rights subsisting in the Documents provided or made available to the Contractor by or on behalf of the Principal in connection with this Deed which are vested in, or otherwise owned by, the Principal.

**Principal's Material** means all documents and materials provided to the Contractor by the Principal from time to time, including documents provided in accordance with clause 7.1 and any other documents, equipment, machinery and data (stored by any means).

**Principal's Representative** means the person named as the Principal's Representative in Item 23 of the Reference Schedule, or any replacement person notified in writing by the Principal to the Contractor from time to time.

**Principal's Statement of Business Ethics** means the statement of business ethics published by the Principal from time to time. At the Date of Contract, a copy of the Principal's Statement of Business Ethics is available at [www.rms.nsw.gov.au/about/what-we-do/ethics/statement-business-ethics.html](http://www.rms.nsw.gov.au/about/what-we-do/ethics/statement-business-ethics.html)

**Privacy Laws** means the *Privacy and Personal Information Protection Act 1998* (NSW), the *Privacy Act 1988* (Cth), any applicable principles, codes of conduct or directions issued under those Acts and all other applicable Law relating to privacy or personal information.

**Program** means, if required under Item 17 of the Reference Schedule, the program for the provision of the Services, and any updates to it, approved by the Principal in accordance with clause 12.2.

**Project** means the project described in Item 4 of the Reference Schedule.

**Provisional Sum** means a provisional sum specified in Part C of Annexure H (Fee and other amounts).

**Records** mean the records and other documents contemplated in clause 25.1(a).

**Reference Schedule** means Schedule 1 (Reference Schedule) to the Deed Form.

**Relevant Offence** means any offence which:

- (a) involves an element of dishonesty or violence;
- (b) involves behaviour which the relevant Principal's Representative would reasonably regard as inconsistent with the inherent requirements of the roles which the relevant person is or would be required to undertake in the performance of the Services; or
- (c) resulted in the person having served a custodial sentence at any time in the preceding 10 years.

**RMS or Roads and Maritime Services** means TfNSW or Transport for NSW, and a reference to "RMS" in a document (including an RMS specification or other document) is to be read as a reference to TfNSW or Transport for NSW.

**Security of Payment Act** means the *Building and Construction Industry Security of Payment Act 1999* (NSW).

**Service Stage** means a stage specified in Item 7 of the Reference Schedule.

**Services** means the services as specified in Annexure G (Services), and includes any:

- (a) services incidental to or reasonably inferred from the Services; and
- (b) Variations to the Services which are directed in accordance with this Deed.

**Subcontractor** means a person who supplies work, services, materials, plant, equipment or advice to the Contractor in connection with the Services (regardless of tier).

**Supporting Statement** means a statement in the form set out in and including the details required by Part II of Annexure B (Contractor Statement and Supporting Statement) or such other form and details as are required by the relevant legislation from time to time.

**Term** means the period specified in Item 5 of the Reference Schedule.

**Third Party IP** means any Intellectual Property Rights subsisting in the Documents provided or made available to the Contractor by or on behalf of the Principal in connection with this Deed which have been licensed to the Principal and which the Principal has a right to sub-license to the Contractor to use, reproduce and modify to the extent required for the Services or the Contractor's other obligations under this Deed.

**Undertaking** means an unconditional undertaking to pay on demand, in the form of Annexure F (Undertaking).

**Variation** means a change to the Services by notice given under clause 13.1.

**Variation Proposal** means a notice from the Contractor referred to in clause 13.2 addressing:

- (a) the price or saving it will give to the Principal for the Variation or proposed Variation;
- (b) the particulars of the plant, labour, materials and goods to be used or not used as a result of the Variation or proposed Variation; and
- (c) the effect on the timing for the provision of the Services, including on the Program and when Completion of the relevant Services is likely to be achieved (if relevant), as a result of the Variation or proposed Variation.

**Variation Rates** means the rates or other amounts described as the "Variation Rates" in Part D of Annexure H (Fee and other amounts).

## 1.2 Interpretation

In this Deed:

- (a) headings are for convenience only and do not affect the interpretation of this Deed;
- (b) words importing the singular include the plural and vice versa;
- (c) where a word or expression has a defined meaning, its other grammatical forms have a corresponding meaning;
- (d) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency;
- (e) a reference to any statute, regulation or law includes a variation, consolidation or replacement and a reference to any statute or law includes all regulations, ordinances, proclamations and by-laws issued under that statute or law;

- (f) a reference to a party includes their successors and permitted assigns;
- (g) where the day on which something is to be done is not a Business Day, that thing must be done on the preceding Business Day;
- (h) if a party comprises more than one person, the obligations of that party are joint and several and the rights of that party are joint;
- (i) “includes” means includes but without limitation;
- (j) a reference to a document or agreement is a reference to that document or agreement as amended or varied;
- (k) the defined terms in clause 1.1 will have the same meaning in all schedules and annexures to this Deed; and
- (l) unless this Deed expressly states otherwise, each party may give or withhold any consent or approval, or exercise any other right, power, authority, discretion or remedy, under this Deed in its absolute discretion.

### **1.3 Precedence**

Where there is any Discrepancy between the terms of this Deed, the following order of precedence will apply:

- (a) the Deed Form;
- (b) the Conditions of Contract;
- (c) Schedule 1 (Reference Schedule), Annexure G (Services) and Annexure H (Fee and other amounts);
- (d) Annexure A (Insurances);
- (e) the remainder of the Annexures;
- (f) any documents incorporated in this Deed by reference.

### **1.4 Other terms excluded**

This Deed comprises the entire agreement between the parties and supersedes the provisions of any previous agreements, proposals, correspondence or discussions in relation to the subject matter of this Deed. To the extent permitted by law, all implied terms are excluded.

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## **2. COMMENCEMENT, TERM AND SECURITY**

### **2.1 Formation of Deed**

This Deed is formed on the Date of Contract.

### **2.2 Term**

This Deed will expire at the end of the Term, unless terminated earlier.

## **2.3 Security**

- (a) If Item 6 of the Reference Schedule states that an Undertaking is required, on or before the Commencement Date the Contractor must give the Principal an Undertaking for the amount stated in Item 6. The Undertaking must be in the form specified in Annexure F (Undertaking).
- (b) Unless the Principal has made or intends to make a demand against the Undertaking, the Principal must return the Undertaking (or, if applicable, the balance remaining after a demand on the Undertaking) to the Contractor as follows:
  - (i) within 10 Business Days after the later of expiry of the Term and the date of Completion; and
  - (ii) there are no moneys of any nature, including debts, damages and indemnity claims, payable by the Contractor to the Principal.
- (c) When either of the circumstances in clause 2.3(b) applies, the Undertaking will be returned when those circumstances no longer apply.
- (d) Undertakings must be provided by a bank, building society, credit union or insurance company acceptable to the Principal.
- (e) The Contractor must not take any steps to prevent the Principal making a demand against the Undertakings, or to prevent the provider of an Undertaking from complying with the Undertaking or any demand by the Principal.

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## **3. SCOPE OF SERVICES**

### **3.1 Performance**

The Contractor will provide the Services in accordance with this Deed.

### **3.2 Commencement**

Subject to clause 4, the Contractor must commence providing the Services on the Commencement Date.

### **3.3 Service Stages**

Where Service Stages are specified in Item 7 of the Reference Schedule, the Contractor must not commence a Service Stage (other than the first Service Stage under the Reference Schedule), and the Principal has no obligation to pay the Contractor for a Service Stage (other than the first Service Stage), unless the Principal has directed the Contractor to commence the Service Stage in writing.

### **3.4 Approvals**

- (a) Subject to clause 3.4(b), the Contractor must obtain and maintain all Approvals required for the performance of the Services.
- (b) The Principal is responsible for obtaining and maintaining the Approvals specified in Item 8 of the Reference Schedule.

### **3.5 Co-operation with others**

The Principal may, for its sole convenience and at its absolute discretion, also engage other contractors. The Contractor must:

- (a) fully cooperate with those other contractors;
- (b) carefully coordinate and integrate the provision of the Services with the services, works or activities provided by those other contractors;
- (c) to the extent the Principal reasonably requires, attend meetings involving those other contractors;
- (d) align its program with the programs of those other contractors; and
- (e) ensure that the performance of the Services does not delay, disrupt or interfere with the services, works or activities of the other contractors.

### **3.6 Prior Services**

This Deed retrospectively applies to any Services performed by the Contractor before the Date of Contract. If the Contractor commences Services before the Commencement Date, this Deed continues to apply to those Services.

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## **4. CONDITIONS TO BE SATISFIED BEFORE SERVICES START**

The Contractor must not start providing the Services until the Contractor has:

- (a) obtained the Contractor's insurances in accordance with clause 14.2; and
- (b) provided the Principal with:
  - (i) satisfactory proof that the Contractor's insurances have been obtained in accordance with clause 14.3; and
  - (ii) the information to be provided in accordance with clause 14.1(d).

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## **5. THE RELATIONSHIP**

### **5.1 Independent contractor**

In providing the Services, the Contractor acts as the Principal's independent contractor and does not have any authority to act as the Principal's agent or on the Principal's behalf, unless the Principal expressly authorises the Contractor to do so in writing. In particular, the Contractor has no authority to enter into contracts, make representations or incur liabilities on behalf of the Principal.

### **5.2 No other relationship**

This Deed does not create any relationship of employment, partnership or joint venture between the Principal and the Contractor.

### **5.3 No employee entitlements**

The Contractor acknowledges that its engagement to carry out the Services does not entitle it to any employee benefits or entitlement.

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## **6. REQUIREMENTS FOR SERVICES**

### **6.1 Standard of Services**

- (a) The Contractor must satisfy itself as to the Principal's requirements for the Services and must comply with the policies, practices and procedures of the Principal relating to the Services and the performance of the Services.
- (b) The Contractor must ensure that the Services are free from Discrepancies and carried out in accordance with all relevant standards (including Australian Standards, where applicable), codes (including the Australian National Construction Code, where applicable), Good Industry Practice and the other requirements of this Deed.
- (c) The Contractor must exercise the standard of skill, diligence and expertise in the performance of the Services that would be expected of a professional provider of services equivalent to the Services. The Contractor acknowledges that the Principal is relying on the Contractor's skill, diligence, expertise and judgement in the Contractor's performance of the Services.

### **6.2 Standard of Deliverables**

The Contractor must ensure that the Deliverables:

- (a) are complete, clear, accurate, coordinated, and free from Discrepancies;
- (b) comply with all relevant standards (including Australian Standards, where applicable), codes (including the Australian National Construction Code, where applicable) and manufacturer's recommendations;
- (c) comply with the Principal's reasonable requirements regarding form and format; and
- (d) comply with the other requirements of this Deed.

### **6.3 Fitness for purpose**

The Contractor warrants that the Services, the Deliverables and any design contained in the Deliverables are Fit For Purpose.

### **6.4 Preparation of Deliverables**

- (a) The Contractor must prepare and submit the Deliverables as reasonably directed by the Principal taking into account its requirements for the Project.
- (b) If at any time (including during the design or construction of any works) either party or another contractor identifies any Discrepancy in the Deliverables or the Services, the Contractor must at its cost revise or amend the Deliverables and the Services as required to remedy or resolve the Discrepancy.
- (c) If remedying the Discrepancy in the Deliverables or the Services involves effecting a material change or making a determination in relation to the design intent of any works, the Contractor must consult the Principal before effecting such a remedy or resolution.

### **6.5 Review by the Principal**

- (a) The Principal may:

- (i) review any Deliverable, or resubmitted Deliverable, prepared and submitted by the Contractor; and
  - (ii) within 15 Business Days of the submission by the Contractor of such Deliverable or resubmitted Deliverable, reject the Deliverable if in its reasonable opinion the Deliverable does not comply with the requirements of this Deed.
- (b) If any Deliverable is rejected, the Contractor must:
- (i) at its own cost, promptly make any changes to the Deliverable required by the Principal to ensure the Deliverable complies with this Deed; and
  - (ii) the Contractor must, if required by the Principal, resubmit the revised Deliverable to the Principal, in which case this clause 6.5(b) will reapply.
- (c) The Contractor must not commence any Services in respect of the Deliverables which it has submitted to the Principal unless the Principal has had 15 Business Days to review the Deliverables and has not rejected those Deliverables.

## **6.6 No obligation to review**

- (a) The Principal does not assume or owe any duty of care to the Contractor to review, or in reviewing, any Deliverables submitted by the Contractor for errors, omissions or compliance with this Deed.
- (b) No review of, comments upon, rejection of, or failure to review or comment upon or reject, any Deliverable prepared by the Contractor or any other direction by the Principal about the Deliverable will:
- (i) relieve the Contractor from, or alter or affect, the Contractor's liabilities; or
  - (ii) prejudice the Principal's rights against the Contractor,
- whether under this Deed or otherwise according to Law.

## **6.7 Reliance by others**

The Contractor acknowledges that the Principal and others engaged by the Principal may rely on the Services carried out by the Contractor in carrying out further work or services relating to the Project. Any such reliance must be consistent with the intended purpose of the Services, as ascertained from this Deed, or as reasonably advised to the Contractor by the Principal (unless inconsistent with the express provisions of this Deed).

## **6.8 Resources and Personnel**

- (a) Subject to clause 3.4(b), the Contractor must provide all things and Personnel necessary to perform the Services and comply with its obligations under this Deed at its own expense.
- (b) The Contractor must use the Nominated Personnel (or other personnel approved in writing by the Principal) to provide the Services, and ensure that those persons have the skills, experience, reliability and ability necessary to perform the Services.

## **6.9 Removal of Personnel**

- (a) The Principal may, if it considers it reasonable to do so, direct the Contractor to cease using any Personnel in respect of any activity relating to the Services. The Contractor must remove that person within the time directed by the Principal.
- (b) The Contractor must:
  - (i) immediately notify the Principal if the Contractor becomes aware that a person involved in the provision of the Services on behalf of the Contractor has been charged with or has been convicted of a Relevant Offence; and
  - (ii) promptly take such action as the Principal requests in relation to that person's involvement in the provision of the Services, including ensuring that, if requested, that person ceases to be involved in the provision of the Services.

## **6.10 Licensing**

The Contractor must be, and must ensure that its Personnel are, registered or licensed to perform the Services in accordance with the requirements of any applicable Law, professional accreditation and Authority.

## **6.11 Legal compliance**

- (a) The Contractor must comply with, and ensure the Services comply with, all applicable Laws and Approvals.
- (b) The Contractor must at all times comply with the NSW Government Code of Practice for Procurement in connection with this Deed and the provision of the Services.

## **6.12 Contractual compliance**

The Contractor must comply with, and ensure the Services comply with, any agreements binding on the Principal to the extent that:

- (a) the Principal discloses any such agreements to the Contractor; and
- (b) the terms of such agreements are not directly inconsistent with the terms of this Deed.

## **6.13 Responsibility preserved**

The Contractor remains fully responsible for the Services despite the Principal's, the Principal's Representative's, or any of the Principal's other contractor's comments on, review of, approval of, acceptance of, or certification issued in connection with the Services (or any failure to do so).

## **6.14 Contractor's Representative**

- (a) The Contractor appoints and gives full authority to the Contractor's Representative to act on behalf of the Contractor in relation to this Deed.
- (b) The Contractor may appoint a replacement Contractor's Representative where that replacement is notified to the Principal and acceptable to the Principal acting reasonably.



- (c) An instruction or direction will be deemed to be an instruction or direction given to the Contractor where the instruction or direction has been given to the Contractor's Representative.

## **6.15 Access**

- (a) The Contractor's access to any premises owned or occupied by the Principal for the purposes of carrying out the Services is subject to the following conditions:
  - (i) the Contractor must ensure that its Personnel complies with the Principal's access, security and health and safety requirements when performing the Services;
  - (ii) if required by the Principal, the Contractor must give the Principal accurate information about the identity and job history of its Personnel; and
  - (iii) the Principal may for its sole convenience and at its absolute discretion deny or restrict access to the premises to any person who the Principal considers does not comply with the Principal's access, security and health and safety requirements.
- (b) The Contractor must:
  - (i) within a reasonable time of any request by the Principal, give access to, and at the Principal's request and cost, verified copies of, any Document or equipment created or used in connection with the Services; and
  - (ii) upon reasonable notice, permit the Principal access to the Contractor's premises in order for the Principal to inspect, discuss and assess any Document created or used in connection with the Services.
- (c) The Principal must comply with the Contractor's reasonable confidentiality, security and access requirements when accessing the Contractor's premises under clause 6.15(b).

## **6.16 Principal Contractor**

- (a) Where Item 11 of the Reference Schedule states the Contractor will be the Principal Contractor:
  - (i) the Principal engages the Contractor as the Principal Contractor for the Construction Work until the Construction Work is complete or the Principal ends the Contractor's engagement by written notice (including so that the Principal can engage another person as Principal Contractor);
  - (ii) the Principal authorises the Contractor to have management or control of the workplace on which the Construction Work is performed and to discharge the duties of a Principal Contractor under the Work Health and Safety Regulation 2017 (NSW); and
  - (iii) the Contractor accepts its engagement as the Principal Contractor and must perform the duties and functions of the Principal Contractor, regardless of whether its engagement is effective.
- (b) Where Item 11 of the Reference Schedule states the Contractor will not be the Principal Contractor, or the Principal ends the Contractor's engagement under clause 6.16(a)(i) for the purpose of engaging a different Principal Contractor, the Contractor:

- (i) acknowledges that the Principal Contractor for the Construction Work will be selected by the Principal; and
- (ii) must comply with any direction given by the Principal Contractor for the Construction Work in its capacity as the Principal Contractor.

### **6.17 Deliver Documentation**

The Contractor must deliver to the Principal upon request (including after termination of this Deed for any reason) all Documents:

- (a) provided by or on behalf of the Principal in connection with the Services (including the Principal's Material); or
- (b) prepared by the Contractor or others as part of the Documents to be provided to the Principal in connection with, or as part of, the Services,

but the Contractor may retain one copy of its own working notes created in the course of providing the Services to the extent necessary to comply with any Law or to maintain compliance with any recognised quality assurance system, provided that the Contractor securely and safely stores such working notes, marks them as confidential and complies with clause 16.

### **6.18 Reporting**

The Contractor must:

- (a) consult with the Principal in the manner and at the times set out in Item 12 of the Reference Schedule, and at such other times as the Principal reasonably requests, in relation to the provision of the Services. Without limitation, matters for consultation may include:
  - (i) the Program and progress of the performance of the Services;
  - (ii) the standard of performance of the Services; and
  - (iii) such other matters as the Principal identifies; and
- (b) keep the Principal fully informed as to any matters affecting the cost, timing or quality of the Services (including as to any matters on which the Principal may specifically request that the Contractor report) promptly upon the Contractor becoming aware of such matters.

### **6.19 Identification of the Services**

The Contractor must co-operate with the Principal in connection with the Principal's use of the Contractor's name in any marketing or promotion associated with a Project to the extent the Principal may reasonably require.

### **6.20 Alterations to approved documents**

The Contractor must not make any alteration to, addition to, or omission from the Deliverables or the Principal's Material supplied or approved by the Principal, without the written approval of the Principal.

## **6.21 Non-compliances**

- (a) The Principal may direct the Contractor to rectify any aspect of the Services, or any Deliverable, which does not comply with this Deed within a reasonable time specified by the Principal.
- (b) All costs and expenses incurred in performing rectification work under clause 6.21(a) are the responsibility of the Contractor and cannot be recovered from the Principal.
- (c) If the Contractor does not comply with the Principal's direction under clause 6.21(a), including within the time specified, the Principal may, after giving the Contractor 5 Business Days' notice, have the non-compliance rectified by itself or others.
- (d) The costs and expenses incurred by the Principal in carrying out or having carried out rectification work under clause 6.21(c) will be a debt due and payable from the Contractor to the Principal, and may be deducted by the Principal from amounts payable to the Contractor.

## **6.22 The Principal's policies**

The Contractor must comply with the ethical and other policy requirements of the Principal relating to the provision of the Services or a Project including:

- (a) the Principal's Statement of Business Ethics;
- (b) the Principal's Customer Charter; and
- (c) the policies specified in Item 13 of the Reference Schedule.

The Principal reserves the right to notify the Contractor at any time of additional policies with which the Contractor must comply.

## **6.23 NSW Government Policy on Aboriginal Participation in Construction**

- (a) Unless otherwise defined, capitalised terms used in this clause 6.23 have the meanings given in the APIC Policy.
- (b) If the Fee is over \$1,000,000.00 (excluding GST) or the Project is primarily directed to one or more Aboriginal communities (including where an Aboriginal community is the sole or predominant beneficiary, key user group or predominant stakeholder), the Contractor must comply with and it must ensure its Subcontractors comply with:
  - (i) the minimum aboriginal participation spend in Item 14 of the Reference Schedule;
  - (ii) the APIC Policy; and
  - (iii) any direction by the Principal in relation to the APIC Policy,including by providing all things within the time frames required by the APIC Policy and the Principal (as relevant).
- (c) The Aboriginal Participation Plan and Aboriginal Participation Report (if any) must be prepared in accordance with the APIC Policy and in the format prescribed by the NSW Procurement Board. Templates are available at:

## **6.24 Building Code**

Where Item 15 of the Reference Schedule states that the Project is federally funded this clause 6.24 applies and the Contractor must comply with the requirements set out in Annexure D (Building Code).

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# **7. PRINCIPAL'S MATERIAL AND PERFORMANCE MANAGEMENT**

## **7.1 Provision of the Principal's Material**

- (a) The Principal (or others acting for the Principal) may provide the Contractor with the Principal's Material relevant to the provision of the Services.
- (b) The Principal's Material will remain the property of the Principal.
- (c) If the Principal informs the Contractor of any Principal's Material in which third parties hold the copyright and of any conditions attaching to the use of that material, the Contractor must use that material only in accordance with those conditions.
- (d) The Contractor must protect and keep safe and secure all Principal's Material provided to it by the Principal, and may only use, copy or reproduce such Principal's Material for the purpose of performing the Services and performing the Contractor's other obligation under this Deed.
- (e) Upon the later of Completion of the Services, expiry of the Term or termination of this Deed, the Contractor must promptly return all Principal's Material to the Principal.
- (f) The Contractor must:
  - (i) act with reasonable care in relying upon or using the Principal's Material in connection with the provision of the Services; and
  - (ii) not rely on or use any part of any Principal's Material for any purpose to the extent that the Principal informs the Contractor that it is not to be so relied upon or used.

## **7.2 Review of the Principal's Material**

- (a) The Contractor must review the Principal's Material for Discrepancies and promptly notify the Principal if it discovers any Discrepancy.
- (b) If either party discovers any Discrepancy in the documents which make up this Deed or between this Deed and any Documents provided to the Contractor by or on behalf of the Principal which the Contractor is required by this Deed to use in performing the Services:
  - (i) the party must promptly give notice to the other; and
  - (ii) the Principal's Representative must instruct the Contractor as to the course it must adopt within 5 Business Days of the date of the notice under clause 7.2(b)(i).

### **7.3 No claim**

The Principal has no Liability in respect of any Principal's Material or information:

- (a) which the Principal informs the Contractor is not to be relied upon or used; or
- (b) to the extent that the Contractor fails to exercise reasonable care in relying upon or using that Principal's Material or information.

### **7.4 Performance Management**

The Contractor acknowledges and agrees that the Principal may at any time carry out performance monitoring and management activities in respect of the Services, as advised from time to time by the Principal to the Contractor at the Principal's absolute discretion.

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## **8. FEES PAYABLE FOR SERVICES**

### **8.1 Lump sum**

Where Part A of Annexure H (Fee and other amounts) states that the Contractor is to be paid for Services at a lump sum price, the Principal will pay the Contractor the amount specified in Part A of Annexure H (Fee and other amounts) in accordance with clause 11. Where provided for in Part A of Annexure H (Fee and other amounts), this amount may be a pro-rata or proportional payment of the lump sum fee and need not be aligned directly with the value of the Services completed in the period covered by the payment claim.

### **8.2 Rates**

Where Part A of Annexure H (Fee and other amounts) states that the Contractor is to be paid for Services by a schedule of rates (including rates per hour), the Principal will pay the Contractor the amount calculated by multiplying the measured quantity of each section, item or hour of work actually undertaken in accordance with this Deed by the applicable rate set out in Part A of Annexure H (Fee and other amounts) for that section, item or hour, in accordance with clause 11.

### **8.3 Variations**

The Principal will pay the Contractor for the Services the subject of any Variation based on the valuation for that Variation agreed or determined under clause 13 in accordance with clause 11.

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## **9. EXPENSES**

### **9.1 Outlays**

The Principal will reimburse the Contractor for Expenses incurred by the Contractor in providing the Services only if the Principal has agreed in writing to:

- (a) the specific items to which those Expenses relate; and
- (b) the amount which it will reimburse the Contractor, before the Expenses are incurred.

### **9.2 Cost Reimbursement**

Unless otherwise agreed in writing, Expenses will be reimbursed on the basis of cost to the Contractor without allowance for any profit or overhead.

### **9.3 Allowance for Credits**

The Principal will not reimburse the Contractor to the extent that it is entitled to any discount, refund, credit (including goods and services tax credit), reimbursement or other allowance in relation to the cost or expense.

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## **10. TAXES AND CHARGES**

### **10.1 Interpretation**

- (a) Unless otherwise stated in this Deed, amounts payable, and consideration to be provided, in connection with this Deed exclude GST.
- (b) Terms used in this clause 10 which are not defined in this Deed, but which are defined in the GST Law, have the meanings given in the GST Law.

### **10.2 Payment of GST**

If GST is payable on a supply made under this Deed, the recipient must pay the supplier an amount equal to the GST payable on that supply at the time the recipient pays or provides consideration for the supply.

### **10.3 Other taxes**

Other than as provided by clause 10.2, the Contractor is responsible for and must pay all taxes and charges payable in connection with the provision of the Services.

### **10.4 Recipient created tax invoices**

Unless the Principal notifies the Contractor otherwise in relation to a particular supply:

- (a) the Principal will issue to the Contractor a recipient created tax invoice for each taxable supply made by the Contractor to the Principal under this Deed; and
- (b) the Contractor must not issue a tax invoice in respect of any supply it makes to the Principal under this Deed.

### **10.5 Registration for GST**

- (a) The Contractor must be registered for GST purposes unless, before entering this Deed, the Principal has notified the Contractor that the Principal does not require the Contractor to be registered for GST.
- (b) Each party must notify the other party if it ceases to be registered for GST purposes or if it ceases to comply with any of the requirements of the GST Law in relation to issuing recipient created tax invoices (including any taxation ruling issued by a taxation authority relating to tax invoices).

### **10.6 Tax withholding**

Despite any other provision of this Deed, if the Principal is obliged to make any deduction or withholding on account of any tax, charge, rate, duty or impost however described in connection with this Deed as a result of not being provided with the Contractor's ABN or for any other reason, the Principal may withhold the relevant amount from the payment due to the Contractor and promptly pay that amount to the relevant authority. The Principal has no obligation to pay any additional amount to the Contractor in connection with any withheld amount.

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## **11. PAYMENTS**

### **11.1 Payment Claims**

- (a) On each Payment Claim Date the Contractor may provide to the Principal a Payment Claim entitled "Payment Claim" setting out:
- (i) details of the Services provided; and
  - (ii) the amount claimed in respect of those Services calculated in accordance with clause 8 or as otherwise specified in this Deed; and
  - (iii) any Expenses incurred during the relevant period,
- in each case as supported by:
- (iv) such information as the Principal requires to substantiate the claim; and
  - (v) a properly executed Contractor Statement and Supporting Statement in relation to the Payment Claim.
- (b) A Payment Claim does not create a tax liability under GST Law.

### **11.2 Payment Schedule**

- (a) Within 10 Business Days after receiving a Payment Claim, the Principal's Representative will issue to the Contractor a Payment Schedule evidencing the Principal's Representative's valuation of the money due from the Principal to the Contractor in relation to that Payment Claim and the reasons for any difference. In preparing the Payment Schedule, the Principal's Representative may deduct:
- (i) any amount claimed by the Principal from the Contractor under this Deed; and
  - (ii) the value of any of the Services for which payment is claimed that the Principal considers have not been performed in accordance with this Deed.
- (b) If an adjudication determination under the Security of Payment Act is made in connection with this Deed or the Services, the Principal's Representative may account to the parties for any money then due and payable in any subsequent Payment Schedule, including by setting off any amounts payable or paid pursuant to that determination.
- (c) The Principal may correct any error in, or otherwise modify, any previous Payment Schedule.

### **11.3 Provisional Sums**

- (a) This clause 11.3 will only apply where Provisional Sums are specified in Part C of Annexure H (Fee and other amounts).
- (b) The Principal may direct the Contractor in writing to proceed or not proceed with Provisional Sum work. The Contractor must not carry out Provisional Sum work, and the Principal has no obligation to pay for Provisional Sum work, unless the Principal has directed the Contractor in writing to proceed with the Provisional Sum work.

- (c) Where the Principal directs the Contractor in writing to proceed with Provisional Sum work, the Contractor must perform the Provisional Sum work and the Fees will be adjusted by the Principal (acting reasonably) as follows:
  - (i) deduct from the Fees the Provisional Sum for that work;
  - (ii) add to the Fees the additional, actual and direct costs incurred by the Contractor in performing the Provisional Sum work, excluding the cost of any supervisor or administrative personnel and overheads; and
  - (iii) add to the Fees the margin specified in Part C of Annexure H (Fee and other amounts) applied to the costs assessed by the Principal under clause 11.3(c)(ii).
- (d) The Contractor must:
  - (i) use its reasonable endeavours to minimise the costs it incurs in performing Provisional Sum work; and
  - (ii) provide reasonable evidence of costs under clause 11.3(c)(ii) with any claim for those costs and before the Contractor is entitled to payment of those costs.

#### **11.4 No other claims**

To the extent permitted by law, the Contractor agrees that:

- (a) all claims for payment for any Services must be made in accordance with this Deed; and
- (b) if this Deed is terminated, the Contractor will not be entitled to any payment other than as expressly provided for under this Deed.

#### **11.5 Payment times**

Subject to clauses 11.1(a) and 11.6, the Principal must pay the Contractor the amount set out in a Payment Schedule as payable by the Principal within 15 Business Days of being served with the Payment Claim.

#### **11.6 Set off**

The Principal may deduct from any payment otherwise due to the Contractor any amount the subject of a claim by the Principal against the Contractor.

#### **11.7 Effect of payment**

- (a) Any payment by the Principal for the Services is not an approval by the Principal of the Contractor's compliance with this Deed, nor evidence of the value of the Services.
- (b) Any failure by the Principal's Representative to set out in a Payment Schedule an amount which the Principal is entitled to retain, deduct, withhold or set-off (whether under this Deed or otherwise) will not prejudice the Principal's right to subsequently exercise that right to retain, deduct, withhold or set-off any amount.



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## **12. TIME FOR PROVISION OF SERVICES**

### **12.1 Time requirements**

The Contractor must:

- (a) subject to clause 4, commence and perform the Services from the Commencement Date, without delay, diligently and with due expedition; and
- (b) provide the Services:
  - (i) so as to achieve Completion by the Date for Completion;
  - (ii) in accordance with the Program (if any); and
  - (iii) to the extent there is no Program, the reasonable requirements notified by the Principal to the Contractor from time to time.

### **12.2 Program**

- (a) Where required by Item 17 of the Reference Schedule, the Contractor must provide the Principal for its approval a draft Program for the provision of the Services to be developed in accordance with this clause 12.2.
- (b) The draft Program will be developed by the Contractor in consultation with the Principal. The draft Program must be in a form acceptable to the Principal, and must:
  - (i) include the major activities to be undertaken by the Contractor in providing the Services;
  - (ii) specify the date for delivery for any Documents or other items required by the Services to be delivered to the Principal;
  - (iii) specify the resources the Contractor will commit to the provision of the Services to achieve Completion by the applicable Date for Completion; and
  - (iv) include any other matter reasonably required by the Principal.
- (c) The Contractor must promptly make any changes to the draft Program reasonably required by the Principal.
- (d) Once the draft Program has been approved by the Principal, it will be the agreed "Program".
- (e) Where the Principal has approved a Program under clause 12.2(d), the Contractor must promptly:
  - (i) prepare an updated draft Program to reflect any change to the Program; and
  - (ii) provide the Principal with the updated draft Program for the Principal's further approval under this clause 12.2.

### 12.3 Extension of time

- (a) The Contractor must promptly notify the Principal of any matter that delays or is likely to delay the provision of the Services and include in the notice details of the circumstances and extent or likely extent of the delay.
- (b) If the Contractor is or will be delayed in achieving Completion by the Date for Completion by:
- (i) an act, default or omission of the Principal, its employees, agents or contractors not required, permitted or contemplated by this Deed;
  - (ii) a Variation directed by the Principal under clause 13.1; or
  - (iii) any cause specified in Item 18 of the Reference Schedule,
- and the Contractor, within 10 Business Days after the cause of the delay occurs, gives the Principal a written request for an extension of the time of the Date for Completion identifying:
- (iv) the event or circumstance giving rise to the delay;
  - (v) the nature and extent of the delay;
  - (vi) the effect on the Program; and
  - (vii) the period, if any, by which, in the opinion of the Contractor, the Date for Completion should be extended; and
  - (viii) the action which the Contractor has taken or will take to avoid or mitigate the delay, or the reasons why the Contractor cannot avoid or mitigate the delay,
- the Contractor will be entitled to such an extension of the Date for Completion as is reasonably determined by the Principal and notified to the Contractor.
- (c) The Contractor will not be entitled to an extension of a Date for Completion unless it gives the Principal a notice in the form, and within the time, required by this clause 12.3.
- (d) The Contractor must take reasonable steps, including managing its resources, to avoid or mitigate any delay to Completion.
- (e) The Contractor will not be entitled to an extension of the Date for Completion to the extent:
- (i) the Contractor or its Personnel caused or contributed to the delay; or
  - (ii) the delay would have been avoided or mitigated if the Contractor complied with clause 12.3(d).
- (f) Notwithstanding that the Contractor may not be entitled to an extension of the Date for Completion, the Principal may by notice extend the Date for Completion for any reason to the benefit of the Principal.

## **12.4 Additional resources**

- (a) The Principal may, from time to time, require the Contractor to provide a resource schedule or updated resource schedule for the Services.
- (b) The Contractor must, if requested by the Principal, demonstrate that the Contractor's resources will be adequate to ensure the Services are performed in compliance with this Deed and Completion is achieved by the Date for Completion.
- (c) If the Contractor fails to demonstrate its resources are adequate under clause 12.4(b) to the Principal's reasonable satisfaction, the Principal may direct the Contractor to increase its resources so they are adequate. The Contractor must promptly comply with any such direction at its own cost.
- (d) The Principal's rights under this clause 12.4 are additional to, and do not exclude or limit, its other rights under this Deed and otherwise, including under clauses 6.8 and 12.6.

## **12.5 Completion**

- (a) The Contractor must promptly notify the Principal of the date on which it considers that Completion was achieved.
- (b) If, after receipt of a notice under clause 12.5(a), the Principal considers Completion has not been achieved, the Principal may notify the Contractor that the Principal does not agree with the Contractor's assessment and set out the Services to be completed before Completion is achieved.
- (c) If the Principal does not issue a notice under clause 12.5(b) within 10 Business Days of receipt of the Contractor's notice under clause 12.5(a), then Completion is deemed to have been achieved by the date notified by the Contractor.
- (d) The issue by the Contractor of a notice specifying Completion has been achieved (whether under this clause 12.5 or otherwise) or any deemed completion under clause 12.5(c), is not evidence or an admission by the Principal that the Services or any of them have been performed satisfactorily or in accordance with this Deed.

## **12.6 Liquidated damages**

- (a) Where Item 19 of the Reference Schedule states that liquidated damages are required, if Completion does not occur by the Date for Completion, the Contractor must pay to the Principal liquidated damages (if specified in Item 19 of the Reference Schedule) for each day of delay in achieving Completion.
- (b) The liquidated damages (if any) will be calculated in the manner set out in Item 19 of the Reference Schedule and will apply from and excluding the Date for Completion to and including the actual date of Completion.
- (c) The parties agree that the liquidated damages (if any) specified in Item 19 of the Reference Schedule will be a genuine pre-estimate of damages likely to be suffered by the Principal if Completion does not occur by the Date for Completion.
- (d) If:
  - (i) no amount of, or rate for, liquidated damages is set out in the Reference Schedule (or if "nil" or "not applicable" or some other form of words to similar effect is included, or if the liquidated damages in Item 19 of the Reference Schedule is left blank); or

- (ii) the Contractor's obligation to pay liquidated damages is held to be unenforceable for any reason whatsoever,

then the Contractor remains liable to the Principal for general damages if Completion does not occur by the Date for Completion.

## **12.7 Suspension of Services**

- (a) The Principal may, for its sole convenience and at its absolute discretion, immediately by notice suspend the provision of the Services and payments relating to those suspended Services regardless of whether there has been any default on the Contractor's part at any time. The Principal may only suspend payment in relation to those Services which are yet to be performed. Clause 11 will continue to apply in respect of previously performed Services.
- (b) If the Principal suspends the provision of the Services, the Contractor may claim payment from the Principal for the direct costs incurred by the Contractor as a result of the suspension of the provision of the Services, provided that the Contractor must minimise and mitigate any such direct costs. The Contractor may only claim payment for such direct costs under a Payment Claim issued under clause 11.1. This clause 12.7(b) does not apply where the suspension was a result of or made necessary by an act or omission of the Contractor or its Personnel, including a breach of this Deed.

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## **13. VARIATIONS**

### **13.1 Variations**

The Principal may direct the Contractor in writing to add to, omit from or vary the scope of or requirements for the Services at any time during the Term. The Contractor must comply with any such direction and the Fees payable the Services will be adjusted in accordance with clause 13.3.

### **13.2 Consequences of Variation or proposed Variation**

- (a) Before directing a Variation under clause 13.1, the Principal may request the Contractor to provide a Variation Proposal. The Variation Proposal must be provided by the Contractor to the Principal within a reasonable time nominated by the Principal.
- (b) If:
  - (i) the Principal directs a Variation under clause 13.1 and no request for a Variation Proposal in relation to that Variation has been made by the Principal under clause 13.2(a); or
  - (ii) the Contractor considers that the direction will affect:
    - A. the price (including a saving in price) for providing the Services;
    - B. the plant, labour, materials and goods to be used or not used as a result of the direction; or
    - C. the timing of the provision of the Services, including on the Program and Date for Completion,

the Contractor must, as soon as practicable, and in any event no later than 10 Business Days after the direction is given, provide the Principal with a Variation Proposal in relation to the additional or varied Services the subject of the direction.

- (c) A Variation Proposal must constitute an offer by the Contractor to comply with the Variation (or proposed Variation). The Principal is not obliged to accept any Variation Proposal.

### **13.3 Valuation of Variations**

Any Variation will be priced as follows:

- (a) where the Principal accepts the price or saving set out in the Variation Proposal, as set out in the accepted Variation Proposal. If the Principal accepts the Variation Proposal, the Principal will issue a notice for the Variation incorporating the terms of the Variation Proposal; and
- (b) if the Contractor does not provide a Variation Proposal or the Principal does not accept the price or saving set out in the Variation Proposal, the Principal may determine the value of the Variation by:
  - (i) applying the Variation Rates; or
  - (ii) if the Variation Rates are not applicable to the Variation, the Principal will reasonably determine the value of the Variation,

and the Principal will notify the Contractor of its determination.

### **13.4 Notification of changes in scope**

As soon as practicable after becoming aware of any matter which is likely to change or which has changed the scope of the Services, the Contractor must give written notice to the Principal detailing the circumstances and extent (or likely extent) of the change.

### **13.5 Entitlement to payment**

The Contractor will have no entitlement to claim, or to be paid for, a Variation unless the Principal directs the Variation in writing.

### **13.6 Omissions**

The Principal may direct a Variation which omits any part of the Services and may thereafter either perform such work itself or engage others to perform the omitted work. The Principal must give the Contractor 15 Business Days' prior written notice of its intention to omit a substantial portion of the Services.

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## **14. INSURANCE**

### **14.1 Principal Arranged Insurance**

- (a) The Principal will effect the Principal Arranged Insurance required to cover the Contractor as an insured in accordance with the requirements specified in Annexure A (Insurances) in relation to the provision of the Services.
- (b) The Principal may for its sole convenience and at its absolute discretion list other insureds on the Principal Arranged Insurance, including any other government entity with an interest in the Services.

- (c) The Principal must maintain the Principal Arranged Insurance required to cover the Contractor as an insured until the expiry of the Term.
- (d) Before the earlier of:
  - (i) 10 Business Days of the Date of Contract; or
  - (ii) the Contractor starting to provide the Services,

the Contractor must provide the Principal with all details reasonably requested by the Principal's Insurer for the purpose of the Principal effecting the Principal Arranged Insurance.
- (e) The Contractor acknowledges and agrees that any settlement paid pursuant to a claim under the Principal Arranged Insurance in relation to the Services may be paid directly to the Principal.
- (f) The Contractor must:
  - (i) ensure that it complies with the conditions of insurance under the Principal Arranged Insurance;
  - (ii) not do or omit to do anything which might vitiate, impair or derogate from the cover under the Principal Arranged Insurance or which might prejudice any claim under the Principal Arranged Insurance;
  - (iii) immediately notify the Principal, upon becoming so aware, of any event which may result in the Principal Arranged Insurance being varied, cancelled or avoided;
  - (iv) immediately notify the Principal in writing, upon becoming so aware, of any occurrence, claim, demand or circumstance that may give rise to a claim under the Principal Arranged Insurance;
  - (v) if a notification is made pursuant to clause 14.1(f)(iv), provide all information reasonably requested by the Principal, and comply with all reasonable requests made by the Principal, in relation to the occurrence, claim, demand or circumstance the subject of the notice;
  - (vi) keep the Principal fully informed of developments concerning any subsequent claim or claims upon the Principal Arranged Insurance; and
  - (vii) ensure that its Personnel keep the Contractor informed of any occurrence, claim, demand or circumstance that may give rise to a claim under the Principal Arranged Insurance so that the Contractor is able to comply with clause 14.1(f)(iv).
- (g) The existence of the Principal Arranged Insurance will not reduce, vary, or otherwise affect the Contractor's liabilities and obligations under this Deed.
- (h) The Contractor must pay or discharge the relevant deductible or excess set out in Annexure A (Insurances) under the heading "Principal Arranged Insurance" payable or retained by itself or the Principal in connection with any claim made in respect of any loss or liability caused by, or contributed to by, the Contractor and its Personnel covered by the Principal Arranged Insurance.

- (i) The Contractor can access the public and product the Principal Arranged Insurance terms at:

<http://www.rms.nsw.gov.au/business-industry/partners-suppliers/documents/specifications/pai-primary-ppl.pdf>

## **14.2 Contractor's insurances**

The Contractor must obtain and maintain the Contractor Arranged Insurances on the terms, for the risks identified, for the period of time and for the amounts specified in Annexure A (Insurances).

## **14.3 Evidence of insurances**

The Contractor must provide evidence of the insurances obtained and maintained under clause 14.2, in the form of a certificate of currency, to the Principal on request.

## **14.4 Failure to provide evidences of insurances**

If the Contractor breaches clause 14.2 or 14.3, the Principal may, in its absolute discretion, obtain the relevant Contractor Arranged Insurances and may:

- (a) recover the cost of doing so as a debt due from the Contractor; or
- (b) deduct the premiums for the relevant insurances from amounts payable to the Contractor.

## **14.5 Notification of claims**

The Contractor must:

- (a) provide full particulars to the Principal in writing of:
  - (i) any occurrence of an event that may give rise to a claim against any of the insurance policies obtained and maintained under, or as required by, this Deed; and
  - (ii) any claim or subsequent proceeding or action and developments concerning the claim,related to this Deed against any of the insurance policies obtained and maintained under, or as required by, this Deed promptly upon becoming aware of such matters;
- (b) give the Principal any further information regarding the claim as the Principal may require; and
- (c) take such steps as are necessary or appropriate to ensure that any Subcontractor engaged to provide Services in accordance with this Deed will, in relation to the Principal and in respect of an event or claim of a like nature arising out of or relating to the operations or responsibilities of the Subcontractor, take similar action to that which the Contractor is required to take under clauses 14.5(a) and 14.5(b).

## **14.6 Insurance claims procedure**

- (a) In relation to the Principal Arranged Insurance, the Contractor must:
  - (i) not, without the consent of the insurer, make any admission, offer, promise or payment in connection with any occurrence or claim; and

- (ii) promptly give all information and reasonable assistance to the Principal and the insurer as the Principal or the insurer, or its nominee, may require in the prosecution, defence or settlement of any occurrence or claim.
- (b) Nothing in this clause 14.6 prevents a party from taking immediate action to avoid loss of life or damage to property where that is reasonably necessary in the circumstances, and any such action will not prejudice the position of either party under the policies of insurance effected in respect of any loss or damage.

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## **15. LIABILITY**

### **15.1 Indemnity**

The Contractor indemnifies the Principal from and against all actions, claims, costs, losses, expenses and damages (including the costs of defending or settling any action or claim) in respect of:

- (a) loss of, loss of use of, or damage to property of the Principal;
- (b) personal injury (including death) or illness to any person or loss of, loss of use of, or damage to any property; and
- (c) claim for breach of confidence or privacy or misuse of Personal Information,

arising out of or in connection with any act or omission of the Contractor, its employees or agents in the carrying out of the Services.

The Contractor's liability to indemnify the Principal is reduced proportionally to the extent that a malicious or negligent act or omission of the Principal, or employees or agents (other than the Contractor) of the Principal, or a breach of this Deed by the Principal has contributed to the injury, damage or loss.

Part 4 of the *Civil Liability Act 2002* (NSW) does not apply to this Deed or any of the Services.

### **15.2 Limitation of liability**

- (a) Subject to clauses 15.2(b) and 15.3, the Contractor's total liability to the Principal arising out of or in connection with the Services (however arising) is limited to the amount set out in Item 21 of the Reference Schedule.
- (b) Subject to clause 15.3, clause 15.2(a) does not limit the Contractor's liability:
  - (i) in respect of liability which:
    - A. cannot be limited at law;
    - B. arises under clause 15.1, 16.3 or 17.5 or a breach of clause 18;
    - C. is due to the Contractor's or the Personnel's wilful or reckless misconduct, fraud or criminal conduct; or
    - D. arises in connection with the Contractor's abandonment of its obligations under this Deed;
  - (ii) to the extent that any insurer under a policy referred to in clause 14.2 seeks to exercise a right of subrogation against the Contractor;



- (iii) to the extent that (ignoring the application of clause 15.2(a)), the Contractor is entitled to recover that liability from any other third party (including any Personnel but excluding any insurer), or would have been entitled to recover for that liability but for any act or omission of the Contractor;
- (iv) to the extent insurance proceeds are recoverable by the Contractor in respect of that liability under any insurance that it is required to effect and maintain under this Deed, or would have been recoverable if the Contractor had effected and maintained insurance as required by this Deed, complied with the insurance policies and taken all reasonable steps to recover the proceeds;
- (v) to pay interest or other amounts which the Deed expressly treats as recoverable debts;
- (vi) for liquidated damages under clause 12.6 or general damages referred to in clause 12.6(d); or
- (vii) for personal injury (including death) or illness to any person in any circumstances,

and those liabilities will not be included in any calculation of the Contractor's total liability under clause 15.2(a).

### **15.3 Exclusion of certain kinds of loss**

(a) Subject to clause 15.3(b), each party will not be liable to the other party for:

- (i) loss of business opportunity;
- (ii) loss of goodwill;
- (iii) loss of contracts (other than this Deed);
- (iv) loss arising from business interruption;
- (v) loss of or corruption of data except any data provided as part of the Deliverables;
- (vi) loss of anticipated savings; or
- (vii) the cost of capital or other financing costs,

arising out of or in connection with this Deed (however arising).

(b) Clause 15.3(a) does not exclude a party's liability:

- (i) which cannot be excluded at law;
- (ii) in the case of the Contractor, which arises under clause 15.1, 16.3 or 17.5 or a breach of clause 18;
- (iii) arising out of or in connection with that party's wilful or reckless misconduct, fraud, criminal conduct or gross negligence;
- (iv) to pay interest or other amounts which this Deed expressly treats as recoverable debts;

- (v) in the case of the Contractor, for liquidated damages under clause 12.6 or general damages referred to in clause 12.6(d); or
- (vi) arising out of or in connection with a substantial breach by that party of this Deed.

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## **16. CONFIDENTIALITY**

### **16.1 Confidential information**

- (a) Subject to clause 16.1(b), the Contractor must:
  - (i) keep confidential this Deed and any information relating to the Services and any discussions concerning this Deed; and
  - (ii) ensure that each of its officers, employees and Subcontractors complies with the terms of clause 16.1(a)(i).
- (b) The Contractor is not obliged to keep confidential any information:
  - (i) which is in the public domain through no default of the Contractor; or
  - (ii) the disclosure of which is:
    - A. required by Law;
    - B. given with the written consent of the Principal; or
    - C. given to a court in the course of proceedings to which the Contractor is a party.
- (c) This clause 16.1 will survive the termination or expiry of this Deed.

### **16.2 Return of Confidential Information**

On the earlier of a request by the Principal, termination of this Deed, expiry of the Term or Completion of the Services, the Contractor must immediately deliver to the Principal or destroy all Documents in the Contractor's power or control relating to the Services except:

- (a) to the extent the Contractor requires the Documents to continue to perform this Deed;
- (b) the Contractor may retain a copy of the Documents to the extent required by law or by its reasonable archiving and risk management policies; and
- (c) the Principal will not be required to return any confidential information incorporated in any Deliverables or which it requires to enjoy the benefit of the Services or the Deliverables.

### **16.3 Confidentiality Deed Poll for sensitive Projects**

If Item 22 of the Reference Schedule states or the Principal at any time directs, that a Project requires the Contractor to enter into a confidentiality deed poll, the Contractor must, no later than the Commencement Date or 5 Business Days after the date of the direction (as applicable), provide to the Principal a Confidentiality Deed Poll duly and properly executed by the Contractor.

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## **17. OWNERSHIP OF DOCUMENTS AND INTELLECTUAL PROPERTY**

### **17.1 Ownership of new Intellectual Property Rights**

Subject to clause 17.3, all Intellectual Property Rights which are created or developed by the Contractor in connection with the provision of the Services will vest absolutely in, and are assigned by the Contractor to, the Principal from the date they are created or developed. The Contractor agrees to do all things necessary to give effect to this clause.

### **17.2 Licence to Contractor**

The Principal grants to the Contractor and its Subcontractors who the Principal has consented to in accordance with clause 19, a non-exclusive, non-transferrable, royalty free licence to use, reproduce and modify the Principal's IP and Third Party IP only to the extent required to provide the Services or meet the Contractor's other obligations under this Deed. Except as expressly stated in this Deed, no licence or right to Intellectual Property Rights is transferred to or created for the benefit of the Contractor or any Personnel.

### **17.3 Ownership of existing Intellectual Property Rights**

All Intellectual Property Rights in those aspects of the Services and the Documents which:

- (a) were created by the Contractor before the date the Contractor commences the Services; or
- (b) are developed independently of this Deed and the Services,

remain the property of the Contractor.

### **17.4 Licence to the Principal**

The Contractor grants the Principal a perpetual, non-exclusive, transferable, irrevocable, royalty-free licence to:

- (a) use, reproduce, add to, modify and communicate to the public all Intellectual Property Rights not assigned to the Principal under clause 17.1 which are incorporated in or necessary to use or enjoy the benefit of any Deliverable or the Services in any manner;
- (b) permit any person to assist the Principal to do any of the things referred to in clause 17.4(a); and
- (c) sublicense any of the rights described in clause 17.4(a) or clause 17.4(b) to any person,

for any purpose. The Principal may for its sole convenience and at its absolute discretion assign this licence or license these rights to any entity that becomes entitled to any interest in the Services or the Deliverables to which the licence relates.

### **17.5 Indemnity**

The Contractor indemnifies the Principal against any Liability arising from others making any claims against the Principal in respect of the ownership of, or rights to use, Intellectual Property Rights the Contractor uses, develops or creates in connection with the provision of the Services including Intellectual Property Rights vesting in the Principal under clause 17.1 or

licensed to the Principal under clause 17.4 or arising out of the Principal's use of the Deliverables in accordance with this Deed.

## **17.6 Ownership of Documents**

All Documents provided to the Principal by the Contractor in connection with the Services will become the Principal's property when provided, and the Contractor must not use them or any information (about or belonging to the Principal) contained in them without the Principal's written consent other than for the purposes of providing the Services to the Principal.

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## **18. MORAL RIGHTS**

### **18.1 Warranty**

The Contractor warrants to the Principal that:

- (a) all individuals who may have moral rights (as that expression is defined in the *Copyright Act 1968* (Cth)) in any Documents provided as part of the Services or any works constructed in accordance with that material have validly provided their written consent (pursuant to section 195AWA of that Act) to the Principal (or any other person); and
- (b) the consent referred to in clause 18.1(a) allows the Principal (and others) to deal with that material or those works (including by way of destruction or alteration) and without attribution of authorship in such manner as the Principal may for its sole convenience and at its absolute discretion decide without being held to have infringed any moral right of the individual.

### **18.2 Existing moral rights**

Where the Services relate to any demolition or redevelopment of existing improvements or the use of any material in relation to which moral rights may exist, the Contractor must, in providing the Services, consider the obligations imposed by the *Copyright Act 1968* (Cth) in relation to moral rights and ensure that nothing is done which may place the Principal in breach of those obligations.

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## **19. SUBCONTRACTING**

### **19.1 Consent to subcontracting**

The Contractor must not subcontract the provision of the Services without the written consent of the Principal.

### **19.2 Responsibility preserved**

Any subcontracting of the Services by the Contractor:

- (a) will not relieve it from the full responsibility for the provision of the Services;
- (b) must be on terms which are consistent with its obligations to the Principal; and
- (c) will result in the Contractor being liable to the Principal for acts or omissions of its Subcontractors as if they were its own acts or omissions.

### **19.3 Co-ordination**

The Contractor must ensure that:

- (a) the services of its Subcontractors are co-ordinated to meet the Principal's requirements for the Services; and
- (b) all its Subcontractors comply with all obligations imposed on the Contractor in this Deed.

### **19.4 Conditions of consent**

A condition of the Principal's consent to any subcontracting of the Services by the Contractor will be that the Subcontractor must be subject to the following conditions of this Deed:

- (a) equivalent indemnity and insurances provisions as apply to the Contractor under this Deed; and
- (b) those provisions in this Deed equally relevant to the Subcontractor.

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## **20. ASSIGNMENT**

### **20.1 Contractor**

- (a) The Contractor must not assign, novate or encumber its rights or obligations under this Deed without the written consent of the Principal, which may be granted subject to conditions that the Principal may impose in its absolute discretion.
- (b) For the purposes of clause 20.1(a) the Contractor will be deemed to have assigned its rights and obligations under this Deed if at any time the power (whether formal or informal, whether or not having legal or equitable force and whether or not based on legal or equitable rights):
  - (i) to exercise or control the right to vote attached to 50% or more of the issued shares or stock in the Contractor;
  - (ii) to dispose of or exercise a right of disposal in respect of 50% or more of the issued voting shares or stock in the Contractor; or
  - (iii) to dominate or control the financial or operating policies of the Contractor (whether alone or in concert with others, and whether by any act or omission or otherwise),

resides with any persons other than those holding that power on the date of this Deed.

### **20.2 Principal assignment to another Government body**

The Principal may, for its sole convenience and at its absolute discretion, assign, novate or otherwise deal with its rights and obligations to any government department, agency authority or state owned corporation without the Contractor's consent and the Contractor must promptly execute any document reasonably required by the Principal to give effect to the assignment, novation or other dealing.

### **20.3 Other Principal assignment**

Subject to clause 20.2, the Principal must not assign or novate its rights or obligations under this Deed without the written consent of the Contractor which must not be unreasonably withheld or delayed.

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## **21. PRINCIPAL'S REPRESENTATIVE**

### **21.1 Principal's Representative's directions**

The Principal's Representative may give written directions to the Contractor with regard to the provision of the Services and the Contractor must comply with all directions given by the Principal's Representative to the extent that such directions are not inconsistent with the terms of this Deed.

### **21.2 Authority**

The Principal's Representative has full authority to act on behalf of the Principal in respect of the subject matter of this Deed. An instruction or written direction given by the Principal's Representative will be deemed to be an instruction or direction given by the Principal.

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## **22. CONFLICT OF INTEREST**

### **22.1 Warranty**

The Contractor warrants that it is not aware of any reason why the provision of the Services will, or may, place it in a position of conflict having regard to any other interest or duty of the Contractor or any of its Personnel.

### **22.2 Disclosure**

The Contractor must fully disclose to the Principal any such conflict of interest or possible conflict of interest immediately upon becoming aware of the conflict or possible conflict of interest.

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## **23. TERMINATION**

### **23.1 Termination for convenience**

The Principal may, for its sole convenience and in its absolute discretion, terminate this Deed at any time and regardless of whether there has been any default by the Contractor, by a minimum of 20 Business Days' notice to the Contractor.

### **23.2 Termination for breach by Contractor**

The Principal may terminate this Deed, or take the whole or any part of the performance of the Services out of the Contractor's hands, immediately by notice to the Contractor if:

- (a) the Contractor breaches this Deed and the Contractor fails to remedy the breach or overcome its effects on the Principal within 10 Business Days, or such longer time as the Principal states, of receiving a notice from the Principal requiring the breach to be remedied;
- (b) the Contractor becomes Insolvent;

- (c) the Contractor has not obtained, or provided evidence of, the Contractor Arranged Insurances in accordance with clause 14 within 10 Business Days after the Date of Contract; or
- (d) the Contractor breaches:
  - (i) the confidentiality requirements under clause 16;
  - (ii) the restrictions on assignment under clause 20.1;
  - (iii) the conflict of interest requirements under clause 22; or
  - (iv) the privacy requirements under clause 24.

### **23.3 Termination for breach by the Principal**

The Contractor may terminate this Deed by notice to the Principal if:

- (a) the Principal has failed to pay an amount due to the Contractor under this Deed;
- (b) the amount referred to in clause 23.3(a) is not the subject of a dispute;
- (c) the Contractor serves a notice on the Principal:
  - (i) stating that the amount referred to in clause 23.3(a) is overdue;
  - (ii) stating that if the amount referred to in clause 23.3(a) is not paid within 25 Business Days of receipt of the notice, the Contractor proposes to exercise its rights under this clause 23.3; and
  - (iii) attaching evidence of the amount overdue, and
- (d) the Principal has not made payment of the amount referred to in clause 23.3(a) within 25 Business Days of receipt of the notice referred to in clause 23.3(c).

### **23.4 Rights of the Principal**

- (a) Termination of this Deed will not affect any other right or remedy of the Principal, including the right of the Principal to engage others to carry out or complete the Services.
- (b) Without limiting the Principal's other rights, where the Principal takes Services out of the Contractor's hands under clause 23.2:
  - (i) to the extent permitted by law, no further amount is payable by the Principal to the Contractor for the Services;
  - (ii) the Principal may have those Services performed by itself or others;
  - (iii) the Contractor must pay the Principal the costs and expenses incurred by the Principal in performing or having performed the Services to the extent such costs and expenses exceed the amount which would have been payable to the Contractor for the Services;
  - (iv) the Principal may demand payment of amounts under clause 23.4(b)(iii) progressively as those amounts are incurred; and

- (v) amounts demanded under clause 23.4(b)(iv) will be a debt due and payable from the Contractor to the Principal 10 Business Days after the Principal gives the demand and provides reasonable evidence of the costs and expenses.

### **23.5 Rights exhaustive**

The rights of termination specified in this clause 23 are the only rights of termination available to the parties and any common law rights of termination are excluded.

### **23.6 Adjustment of Fee on termination**

- (a) Where this Deed is terminated under clause 23.1, the Principal must pay the Contractor for Services provided up until the date of termination.
- (b) Where this Deed is terminated under clause 23.2, the Principal must pay the Contractor for the Services performed by the Contractor as at the date of termination after first deducting the Principal's reasonable assessment of:
  - (i) amounts which are reasonably likely to be payable by the Contractor under clause 23.4(b); and
  - (ii) any other loss or damage suffered, or reasonably likely to be suffered, by the Principal as a consequence of the termination of this Deed, or breach by the Contractor.
- (c) Other than as set out in clauses 23.6(a) or 23.6(b), the Contractor will have no claim against the Principal for any expenses or losses (including loss of profit or opportunity) arising from the termination of this Deed under clause 23.1.

### **23.7 Contractor's continuing liability**

Termination of this Deed by the Principal does not release the Contractor from liability in respect of any breach of, or non-performance of any obligation pursuant to, this Deed.

### **23.8 Return of property**

On termination or expiry of this Deed, the Contractor must immediately return to the Principal all Documents and other property provided to the Contractor by the Principal under this Deed and all Deliverables which have not been handed over to the Principal or which are otherwise in the Contractor's possession.

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## **24. PRIVACY**

### **24.1 Compliance**

The Contractor must comply with all relevant Privacy Laws when providing the Services, including obtaining the consent of each individual where Personal Information of that individual is collected, used or disclosed.

### **24.2 Collection on behalf of the Principal**

Where the Contractor is required to collect Personal Information on behalf of the Principal, the Contractor must comply with the *Privacy and Personal Information Protection Act 1998 (NSW)* as if it were the Principal collecting the Personal Information.



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## 25. RECORDS

### 25.1 Maintaining Records

The Contractor must:

- (a) maintain all necessary records and documentation relating to this Deed and the Services, including records required to be maintained:
  - (i) by the *State Records Act 1998* (NSW) as if the Contractor was bound by that Act and
  - (ii) any other law; and
- (b) permit the Principal or its representatives to inspect the Records or other Documents at any time on reasonable notice to ensure compliance with the Contractor's obligations under this Deed.

### 25.2 Auditing Records

- (a) The Principal may appoint an Auditor to conduct regular or one-off Audits of the Contractor's performance in providing the Services and complying with its other obligations under this Deed.
- (b) The Contractor must make available for inspection for an Audit all such records as the Auditor may reasonably require regardless of where they are located or the manner in which they are stored. The Auditor will be entitled to take copies of records as may reasonably be required for the purposes of the Audit.
- (c) The Contractor must provide all appropriate resources and all reasonable assistance required by the Auditor and fully co-operate in good faith.
- (d) Each party will bear its own costs in respect of an Audit. The Principal will bear the Auditor's costs except if the Audit reveals a material non-compliance with this Deed in which case the Contractor must pay the Auditor's costs.
- (e) If the Audit reveals any non-compliance with this Deed then the Contractor must remedy that non-compliance within such time as the Principal reasonably requires and must advise the Principal in writing what steps the Contractor has taken to ensure that the identified non-compliance will not re-occur.
- (f) The Principal must ensure the Auditor complies with the Contractor's reasonable access requirements when performing any Audit under this clause 25.2 at the Contractor's premises.

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## 26. DISPUTES

### 26.1 Claim Notice

If a party claims that a dispute has arisen under this Deed (**Claimant**), that party must give a notice to the other party (**Respondent**) stating the matters in dispute and designating as its representative a person (other than the party's representative under this Deed) to negotiate the dispute (**Claim Notice**).

## 26.2 Negotiation

- (a) Within 10 Business Days of receiving the Claim Notice, the Respondent must notify the Claimant of its representative (being a person other than the party's representative under this Deed) to negotiate the dispute.
- (b) The nominated representatives must:
  - (i) meet to discuss the matter in good faith within 10 Business Days after service by the Respondent of notice of its representative; and
  - (ii) use all reasonable endeavours to settle or resolve the dispute within 15 Business Days after they have met.

## 26.3 Expert determination

- (a) If a dispute referred to in a Claim Notice is not resolved within 40 Business Days after the issue of the Claim Notice, either party may give to the other party a written notice requiring the dispute to be referred to expert determination in accordance with this clause (**Dispute Notice**).
- (b) If a Dispute Notice is served, the dispute is referred to expert determination to be conducted by, subject to clause 26.3(m):
  - (i) an expert agreed by the parties; or
  - (ii) if the parties cannot agree on an expert within 15 Business Days after the Dispute Notice has been served, an expert nominated by the Resolution Institute.
- (c) When the person to be the expert has been agreed or nominated, the Principal, on behalf of both parties, must engage the expert by a letter of engagement (with a copy to the Contract) that sets out:
  - (i) the relevant Dispute Note;
  - (ii) the expert's fees;
  - (iii) the provisions of this clause 26.3 and the Annexure E (Rules for the Expert Determination Process & Code of Conduct for an Expert); and
  - (iv) any other matters which are relevant to the engagement.
- (d) If the expert appointed under clause 26.3(c):
  - (i) is unavailable;
  - (ii) declines to act; or
  - (iii) does not respond within 10 Business Days to a request by the Principal for advice as to whether he or she is able to conduct the determination,the Principal may request the Resolution Institute nominate a further expert.
- (e) Expert determination pursuant to clause 26.3(b) will be conducted in accordance with Annexure E (Rules for the Expert Determination Process & Code of Conduct for an Expert).

- (f) Each party must do all things necessary on its part for the proper conduct of the expert determination.
- (g) In determining the dispute the expert will be acting as an expert and not as an arbitrator.
- (h) The expert must determine the dispute or difference between the parties within 80 Business Days of the date of the Dispute Notice (or the first Dispute Notice, if the expert determination relates to more than one Dispute Notice).
- (i) The expert's determination will be final and binding, except where:
  - (i) if the dispute relates to, involves or includes a monetary amount:
    - A. the difference between the aggregate of each amount asserted by a Claimant in the expert determination to the aggregate of those amounts determined by the expert is more than the monetary amount specified in Item 24(a) of the Reference Schedule; or
    - B. the aggregate of each amount asserted by each Claimant in the expert determination is more than the monetary amount specified in Item 24(b) of the Reference Schedule; or
  - (ii) the dispute does not relate to, involve or include a monetary amount,

and either party gives notice of appeal to the other party within 10 Business Days of receiving such determination.
- (j) If the expert does not make a determination within the time specified in clause 26.3(h), either party may give the other party a notice of appeal, in which case the jurisdiction of the expert shall lapse and clause 26.3(k) will apply.
- (k) If a notice of appeal is given under clause 26.3(i) or clause 26.3(j) the dispute may be referred to litigation by a written notice by either party to the other party.
- (l) The Principal may, at its absolute discretion, require any dispute the subject of a Dispute Notice which has not been determined by an expert under this clause 26.3 (**Unresolved Dispute**) to be heard together or consolidated with any other Unresolved Dispute, by giving written notice to the Contractor and the relevant expert (if any) stating the Unresolved Disputes which are to be heard together or consolidated.
- (m) If the Principal gives a notice under clause 26.3(l), then in respect of the Unresolved Disputes referred to in that notice:
  - (i) if an expert has not been appointed in respect of any of those Unresolved Disputes, then those Unresolved Disputes must be consolidated or heard together by a single expert appointed under this clause 26.3. If more than one expert has been nominated under clauses 26.3(b)(ii) or 26.3(c), the Principal may in its absolute discretion nominate which of those experts will determine the Unresolved Disputes; and
  - (ii) if an expert has been appointed in respect of any of those Unresolved Disputes, then:

- A. those Unresolved Disputes must be consolidated or heard together by the expert nominated by the Principal in its absolute discretion;
- B. if the expert considers it appropriate, and the Principal has given its written consent, he or she may vary the time referred to in clause 26.3(h), clause 26.3(j), or any time referred to in Annexure E (Rules for the Expert Determination Process & Code of Conduct for an Expert). The Principal may withhold its consent in its absolute discretion; and
- C. the jurisdiction of any expert other than the expert referred to in clause 26.3(m)(ii)A to determine those Unresolved Disputes will lapse.

#### **26.4 Continued Performance**

The Contractor must continue to provide the Services in accordance with this Deed even if there is a dispute between the parties.

#### **26.5 Urgent relief**

Nothing in this clause 26 will prejudice the right of a party to seek urgent injunctive or declaratory relief from a court.

#### **26.6 Survival**

This clause 26 will survive the termination or expiry of this Deed.

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### **27. GENERAL**

#### **27.1 Waiver**

The Contractor acknowledges that no waiver by the Principal of a breach of any term of this Deed will be a waiver of any other breach of that or any other term.

#### **27.2 Publicity**

Without limiting clause 16, the Contractor:

- (a) must not disclose any information concerning the Principal, the Services or this Deed:
  - (i) through any communications media; or
  - (ii) by any press release, advertisement, information, publication, document, article or promotional material,without the Principal's written approval;
- (b) must refer any media enquiries concerning the Principal, the Services or this Deed to the Principal's Representative; and
- (c) must ensure all consultants, Subcontractors and suppliers engaged by the Contractor for the performance of the Services comply with the requirements of this clause.

### 27.3 Applicable law

The law of New South Wales applies.

### 27.4 Clauses survive termination

- (a) Any provision of this Deed which expressly or by implication from its nature is intended to survive the termination or expiry of this Deed and any rights arising on termination shall survive, including any warranties, guarantees, licences or indemnities given under this Deed.
- (b) No provision of this Deed which is expressed to survive the termination or expiry of this Deed will prevent any other provision of this Deed, as a matter of interpretation, also surviving the termination or expiry of this Deed.

### 27.5 Notices

- (a) A notice given under or in connection with this Deed must be given to the Principal's Representative or the Contractor's Representative (as applicable).
- (b) A notice must be in writing and delivered, posted by prepaid express post or sent by email to the relevant address in Item 10 or Item 23 of the Reference Schedule.
- (c) A notice is taken to be given in the case of:
  - (i) delivery by hand, on the day of delivery;
  - (ii) prepaid express post, on the second Business Day after the date of posting; and
  - (iii) email, at the local time (in the place of receipt of that email) that would be determined if section 13A of the *Electronic Transactions Act 2000* (NSW) were to apply.
- (d) In relation to any notice under clause 23 or 26:
  - (i) the sender will only be permitted to give a notice by email under clause 27.5(b) if the notice is concurrently delivered by hand or prepaid express post in accordance with clause 27.5(b); and
  - (ii) the notice will only be taken to be given at the same time as the concurrent notice is taken to be given under clause 27.5(c)(i) or 27.5(c)(ii) (as applicable).
- (e) At any time and from time to time the Principal's Representative may notify the Contractor that an electronic platform will be used for giving notices under or in connection with this Deed. The Principal's Representative's notice will set out:
  - (i) the name of the relevant electronic platform;
  - (ii) the commencement date for use of the electronic platform;
  - (iii) any password, login details or similar information required for the Contractor to use the electronic platform; and
  - (iv) any other information reasonably necessary for the use and service of notices via the electronic platform.

- (f) On and from the commencement date for use of the electronic platform referred to in clause 27.5(e), all notices must:
  - (i) be sent through the electronic platform in accordance with the requirements set out in clause 27.5(e); and
  - (ii) in the case of notices listed in clause 27.5(d) a copy of the notice sent through the electronic platform must be printed and delivered or posted to the relevant address as set out in clause 27.5(b) (in which case the deemed time of receipt for the notice will be the deemed time of receipt of delivered or posted notice and not the time of receipt through the electronic platform).
- (g) A notice issued pursuant to clause 27.5(f)(ii) must be a printed copy of the notice sent through the electronic platform and in the event that a notice under clause 27.5(f)(ii) is not a printed copy, neither notice will constitute a valid notice.
- (h) With respect to notices sent by email or through the electronic platform, an attachment to a notice will only form part of a notice if it is uploaded to the electronic platform in:
  - (i) pdf format;
  - (ii) a format compatible with Microsoft Office; or
  - (iii) such other format as may be agreed between the parties in writing from time to time.

## **27.6 Government information disclosure**

The Contractor acknowledges that the Principal may be required to publish certain information concerning this Deed in accordance with sections 27 – 35 of the *Government Information (Public Access) Act 2009* (NSW). If the Contractor reasonably believes that any part of this Deed contains information which is commercial-in-confidence or could reasonably be expected to affect public safety or security, the Contractor should immediately advise the Principal in writing, identifying the provisions and providing reasons so that the Principal may consider seeking to exempt those provisions from publication.

The Contractor acknowledges that the Principal may from time to time be required to disclose certain information in accordance with the requirements of the *Government Information (Public Access) Act 2009* (NSW) and that the Contractor must indicate what, if any, information is characterised as being commercially sensitive information for the purposes of that Act.

## **27.7 Other Government bodies**

The Contractor acknowledges that the Principal may make information concerning the Contractor (including any information provided by the Contractor to the Principal and any information relating to the Contractor's performance under this Deed) available to the NSW Government and its departments, agencies, authorities and state owned corporations.

## **27.8 Exchange of information**

The Contractor acknowledges that information about the Contractor from any source, including substantiated reports of unsatisfactory performance, may be taken into account by the Principal, Austroads and other road agencies, the NSW Government and its departments, agencies, authorities and state owned corporations in considering whether to offer the Contractor future opportunities for work.

## **27.9 Defence to defamation**

The Contractor agrees that the Principal will be entitled to rely on the defence of qualified privilege for the purposes of section 30 of the *Defamation Act 2005* (NSW) in relation to the provision of information under clauses 27.7 and 27.8.

## **27.10 Release**

The Contractor releases the Principal from and against any Liability arising out of its provision of information under clauses 27.6, 27.7 and 27.8 or the use of such information by the NSW Government and its relevant departments, agencies, authorities and state owned corporations.

## **27.11 Related body corporates**

The Contractor must provide the Principal in writing with details of any related body corporate, or any other private sector entity in which the Contractor has an interest, that will be involved in carrying out any of the Contractor's obligations under this Deed or that will receive a benefit under this Deed.

## **27.12 Severability**

If any provision of this Deed is illegal, void, invalid or unenforceable for any reason, all other provisions which are self-sustaining and capable of separate enforcement will, to the maximum extent permitted by law, be and continue to be valid and enforceable.

## **27.13 Jurisdiction**

Each party irrevocably:

- (a) submits to the non-exclusive jurisdiction of the courts of the State of New South Wales, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought at any time relating to this Deed; and
- (b) waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 27.13(a).

## **27.14 If the Contractor is a Trustee**

If the Contractor enters into this Deed as a trustee for a trust (**Contractor Trust**), without limiting any other provision of this Deed, the Contractor represents and warrants that:

- (a) the Contractor is the only trustee of the Contractor Trust;
- (b) the Contractor has unqualified power under the constitute of the Contractor Trust to perform its obligations under this Deed;
- (c) no action is currently taking place or pending to remove the Contractor as trustee of the Contractor Trust or to appoint additional trustees of the Contractor Trust;
- (d) the Contractor has entered into this Deed in its capacity as trustee of the Contractor Trust and for the benefit of the beneficiaries of the Contractor Trust;
- (e) the Contractor has the right to be fully indemnified out of the assets of the Contractor Trust in respect of the obligations incurred by it in relation to this Deed;

- (f) there is no subsisting breach of the constitution of the Contractor Trust;
- (g) the Contractor Trust has not been terminated and there is no action pending to terminate the Contractor Trust; and
- (h) the Contractor must seek the consent of the Principal, which must not be unreasonably withheld or delayed, before making any amendment to the Contractor Trust or the relevant trust deed.

### **27.15 Joint Venture Agreement Amendments**

If the Contractor entered into this Deed as an unincorporated joint venture entity (**JV**), the Contractor:

- (a) warrants that it provided to the Principal a copy of the duly executed JV agreement (**JV Agreement**) before the Date of Contract; and
- (b) must seek the consent of the Principal, which must not be unreasonably withheld or delayed, before making any amendment to the JV Agreement.



# Professional Services Contract (Construction Industry)

## SCHEDULE 1 – REFERENCE SCHEDULE

**[GUIDANCE NOTE: This schedule is to be completed by filling in the boxes with details relevant to the specific engagement. Where suggested wording has been included, you are free to delete or amend it after careful consideration. If you make any changes (other than completing default items), please ensure you read each Item against the clauses listed for that Item and check that the changes work in context. These notes should be deleted before this document is issued. Do not change any wording which is outside a bordered box unless the wording change has been approved by Legal Branch through Commercial Services, Infrastructure and Place ]**

**Item 1 – Commencement Date  
(clause 1.1)**

The Contractor is to commence providing the Services on:

[insert date the Contractor is to commence the Services.]

**Item 2 – Contractor  
(clause 1.1)**

The Contractor is:

Name: [Insert Contractor's full legal title]  
ABN / ACN: [Insert ABN and ACN]  
Address: [Insert address]

**Item 3 – Date for Completion  
(clause 1.1)**

The Contractor is to complete the Services by

[insert date on which the Services are to be completed.]

**Item 4 – Project  
(clause 1.1)**

The Services relate to the following Project:

[Insert short description of Project.]

**Item 5 – Term  
(clause 2.2)**

The Term is:

The period commencing on the Date of Contract and expiring 12 months after the date of Completion.  
**[Guidance Note: The default value is 12 months after the date of Completion and any length of time greater than this period will require approval from Commercial Services.]**

**Item 6 – Undertaking  
(clause 1.1 and 2.3)**

The Contractor is required to provide an Undertaking:

[Yes / No]  
[Strike out the alternative that does not apply.]  
**[Guidance Note: security will be required for Services of high value or high risk projects. Please refer to the Engineering Contracts Manual for guidance.]**

The amount of the Undertaking is:

[\$insert dollar amount]  
[Guidance Note: The amount of the Undertaking must be a hard dollar amount calculated based on 5% of the estimated Fee.]

**Item 7 – Service Stages (clause 1.1 and 3.3)**

The following Service Stages apply:

[Insert details of any stages to the Services. If there are any stages then include details of the fees for each Service Stage.]

**Item 8 – Approvals to be obtained and maintained by the Principal (clause 3.4(b))**

The Principal is responsible for obtaining and maintaining the following Approvals:

[Insert details of Approvals to be obtained and maintained by the Principal (if any).]

**Item 9 – Nominated Personnel (clause 1.1 and 6.8)**

The following Personnel are to provide the Services:

[Insert names and/or positions of the Nominated Personnel]

**Item 10 – Contractor's Representative (clause 1.1 and 6.14)**

The Contractor's Representative is:

[Insert name, title, email address and phone number].

**Item 11 – Principal Contractor (clause 6.16)**

The Contractor will be the Principal Contractor:

[Yes / No]  
[Strike out the alternative that does not apply.]  
[Guidance Note: Select "Yes" if the Contractor would be the Principal Contractor where one is required  
Select "No" if the Principal or another Principal Contractor (eg: head contractor) would be the Principal Contractor where one is required.]  
[The Principal Contractor will be [Insert]]  
[Guidance Note: Use this if another contractor will be Principal Contractor or delete if not applicable.  
ie, a Principal Contractor is required for construction work (eg: geotechnical drilling) over a specific value (\$250,000 as at September 2016).]

**Item 12 – Reporting (clause 6.18)**

The Contractor is required to consult with the Principal as follows:

[insert details]

**Item 13 – Compliance with policies (clause 6.22)**

The Contractor must comply with the following policies:

Compliance required	Relevant policy

The Contractor must implement and maintain systems, strategies and plans required to comply with the following NSW Government Guidelines and Policies	Work Health and Safety Management Systems Guidelines
	NSW Government Procurement Guideline: Skills and Training in the Construction Industry
[List any other policies relevant to the Contract]	

**Item 14 – APIC policy (clause 6.23)**

The minimum aboriginal participation spend at the Date of Contract is:

[insert the Fee x 1.5%] (excl GST) / Not applicable]

**Item 15 – Building Code (clause 6.24)**

Does the Building Code apply to the Services as there is Commonwealth funding (above the minimum thresholds specified in Schedule 1 of the Building Code) for the Project?

[Yes/No]

[Strike out the alternative that does not apply]

If 'Yes' applies each Building Code Entity must comply with the Building Code.

Is a Workplace Relations Management Plan (Commonwealth) required?

[Yes/No]

[Strike out the alternative that does not apply]

**[Guidance Note: clause 6.24 and Appendix D will apply if TfNSW is obliged to comply with the Building Code for the Project because there is Commonwealth Funding.]**

**Item 16 – Payment Claim Date (clause 1.1 and 11.1)**

The Payment Claim Date is:

[If nothing is stated then the Payment Claim Date is the last Business Day of every month]

**Item 17 – Program (clause 1.1 and 12.2)**

The Program is as follows:

[Choose relevant alternative  
Alternative 1: The Contractor must submit its  
program to the Principal by [insert date].

Alternative 2: Nil]

**Item 18 – Grounds for extension of Date for  
Completion  
(clause 12.3)**

The specified causes of delay are:

1. Lightning, flood, earthquake, cyclone, or other physical natural disaster but excluding inclement weather.
2. Riots, civil commotion, act of public enemy, war, or invasion by foreign enemies.
3. State-wide or nation-wide industrial action or strikes not caused or contributed to by the Contractor.

**Item 19 – Liquidated damages  
(clause 12.6)**

Liquidated damages:

[Choose relevant alternative  
Alternative 1 [If liquidated damages are required]: will  
be calculated as follows: (Insert details)  
Alternative 2 [If liquidated damages are not required]:  
are not required.]

**Item 20 – Contractor's Insurance  
(clause 14.2)**

In addition to the insurances listed in Annexure A (Insurances), the Contractor must effect and maintain the following insurances:

The Contractor's professional indemnity insurance must be for an amount not less than the minimum level of professional indemnity insurance set out in Category [PI-1 / PI-2 / PI-3 / PI-4] in Item 4 of Annexure A (Insurances).  
**[Guidance Note: choose one Category that applies to the Services. If multiple Categories apply, choose the Category with the highest value. Strike out all other Categories. For high risk projects or where the service is not listed, seek advice from a Commercial Services representative.]**

[Insert details of required additional insurances (if any) as follows:  
 Type of insurance policy: [insert]  
 Minimum sum insured: [insert]  
 Period of insurance: [insert]  
 Insurance cover: [insert]  
 If there are no other insurances delete the text above and insert 'Nil'.]

**Item 21 – Limit of liability (clause 15.2)**

The liability limit for the purposes of clause 15.2 is:

[insert]  
**[Guidance Note: See ICN 259 for guidance.]**

**Item 22 – Confidentiality Deed Poll (clause 16.3)**

The Project requires the Contractor to enter into a Confidentiality Deed Poll:

[Yes / No]  
 [Strike out the alternative that does not apply.]

**Item 23 – Principal's Representative (clause 1.1 and 21)**

The Principal's Representative is:

[Insert name, title, email address and phone number]

**Item 24 – Difference between amount asserted by a party and expert's decision (clause 26.3(i))**

(a) The monetary amount for the purposes of clause 26.3(i)(i)A is:

\$250,000.00

(b) The monetary amount for the purposes of clause 26.3(i)(i)B is:

\$500,000.00

## Annexure A Insurances

(clause 14)

**Table 1: Table of Insurances**

**[Note: Amounts and types of insurance required to be reviewed for each engagement.]**

	TYPE OF INSURANCE	MINIMUM SUM INSURED	PERIOD OF INSURANCE	INSURANCE COVER IS TO INCLUDE THE FOLLOWING
<b>Principal Arranged Insurance</b>				
The details of the policies below are provided in the certificate of currency issued by the Principal's Insurer. A copy of the Public and Products Liability policy may be inspected by appointment at the offices of the Principal's Insurer.				
1	Public and Products Liability	\$20m	Until the expiry of the Term	The Principal, the Contractor, the Subcontractors and any other parties required by the Principal.
Excess for Public and Products Liability	<p>The Contractor is responsible for meeting the amount of any excess payable under the Principal Arranged Insurance in respect of any claim made by it. The excess amounts current at the Date of Contract are:</p> <ul style="list-style-type: none"> <li>Injury to Contractors – excess is \$100,000 per Event/Occurrence</li> <li>Products Liability – excess is \$50,000 per Event/Occurrence</li> <li>Underground Services – excess is \$50,000 per Event/Occurrence</li> <li>Any other claim – excess is \$10,000 per Event/Occurrence</li> </ul> <p>The Contractor may effect insurance to cover the amount of that excess.</p>			
<b>Contractor Arranged Insurances</b>				
2	Motor Vehicle Comprehensive or Third Party Property Damage effected with an approved insurer as defined in Definitions and Notes clause 1 below	\$20 million for any single occurrence. [Insurance amount to be reviewed for each Deed.]	Annual until the later of the Contractor ceasing to perform the Services and expiry of the Term.	<p>(a) Motor Vehicles owned or used by the Contractor or subcontractors directly or indirectly engaged in performance of the Services.</p> <p>(b) Is governed by the law of New South Wales and subject to Australian jurisdiction as defined in Definitions and Notes clause 2 below.</p> <p>(c) If applicable to this Deed – all plant and equipment owned or used by the Contractor or subcontractors directly or indirectly engaged in the performance of</p>

	TYPE OF INSURANCE	MINIMUM SUM INSURED			PERIOD OF INSURANCE	INSURANCE COVER IS TO INCLUDE THE FOLLOWING
						the Services.
3	Workers Compensation effected with an approved insurer as defined in Definitions and Notes clause 1 below	As per the relevant Workers Compensation legislation			Annual until the later of the Contractor ceasing to perform the Services and expiry of the Term.	As per State Workers Compensation legislation.
4	Professional Indemnity Insurance	<b>Category</b>	<b>Minimum level of Professional Indemnity Insurance</b>	<b>Example of services relevant to the level of Professional Indemnity Insurance</b>	7 years from the later of date of Completion and expiry of the Term.	The Contractor, its Subcontractors and anyone else who is involved in providing the Services for or on behalf of the Contractor.
		PI-1	\$1M	<ul style="list-style-type: none"> <li>• REF preparation and specialist environmental studies.</li> <li>• Route Studies.</li> <li>• Environmental Monitoring.</li> <li>• Site Management - contract value up to \$2M.</li> <li>• Technical advice.</li> <li>• Laboratory Testing (NATA Accredited Laboratory).</li> <li>• Survey.</li> </ul>		
		PI-2	\$2M	<ul style="list-style-type: none"> <li>• Traffic Modelling.</li> </ul>		
		PI-3	\$5M	<ul style="list-style-type: none"> <li>• Design - Construction costs up to \$20M.</li> <li>• Geotechnical – without tunnels.</li> <li>• EIS preparation.</li> <li>• Site Management - contract value above \$2M.</li> </ul>		
		PI-4	\$10M	<ul style="list-style-type: none"> <li>• Design - Construction costs above \$20M.</li> <li>• Geotechnical – with tunnels.</li> <li>• Project Management.</li> <li>• Financial Studies.</li> </ul>		
5	Additional Insurance	As specified in Item 20 of the Reference Schedule				

#### Definitions and Notes:

1. Approved insurer means:

- (a) An Australian registered insurance company which is approved by the Australian Prudential Regulatory Authority (APRA) to conduct general insurance business in Australia; or
- (b) Lloyds Underwriters; or

- (c) A Treasury Managed Fund insurance scheme with the NSW State Government; or
- (d) Self Insurance Corporation of NSW through Insurance and Care NSW (icare); or
- (e) The Comcover insurance scheme for the Australian Federal Government

Note that where the insurance risk is insured by an insurer not listed in Note 1(a) or 1(b) then a 'fronting' placement is acceptable from an insurer listed in Note 1(a) or 1(b).

- 2. Insurance policies must be subject to the laws of Australian (or an Australian State or Territory) and their courts.
- 3. The Principal's Insurer is:

Self Insurance Corporation of NSW through  
Insurance and Care NSW (icare) ABN 16 759 382 489  
Level 15, 321 Kent Street  
SYDNEY NSW 2000  
Telephone: 61 2 9216 3852  
Email: cpai@icare.nsw.gov.au


***[Guidance Note: TfNSW staff to contact the TfNSW Insurance Team where any insurance submissions or provisions are not complying with this document or where additional specific insurances may be required. All enquiries are to be directed to TfNSW Insurance team (Ph: insert phone number)]***



# Annexure B - Contractor Statement and Supporting Statement

## Part I

**All suppliers/contractors must provide this Statement with every invoice/Payment Claim for all works/services carried out for Transport for NSW (TfNSW). TfNSW is entitled by law to withhold payment until this Statement is provided (see Note 2 overleaf).**

Workers Compensation Insurance Certificate of Currency for the work period in question. Unless the contractor is exempt 

### Details

Contractor's Legal Name:																							
Contractor's Trading / Business Name:																							
Contractor's ABN:	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> <td style="width: 20px; height: 20px;"></td> </tr> </table>																					Contractor's ACN:	
Contractor's Address:																							
TfNSW Contract No:		Project/Contract Title:																					
Description of Works:																							
Period of Work this Statement applies to (see Note 3):	From:		To:																				
Invoice or Payment Claim Numbers this applies to:																							
Invoice or Payment Claim Dates this Statement applies to:																							

### Declaration

Tick one in each row

I declare that the following is true to the best of my knowledge and belief in respect of the Period of Work above:

All workers engaged by the Contractor in respect of the works have been paid all remuneration entitlements.	_____
All workers compensation insurance premiums have been paid and <b>attached</b> is a true copy of a Certificate of Currency for workers compensation insurance valid for the period covered by this Statement; <b>or</b>	_____
the Contractor is an exempt employer for workers compensation purposes (see Note 6);	<b>or</b>
_____	_____
The Contractor is registered as an employer under the <i>Payroll Tax Act 2007</i> and has paid all payroll tax due in respect of employees in relation to the works the subject of this Statement; <b>or</b>	_____
the Contractor is not required to be registered;	<b>or</b>
_____	_____
The Contractor has not engaged any subcontractors for the works the subject of this Statement, <b>or</b>	_____
The Contractor has engaged subcontractors and has obtained a similar statement to this Statement from each of those subcontractors and believes it to be true	<b>or</b>
_____	_____
I am authorised to make this declaration and I am in a position to know the truth of its contents	_____

Signature of Authorised Person:

Name of Signatory (print):

Date:

Position / Job Title of Signatory (print - see Note 4):

(Electronic copy is available at: <http://hcms.dta.nsw.gov.au/forms/categories/contractor/roadworks/45062893.pdf>)

(see Notes on page 2)

Page 1 of 2

## Notes for Contractor Statement

1. A Contractor is any person or company who carries out work under a contract of any kind for any business of the Principal. References to “Subcontractor” and “Principal Contractor” in the legislation mentioned below have been changed in this Statement to “Contractor” and “the Principal” respectively to avoid confusion.
2. This form is prepared for the purposes of section 127 of the *Industrial Relations Act 1996* (“IRA”), section 175B of the *Workers Compensation Act 1987* (“WCA”) and Schedule 2 Part 5 of the *Payroll Tax Act 2007* (“PTA”). These provisions allow the Principal to withhold payment from a Contractor without any penalty unless and until the Contractor provides to the Principal a Statement declaring that:
  - a. All workers compensation insurance premiums payable up to and including the date(s) on the Statement have been paid, and all premiums owing during the term of the contract will be paid; and
  - b. all remuneration payable to relevant employees for work under the contract has been paid; and
  - c. all payroll tax payable relating to the work undertaken has been paid.
3. Section 127 of the IRA says that the Statement must state the period to which it relates. For sequential statements ensure that the dates provide continuous coverage.
4. The person signing this declaration must be a person who is authorised by the Contractor either to sign this Statement (or to sign statements of this kind) and must be a person who is in a position to know the truth of the statements. The Contractor's principal accounting/financial officer may be appropriate. An individual project manager will normally not be appropriate. If the Contractor is a company then the person signing should be a director unless the company has delegated the power to sign such statements to another person (e.g. the principal accounting officer).
5. A Statement is not required where the Principal is making payment to a receiver, liquidator or trustee in bankruptcy (see section 127(10) of the IRA, section 175B(12) of the WCA and Sch 2 Part 5 (20) of the PTA).
6. Section 127(6) of the IRA says that references to payments to workers means all types of remuneration to which they are entitled.
7. As of 30 June 2011, an employer is exempt from taking out workers compensation insurance if the employer pays less than \$7500 annually on wages, does not employ an apprentice or trainee and is not a member of a group for workers compensation purposes.

## Generic Version of Statement

This form has been specially adapted for use specifically for Contractors working for the Principal. Generic versions of this Statement for non-Principal use can be obtained at:  
[http://www.industrialrelations.nsw.gov.au/pdfs/subcontractor\\_statement\\_form.pdf](http://www.industrialrelations.nsw.gov.au/pdfs/subcontractor_statement_form.pdf); or  
<http://www.osr.nsw.gov.au/lib/doc/forms/opt011.pdf>.

## Record Retention

The Principal will keep a copy of this Statement for 7 years. If the Contractor obtains a similar statement from its subcontractor then the Contractor must keep that statement for 7 years.

## Offences for False Statement

Knowingly giving a false statement may be an offence under section 127(8) of the IRA, section 175B of the WCA and Sch 2 Part 5 clause 18(8) of the PTA.

## Further Information

These notes are not intended as legal advice and Contractors should obtain their own professional advice if they have any questions about this Statement or these Notes. For more information, refer to OSR Revenue Ruling PT 59 at <http://www.osr.nsw.gov.au/lib/doc/rulings/rrpt59.pdf>, visit the WorkCover website [www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au), Office of State Revenue website

[www.osr.nsw.gov.au](http://www.osr.nsw.gov.au), or the Office of Industrial Relations, Department of Commerce website [www.commerce.nsw.gov.au](http://www.commerce.nsw.gov.au). Copies of the *Workers Compensation Act 1987*, the *Payroll Tax Act 2007* and the *Industrial Relations Act 1996* can be found at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

## Part II

### Supporting Statement

This statement must accompany any payment claim served on a principal to a construction contract by a head contractor.

For the purposes of this Statement the terms “principal”, “head contractor”, “subcontractor”, and “construction contract” have the meanings given in section 4 of the *Building and Construction Industry Security of Payment Act 1999*.

The Contractor is a “head contractor” in terms of the *Building and Construction Industry Security of Payment Act 1999*, and makes relevant statements below accordingly.

This Statement must be signed by the Contractor (or by a person who is authorised, or held out as being authorised, to sign the statement by the Contractor).

Relevant legislation includes Building and Construction Industry Security of Payment Regulations 2008 cl 4A

### Main Contract

---

Head contractor: \_\_\_\_\_

*(Business name of the head contractor)*

ABN \_\_\_\_\_

ACN \_\_\_\_\_

Of \_\_\_\_\_

*(Address of Contractor)*

has entered into a contract with

**Transport for NSW**

Contract description \_\_\_\_\_

Contract number/identifier \_\_\_\_\_

### Subcontracts

The head contractor has entered into a contract with the subcontractors listed in the attachment to this Statement

### Period

This Statement applies for work between: \_\_\_\_\_ and \_\_\_\_\_ inclusive,

subject of the payment claim dated: \_\_\_\_\_

I, \_\_\_\_\_ (full name) being the head contractor, a director of the head contractor or a person authorised by the head contractor on whose behalf this declaration is made, hereby declare that I am in a position to know the truth of the matters that are contained in this supporting statement and declare that, to the best of my knowledge and belief, all amounts due and payable to subcontractors have been paid (not including any amount identified in the attachment as an amount in dispute).

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Full Name: \_\_\_\_\_

Position / Title: \_\_\_\_\_

**Attachment to the Supporting Statement**

<b>Schedule of subcontractors paid all amounts due and payable</b>				
<b>Subcontractor</b>	<b>ABN</b>	<b>Contract number/identifier</b>	<b>Date of works (period)</b>	<b>Payment claim dated (head contractor claim)</b>

<b>Schedule of subcontractors for which an amount is in dispute and has not been paid</b>				
<b>Subcontractor</b>	<b>ABN</b>	<b>Contract number/identifier</b>	<b>Date of works (period)</b>	<b>Payment claim dated (head contractor claim)</b>

**Notes for Supporting Statement**

**Offences for False Statement**

In terms of s 13(8) of the *Building and Construction Security of Payment Act 1999* a head contractor who serves a payment claim accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances is guilty of an offence.

**Further Information**

These notes are not intended as legal advice and Contractors should obtain their own professional advice if they have any questions about this Statement or these Notes. Copies of relevant legislation can be found at [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au).

**Annexure C – Confidentiality Deed Poll**

**CONFIDENTIALITY DEED POLL - CORPORATE**

THIS DEED POLL IS GIVEN DAY OF 20

BY: [Insert legal name of CONTRACTOR] ABN [insert ABN] ACN [insert ACN] of [insert address] (Contractor)

In favour of: Transport for NSW (ABN 18 804 239 602) a NSW Government agency constituted under the Transport Administration Act 1988 (NSW) (PRINCIPAL)

**DEED POLL DETAILS**

COMMENCEMENT DATE: [INSERT DATE]

APPROVED PURPOSE: The performance of the Services under the [insert name of relevant Contract]

**NOTICES**

If to the Principal: Attention: Office held: Address:
If to Contractor: Attention: Office held: Address:

**EXECUTION CLAUSE**

[GUIDANCE NOTE: UPDATE THIS EXECUTION CLAUSE TO REFLECT THE CONTRACTOR'S AUTHORISED SIGNATORIES.]

Executed as a deed poll by the Contractor in accordance with section 127 of the Corporations Act:

Company secretary / or director Director
Name printed Name printed
Date Signed

# COVENANTS BY RECIPIENT IN FAVOUR OF THE PRINCIPAL

---

## 1. Dictionary and interpretation

### 1.1 Definitions

The following words have these meanings in this deed poll unless the contrary intention appears:

**Approved Purpose** means the Approved purpose as set out in the Details.

**Authorised Officer** means a person appointed by a the Contractor to act as an Authorised Officer for the purposes of this deed poll.

**Confidential Information** means all Information obtained by the Contractor from the Principal or disclosed to the Contractor by the Principal, any Representative of the Principal, or any person acting on the Principal's behalf, for or in connection with the Approved Purpose and all Information created by the Contractor in the course of carrying out the Approved Purpose, including:

- (a) information which, either orally or in writing, is designated or indicated as being the proprietary or confidential information of the Principal, or a third party to whom the Principal owes an obligation of confidentiality;
- (b) information derived or produced partly or wholly from the Information including any calculation, conclusion, summary or computer modelling; and
- (c) trade secrets or information which is capable of protection at law or equity as confidential information,

whether the information:

- (d) was disclosed orally, in writing or in electronic or machine readable form;
- (e) was disclosed or created before, on or after the date of this deed poll;
- (f) was disclosed as a result of discussions between the parties concerning or arising out of the Approved Purpose; or
- (g) was disclosed by the Principal, any of its Representatives or by a person acting on the Principal's behalf.

**Details** means the section of this deed poll headed Details.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Excluded Information** means Confidential Information:

- (a) which is in or becomes part of the public domain otherwise than through breach of this deed poll or an obligation of confidence owed to the Principal;
- (b) which the Contractor can prove by contemporaneous written documentation was already known to it at the time of disclosure by the Principal, its Representative or a person acting on the Principal's behalf, unless such knowledge arose from disclosure of information in breach of an obligation of confidentiality; or

- (c) which the Contractor acquires from a source other than the Principal, a Representative of the Principal or a person acting on the Principal's behalf where such source is entitled to disclose it.

**Government Agency** means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, agency or entity.

**Information** means all information regardless of its Material Form, relating to or developed in connection with:

- (a) the business, technology or other affairs of the Principal or any other Government Agency;
- (b) the Approved Purpose; or
- (c) any systems, technology, ideas, concepts, know-how, techniques, designs, specifications, blueprints, tracings, diagrams, models, functions, capabilities and designs, (including computer software, manufacturing processes or other information embodied in drawings or specifications), intellectual property or any other information, owned or used by, or licensed to the Principal or any other Government Agency.

**Material Form** in relation to Information, includes any form (whether visible or not) of storage from which the Information can be reproduced and any form in which the Information is embodied or encoded.

**Personal Information** has the meaning it has in the *Privacy and Personal Information Protection Act 1998* (NSW).

**Principal** means Transport for NSW (ABN 18 804 239 602) a NSW Government agency constituted under the *Transport Administration Act 1988* (NSW).

**Representative** of the Principal or the Contractor includes their employee, agent, officer, director, auditor, adviser, partner, consultant, joint venturer, contractor or sub-contractor.

## 1.2 References to certain general terms

Unless the contrary intention appears, a reference in this deed poll to:

- (a) **(variations or replacement)** a document (including this deed poll) includes any variation or replacement of it;
- (b) **(clauses, attachments and schedules)** a clause, attachment or schedule is a reference to a clause in or attachment or schedule to this deed poll;
- (c) **(reference to statutes)** a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (d) **(law)** law means common law, principles of equity, and laws made by parliament (and laws made by parliament include State, Territory and Commonwealth laws and regulations and other instruments under them, and consolidations, amendments, re-enactments or replacements of any of them.
- (e) **(singular includes plural)** the singular includes the plural and vice versa;



- (f) **(person)** the word “person” includes an individual, a firm, a body corporate, a partnership, joint venture, an unincorporated body or association, or any Government Agency;
- (g) **(executors, administrators, successors)** a particular person includes a reference to the person’s executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
- (h) **(two or more persons)** an agreement, representation or warranty in favour of two or more persons is for the benefit of them jointly and each of them individually;
- (i) **(jointly and severally)** an agreement, representation or warranty by two or more persons binds them jointly and each of them individually;
- (j) **(reference to a group of persons)** a group of persons or things is a reference to any two or more of them jointly and to each of them individually;
- (k) **(meaning not limited)** the words “include”, “including”, “for example” or “such as” are not used as, nor are they to be interpreted as, words of limitation, and, when introducing an example, do not limit the meaning of the words to which the example relates to that example or examples of a similar kind.

### 1.3 Headings

Headings (including those in brackets at the beginning of paragraphs) are for convenience and do not affect the interpretation of this deed poll.

### 1.4 Confidential Information not in public domain

Confidential Information will not be regarded as being in the public domain by reason only of the fact that some portion of it is public or that information is publicly available which, together with other information, could be used to produce any Confidential Information.

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## 2. Term

This deed poll commences on the Commencement Date. The obligations of the Contractor survive termination or expiry of this deed poll.

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## 3. Disclosure

### 3.1 No obligation to disclose information

The Contractor acknowledges that nothing in this deed poll obliges the Principal, its Representatives or any person acting on the Principal's behalf to disclose any particular information to the Contractor or its Representatives. The Contractor acknowledges that the Principal has an absolute discretion as to the information, which it chooses to disclose.

### 3.2 No representations or warranties given

The Contractor acknowledges that neither the Principal, nor any of its Representatives, nor any person acting on the Principal's behalf:

- (a) has made nor makes any representation or warranty, express or implied, as to the accuracy, content, legality or completeness of the Confidential Information;

- (b) is under any obligation to notify the Contractor or provide any further information to the Contractor if it becomes aware of any inaccuracy, incompleteness or change in the Confidential Information; or
- (c) has made nor makes any representation or warranty, express or implied that the Confidential Information does not infringe the intellectual property rights or any other right of any person.

### **3.3 Contractor to make its own assessment**

The Contractor agrees and acknowledges that:

- (a) it will rely solely on its own investigations and analysis in evaluating the Information disclosed by the Principal or its Representatives or any person acting on the Principal's behalf; and
- (b) any forecasts or estimates in the Information disclosed by the Principal or its Representatives or any person acting on the Principal's behalf may not prove correct or be achieved.

---

## **4. Obligation of confidence**

### **4.1 Confidential discussions**

The Contractor undertakes not to disclose to any person without the prior written consent of the Principal or except as it may be required to disclose by any law or order of any Government Agency or the rules of any stock exchange:

- (a) the existence of and contents of this deed poll and any other instruments entered into or to be entered into in connection with this deed poll;
- (b) the contents of any discussions between the parties relating to the Approved Purpose; or
- (c) the fact that any discussions between the parties relating to the Approved Purpose have taken place or will or may take place.

### **4.2 Contractor to maintain confidence**

The Contractor must:

- (a) maintain the confidential nature of the Confidential Information;
- (b) not, without the prior written consent of the Principal, disclose any of the Confidential Information to any person other than those of its Representatives who need it for the Approved Purpose;
- (c) not use or disclose or reproduce any of the Confidential Information for any purpose other than the Approved Purpose;
- (d) establish and maintain effective security measures to safeguard the Confidential Information from unauthorised access, use, copying or disclosure and use the same degree of care a prudent person would use to protect that person's confidential information; and
- (e) immediately notify the Principal of any potential, suspected or actual unauthorised use, copying or disclosure of the Confidential Information.

### **4.3 Contractor to inform the Principal before disclosure**

Before disclosing any of the Confidential Information to any of its Representatives for the Approved Purpose, the Contractor must:

- (a) inform the Principal of the name and title of the Representatives to whom it is to be disclosed;
- (b) ensure that each Representative is made fully aware of the confidential nature of all Confidential Information prior to obtaining access to it;
- (c) cause each Representative to sign an undertaking in the form set out in Attachment A; and
- (d) deliver the signed undertaking to the Principal.

### **4.4 Contractor's Representatives leaving its employ**

The Contractor agrees to notify the Principal promptly if any of its Representatives who have had access to the Confidential Information leave the employ or engagement of the Contractor.

### **4.5 Contractor's control of Confidential Information**

The Contractor's obligation of non-disclosure under this deed poll includes keeping the Confidential Information out of any computer, database, or other electronic means of data or information storage except for a computer, database, or other electronic means of data or electronic storage exclusively controlled by the Contractor.

---

## **5. Contractor's Representatives**

### **5.1 Contractor's responsibility for Representatives' conduct**

The Contractor must procure that its Representatives (whether or not still employed or engaged by the Contractor) do not do or omit to do anything, which if done or omitted to be done by the Contractor, would be a breach of the Contractor's obligations under this deed poll.

### **5.2 Contractor to assist in the Principal's action**

The Contractor must give the Principal all assistance it requires to take any action or bring any proceedings for breach of the undertaking delivered under clause 4.3 ("Contractor to inform the Principal before disclosure").

---

## **6. Acknowledgements**

### **6.1 Confidential Information belongs to the Principal**

The Contractor acknowledges that:

- (a) the Confidential Information constitutes valuable and proprietary information of the Principal or its Representatives; and
- (b) this deed poll does not grant to the Contractor any licence or other right in relation to the Confidential Information except as expressly provided in this deed poll.

## **6.2 Injunctive relief**

The Contractor acknowledges that damages are not a sufficient remedy for the Principal and its Representatives for any breach of this deed poll and the Principal is entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach by the Contractor, in addition to any other remedies available to it at law or in equity.

---

## **7. Indemnity**

### **7.1 Contractor indemnifies the Principal**

The Contractor undertakes to indemnify the Principal and its Representatives and all persons acting on the Principal's behalf, against all liability or loss arising directly or indirectly from, and any costs, charges and expenses incurred in connection with:

- (a) any breach by the Contractor of this deed poll; or
- (b) any act or omission by any of its Representatives which, if done or omitted to be done by the Contractor, would be a breach of the Contractor's obligations under this deed poll.

### **7.2 No set-off**

The Contractor undertakes to pay to the Principal and its Representatives and all persons acting on the Principal's behalf any sum due under clause 7.1 ("Contractor indemnifies the Principal") without any deduction or set-off (and irrespective of any counterclaim) whatsoever.

---

## **8. Exclusions**

### **8.1 Excluded Information**

Clauses 4.2 ("Contractor to maintain confidence"), 4.3 ("Contractor to inform the Principal before disclosure"), 4.4 ("Contractor's Representatives leaving its employ") and 4.5 ("Contractor's control of Confidential Information") do not apply to the Excluded Information.

### **8.2 Disclosure required by law**

Subject to compliance with clause 8.3 ("Limitation of disclosure"), this deed poll does not apply to the disclosure of any Confidential Information to the extent that it is required to be disclosed by the Contractor under any law.

### **8.3 Limitation of disclosure**

Before the Contractor discloses any Confidential Information under any law, order or rule of the kind referred to in clause 8.2 ("Supervening obligation"), the Contractor must provide the Principal with:

- (a) sufficient notice to enable it to seek a protective order or other remedy; and
- (b) all assistance and co-operation which the Principal considers necessary to prevent or minimise that disclosure of the Confidential Information.

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## **9. Return of Confidential Information**

### **9.1 Return of Confidential Information**

The Contractor must (at its own expense):

- (a) return to the Principal or at the option and direction of the Principal destroy all documents and other materials in any medium in the possession, power or control of the Contractor or any of its Representatives which contain or refer to any Confidential Information (whether or not those documents and other materials were created by the Principal or its Representatives or any person acting on the Principal's behalf); and
- (b) delete any Confidential Information that has been entered into a computer, database or other electronic means of data or information storage,

on the earlier of:

- (c) demand by the Principal; or
- (d) the time the documents and other materials are no longer required for the Approved Purpose.

### **9.2 No release from obligations**

The return, destruction or deletion of the documents and other materials referred to in clause 9.1 ("Return of Confidential Information") does not release the Contractor or its Representatives from their obligations under this deed poll.

---

## **10. Privacy**

The Confidential Information may include Personal Information. In addition to any other obligations it may have under any law or under this deed poll, the Contractor agrees to:

- (a) take all necessary measures to ensure that Personal Information in its possession or control in connection with this deed poll is protected against loss and unauthorised access, use, modification or disclosure; and
- (b) comply with the Privacy and Personal Information Protection Act 1998 (NSW) as though the Contractor were a public sector agency as defined in that Act.

---

## **11. Notices**

### **11.1 Form**

Unless expressly stated otherwise in this deed poll, all notices, certificates, consents, approvals, waivers and other communications in connection with this deed poll ("notices") must be in writing, signed by the sender (if an individual) or an Authorised Officer of the sender and marked for the attention of the person identified in the Details or, if the recipient has notified otherwise, then marked for attention in the way last notified.

### **11.2 Delivery**

Notices must be:

- (a) left at the address set out or referred to in the Details;

- (b) sent by prepaid ordinary post (airmail if appropriate) to the address set out or referred to in the Details. or
- (c) given in any other way permitted by law.

However, if the intended recipient has notified a changed postal address then the communication must be to that address.

### **11.3 When effective**

Notices take effect from the time they are received unless a later time is specified in the notice.

### **11.4 Receipt - post**

If sent by post, notices are taken to be received three days after posting (or seven days after posting if sent to or from a place outside Australia).

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## **12. General**

### **12.1 No liability for loss**

The Contractor acknowledges that the Principal is not liable for loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising a right or remedy under this deed poll.

### **12.2 Approvals and consents**

The Contractor acknowledges that by giving its approval or consent the Principal does not make or give any warranty or representation as to any circumstance relating to the subject matter of the consent or approval.

### **12.3 Remedies cumulative**

The rights and remedies provided in this deed poll are in addition to other rights and remedies given by law independently of this deed poll.

### **12.4 Variation and waiver**

A provision of this deed poll or a right created under it, may not be waived or varied except in writing.

### **12.5 Indemnities**

The indemnities in this deed poll are continuing obligations, independent from the other obligations of the Contractor under this deed poll and continue after this deed poll ends. It is not necessary for the Principal to incur expense or make payment before enforcing a right of indemnity under this deed poll.

### **12.6 Governing law**

This deed poll is governed by the law in force in New South Wales. The Contractor submits to the exclusive jurisdiction of the courts of New South Wales.

**ATTACHMENT A  
(CLAUSE 4.3)**

**CONFIDENTIALITY UNDERTAKING - INDIVIDUAL**

**Individual's name:** #insert full name of the employee of the Contractor#  
**Approved Purpose:** #insert#  
**Confidentiality Deed Poll:** Confidentiality Deed Poll in favour of Transport for NSW (**PRINCIPAL**) by the Contractor  
**Contractor's Name:** #insert name of the Contractor#

I, agree for the benefit of the Principal:

- (a) that the Confidentiality Information made available to me is confidential to the Principal;
- (b) to keep the Confidential Information confidential;
- (c) only to use it for the Approved Purpose;
- (d) not to disclose any of the Confidential Information to any person other than:
  - (i) to those who have signed an undertaking in this form; and
  - (ii) who require it for the Approved Purpose, unless I have the prior written consent of the Principal; and
- (e) that I am aware that damages are not a sufficient remedy for the Principal for any breach of this undertaking and the Principal is entitled to specific performance or injunctive relief (as appropriate) as a remedy for any breach or threatened breach by me of this undertaking, in addition to any other remedies available to the Principal at law or in equity.

The Contractor has informed me of the confidentiality obligations under the Confidentiality Deed Poll and of my obligations to maintain confidence. I understand that the Confidential Information is the Principal's information, know-how, processes and methods and any other information not in the public domain.

**EXECUTED**

.....  
Signed Date  
.....  
Print name

**[GUIDANCE NOTE: This Undertaking is a template only. It should be copied and filled in and signed by each employee of the Contractor who will have access to the Confidential Information.]**

## Annexure D – Building Code

**[Guidance Note: This Annexure D only applies in relation to Commonwealth funded building works for the purposes of the Building Code 2016.]**

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### 1. Definitions

In this Annexure D:

<b>ABCC</b>	means the body referred to in subsection 29(2) of the Act.
<b>ABC Commissioner</b>	means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.
<b>Act</b>	means the Building and Construction Industry (Improving Productivity) Act 2016.
<b>Building Code</b>	means the Code for the Tendering and Performance of Building Work 2016, which is available at <a href="https://www.legislation.gov.au/Details/F2017C00668">https://www.legislation.gov.au/Details/F2017C00668</a> .
<b>Building Code Subcontractor</b>	means a Building Contractor or Building Industry Participant with whom the Contractor has entered, or proposes to enter, into a subcontract with to undertake any of the Works.
<b>Building Contractor</b>	has the same meaning as in the Act.
<b>Building Industry Participant</b>	has the same meaning as in the Act.
<b>Building Work</b>	has the same meaning as in subsection 3(4) of the Building Code.
<b>Commonwealth Funded Building Work</b>	means Building Work in items 1-8 of Schedule 1 of the Building Code.
<b>Enterprise Agreement</b>	has the same meaning as in the Fair Work Act 2009.
<b>Exclusion Sanction</b>	has the same meaning as in subsection 3(3) of the Building Code.
<b>Related Entity</b>	has the same meaning as in subsection 3(2) of the Building Code.
<b>Works</b>	means Commonwealth Funded Building Work that is the subject of this Contract.

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### 2. Building Code 2016

- (a) The Contractor declares as at the Commencement Date, that it and its Building Code Subcontractors:
- (i) are not subject to an Exclusion Sanction;
  - (ii) unless approved otherwise by the ABC Commissioner, are not excluded from performing Building Work funded by a state or territory government; and
  - (iii) are not covered by, and do not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code.
- (b) The Contractor and its Building Code Subcontractors:
- (i) declare as at the Commencement Date; and
  - (ii) must ensure that during the performance of the Services, that it and its Building Code Subcontractors:
    - (iii) comply with the Building Code; and
    - (iv) will only use products in relation to the Services that comply with the relevant Australian standards published by, or on behalf of, Standards Australia.



*Guidance Note: Paragraph (b)(v) must be included where: (1) the Commonwealth's contribution to the project that includes the Services is at least \$5,000,000 and represents at least 50% of the total construction project value proportion of that project; or (2) the Commonwealth's contribution to the project that includes the Services is at least \$10,000,000 (irrespective of its proportion of the total construction project value).*

*(v) comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Services.*

- (c) Without limiting and notwithstanding clause 2(b)(iii) of this Annexure D, the Contractor will ensure that remedial action is taken to rectify any behaviour on the part of it and its Building Code Subcontractors that is non-compliant with the Building Code.
- (d) The Contractor must every six months during the performance of the Services, advise the Principal whether:
  - (i) it has in the preceding 6 months or since it last advised the Principal, whichever is the earliest, had an adverse decision, direction or order of a court or tribunal made against it for a breach of a designated building law, work health and safety law or the Migration Act 1958; or
  - (ii) it has in the preceding 6 months or since it last advised the Principal, whichever is the earliest:
    - A. been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) to a Building Contractor or Building Industry Participant; or
    - B. owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant.
- (e) Compliance with the Building Code does not relieve the Contractor from responsibility to perform the Services, or from liability for any defect in the Services arising from compliance with the Building Code.
- (f) The Contractor must notify the ABCC of any breach or suspected breach of the Building Code as soon as practicable but no later than 2 Business Days after becoming aware of the breach or suspected breach and of the steps proposed to be taken to rectify the breach.
- (g) The Contractor acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code and will ensure that it and its Building Code Subcontractor comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the Act, requests to interview any person under section 74 of the Act, requests to produce records or documents under sections 74 and 77 of the of the Act and responding to requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.
- (h) The Contractor must only enter into a subcontract for any of the Services where:
  - (i) the Building Code Subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code (located in Part 4 in the document titled Model Clauses Type B, available on the ABCC website ([www.abcc.gov.au](http://www.abcc.gov.au))); and
  - (ii) the subcontract with the Building Code Subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors and subcontractors in relation to the Building Code.
- (i) The Contractor must ensure that it and its Building Code Subcontractor comply with clauses contained in the subcontract referred to in clause 2(h)(ii) of this Annexure D.

## **Annexure E – Rules for the Expert Determination Process & Code of Conduct for an Expert**

### **(A) RULES FOR THE EXPERT DETERMINATION PROCESS**

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#### **1. Commencement**

The expert determination process ("Process") commences on the date of the letter of appointment of the expert to submit the dispute or difference to determination by the expert.

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#### **2. Written Submissions**

##### **2.1 Initial statement and submissions**

Within 10 Business Days after the date of commencement of the Process, the Claimant must provide to the Respondent and the expert a statement of the dispute or difference, any agreed statement of facts, a written submission on the dispute or difference in support of the Claimant's contention, and any evidence that the Claimant wishes to rely upon.

##### **2.2 Response**

Within 15 Business Days after receipt of the Claimant's statement and written submission, the Respondent must provide to the Claimant and the expert a written response to the written submission of the Claimant, and any evidence that the Respondent wishes to rely upon.

##### **2.3 Claimant's opportunity to reply**

If, upon the application of the Claimant, the expert considers it appropriate, the Claimant may make a written reply to the response of the Respondent under rule 2.2 (which may include any evidence in reply) within the time allowed by the expert and a copy of the written reply must be provided by the Claimant to the Respondent.

##### **2.4 Respondent may respond if expert allows**

If, upon the application of the Respondent, the expert considers it appropriate, the Respondent may make a written response to the reply of the Claimant under rule 2.3 (which may include any evidence in reply) within the time allowed by the expert and a copy of the written response must be provided by the Respondent to the Claimant.

##### **2.5 Further information**

If the expert decides further written submissions are required for the determination of the dispute or difference, the expert may:-

- (a) require a further written submission from either or both parties, giving each party a reasonable opportunity to make a written response to the other's submission; and
- (b) call a conference between the parties and the expert in accordance with rule 3.

---

## **3. Conference**

### **3.1 Expert to organise**

When the expert determines that a conference between the parties is necessary, the expert is responsible for arranging the conference at a venue and time convenient for the parties and must notify them accordingly.

### **3.2 Expert to notify matters to be addressed**

At least 5 Business Days prior to the conference, the expert must inform the parties of the matters to be addressed at the conference.

### **3.3 Make representations**

At the time and place notified for any conference, the parties must appear before the expert to make representations on the matters the subject of the conference.

### **3.4 Rules of evidence do not apply**

The expert in conducting the conference is not bound by the rules of evidence.

### **3.5 Representation approved**

At a conference either party may have legal or other representation.

### **3.6 Conference private**

The conference will be held in private.

### **3.7 Transcripts**

Transcripts of the conference proceedings will be taken and be available to the expert and the parties if so required by either party.

### **3.8 Confidentiality**

All proceedings and submissions relating to the Process are confidential between the parties and the expert and must be kept confidential. A party may not divulge information to any third party, at any time or in any circumstances except with the prior written consent of the other party or as may be required by law or in order to enforce the determination of the expert.

---

## **4. The Determination**

### **4.1 Questions to be determined**

- (a) For each issue in a Dispute Notice, the expert must determine the following questions, to the extent that they are applicable to the issue and unless otherwise agreed by the parties:
  - (i) Is there an event, act or omission which gives the Claimant a right to compensation, or assists in otherwise resolving the issue if no compensation is claimed:
    - A. under the Deed,

- B. for damages for breach of the Deed, or
  - C. otherwise in law?
- (ii) If so:
- A. what is the event, act or omission?
  - B. on what date did the event, act or omission occur?
  - C. what is the legal right which gives rise to the liability to compensation or resolution otherwise of the issue?
  - D. is that right extinguished, barred or reduced by any provision of the Deed, estoppel, waiver, accord and satisfaction, set-off, cross-claim or other legal right?
- (iii) In light of the answers to the questions in clauses 4.1(a)(i)A and 4.1(a)(i)B of this Annexure E:
- A. what compensation, if any, is payable by one party to the other and when did it become payable?
  - B. applying the rate of interest specified in the Deed, what interest, if any, is payable when the expert determines that compensation?
  - C. if compensation is not claimed, what otherwise is the resolution of the issue?
- (b) The expert must determine, for each issue in a Dispute Notice, any other questions identified or required by the parties, having regard to the nature of the issue.

## 4.2 Time for determination

The expert must determine the dispute or difference between the parties within the time prescribed in the Deed. The expert must notify his or her determination in writing to the parties. The expert must give a brief signed statement of his or her reasons for the determination to the parties immediately upon the determination being made.

## 4.3 Errors in determination

Where the determination made by the expert contains:-

- (a) a clerical mistake;
- (b) an error arising from an accidental slip or omission;
- (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter; or
- (d) a defect of form,

the expert must correct the determination.

---

## **5. Termination**

### **5.1 Expiry**

Subject to clause 4.3 of this Annexure E, the Process concludes when the expert has notified a determination to the parties.

### **5.2 Early termination**

The Process will be terminated if either party gives the other party a notice of appeal in accordance with the Deed.

---

## **6. Costs**

### **6.1 Sharing of costs**

Each party bears its own costs of the Process and must share equally the costs of the expert and the Process.

### **6.2 Security for costs**

Security for costs must be deposited by both parties at the commencement of the Process if the expert so directs.

### **6.3 Costs on early termination**

Where the Process is terminated prior to the determination of the dispute or difference, each party bears its own costs of the Process so far. The costs of the expert and of the Process must be borne equally by the parties.

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## **7. Modification**

Unless otherwise stated, these Rules may be modified only by agreement of the parties and of the expert.

## **(B) CODE OF CONDUCT FOR AN EXPERT**

1. The function of the expert is to make a determination on the dispute or difference in accordance with the Rules, this Code of Conduct for an Expert, and the letter of appointment of the expert.
2. The expert will receive the written submissions and responses and replies of the parties in accordance with the procedures specified in the Rules and may require any further information or documentation from the parties the expert thinks is necessary for the determination of the dispute or difference in accordance with the procedures specified in the Rules.
3. The expert will decide whether a conference between the parties and the expert is necessary for receiving further information on any specified matter(s). If a conference is thought to be necessary, the expert must inform the parties of the precise subject matter(s) of the hearing and may only hear representations on these matter(s).
4. The expert is not bound by the rules of evidence and may receive information at any conference in any manner the expert thinks fit, as long as the requirements of procedural fairness are met at all times.
5. The expert must disclose all information and documents received from either party to the other party. Where a party fails to make a written submission or appear at any conference after having received due notice, the expert may proceed with the Process. Except as provided above, no consultation will take place other than in the presence of both parties.
6. The expert will reach his or her determination on the basis of the information received from the parties and on the basis of his or her own expertise. The decision must be reached as an expert and not as an arbitrator. The expert's determination must be made as expeditiously as possible and in accordance with the Rules.
7. The expert must respect the confidentiality of all information received either through written submissions or oral proceedings. Information acquired through the Process may not be divulged to any other body except with the prior written consent of the parties.
8. If the expert becomes aware of any circumstances that might reasonably be considered to affect adversely his or her capacity to act independently or impartially, the expert must inform the parties immediately. The expert must in those circumstances terminate the proceedings, unless the parties agree otherwise.

**Annexure F - Undertaking**

**On behalf of the Contractor**

Name of Financial Institution: .....

The Principal: »

The Contractor: .....

ABN .....

Security Amount: \$ .....

The Contract: The contract between the Principal and the Contractor

Contract Name: »

Contract Number: »

**Undertaking**

1. At the request of the Contractor and the Financial Institution, and in consideration of the Principal accepting this Undertaking from the Financial Institution in connection with the Contract, the Financial Institution unconditionally undertakes to pay on demand any amount or amounts demanded by the Principal to the maximum aggregate sum of the Security Amount.
2. The Financial Institution unconditionally agrees that, if notified in writing by the Principal (or someone authorised by the Principal) that it requires all or some of the Security Amount, the Financial Institution will pay the Principal at once, without reference to the Contractor and despite any notice from the Contractor not to pay.
3. The Principal must not assign this Undertaking without the prior written agreement of the Financial Institution, which must not be unreasonably withheld.
4. This Undertaking continues until one of the following occurs:
  - (a) the Principal notifies the Financial Institution in writing that the Security Amount is no longer required;
  - (b) this Undertaking is returned to the Financial Institution; or
  - (c) the Financial Institution pays the Principal the whole of the Security Amount, or as much as the Principal may require overall.
5. At any time, without being required to, the Financial Institution may pay the Principal the Security Amount less any amounts previously paid under this Undertaking (or a lesser sum specified by the Principal), and the liability of the Financial Institution will then immediately end.

Dated ..... at .....

**Execution by the Financial Institution:**

## **Annexure G - Services**

**[Guidance Note: Either insert full details of all TfNSW's requirements for the Services or refer to and attach a Scope of Works or Brief which does that. Mention all relevant Australian Standards and specifications that are required to be met.**

**If including service levels ensure that they are capable of being measured, reported and assessed.**

**Make sure the terminology used matches the terminology in the Deed.]**



## Annexure H - Fee and other amounts

### Part A - Fee (clause 1.1 and 8)

The Fee is to be calculated:

[as a lump sum amount / using the rates / as the aggregate of the lump sum and using the rates]

[Strike out the alternatives that do not apply.]

**[ Guidance Note: The Fee is exclusive of GST. A separate line item should be included stating the amount of GST.]**

Lump Sum  
(clause 8.1)

[\$#]

[Insert lump sum amount (including Provisional Sums (if any)) or delete entirely if there is no lump sum.]

**[ Guidance Note: Provisional Sums (if any) form part of the lump sum.]**

Rates  
(clause 8.2)

[Insert rates or delete entirely if rates do not apply.]

### Part B - Expenses (clause 1.1 and 9)

The Contractor will only be entitled to reimbursement of the following Expenses:

[List expense items Contractor may claim]

### Part C - Provisional Sum work (clause 1.1 and 11.3)

The Provisional Sum work includes:

[Insert any provisional sum work and the Provisional Sums allowed for that work.]

The margin for Provisional Sum work is [insert] %.

**[ Guidance Note: the margin for Provisional Sum work must not be more than 10%. Provisional Sums are included in the lump sum and are used when it is not yet determined that the Provisional Sum work or item will be included in the Services or the price for the Provisional Sum work or item is not yet known. In such event an estimated amount is included in the lump sum component of the Fee, which amount will be adjusted in accordance with clause 12.3.**

**For the avoidance of doubt, Provisional Sums are separate to and do not include pre agreed variations.]**

### Part D - Variation Rates (clause 1.1 and 13.3)

The Variation Rates are as follows:

[Insert Variation Rates.]