



Government of **Western Australia**
Department of **Health**

Request Conditions and General Conditions of Contract

Works June 2015 - June 2021

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PART A – REQUEST CONDITIONS

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions Generally

In the Request:

Addendum means any addendum issued by the Contract Authority or the Customer in relation to the Request and which is available at Tenders WA [www.tenders.wa.gov.au].

Closing Time means the time and date specified on the front of the Request as the closing time for the submission of Offers.

Contract means either:

- (a) the head agreement between the Contract Authority and the successful Respondent, the terms and conditions of which are contained in the Head Agreement Documents; or
- (b) the customer contract between the Customer and the successful Respondent for the supply of the Goods, Services and Works by the successful Respondent, the terms and conditions of which are contained in the Customer Contract Documents,

as the context requires.

General Conditions mean Part B of this document.

Offer means the offer submitted by the Respondent in response to the Request.

Offer Information means all information, other than the Respondent's Offer, submitted by the Respondent in response to, or in connection with, the Request.

Offer Validity Period means the period specified in the Request.

Offered Price means the price, or the price determined by applying the formula or method, specified in the Offer.

Respondent means any person who submits an Offer.

Request Conditions means this Part A.

Section means a section of the Request.

1.2 Interpretation

In the Request and these Request Conditions:

- words defined in the General Conditions also apply to these Request Conditions; and
- unless the context otherwise requires:
 - (a) the singular includes the plural and vice versa;
 - (b) a reference to any thing is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
 - (c) a reference to a gender includes other genders;

- (d) a reference to a person includes a State Agency, a public body, a company and an incorporated or unincorporated association or body of persons;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, a person taking by novation) and permitted assigns;
- (f) if the Respondent consists of a partnership or joint venture, then:
 - (i) an obligation imposed on the Respondent under the Request binds each person who comprises the Respondent jointly and severally;
 - (ii) each person who comprises the Respondent agrees to do all things necessary to enable the obligations imposed on the Respondent under the Request to be undertaken; and
 - (iii) the act of one person who comprises the Respondent binds the other persons who comprise the Respondent;
- (g) an agreement, representation or warranty on the part of or in favour of two (2) or more persons binds, or is for the benefit of, them jointly and severally;
- (h) a reference to the Request or another instrument includes all variations and replacements of either of them despite any change of, or any change in the identity of, the Contract Authority, the Customer or the Respondent;
- (i) a reference to a clause, schedule, attachment or appendix is a reference to a clause, schedule, attachment or appendix to the Request;
- (j) all the provisions in any schedule, attachment or appendix to the Request are incorporated in, and form part of, the Request and bind the Contract Authority, the Customer and the Respondent;
- (k) headings are included for convenience and do not affect the interpretation of the Request;
- (l) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of it;
- (m) no rule of interpretation is to be applied to disadvantage the Contract Authority, the Customer or the Respondent on the basis that it was responsible for preparing the Request;
- (n) if a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (o) if the word "including" or "includes" is used, the words "without limitation" are taken to immediately follow;
- (p) a reference to writing includes any means of representing or reproducing words in visible form including by electronic means such as facsimile transmission;
- (q) a reference to a liability includes all obligations to pay money and all other losses, costs and expenses of any kind;
- (r) a reference to a day is to a calendar day, a month is to a calendar month and a year is to a calendar year;
- (s) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated inclusive of that day;

- (t) if a date stipulated for payment or for doing an act is not a Business Day, the payment must be made, or the act must be done, on the next Business Day;
- (u) a reference to a monetary amount means that amount in Australian currency, and
- (v) a reference to time means the time observed by the general community from time to time in Western Australia.

2. CONDITIONS

2.1 Submission of Offer

Any Offer which:

- (a) is not submitted before the Closing Time;
- (b) is incomplete at the Closing Time; or
- (c) is not submitted in accordance with the provisions of clause 1.2 in Part A of the Request,

will be excluded from consideration, unless the Respondent can provide conclusive evidence of mishandling of the Offer.

For the purposes of the Request, mishandling will only have occurred where:

- (a) in the case of submission of the Offer by hand or by post, the Offer was received by the Contract Authority or Customer prior to the Closing Time but the Offer was not transferred by the Contract Authority or Customer to the tender box by the Closing Time; or
- (b) in the case of submission of the Offer by facsimile, the Offer was received by the Contract Authority or Customer prior to the Closing Time but the Offer was not transferred by the Contract Authority or Customer to the tender box by the Closing Time.

If the Respondent submits the Offer by facsimile, then the Offer must be received in full by the Contract Authority or Customer prior to the Closing Time. If the Respondent submits the Offer by facsimile, the Respondent agrees that:

- (a) receipt of the Offer will be determined by the date and time which the Contract Authority's or Customer's facsimile machine records that the facsimile was successfully received; and
- (b) facsimile transmission is not a reliable method of submitting Offers and the Respondent submits the Offer entirely at its own risk in respect of transmission failures and transmission errors howsoever caused.

If the Respondent submits the Offer electronically, then the Respondent must ensure that any files uploaded are in one of the following file formats and extensions:

.doc/docx*	.pub*	.pdf#	.txt	.rtf	.ppt/pptx	.xls/xlsx*
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* Microsoft Compatible

Adobe Compatible

NB: Zipped Files Acceptable

The Offer must be received in full by the Contract Authority or Customer prior to the Closing Time. If the Respondent submits the Offer electronically, the Respondent agrees that:

- (a) receipt of the Offer will be determined by the date and time shown on the electronic tender lodgement service receipt issued or, if no receipt is issued, the date and time which the Contract Authority's or Customer's computer records that the Offer was received;
- (b) if any files uploaded as part of the Offer contain a virus then, notwithstanding any disclaimer made by the Respondent in respect of viruses, the Respondent must pay to the Contract Authority or Customer all costs incurred by the Contract Authority or the Customer arising from, or in connection with, the virus;
- (c) electronic lodgement of the Offer may take time and the Respondent must make its own assessment of the time required for full transmission of its Offer;
- (d) neither the Contract Authority nor the Customer will be responsible in any way for any loss, damage or corruption of the electronic copy of the Offer;
- (e) if the Offer becomes corrupted, illegible or incomplete as a result of transmission, storage, encryption or decryption, then the Contract Authority or Customer may request the Respondent to provide another copy of the Offer either electronically or in hard copy or both;
- (f) if the Contract Authority or Customer requests the provision of another copy of the Offer, then the Respondent must:
 - (i) provide the copy in the form or forms requested within the period specified by the Contract Authority or Customer;
 - (ii) provide a statutory declaration that the copy is a true copy of the Offer which was electronically submitted by the Respondent and that no changes to the Offer have been made after the initial attempted electronic submission; and
 - (iii) provide a copy of the electronic tender lodgement service receipt for the initial attempted electronic submission.

An Offer is not assignable by the Respondent without the prior written consent of the Contract Authority or Customer.

If an Offer is submitted by a consortium of two (2) or more persons either by way of joint venture, partnership or otherwise, the Offer is binding on those persons jointly and severally.

An Offer is, upon submission, the absolute property of the Contract Authority or Customer and will not be returned to the Respondent. Nothing in this provision affects the intellectual property rights of the Respondent in the Offer, except that the Contract Authority or Customer may make such copies of the Offer as the Contract Authority or Customer requires for the proper evaluation of the Offer.

2.2 Cancellation and Variation

The Contract Authority or Customer reserves the right, at any time and from time to time, to cancel, vary, supplement, supersede or replace the Request or any part of the Request.

If the Contract Authority or Customer cancels, varies, supplements, supersedes or replaces the Request, then;

- (a) the Contract Authority or Customer will advise each Respondent that the Request has been cancelled, varied, supplemented, superseded or replaced; and
- (b) the Respondent shall not have any recourse against the Contract Authority or Customer whatsoever including for claims for any costs or expenses incurred up to and including the date that the Request or any part of the Request is cancelled, varied, supplemented, superseded or replaced.

2.3 Contract Authority's Rights

The Contract Authority or Customer is not obliged to accept the Offer containing the lowest Offered Price.

If the Respondent's Offer makes reference to information on its website, or on any other website, the Contract Authority or the Customer will not take into account that information when evaluating an Offer.

The Contract Authority or Customer is under no obligation to accept any Offer and may reject any Offer or all Offers, in the Contract Authority's or Customer's discretion, including:

- (a) **(failure to comply with Request Conditions)** if an Offer fails to comply with these Request Conditions;
- (b) **(failure to comply with requirements)** if an Offer fails to comply with any of the requirements set out in Part B of the Request;
- (c) **(false or misleading)** if an Offer contains information or representations that are false or misleading;
- (d) **(change of control)** if anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Respondent to another person, including in respect of a Respondent which is a body corporate, if there is a change in control of the Respondent within the meaning of the Corporations Act;
- (e) **(change of consortium membership)** in respect of a Respondent which consists of a consortium, if there is a change of membership of the consortium members; or
- (f) **(change of policy or commercial reasons)** if the Contract Authority or Customer decides to cancel the Request due to changes of policy or for commercial reasons.

After the Closing Time, the Contract Authority or Customer may:

- (a) request additional information from the Respondent in relation to the content of the Offer for the sole purpose of clarifying the Offer; and
- (b) request information from the Respondent regarding the financial capacity of the Respondent,

and if so requested, the Respondent must promptly provide such information to the Contract Authority or Customer.

In evaluating an Offer, the Contract Authority or Customer may take into account any information regarding the Respondent that the Contract Authority or Customer has in its possession or receives from any source, including information about the past or current performance of the Respondent under any other contract, arrangement or dealing between the Respondent and a State Agency.

The Contract Authority or Customer reserves the right to conduct site visits as it deems appropriate.

2.4 Selection of Preferred Respondent

The Contract Authority or Customer may select, but is not obliged to select, one or more Respondents as a preferred Respondent.

Selection as a preferred Respondent does not confer any rights on a preferred Respondent and the Request Conditions, including clause 2.3, continue to apply until such time as a Contract is awarded or the Request is terminated.

The Respondent agrees that, if it is selected as a preferred Respondent, then:

- (a) its Offer will remain open for acceptance by the Contract Authority or Customer at any time prior to the expiry of the Offer Validity Period;
- (b) the Contract Authority or Customer may choose to negotiate any aspect of the Offer; and
- (c) the Contract Authority or Customer may request the Respondent to provide a performance guarantee, a bank guarantee or some other form of security on terms and conditions acceptable to the Contract Authority or Customer.

At any time during the negotiations either the Contract Authority, the Customer or a preferred Respondent may terminate the negotiations for any reason.

If negotiations are terminated, the Contract Authority or Customer may:

- (a) accept the Respondent's original Offer; or
- (b) select and then negotiate with any other Respondent as a preferred Respondent in accordance with this clause 2.4; or
- (c) terminate the Request.

2.5 Discretion

Whenever the consent of the Contract Authority or Customer is required under the Request, that consent may be given or withheld by the Contract Authority or Customer in the Contract Authority's or Customer's absolute discretion and may be given subject to such conditions as the Contract Authority or Customer may determine.

2.6 Agreement with These Request Conditions

In submitting an Offer, the Respondent is deemed to have read and agreed to these Request Conditions.

2.7 Agreement by Respondent

In submitting an Offer, the Respondent agrees that:

(information true and correct) all information in its Offer and all Offer Information is true and correct at the time of its submission;

(relies on own enquiries) other than in respect of information provided by the Contract Authority or Customer to the Respondent in writing, it relies entirely on its own enquiries in relation to all matters in respect of the Request, the Request Conditions and the General Conditions;

(understood Request) it has examined and understood the Request, the Request Conditions, the General Conditions and any other information available to the Respondent in respect of the Request;

(understood Addenda) prior to the Closing Time the Respondent must log on to Tenders WA [www.tenders.wa.gov.au] to ensure that prior to submitting its Offer it has examined and understood each Addendum in respect of the Request as by submitting its Offer it will be deemed to have examined and understood each Addendum;

(made reasonable enquiries) it has examined all information relevant to the risks, contingencies and other circumstances having an effect on its Offer which is obtainable by the making of reasonable enquiries, which enquiries the Respondent has made;

(does not rely on warranties) other than in respect of information provided by the Contract Authority or Customer to the Respondent in writing, it does not rely on any warranty or representation of the Contract Authority, the Customer or any person actually or ostensibly acting on behalf of the Contract Authority or the Customer;

(no reference to information on websites) it must not make reference to any information contained on the Respondent's website or on any other website. Any information on the Respondent's website or on any other website which the Respondent wishes the Contract Authority or Customer to rely on must be set out in full in the Respondent's Offer;

(no secret commission) it has not paid or received and will not pay or receive any secret commission in respect of the Request;

(no collusion) it has not colluded and will not collude with any other person in respect of the Request;

(no inflation or deflation of Offered Price) its Offered Price is not inflated or deflated to advantage another Respondent;

(no unlawful arrangement) it has not entered and will not enter into any unlawful arrangement with any other person in respect of the Request;

(no improper influence) it has not sought and will not seek to influence any decision in respect of the Request by improper means; and

(own cost and expenses) it will pay its own costs and expenses in connection with:

- (a) the preparation and submission of its Offer; and
- (b) any discussions, enquiries or negotiations with, or provision or consideration of further information to, the Contract Authority or Customer, whether before or after the submission of any Offer,

irrespective of whether its Offer is accepted or not.

2.8 Withdrawal of Offer

The Respondent may withdraw its Offer at any time prior to acceptance of its Offer, by notifying the Contract Authority or Customer in writing.

2.9 Offer Validity

Unless the Respondent withdraws its Offer under clause 2.8, the Respondent agrees that its Offer will remain open for acceptance by the Contract Authority or Customer for the Offer Validity Period.

The Offer Validity Period may be extended or further extended by the Contract Authority or Customer by advising each Respondent in writing at any time or times.

2.10 Disclosure of Offer Information

- (a) The Respondent agrees and acknowledges that its Offer and its Offer Information are subject to the *Freedom of Information Act 1992 (WA)* and may also be disclosed by the Contract Authority, the Customer or the State under a court order or upon request by Parliament or any committee of Parliament or if otherwise required by law.
- (b) By submitting an Offer, the Respondent releases the Contract Authority, the Customer and the State from all liability whatsoever for any loss, injury, damage, liability, costs or expense resulting from the disclosure of its Offer and its Offer Information under this clause by the Contract Authority, the Customer or the State.
- (c) The Respondent agrees and acknowledges that the powers and responsibilities of the Auditor General for the State under the *Financial Management Act 2006* and the *Auditor General's Act 2006* are not affected in any way by the Request.
- (d) Subject to this clause and to the provisions of the *Financial Management Act 2006* and the *Auditor General's Act 2006*, the Contract Authority and the Customer will not make public any part of the Offer or any Offer Information that the Respondent expressly and reasonably nominates in its Offer as confidential. However, the Contract Authority or Customer may require the Respondent to withdraw any claim to confidentiality in respect of any part of the Offer or any Offer Information as a condition of acceptance of the Offer.

2.11 Conflict of Interest

The Respondent must, prior to any acceptance of its Offer by the Contract Authority or Customer, disclose to the Contract Authority or Customer any information that is or might be relevant to determining whether an actual, potential or perceived conflict of interest exists or might exist in relation to the Request or the performance of the Contract (if awarded) by the Respondent.

The Contract Authority or Customer may, in its discretion, accept or reject the Respondent's Offer if the Contract Authority or Customer considers that the Respondent has, or could reasonably be considered to have, an actual, potential or perceived conflict of interest in relation to the Request or the performance of the Contract (if awarded) by the Respondent.

2.12 No Bribe, Inducement or Offer of Employment

The Respondent must not, without the prior written consent of the Contract Authority or Customer, directly or indirectly approach or communicate with any officer or employee of the Contract Authority or the Customer having any connection or involvement with the Request, with respect to:

- (a) an offer of employment; or
- (b) availability of employment,

with the Respondent or any related entity.

The Respondent must not directly or indirectly offer a bribe, gift or inducement to any officer or employee of the Contract Authority or the Customer in connection with the Request.

PART B – GENERAL CONDITIONS

1. RECITALS

This Part B is the Department of Health's Works June 2015 to June 2021 version of the WA Government's General Conditions of Contract for the Supply of Goods, Services and Works.

2. DEFINITIONS AND INTERPRETATION

2.1 Definitions

In these General Conditions, unless the context otherwise requires:

Acceptance means sign off by the Customer in acknowledgment that agreed acceptance test criteria or alternative acceptance formalities have been satisfied in respect of the Goods and/or Services.

Adjustment has the same meaning as in the *GST Act*.

Adjustment Note has the same meaning as in the *GST Act*.

Annexure means any annexure to a Customer Contract or a Head Agreement.

Authorisation means any approval, agreement, certificate, authorisation, code of conduct, government policy, consent, exemption, filing, licence, notarisaton, permit, registration, waiver, compliance report or environmental consent by any Government Agency required under any Law, and includes any renewal of, or variation to, any of them but does not include any act or omission by the Contract Authority under any Head Agreement or Customer under a Customer Contract.

Authorised Body has the same meaning as in the Procurement Act.

Business Day means any day except a Saturday, Sunday or a public holiday in Western Australia.

Business Hours means the hours specified in the Head Agreement or the Customer Contract as applicable or, if none are specified, the hours between 8.00 am and 5.00 pm, Western Australia, on a Business Day.

Buying Rules means the defined processes used by the Customer to purchase items under a Common Use Arrangement, a Panel Arrangement or Single Supplier Standing Offer Arrangement (if any), which may be changed from time to time during the Term in the Contract Authority or Customer's discretion. The Buying Rules at the date of the Common Use Arrangement, Panel Arrangement or Single Supplier Standing Offer Arrangement (if any) are set out in Schedule 6.

Commencement Date means the commencement date specified in the Head Agreement or Customer Contract as the context requires.

Common Use Arrangement means:

- (a) a whole of government standing offer arrangement; or
- (b) a multi-user standing offer arrangement,

awarded to a single supplier or a panel of suppliers for the provision of specific goods, services or works commonly used within Government. Common Use Arrangements are aggregated supply arrangements that enable Potential Customers to source Goods, Services and Works. A Common Use Arrangement may be a Panel Arrangement or a Single Supplier Standing Offer Arrangement.

Confidential Information means information in respect of the Customer Contract or a Head Agreement that:

- (a) is by its nature confidential; or
- (b) is specified by the Contract Authority or the Customer to be confidential, including any information specified to be confidential in the Customer Contract; or
- (c) the Contractor knows or ought to know is confidential.

Consultancy Services means the consultancy services (if any) described in the Customer Contract.

Contract Authority means the person specified as the contract authority in the Head Agreement.

Contract Authority's Representative means a person appointed by the Contract Authority whose functions and powers are set out in clause 24.2.

Contractor means the person specified as the contractor in the Customer Contract or the Head Agreement.

Contractor Personnel means all officers, employees, agents and subcontractors of the Contractor, and all officers, employees or agents of subcontractors, engaged in relation to the supply of the Goods, Services and Works.

Contractor's Representative means a person appointed by the Contractor whose functions and powers are set out in clause 24.3.

Copyright Act means the *Copyright Act 1968* (Cth).

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

Customer means the person (if any) specified as the Customer in the Customer Contract.

Customer Contract means the contract between the Customer and the Contractor for the supply of Goods, Services and Works by the Contractor, the terms and conditions of which are contained in the Customer Contract Documents.

Customer Contract Details means the relevant Schedule to the Request, describing the specific requirements of the Customer in respect of Goods, Services and Works to be delivered by the Contractor.

Customer Contract Documents means:

- (a) the Letter or, when buying off a Panel Arrangement or a Single Supplier Standing Offer Arrangement, an Order;

- (b) when buying off a Panel Arrangement or Single Supplier Standing Offer Arrangement:
 - (i) the Quote where a Quote is provided;
 - (ii) any request for a Quote by the Customer;;
- (c) when buying off a Common Use Arrangement, a Panel Arrangement or Single Supplier Standing Offer Arrangement:
 - (i) the price list contained in the Head Agreement;
 - (ii) the Head Agreement;
- (d) the Customer Contract Details;
- (e) the Offer;
- (f) the Request, including any addenda; and
- (g) these General Conditions.

Customer Personnel means the Customer's officers, employees and agents.

Customer's Representative means a person appointed by the Customer whose functions and powers are set out in clause 24.1.

Date for Practical Completion means where the Customer Contract is for Works, the date specified in the Customer Contract by which the Works must reach Practical Completion as updated from time to time pursuant to these General Conditions.

Date of Practical Completion means where the Customer Contract is for Works, the date on which the Customer's Representative or the Superintendent (if appointed) certifies that the Contractor has reached Practical Completion.

Defective means:

- (a) in respect of Goods, any Goods that do not comply with the Customer Contract or are otherwise defective in any manner; and
- (b) in respect of Services, any Services that do not comply with the Customer Contract or are otherwise defective in any manner; and
- (c) in respect of Works, any Works that do not comply with the Customer Contract or are otherwise defective in any manner.

Defects Liability Period means the period commencing on the Date of Practical Completion and running for the duration of time specified in the Customer Contract, or if no duration is specified, for a period of one (1) year.

Deliverable means any deliverable referred to in the Request.

Delivery Date means the date for delivery of the Goods specified in the Customer Contract/Order.

Delivery Place means the place for delivery of the Goods specified in the Customer Contract/Order.

Delivery Time means the time for delivery of the Goods specified in the Customer Contract/Order.

Discount means any discount in respect of the Price specified in the Customer Contract.

Event of Default means the occurrence of any one of the following events:

- (a) the Contractor breaches an obligation under the Customer Contract or any Head Agreement that cannot be remedied; or
- (b) the Contractor breaches any other obligation under the Customer Contract or any Head Agreement and that breach is not remedied within 10 Business Days after the Contract Authority or the Customer gives a notice to the Contractor requiring the breach to be remedied; or
- (c) the Contractor commits 3 breaches of its obligations under the Customer Contract or any Head Agreement over any 12 month period, whether or not the Contract Authority or the Customer has given the Contractor notice of any such breaches and whether or not the Contractor has rectified such breaches; or
- (d) a representation or warranty made by the Contractor under the Customer Contract or any Head Agreement is or becomes untrue or is breached; or
- (e) an Insolvency Event occurs in respect of the Contractor; or
- (f) the Contractor ceases, or threatens to cease, to carry on business; or
- (g) the Contractor or any person included in the Specified Personnel is convicted of a criminal offence that is punishable by imprisonment or detention; or
- (h) if the Contractor is a body corporate, the Contractor is convicted of a criminal or statutory offence that is punishable by a fine or penalty of, or exceeding, \$10,000; or
- (i) if in the reasonable opinion of the Contract Authority or the Customer, the reputation of the Contract Authority, the Customer, the State of Western Australia or the Government of Western Australia is, or is likely to be, damaged by any act or omission of the Contractor.

Existing Material means a work (as defined in the *Copyright Act*), a product or any other material, which satisfies all of the following criteria:

- (a) the work, product or other material:
 - (i) was created prior to the commencement of the Term; or
 - (ii) is to be created during the Term outside the scope of the Customer Contract, including any subsequent modifications to such work, product or other material;
- (b) the Intellectual Property Rights in the work, product or other material are not owned by the Crown in right of the State of Western Australia, the Contract Authority or the Customer; and
- (c) the work, product or other material is required specifically for, or in connection with, the Goods, Services and Works or Records.

General Conditions means these general conditions of contract.

Government Agency means any government or any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, Minister of the Crown, agency, entity or Parliament.

Goods means the deliverables, goods, hardware, products or software (if any) described, and in the quantity specified, in the Head Agreement or Customer Contract.

Goods, Services and Works means:

- (a) Goods, if the Customer Contract is for the supply of Goods only;
- (b) Services, if the Customer Contract is for the supply of Services only;
- (c) Works, if the Customer Contract is for the supply of Works only; or
- (d) any combination of the above, as specified in the Customer Contract.

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

GST Act means *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* and, where the context permits, includes the Commissioner of Taxation's goods and services tax rulings and determinations and any other written law dealing with GST applying for the time being in the State of Western Australia.

Head Agreement means any head agreement entered into between the Contract Authority and the Contractor under a Common Use Arrangement, a Panel Arrangement or a Single Supplier Standing Offer Arrangement.

Head Agreement Details means the relevant Schedule to the Request, describing the specific requirements of the Contract Authority in respect of Goods, Services and Works to be delivered by the Contractor under Customer Contracts.

Head Agreement Documents means:

- (a) the letter or other instrument issued by the Contract Authority accepting the Contractor's Offer, which letter or other instrument may also specify:
 - (i) any amendments to these General Conditions, the Head Agreement or the Customer Contract Details or any of them;
 - (ii) any other terms and conditions which are to form part of the Head Agreement, the Customer Contract or both; andwhich the Contract Authority and the Contractor have agreed;
- (b) the Head Agreement Details;
- (c) the Offer;
- (d) the Request, including any addenda; and
- (e) these General Conditions.

Insolvency Event means the happening of any of these events:

- (a) an order is made, or an application is made to a court for an order, that a body corporate be wound up; or
- (b) except to reconstruct or amalgamate while solvent, a body corporate:
 - (i) is wound up or dissolved; or
 - (ii) resolves to wind itself up, or otherwise dissolve itself, or gives notice of intention to do so; or
 - (iii) enters into, or resolves to enter into, any form of formal or informal arrangement for the benefit of all or any class of its creditors,

including a scheme of arrangement, deed of company arrangement, compromise or composition with, or assignment for the benefit of, all or any class of its creditors; or

- (c) a liquidator or provisional liquidator is appointed (whether or not under an order), or an application is made to a court for an order, or a meeting is convened or a resolution is passed, to make such an appointment, in respect of a body corporate; or
- (d) a receiver, manager, receiver and manager, trustee, administrator, controller (as defined in section 9 of the Corporations Act) or similar officer is appointed, or an application is made to a court for an order, or a meeting is convened or a resolution is passed, to make such an appointment, in respect of a body corporate or any asset or undertaking of a body corporate; or
- (e) any step is taken to enforce security over, or a distress, attachment, execution or other similar process is levied, enforced or served out against any asset or undertaking of a body corporate; or
- (f) the process of any court or authority is invoked against a body corporate, or any asset or undertaking of a body corporate, to enforce any judgment or order for the payment of money or the recovery of any property; or
- (g) a body corporate:
 - (i) takes any step to obtain protection, or is granted protection, from its creditors under any applicable legislation; or
 - (ii) stops or suspends payment of all, or a class of, its debts; or
 - (iii) is or is taken by any applicable legislation to be, or states that it is, or makes a statement from which it may be reasonably deduced that it is:
 - (A) insolvent or unable to pay its debts when they fall due; or
 - (B) the subject of an event described in section 459C(2)(b) or section 585 of the Corporations Act; or
 - (iv) is taken to have failed to comply with a statutory demand as a result of the operation of section 459F(1) of the Corporations Act; or
 - (v) ceases, or threatens to cease, to carry on all or a material part of its business; or
- (h) a person becomes an insolvent under administration as defined in section 9 of the Corporations Act or action is taken which could result in that event; or
- (i) a person dies, ceases to be of full legal capacity or otherwise becomes incapable of managing its own affairs for any reason; or
- (j) anything analogous or having a substantially similar effect to any of the events specified above happens under the law of any applicable jurisdiction.

Intellectual Property Rights means:

- (a) patents, copyright, rights in circuit layouts, registered designs, trade marks and the right to have confidential information (being information which is

capable of being protected by way of an action for breach of confidence) kept confidential; and

- (b) any application or right to apply for registration of any of those rights, but does not include Moral Rights.

Latent Condition means a condition on the Premises (other than weather conditions or conditions arising from weather conditions) that differs materially from the physical conditions that should reasonably have been anticipated by an experienced and competent contractor at the date of the Customer Contract if:

- (a) the Contractor had examined all information made available by the Customer or the Customer's Representative or the Superintendent; and
- (b) the Contractor had examined all information reasonably obtainable by the Contractor relevant to the risks and other circumstances having an effect upon the Quote; and
- (c) such conditions could not be overcome by the Contractor in the ordinary course of performing the Works by the application of good construction practice and procedure.

Law means all applicable present and future laws including:

- (a) acts, ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction of the State or the Commonwealth of Australia;
- (b) Authorisations;
- (c) principles of law or equity;
- (d) statutory codes or guidelines; and
- (e) fees, rates, taxes, levies and charges payable in respect of those things referred to in (a) to (d) of this definition,

whether or not existing at the Commencement Date.

Letter means the letter signed by the Customer that:

- (a) accepts the Offer; and
- (b) may also specify:
- (i) any amendments to these General Conditions or the Customer Contract Details or both;
- (ii) any other terms and conditions which are to form part of the Customer Contract; and

which the Customer and the Contractor have agreed.

Liquidated Damages means:

- (a) where the Customer Contract is for Works, the amount payable by the Contractor for each day that the Date of Practical Completion is delayed beyond the Date for Practical Completion specified in the Customer Contract; or
- (b) where the Customer Contract is for Goods or Services, the amount calculated in accordance with the Customer Contract,

if any.

Material means Existing Material and New Material.

New Material means anything created by the Contractor under the Customer Contract in which Intellectual Property Rights subsist.

Moral Rights has the same meaning as in the *Copyright Act*.

Offer means the offer submitted by the Contractor in response to the Request.

Order means a purchase order for Goods, Services and Works made by the Customer under a Customer Contract or under a Head Agreement.

Panel means the panel of suppliers of the Goods, Services and Works established under clause 4, where each supplier must provide Goods, Services and Works to Customers in accordance with the Head Agreement and the relevant Customer Contract.

Panel Arrangement means a standing offer arrangement for the supply of Goods, Services and Works by members of the Panel to Customers.

Potential Customer means:

- (a) any State Agency; and
- (b) any Authorised Body listed on the Department of Finance's list of authorised bodies, accessible at wa.gov.au.

PPSA means the *Personal Property Securities Act 2009 (Cth)*.

PPS Law means the PPSA and any amendment made at any time to the Corporations Act or any other legislation as a consequence of the PPSA.

Practical Completion means where a Customer Contract is for Works, that stage in the performance of the Works where:

- (a) the Works are completed except for minor defects which:
 - (i) do not prevent the Works from being used for their stated purpose; and
 - (ii) the Customer's Representative or the Superintendent (if appointed) believes the Contractor has reasonable grounds for not promptly rectifying and deferral of such rectification will not prevent the Works from being used by the Customer; and
- (b) when all tests required under the Customer Contract have been completed and all documents required for the use, maintenance and operation of the Works have been provided to the Customer, including 'as-built' construction drawings.

Premises means any premises which are owned or occupied by the Customer and:

- (a) are identified in the Customer Contract; or
- (b) are premises on which the Goods, Services and Works are to be supplied or to which the Contractor has access in order to supply the Goods, Services and Works

and includes anything on those premises.

Price means the price that is:

- (a) specified in the Customer Contract or Head Agreement; or

- (b) determined by applying any formula or method that is specified in the Customer Contract or Head Agreement.

Procurement Act means the *Procurement Act 2020 (WA)*.

Quote means a quote offered by a supplier of Goods, Services and Works in response to a request issued by the Customer under a Panel Arrangement or Single Supplier Standing Offer Arrangement.

Records means records and information of any kind, including originals and copies of all accounts, financial statements, books, files, reports, records, correspondence, documents and other materials created for, or relating to, or used in connection with, the supply of the Goods, Services or Works, whether or not containing Confidential Information, and however such records and information are held, stored or recorded.

Request means the request issued by the Contract Authority or the Customer for the supply of the Goods, Services and Works.

Schedule means a schedule to the Request.

Services means the services (if any) described in the Customer Contract or Head Agreement.

Single Supplier Standing Offer Arrangement means a standing offer arrangement for the supply of Goods, Services and Works to either the Contract Authority or the Customer by a sole Contractor.

Specification means the specification of the Goods, Services and Works specified, or referred to, in the Customer Contract or Head Agreement.

Specified Personnel means the Contractor Personnel specified in the Customer Contract.

Superintendent means a person appointed by the Customer whose functions and powers are set out in clause 31 and so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative.

Superintendent's Representative means a person appointed by the Superintendent under clause 31.

State means the State of Western Australia.

State Agency has the same meaning as given in the Procurement Act.

Term means the initial term of the Customer Contract or Head Agreement or both of them as the context requires and includes any extension of that initial term.

Working Papers means all working papers, notes, reports, documents and other works (whether in paper, electronic or other forms) brought into existence by the Contractor for the purposes of performing the Contractor's obligations under the Customer Contract.

Works means building work (if any) described in the Customer Contract or Head Agreement or, if none is described, the provision of Goods, Services and Works that would otherwise be considered building work under the *Building Act 2011*.

2.2 Interpretations

In these General Conditions, subject to any express stipulation to the contrary or unless the context otherwise requires:

- (a) the singular includes the plural and vice versa;
- (b) a reference to any thing is a reference to the whole or any part of it and a reference to a group of things or persons is a reference to any one or more of them;
- (c) a reference to a gender includes other genders;
- (d) a reference to a person includes a State Agency, a public body, a company and an incorporated or unincorporated association or body of persons;
- (e) a reference to a person includes a reference to the person's executors, administrators, successors, substitutes (including, but not limited to, a person taking by novation) and permitted assigns;
- (f) if the Contractor consists of a partnership or joint venture, then:
 - (i) an obligation imposed on the Contractor under the Head Agreement or the Customer Contract binds each person who comprises the Contractor jointly and severally;
 - (ii) each person who comprises the Contractor is deemed to agree to do all things necessary to enable the obligations imposed on the Contractor under the Head Agreement or the Customer Contract to be undertaken;
 - (iii) the act of one person who comprises the Contractor binds the other persons who comprise the Contractor; and
 - (iv) an Event of Default by one person who comprises the Contractor constitutes an Event of Default by the Contractor;
- (g) an agreement, representation or warranty on the part of, or in favour of, 2 or more persons binds, or is for the benefit of, them jointly and severally;
- (h) a reference to the Head Agreement or the Customer Contract or another instrument includes all variations and replacements of either of them despite any change of, or any change in the identity of, the Contract Authority, the Customer or the Contractor;
- (i) a reference to a clause, schedule, attachment or appendix is a reference to a clause in, or a schedule, attachment or appendix to, these General Conditions;
- (j) all the provisions in any schedule, attachment or appendix to these General Conditions are incorporated in, and form part of, these General Conditions and bind the Contract Authority, the Customer and the Contractor;
- (k) headings are included for convenience and do not affect the interpretation of these General Conditions;
- (l) a reference to 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;

- (m) no rule of interpretation is to be applied to disadvantage the Contract Authority, the Customer or the Contractor on the basis that it was responsible for preparing the Customer Contract or Head Agreement;
- (n) if a word or phrase is defined, other grammatical forms of that word or phrase have a corresponding meaning;
- (o) if the word “including” or “includes” is used, the words “without limitation” are taken to immediately follow;
- (p) a reference to writing includes all means of representing or reproducing words in visible form including by electronic means such as facsimile transmission;
- (q) a reference to a liability includes all obligations to pay money and all other losses, costs and expenses of any kind;
- (r) a reference to a day is to a calendar day, a month is to a calendar month and a year is to a calendar year;
- (s) if a period of time is specified and dates from a given day or the day of an act or event, it is to be calculated inclusive of that day;
- (t) if a date stipulated for payment or for doing an act is not a Business Day, the payment must be made, or the act must be done, on the next Business Day;
- (u) a reference to time means the time observed by the general community from time to time in Western Australia;
- (v) a reference to a monetary amount means that amount in Australian currency;
- (w) where the context permits or requires reference to the Contractor includes the Contractor Personnel; and
- (x) where the context permits or requires reference to the Customer includes the Customer’s Personnel.

3. SCOPE OF CUSTOMER CONTRACT AND HEAD AGREEMENT

3.1 Goods, Services and Works

If this is a Common Use Arrangement, a Panel Arrangement or Single Supplier Standing Offer Arrangement the Head Agreement constitutes a standing offer whereby Customers and Potential Customers may acquire Goods, Services and Works specified in the Head Agreement from the Contractor.

If this is not a Common Use Arrangement, a Panel Arrangement or Single Supplier Standing Offer Arrangement, the Customer Contract is for the Goods, Services and Works specified in the Customer Contract Documents.

3.2 Pricing

The Price is:

- (a) in the case of a Common Use Arrangement, a Panel Arrangement or a Single Supplier Standing Offer Arrangement, determined by reference to the Head Agreement and any Order; or
- (b) if not a Common Use Arrangement, a Panel Arrangement or a Single Supplier Standing Offer Arrangement, determined by reference to the Customer Contract.

3.3 Term of Customer Contract

The Customer Contract is for the Term.

3.4 Extension of Customer Contract

The Customer has the option or options (exercisable in its absolute discretion) to extend the Term for the period or periods (as applicable) specified in the Customer Contract.

If the Customer wishes to exercise an option under this clause, then the Customer must give the Contractor a notice:

- (a) by the date or dates specified in the Customer Contract; or
- (b) if no period is specified in the Customer Contract, at least 20 Business Days before the expiry of the Term,

stating that the Customer Contract is to be extended and the period of the extension.

If the Customer exercises an option under this clause, then references to "the Term" in these General Conditions are to be read as including the period of extension of the Term.

3.5 Standards and Codes

Goods

The Contractor must supply the Goods in accordance with the Specification.

All Goods delivered by the Contractor must conform:

- (a) with all samples provided by the Contractor to the Contract Authority or the Customer; and
- (b) if no standards for the Goods are specified in the Specification:
 - (i) to all relevant and current standards published by the Standards Association of Australia; or
 - (ii) if the Request specifies that it is a "Covered Procurement", to all relevant and current international standards; and
- (c) if the Goods comprise software, there has been sign off by the Customer in acknowledgment that agreed acceptance test criteria or alternative acceptance formalities have been satisfied.

Services

- (a) The Contractor must supply the Services in accordance with the Specification.
- (b) If no standards for the Services are specified in the Specification, then the Contractor must supply the Services in accordance with the highest standards that usually apply to the supply of the Services and with proper skill, care and diligence.

Works

The Contractor must perform the Works during the Term:

- (a) in accordance with the Specification; and
- (b) to all relevant and current standards published by the Standards Association of Australia; or
- (c) if the Request specifies that it is a "Covered Procurement", to all relevant and current international standards.

3.6 Scope of the Head Agreement

The Contract Authority and the Contractor agree that:

- (a) the Contractor must maintain an offer throughout the Term to supply the Goods, Services and Works to Customers and Potential Customers, which offer may be accepted by a Customer or Potential Customer at any time during the Term, on the terms and conditions set out in the Head Agreement; and
- (b) the Head Agreement only confers on the Contractor the right to enter into a Customer Contract:
 - (i) for the supply of the Goods, Services and Works described in the Head Agreement; and
 - (ii) that conforms to:
 - (A) the price list contained in the Head Agreement
 - (B) the Customer Contract Details; and
 - (C) the General Conditions.

3.7 Term of Head Agreement

The Head Agreement is for the Term.

3.8 Extension of Head Agreement

The Contract Authority has the option or options (exercisable in its absolute discretion) to extend the Term for the period or periods (as applicable) specified in the Head Agreement.

If the Contract Authority wishes to exercise an option under this clause, then the Contract Authority must give the Contractor a notice:

- (a) by the date or dates specified in the Head Agreement; or
- (b) if no period is specified in the Head Agreement, at least 20 Business Days before the expiry of the Term,

stating that the Head Agreement is to be extended and the period of the extension.

If the Contract Authority exercises an option under this clause, then references to “the Term” in these General Conditions are to be read as including the period of extension of the Term.

4. FORMATION OF CUSTOMER CONTRACT AND HEAD AGREEMENT

4.1 Formation of Customer Contract

A Customer Contract comes into existence when the Contractor receives a Letter or an Order.

Subject to clause 4.3, the terms of a Customer Contract are contained in the Customer Contract Documents.

4.2 Formation of Head Agreement

A Head Agreement comes into existence when the Contract Authority accepts the Contractor’s Offer in respect of a Common Use Arrangement, a Panel Arrangement or a Single Supplier Standing Offer Arrangement, whether by letter or other instrument.

The terms of a Head Agreement are contained in the Head Agreement Documents.

Clauses 4.3 to 4.17 apply if this is a Common Use Arrangement

4.3 Constitution of Customer Contract

The Contract Authority and the Contractor agree that:

- (a) the following documents constitute a contract between the relevant Customer and the Contractor:
 - (i) an Order;
 - (ii) the price list contained in the Head Agreement;
 - (iii) the letter awarding the Head Agreement;
 - (iv) the Offer;
 - (v) the Head Agreement Details;
 - (vi) the Request; and
 - (vii) the General Conditions;
- (b) a Customer Contract will commence on the date the Goods, Services and Works are ordered; and
- (c) each Customer Contract must be for the supply of the Goods, Services and Works described in the Head Agreement.

4.4 Orders

The Contract Authority and the Contractor agree that:

- (a) a Potential Customer or a Customer (as applicable) may submit an Order to the Contractor at any time during Term; and
- (b) any order submitted by a Customer to the Contractor is deemed to be an Order for the purposes of the Head Agreement and the Customer Contract, whether or not all details have been included in the order and whether or not the order is identified as an Order.

4.5 Supply of Goods, Services and Works to Customers

The Contract Authority and the Contractor agree that:

- (a) if the Contractor receives an Order it must provide Goods, Services and Works in accordance with the Order and the Head Agreement;
- (b) unless the Contract Authority otherwise agrees, the Contractor will not provide any Goods, Services and Works to any Customer or Potential Customer which are capable of being provided under a Customer Contract unless those Goods, Services and Works are provided under the terms and conditions of the Head Agreement; and
- (c) unless the Contract Authority otherwise agrees and notwithstanding any agreement or arrangement between the Contractor and the Customer or Potential Customer to the contrary, any Goods, Services and Works provided to, a Customer or Potential Customer which are capable of being provided under the Head Agreement are deemed to be provided pursuant to, and on the terms and conditions of, the Head Agreement and the deemed Order.

4.6 Variation of Order

The Contract Authority and the Contractor agree that an Order can be varied on the condition that the variation is within the scope of the Head Agreement and that it does not erode, undermine or in any way conflict with the Head Agreement.

4.7 Contract Authority's liability under the Head Agreement

The Contract Authority and the Contractor agree that the Contract Authority is not and will not be liable to the Contractor:

- (a) to perform any obligation, or satisfy any liability, of a Customer; or
- (b) to rectify any breach or default of a Customer; or
- (c) in respect of any claim, loss, liability or damage which the Contractor suffers or incurs as a consequence of, or in connection with, an Order or the Contractor's dealings with a Customer.

4.8 Effect of Expiration or Termination of the Head Agreement

The Contract Authority and the Contractor agree that:

- (a) expiration or termination of the Head Agreement will not affect any existing Order;

- (b) if the Head Agreement expires or is terminated, then the Contractor may not enter into any new Orders after the date of expiration or termination; and
- (c) the Contractor will not be entitled to any compensation for loss or damages for future profits or loss of income as a result of, or in connection with, the expiration or termination of the Head Agreement.

4.9 Effect of Expiration or Termination of Orders

The Contract Authority and the Contractor agree that:

- (a) expiration or termination of an Order will not affect the Head Agreement; and
- (b) the Contractor will not be entitled to any compensation from the Contract Authority for loss or damages for future profits or loss of income as a result of, or in connection with, the expiration or termination of an Order.

4.10 Dealing with Head Agreement

If the Head Agreement is assigned or novated from the Contractor to a third party, then:

- (a) the Customer and the Contractor agree that the Customer Contract is deemed to be assigned or novated from the Contractor to the third party; and
- (b) the Customer appoints the Contract Authority as its agent to do all things necessary or convenient to give effect to the deemed assignment or novation.

4.11 Agency

The Customer appoints the Contract Authority as its agent to exercise all functions conferred on the Contract Authority under the Customer Contract.

The Contract Authority is not personally liable for any claim, loss, liability or damage which the Contractor suffers or incurs as a consequence of, or in connection with, any function undertaken by the Contract Authority while acting as agent for the Customer.

4.12 Application of clauses 4.13 to 4.17

If the Head Agreement relates to a Single Supplier Standing Offer Arrangement, a Panel Arrangement or a Common Use Arrangement then clauses 4.13 to 4.17 form part of the Head Agreement.

4.13 Addition of Goods

The Contractor must promptly notify the Contract Authority in writing when it offers to supply:

- (a) a new good which is similar in nature to, or has the same function as, a Good ("**New Good**"); or
- (b) a good which is an improved version of a Good ("**Improved Good**"), on a general commercial basis or otherwise to the public or other customers.

If required by the Contract Authority, the Contractor must add the New Good or the Improved Good (as applicable) to the list of Goods offered to Customers under the Head Agreement.

4.14 Deletion of Goods

The Contractor may, with the Contract Authority's prior written consent, remove a Good ("**Deleted Good**") from the list of Goods offered to Customers under the Head Agreement.

4.15 Substitution of Goods

The Contractor may, with the Contract Authority's prior written consent, permanently or temporarily substitute another good ("**Substitute Good**") for a Good which is offered to Customers under the Head Agreement ("**Substituted Good**"), whether the Substitute Good is:

- (a) different in nature from, or has a different function to, the Substituted Good;
- (b) supplied or sourced from a different country of origin than the Substituted Good; or
- (c) manufactured by a manufacturer other than the manufacturer of the Substituted Good.

4.16 Effective Date of Addition, Deletion or Substitution

- (a) The Contractor must:
 - (i) offer the New Good, the Improved Good or the Substitute Good; or
 - (ii) cease offering the Deleted Good or the Substituted Good,(as applicable) to Customers and Potential Customers on and from a date approved by the Contract Authority.
- (b) On and from the date approved:
 - (i) the Head Agreement is deemed to be amended to remove the Deleted Good or the Substituted Good or to include the New Good, the Improved Good or the Substitute Good (as applicable);
 - (ii) references to "Goods" in the Head Agreement exclude the Deleted Good or the Substituted Good and include the New Good, the Improved Good or the Substitute Good (as applicable);
 - (iii) Customers and Potential Customers may no longer submit Orders for the Deleted Good or the Substituted Good (as applicable);
 - (iv) Customers and Potential Customers may submit Orders for the New Good, the Improved Good or the Substitute Good (as applicable); and
 - (v) all Contracts and outstanding Orders submitted by Customers and Potential Customers are deemed to be amended to:
 - (A) delete references to the Deleted Good; and
 - (B) delete references to the Substituted Good and substitute references to the Substitute Good,

as applicable.

4.17 Provision of information

The Contractor must promptly provide any information requested by the Contract Authority in respect of the proposed New Good, Improved Good or Substitute Good and must promptly provide samples of the proposed New Good, Improved Good or Substitute Good if requested by the Contract Authority.

Clauses 4.18 to 4.20 apply if this is a Panel Arrangement.

4.18 Generally

(a) In this clause:

Panel means the panel of Panel Members.

Panel Arrangement means the arrangement for the supply of Goods, Services and Works by Panel Members to the Customer.

Panel Member means a successful Respondent or other entity who has been appointed as a member of the Panel.

- (b) This clause applies to a Panel Arrangement established by the Contract Authority or Customer for the supply of Goods, Services and Works to the Customer.
- (c) The Contract Authority or Customer reserves the right:
- (i) to appoint as many Panel Members as it sees fit; and
 - (ii) at any time and from time to time, to supplement the Panel or any member of the Panel.
- (d) The Customer will purchase Goods, Services and Works from the Panel in accordance with the Buying Rules.
- (e) Each Panel Member acknowledges that, without limiting sub-clause (d):
- (i) the Customer may request Goods, Services and Works from any Panel Member;
 - (ii) neither the Contract Authority nor the Customer makes any representation that the Customer will procure or seek to procure the Goods, Services and Works, or any particular volume of Goods, Services and Works, from a Panel Member;
 - (iii) the Customer will request Goods, Services and Works from a Panel Member by submitting an Order to proceed to that Panel Member;
 - (iv) a Panel Member may not receive any Orders from the Customer during the Term; and
 - (v) appointment to a Panel does not give a Panel Member an exclusive right to provide the Goods, Services and Works to the Customer.
- (f) On termination of a Panel Member's contract under clause 26, that Panel Member is immediately removed from the Panel and is prohibited from rejoining the Panel under sub-clause (c)(ii).

4.19 Consequences of being appointed to Panel

The Contractor acknowledges that:

- (a) Customers and Potential Customers may submit Orders to the Contractor or to any other member of the Panel; and
- (b) appointment to a Panel does not give the Contractor an exclusive right to provide the Goods and/or Services to the Contract Authority, a Customer or a Potential Customer.

4.20 Change Panel

The Contract Authority or Customer reserves the right, at any time and from time to time, to cancel, vary, supplement, supersede or replace the Panel or any member of the Panel.

Generally

4.21 No assurance of Orders

The Contractor acknowledges that the Contractor may not receive any Orders from any Customer or any Potential Customer during the Term.

None of the Contract Authority, any Customer nor any Potential Customer makes any representation that it will procure or seek to procure any particular volume of Goods, Services and Works from the Contractor.

4.22 Order of Precedence – Customer Contract Documents

The Customer Contract Documents shall be read in the order of precedence:

- (a) specified in the Customer Contract Documents; or
- (b) if no order of precedence is specified in the Customer Contract Documents, then the Customer Contract Documents shall be read in descending order of precedence as listed in the definition of Customer Contract Documents in clause 2.1.

Where any inconsistency occurs between the provisions contained in two or more Customer Contract Documents, the Customer Contract Document lower in the order of precedence shall where possible be read down to resolve the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions shall be severed from the Customer Contract Document lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document.

4.23 Order of Precedence – Head Agreement Documents

The Head Agreement Documents shall be read in:

- (a) the order of precedence specified in the Head Agreement Documents; or
- (b) if no order of precedence is specified in the Head Agreement Documents, then the Head Agreement Documents shall be read in descending order of

precedence as listed in the definition of Head Agreement Documents in clause 2.1.

Where any inconsistency occurs between the provisions contained in two or more Head Agreement Documents, the Head Agreement Document lower in the order of precedence shall where possible be read down to resolve the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions shall be severed from the Head Agreement Document lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document.

4.24 Variations – Customer Contract

The Customer and the Contractor may vary the Customer Contract or any other technical requirements of the Customer by completing and signing a change order in the form specified in Schedule 10 to the Request.

If there is no schedule 10 to the Request, the Customer Contract may only be varied in writing executed by the Customer and the Contractor.

4.25 Variations – Head Agreement

The Head Agreement may only be varied in writing executed by the Contract Authority and the Contractor.

5. RELATIONSHIP

The Contractor is an independent contractor, and nothing in the Customer Contract or the Head Agreement may be construed to make the Contractor a partner, agent, employee or joint venturer of the Contract Authority or the Customer.

The Contractor must not represent that the Contractor or any of its Contractor Personnel are the employees, agents, partners or joint venturers of the Contract Authority or the Customer.

6. SERVICE AND WORK SPECIFIC ISSUES

6.1 Application of this clause

If the Customer Contract is for the supply of:

- (a) Services; or
- (b) Works,

then this clause 6 forms part of the Customer Contract.

6.2 Supply of Services

The Contractor must supply the Services during the Term in accordance with the Customer Contract.

6.3 Performance of Works

The Contractor must perform the Works during the Term:

- (a) in accordance with the Customer Contract; and
- (b) in a proper and workmanlike manner.

6.4 Orders

If the Customer Contract refers to the giving of Orders for the Services or Works, then the Contractor must supply the Services or Works in accordance with Orders given by the Customer.

The Customer may give the Contractor an Order at any time.

The Customer may give the Contractor any number of Orders.

An Order must specify:

- (a) if for Services, the Services, the scope of the Services and the date, time and place for performance of the Services (if applicable); or
- (b) if for Works, the Works, the date Works must commence and the Date for Practical Completion.

6.5 Additional Work

The Contractor must not vary the Goods, Services and Works to be supplied pursuant to a Customer Contract unless directed or instructed to do so by:

- (a) the Customer or by the Customer's Representative; or
- (b) if the Customer Contract is for Works, the Superintendent or Superintendent's Representative, where a Superintendent is appointed under the Customer Contract.

The Customer or Customer's Representative, or the Superintendent (if appointed) may instruct or direct the Contractor to:

- (c) increase, decrease, omit or change any part of the Goods, Services or Works to be supplied;
- (d) supply additional Goods, Services or Works; and
- (e) demolish or remove any Goods, Services or Works no longer required by the Customer,

and the Contractor is obliged to comply with that instruction or direction, as long as it is within the general scope of the Customer Contract or the Head Agreement.

6.6 Price for Additional Work

Where a variation is instructed or directed or pursuant to clause 6.5, then the Customer, the Customer's Representative or the Superintendent (if appointed) must determine the price for the varied Goods, Services or Works as follows:

- (a) at the rate specified in the Customer Contract or Head Agreement; or
- (b) if no rate is specified in the Customer Contract or Head Agreement, at the rate agreed between the Customer and the Contractor; or

- (c) if no rate is agreed under this clause 6.6, at a reasonable rate determined by the Customer, Customer's Representative or Superintendent.

In seeking to agree the price for varied Works pursuant to clause 6.6(b) or in determining the price pursuant to clause 6.6(c), the price must include a margin for the Contractor.

Any valuation of a variation that results in an increased amount payable by the Customer must be added to the Price and any valuation that results in a decreased amount payable by the Customer must be deducted from the Price.

6.7 Specified Personnel

If the Customer requires Specified Personnel, then the Contractor:

- (a) must ensure that all Specified Personnel are available to carry out, and do carry out, the Services or perform the Works; and
- (b) must not allow the Services or the Works to be carried out by any other person without the prior written consent of the Customer.

The Contractor must remove any person included in the Specified Personnel from the supply of the Services or the Works if the Customer reasonably requires by notice in writing to the Contractor that the person be removed. If requested, the Customer must give the Contractor the reason for the removal of the person included in the Specified Personnel.

If the Customer gives a notice to the Contractor under this clause 6.7, then the Contractor must promptly:

- (a) remove the person included in the Specified Personnel; and
- (b) replace the person included in the Specified Personnel with additional Contractor Personnel of similar skills and experience reasonably acceptable to the Customer.

If Specified Personnel are replaced with additional Contractor Personnel under this clause 6.7, then references to Specified Personnel are taken to include such additional Contractor Personnel.

6.8 Unsatisfactory Services and defective Works

If the Customer finds that any of the Services are Defective, then, without limiting any other remedy available to the Customer, the Customer may by notice to the Contractor require the Contractor to re-supply the Defective Services and the Contractor must re-supply the Defective Services at no cost to the Customer.

If the Contractor receives a notice under this clause 6.8 and the Contractor does not re-supply the Defective Services within a reasonable time, then the Customer may purchase from another supplier substitute services which in the opinion of the Customer (as applicable) are most suitable, even though such services may be of a different kind, quantity and quality from the Services.

If the Customer purchases substitute services, then:

- (a) the Customer does not have to pay the Price for the Defective Services; and

- (b) the Contractor must reimburse the Customer (as applicable) for:
 - (i) any amount by which the cost of substitute services exceeds the Price for the Defective Services; and
 - (ii) the Customer's reasonable costs and expenses resulting from having to purchase substitute services,
within 5 Business Days from the date that the Customer (as applicable) gives the Contractor an invoice for those costs.

Without prejudice to other parts of this clause 6.8, if the Customer Contract is for Works the Contractor must also:

- (a) rectify any Defective Works notified by the Customer's Representative or the Superintendent (if appointed) within 10 Business Days after the Date of Practical Completion; and
- (b) rectify any Defective Works, including defects, as notified by the Customer during the Defects Liability Period,

and the notice may specify how the defect is to be rectified and the time by which it must be rectified and the defect must be so rectified within that period.

For the Defective Works that have been rectified, a new Defects Liability Period commences from the time of completion of the rectification.

7. GOODS SPECIFIC ISSUES

7.1 Application of this clause

If the Customer Contract is for the supply of Goods then this clause 7 forms part of the Customer Contract or the Head Agreement.

7.2 Supply of Goods

The Contractor must supply the Goods during the Term in accordance with the Customer Contract or the Head Agreement.

7.3 Orders

If the Customer Contract or the Head Agreement refers to the giving of Orders for the Goods, then the Contractor must supply the Goods in accordance with Orders given by the Customer.

The Customer may give the Contractor an Order at any time during the Term.

The Customer may give the Contractor any number of Orders.

An Order must specify:

- (a) the Goods;
- (b) the quantity of the Goods; and
- (c) the date, time and place for delivery of the Goods if different from the Delivery Date, Delivery Time or Delivery Place.

7.4 Inspection and Testing

Subject to the Customer:

- (a) giving reasonable prior notice to the Contractor; and
- (b) complying with all reasonable directions and procedures of the Contractor relating to occupational health, safety, security and confidentiality in connection with the Contractor's premises,

the Customer may inspect and test any Goods at the Contractor's premises at any time during the Term.

The Contractor must do everything reasonably necessary to enable the inspection and testing to be carried out.

7.5 Sources of Supply

If the Customer requests, the Contractor must use reasonable endeavours to promptly provide full details of:

- (a) the method and place of manufacture or production;
- (b) the materials used in manufacture or production;
- (c) the source of supply; and
- (d) everything else reasonably required by the Customer,

in connection with any of the Goods or any equipment provided or used by the Contractor in relation to the manufacture, production or supply of the Goods.

7.6 Packing

All Goods must be properly and securely packaged and accurately labelled for identification and safety before delivery to the Customer.

7.7 Delivery

Unless the Customer specifies otherwise in an Order, the Contractor must deliver the Goods to the Delivery Place on the Delivery Date at the Delivery Time.

If no Delivery Date or Delivery Time is specified in the Customer Contract or in an Order, then:

- (a) the Contractor must give notice to the Customer at least 2 Business Days before the delivery of Goods; and
- (b) the Contractor must deliver the Goods during Business Hours.

If a period of days is specified as the Delivery Time, then the Contractor must deliver the Goods within Business Hours on any day in that period.

The Contractor must comply with all reasonable directions from the Customer or any other person who has control of the Delivery Place.

7.8 Variation of Delivery

The Customer may at any time, including at the time of actual delivery, vary the Delivery Place, the Delivery Date or the Delivery Time.

When possible, the Customer will use reasonable endeavours to inform the Contractor of the variation a reasonable time before delivery is due.

The Customer must reimburse the Contractor for the Contractor's reasonable costs and expenses resulting from a variation to the Delivery Place, Delivery Date or Delivery Time under this clause 7.8.

7.9 Delay in Delivery Date - Contractor Caused

If delivery of the Goods is likely to be delayed until after the Delivery Date due to an act or omission of the Contractor, then the Contractor must notify the Customer of the likely delay as soon as the Contractor becomes aware of it.

A notice from the Contractor under this clause 7.9 does not release the Contractor from its obligations relating to delivery of the Goods or from any other obligation or liability under the Customer Contract.

If:

- (a) the Customer receives a notice under this clause 7.9; or
- (b) the Goods are not delivered by the Delivery Date,
and the Customer requires the Goods by the Delivery Date, then the Customer:
 - (i) must give notice to the Contractor if it intends to purchase substitute goods from another supplier under this clause 7.9 no later than 5 Business Days before the purchase of the substitute goods; and
 - (ii) may purchase from another supplier substitute goods which in the opinion of the Customer (as applicable) are most suitable, even though such goods may be of a different kind, quantity and quality from the Goods.

If the Customer purchases substitute goods:

- (a) the Customer does not have to take delivery of, or pay the Price for, the Goods; and
- (b) the Contractor must reimburse the Customer (as applicable) for:
 - (i) any amount by which the cost of substitute goods exceeds the Price for the Goods; and
 - (ii) the Customer's reasonable costs and expenses resulting from having to purchase substitute goods,
within 10 Business Days from the date on which the Customer (as applicable) gives the Contractor an invoice for those costs.

7.10 Delay in Delivery Date - Customer Caused

If delivery of the Goods is likely to be delayed until after the Delivery Date due to an act or omission of the Customer and that act or omission justifies an extension of the Delivery Date, then the Contractor must, within 10 Business Days after the act or omission of the Customer giving rise to the delay, notify the Customer in writing of:

- (a) the strategies that the Contractor has developed and will implement to avoid, minimise or manage the consequences of the delay;

- (b) the period, or likely period, of delay;
- (c) the likely effect of the delay on the Customer Contract;
- (d) the additional costs which the Contractor will reasonably incur, and
- (e) request an extension of time that is reasonable in the circumstances.

After receiving a request for an extension of time under this clause 7.10, the Customer must:

- (a) promptly consent to a reasonable extension of time; and
- (b) pay all reasonable additional costs incurred by the Contractor within 30 days of receiving the request,

unless there are reasonable grounds for refusing its consent.

7.11 Title and Risk

- (a) Subject to sub-clause (b), risk in the Goods passes to the Customer on delivery of the Goods to the Customer in accordance with the Customer Contract.
- (b) If the Goods form part of a Works contract, risk in the Goods passes to the Customer on incorporation into the Works or installation of the Goods in the Premises (as applicable).
- (c) Property and title in the Goods passes to the Customer on payment for the Goods, or if the Goods form part of a Works contract, on incorporation of the goods into the Works or installation of the Goods in the Premises (as applicable).
- (d) Property and risk in any Goods removed by the Contractor or returned to the Contractor re-passes to the Contractor at the time the Goods are removed or returned.

7.12 Payment before Delivery

Despite any other provision of the Customer Contract, if the Customer pays the Price for Goods before the Contractor has delivered the Goods, then the Contractor will hold that payment on trust for the Customer until the Contractor delivers the Goods to the Customer.

7.13 Rejection of Goods

Neither the delivery of the Goods by the Contractor to the Customer nor payment of the Price by the Customer to the Contractor constitutes acceptance of the Goods by the Customer.

The Customer may reject Faulty Goods by giving a notice of rejection to the Contractor within 10 Business Days after the later of:

- (a) delivery of the Goods to the Customer;
- (b) installation of the Goods in the Premises;
- (c) if this is a Works contract, the Date of Practical Completion; or
- (d) the date the Customer first uses the Goods.

The Customer is also entitled to reject the Goods under the *Sale of Goods Act 1895*.

7.14 If Defective Goods

If the Customer finds that any Goods are Defective Goods, then the Customer may by notice in writing to the Contractor reject the Defective Goods, in which case:

- (a) the Customer must provide a reason or reasons for rejection, if requested by the Contractor;
- (b) the Contractor must immediately repair or replace the Defective Goods;
- (c) if the Contractor has not repaired or replaced the Defective Goods to the reasonable satisfaction of the Customer within 5 Business Days, the Customer may notify the Contractor that the Defective Goods are to be removed immediately and that the Customer will be purchasing substitute goods. Upon such notification the Contractor shall remove the Defective Goods and make good any damage caused by such removal and the Customer may purchase from another supplier substitute goods which in the opinion of the Customer (as applicable) are most suitable, even though such goods may be of a different kind, quantity and quality from the Goods.

If the Customer purchases substitute goods:

- (i) the Customer does not have to take delivery of, or pay the Price for, the Goods; and
- (ii) the Contractor must reimburse the Customer (as applicable) for:
 - (A) any amount by which the cost of substitute goods exceeds the Price for the Goods; and
 - (b) the Customer's reasonable costs and expenses resulting from having to purchase substitute goods,
within 10 Business Days from the date on which the Customer (as applicable) gives the Contractor an invoice for those costs; and
- (d) the Contractor must reimburse the Customer for the Customer's reasonable costs and expenses resulting from not having the use of the Goods while the Defective Goods are being replaced, repaired or rectified.

7.15 Remedies for Defects in Goods

If the Contractor fails to comply with the Customer's notice under clause 7.14, then the Customer may do any one or more of the following:

- (a) return the Defective Goods to the Contractor at the Contractor's cost;
- (b) hold the Defective Goods as security for the performance of the Contractor's obligations under clause 7.14;
- (c) sell the Defective Goods (without being liable to the Contractor in any way for the amount of the sale proceeds) and:
 - (i) keep so much of the net sale proceeds as is necessary to recover the Customer's costs, expenses and losses resulting from the Contractor's breach of the Customer Contract; and

- (ii) pay the balance of the net sale proceeds to the Contractor,
- (iii) purchase from another supplier substitute goods which in the opinion of the Customer (as applicable) are most suitable, even though such goods may be of a different kind, quantity and quality from the Goods.

If the Customer purchases substitute goods:

- (A) the Customer does not have to take delivery of, or pay the Price for, the Goods; and
- (B) the Contractor must reimburse the Customer (as applicable) for:
 - a. any amount by which the cost of substitute goods exceeds the Price for the Goods; and
 - b. the Customer's reasonable costs and expenses resulting from having to purchase substitute goods,
within 10 Business Days from the date on which the Customer (as applicable) gives the Contractor an invoice for those.

The Customer is not liable to the Contractor for any loss or damage to Defective Goods resulting from the exercise of any right under this clause.

7.16 Sale of Goods Act 1895

The Customer and the Contractor acknowledge that:

- (a) the *Sale of Goods Act 1895* applies to the Customer Contract; and
- (b) to the extent that there is any inconsistency between the *Sale of Goods Act* and the Customer Contract, and to the extent permitted by law, the Customer Contract applies rather than the *Sale of Goods Act*.

8. DELIVERY MANAGEMENT

8.1 Customer Supplied Items

The Customer will provide the items specified in the Customer Contract. Such items will, to the Customer's reasonable knowledge and belief, be fit for any purpose stated in the Customer Contract.

8.2 Facilities

The Customer warrants that:

- (a) any facilities (including items of equipment and software) which it makes available to the Contractor will comply with the Specifications and any other standards set out in the Customer Contract;
- (b) facilities made available to the Contractor will be maintained in the manner specified (if at all) in the Customer Contract; and
- (c) should a facility which is provided by the Customer under this clause fail at any time to meet the requirements specified in the Customer Contract, then without limiting any other rights of the Contractor, the Customer will

promptly take reasonable steps to ensure that the facility meets those requirements as soon as practicable.

8.3 Site Preparation

To the extent specified in the Customer Contract, the Customer will be responsible for site preparation to enable the Contractor to perform its obligations under the Customer Contract.

9. ACCESS

9.1 Access and Records

Subject to the Contract Authority, the Customer or both (as applicable):

- (a) giving reasonable prior notice to the Contractor; and
- (b) complying with all reasonable directions and procedures of the Contractor relating to occupational health, safety, security and confidentiality in connection with the Contractor's premises,

the Contractor must allow the Contract Authority, the Customer or both to:

- (a) have reasonable access to any premises used or occupied by the Contractor in connection with the Goods, Services and Works;
- (b) have reasonable access to all Records in the custody or control of the Contractor;
- (c) examine, audit, copy and use any Records in the custody or control of the Contractor; and
- (d) photograph, film or otherwise record anything done by the Contractor in supplying the Goods, Services and Works, if reasonably required by the Contract Authority, the Customer or both.

The Contractor must keep accurate, complete and current written Records in respect of the Head Agreement and the Customer Contract, including:

- (a) if the Customer Contract is for the supply of Goods:
 - (i) the type and quantity of the Goods supplied to the Customer;
 - (ii) the date and time on which the Contractor supplied the Goods to the Customer; and
 - (iii) the place to which the Contractor delivered the Goods to the Customer;
- (b) if the Customer Contract is for the supply of Services:
 - (i) the type of Services, including the separate tasks, supplied to the Customer on each day during the Term;
 - (ii) the time that the Contractor spent providing the Services on each day during the Term; and
 - (iii) the name and title of all Contractor Personnel who provided the Services or were responsible for supervising the provision of the Services; and

- (c) if the Customer Contract is for Works:
 - (i) the type of Works, including the separate tasks, carried out on each day during the Term;
 - (ii) the time that the Contractor spent carrying out the Works on each day during the Term; and
 - (iii) the name and title of all Contractor Personnel who carried out the Works or were responsible for supervising the carrying out of the Works.

The Contractor must comply with the directions of the Contract Authority and the Customer in relation to the keeping of Records whether those directions relate to the period before or after the expiry of the Term.

The Contractor must keep all Records for at least seven (7) years after the later of the expiry or termination of the Head Agreement, or the last of the Customer Contracts, as the case may be.

The Contractor must do everything necessary to obtain any third party consents which are required to enable the Contract Authority and the Customer to have access to Records under this clause 9.

9.2 Access to Customer's Premises

- (a) The Customer will provide the Contractor with access to the Customer's premises (or if the Customer's premises are not where the Services or Works are to be performed, to the relevant premises) as specified in the Customer Contract to enable the Contractor to fulfil its obligations under the Contract.
- (b) The Contractor must take all necessary steps to ensure that it does not cause and that third parties are prevented from causing:
 - (i) any damage to any property of the Customer or property on the Premises; and
 - (ii) any injury or death to any person caused by or as a result of the performance of the Services or Works.
- (c) Access may be temporarily denied or suspended by the Customer, at its sole discretion. Where access is temporarily denied or suspended by the Customer (except in circumstances where access is temporarily denied or suspended due to an investigation into the conduct of the Contractor or the Contractor Personnel), the Contractor will (subject to compliance with clause 35 where the Customer Contract is for Works) be entitled to an extension of time to complete any obligations which are directly and adversely affected by the denial of access. Without limiting the foregoing, the Customer will, following a temporary denial or suspension of access, permit a resumption of access as soon as practicable.

9.3 Survival of Clause

This clause 9 survives expiration or termination of the Customer Contract.

10. CONTRACTOR PERSONNEL

10.1 Contractor Personnel Generally

The Contractor must ensure that all Contractor Personnel:

- (a) are properly qualified and suitable for the tasks that they are to do;
- (b) hold all necessary permits, licences and authorities required by law; and
- (c) act, in all circumstances and at all times, in a fit and proper manner.

10.2 Specified Personnel

- (a) Where Specified Personnel are specified in the Customer Contract as being responsible for the performance of key roles or tasks under the Customer Contract, the Contractor will provide those individuals to fulfil those tasks.
- (b) If, notwithstanding this obligation, a specified individual is unavailable at any time during the scheduled performance of these key roles or tasks, the Contractor will within 2 Business Days advise the Customer of the reason for the absence and expected length of absence and propose a substitute or permanent replacement (as appropriate).
- (c) Any substitute Specified Personnel must be:
 - (i) approved by the Customer (the Customer may not unreasonably withhold its approval of a substitute but it may give its approval subject to such conditions as it reasonably considers necessary to protect its interests under the Customer Contract); and
 - (ii) of at least equivalent skill and experience.

10.3 Awards, Workplace Agreements

The Contractor must ensure that the remuneration and terms of employment of all Contractor Personnel for the duration of the Customer Contract will be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry.

10.4 Police Clearance

The Contract Authority or the Customer may request the Contractor, at any time and from time to time, to obtain and provide it with an Australia-wide police clearance in respect of any Contractor Personnel.

The Contractor must comply with that request within thirty (30) Business Days of such request.

If any police clearance evidences that any Contractor Personnel has committed a criminal offence punishable by imprisonment or detention, then the Contract Authority or the Customer may, without prejudice to their other rights under the Customer Contract or Head Agreement, request the Contractor to promptly remove that Contractor Personnel from involvement in the Customer Contract or the Head Agreement as the case requires.

If the Contractor is requested to remove any Contractor Personnel under this clause, the Contractor must, at its own cost, promptly remove that Contractor Personnel from all involvement in the Customer Contract or the Head Agreement as the case may be and arrange for a replacement of that Contractor Personnel.

10.5 Prevention of Paedophilia

The Contractor must ensure that any Contractor Personnel who will be required to, or is likely to, enter a school, completes a confidential declaration before entering Premises where children are likely to be present. The confidential declaration must be in the form provided by the Customer to the Contractor.

The Contractor must ensure that, except with the prior written consent of the Customer, no Contractor Personnel enters Premises where children are likely to be present for the purposes of supplying the Goods, Services and Works without first having completed a confidential declaration.

The confidential declaration will be deemed to have been re-made by each of the Contractor Personnel on each and every occasion they enter Premises where children are likely to be present.

10.6 Working with Children

If the Services to be provided by the Contractor under the Customer Contract involve "child-related work" (as that term is defined in section 6 of the Working with Children (Criminal Record Checking) Act 2004) ("*the Act*") then:

- (a) all Contractor Personnel who will undertake "child-related work" must provide to the Customer an assessment notice under section 12 of the Act before they commence work under the Customer Contract; and
- (b) the Contractor must otherwise at all times comply, and ensure that all Contractor Personnel comply, with the provisions of the Act.

The Customer may require the Contractor to immediately remove any Contractor Personnel from the Premises who do not have a current assessment notice.

A breach of this clause will be deemed an Event of Default which cannot be remedied.

11. GENERAL WARRANTIES

11.1 Contractor's General Warranties

Except where the Contractor has otherwise disclosed in writing to the Contract Authority and the Customer, and the Contract Authority and the Customer have given their prior written consent to the matter disclosed, the Contractor warrants in favour of the Contract Authority and the Customer that:

- (a) the Contractor has no conflict of interest arising out of the Customer Contract or the Head Agreement;
- (b) the Contractor is properly authorised and has the power to enter into the Customer Contract and the Head Agreement and perform the Contractor's obligations under the Customer Contract and the Head Agreement;

- (c) the Contractor's obligations under the Customer Contract and the Head Agreement are valid and binding and are enforceable against the Contractor;
- (d) all information provided by the Contractor to the Contract Authority, the Customer or both in connection with the Customer Contract and the Head Agreement is true and correct;
- (e) there is no litigation or arbitration, and there are no administrative proceedings, taking place, pending or threatened against the Contractor which could have a materially adverse effect on the Contractor's ability to supply the Goods, Services and Works in accordance with the Customer Contract and the Head Agreement;
- (f) neither the Contractor nor any person included in the Specified Personnel has been convicted of a criminal offence that is punishable by imprisonment or detention;
- (g) except where lawfully excused under the Customer Contract or the Head Agreement, there is nothing that prevents the Contractor from complying with any obligation under the Customer Contract and the Head Agreement; and
- (h) none of the Goods have been imported from overseas at less than their normal commercial value.

11.2 General Warranties Made Continuously

The warranties made by the Contractor under clause 11.1 are taken to be made continuously throughout the Term.

11.3 Contractor's Undertakings

The Contractor must:

- (a) properly provide for the care, safety, security and protection of:
 - (i) the Goods, if the Customer Contract is for the supply of Goods, until risk in the Goods passes to the Customer under clause 7.11;
 - (ii) all Records (whether created by the Contract Authority, the Customer, the Contractor or any other person) that are in the custody or control of the Contractor; and
 - (iii) all property supplied by the Contract Authority, the Customer or both to the Contractor in connection with the Customer Contract;
- (b) promptly notify the Contract Authority or the Customer, as the case requires, if any warranty under clause 11.1 is breached or becomes untrue;
- (c) always act ethically in connection with the Head Agreement and the Customer Contract and in accordance with good corporate governance practices;
- (d) comply with all Laws;
- (e) if the Contractor has custody or control of State Records, comply with the Contract Authority's and the Customer's record keeping plan to the extent necessary under the *State Records Act 2000 (WA)*;

- (f) cooperate fully with the Contract Authority and the Customer in respect of the administration of the Customer Contract and the Head Agreement;
- (g) use its best endeavours to ensure that no Contractor Personnel cause the Contractor to breach the Customer Contract and the Head Agreement; and
- (h) not directly or indirectly offer a bribe, gift or inducement to any officer or employee of the Contract Authority or the Customer in connection with the Customer Contract or the Head Agreement.

11.4 Contractor's Expenses and Equipment

Unless the Customer agrees otherwise in writing, the Contractor must:

- (a) pay all out-of-pocket expenses incurred by the Contractor in connection with the Customer Contract including travel expenses, accommodation and subsistence expenses; and
- (b) provide everything necessary to enable it to fully comply with all of its obligations under the Customer Contract, subject to the Customer doing everything that is required under the Customer Contract to enable the Contractor to so comply.

11.5 Warranties

The Contractor must give, or must ensure that the Contract Authority and the Customer have the benefit of, any warranties specified in the Customer Contract and the Head Agreement.

The Contractor must do everything necessary to obtain the benefit of all manufacturer and other third party warranties, including any warranties that are obtained by any subcontractor, and must ensure that the Customer has the benefit of those warranties.

A warranty may survive the expiry or termination of the Contract.

11.6 Premises

The Contractor must:

- (a) comply with all reasonable directions and procedures of the Customer and the owner or occupier of the Premises relating to occupational health, safety, security and confidentiality in connection with the Premises;
- (b) keep the Premises in the same state that the Premises were in before the Contractor commenced supply of the Goods, Services and Works and regularly remove all rubbish and excess materials resulting from the supply of the Goods, Services and Works;
- (c) leave the Premises in the same state that the Premises were in before the Contractor commenced supply of the Goods, Services and Works;
- (d) do everything reasonably necessary to protect people and property on the Premises;
- (e) avoid unnecessary interference with the passage of people and vehicles, and with the operations of the Customer and the owner or occupier of the Premises and their employees, agents and contractors;

- (f) prevent any nuisance or disturbance being caused at the Premises resulting from the supply of the Goods, Services and Works;
- (g) remove any Contractor Personnel from the Premises if the Customer or the owner or lawful occupier of the Premises requires by notice in writing to the Contractor that those Contractor Personnel be removed; and
- (h) take all reasonable steps to ensure that no loss or damage occurs to:
 - (i) any Works;
 - (ii) any unfixed materials;
 - (iii) any items which have been provided by the Customer, including the Customer's facilities; and
 - (iv) any of the Contractor's own facilities and equipment,

and must promptly make good any loss or damage that occurs. This shall be at the Contractor's cost where such loss or damage is caused by the Contractor or should reasonably have been prevented by the Contractor. If the loss or damage is not caused by the Contractor and could not reasonably have been prevented by the Contractor, the Contractor may submit a claim for a variation for the cost and if this contract is for Works (including applicable margin) of making good pursuant to clause 34.

Where the Customer Contract provides for exclusive access to the Premises then the Contractor acknowledges that:

- (a) the Premises may only be accessed from the date stated in the Customer Contract until the Services are completed or the Works reach Practical Completion;
- (b) the Premises may only be accessed for the sole purpose of performing the Services or Works; and
- (c) it must allow the Customer, the Customer's Representative, the Superintendent or any person nominated by the Customer, access to the Premises, or the relevant part of the Premises, upon reasonable notice to the Contractor.

11.7 Cooperation with other Service Providers

- (a) Subject to clause 11.7(b), the Contractor must cooperate with any third party service provider appointed by the Customer where this is necessary to ensure the integrated and efficient conduct of the Customer's operations. Without limiting the foregoing, the Contractor must provide such reasonable assistance to other service providers as the Customer may request from time to time, provided that the Contractor will be entitled by prior agreement with the Customer (which will not be unreasonably withheld) to charge for costs incurred as a direct result of providing such cooperation.
- (b) Nothing in clause 11.7 will require the Contractor to disclose its confidential information to a third party service provider.

11.8 Data Security

The Contractor must:

- (a) comply with all Customer data security requirements in respect of access to and use of Customer data as specified in the Customer Contract, in addition to any statutory obligation relevant to data security;
- (b) prohibit and prevent any Contractor Personnel who does not have the appropriate level of security clearance from gaining access to Customer data;
- (c) without limiting clause 11.8(b), use reasonable endeavours to prevent any unauthorised person from gaining access to Customer data; and
- (d) notify the Customer immediately, and comply with all directions of the Customer, if the Contractor becomes aware of any contravention of the Customer's data security requirements.

11.9 Use of Chlorofluorocarbons

The Contractor must not, in the provision of the Goods, Services and Works, use goods, materials or substances which contain, or were manufactured with, chlorofluorocarbons.

12. PAYMENT AND INVOICING

12.1 Price

The Customer must pay to the Contractor the Price in accordance with this clause 12.

12.2 Variations to Price

If a formula or method for variation of the Price is specified in the Customer Contract, then the Price may only be varied in accordance with that formula or method.

If no formula or method for variation of the Price is specified in the Customer Contract, then the Price is fixed for the Term and cannot be varied unless agreed by the Customer and the Contractor in writing.

12.3 Timing of Invoice

If the time or times at which the Contractor must submit invoices to the Customer is or are specified in the Customer Contract, then the Contractor must submit invoices at that time or those times.

If no time or times at which the Contractor must submit invoices to the Customer is or are specified in the Customer Contract, then the Contractor must submit invoices to the Customer at a time or times agreed between the Customer and the Contractor, provided that the Contractor must not submit any invoice later than 20 Business Days after the expiration or termination of the Customer Contract.

12.4 Invoices

An invoice given by the Contractor to the Customer must:

- (a) be set out in a manner that clearly identifies which Goods, Services and Works the invoice covers and the amount of the Price payable for those Goods, Services and Works, minus any Discount; and
- (b) specify the relevant Order (if applicable).

12.5 Payment of Invoice

- (a) Subject to clauses 12.4 and 12.8, the Customer must pay the amount specified in an invoice within the payment term specified in sub-clause (b) if the amount claimed in the invoice is:
 - (i) properly payable; and
 - (ii) correctly calculated in accordance with the Customer Contract.
- (b) The payment term is:
 - (i) 20 days commencing the day after the date the invoice is received, for any invoice where the amount payable is under \$1 million (GST inclusive); or
 - (ii) 30 days commencing the day after the date the invoice is received, for any invoice where the amount payable is \$1 million (GST inclusive) or greater.

12.6 Method of Payment

The Customer may pay the amount specified in an invoice:

- (a) by cash;
- (b) by cheque;
- (c) by electronic funds transfer to the account with a financial institution nominated by the Contractor; or
- (d) by credit card.

The Contractor must not impose a surcharge on the Customer for payment by credit card.

12.7 Right to Request Further Details

If the Customer requests, the Contractor must promptly provide information and documentation sufficient to confirm that the amount specified in an invoice is calculated in accordance with the Customer Contract.

12.8 No Obligation to Pay

The Customer has no obligation to make any payment to the Contractor:

- (a) if the Customer Contract is for the supply of Goods, and the Goods are Defective;
- (b) if the Customer Contract is for the supply of Services, and the Services are Defective;

- (c) if the Customer Contract is for the provision of Works, and the Works are Defective; and
- (d) if the Customer is satisfied that an Event of Default has occurred and continues unremedied.

12.9 Incorrect Invoice before Payment

If, before payment of an invoice, the Customer or the Contractor finds that the invoice does not comply with clause 12.4 or clause 12.5 and:

- (a) an Adjustment arises, then the Contractor must immediately issue an Adjustment Note; and
- (b) no Adjustment arises, then the Contractor must immediately issue a correct invoice.

12.10 Incorrect Invoice after Payment

If, after payment of an invoice, the Customer or the Contractor finds that the invoice did not comply with clause 12.4 or clause 12.5 and the Customer has paid:

- (a) less than the amount that should have been paid and an Adjustment arises, then:
 - (i) the Contractor must immediately issue an Adjustment Note; and
 - (ii) the Customer must pay the difference to the Contractor within 30 days after the date that the Adjustment Note is received; or
- (b) less than the amount that should have been paid and no Adjustment arises, then:
 - (i) the Contractor must immediately issue a correct invoice; and
 - (ii) the Customer must pay the difference to the Contractor within 30 days after the date that the correct invoice is received; or
- (c) more than the amount that should have been paid and an Adjustment arises, then the Contractor must:
 - (i) immediately issue an Adjustment Note; and
 - (ii) pay the difference to the Customer (including any interest paid under clause 12.12 in respect of that difference) within 30 days from the time that the Customer calculates the amount of the overpayment unless the Customer elects by notice to the Contractor to offset the difference against any amount subsequently payable by the Customer to the Contractor; or
- (d) more than the amount that should have been paid and no Adjustment arises, then the Contractor must:
 - (i) immediately issue a correct invoice; and
 - (ii) pay the difference to the Customer (including any interest paid under clause 12.12 in respect of that difference) within 20 Business Days from the time that the Customer calculates the amount of the overpayment unless the Customer elects by notice to the Contractor

to offset the difference against any amount subsequently payable by the Customer to the Contractor.

12.11 Timing of Payment

For the purpose of determining the date of payment under clause 12.12 and for the purpose of calculating any Discount applicable under the Customer Contract for settlement of accounts:

- (a) if payment is by cash – payment is taken to be made immediately the cash is received by the Contractor;
- (b) if payment is by cheque – payment is taken to be made on the date on which the cheque is received by the Contractor;
- (c) if payment is by electronic funds transfer – payment is taken to be made at the time the funds are sent electronically; or
- (d) if payment is by credit card – payment is taken to be made on the date on which the Customer signs the credit card voucher.

12.12 Failure to Pay

If demanded by the Contractor, the Customer must pay interest on any payment not made by the Customer by the date required by clause 12.5 or any later date for payment agreed by the Contractor.

Interest under clause 12.12 is to be:

- (a) calculated from the due date for payment determined under clause 12.12 until (but not including) the date of payment (as determined under clause 12.11); and
- (b) at the rate specified in the Customer Contract or, if no rate is specified in the Customer Contract, at the rate payable under the Rules of the Supreme Court on unpaid judgments.

13. TAXES

- (a) In this clause 13, the expressions “consideration”, “recipient”, “supply”, “tax invoice” and “taxable supply” have the meanings given to those expressions in the *GST Act*.
- (b) All sums payable, or consideration to be provided, under the Customer Contract are expressed inclusive of GST.
- (c) If GST is imposed on any supply made under the Customer Contract, the recipient must pay to the supplier an amount equal to the GST payable on the taxable supply.
- (d) The amount referred to in clause 13(c) must be paid in addition to, and at the same time as, payment for the taxable supply is required to be made under the Customer Contract.
- (e) If a GST-inclusive price is charged or varied under the Customer Contract, the supplier must provide the recipient of the supply with a valid tax invoice at or before the time of payment or variation.

- (f) If the amount of GST paid or payable by the supplier on any supply made under the Customer Contract differs from the amount of GST paid by the recipient, because the Commissioner of Taxation lawfully adjusts the value of the taxable supply for the purpose of calculating GST, then the amount of GST paid by the recipient will be adjusted accordingly by a further payment by the recipient to the supplier or the supplier to the recipient, as the case requires.
- (g) All duties, taxes and charges (other than GST) imposed or levied in Australia or overseas in connection with the supply of the Goods, Services and Works are payable by the Contractor.

14. INTELLECTUAL PROPERTY RIGHTS

14.1 Intellectual Property Rights – Owned by State or Customer

- (a) Unless the Customer Contract states that the Intellectual Property Rights in the New Material are to be owned by the Contractor, then this clause 14.1 forms part of the Customer Contract.
- (b) The Intellectual Property Rights in the New Material will be owned by the State unless the Customer Contract provides that they will be owned by the Customer.
- (c) The Contractor automatically assigns the entire future Intellectual Property Rights in all New Material to the State or the Customer as the case requires upon their creation.
- (d) The State or the Customer grants to the Contractor a revocable, royalty-free, non-exclusive licence to use the New Material to the extent necessary to provide the Services. The licence will terminate on the expiration or termination of the Term.
- (e) Unless specified to the contrary in the Request, copyright and property in all Working Papers vest in the State of Western Australia.
- (f) The Contractor warrants that all Contractor Personnel:
 - (i) who are employed or engaged solely for the purposes of the Customer Contract are employed or engaged under written agreements under which all Intellectual Property Rights in any New Material vest in the State or the Customer on the creation of that New Material; and
 - (ii) who are not employed or engaged solely for the purposes of the Customer Contract are employed or engaged under written agreements under which all Intellectual Property Rights in any work (as defined in the *Copyright Act*), product or other material created by the Contractor Personnel vest in the Contractor on the creation of that work, product or other material.

14.2 Intellectual Property Rights – Contractor

- (a) Where the Customer Contract states that the Intellectual Property Rights in the New Material are to be owned by the Contractor, then this clause 14.2 forms part of the Customer Contract.

- (b) The Customer acknowledges that the entire future Intellectual Property Rights in all New Material are to be owned by the Contractor upon their creation.
- (c) The Contractor:
 - (i) grants to the Customer an irrevocable, perpetual, royalty-free, non-exclusive licence to exercise any or all of the rights of an owner of Intellectual Property Rights in the New Material during the remainder of the duration of the Intellectual Property Rights in that New Material; and
 - (ii) must, if a third party owns Moral Rights in any New Material, obtain a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the Customer to use the New Material without regard to the third party's Moral Rights.
- (d) The licence granted under clause 14.2(c) extends to all Working Papers.

14.3 Existing Material - Licence

Nothing in clause 14.1 or 14.2 (as applicable) affects the ownership of any Intellectual Property Rights in any Existing Material.

The Contractor:

- (a) grants, and the Contractor must ensure that any other owner of any Intellectual Property Rights in any Existing Material grants, to the State or the Customer in writing, an irrevocable, perpetual, royalty-free, non-exclusive licence to exercise any or all of the rights of an owner of Intellectual Property Rights in the Existing Material during the remainder of the duration of the Intellectual Property Rights in that Existing Material; and
- (b) must, if a third party owns Moral Rights in any Existing Material, obtain a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State or the Customer to use the Existing Material without regard to the third party's Moral Rights.

14.4 Warranty

The Contractor warrants that:

- (a) the Contractor has the right to grant the licences granted under clause 14.3 (a);
- (b) no Intellectual Property Rights or Moral Rights in any Material is or will be owned by any third party unless:
 - (i) if a third party owns any Intellectual Property Rights in the Material, the Contractor has obtained a written licence from the third party owner to the same effect as the licence referred to in clause 14.3 (a); and
 - (ii) if a third party owns Moral Rights in the Material, the Contractor has obtained a written consent and waiver from the third party owner in relation to his or her Moral Rights to enable the State or the Customer to use the Material without regard to the third party's Moral Rights; and

- (c) the Material will not infringe the Intellectual Property Rights or Moral Rights of any third party.

14.5 Intellectual Property Rights Indemnity

The Contractor indemnifies and will keep indemnified the Contract Authority, the Customer, the State of Western Australia and all their respective officers, employees and agents from and against all costs, losses, expenses, actions, suits, demands, claims, damages and other liabilities resulting from the Contractor's failure to comply with this clause 14, including any breach of warranty under clauses 14.1 (if applicable) and 14.4, or otherwise resulting from the actual or alleged infringement of the Intellectual Property Rights or the Moral Rights of any third party by the Contractor.

14.6 Continuing obligation

The obligations of the Contractor under this clause 14 are continuing obligations and survive expiration or termination of the Customer Contract.

15. CONFIDENTIALITY

15.1 Contract Disclosure

- (a) The Contract Authority, the Customer or both may publicly disclose:

- (i) the identity of the Contractor;
- (ii) the value of any Customer Contract; and
- (iii) a general description of the Goods, Services and Works supplied under any Customer Contract.

- (b) In relation to each of:

- (i) a Customer Contract;
- (ii) the Head Agreement; and
- (iii) information held or compiled by the Contract Authority, the Customer or the State of Western Australia in relation to a Customer Contract or the Goods, Services and Works supplied under a Customer Contract,

the Contractor acknowledges that:

- (iv) each is subject to the *Freedom of Information Act 1992*;
- (v) any or all of them may be disclosed by the Contract Authority, the Customer or the State of Western Australia in response to a request made under section 275 of the *Personal Property Securities Act 2009* (Cth), or otherwise as required by that Act; and
- (vi) each is subject to section 81 of the *Financial Management Act 2006*.

15.2 Confidentiality

The Contractor must keep the Contract Authority's and the Customer's Confidential Information confidential. The Contractor must not use or disclose

to any person the Contract Authority's or the Customer's Confidential Information except:

- (a) where necessary for the purpose of supplying the Goods, Services and Works; or
- (b) as authorised in writing by the Contract Authority or the Customer (as applicable); or
- (c) to the extent that the Confidential Information is public knowledge (other than because of a breach of this clause by the Contractor); or
- (d) as required by any law, judicial or parliamentary body or governmental agency; or
- (e) when required (and only to the extent required) to the Contractor's professional advisers, and the Contractor must ensure that such professional advisers are bound by the confidentiality obligations imposed on the Contractor under this clause 15.2.

15.3 Return of Confidential Information

Except to the extent that the Contractor is required by law to retain any Records, the Contractor must return all Records containing the Contract Authority's and the Customer's Confidential Information immediately at the expiration or termination of the Customer Contract or the Head Agreement.

15.4 Publicity

Unless:

- (a) the Contract Authority or the Customer gives its prior written consent; or
- (b) the Contractor is required by law to do so,

the Contractor must not:

- (a) use a Customer Contract or Head Agreement or the Contract Authority's or the Customer's name or logo; or
- (b) use the name or logo of any State Agency specified in a Customer Contract or Head Agreement for the purposes of this clause; or
- (c) refer to the Contractor's association with the State of Western Australia or the Government of Western Australia which results from a Customer Contract or Head Agreement; or
- (d) make any statement concerning a Customer Contract or Head Agreement, in any publication, advertisement or media release.

The Contract Authority may use a Customer Contract and the Contractor's name and logo for reasonable promotional or publicity purposes at the Customer's discretion, but if the Customer uses the Customer Contract or the Contractor's name or logo for such purposes, then the Customer must acknowledge the role of the Contractor to the extent that is reasonable in the circumstances.

The Contract Authority may use the Head Agreement and the Contractor's name and logo for reasonable promotional or publicity purposes at the Contract Authority's discretion, but if the Contract Authority uses the Head Agreement or

the Contractor's name or logo for such purposes, then the Head Agreement must acknowledge the role of the Contractor to the extent that is reasonable in the circumstances.

16. PRIVACY

- (a) The Contractor agrees to comply with its obligations (if any) under or arising pursuant to the *Privacy Act 1988* (Cth) to the extent relevant to a Customer Contract and Head Agreement.
- (b) The Contractor also agrees to comply with:
 - (i) such other Commonwealth, State or Territory legislation related to privacy which is relevant to a Customer Contract and Head Agreement;
 - (ii) any directions made by a Privacy Commissioner relevant to a Customer Contract and Head Agreement;
 - (iii) any privacy procedures stated in a Customer Contract and Head Agreement; and
 - (iv) any other reasonable direction relating to privacy which is given by the Customer or Contract Authority.
- (c) If the Contractor is exempt from compliance with the *Privacy Act 1988* (Cth) because its annual turnover is less than the prescribed threshold, and if the Contractor is not subject to an approved privacy code, the Contractor must comply with the Australian Privacy Principles set out in the *Privacy Act 1988* (Cth) as if it were required to comply with that legislation.

17. INSURANCE

17.1 Customer Contract Insurance Requirements

The Contractor must take out and maintain insurance in relation to all insurable liabilities of the Contractor under the Customer Contract as specified in the Customer Contract.

The insurance required under clause 17.1 must be on the terms, for the period of time and for the amounts specified in the Customer Contract.

17.2 Head Agreement Insurance Requirements

The Contractor must take out and maintain insurance in relation to all insurable liabilities of the Contractor under the Head Agreement as specified in the Head Agreement.

The insurance required under clause 17.2 must be on the terms, for the period of time and for the amounts specified in the Head Agreement.

17.3 Reputable and Solvent Insurer

Any policy of insurance taken out by the Contractor must be taken out with a reputable and solvent insurer acceptable to the Contract Authority and the

Customer which carries on insurance business in Australia and is authorised in Australia to operate as an insurance company.

17.4 Maintenance of Insurance

The Contractor must:

- (a) punctually pay all premiums and amounts necessary for effecting and keeping current the insurance required under clauses 17.1 and 17.2;
- (b) not vary or cancel any insurance required under clauses 17.1 and 17.2 or as otherwise required under the Customer Contract or the Head Agreement or allow it to lapse during the Term of either of them as the case may be or otherwise do or allow to be done anything which may vitiate, invalidate, prejudice or render ineffective the insurance or entitle the insurer to refuse a claim; and
- (c) without limiting clause 17.4(b), promptly reinstate any insurance required under clauses 17.1 or 17.2 if it lapses or if cover is exhausted.

17.5 Evidence of Insurance

The Contractor must give to the Contract Authority or the Customer as the case requires sufficient evidence of the insurances required under clauses 17.1 or 17.2 as the case requires (including, if requested, a copy of any policy) and provide a certificate of currency of insurance as requested by the Contract Authority or the Customer as the case requires at any time.

17.6 Failure to Prove Insurance

If the Contractor does not comply with clauses 17.1, 17.3, 17.4 or 17.5 then without limiting any other remedy available to the Contract Authority or the Customer, the Customer may withhold payment of any money due under the Customer Contract to the Contractor until the Contractor has complied.

17.7 Incidents and claims

If the Contract Authority or the Customer or the Contractor becomes aware of any event or incident occurring which gives rise or is likely to give rise to a claim under any insurance required under clauses 17.1 or 17.2, it must as soon as reasonably practicable notify the Contract Authority, the Customer and the Contractor (as applicable) in writing of that event or incident.

Failure to comply with this clause 17.7 will not invalidate or otherwise affect any indemnities, liabilities and releases of the Customer Contract.

17.8 Continuing obligation

The Contractor must maintain the insurance required under clause 17.1 for the period specified in the Customer Contract.

The Contractor must maintain the insurance required under clause 17.2 for the period specified in the Head Agreement.

If no period is specified in the Customer Contract or the Head Agreement, then:

- (a) the insurances (except for the professional indemnity insurance) required under clauses 17.1 and 17.2 are to be maintained throughout the Term; and
- (b) the professional indemnity insurance (if any) required under clause 17.1 is to be maintained throughout the Term and for a period of 6 years after the expiration or termination of the Customer Contract.

The obligations of the Contractor under this clause 17 are continuing obligations and survive expiration or termination of the Customer Contract and the Head Agreement for so long as the obligations of the Contractor under this clause 17.8 continue.

17.9 No Limitation of Other Liabilities

Nothing in this clause 17 limits the Contractor's other liabilities under the Customer Contract or the Head Agreement or restricts the Contractor from insuring for sums or risks greater than those required under the Customer Contract or the Head Agreement.

18. GUARANTEES

The Parties acknowledge their respective rights and obligations in relation to any performance guarantee or financial undertaking referred to in the Head Agreement or the Customer Contract.

19. LIABILITY

The liability of either party for breach of the Head Agreement or the Customer Contract or for any other common law or statutory cause of action arising out of the operation of the Head Agreement or the Customer Contract will be determined under the relevant law in Western Australia that is recognised, and would be applied, by the High Court of Australia from time to time.

20. INDEMNITIES

- (a) The Contractor indemnifies the Contract Authority, the Customer, the State of Western Australia and all their respective officers, employees and agents against all costs, losses, expenses, claims, damages and other liabilities (including, without limitation, legal costs and expenses) as a result of any action, suit, claim, demand or proceeding taken or made by any third party arising from or in connection with:
 - (i) any breach of contract by the Contractor under a Customer Contract or a Head Agreement;
 - (ii) any wilful, tortious or unlawful act or omission of the Contractor or any Contractor Personnel; or
 - (iii) any breach of a Law relevant to a Customer Contract or a Head Agreement by the Contractor or any Contractor Personnel.
- (b) If the Customer Contract includes Services or Works, the Contractor shall indemnify the Contract Authority, the Customer and the State of Western

Australia against all costs, losses, expenses, claims, damages and other liabilities (including, without limitation, legal costs and expenses) suffered or incurred by the Contractor Authority, the Customer and the State of Western Australia in connection with:

- (i) loss of or damage to the Customer's property, including existing property on the Premises in or upon which the Services or Works are being performed; and
- (ii) personal injury, illness or death of any person, arising out of or in connection with (whether directly or indirectly) the performance of the Services or the carrying out of the Works.

The Contractor's liability under the indemnities in clause 20 will be reduced proportionally to the extent that any costs, losses, expenses, claims, damages or other liabilities result from the negligence of the Contract Authority, the Customer, the State of Western Australia or their respective officers, employees or agents.

The Contract Authority and the Customer agree to use their best endeavours to cooperate with the Contractor, at the Contractor's cost, in respect of the conduct of any defence, or the agreement of any settlement, of any third party action, suit, claim, demand or proceeding the subject of the indemnity under clause 20(a).

21. CONFLICT OF INTEREST

If a conflict of interest arises in respect of the Contractor, the Contractor must:

- (a) promptly notify the Contract Authority and any relevant Customer that the conflict has arisen and provide full details; and
- (b) take reasonable steps in consultation with the Contract Authority and any relevant Customer to remove the conflict.

22. PERFORMANCE MANAGEMENT

The parties agree to duly and punctually comply with any performance management requirements contained in the Customer Contract or the Head Agreement.

23. GOVERNMENT POLICY

If any obligations relating to Government procurement policies are specified in the Customer Contract or the Head Agreement, then those obligations form part of the Customer Contract and the Head Agreement as the case may be and the Contractor must comply with them.

24. CONTRACT ADMINISTRATION

24.1 Customer's Representative

Any person described in the Customer Contract as the Customer's Representative may act as the representative of the Customer in relation to the Customer Contract.

The Contractor agrees and acknowledges that the Customer's Representative may administer the Customer Contract and any such administration by the Customer's Representative will be deemed to be administration by the Customer for the purposes of the Customer Contract.

The Customer may by notice to the Contractor at any time:

- (a) vary or terminate the appointment of the Customer's Representative; and
- (b) appoint any other person to act as the Customer's Representative in relation to the Customer Contract.

24.2 Contract Authority's Representative

Any person described in the Head Agreement as the Contract Authority's Representative may act as the representative of the Contract Authority in relation to the Head Agreement.

The Contractor agrees and acknowledges that the Contract Authority's Representative may administer the Head Agreement and any such administration by the Contract Authority's Representative will be deemed to be administration by the Contract Authority for the purposes of the Head Agreement.

The Contract Authority may by notice to the Contractor at any time:

- (a) vary or terminate the appointment of the Contract Authority's Representative; and
- (b) appoint any other person to act as the Contract Authority's Representative in relation to the Head Agreement.

24.3 Contractor's Representative

Any person described in the Customer Contract or the Head Agreement as the Contractor's Representative may act as the representative of the Contractor in relation to the Customer Contract or the Head Agreement as the case may be.

The Contract Authority and the Customer agree and acknowledge that the Contractor's Representative may administer the Customer Contract or the Head Agreement as the case may be and any such administration by the Contractor's Representative will be deemed to be administration by the Contractor for the purposes of the Customer Contract or the Head Agreement.

The Contractor may by notice to the Contract Authority and the Customer at any time:

- (a) vary or terminate the appointment of the Contractor's Representative; and
- (b) appoint any other person to act as the Contractor's Representative in relation to the Customer Contract or the Head Agreement.

24.4 Notices

- (a) Each notice or other communication given under the Customer Contract and the Head Agreement:
 - (i) must be in writing;
 - (ii) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised officer or agent of, that party.
- (b) All notices or other communications must be:
 - (i) delivered or sent by prepaid post to the address; or
 - (ii) sent by email in the form of a PDF file letter to the email address, of the addressee stated in the Customer Contract or the Head Agreement or as notified by that party to each other party from time to time.
- (c) Subject to clause 24.4(d), a notice or other communication is taken to be received:
 - (i) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia, and on the fifth Business Day after the date of posting by airmail to an address outside Australia;
 - (ii) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email; and
 - (iii) in the case of delivery by hand, on delivery.
- (d) If the notice or other communication is taken to be received on a day which is not a Business Day or after 5.00pm, it is taken to be received at 9:00am on the next Business Day.
- (e) In connection with notices or other communications sent by email:
 - (i) only the letter in PDF format attached to the email and any attachments to such letter which are referred to in the letter, will form part of the notice or other communication in accordance with this clause 24.4. Any text in the body of the email or the subject line will not form part of the notice or other communication; and
 - (ii) the Contractor must ensure that, in connection with any notices or other communications in connection with the Customer Contract or Head Agreement:
 - (A) their firewall and/or mail server (as applicable):
 - (1) allows messages of up to 10 MB to be received;
 - (2) does not trap any messages in the spam filter which have been sent from the State of Western Australia domain; and
 - (3) automatically sends a receipt notification to the sender upon receipt of a message; and
 - (B) its systems automatically send a notification message to each of the sender and the recipient when a message is received by the

recipient's domain but cannot or will not be delivered to the recipient.

25. DISPUTE RESOLUTION

25.1 No litigation pending possible resolution

Subject to clause 25.5 and clause 35, the parties agree that unless and until a party has complied with the requirements of this clause 25, a party may not commence any court proceedings in respect of any dispute.

25.2 Referral to contract representatives

If at any time a dispute exists:

- (a) between the Contract Authority and the Contractor either party may refer the dispute to the relevant contract representatives appointed under clauses 24.2 and 24.3 for resolution;
- (b) between the Customer and the Contractor either party may refer the dispute to the relevant contract representatives appointed under clause 24.1, 24.3 or 31(as the case requires) for resolution; and
- (c) the relevant contract representatives will consider the dispute referred to them and in doing so, give due consideration to submissions by the parties in connection with the dispute.

25.3 Further referral

- (a) If a dispute remains unresolved 10 Business Days after the referral of the dispute to the relevant contract representatives under clause 25.2, a party may give a written notice to the other party in accordance with this clause 25.3 (**Dispute Notice**).
- (b) The Dispute Notice must:
 - (i) state that the notice is given under this clause 25.3;
 - (ii) describe the nature of the dispute; and
 - (iii) nominate the party's authorised officer for resolution of the dispute (**Authorised Officer**).
- (c) Within 2 Business Days after receipt of a Dispute Notice, the recipient party must give a written notice to the other party nominating its Authorised Officer.
- (d) The parties must ensure that their Authorised Officers meet and negotiate with a view to resolving the dispute within 5 Business Days after receipt of the Dispute Notice.
- (e) If the parties' Authorised Officers fail to resolve the dispute within 10 Business Days after receipt of the Dispute Notice , the parties' Authorised Officers may agree a dispute resolution process for the resolution of the dispute in which case the dispute will be resolved in accordance with such process.

- (f) Either party may commence litigation if:
 - (i) the parties fail to resolve the dispute in accordance with paragraph (d) and fail to agree a dispute resolution process in accordance with paragraph (e) within 10 Business Days after the receipt of the Dispute Notice;
 - (ii) either party fails to comply with any of the requirements of this clause 25; or
 - (iii) either party fails to comply with any dispute resolution process agreed in accordance with paragraph (e).

25.4 Continue to perform obligations

The parties must continue to perform their obligations under the Head Agreement or a Customer Contract as the case may be despite the existence of any dispute between the parties.

25.5 No application of clause

This clause does not apply:

- (a) if a party considers it necessary to seek an urgent interim determination; or
- (b) where the Contract Authority or a Customer as the case may be considers that an Event of Default has occurred under the Head Agreement or a Customer Contract.

26. TERMINATION

26.1 Termination – Customer Contract

The Customer may terminate the Customer Contract by notice to the Contractor at any time after an Event of Default occurs except to the extent that the right is stayed by operation of section 415D, 434J or 451E of the Corporations Act.

26.2 Consequences of Expiration or Termination – Customer Contract

- (a) The expiration or termination of the Customer Contract does not affect any rights, liabilities or obligations of the Customer or the Contractor as a result of anything occurring before the expiration or termination.
- (b) On expiration or termination of the Customer Contract, the Contractor must:
 - (i) complete as soon as practicable, or cease to fulfil, any outstanding Orders as the Customer directs;
 - (ii) deliver to the Customer all Records as required by the Customer as soon as practicable after the later of the completion of all outstanding Orders under clause 26.2 (b)(i) or the date of expiration or termination of the Customer Contract; and

- (iii) vacate the Premises as soon as practicable after the later of the completion of all outstanding Orders under clause 26.2 (b)(i) or the date of expiration or termination of the Customer Contract.
- (c) Without limiting clause 26.2 (b), on termination of the Customer Contract, the Contractor must:
 - (i) allow the Customer to use at the Customer's sole risk and without charge for a reasonable period not exceeding 20 Business Days any property of the Contractor which is located on the Premises if required in connection with the Customer Contract, but the Customer must pay the Contractor for any materials or consumables used by the Customer as a result of using that property; and
 - (ii) in every other respect cooperate with the Customer as reasonably required by the Customer in order to minimise any loss, damage or inconvenience to the Customer resulting from the expiration or termination of the Customer Contract.
- (d) The Customer must pay to the Contractor:
 - (i) the Price for Goods, Services and Works supplied as a result of the Customer directing the completion of an outstanding Order under clause 26.2 (b)(i); and
 - (ii) a reasonable price for the materials or consumables used under clause 26.2 (c)(i).

26.3 Termination – Head Agreement

The Contract Authority may terminate the Head Agreement by notice to the Contractor at any time after an Event of Default occurs except to the extent that the right is stayed by operation of section 415D, 434J or 451E of the Corporations Act.

26.4 Consequences of Expiration or Termination – Head Agreement

The expiration or termination of the Head Agreement does not affect any rights, liabilities or obligations of the Contract Authority or the Contractor as a result of anything occurring before the expiration or termination.

On expiration or termination of the Head Agreement, the Contractor must:

- (a) deliver to the Contract Authority all Records and Working Papers (or copies thereof if clause 14.2 applies) as required by the Contract Authority;
- (b) not represent that the Contractor is in any way connected to the Contract Authority;
- (c) return all of the Contract Authority' Confidential Information to the Contract Authority; and
- (d) in every other respect co-operate with the Contract Authority as reasonably required by the Contract Authority in order to minimise any loss, damage or inconvenience to the Contract Authority and Customers resulting from the expiration or termination of the Head Agreement.

26.5 Limited Liability - Customer Contract

Other than where the Customer has repudiated the Customer Contract or damages are not an appropriate remedy, if the Customer breaches the Customer Contract, then the remedies of the Contractor are limited to damages.

26.6 Limited Liability – Head Agreement

Other than where the Contract Authority has repudiated the Head Agreement or damages are not an appropriate remedy, if the Contract Authority breaches the Head Agreement, then the remedies of the Contractor are limited to damages.

26.7 Suspension at Any Time - Customer Contract

- (a) A Customer may at any time by notice to the Contractor temporarily suspend the Customer Contract (except for clauses 9, 11, 15, 16, 17, 18, 19, 20, 21, 26 and 27) for a period not exceeding 3 months, except to the extent that the right is stayed by operation of section 415D, 434J or 451E of the Corporations Act.
- (b) The Customer does not need to give a reason for temporary suspension of the Customer Contract.
- (c) If the Customer suspends the Customer Contract under this clause and the Contractor is not in default under the Customer Contract, then:
 - (i) the Customer must pay to the Contractor the Contractor's costs and expenses directly resulting from the suspension (excluding loss of profits and revenue);
 - (ii) the Contractor must give the Customer an invoice for the amount payable together with sufficient evidence to support the invoice; and
 - (iii) the Customer must pay any amount under clause 26.7 (c)(i) within 30 days after receiving an invoice under clause 26.7 (c)(ii).

26.8 Ending of Suspension - Customer Contract

The Customer may end the suspension at any time by notice to the Contractor.

At the end of the suspension, the rights and obligations of the Customer and the Contractor under the Customer Contract recommence.

26.9 Suspension at Any Time – Head Agreement

The Contract Authority may at any time by notice to the Contractor temporarily suspend the Head Agreement (except for clauses 2, 5, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 26, 27 and 28) for a period not exceeding 3 months except to the extent that the right is stayed by operation of section 415D, 434J or 451E of the Corporations Act.

The Contract Authority does not need to give a reason for temporary suspension of the Head Agreement.

26.10 Ending of Suspension – Head Agreement

The Contract Authority may end the suspension at any time by notice to the Contractor.

At the end of the suspension, the rights and obligations of the Contract Authority and the Contractor under the Head Agreement recommence.

27. GENERAL

27.1 Assignment, Novation etc – Head Agreement

Unless the Contractor obtains the Contract Authority's prior written consent, the Contractor must not:

- (a) sell, transfer, assign, novate, mortgage, charge or otherwise dispose of or deal with any of its rights or obligations under the Head Agreement; or
- (b) subcontract any of its rights or obligations under the Head Agreement.

If the Contractor is a corporation (other than a public company as defined in the Corporations Act) the Contractor is taken to have assigned the Head Agreement if:

- (c) anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Contractor to another person; or
- (d) there is any change in control of the Contractor within the meaning of the Corporations Act.

Any consent given by the Contract Authority under this clause to subcontract the Head Agreement is taken to be subject to the following terms and conditions unless otherwise stated in the consent:

- (e) the Contractor must include in any subcontract provisions consistent with clauses 14, 15 and 17 and this clause, as if references in those clauses to the Contractor referred instead to the subcontractor;
- (f) the Contractor must ensure that it is a term of any agreement to subcontract that the remuneration and terms of employment of any employee employed by a subcontractor for the performance of the agreement to subcontract will, for the duration of the agreement to subcontract, be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry;
- (g) the engagement by the Contractor of a subcontractor in no way relieves the Contractor from its obligation to perform the Contractor's obligations under the Head Agreement; and
- (h) the Contractor must, if requested by the Contract Authority, supply to the Contract Authority a copy of any subcontract, which copy may exclude commercially sensitive information but must indicate that the Contractor has complied with this clause 27.1.

27.2 Assignment, Novation etc – Customer Contract

Unless the Contractor obtains the Customer's prior written consent, the Contractor must not:

- (a) sell, transfer, assign, novate, mortgage, charge or otherwise dispose of or deal with any of its rights or obligations under the Customer Contract; or
- (b) subcontract any of its rights or obligations under the Customer Contract, subject to subclause (c);
- (c) if the Customer Contract is for Works, the Contractor may subcontract any part of the Works without the Customer's prior written consent, unless the Customer Contract expressly requires the Customer's prior written consent.

If the Contractor is a corporation (other than a public company as defined in the Corporations Act) the Contractor is taken to have assigned the Customer Contract if:

- (d) anything occurs, the effect of which is to transfer, directly or indirectly, the management or control of the Contractor to another person; or
- (e) there is any change in control of the Contractor within the meaning of the Corporations Act.

Any consent given by the Customer under this clause to subcontract the Customer Contract is taken to be subject to the following terms and conditions unless otherwise stated in the consent:

- (f) the Contractor must include in any subcontract provisions consistent with clauses 14, 15 and 17 and this clause, as if references in those clauses to the Contractor referred instead to the subcontractor;
- (g) the Contractor must ensure that it is a term of any agreement to subcontract that the remuneration and terms of employment of any employee employed by a subcontractor for the performance of the agreement to subcontract will, for the duration of the agreement to subcontract, be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry;
- (h) the engagement by the Contractor of a subcontractor in no way relieves the Contractor from its obligation to perform the Contractor's obligations under the Customer Contract; and
- (i) the Contractor must, if requested by the Customer, supply to the Customer a copy of any subcontract, which copy may exclude commercially sensitive information but must indicate that the Contractor has complied with this clause 27.2.

27.3 Waiver

- (a) Any waiver by the Contract Authority, the Customer or the Contractor must be in writing and signed by the party waiving the right.

- (b) Any waiver by the Contract Authority, the Customer or the Contractor does not affect its rights in respect of any other breach of the Customer Contract or the Head Agreement as the case may be by another party.
- (c) Subject to clause 27.3 (a), any failure by the Contract Authority, the Customer or the Contractor to enforce any right under the Customer Contract or the Head Agreement as the case may be will not be construed as a waiver of their respective rights under the Customer Contract or the Head Agreement.

27.4 Entire Agreement

The Customer Contract and the Head Agreement as the case may be supersedes all prior negotiations, understandings and agreements between the Contract Authority, the Customer and the Contractor relating to the matters covered by the Customer Contract and the Head Agreement and constitute the full and complete agreement between the Contract Authority, the Customer and the Contractor relating to the matters covered by the Customer Contract and the Head Agreement.

27.5 Rights Are Cumulative

Unless otherwise stated the rights, powers and remedies in the Customer Contract and the Head Agreement are in addition to, and not exclusive of, the rights, powers and remedies existing at law or in equity.

27.6 Counterparts

Unless stated to the contrary in the Customer Contract or the Head Agreement, the Customer Contract and the Head Agreement may be executed in counterparts.

27.7 Applicable Law

The Customer Contract and the Head Agreement are governed by the laws of the State of Western Australia. The Contract Authority, the Customer and the Contractor irrevocably submit to the exclusive jurisdiction of the courts of Western Australia.

27.8 Auditor General

The powers and duties of the Auditor General are not limited or otherwise affected by the terms and conditions of the Customer Contract and the Head Agreement.

The Contractor must allow the Auditor General, or an authorised representative of the Auditor General, to have access to and examine the Contractor's Records concerning the Customer Contract and the Head Agreement.

27.10 Consent

- (a) Whenever the consent of the Contract Authority is required under the Head Agreement:
 - (i) that consent may be given or withheld by the Contract Authority in the Contract Authority's absolute discretion and may be given subject to such conditions as the Contract Authority may determine;
 - (ii) the Contract Authority is not required to provide a reason or reasons for giving or refusing its consent; and
 - (iii) the Contractor agrees that any failure by it to comply with or perform a condition imposed under clause 27.10 (a) will constitute a breach of a condition by the Contractor under the Head Agreement.
- (b) Whenever the consent of the Customer is required under a Customer Contract:
 - (i) that consent may be given or withheld by the Customer in the Customer's absolute discretion and may be given subject to such conditions as the Customer may determine;
 - (ii) the Customer is not required to provide a reason or reasons for giving or refusing its consent; and
 - (iii) the Contractor agrees that any failure by it to comply with or perform a condition imposed under clause 27.10 (b)(i) will constitute a breach of a condition by the Contractor under the Customer Contract.

27.11 Further Assurance

The Contract Authority, the Customer and the Contractor must do everything reasonably necessary, including signing further documents, to give full effect to the Customer Contract or the Head Agreement as the case requires.

27.12 Right of Set Off

The Customer may set off or deduct any amount claimed by the Customer from any amount owing by the Customer to the Contractor on any account under the Customer Contract or any other contract between the Contractor and the Customer.

27.13 Costs

Unless otherwise stated, the Contractor must comply with all obligations of the Contractor at the Contractor's cost.

The Contract Authority, the Customer and the Contractor must pay their own legal and other costs in connection with the preparation and signing of the Customer Contract and the Head Agreement.

The Contractor must pay all stamp duty on the Customer Contract and the Head Agreement.

27.14 Trusts

If the Contractor has entered into Customer Contract or the Head Agreement in the capacity of trustee whether or not the Contract Authority or the Customer has any notice of the trust, the Contractor:

- (a) is taken to enter into the Customer Contract and the Head Agreement both as trustee and in the Contractor's personal capacity and acknowledges that the Contractor is personally liable for the performance of the Contractor's obligations under the Customer Contract and the Head Agreement;
- (b) will take any action necessary to ensure the assets of the trust are available to satisfy any claim by the Contract Authority or the Customer for any default by the Contractor;
- (c) warrants that:
 - (i) the Contractor has a right to be fully indemnified out of the assets of the trust in respect of obligations incurred under the Customer Contract and the Head Agreement;
 - (ii) the assets of the trust are sufficient to satisfy the right of indemnity referred to in clause 27.14 (c)(i) and all other obligations in respect of which the Contractor has a right to be indemnified out of those assets; and
 - (iii) the Contractor has the power and authority under the terms of the trust to enter into the Customer Contract or the Head Agreement.

28. PPSA

28.1 Generally

In this clause:

- (a) “**Contract Authority or Customer’s Personal Property**” means all personal property the subject of a security interest granted to or held by the Contract Authority or Customer under the Head Agreement or Customer Contract; and
- (b) words and phrases used which have a defined meaning in the PPS Law have the same meaning as in the PPS Law unless the context otherwise indicates.

28.2 Further Assurance

If the Contract Authority or Customer determines that the Head Agreement or Customer Contract (or a transaction in connection with it) is or contains a security interest for the purposes of the PPS Law, the Contractor agrees to do anything (including without limitation obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which the Contract Authority or Customer asks and considers necessary for the purposes of:

- (a) ensuring that the security interest is enforceable, perfected and otherwise effective; and/or

- (b) enabling the Contract Authority or Customer to apply for any registration, complete any financing statement or give any notification in connection with the security interest so that the Contract Authority or Customer has the priority required by it; and/or
- (c) enabling the Contract Authority or Customer to exercise rights in connection with the security interest.

28.3 No Requirement for PPSA Notices

The Contract Authority or Customer need not give any notice under the PPSA (including notice of a verification statement) unless the giving of such notice is required by the PPSA and cannot be excluded.

28.4 Priority of the Contract Authority or Customer's Interest

Nothing in the Head Agreement or Customer Contract shall be taken or construed as an agreement or consent by the Contract Authority or Customer to:

- (a) subordinate the Contract Authority or Customer's interest in the Contract Authority or Customer's Personal Property (or any part thereof) to any other encumbrance or interest affecting the Contract Authority or Customer's Personal Property at any time; or
- (b) delay the time when a security interest created or provided for under the Head Agreement or Customer Contract attaches to the relevant collateral.

28.5 Enforcement

To the extent that Chapter 4 of the PPSA would otherwise apply to an enforcement by the Contract Authority or Customer of any security interest in the Contract Authority or Customer's Personal Property, the Contractor and the Contract Authority or Customer agree that the following provisions of the PPSA do not apply, to the extent the PPSA allows them to be excluded:

- (a) **(enforcement methods)** sections 118 (Enforcing security interests in accordance with land law decisions), 125 (Obligation to dispose of or retain collateral), 129(2) and (3) (Disposal by purchase), 134(2) (Proposal of secured party to retain collateral), 136(3) and 136(4) (Retaining collateral free of interests), 137 (Persons entitled to notice may object to proposal) and 138B(4) (Seizure and disposal or retention of crops);
- (b) **(notices)** sections 95 (Secured party must give notice of removal of accession), 121(4) (Enforcement of security interests in liquid assets – notice to higher priority parties and grantor), 127 (Seizure by higher priority parties – notice), 130 (Notice and disposal of collateral), 132 (Secured party to give statement of account), and 135 (Notice of retention of collateral) and 136(5) (Retaining collateral free of interests); and
- (c) **(rights to remedy)** sections 142 (Entitled persons may redeem collateral) and 143 (Entitled persons may reinstate security agreement).

28.6 Negative undertakings

The Contractor must not:

- (a) create any security interest or lien over any of the Contract Authority or Customer's Personal Property whatsoever (other than security interests granted in favour of the Contract Authority or Customer under this Head Agreement or Customer Contract);
- (b) sell, lease or dispose of its interest in or control (as such term is defined in the PPSA) or use of any of the Contract Authority or Customer's Personal Property;
- (c) give possession of the Contract Authority or Customer's Personal Property to another person other than the Contract Authority or Customer or where the Contract Authority or Customer expressly authorises it to do so;
- (d) permit any of the Contract Authority or Customer's Personal Property to become an accession to or commingled with any asset;
- (e) change its name without first notifying the Contract Authority or Customer of the new name not less than 21 days before the change takes effect;
- (f) relocate its principal place of business outside Australia or change its place of registration or incorporation;
- (g) move any of the Contract Authority or Customer's Personal Property outside Australia; or
- (h) allow any other person to acquire control of any personal property forming part of the Contract Authority or Customer's Personal Property at any time.

28.7 Contract Authority or Customer's Interest Remains Unaffected

The Contract Authority or Customer's interest in the Contract Authority or Customer's Personal Property is not affected by anything which, but for this provision, might have that effect including any failure to perfect or to continuously perfect the security interest in relation to any personal property forming part of the Contract Authority or Customer's Personal Property at any time.

28.8 Notices to the Contract Authority or Customer

The Contractor must notify the Contract Authority or Customer as soon as the Contractor becomes aware of any of the following:

- (a) if any personal property which does not form part of the Contract Authority or Customer's Personal Property becomes an accession to the Contract Authority or Customer's Personal Property and is subject to a security interest in favour of a third party that has attached at the time it becomes an accession;
- (b) if any of the Contract Authority or Customer's Personal Property is located or situated outside Australia; and

- (c) upon request by the Contract Authority or Customer, of the present location or situation of any of the Contract Authority or Customer's Personal Property.

28.9 Costs and Expenses Relating to the PPSA and Registration

- (a) Everything the Contractor is required to do under this clause 28 is at the Contractor's expense.
- (b) The Contractor agrees to pay or reimburse, upon demand, all costs and expenses of the Contract Authority or Customer in connection with anything the Contract Authority or Customer is required to do under this clause 28, including preparing, registering and maintaining any financing statement or financing change statement.

Clauses 29 to 35 only apply to Customer Contracts for Works**29. SECURITY****29.1 Application**

This clause 29 forms part of the Customer Contract where the Customer Contract expressly states that security is required.

29.2 Provision of Security and application of retention

The Contractor must provide security for the due and proper performance of the Customer Contract in the form and amount specified in the Customer Contract.

If no specific form and amount is specified in the Customer Contract, the security must be in the form of retention being an amount of 10% of each payment due and payable from the Customer to the Contractor, up to 5% of the total Price of the Customer Contract. The retention must be with-held in accordance with clause 33. The Customer in its discretion may approve another form of security upon request from the Contractor.

The Contractor is not entitled to interest on retention monies held or on other forms of security. Neither retention monies nor other security is held on trust.

The Customer may have recourse to security upon no less than five Business Days' written notice to the Contractor if the Customer becomes entitled to have recourse in order to remedy any loss, costs, expense, liability or damage suffered by the Customer arising from an Event of Default or where the Contractor has not paid an amount due to the Customer by the due date for payment.

The Customer shall release 50% of the security to the Contractor upon Practical Completion (if the Customer has not become entitled to have recourse to such security before Practical Completion). The Customer shall release the remaining 50% at the end of the Defects Liability Period, unless it has become entitled to have recourse to the remaining security before the end of the Defects Liability Period.

30. LATENT CONDITIONS

- (a) If the Contractor encounters a Latent Condition during the performance of the Works, the Contractor must immediately, and before such condition is disturbed, give the Customer's Representative or the Superintendent (if appointed) written notice of:
- (i) the existence of the Latent Condition; and
 - (ii) the Contractor's estimate of the increased costs and time required (if any) to deal with the Latent Condition.

- (b) Upon receipt of the Contractor's notification of a Latent Condition, the Customer's Representative or the Superintendent (if appointed) must:
- (i) direct a variation under clause 4.24 or clause 6.5 relating to any alteration, amendment, deletion, addition or other variation to the Works required as a result of the Latent Condition; and
 - (ii) determine an appropriate adjustment to:
 - (A) the Price, in accordance with clause 6.6; and
 - (B) the Date for Practical Completion,
- provided that the Customer's Representative or the Superintendent (if appointed) need not have regard to any costs or delays resulting from a Latent Condition and incurred more than 5 Business Days before the date of the Contractor's notice under clause 30(a).

31. SUPERINTENDENT AND SUPERINTENDENT'S REPRESENTATIVE

- (a) The Customer, in its absolute discretion, may appoint a Superintendent to the Customer Contract if it is for Works and if the Customer does so, it must be stated in the Customer Contract.
- (b) If subclause (a) applies, the Superintendent shall not be the same entity as the Customer's Representative.
- (c) Where a Superintendent is appointed under subclause (a), the Superintendent shall perform the following functions:
 - (i) assessment and certification of the Contractor's claims for payment;
 - (ii) assessment and certification of the Contractor's claims for extensions of time, variations and other claims;
 - (iii) general administration and management of the Customer Contract; and
 - (iv) issuing directions or instructions to the Contractor in relation to the Works.
- (d) Unless appointed pursuant to clause 31(h) and subject to compliance with that clause, the Customer's Representative shall not administer the Customer Contract under clause 24.1 when a Superintendent is appointed under subclause (a).
- (e) When undertaking assessment and certification functions, the Superintendent must:
 - (i) act honestly and in good faith;
 - (ii) act within the time prescribed under the Customer Contract or if no time is prescribed, within a reasonable time; and
 - (iii) arrive at a reasonable value or measure of time, quantities and work.

- (f) The Contractor must only take directions or instructions in relation to the Works from the Superintendent if the Customer has appointed a Superintendent under subclause (a).
- (g) The Contractor must comply with all reasonable directions or instructions of the Superintendent, including directions or instructions to perform variations to the Works.
- (h) The Superintendent may appoint a Superintendent's Representative to perform any or all of the Superintendent's functions under this clause 31, which shall not prevent the Superintendent from performing any functions and where a Superintendent's Representative is appointed:
 - (i) all acts or functions performed by the Superintendent's Representative shall be deemed to be acts or functions performed by the Superintendent;
 - (ii) this may be the Customer's Representative; and
 - (iii) any such appointment must be notified in writing to the Contractor and will only be effective upon such notification.

32. COMMENCEMENT AND PRACTICAL COMPLETION

- (a) The Contractor must commence work on the Premises within five (5) Business Days of the Commencement Date stated in the Customer Contract Details or if the Customer has not given access to the Premises by that date, within five (5) Business Days of the date of access to the Premises. Before commencing the Works the Contractor must give the Customer's Representative or the Superintendent (if appointed) three Business Days clear notice in writing. Thereafter the Contractor must perform the Works in accordance with the Customer Contract and any directions of the Customer's Representative or Superintendent and at a rate of progress satisfactory to the Customer's Representative or Superintendent.
- (b) The Contractor must complete the Works by the Date for Practical Completion.
- (c) The Contractor must:
 - (i) give the Customer's Representative or the Superintendent at least 10 Business Days' prior notice of the date upon which it expects to reach Practical Completion; and
 - (ii) in writing, request the Customer's Representative or the Superintendent to issue a certificate of Practical Completion, if the Contractor believes that Practical Completion has been reached.
- (d) The Customer's Representative or the Superintendent must:
 - (i) within 10 Business Days of the Contractor's notice under subclause (c)(ii) either:
 - (A) issue a certificate of Practical Completion; or
 - (B) give the Contractor reasons in writing for not issuing the certificate of Practical Completion;

- (ii) when it is of the opinion that Practical Completion has been reached, issue a certificate of Practical Completion, whether or not this has been requested by the Contractor.
- (e) Where Liquidated Damages are specified in the Customer Contract Details and the Contractor fails to complete the Works by the Date for Practical Completion, then on and from the Date for Practical Completion the Contractor must pay or allow the Customer the Liquidated Damages, for every day until such time as the Practical Completion is certified.
- (f) Subject to clause 32(g), if the Contractor is delayed in performing the Works by:
 - (i) the reasons for delay expressly stated in the Request or the Quote; or
 - (ii) where the Request or the Quote do not expressly state such reasons, by a reason beyond the reasonable control of the Contractor,

the Customer's Representative or the Superintendent (if appointed) may extend the Date for Practical Completion by the amount of time the Contractor has been delayed. For the avoidance of doubt, subclause 32(f)(ii) does not apply where the Request or the Quote expressly state reasons for delay.

- (g) If and to the extent the Contractor is delayed in achieving Practical Completion by the Date for Practical Completion by an act or omission of the Customer:
 - (i) the Customer's Representative or the Superintendent (if appointed) must grant a fair and reasonable extension to the Date for Practical Completion; and
 - (ii) the Customer shall be liable for the reasonable direct costs of the Contractor as a direct consequence of the extension of time granted,

in each case upon the written request of the Contractor. Such request must be made in accordance with clause 34.

- (h) The Contractor shall not be entitled to any damages, losses, expenses, costs or other compensation for any delays in the performance of the Works, except where expressly stated elsewhere in these General Conditions or the Customer Contract.

33. PAYMENT FOR WORKS

- (a) If the Customer Contract states that:
 - (i) the Price is to be paid as a lump sum at the time stated in the Customer Contract clauses 12.1 to 12.12 shall apply in relation to payment for those Works and the remainder of this clause 33 shall not apply; or

- (ii) the Contractor is entitled to claim the Price in progress payments, clauses 12.1, 12.2, 12.6, 12.7, 12.8, 12.12 and the remainder of clause 33 shall apply in relation to payment for those Works; and
 - (iii) for the avoidance of doubt, if the Schedule does not state how the Price is to be paid, the Contractor shall be entitled to claim progress payments and clause 33(a)(ii) shall apply.
- (b) The Contractor may issue a progress claim once each calendar month and is entitled to progress payments for the value of the Works that have been certified as completed by the Customer's Representative or the Superintendent (if appointed), less:
- (i) any amount that the Contract states may be withheld as retention; and
 - (ii) any amount which the Customer is entitled to set-off pursuant to clause 27.12.

The total value of the Works shall be deemed to be the Price. The value of Works that have been certified will be on a percentage completed basis. This same percentage will be applied to the Price to arrive at the value of the Works for a progress payment.

- (c) Within 10 Business Days of receipt of a progress claim by the Customer's Representative or the Superintendent (if appointed), the Customer's Representative or the Superintendent (if appointed) must certify (in its sole and absolute discretion) the percentage of Works completed by the Contractor. No such certification shall be deemed to be approval or authorisation for any work that the Contractor may have carried out without the express written authorisation of the Customer.
- (d) After Practical Completion of the Works has been certified, the Contractor shall be entitled to the total Price for the Works and may issue a progress claim for the same, less any amount that may be held by the Customer as retention money for the duration of the Defects Liability Period pursuant to clause 29.2.
- (e) Where the Customer's Representative or the Superintendent (if appointed) considers that a progress claim does not represent the progress of the Works, the Customer's Representative or the Superintendent (if appointed) must at the time it issues a payment certificate give the Contractor reasons in writing.
- (f) The Customer must pay the amount certified pursuant to this clause 33 within 20 Business Days of receipt of the relevant progress claim.
- (g) If there is any dispute about the amount of a progress claim and the amount certified pursuant to clause 33(c), the Customer must pay the amount certified and the disputed amount shall be dealt with in accordance with clause 25 or as otherwise permitted at law.
- (h) If stated in the Customer Contract, the Customer must issue to the Contractor a recipient created tax invoice in respect of GST for the total amount certified pursuant to clause 33(c).

34. CLAIMS REQUIREMENTS

- (a) The Contractor must:
 - (i) submit any claims for extensions of time and costs as a consequence of such extension within 20 Business Days of the first day on which the Contractor is delayed in the performance of the Works;
 - (ii) submit any claims for variations to the Works within 20 Business Days of receipt of the direction to perform the varied Works;
 - (iii) provide any supporting evidence showing the basis for the claim; and
 - (iv) provide any further information as requested by the Customer's Representative or the Superintendent (if appointed).
- (b) If the Contractor does not submit any claim for extension of time or variation to the Works as provided in clause 34(a), the Contractor shall be barred from making any relevant claim.

35. CONSTRUCTION CONTRACTS ACT

- (a) The parties agree that the prescribed appointer for the purposes of the *Construction Contracts Act 2004* (WA) is the Institute of Arbitrators and Mediators Australia, Western Australia Chapter, and that any application under that Act must be made to that institute and no other.
- (b) The Contractor must immediately give to the Customer and the Contract Authority a copy of any notice that the Contractor receives from a subcontractor (for whom consent has been given under clauses 27.1 (b), 27.2 (b) or 27.2 (c)) under sections 26 and/or 42 of the *Construction Contracts Act 2004* (WA).
- (c) The *Construction Contracts Act 2004* (WA) will have the following impact on clause 25:
 - (i) an application for adjudication under Part 3 of the *Construction Contracts Act 2004* (WA) will not be considered a Dispute Notice;
 - (ii) if a dispute to which clause 25 applies arises and the dispute is, or subsequently becomes, the subject of an application for adjudication under Part 3 of the *Construction Contracts Act 2004* (WA), the operation of clause 25.1 will be stayed in relation to that dispute until such time as the application is dismissed or determined under the *Construction Contracts Act 2004* (WA); and
 - (iii) if a determination is made pursuant to Part 3 of the *Construction Contracts Act 2004* (WA), clause 25 will have no application in relation to the dispute the subject of that determination and either party may commence court proceedings relating to the determination in accordance with the *Construction Contracts Act 2004* (WA).

END