



# AS 2124 PROJECT BANK ACCOUNT PACK

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**Title**

[Insert Contract Description]

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**Description**

Information pack for PBA projects

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**Reference**

Contract [insert]

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**Principal**

Housing Authority

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**Lodgement**

As Stated in the Request

## NOTE FOR TENDERERS

The information contained in this AS 2124 PBA Pack is to be fully considered for Tendering purposes. However, Tenderers are not required to fill in any of the documentation within the pack at this time or to submit any of these documents with their Tender

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# INTRODUCTION TO PROJECT BANK ACCOUNTS

Payments to the Contractor in relation to this project will occur through a Project Bank Account (PBA). This 'AS 2124 Project Bank Account Pack' (**Pack**) contains important information and documents relevant to the operation of a PBA.

Please note, unless otherwise stated, words defined with a particular meaning in the Request document have the same meaning in this Pack.

## **Tendering**

The Tenderer acknowledges that in preparing its submission in response to the relevant Request, the Tenderer has obtained and taken into account the latest version of this Pack which is available from the Department of Communities' (**Department**) website:

<http://www.housing.wa.gov.au/contractors/ProjectBankAccounts> .

The Tenderer shall be prepared to enter into all of the agreements set out in this Pack.

Tenderers must notify all potential subcontractors that they are bidding for a PBA project and direct them to the PBA information available on the Department's website:

<http://www.housing.wa.gov.au/contractors/ProjectBankAccounts>

## **What is a Project Bank Account?**

In general terms, a PBA is an alternative payment mechanism that facilitates direct and nearly simultaneous payment to a project's head contractor and its subcontractors if the subcontract value is greater than \$20,000 (inclusive of GST). A subcontractor with a contract value under \$20,000 (inclusive of GST) and any supplier of goods or materials to the head contractor, regardless of value, can also participate in the PBA if they choose. PBAs operate through a trust arrangement and improve security of payment, subject to certain criteria being met.

## **What is different about a project with a Project Bank Account?**

PBA projects are very similar to conventional projects with monthly payment claims still being submitted by the head contractor. These claims are assessed and certified by the Superintendent in the usual way. However, the payment arrangements with the head contractor are different. Instead of payments being deposited into the head contractor's ordinary bank account by the Principal, payments will be routed through a dedicated trust account that is established by the head contractor for the project (i.e. the PBA).

The Principal will pay money into the PBA and the bank will disburse the funds in accordance with the head contractor's payment instructions, which are based on the head contractor's subcontract and supply arrangements. The head contractor and participating subcontractors will then receive their payments directly and simultaneously from the PBA.

The PBA will also hold any retention moneys arising under the terms of the head contractor's subcontracts. Retention amounts will be detailed in the payment instructions and will be released when the head contractor is obligated to return them, or entitled to access the moneys in accordance with the relevant subcontract.

## **Who participates in the PBA?**

All subcontractors who have a contract with the head contractor that is valued at equal to or greater than \$20,000 (inclusive of GST) will automatically become 'beneficiaries' and will have their payment claims paid through the PBA. The \$20,000 monetary threshold is taken to be the combined total for works completed by the subcontractor in relation to the contract being undertaken by the head contractor.

Subcontractors performing work valued at less than this amount will have the ability to opt in by notifying the head contractor by completing an 'Opt-in Notice'. Where the value of the works completed by a subcontractor increases to greater than \$20,000 they will automatically become 'beneficiaries' from that point on.

Material suppliers will not automatically participate in the PBA, however they will also have the ability to opt in by notifying the head contractor by completing an 'Opt-in Notice' that they wish to do so.

For more detailed information of what constitutes a 'subcontractor', 'supplier' and 'beneficiary', refer to the defined terms and interpretation section of the PBA Trust Deed Poll, included in this Pack.

### **What is different in terms of documents?**

When a PBA is used on a project, the head contractor will be required to execute two additional documents in addition to an amended Contract. These are:

- i. the PBA Trust Deed Poll – which is an agreement between the Principal and the head contractor that sets out how the PBA will operate; and
- ii. the PBA Agreement – which is an agreement between the Principal, the head contractor and the bank (that establishes the PBA) and sets out how the PBA will operate.

Where a head contractor has a bank loan from a bank or other financial institution (no matter what that loan is for) and the provider of that loan has taken general security over the head contractor's assets, that bank or financial institution will also need to provide a signed document to release the PBA from their security, or to preserve the PBA ahead of their security.

### **How does the trust work?**

The head contractor makes its usual payment claims for the works, and the Principal makes its usual progress payments (being the amounts certified by the Superintendent). However, instead of progress payments being made into the head contractor's nominated bank account, they are paid into the PBA. The PBA is also a bank account in the head contractor's name, but it is a "trust" account.

The trust is established through the PBA Trust Deed Poll which is signed by the head contractor and is also signed by the Principal. This deed poll sets the rules of the trust. The beneficiaries of the trust are the head contractor itself and the subcontractors.

For the trust structure to work, the funds in the PBA are said to be held by the head contractor for the beneficiaries on a 'trust' basis. This account is opened through the PBA Agreement.

Before the Principal pays for the works each month, the head contractor will be required to submit 'Progress Payment Instructions' to the bank, which allocate the certified amount between the head contractor and participating subcontractors, and allocate the subcontractor retentions (which are held in the PBA until they can be released under the terms of the relevant subcontract).

These Progress Payment Instructions are very important and fulfil a number of functions. Provided that the Progress Payment Instructions are correct and valid, they:

- trigger the obligation of the Principal to pay the amount certified by the Superintendent into the PBA;
- identify the relevant subcontractors, their allocation and their account details (to allow the bank to disburse funds out of the PBA);

- specify the retention amounts (as the retention amounts between the head contractor and participating subcontractors will be held on trust in the PBA until they can be released under the terms of the relevant subcontract); and
- are provided to the bank (that holds the trust account) and act as an irrevocable direction to the bank to pay the amounts in the PBA to the head contractor and the subcontractors (in the allocated amounts).

The head contractor will acknowledge in the head contract that payment out of the PBA is a 'good discharge' of the payment obligation of the Principal to the head contractor.

This structure maintains the debtor/creditor relationship that exists under the head contract (and the subcontracts) and provides for a payment mechanism only. The PBA is not intended to affect turnover reporting or interfere with ordinary contractual relationships.

### **Who will establish the bank account?**

The head contractor is responsible for establishing the PBA. The State Government has pre-agreed PBA documentation with the Commonwealth Bank of Australia. However, the Contractor is permitted to establish the PBA with a different bank providing the bank agrees to the terms of the PBA Agreement and the security release forms as contained in the Contract (or other terms acceptable to the Principal). If the Tenderer proposes to establish the PBA on terms other than as contained in the Contract, the Tenderer must submit the proposed alternative terms as part of the tender.

The bank account will be established by virtue of the Principal, the head contractor and the bank entering into the PBA Agreement. The PBA Agreement requires the bank to acknowledge that the account is a trust account and therefore it must act on the payment instructions (as received from the head contractor) and give effect to them.

As the PBA is a zero balance account, payments out of the PBA will effectively be made within the same day as the funds are received by the PBA from the Principal or the head contractor. The effect of this will be to enhance certainty of payment timeframes for parties that participate in the PBA.

Note - If Tenderers wish to discuss PBA requirements for this request, please contact either the nominated person in the Request document or the below contact for PBA enquiries:

Telephone: 08 9222 4686

Email: [PBA\\_Support@communities.wa.gov.au](mailto:PBA_Support@communities.wa.gov.au)

Website: <http://www.housing.wa.gov.au/contractors/ProjectBankAccounts>

### **What is a "deed poll"?**

A deed poll is a type of legal document that can be executed by one party, and which gives benefits to other parties (in this case, the beneficiaries of the trust) despite the fact that the other parties have not signed the document. The Principal will also sign the PBA Trust Deed Poll for certain limited reasons that do not affect the trust.

In the case of the deed poll used to create the PBA trust, the beneficiaries are the head contractor itself and the 'subcontractors' to that head contractor. As mentioned above, the beneficiaries can also include subcontractors whose contracts are for less than \$20,000 (including GST) or 'suppliers' of goods or materials. All beneficiaries are able to enforce the terms of the deed poll in their favour, even though they are not a party to the document.

### **What about the *Personal Property Securities Act*?**

The *Personal Property Securities Act 2009* (Cth) ("**PPSA**") applies to personal property and security interests. It is possible that the PPSA will apply to moneys in the PBA (both the regular progress payments for works undertaken and to any subcontractor retentions).

To ensure their interests (if any) are protected, head contractors and participating subcontractors should seek their own independent advice about the PPSA and their ability to register any interest in the PBA. It is likely that by registering their interests in the PBA on the Personal Property Securities Register subcontractors will enhance their security of payment.

### **Request Requirements**

Where applicable to a Request for Tender, the successful Tenderer will be required to accept and enter into a number of additional documents, as a condition of the Contract:

#### ***(a) PBA Trust Deed Poll***

The PBA Trust Deed Poll is contained in **Annexure A** of this Pack.

As a condition of the Contract, the PBA Trust Deed Poll must be signed by the Contractor. The Principal will also sign it. Subcontractors do not have to sign the PBA Trust Deed Poll and will automatically become beneficiaries of the trust whether or not they are known or appointed at the time of the contract award. Subcontractors whose contract for the Project is less than \$20,000 (including GST) must complete an 'Opt-in Notice' if they wish to be included in the trust.

Clauses 42, 43 and 44.2 of the General Conditions of Contract also contain provisions in relation to the appointment of subcontractors and the statutory declaration requirements.

#### ***(b) PBA Agreement***

The PBA Agreement is contained in **Annexure B** of this Pack.

As a condition of the Contract, the Contractor will be required to establish a bank account (this is the trust account) which is done through entering into the PBA Agreement. This agreement governs the operation of the bank account with the bank. The terms of the PBA Agreement in Annexure B have been negotiated between the State Government and the Commonwealth Bank of Australia. If the Tenderer proposes to establish the PBA with another bank on terms other than as contained in the Contract, the Tenderer must submit the proposed alternative terms as part of the tender. In either case, the account must be in place at the same time as the PBA Trust Deed Poll comes into effect.

The Principal will be the last party to sign the PBA Agreement and it shall be supplied to the Principal duly executed by the other parties as a condition of the Contract.

#### ***(c) Deed of Release & Priority Deed Poll***

The Deed of Release & Priority Deed Poll is contained in **Annexure C** of this Pack.

As the PPSA may impact on the PBA arrangements above the Contractor will need to identify any financial institutions that have security interests registered over their assets pursuant to the PPSA. The trust account arrangements implemented pursuant to the PBA Trust Deed Poll and PBA Agreement will need to be recognised by the registered holder of any such security interests and rank ahead of, or sit outside, any existing registered security interests of those financial institutions.

The Contractor will need to supply a fully executed Deed of Release or Priority Deed Poll, to give effect to the payment arrangements under the Contract.

### **PBA Amendments to the Contract**

The general conditions of the Contract are based on the *General Conditions of Contract* (AS 2124-1992) as amended by the Principal. The Tenderer's attention is drawn *inter alia* to the amendments made to clauses 42, 43 and 44.2 of the General Conditions of Contract set out in **Annexure D** of this Pack, which relate to payment claims and additional requirements in relation to PBAs. These amendments replace the equivalent clauses of the General Conditions and form part of the Contract.

The amendments to these clauses are found in **Annexure D** of this Pack.

Included as part of these amendments is a requirement under clause 43 (b) that the Contractor must complete a statutory declaration in relation to subcontractors. The required Statutory Declaration is contained in **Annexure E** of this Pack.

### **PBA Amendments to Subcontracts**

Conditions are provided in **Annexure F** of this Pack as a suggestion to head contractors and subcontractors as to what they may choose to incorporate in subcontracts where a project bank account is to be utilised. Any decision to use these provisions is at the risk of the head contractor and subcontractor.

### **No Reliance**

The Principal and the State Government recommend that each party seek its own legal advice on matters connected with project bank accounts and contracting generally and accepts no responsibility to any head contractor or any subcontractors for the documents referred to in (or the contents of) this Pack (including, without limitation, the contents of any Annexures).

### **Principal's Right to Vary or Cancel**

Despite the contents of this document, the Principal reserves the right in its absolute discretion (for any reason whatsoever) to:

- cancel, amend or supplement this document, or modify the manner in which the PBA is to be implemented as part of the Contract; and/or
- make any additions, deletions or amendments to any documents contained in any Addenda to this document, prior to execution of the Contract.

The Principal reserves the right in its absolute discretion to determine, at any time prior to the award of the Contract, whether the payments to the Contractor in relation to this project will or will not occur through a Project Bank Account.

# **AS 2124 Project Bank Account Pack**

## **ANNEXURE A**

### **Project Bank Account Trust Deed Poll**



# PBA Trust deed poll

[Name of Contractor] (Contractor)

[ABN/ACN] [number]

*[Insert actual legal name of the Contractor (not trading name) and ACN or ABN of the Contractor above]*

Housing Authority (Principal)

PBA trust in relation to [Project]. Contract No. [insert]

*[Insert name of Project and contract number above]*

[INSERT YEAR]

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**THIS DEED POLL** is made on \_\_\_\_\_.  
[The Principal will insert the date that the deed poll is signed.]

**BY:**

- (1) [Name of Contractor] [ABN/ACN] [number] whose registered office is at [address] (the **Contractor**);  
[Insert actual legal name of the Contractor and ACN or ABN of the Contractor above];

**IN FAVOUR OF:**

- (2) **Housing Authority** being a body corporate continued pursuant to s.6 of the *Housing Act 1980* (WA) (the **Principal**); and
- (3) **Beneficiaries.**

**RECITALS:**

- (A) The Principal and the Contractor have entered into the Contract for the carrying out and completion of the Project.
- (B) The Contractor has engaged or will engage Subcontractors to carry out and complete parts of the Project.
- (C) The Principal will make payments to the Contractor as the Project progresses and these payments are to be held on trust by the Contractor for the Beneficiaries.
- (D) This deed poll establishes the terms of the trust for the benefit of the Beneficiaries.
- (E) The Principal is a party to this deed poll to accept the obligations placed on it and to benefit from its rights under this deed poll.

**THE CONTRACTOR DECLARES AS FOLLOWS:**

1. **INTERPRETATION**

1.1 **Definitions**

The following definitions apply in this deed poll.

**ABA File Format** means the format referred to as "Australian Bankers' Association direct entry file format".

**Authorised Representative** means:

- (a) in respect of the Principal and the Contractor, a person it notifies to the Bank (with a certified copy of that person's specimen signature) as being its authorised representative for the purposes of this deed poll where the Bank has no notice of revocation of that authority; and
- (b) in respect of the Bank, a person whose title or acting title includes 'manager', 'director', 'executive', 'chief', 'head', 'counsel' or 'president', or a person notified to the other parties as being its authorised representative for the purposes of this deed poll.

**Bank** means a bank (operating in Australia).

**Beneficiary** means:

- (a) the Contractor; and / or
- (b) any Subcontractor from time-to-time,

and **Beneficiaries** means the Contractor and all Subcontractors from time-to-time.

**Business Day** means any day other than:

- (a) a Saturday or a Sunday; or
- (b) a gazetted holiday in Perth, Western Australia under the *Public and Bank Holidays Act 1972 (WA)*.

**Contract** means the contract between the Principal and the Contractor dated *[insert date of execution of the Contract or date of issue of the letter of award]* in respect of the Project.

**Contractor Deposit Instruction** means a payment instruction:

- (a) in ABA File Format; and
- (b) which gives effect to the requirements set out in Schedule 5,

the purpose of which is to initiate deposits or transfers by the Contractor (in each case) from or to the Project Bank Account.

**First PI** has the meaning given in clause 5.8(e).

**General PBA** has the meaning given in clause 2.1.

**Insolvency Event** means the occurrence of one or more of the events set out in clause 44.11 of the Contract.

**Law** means:

- (a) Commonwealth, Western Australian and local government legislation, including statutes, ordinances, instruments, codes, requirements, regulations, by-laws and other subordinate legislation;
- (b) common law; and
- (c) principles of equity.

**Opt-in Notice** means a notice in the form contained in Schedule 7.

**Opt-in Subcontractor** means:

- (a) any person that is contracted by the Contractor to:
  - (i) undertake work or services; or
  - (ii) undertake work or services and supply goods or materials,

where the total aggregate value of such 'work or services' or 'work or services and supply of goods or materials' in connection with the Project is less than \$20,000 (GST inclusive); or

- (b) any person that is a Supplier in connection with the Project,

where the person has expressly stated (to the Contractor) that they wish to participate in the trust created by this deed poll.

**Original PI** has the meaning given in clause 5.8(c).

**Payment Claim** means a claim for payment issued by the Contractor to the Principal in accordance with the Contract.

**Payment Instruction** means a valid payment instruction in relation to the operation of the Project Bank Account that is:

- (a) authorised by the Contractor or an Authorised Representative of the Contractor acceptable to the Bank;
- (b) issued by the Contractor pursuant to this deed poll, contemporaneously to the Principal and to the Bank where the Project Bank Account is held;
- (c) in the form of a:
  - (i) Progress Payment Instruction;
  - (ii) Retention Release Instruction; or
  - (iii) Contractor Deposit Instruction; and
- (d) subject to clause 5.5(b), irrevocable.

**PBA Agreement** means the agreement entered into between the Contractor, the Principal and the Bank which establishes the Project Bank Account.

**PPI – Consolidated Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 1.

**PPI – Contractor Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 2.

**PPI – Retention Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 4.

**PPI – Subcontractor Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 3.

**Progress Payment Instruction** means a PPI - Consolidated Allocation or any one or more of a:

- (a) PPI - Contractor Allocation;
- (b) PPI - Subcontractor Allocation; or
- (c) PPI - Retention Allocation,

the purpose of which is to originate a payment by the Principal into the Project Bank Account.

**Project** means *[insert a brief description of the Project]*.

**Project Bank Account** means the bank account established as a trust account with a single Bank in accordance with clause 2.1.

**Related Body Corporate** has the meaning given to that term in the *Corporations Act 2001* (Cth).

**Retention Amount** means any moneys which the Contractor is entitled to retain from amounts due to Subcontractors pursuant to any express provision of a Subcontract permitting either a specified percentage amount or a specified amount to be retained from payments to be made under the Subcontract.

**Retention PBA** has the meaning given in clause 2.1.

**Retention Release Event** is the agreement or determination or occurrence of an event under a Subcontract consequent upon which retention moneys or any part thereof (retained pursuant to an express provision of that Subcontract) are to (as relevant) be released to the Subcontractor or paid to the Contractor.

**Retention Release Instruction** means a payment instruction:

- (a) in ABA File Format; and
- (b) which gives effect to the requirements set out in Schedule 6,

the purpose of which is to disburse Retention Amounts from the Project Bank Account.

**Subcontract** means a contract between the Contractor and a Subcontractor in respect of the Project or a part thereof.

**Subcontractor** means:

- (a) a person who has been contracted by the Contractor to:
  - (i) undertake work or services; or
  - (ii) undertake work or services and supply goods or materials,where in either case the total aggregate value of such 'work or services' or 'work or services and supply of goods or materials' in connection with the Project is equal to or greater than \$20,000 (GST inclusive); and
- (b) any Opt-in Subcontractor that has signed an Opt-in Notice and given a copy of that notice to the Contractor.

To avoid doubt, a "Subcontractor" may be a Selected Subcontractor or a Nominated Subcontractor (in each case as defined in the Contract).

**Supplier** means a person who has been contracted to supply goods or materials to the Contractor in connection with the Project but who undertakes no design, fabrication, construction work or service of any kind in connection with the Project.

**Term** means the period from the date of this deed poll until the later of:

- (a) such time as all moneys due to the Beneficiaries under the Contract and/or the Subcontracts have been paid in full in accordance with the terms of this deed poll; and
- (b) the date that is 24 months from the date of termination of the Contract.

## 1.2 Interpretation

Rules for interpreting this deed poll are set out in Schedule 8.0

### 1.3 **Deed poll**

This document is a deed poll intended to operate for the benefit of the Principal and the Beneficiaries and is enforceable by the Principal and the Beneficiaries.

## 2. **ACCOUNT**

### 2.1 **Establishing and status**

The Contractor will:

- (a) within 10 Business Days of the date of this deed poll, establish the Project Bank Account with a single Bank;
- (b) procure that the Project Bank Account will be two separate accounts each being designated a trust account and each:
  - (i) will be a new interest bearing deposit account;
  - (ii) can have no overdraft facility;
  - (iii) will be an account which the Principal is able to view on-line;
  - (iv) is to be electronically linked to the other; and
  - (v) is to be established on terms approved in writing by the Principal,  
in each case as follows:
    - (vi) one account being for the purpose of receiving and disbursing payments to be made to or from the Contractor (such account being the **General PBA**); and
    - (vii) the other account being for the purpose of receiving and disbursing Retention Amounts (such account being the **Retention PBA**).

### 2.2 **Charges and interest**

The Contractor:

- (a) declares it is liable for, and will pay from its own funds, any charges or costs associated with the establishment and operation of the Project Bank Account (including money transmission costs);
- (b) may retain (for itself) any interest earned on moneys standing to the credit of the Project Bank Account subject to the limitations on withdrawal in clauses 3.7 and 5.9(c); and
- (c) will ensure that the Project Bank Account does not become overdrawn.

### 2.3 **Retention obligation**

The Contractor will procure that:

- (a) all Retention Amounts are transferred to and held in the Retention PBA; and
- (b) such Retention Amounts are only disbursed from the Retention PBA in accordance with this deed poll; and



- (c) notwithstanding the termination, novation or amendment and novation of the Contract, each Retention Amount will be held in the Retention PBA until a Retention Release Event occurs for such Retention Amount under the relevant Subcontract.

## 2.4 **Transfer to new Bank**

- (a) If the Bank (**Retiring Bank**) with whom the Project Bank Account has been established pursuant to clause 2.1:
  - (i) resigns from its role as holder of the Project Bank Account;
  - (ii) for any reason ceases to hold the Project Bank Account; and/or
  - (iii) provides notice to the Contractor that it intends to resign or cease to hold the Project Bank Account,

the Contractor will procure with the agreement of the Principal that a new Bank assumes the role as holder of the Project Bank Account on the same terms as the account established pursuant to clause 2.1.

- (b) If the Contractor fails to comply with clause 2.4(a) within 5 Business Days of the earliest to occur of the events in clause 2.4(a)(i), 2.4(a)(ii) or 2.4(a)(iii), the Principal may, but is not obliged to:
  - (i) nominate a Bank of its choosing to hold the Project Bank Account on terms substantially the same as the account established pursuant to clause 2.1; and
  - (ii) issue a notice to the Retiring Bank directing that all moneys contemplated by this deed poll and held by the Retiring Bank be forthwith transferred to the new Bank,

and following such transfer the Project Bank Account will be transferred to that new Bank and this shall be the Project Bank Account for all purposes of this deed poll.

## 3. **TRUST**

### 3.1 **Creation of trust**

- (a) The Contractor agrees to act as trustee of the trust created by this deed poll.
- (b) The Contractor declares that it holds all moneys standing to the credit of the Project Bank Account on trust for the Beneficiaries upon the terms of and subject to this deed poll.
- (c) The Contractor agrees to the Principal making a payment of \$1 into the Project Bank Account. This payment will reduce the total amount owing to the Contractor by the Principal under the Contract by \$1.
- (d) The Contractor also declares that it holds its right to payment from the Principal under the Contract, to the extent that that right to payment reflects work performed by a Beneficiary from time to time, on trust for that Beneficiary upon the terms of and subject to this deed poll.

### 3.2 **Operation of the trust**

Pending the application of moneys in the Project Bank Account pursuant to a Payment Instruction and subject to clause 3.6, all moneys deposited into and standing to the credit of the Project Bank Account and all choses-in-action connected therewith are held on trust

for each Beneficiary in the amounts identified against their respective names in the relevant Payment Instruction.

### 3.3 **Retention Amounts on trust**

Where a relevant Payment Instruction identifies any amount as being a Retention Amount, a portion of moneys equating to the Retention Amount (as deposited into and standing to the credit of the Project Bank Account) is held on trust for the Subcontractor from whom it has been retained (pursuant to the Subcontract to which it is a party) as specified in the Payment Instruction, until a Retention Release Event occurs under the relevant Subcontract.

### 3.4 **Beneficiaries bound**

- (a) This deed poll is made with the intention that the Beneficiaries are bound by it and entitled to its benefits.
- (b) The extent of the rights and interests of a Beneficiary in moneys standing to the credit of the Project Bank Account from time to time is determined by relevant Payment Instructions.
- (c) The Beneficiaries have no rights and/or interest in the moneys held in the Project Bank Account other than as a beneficiary of the moneys identified against their respective names in the relevant Payment Instruction.
- (d) To the extent it is not identified in a relevant Payment Instruction or no amount is allocated to it in a relevant Payment Instruction, or it is not a beneficiary of a Retention Amount that is standing to the credit of the Retention PBA, a Beneficiary will have no interest in moneys deposited into (or standing to the credit of) the Project Bank Account.

### 3.5 **Relevant Payment Instructions**

In clauses 3.2 to 3.4 a reference to "*relevant Payment Instruction*" means either:

- (a) the PPI - Consolidated Allocation or any one or more of a:
  - (i) PPI - Contractor Allocation;
  - (ii) PPI - Subcontractor Allocation; or
  - (iii) PPI - Retention Allocation,  
  
(if any) that most recently preceded the deposit of moneys by the Principal into the Project Bank Account;
- (b) the Retention Release Instruction insofar as any Retention Amount is standing to the credit of the trust account for Retention Amounts that is linked to the Project Bank Account; or
- (c) the Contractor Deposit Instruction that most recently preceded the deposit of moneys by the Contractor into the Project Bank Account.

### 3.6 **Shortfall of moneys**

- (a) If the total amount deposited by the Principal into the General PBA is less than the total amount identified in the relevant Progress Payment Instruction, the moneys standing to the credit of the General PBA are held on trust for each Beneficiary in the relevant proportion. The "relevant proportion" is the proportion that the amount

identified in the relevant Payment Instruction against a Beneficiary's name bears to the total amount of moneys identified in the relevant Payment Instruction.

- (b) To the extent that:
- (i) the total amount due and owing from (or otherwise payable by) the Contractor to a Subcontractor in connection with the Project is greater than the amount identified in the relevant Progress Payment Instruction for that Subcontractor; and / or
  - (ii) amounts are due and owing from the Contractor to a Subcontractor in connection with the Project and the amounts are not referable to any previously issued Progress Payment Instruction,

the Contractor must pay into the General PBA any amount required to make payment of the total amount due to the Subcontractor. Any such payment into the General PBA must:

- (iii) be accompanied by a Contractor Deposit Instruction; and
- (iv) be made in sufficient time so as to allow the Bank (where the Project Bank Account is held) to apply the relevant funds to that Subcontractor at the same time as acting on the relevant Progress Payment Instruction,

and the moneys deposited by such payment into the General PBA will be held on trust for the benefit of the relevant Subcontractor.

### 3.7 **Acknowledgement of Contractor**

- (a) The Contractor acknowledges and agrees that, irrespective of any dispute or disputes which may arise out of or in connection with work performed by any Beneficiary, the Contractor may not withdraw any moneys from the Project Bank Account other than:
  - (i) interest in accordance with clause 5.9(c); and
  - (ii) (in its capacity as a Beneficiary) pursuant to a Progress Payment Instruction or Retention Release Instruction.
- (b) The Contractor warrants for the benefit of the Subcontractors and the Principal that, to the extent any party has a registered security interest over all or substantially all of the Contractor's assets (as identified under the "Personal Property Securities Register" maintained pursuant to the *Personal Property Securities Act 2009* (Cth)), that security interest will not extend to or cover the Project Bank Account or moneys paid into the Project Bank Account.

### 4. **PAYMENT BY PRINCIPAL**

- (a) The Principal will pay all moneys due (or otherwise payable) to the Contractor pursuant to the Contract into the General PBA as and when such moneys become due for payment (or are otherwise payable). Such payment shall be in accordance with, and subject to, the terms of the Contract.
- (b) The Principal acknowledges and agrees that, on and from the payment of moneys by it into the General PBA in accordance with the Contract, it will (save in the case of manifest error) cease to have any rights and/or interest in such moneys.

## 5. OPERATION OF THE BANK ACCOUNT

### 5.1 No payment

The Contractor acknowledges and agrees that pursuant to the Contract, the Principal will not be obligated to pay any amount to the Contractor under the Contract until such time as the Project Bank Account has been established.

### 5.2 Other documents

- (a) The Contractor will operate the Project Bank Account at all times in accordance with this deed poll, the PBA Agreement, and the Contract.
- (b) If there is any conflict between this deed poll, a Payment Instruction, the PBA Agreement, and/or the Contract, the documents shall take precedence in the following order:
  - (i) this deed poll;
  - (ii) the PBA Agreement;
  - (iii) the Payment Instruction; and
  - (iv) the Contract.

### 5.3 Records

The Contractor will keep accurate, complete and up to date books of account and records of all transactions relating to the Project Bank Account, including but not limited to details of all payments out of the Project Bank Account.

### 5.4 On-line account

The Contractor will ensure that the Project Bank Account can be operated via an electronic or on-line facility operated by the Bank, and that:

- (a) the Principal will have the ability to "view" the account electronically or on-line but (subject to clauses 5.10 and 10) will have no ability or authority to act on the account; and
- (b) the Contractor's access details for such facility are only made available to those of its employees and/or representatives which need to know such information and that such employees and/or representatives are aware of the confidential nature of the access details, the Project Bank Account details and the Project Bank Account transactions.

### 5.5 Authorisation to Bank

- (a) The Contractor will ensure each Payment Instruction is issued to the Bank and is an instruction to the Bank to make (as relevant):
  - (i) subject to clause 5.5(b), in the case of a Progress Payment Instruction, any transfers to the Retention PBA, or payments to a Beneficiary from the General PBA, in each case in accordance with the Progress Payment Instruction, not less than 28 days from issue of the associated Payment Claim;
  - (ii) in the case of a Retention Release Instruction, or any transfers from the Retention PBA to any Beneficiary, in each case in accordance with the Retention Instruction, as soon as practicable; and

- (iii) in the case of a Contractor Deposit Instruction:
  - (A) any transfers to the Retention PBA or payments to a Beneficiary from the Project Bank Account, in each case in accordance with the Contractor Deposit Instruction, within three days from the issue of the Contractor Deposit Instruction; or
  - (B) as directed by the Principal pursuant to this deed poll.
- (b) The Contractor will forthwith issue a revised Payment Instruction if any previously issued Payment Instruction is invalid pursuant to the PBA Agreement and it is agreed between the Contractor and the Principal that the Payment instructions:
  - (i) contained errors (including arithmetic errors); or
  - (ii) failed to comply with the requirements of the Contract, the PBA Agreement or this deed poll.

Any such revised Payment Instruction must advise the Bank of the invalidity and instruct the Bank to make payment within 28 days from issue of the associated Payment Claim.

#### 5.6 **Informing Subcontractors**

The Contractor will promptly inform each Subcontractor of the amounts which are to be paid to them from the Project Bank Account pursuant to a relevant Payment Instruction and the date on which the Subcontractor can expect to receive such payment. The Contractor will supply such information on the same day as the Payment Instruction is supplied to the Bank authorising payments out of the Project Bank Account.

#### 5.7 **Related Bodies Corporate**

The Contractor acknowledges and agrees that a Payment Instruction may only include an entity that is a Related Body Corporate of the Contractor if and to the extent that entity:

- (a) is a bona fide provider of construction services to the Contractor in the ordinary course of its business; and
- (b) is not a company:
  - (i) whose primary or substantial purpose is to appoint subcontractors who might otherwise be Subcontractors;
  - (ii) that discharges its obligations solely or primarily through the appointment of subcontractors; or
  - (iii) that would (or is reasonably likely to) use all or substantially all of the moneys it would receive from the Project Bank Account to discharge liabilities to subcontractors.

#### 5.8 **General rules**

The Contractor:

- (a) acknowledges and agrees that without prejudice to clause 5.5(a)(i), all moneys deposited into the General PBA are to be disbursed from it to other accounts (including pursuant to clause 5.8(b)) as soon as reasonably practicable after funds have been deposited into the General PBA;

- (b) acknowledges and agrees that Retention Amounts are to be transferred to the Retention PBA pursuant to clause 2.3 and disbursed in accordance with clause 5.11;
- (c) will not issue a Payment Instruction (**Original PI**) which specifies a date into the future for the Bank to effect the transaction(s) contemplated in that instruction, if a different Payment Instruction will be (or is likely to be) issued in the intervening period that is prior to the Bank putting into effect the transactions in the Original PI (unless that different Payment Instruction complies with clause 5.8(d)(i));
- (d) acknowledges and agrees that if a Progress Payment Instruction has been issued which specifies a date for the Bank to effect the transaction(s) contemplated in that instruction, the Contractor must not issue a Contractor Deposit Instruction with a processing date that is:
  - (i) the same date as the processing date of such Progress Payment Instruction; or
  - (ii) the day before or day after the processing date of such Progress Payment Instruction; and
- (e) acknowledges and agrees that:
  - (i) the disbursement or application of funds deposited pursuant to a Contractor Deposit Instruction, must equal the amount deposited pursuant to that Contractor Deposit Instruction; and
  - (ii) if at any time:
    - (A) there are monies standing to the credit of the General PBA;
    - (B) a Payment Instruction has been issued (the **First PI**); and
    - (C) the Bank has not actioned the First PI through the disbursement of moneys,
 

the Contractor must not issue any other Payment Instruction (other than a Retention Release Instruction) with:

      - (D) the same processing date as the First PI; or
      - (E) an earlier processing date than the First PI.

#### 5.9 **Account transactions**

- (a) All payments to the Beneficiaries from the Project Bank Account will be made by bank transfer. The Contractor will inform the Principal of the details of the Project Bank Account so as to (amongst other things) facilitate payment by the Principal into the General PBA. The Contractor will keep the relevant bank account details of each Subcontractor up to date at all times.
- (b) The Contractor acknowledges that failure to supply its account details may result in moneys not being paid to it and that the Principal does not have any liability for such failure.
- (c) Any interest paid by the Bank in respect of the moneys held in the Project Bank Account shall accrue to the benefit of and become the Contractors and may be withdrawn by the Contractor and transferred into an account in the name of the Contractor (other than the Project Bank Account) at any time.

#### 5.10 **Authority to direct**

The Contractor irrevocably appoints the Principal as its agent for the purpose of preparing a Payment Instruction and issuing a Payment Instruction in relation to the Project Bank Account where:

- (a) the Contract is terminated pursuant to clause 44.4(b) of the Contract; and/or
- (b) the Principal exercises its rights pursuant to clause 44.11 of the Contract.

#### 5.11 **Disbursement of Retention Amounts**

- (a) Forthwith upon the occurrence of a Retention Release Event, the Contractor shall duly complete, execute and contemporaneously issue to the Principal and to the Bank with whom the Project Bank Account is held, a Retention Release Instruction.
- (b) The Retention Release Instruction issued pursuant to clause 5.11(a) shall:
  - (i) identify the dollar value of the Retention Amount and to whom it must be paid (in each case consistent with the Subcontract); and
  - (ii) be determinative of the beneficial interest in the Retention Amount the subject of that instruction (the identified recipient of the Retention Amount being the Beneficiary with the beneficial interest).
- (c) The beneficial interest in the Retention Amount identified in any Payment Instruction executed and delivered pursuant to clause 5.11(a) shall (on and from the date and time of receipt of that Payment Instruction by the relevant Bank) be as set out in that Payment Instruction.

#### 5.12 **Forms of Payment Instruction**

- (a) It is acknowledged and agreed that:
  - (i) the information set out in the "Payment Instruction" schedules, being Schedules 1 to 6 of this deed poll, reflect the intention of the Contractor and the Principal and describe the operation of the trust and the intended movement of moneys between the Principal, the Contractor and the Subcontractors;
  - (ii) cash transfers will only be effected through the completion and electronic submission of instructions in ABA File Format; and
  - (iii) the Contractor and the Principal will agree a protocol or convention for completing the form and substance of an ABA File Format such that it gives effect to the relevant Payment Instruction and:
    - (A) no Payment Instruction will be issued by the Contractor unless and until such agreement has been reached; and
    - (B) Payment Instructions must only be issued by the Contractor if they comply with the protocol or convention that has been agreed (in writing) by the Principal.
- (b) A reference in this deed poll to:
  - (i) a Payment Instruction being a "Progress Payment Instruction, Retention Release Instruction or Contractor Deposit Instruction (as the case may be)"; or

- (ii) a Payment Instruction that complies with a schedule,

or any reference with same or similar meaning shall (for the purposes of this deed poll) be deemed to be a reference to the Payment Instruction (of any kind) given in ABA File Format as agreed between the Principal and the Contractor pursuant to clause 5.12(a).

## 6. SUBCONTRACTORS

### 6.1 Opt-in Subcontractors

- (a) The Contractor will ensure that:
  - (i) any Opt-in Subcontractor who wishes to become a 'Subcontractor' is promptly provided with the form of an Opt-In Notice (which must be within seven calendar days of the Opt-In Subcontractor expressly stating to the Contractor that they wish to participate in the trust created by this deed poll); and
  - (ii) copies of all duly signed Opt-in Notices received by it are forthwith supplied to the Principal.
- (b) Upon the supply of a duly signed Opt-in Notice to the Contractor, the Opt-in Subcontractor that has signed that notice will be deemed a Subcontractor (on and from that point) for all purposes of this deed poll and shall be paid via the Project Bank Account pursuant to the operation of this deed poll.

### 6.2 Removal of Subcontractor

- (a) If, prior to the expiry of the Term, a Subcontractor ceases to be involved in the Project for whatever reason (including but not limited to the termination of its Subcontract) (**Retiring Subcontractor**), the Contractor shall forthwith duly complete, execute and issue a Retention Release Instruction pursuant to which the Contractor shall ensure payment out of the Project Bank Account of (as relevant):
  - (i) Retention Amounts (if any) held on trust for the benefit of the Retiring Subcontractor, in accordance with the terms of the Subcontract; or
  - (ii) moneys (if any) held on trust for the benefit of the Contractor consequent upon the occurrence of a Retention Release Event occurring in relation to the Retiring Subcontractor.
- (b) The Retention Release Instruction issued pursuant to clause 6.2(a) will direct payment to the Retiring Subcontractor unless and to the extent the Contractor is entitled to the benefit of that Retention Amount (or any part of it).
- (c) On payment of all moneys due to it from the Project Bank Account in accordance with clause 6.2(a) above, the Retiring Subcontractor shall cease to be a Beneficiary and to have any further rights and/or interests in the Project Bank Account and any funds standing to the credit of it.

## 7. CONFIDENTIALITY

Information that the Contractor receives in the performance of its obligations under this deed poll will be kept confidential except where:

- (a) the information is public knowledge (but not because of a breach of this deed poll);
- (b) disclosure is required by Law or a regulatory body (including a relevant stock exchange);



- (c) disclosure is made to a person who must know for the purposes of this deed poll (which, to avoid doubt, includes the Principal and the Bank where the Project Bank Account is held); or
- (d) disclosure is made to a legal advisor or financial advisor who has agreed to keep the information confidential.

8. **ASSIGNMENT**

The Contractor will not assign or otherwise transfer any of its rights or obligations under this deed poll without the prior written consent of the Principal.

9. **TERMINATION**

- (a) This deed poll shall continue for the Term, subject to early termination in accordance with clause 9(c) below.
- (b) The Contractor must ensure that the Project Bank Account is maintained for the Term.
- (c) This deed poll shall immediately terminate if:
  - (i) the Contractor and the Principal agree in writing that this deed poll should terminate; or
  - (ii) the Contractor's employment under the Contract terminates and all moneys, including Retention Amounts, have been paid out from the Project Bank Account in accordance with the terms of this deed poll. To avoid doubt, notwithstanding the termination of the Contractor's employment under the Contract, this deed poll will not terminate if any Retention Amounts remain in the Retention PBA.

An amendment and novation of the Contract is not a termination for the purposes of this clause 9(c).

- (d) On termination of this deed poll the Contractor will undertake to ensure all moneys held on trust for the benefit of the Beneficiaries and held in the Project Bank Account are promptly paid to the relevant Beneficiary in accordance with the terms of this deed poll (less any outstanding bank charges and costs as referred to in clause 2.2).
- (e) The trust established pursuant to this deed poll cannot be terminated without the consent of the Principal and the Contractor.

10. **REMOVAL OF TRUSTEE**

- (a) Without prejudice to clause 5.10, if:
  - (i) the Principal terminates or purports to terminate the Contract; or
  - (ii) except to the extent that such right is stayed by reason of the operation of the ipso facto provisions in sections 415D, 415F, 434J, 434L, 451E or 451G of the *Corporations Act 2001* (Cth) an Insolvency Event occurs in relation to the Contractor, or where the Contractor comprises two or more persons, to any one of those persons,

then, upon the issue of notice to the Contractor issued by the Principal stating that the Principal is exercising its rights to remove the trustee in accordance with this clause 10:

- (i) the Contractor will immediately and without any further action being required, cease to be the trustee;
  - (ii) the Contractor will immediately cease to operate the Project Bank Account and (unless expressly requested otherwise by the Principal) will take no further steps to exercise any rights as account holder of that account; and
  - (iii) the Principal will nominate and appoint another person as the trustee of the Project Bank Account on the terms of this deed poll.
- (b) The Principal shall ensure that the person so nominated must calculate the interest accrued upon the moneys standing to the credit of the Project Bank Account to the date that the Contractor ceased to be trustee of the Project Bank Account and will pay this amount to the Contractor.
- (c) If the Contractor ceases to be trustee of the Project Bank Account it must do all such acts and do all such things as the Principal may deem necessary for the effectual operation of clauses 10(a) and 10(b).
- (d) Without limiting clause 10(c), the Contractor appoints the Principal as the true and lawful attorney of the Contractor with full power and authority to execute all such documents as may be necessary to give effect to the operation of clauses 10(a), 10(b) and 10(c) and thereafter the person nominated by the Principal under this clause 10 as the new trustee will administer the Project Bank Account in accordance with the terms of this deed poll.

#### 11. **NO LIABILITY**

- (a) Neither the Principal, nor the Superintendent, nor the Superintendent's Representative shall:
- (i) have any duty of care to any Subcontractor under or in relation to this deed poll;
  - (ii) have any liability to the Subcontractors (whether in contract, tort, or under any other legal theory) under or in relation to this deed poll;
  - (iii) have any liability to the Beneficiaries for any act or omission or breach of any obligation by any party under the Subcontracts;
  - (iv) have any liability to the Subcontractors for any act or omission or breach of any obligation by any party under the Contract; or
  - (v) have any obligations to make payment into the Project Bank Account or to any Beneficiary or third party (except insofar as the destination of the payment must be the Project Bank Account).
- (b) In this clause 11:
- (i) the terms **Superintendent** and **Superintendent's Representative** shall have the meanings given to them under the Contract; and
  - (ii) a reference to the Principal, the Superintendent and Superintendent's Representative shall be deemed to include each of their respective employees and agents.

## 12. GENERAL

### 12.1 Notices

- (a) **(Form of Notices)** Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this deed poll:
- (i) must be in writing; and
  - (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 agent of, that party.
- (b) **(Procedure for sending notices)** All notices must be:
- (i) delivered or posted by prepaid post to the address; or
  - (ii) sent by email in the form of a .pdf file letter (or such other form agreed by the Principal) to the email address,  
  
of the addressee set out below (or as otherwise notified by that party to each other party from time to time):
  - (iii) the **Contractor**:  
  
**[Insert postal and email address of Contractor]**
  - (iv) the **Principal**:  
  
**[Insert postal and email address of the Principal]**.
- (c) **(Date of receipt)** Subject to clause 12.1(d), a notice is taken to be received by the addressee:
- (i) in the case of prepaid post, on the sixth Business Day after the date of posting to an address within Australia, and on the seventh Business Day after the date of posting by airmail to an address outside Australia;
  - (ii) in the case of email, when the sender receives confirmation on its server that the message has been transmitted; and
  - (iii) in the case of delivery by hand, on delivery.
- (d) **(Next Business Day)** If the 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) **(Notices sent by email)** In connection with notices sent by email, 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 communication in accordance with this clause 12.1. Any text in the body of the email or the subject line will not form part of the notice.

### 12.2 Alterations

This deed poll cannot be varied, modified, or altered in any way unless it has the prior written consent of the Principal and of each Beneficiary in existence at the time of the intended variation, modification or alteration.

### 12.3 **No fettering**

Nothing contained in this deed poll or contemplated by this deed poll has the effect of constraining the Principal or placing any fetter on the Principal's discretion to exercise or not to exercise any of its statutory rights, duties, powers or functions.

### 12.4 **Costs**

Except as otherwise provided in this deed poll, each of the Contractor and the Principal agrees to:

- (a) pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed poll; and
- (b) perform its obligations in accordance with this deed poll at its own cost.

### 12.5 **Stamp duty**

The Contractor agrees to pay any stamp duty, duties or other taxes of a similar nature (including fines, penalties and interest) in connection with this deed poll or any transaction contemplated by this deed poll<sup>1</sup>.

### 12.6 **Clauses to survive termination**

- (a) All provisions of this deed poll which expressly or by implication from their nature are intended to survive termination, completion or expiration of this deed poll will survive such termination, completion or expiration, including any provision which is in connection with:
  - (i) confidentiality or privacy; and
  - (ii) any right or obligation arising on termination of this deed poll.
- (b) Nothing in this clause 12.6 prevents any other provision of this deed poll, as a matter of interpretation, also surviving the termination of this deed poll.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this deed poll. All rights and obligations in accordance with this deed poll survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this deed poll.

### 12.7 **Counterparts**

This deed poll may be executed in any number of counterparts and all of such counterparts taken together will be deemed to constitute one and the same instrument.

### 12.8 **Entire agreement**

This deed poll constitutes the entire agreement between the Contractor and the Principal in connection with its subject matter and supersedes all previous agreements or understandings between the Principal and the Contractor in connection with its subject matter.

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<sup>1</sup> No stamp duty is currently payable on this deed or transactions contemplated by it.

#### 12.9 **Further action**

The Contractor agrees to do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this deed poll and any transactions contemplated by it.

#### 12.10 **Severability**

Any provision of this deed poll that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this deed poll nor affect the validity or enforceability of that provision in any other jurisdiction.

#### 12.11 **Waiver and estoppel**

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy under any Law or under this deed poll by any party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or this deed poll.
- (b) A waiver given by any party under this deed poll is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this deed poll operates as a waiver of any other breach of that term or of a breach of any other term of this deed poll.
- (d) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under any Law or under this deed poll does not preclude, or operate as an estoppel of any form of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or under this deed poll.

#### 12.12 **Relationship**

- (a) No duty of any kind (whether to act with good faith, to exercise a duty of care or otherwise) is assumed by (or to be implied on) the Principal in connection with this deed poll or any matter arising out of or in connection with this deed poll.
- (b) Neither this deed poll nor the relationship created by it, is intended to create, and will not be construed as creating, any partnership or joint venture as between the Principal, the Contractor and/or the Subcontractors.
- (c) The Contractor must not act as or represent itself to be the servant or agent of the Principal.

#### 12.13 **Joint and several liability**

If any Beneficiary consists of more than one person, then the rights and obligations of such persons in accordance with this deed poll are joint and several as between those persons.

#### 12.14 **Enforcement**

This deed poll may be enforced by any Beneficiary, including pursuant to section 11(2) of the *Property Law Act 1969* (WA).

12.15 **Governing law and jurisdiction**

This deed poll is governed by and will be construed according to the Laws of Western Australia and the Principal and the Contractor irrevocably submit to the exclusive jurisdiction of the courts of that State and the courts competent to determine appeals from those courts.

**EXECUTED** as a deed poll.

Each person who executes this deed poll on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

**EXECUTED** as a deed poll by **[NAME OF CONTRACTOR]** in accordance with Section 127 of the *Corporations Act 2001* (Cth):

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Signature of director/company secretary

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

The **COMMON SEAL** of the  
**HOUSING AUTHORITY**  
was hereunto affixed  
in the presence of:                    )

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Name of Authorised Officer

\_\_\_\_\_  
Name of Authorised Officer

\_\_\_\_\_  
Position of Authorised Officer

\_\_\_\_\_  
Position of Authorised Officer

**OR**<sup>\*2</sup>

Signed for and on behalf of            )  
**HOUSING AUTHORITY**                    )  
by an authorised officer:                )

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Name of Authorised Officer

\_\_\_\_\_  
Position of Authorised Officer

\* Delete the execution clause which does not apply.

\_\_\_\_\_  
<sup>2</sup> Delete the execution clause that does not apply. If in doubt seek advice from LLS as to which execution clause should be used.



## **SCHEDULE 1**

### **PPI – Consolidated Allocation**

For the purposes of the PBA Agreement, this Schedule 1 establishes the minimum requirements of a 'PPI – Consolidated Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Consolidated Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Consolidated Allocation.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to the Contractor; the amount to be disbursed to the Contractor; and the Contractor's account details;
  - b. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details; and
  - c. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the PPI – Consolidated Allocation.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 2**

### **PPI – Contractor Allocation**

For the purposes of the PBA Agreement, this Schedule 2 establishes the minimum requirements of a 'PPI – Contractor Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Contractor Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Contractor Allocation.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to the Contractor; the amount to be disbursed to the Contractor; and the Contractor's account details.
4. Specify the date for actioning the PPI – Contractor Allocation.
5. Be in a form acceptable to the Bank and the Principal.

### **SCHEDULE 3**

#### **PPI – Subcontractor Allocation**

For the purposes of the PBA Agreement, this Schedule 3 establishes the minimum requirements of a 'PPI – Subcontractor Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Subcontractor Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Subcontractor Allocation.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details.
4. Specify the date for actioning the PPI – Subcontractor Allocation.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 4**

### **PPI – Retention Allocation**

For the purposes of the PBA Agreement, this Schedule 4 establishes the minimum requirements of a 'PPI – Retention Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Retention Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to transfer to the Retention PBA the Retention Amount(s) identified in the PPI - Retention Allocation which is / are to be held on trust pending receipt of a Retention Release Instruction within 9 days of the issue of the PPI – Retention Allocation.
3. Identify the transfer in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and
  - b. the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the PPI – Retention Allocation.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 5**

### **Contractor Deposit Instruction**

For the purposes of the PBA Agreement, this Schedule 5 establishes the minimum requirements of a Contractor Deposit Instruction that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

A Contractor Deposit Instruction must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Contractor into the General PBA within 3 days of the issue of the Contractor Deposit Instruction.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details; and
  - b. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the Contractor Deposit Instruction.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 6**

### **Retention Release Instruction**

For the purposes of the PBA Agreement, this Schedule 6 establishes the minimum requirements of a Retention Release Instruction that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

A Retention Release Instruction must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse Retention Amounts from the Retention PBA, to the account(s) specified.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the Retention PBA to each Subcontractor (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); the amount to be transferred in relation to that Subcontractor; and the Subcontractor's account details);
  - b. amounts to be disbursed from the Retention PBA to the Contractor (using a unique identifier for the name of the Contractor); the amount to be transferred in relation to the Contractor; and the Contractor's account details; and
  - c. the balance of Retention Amounts in the Retention PBA.
4. Specify the date for actioning the Retention Release Instruction.
5. Be in a form acceptable to the Bank and the Principal.

## SCHEDULE 7

### Form of Opt-in Notice

To: **Housing Authority** being a body corporate pursuant to s.6 of the *Housing Act 1980* (WA)  
(the **Principal**)

and

**[the Contractor]** (the **Contractor**),

*[Insert full legal name and ACN or ABN of the Contractor]*

From: **[Opt-in Subcontractor]** (the **Opt-in Subcontractor**)

*[Insert full legal name and ACN or ABN of the Opt-in Subcontractor.]*

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

*[Insert the date that the Opt-In Subcontractor signs the notice.]*

#### **PBA Trust Deed Poll in relation to [Contract] (PBA Trust Deed Poll)**

*[Insert name of Project.]*

We refer to the PBA Trust Deed Poll. Terms used in this notice have the same meaning given in the PBA Trust Deed Poll. This is an Opt-in Notice.

The Opt-in Subcontractor has been contracted by the Contractor in relation to the Project. On and from the date of this notice, the Opt-in Subcontractor agrees to be a Subcontractor under (and for the purposes of) the PBA Trust Deed Poll and to be bound by (and benefit from) all of the terms of the PBA Trust Deed Poll as a Beneficiary (as that term is defined in the PBA Trust Deed Poll).

Our bank account details are as follows:

Name **[Account Name]**

Short form name **[Opt-in Subcontractor]**

ABN **[Opt-in Subcontractor ABN]**

Bank Details BSB: **[Opt-in Subcontractor BSB]**

Account number: **[Opt-in Subcontractor Account number]**

*[Insert the details of the Opt-in Subcontractor's bank account.]*

This notice is governed by the Laws of Western Australia.

**SIGNED** by **[NAME OF OPT IN SUBCONTRACTOR]** acting through a duly authorised representative

\_\_\_\_\_  
Signature of duly authorised representative of the Opt-in Subcontractor

\_\_\_\_\_  
Name of duly authorised representative of the Opt-in Subcontractor

## SCHEDULE 8

### Interpretation

In this deed poll, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, or schedule is to a clause or paragraph of, or schedule to, this deed poll, and a reference to this deed poll includes any schedule;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, amended, supplemented or replaced from time to time;
- (e) a reference to **A\$, \$A, dollar** or **\$** is to Australian currency;
- (f) a reference to time is to Perth, Western Australia time;
- (g) a reference to a party includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) 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;
- (j) the meaning of general words is not limited by specific examples introduced by **including, for example** or similar expressions;
- (k) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (l) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (m) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this deed poll or any part of it;
- (n) a reference to **"contract"** means a legal, valid and binding agreement (whether in writing or not) and a reference to **"contracted"** means entered into a legal, valid and binding agreement (whether in writing or not);
- (o) a reference to **"being the ABA File Format"** means the format approved pursuant to clause 5.12;
- (p) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day; and
- (q) headings are for ease of reference only and do not affect interpretation.



# **AS 2124 Project Bank Account Pack**

## **ANNEXURE B**

### **Project Bank Account Agreement**

# PBA agreement

[Name of Contractor] (Contractor)

[ABN/ACN] [number]

*[Insert actual legal name of the Contractor (not trading name) and ACN or ABN of the Contractor above]*

and

[Name of Bank] (Bank)

[ABN/ACN] [number]

*[Insert name and ACN or ABN of Bank above]*

Housing Authority(Principal)

Project Bank Account in respect of [Project].

Contract No. [insert]

*[Insert name of Project and contract number above]*

[INSERT YEAR]

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THIS DEED is made on \_\_\_\_\_.

*[The Principal will insert the date this document is signed]*

**BETWEEN:**

- (1) [Name of Contractor] [ABN/ACN] [number] whose registered office is at [address] (the **Contractor**);  
*[Insert actual legal name of the Contractor and ACN or ABN of the Contractor above]*
- (2) [Name of Bank] [ABN/ACN] [number] whose registered office is at [address] (the **Bank**);  
and  
*[Insert name and ACN or ABN of Bank above]*

**Housing Authority being a body corporate continued pursuant to s.6 of the Housing Act 1980 (WA) (the Principal).RECITALS:**

- (A) The Principal and the Contractor have entered into the Contract for the carrying out and completion of the Project.
- (B) Subcontractors have been and will be engaged to carry out and complete parts of the Project.
- (C) Under the PBA Trust Deed Poll, the Contractor has agreed that all moneys standing to the credit of the Accounts are held on trust for each of the Contractor and the Subcontractors in the amounts identified against their respective names in the Payment Instruction issued in relation to funds that are deposited into the Accounts.
- (D) This document outlines the terms and conditions on which the Bank has agreed to disburse amounts that are deposited in the Accounts.
- (E) The Principal is a party to this document to obtain the benefit of rights and acknowledgement of benefits granted to it under (or by virtue of being a party to) this document and agrees to be bound as contemplated by this document.

**THE PARTIES AGREE AS FOLLOWS:**

1. **INTERPRETATION**

1.1 **Definitions**

The following definitions apply in this document.

**ABA File Format** means the format referred to as "Australian Bankers' Association direct entry file format".

**Accounts** means trust accounts with the number:

- (a) [BSB number] [account number] titled '*[insert Contractor and Project name]*' – General PBA Trust Account' (**General PBA**); and
- (b) [BSB number] [account number] titled '*[insert Contractor and Project name]*' – Retention PBA Account' (**Retention PBA**),

or any replacement account agreed by the parties to this document or in the absence of agreement, as nominated by the Principal.

**Authorised Representative** means:

- (a) in respect of the Principal and the Contractor, a person it notifies to the Bank (with a certified copy of that person's specimen signature) as being its authorised representative for the purposes of this document where the Bank has no notice of revocation of that authority; and
- (b) in respect of the Bank, a person whose title or acting title includes 'manager', 'director', 'executive', 'chief', 'head', 'counsel' or 'president', or a person notified to the other parties as being its authorised representative for the purposes of this document.

**Business Day** means any day other than:

- (a) a Saturday or a Sunday; or
- (b) a gazetted holiday in Perth, Western Australia under the *Public and Bank Holidays Act 1972 (WA)*.

**Contract** means the contract between the Principal and the Contractor dated *[insert date of execution of the Contract or date of issue of the letter of award]* in respect of the Project.

**Contractor Deposit Instruction** means a payment instruction:

- (a) in ABA File Format; and
- (b) which gives effect to the requirements set out in Schedule 5,

the purpose of which is to initiate deposits or transfers by the Contractor (in each case) from or to the General PBA.

**Deposit Amount** means those moneys deposited into and standing to the credit of the Accounts.

**General PBA** is defined under the definition of "Accounts"

**Government Authority** means any Federal, State, local government (including any local council), and any agency, department, directorate or instrumentality thereof, including any independent regulator deriving power from statute, within Australia or elsewhere.

**Law** means:

- (a) Commonwealth, Western Australian and local government legislation, including statutes, ordinances, instruments, codes, requirements, regulations, by-laws and other subordinate legislation;
- (b) common law; and
- (c) principles of equity.

**Opt-in Notice** means a notice given in the form set out in the PBA Trust Deed Poll.

**Opt-in Subcontractor** means:

- (a) any person that is contracted by the Contractor to:
  - (i) undertake work or services; or
  - (ii) undertake work or services and supply goods or materials,

where the total aggregate value of such 'work or services' or 'work or services and supply of goods or materials' in connection with the Project is less than \$20,000 (GST inclusive); or

- (b) any person that is a Supplier in connection with the Project,

where the person has expressly stated (to the Contractor) that they wish to participate in the trust created by the PBA Trust Deed Poll.

**Payment Instruction** means a valid payment instruction in relation to the operation of the Accounts that is:

- (a) authorised by the Contractor or an Authorised Representative of the Contractor acceptable to the Bank;
- (b) issued by the Contractor pursuant to the PBA Trust Deed Poll, contemporaneously to the Principal and to the Bank;
- (c) in the form of a:
  - (i) Progress Payment Instruction;
  - (ii) Retention Release Instruction; or
  - (iii) Contractor Deposit Instruction; and
- (d) subject to clause 3.1(c), irrevocable.

**PBA Trust Deed Poll** means the document of that name executed by the Contractor and which is also executed by the Principal in connection with the Contract, on or around the date of the Contract, pursuant to which the Accounts are to be established and moneys due to the Contractor under the Contract are to be paid and held on trust.

**PPI – Consolidated Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 1.

**PPI – Contractor Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 2.

**PPI – Retention Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 4.

**PPI – Subcontractor Allocation** means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 3.

**PPS Law** means:

- (a) the PPSA and any regulation made at any time under the PPSA, including the PPS Regulations (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a Law or regulation referred to in paragraph (a).

**PPS Regulations** means the *Personal Property Securities Regulations 2010* (Cth).

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

**Progress Payment Instruction** means a PPI - Consolidated Allocation or any one or more of a:

- (a) PPI - Contractor Allocation;
- (b) PPI - Subcontractor Allocation; or
- (c) PPI - Retention Allocation,

the purpose of which is to originate a payment by the Principal into the General PBA.

**Project** means *[insert a brief description of the Project]*.

**Retention Amount** means any moneys which the Contractor is entitled to retain from amounts due to Subcontractors pursuant to any express provision of the relevant subcontract, permitting either a specified percentage amount or a specified amount to be retained from payments to be made under such subcontract.

**Retention PBA is defined under the definition of "Accounts"**.

**Retention Release Instruction** means a payment instruction:

- (a) in ABA File Format; and
- (b) which gives effect to the requirements set out in Schedule 6,

the purpose of which is to disburse Retention Amounts from the Retention PBA.

**Security Interest** means any:

- (a) 'security interest' as defined in the PPS Law;
- (b) security for payment of money, performance of obligations or protection against default (including a mortgage, bill of sale, charge, lien, pledge, trust, power or title retention arrangement, right of set-off, assignment of income, garnishee order or monetary claim and flawed deposit arrangements); and
- (c) thing or preferential interest or arrangement of any kind giving a person priority or preference over claims of other persons or creditors with respect to any property or asset,

and includes any agreement to create any of them or allow them to exist.

**Subcontractor** means:

- (a) a person who has been contracted by the Contractor to:
  - (i) undertake work or services; or
  - (ii) undertake work or services and supply goods or materials;

where in either case the total aggregate value of such 'work or services' or 'work or services and supply of goods or materials' in connection with the Project is equal to or greater than \$20,000 (GST inclusive); and

- (b) any Opt-in Subcontractor that has signed an Opt-in Notice and given a copy of that notice to the Contractor.

To avoid doubt, a "Subcontractor" may be a Selected Subcontractor or a Nominated Subcontractor (in each case as defined in the Contract).



**Supplier** means a person who has been contracted to supply goods or materials to the Contractor in connection with the Project but who undertakes no design, fabrication, construction work or service of any kind in connection with the Project.

## 1.2 Interpretation

In this document, except where the context otherwise requires:

- (a) the singular includes the plural and vice versa, and a gender includes other genders;
- (b) another grammatical form of a defined word or expression has a corresponding meaning;
- (c) a reference to a clause, paragraph, schedule or annexure is to a clause or paragraph of, or schedule or annexure to, this document, and a reference to this document includes any schedule or annexure;
- (d) a reference to a document or instrument includes the document or instrument as novated, altered, amended, supplemented or replaced from time to time;
- (e) a reference to **A\$, \$A, dollar** or **\$** is to Australian currency;
- (f) a reference to time is to Perth, Western Australia time;
- (g) a reference to a party is to a party to this document, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (h) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (i) 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;
- (j) the meaning of general words is not limited by specific examples introduced by **including, for example** or similar expressions;
- (k) any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (l) any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- (m) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this document or any part of it;
- (n) a reference to "**contract**" means a legal, valid and binding agreement (whether in writing or not) and a reference to "**contracted**" means entered into a legal, valid and binding agreement (whether in writing or not); and
- (o) if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day.

### 1.3 **Headings**

Headings are for ease of reference only and do not affect interpretation.

### 1.4 **Payment Instructions**

- (a) It is acknowledged and agreed that:
  - (i) the information set out in the "Payment Instruction" schedules, being Schedules 1 to 6 of this document, reflect the intention of the parties and describe the operation of the trust and the intended movement of moneys between the parties to this document; and
  - (ii) cash transfers will only be effected through the completion and electronic submission of instructions in ABA File Format.
- (b) A reference in this document to:
  - (i) a Payment Instruction being a "Progress Payment Instruction, Contractor Deposit Instruction or Retention Release Instruction (as the case may be)"; or
  - (ii) a Payment Instruction that complies with a schedule,or any reference with same or similar meaning shall (for the purposes of this document) be deemed to be a reference to the Payment Instruction (of any kind) given in ABA File Format.
- (c) Despite anything expressed to the contrary in this document, it is acknowledged and agreed that:
  - (i) cash transfers will only be effected through the completion and electronic submission of instructions in ABA File Format; and
  - (ii) submission of any request in ABA File Format to the Bank, will be deemed to be compliant with Schedules 1, 2, 3, 4, 5 or 6 (as relevant) and the provisions of this document will be construed accordingly (including, to avoid doubt, clauses 5.5 and 5.6 of this document).

## 2. **APPOINTMENT OF BANK AND ACCOUNT ESTABLISHMENT**

- (a) The Contractor irrevocably and unconditionally appoints the Bank to hold and disburse the Deposit Amount on the terms and conditions contained in this document.
- (b) Subject to this document, the Bank accepts the appointment under clause 2(a), and undertakes to perform only the duties or obligations that are expressly set out in this document.
- (c) The Accounts will be set up as a trust account with the Contractor as trustee.
- (d) The Contractor shall provide the Bank with:
  - (i) a certificate setting out the full name and address and containing the specimen signature of each Authorised Representative and each person who executes and delivers or is intended to execute and deliver a document or notice for and on behalf of the Contractor;
  - (ii) the relevant PBA Trust Deed Poll; and

- (iii) such opinions, certificates and other documents which the Bank requires to undertake any know-your-customer procedures.
- (e) The Accounts will have no overdraft facility and will not be capable of becoming overdrawn.

### 3. **DEPOSIT AMOUNT**

#### 3.1 **Disbursement of Deposit Amount**

- (a) The Bank shall disburse amounts standing to the credit of the Accounts in accordance with this clause 3.1 only upon receipt of a valid Progress Payment Instruction, Retention Release Instruction or Contractor Deposit Instruction duly authorised by the Contractor.
- (b) Upon receipt of a Payment Instruction of the type referred to in clause 3.1(a) above, the Bank shall disburse the Deposit Amount in accordance with the relevant Payment Instruction.
- (c) If:
  - (i) any Payment Instruction is invalid due to errors (including arithmetic errors) or a failure to comply with the requirements of the Contract, the PBA Trust Deed Poll or this document; and
  - (ii) prior to the bank acting on such Payment Instruction, the Bank receives notice of such invalidity by the Contractor and notice from the Principal that the Principal concurs or otherwise agrees with the invalidity,then that Payment Instruction is deemed to be revoked and the Bank is not obliged to act on it.
- (d) If any Payment Instruction issued to the Bank would overdraw the Accounts, that Payment Instruction is deemed to be revoked and the Bank is not obliged to act on it.

#### 3.2 **Interest bearing account**

Unless otherwise agreed in writing with the Principal, the Bank and the Contractor agree that the Deposit Amount will bear interest for the benefit of the Contractor.

### 4. **OPERATION OF ACCOUNTS**

#### 4.1 **Operation by the Principal**

- (a) Save where an administrator, provisional liquidator, liquidator or a person having a similar or analogous function under the Laws of any relevant jurisdiction provides a contrary direction to the Bank, the Bank acknowledges and agrees that, at any time, the Principal may by notice in writing to the Contractor and the Bank take exclusive control of the operation of the Accounts and until revocation in writing of the notice:
  - (i) only an Authorised Representative of the Principal may authorise withdrawals or transfers from the Accounts or the operation or closure of the Accounts; and
  - (ii) the power of the Contractor to control the operation of the Accounts will be suspended.

- (b) If the Principal exercises any right referred to in clause 4.1(a) it must do so in accordance with the PBA Trust Deed Poll.
- (c) The Bank may assume that any act by the Principal under this clause 4.1 is in accordance with its rights and obligations under this document, the Contract and the PBA Trust Deed Poll.
- (d) The Contractor and the Principal acknowledge and agree that the Bank may act in accordance with this clause 4.1 without conducting any further investigation of any circumstance or requiring any further consent of any other party.

#### 4.2 **Operation of Accounts by Contractor**

The Contractor undertakes to the Principal and the Bank that it will:

- (a) not close, make withdrawals from or transfer funds from or otherwise operate, the Accounts other than in accordance with clause 3.1;
- (b) provide the Bank with any documents and certificates reasonably requested by the Bank;
- (c) not create, assume, permit or allow to exist any Security Interest over the Accounts other than the Security Interests created by the PBA Trust Deed Poll, by operation of Law, unless the Contractor first supplies to the Principal a duly executed deed of release or priority deed poll in relation to that Security Interest (in a form and substance acceptable to the Principal); and
- (d) ensure that any proceeds or money withdrawn from the Accounts in breach of this document is kept separate from any other money and is held in trust for the Subcontractors in accordance with the PBA Trust Deed Poll.

#### 4.3 **Principal is not responsible for the Accounts**

The Contractor and the Bank acknowledge and agree that the Principal and its Authorised Representatives:

- (a) are not responsible for the Contractor's performance of its obligations in relation to the Accounts; and
- (b) have no duties in relation to the Accounts,

save that if the Principal operates the Accounts in accordance with clause 4.1 it must do so in accordance with the terms of the Contract and the PBA Trust Deed Poll.

#### 4.4 **Account fees**

All bank charges applicable to the Accounts, including customary bank charges and audit charges, are to be met by the Contractor in accordance with arrangements made from time-to-time between the Bank and the Contractor. Any such arrangements shall comply with this document (including, to avoid doubt, clauses 4.2(a) and 5.2).

### 5. **BANK UNDERTAKINGS**

#### 5.1 **Disclosure of information**

On request by the Principal, the Bank must provide to the Principal the information made available to the Contractor by the Bank, relating to the Accounts. The Contractor consents to the provision of that information.

## 5.2 **Set-off and waiver**

The Bank acknowledges that other than any amounts identified in a Payment Instruction as being payable to the Contractor, the Deposit Amount is not beneficially owned by the Contractor and the Bank must not exercise any rights or powers under a Security Interest, or any right of set-off, combination of accounts or counterclaim in respect of the Accounts.

## 5.3 **PPSA Subordination**

The Bank subordinates in favour of the Subcontractor and the Contractor in their capacity as beneficiaries of the trust created by the PBA Trust Deed Poll, any Security Interest in the Accounts that the Bank holds (including any Security Interest perfected by control for the purposes of the PPSA) to the Security Interest created under the PBA Trust Deed Poll.

## 5.4 **Termination right of the Bank**

The Bank may at any time resign without assigning any reason for its resignation by giving written notice to that effect to each of the other parties to this document. Any moneys standing to the credit of the Accounts must be transferred to an account as instructed by the Principal.

## 5.5 **Communication with the Bank**

The Bank:

- (a) is only subject to, and only obliged to recognise, notifications or directions given in accordance with this document;
- (b) may rely on any document or notice (including any facsimile) reasonably believed by it to be genuine and correct, and purporting to be from the Contractor or Principal;
- (c) has no duty or obligation to investigate the authenticity or correctness of the matters stated in any document or notice provided by the Contractor or the Principal to the Bank (including, to avoid doubt, any Payment Instruction in ABA File Format), or confirm that the signatories on any document or notice were properly appointed; and
- (d) is under no duty to enquire or determine whether or not any instructions received by the Contractor or the Principal (including, to avoid doubt, any Payment Instruction in ABA File Format) are in accordance with any agreement or document (including the Contract or PBA Trust Deed Poll) other than this document.

## 5.6 **Limit on Bank duties and responsibilities**

- (a) The duties and responsibilities of the Bank in relation to the Accounts and the Deposit Amount are limited to those set out in this document and, accordingly, the Bank:
  - (i) acts as a depository only and is not responsible or liable for the sufficiency or validity of any funds deposited with it; and
  - (ii) is not and must not be treated as being a trustee or fiduciary acting for the benefit of any of the parties.
- (b) To avoid doubt, the Bank is not required to use or advance its own funds in addition to the Deposit Amount or otherwise incur financial liability on its part in performance of its duties or the exercise of its rights under this document.
- (c) The Bank is under no duty to ensure that funds withdrawn from the Accounts are actually applied for the purpose for which they were withdrawn.

- (d) The Bank is not responsible or liable to the Contractor, Principal or any other person for:
  - (i) any non-payment of any sums which should be paid into the Accounts by the Principal;
  - (ii) any withdrawal from the Accounts in accordance with any Payment Instruction provided that the Bank acted in good faith in relation to that withdrawal;
  - (iii) any loss or liability arising out of or in connection with its performance of or its failure to perform any of its obligations under this document, save as are caused by its own direct fraud, gross negligence or wilful default, and under no circumstance will the Bank be liable:
    - (A) for acting in accordance with or relying on any instruction (including, but not limited to a Payment Instruction), notice, demand, certificate or document given by the Contractor or Principal; or
    - (B) to any party for any consequential loss (including loss of business, goodwill, opportunity or profit) even if advised of such loss or damage.

**5.7 Survival**

Clauses 5.5 and 5.6 above and this clause 5.7 will survive notwithstanding any termination of this document or the resignation or replacement of the Bank as account bank.

**6. TERM OF THIS DOCUMENT**

This document remains in full force and effect unless and until the Bank terminates it in accordance with clause 5.4 or is notified otherwise by the Principal and the Contractor.

**7. NOTICES**

- (a) **(Form of Notices)** Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this document:
  - (i) must be in writing; and
  - (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 agent of, that party.
- (b) **(Procedure for sending notices)** All notices must be:
  - (i) delivered or posted by prepaid post to the address; or
  - (ii) sent by email in the form of a .pdf file letter (or such other form agreed by the Principal) to the email address,

of the addressee set out in the notice details set out below (or as otherwise notified by that party to each other party from time to time):

- (iii) the **Contractor**:  
**[insert postal and email address of Contractor]**;
- (iv) the **Bank**:  
**[insert postal and email address of Bank]**

(v) the **Principal**:

[insert postal and email address of Principal].

- (c) **(Date of receipt)** Subject to clause 7(d), a notice is taken to be received by the addressee:
- (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, when the sender receives confirmation on its server that the message has been transmitted; and
  - (iii) in the case of delivery by hand, on delivery.
- (d) **(Next Business Day)** If the 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) **(Notices sent by email)** In connection with notices sent by email 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 communication in accordance with this clause 7. Any text in the body of the email or the subject line will not form part of the notice.

## 8. **CUMULATIVE RIGHTS**

A party's rights and remedies under this document do not exclude any other legal right or remedy.

## 9. **MISCELLANEOUS**

### 9.1 **Alterations**

Subject to clause 5.4, no variation, modification or waiver of any provision in this document, nor consent to any departure by any party from any such provision, will be of any effect unless it is in writing and signed by the parties or (in the case of a waiver) by the party giving it. Any such variation, modification, waiver or consent will be effective only to the extent to or for which it may be made or given.

### 9.2 **No Fettering**

Nothing contained in this document or contemplated by this document has the effect of constraining the Principal or placing any fetter on the Principal's discretion to exercise or not to exercise any of its statutory rights, duties, powers or functions.

### 9.3 **Approvals and consents**

Except where this document expressly states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this document.

### 9.4 **Assignment**

A party may only assign this document or a right under this document with the prior written consent of each other party.

## 9.5 **Costs**

- (a) Except as otherwise provided in this document, each party must:
  - (i) pay its own costs and expenses in connection with negotiating, preparing, executing and performing this document; and
  - (ii) perform its obligations in accordance with this document at its own cost.
- (b) The Contractor must pay all costs and expenses of the Bank on demand in relation to:
  - (i) the negotiation, preparation, execution, delivery, stamping, registration, completion of any variation or assignment of this document; and
  - (ii) the enforcement, protection or waiver of any rights under this document.

## 9.6 **Stamp duty**

Any stamp duty, duties or other taxes of a similar nature (including fines, penalties and interest) in connection with this document or any transaction contemplated by this document, must be paid by the Contractor.

## 9.7 **Clauses to survive termination**

- (a) All provisions of this document which expressly or by implication from their nature are intended to survive termination, completion or expiration of this document will survive such termination, completion or expiration, including any provision which is in connection with:
  - (i) confidentiality or privacy; and
  - (ii) any right or obligation arising on termination of this document.
- (b) Nothing in this clause 9.7 prevents any other provision of this document, as a matter of interpretation, also surviving the termination of this document.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this document. All rights and obligations in accordance with this document survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this document.

## 9.8 **Counterparts**

This document may be executed in any number of counterparts and all of such counterparts taken together will be deemed to constitute one and the same instrument.

## 9.9 **No merger**

The rights and obligations of the parties under this document do not merge on completion of any transaction contemplated by this document.

## 9.10 **Entire agreement**

This document constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.



#### 9.11 **Further action**

Each party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this document and any transactions contemplated by it.

#### 9.12 **Severability**

Any provision of this document that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this document nor affect the validity or enforceability of that provision in any other jurisdiction.

#### 9.13 **Waiver and estoppel**

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy under any Law or under this document by a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or this document.
- (b) A waiver given by a party under this document is only effective and binding on the other party if it is given or confirmed in writing by the party granting the waiver.
- (c) No waiver of a breach of a term of this document operates as a waiver of any other breach of that term or of a breach of any other term of this document.
- (d) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under any Law or under this document does not preclude, or operate as an estoppel of any form of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or under this document.

#### 9.14 **Relationship**

- (a) Neither this document nor the relationship created by it, are intended to create, and will not be construed as creating, any partnership or joint venture as between the parties.
- (b) The parties must not act as or represent themselves to be the servant or agent of the Principal.

#### 9.15 **Confidentiality**

Save in relation to the supply of any information to the Principal (which the parties hereby permit), a party may only use confidential information of another party for the purposes of this document, and must keep the terms of this document and any confidential information of another party confidential except where:

- (a) the information is public knowledge (but not because of a breach of this document) or the party has independently created the information;
- (b) disclosure is required by Law or a regulatory body (including a relevant stock exchange);
- (c) disclosure is made to a Subcontractor on the basis that the Subcontractor keeps the information confidential; or

- (d) disclosure is made to any other person who must know for the purposes of this document on the basis that the person keeps the information confidential.

#### 9.16 **Announcements**

- (a) Subject to clause 9.16(b), a public announcement in connection with this document or any transaction contemplated by this document must be agreed by the parties before it is made, except if required by Law or a regulatory body (including a relevant stock exchange), in which case the party required to make an announcement must, to the extent practicable, first consult with and take into account the reasonable requirements of each other party.
- (b) Notwithstanding clause 9.16(a), the Principal may at any time, without consulting the other parties to this document, make a public announcement in connection with this document:
  - (i) for the purpose of responding to inquiries in relation to the status and progress of the Project;
  - (ii) for the purpose of responding to inquiries in relation to payment to Subcontractors that have been engaged to carry out and complete parts of the Project; and
  - (iii) as the Principal considers to be necessary for the proper operation of government, as determined by the Principal from time to time, in its absolute discretion.

#### 9.17 **Principal as a party**

- (a) Subject to clause 9.17(b), it is agreed and acknowledged that the Principal is a party to this document to benefit from the rights, acknowledgements and benefits conferred on it expressly or by virtue of being a party to this document. To avoid doubt, any act, matter or thing requiring the consent, approval or agreement of a party to this document is a right or benefit for the purposes of this clause 9.17.
- (b) If the Principal issues a notice in writing pursuant to clause 4.1(a), the Principal and the Authorised Representative shall be bound by and subject to the provisions of this document as if it were the holder of the Accounts (and for so long as it has taken exclusive control of the operation of the Accounts pursuant to clause 4.1(a)).

#### 9.18 **Governing law and jurisdiction**

This document is governed by and will be construed according to the Laws of Western Australia and the parties irrevocably submit to the exclusive jurisdiction of the courts of that State and the courts competent to determine appeals from those courts.

**EXECUTED** as a deed.

Each person who executes this deed on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

**EXECUTED** as a deed by **[NAME OF CONTRACTOR]**, in accordance with Section 127 of the *Corporations Act 2001* (Cth):

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Signature of director/company secretary

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

**Signed sealed and delivered** for **[NAME OF BANK]** by its attorney in the presence of:

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

\_\_\_\_\_  
Signature of attorney

\_\_\_\_\_  
Name of witness (print)

\_\_\_\_\_  
Name of attorney (print)

The **COMMON SEAL** of the        )  
**HOUSING AUTHORITY**            )  
was hereunto affixed            )  
in the presence of:              )

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Name of Authorised Officer

\_\_\_\_\_  
Name of Authorised Officer

\_\_\_\_\_  
Position of Authorised Officer

\_\_\_\_\_  
Position of Authorised Officer

**OR**\*<sup>1</sup>

Signed for and on behalf of            )  
**HOUSING AUTHORITY**                    )  
by an authorised officer:                )

\_\_\_\_\_  
Signature of Authorised Officer

\_\_\_\_\_  
Name of Authorised Officer

\_\_\_\_\_  
Position of Authorised Officer

\* Delete the execution clause which does not apply.

—————*GUIDENOTES*—————

<sup>1</sup> Delete the execution clause that does not apply. If in doubt seek advice from LLS as to which execution clause should be used.

## **SCHEDULE 1**

### **PPI – Consolidated Allocation**

For the purposes of the PBA Agreement, this Schedule 1 establishes the minimum requirements of a 'PPI – Consolidated Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of this document.

The PPI – Consolidated Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Consolidated Allocation.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to the Contractor; the amount to be disbursed to the Contractor; and the Contractor's account details;
  - b. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details; and
  - c. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the PPI – Consolidated Allocation.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 2**

### **PPI - Contractor Allocation**

For the purposes of the PBA Agreement, this Schedule 2 establishes the minimum requirements of a 'PPI – Contractor Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of this document.

The PPI – Contractor Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Contractor Allocation.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to the Contractor; the amount to be disbursed to the Contractor; and the Contractor's account details.
4. Specify the date for actioning the PPI – Contractor Allocation.
5. Be in a form acceptable to the Bank and the Principal.

### **SCHEDULE 3**

#### **PPI - Subcontractor Allocation**

For the purposes of the PBA Agreement, this Schedule 3 establishes the minimum requirements of a 'PPI – Subcontractor Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of this document.

The PPI – Subcontractor Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Subcontractor Allocation.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details.
4. Specify the date for actioning the PPI – Subcontractor Allocation.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 4**

### **PPI - Retention Allocation**

For the purposes of the PBA Agreement, this Schedule 4 establishes the minimum requirements of a 'PPI – Retention Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of this document.

The PPI – Retention Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to transfer to the Retention PBA the Retention Amount(s) identified in the PPI - Retention Allocation which is / are to be held on trust pending receipt of a Retention Release Instruction within 9 days of the issue of the PPI – Retention Allocation.
3. Identify the transfer in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and
  - b. the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the PPI – Retention Allocation.
5. Be in a form acceptable to the Bank and the Principal.



## **SCHEDULE 5**

### **Contractor Deposit Instruction**

For the purposes of the PBA Agreement, this Schedule 5 establishes the minimum requirements of a Contractor Deposit Instruction that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of this document.

A Contractor Deposit Instruction must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Contractor into the General PBA within 3 days of the issue of the Contractor Deposit Instruction.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details; and
  - b. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the Contractor Deposit Instruction.
5. Be in a form acceptable to the Bank and the Principal.

## **SCHEDULE 6**

### **Retention Release Instruction**

For the purposes of the PBA Agreement, this Schedule 6 establishes the minimum requirements of a Retention Release Instruction that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of this document.

A Retention Release Instruction must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse Retention Amounts from the Retention PBA, to the account(s) specified.
3. Identify the disbursements in paragraph 2 as follows:
  - a. amounts to be disbursed from the Retention PBA to each Subcontractor (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); the amount to be transferred in relation to that Subcontractor; and the Subcontractor's account details);
  - b. amounts to be disbursed from the Retention PBA to the Contractor (using a unique identifier for the name of the Contractor); the amount to be transferred in relation to the Contractor; and the Contractor's account details; and
  - c. the balance of Retention Amounts in the Retention PBA.
4. Specify the date for actioning the Retention Release Instruction.
5. Be in a form acceptable to the Bank and the Principal.

# **AS 2124 Project Bank Account Pack**

## **ANNEXURE C**

### **Deed of Release and Priority Deed Poll**

## FORM DEED OF RELEASE - DEED POLL

Release and (for PPSA registered security interests) undertaking to amend registration

Secured Party: **[Insert name of Contractor's finance provider (or other entity) who holds security]** ('we' or 'us').

Grantor: **[Insert Contractor name]** as trustee for each beneficiary of the trust established by the PBA Trust Deed Poll in connection with the **[insert project name]** Project, which is executed by the Grantor and which is also executed by the Housing Authority being a body corporate continued pursuant to s.6 of the *Housing Act 1980* (WA) ('you').

Security Interest: Any security interest (including a 'security interest' as defined under the *Personal Property Securities Act 2009* (Cth)) held by the Secured Party in respect of the Released Property.

Date: **[insert date of release]**

Released Property: Means:

- (i) the bank account (established as a trust account) pursuant to the PBA Trust Deed Poll;
- (ii) all moneys standing to the credit of that bank account from time-to-time;
- (iii) rights held in trust by you for the beneficiaries pursuant to the PBA Trust Deed Poll and the "PBA Agreement" being an agreement between you and the bank that holds the above mentioned bank account.

The Released Property is released from the Security Interest on the date of this deed poll.

The Secured Party undertakes to amend the registration of the Security Interest in accordance with the requirements of the *Personal Property Securities Act 2009* (Cth) if an amendment is necessary in order to give effect to the release contemplated by this deed poll.

Nothing in this deed poll releases, terminates or otherwise affects any debts or liabilities of the Grantor or any other person secured by the Security Interest to the extent such debts or liabilities remain outstanding at the date of this deed poll or arise after the date of this deed poll.

### Executed by the Secured Party as a deed poll

**[Insert execution clause of Secured Party]**

### Secured Party Contact Details

Phone Number: **[●]**

Email address: **[●]**

Reference Number: **[●]**

## Priority deed poll

In connection with the Project Bank Account established for [• project]

[Name of finance provider (or other entity) with security interest] (Second Creditor)

**Alt**[ABN/ACN/ARBN] [number]

[**Note:** This deed poll will need to be delivered by Contractors if they have secured financing in place with a lender or financial institution. The PBA (the trust account) will be caught by a general security agreement which the Contractor's lender might have. The PBA needs to be 'carved out' from this security.]

---

[INSERT YEAR]

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THIS DEED POLL is made on

[year]

BY:

[Full name of finance provider (or other entity) with security interest or Security Trustee if syndicated/club financing] Alt[ABN/ACN/ARBN] [number] Opt[whose registered office is at [address]] (the **Second Creditor**),

IN FAVOUR OF:

each First Creditor (as defined below).

RECITALS:

- (A) The Contractor has or will enter into a contract with **Housing Authority** being a body corporate continued pursuant to s.6 of the *Housing Act 1980* (WA) (the **Principal**) for the carrying out and completion of works.
- (B) It is a requirement of the contract that the Contractor and its Subcontractors participate in arrangements required by the Housing Authority to effect 'project bank accounts' pursuant to a PBA Trust Deed Poll and a PBA Agreement.
- (C) The Second Creditor has agreed to enter into this deed poll to acknowledge that the Securities will have the priority set out in this document.

THE PARTIES AGREE AS FOLLOWS:

1. **INTERPRETATION**

1.1 **Definitions**

The following definitions apply in this document.

**Bank** means [insert name of bank.]

**Contractor** means [insert name of tenderer.]

**Creditor** means the First Creditor or the Second Creditor.

**First Creditor** means each 'Beneficiary' as defined under the PBA Trust Deed Poll.

**Government Agency** means any government or governmental, semi-governmental, administrative, public, regulatory or judicial entity, body, department, commission, agency or authority.

**PBA Agreement** means the agreement entered into between the Contractor, the Principal and the Bank which establishes the Project Bank Account.

**PBA Trust Deed Poll** means the document of that name duly executed by the Contractor and which is also executed by the Housing Authority, in respect of the Project.

**Personal Property** means all Secured Property which is 'personal property' (as defined in the PPSA).

**Project** means the carrying out and completion of construction of [•].

**Power** means, in respect of a Creditor, any right, power, discretion or remedy of that Creditor under any of its Security or applicable law.

**PPS Law** means:

- (a) the PPSA and any regulation made at any time under the PPSA, including the PPS Regulations (each as amended from time to time); and
- (b) any amendment made at any time to any other legislation as a consequence of a law or regulation referred to in paragraph (a).

**PPS Regulations** means the *Personal Property Securities Regulations 2010* (Cth).

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

**Receiver** means any person or persons appointed as a receiver or receiver and manager pursuant to a Security.

**Secured Amounts** means, in respect of a Security at any time, all monetary liabilities and obligations and amounts which are secured by that Security at that time.

**Secured Property** means all property and assets the subject of both a Security of the First Creditor and a Security of the Second Creditor, as described in Schedule 1.

**Security** means, in respect of a Creditor:

- (a) each Security Interest of that Creditor described in Schedule 1; and
- (b) any other present or future Security Interest of that Creditor to the extent that it affects the Secured Property.

**Security Interest** means any:

- (a) 'security interest' as defined in the PPS Law;
- (b) security for payment of money, performance of obligations or protection against default (including a mortgage, bill of sale, charge, lien, pledge, trust, power or title retention arrangement, right of set-off, assignment of income, garnishee order or monetary claim and flawed deposit arrangements); or
- (c) thing or preferential interest or arrangement of any kind giving a person priority or preference over claims of other persons or creditors with respect to any property or asset,

and any agreement to create any of them or allow them to exist.

## 1.2 Interpretation

In this document:

- (a) headings are for reference only and do not affect interpretation;
- (b) subject to clause 1.3, any undertaking, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- (c) the singular includes the plural and vice versa, a gender includes other genders and different grammatical forms of defined expressions have corresponding meanings;
- (d) unless stated otherwise, anything (other than making a payment) required to be done on or by a day which is not a Business Day, must be done on or by the next Business Day;



- (e) no provision or expression is to be construed against a party on the basis that the party (or its advisers) was responsible for its drafting; and
- (f) examples and use of the word **including** and similar expressions do not limit what else may be included.

Unless the context requires otherwise, a reference in this document to:

- (g) a party to any document includes that person's successors and permitted substitutes and assigns;
- (h) an agreement includes any legally enforceable arrangement, understanding, undertaking or representation whether or not in writing;
- (i) a document or agreement includes that document or agreement as novated, altered, supplemented or replaced from time to time;
- (j) any thing includes any part of it and a reference to a group of things or persons includes each thing or person in that group;
- (k) clauses, schedules and annexures are to those in this document, and a reference to this document includes any schedule and annexure;
- (l) a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
- (m) time is to Perth, Western Australia time unless otherwise stated;
- (n) legislation or other law or a provision of them includes regulations and other instruments under them, and any consolidation, amendment, re-enactment or replacement;
- (o) **property** or an **asset** includes any real or personal, present or future, tangible or intangible property or asset and any right, interest, revenue or benefit in, under or derived from the property or asset; and
- (p) amendment demand, attachment, financing change statement, financing statement and perfection have the meaning given in the PPSA.

### 1.3 **Creditor obligations**

A Creditor's obligations under this document are several, and no Creditor is responsible for the obligations of another Creditor. A Creditor's failure to perform an obligation does not relieve another Creditor or the Security Provider of its obligations.

## 2. **PRIORITY ARRANGEMENTS**

### 2.1 **Consent**

Each Creditor consents to the other Creditor's Security and agrees that the creation and existence of the other Creditor's Security is not a breach of, or default under, its Security or this document.

### 2.2 **Order of priority**

In respect of all Secured Property, the First Creditor's Security has priority over, and ranks ahead of, the Second Creditor's Security for all Secured Amounts under the First Creditor's Security.

### 2.3 **Application of money and proceeds**

All money and proceeds received or recovered from the disposal of, or other dealing with, the Secured Property (including any insurance or compensation proceeds for loss or damage to the Secured Property payable to a Creditor) must be applied in accordance with the priority set out in clause 2.2, whether or not arising from the enforcement of any Security.

### 2.4 **Contingent liabilities**

If a Security secures a contingent liability owed to a Creditor, until that Creditor is satisfied that the contingent liability has been extinguished, that Creditor may retain from the proceeds of the exercise of any Power an amount consistent with the priority established under clause 2.2 which it reasonably estimates to be the amount of the contingent liability.

### 2.5 **Priority arrangements paramount**

This document and the priority arrangements in it apply despite anything which might otherwise affect them, including:

- (a) anything contained in any Security;
- (b) the order of creation, execution, attachment, perfection, filing for registration or registration of any Security;
- (c) the order in which any Secured Amounts secured by any Security was made available or came into existence;
- (d) an increase or decrease in the amount secured by any Security for any reason;
- (e) the order in which any Powers are exercised (including the appointment of a Receiver), whether under a Security or any other document relating to any Secured Amounts secured by any Security;
- (f) any partial discharge or release of any Security or Secured Property;
- (g) any notice received by a Creditor pursuant to a Security, or of a Security Interest;  
or
- (h) any law, rule of equity or order or decision of any Government Agency to the contrary.

### 2.6 **Continuation**

The priority arrangements in this document will continue until:

- (a) there is no longer any Secured Property; or
- (b) agreed otherwise by the Creditors in writing.

### 2.7 **Other property**

Nothing in this document affects the operation of a Security to the extent it secures property or assets other than the Secured Property.

### 3. **PPS LAW**

#### 3.1 **Section 61**

In respect of the Personal Property, this document is an agreement to subordinate security interests for the purposes of section 61 of the PPSA.

#### 3.2 **Notices under Chapter 4**

The Creditors contract out of the Second Creditor's right to receive any notice from the First Creditor under Chapter 4 of the PPSA.

#### 3.3 **Amounts under section 127(6)**

The Creditors contract out of the Second Creditor's right to receive any amount from the First Creditor under section 127(6) of the PPSA.

### 4. **DEALINGS BETWEEN CREDITORS**

#### 4.1 **Distribution**

If a Creditor (**Recipient**) receives or recovers an amount pursuant to its Security which the other Creditor (**Claimant**) has a right to receive pursuant to this document, the Recipient must:

- (a) promptly notify the Claimant of the amount received or recovered; and
- (b) promptly pay an equivalent amount (net of its reasonable enforcement and costs incurred in obtaining the amount) to, or as directed by, the Claimant.

On the Claimant's receipt of the Recipient's payment under paragraph (b), the Security Provider acknowledges that the Recipient will be taken to not have received the relevant amount, and the Security Provider's liability to the Recipient will not be reduced or discharged by that amount.

#### 4.2 **Dealing with a Security**

The Second Creditor must not transfer, assign or otherwise deal with any of its Security except:

- (a) for the purpose of enforcement of the Security in accordance with this document;
- (b) where any person taking a transfer or assignment of that Security first enters into a deed with the other parties to this document on the same terms as this document; or
- (c) where the First Creditor first agrees in writing.

#### 4.3 **Exercise of Powers and enforcement**

- (a) The Second Creditor must obtain the consent of the First Creditor before:
  - (i) taking steps to exercise any Power in connection with enforcement of its Security in relation to the Secured Property; or
  - (ii) making, or permitting a Receiver to make, any application under section 420B of the *Corporations Act 2001* (Cth) in relation to any Secured Property.

5. **GENERAL PROVISIONS**

5.1 **Governing law and jurisdiction**

This document is governed by the laws of Western Australia. Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of that place (and any court of appeal) and waives any right to object to an action being brought in those courts, including on the basis of an inconvenient forum or those courts not having jurisdiction.

5.2 **Irrevocable**

This deed poll cannot be revoked or otherwise modified without the prior written consent of each of the First Creditors.

5.3 **Enforceability**

This document operates as a deed poll and is enforceable against the Second Creditor in accordance with its terms by the First Creditor, despite the First Creditors not being parties to this deed poll.

## SCHEDULE 1

### Securities and Secured Property

#### First Creditor's Securities

1. Each Security Interest granted in favour of or vesting in a First Creditor in respect of the property described under the heading 'Secured Property' below pursuant to the PBA Trust Deed Poll and the PBA Agreement.

#### Second Creditor's Securities

1. [Fully describe, e.g. Deed titled 'Fixed and Floating Charge/General security deed' by [ ] in favour of the Second Creditor dated on or about the date of this document].

#### Secured Property

1. The bank account (being a trust account) in the name of the Contractor effected pursuant to the PBA Trust Deed Poll and the PBA Agreement (**PBA Account**).
2. Each First Creditor's legal and beneficial interest in and to the trust moneys standing to the credit of the PBA Account from time-to-time.

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**EXECUTED** as a deed poll.

Each attorney signing this document under a power of attorney certifies, by the attorney's signature, that the attorney has no notice of the revocation of the power of attorney.

**[Insert Second Creditor Execution panel]**

**Second Creditor**

# **AS 2124 Project Bank Account Pack**

## **ANNEXURE D**

### **Amendments to Clause 42, Clause 43 and Clause 44.2 of the General Conditions**

## PBA Amendments to AS 2124 – 1992

*In Clauses 42.1, 43 and 44.2 the following terms have the following meanings:*

**Bank** means the bank with which the Project Bank Account is established.

**Contractor Deposit Instruction** means an irrevocable payment instruction in relation to the operation of the Project Bank Account, the purpose of which is to initiate deposits or transfers by the Contractor, in the form agreed pursuant to the PBA Trust Deed Poll.

**Opt-in Notice** means a notice executed by an Opt-in Subcontractor in the form set out in the PBA Trust Deed Poll.

**Opt-in Subcontractor** means:

(a) any person that is contracted by the Contractor to:

- (i) undertake work or services; or
- (ii) undertake work or services and supply goods or materials,

where the total aggregate value of such 'work or services' or 'work or services and supply of goods or materials' in connection with the Works is less than \$20,000 (GST inclusive); or

(b) any person that is a Supplier in connection with the Works,

where the person has expressly stated (to the Contractor) that they wish to participate in the trust created by the PBA Trust Deed Poll.

**Payment Report** means a report in relation to the period since the last payment made by the Principal under the Contract identifying:

- (a) any Subcontractors who have performed work included in the Superintendent's most recent payment certificate, who have already been paid for that work by the Contractor;
- (b) any rights of set-off that the Contractor is able to exercise (or intends to exercise) in relation to moneys that might otherwise be payable to any Subcontractor identified in Progress Payment Instruction(s) for the current month (including reasonable details of the amounts that may be set-off and to the extent it is lawfully able to do so, reasons for the exercise of the set-off right);
- (c) any Subcontractor that has failed to make a payment claim under a Subcontract (but which was entitled to do so), where work undertaken by the Subcontractor has been included in the Superintendent's most recent payment certificate;
- (d) any amount claimed by a Subcontractor that is included in the Superintendent's most recent payment certificate, and is in dispute, including, but not limited to:
  - (i) any formal dispute between the Contractor and Subcontractor under the relevant subcontract;
  - (ii) any disagreement between the Contractor and Subcontractor in relation to the amount claimed by the Subcontractor; or

- (iii) any claim made by the Subcontractor under the *Construction Contracts Act 2004* (WA);
- (e) any difference between the amount allocated to a Subcontractor (or to works performed by a Subcontractor) in the payment claim and the amount allocated to that Subcontractor in the Progress Payment Instruction(s), and the reasons for the difference; and
- (f) copies of any Opt-In Notices that have been received by the Contractor since the issue of the previous Payment Report, or in the case of the first Payment Report, since the award of the Contract.

**PBA Agreement** means the agreement entered into between the Contractor, the Principal and the Bank which establishes the Project Bank Account in the form approved by the Principal.

**PBA Trust Deed Poll** means the document of that name executed by the Contractor and which is also executed by the Principal on or around the date of the Contract, pursuant to which a Project Bank Account is to be established and moneys due to the Contractor under the Contract are to be paid and held on trust, such document to be in a form and substance acceptable to the Principal in the form approved by the Principal.

**PPI - Consolidated Allocation** means an irrevocable payment instruction in the form required by the PBA Trust Deed Poll, which contains a breakdown of the total amount identified in the payment certificate and sets out:

- (a) the amounts payable to each of the Subcontractors under their relevant Subcontract;
- (b) any allowable Retention Amounts to be retained by the Contractor pursuant to any relevant Subcontract (which amounts are to be held in the Project Bank Account and released in accordance with the PBA Trust Deed Poll);
- (c) any amount that is to be paid to the Contractor pursuant to the Contract; and
- (d) a total to be paid (that is the aggregate of the amounts identified pursuant to subclauses (a), (b) and (c) above which, to avoid doubt, must be equal to the amount identified in the payment certificate to which the Progress Payment Instruction relates,

and which complies with the requirements of the Contract.

**PPI - Contractor Allocation** means an irrevocable payment instruction in the form required by the PBA Trust Deed Poll, which sets out any amount to be paid to the Contractor out of the Project Bank Account, being the amount of money that remains after the aggregate of the amounts in each:

- (a) PPI Subcontractor Allocation; and
- (b) PPI Retention Allocation,

are subtracted from the amount certified by the Superintendent for the month pursuant to the Contract and which complies with the requirements of the Contract.

**PPI - Retention Allocation** means an irrevocable payment instruction in the form required by the PBA Trust Deed Poll, which sets out any allowable Retention Amounts to be retained by the Contractor pursuant to any relevant Subcontract



(which amounts are to be held in the Project Bank Account and released in accordance with the PBA Trust Deed Poll) and which complies with the requirements of the Contract.

**PPI - Subcontractor Allocation** means an irrevocable payment instruction in the form required by the PBA Trust Deed Poll, which sets out the amounts payable to each of the Subcontractors under their relevant Subcontract and which complies with the requirements of the Contract.

**Progress Payment Instruction** means a PPI – Consolidated Allocation or any one or more of a:

- (a) PPI - Contractor Allocation;
- (a) PPI - Subcontractor Allocation; or
- (b) PPI - Retention Allocation,

the purpose of which is to originate a payment by the Principal into the Project Bank Account.

**Project Bank Account** means the bank account established as a trust account with a single Bank as more particularly defined in the PBA Trust Deed Poll.

**Retention Amount** means any moneys which the Contractor is entitled to retain from amounts due to Subcontractors pursuant to any express provision of a Subcontract permitting either a specified percentage amount or a specified amount to be retained from payments to be made under the Subcontract.

**Retention Release Event** is the agreement or determination or occurrence of an event under a Subcontract consequent upon which retention moneys or any part thereof (retained pursuant to an express provision of that Subcontract) are to (as relevant) be released to the Subcontractor or paid to the Contractor.

**Retention Release Instruction** means an irrevocable payment instruction in relation to the operation of the Project Bank Account which instructs the payment of Retention Amounts that are payable, that is in the form agreed pursuant to the PBA Trust Deed Poll.

**Subcontractor** means:

- (a) a person who has been contracted by the Contractor to:
  - (i) undertake work or services; or
  - (ii) undertake work or services and supply goods or materials;where in either case the total aggregate value of such 'work or services' or 'work or services and supply of goods or materials' in connection with the Works is equal to or greater than \$20,000 (GST inclusive); and
- (b) any Opt-in Subcontractor that has signed an Opt-in Notice and given a copy of that notice to the Contractor.

To avoid doubt, a "Subcontractor" may be a Selected Subcontractor or a Nominated Subcontractor (in each case as defined in the Contract).

**Supplier** means a person who has been contracted to supply goods or materials to the Contractor in connection with the Works but who undertakes no design, fabrication, construction work or service of any kind in connection with the Works.

## **42.1 PAYMENT CLAIMS, CERTIFICATES, CALCULATIONS AND TIME FOR PAYMENT**

*Delete the entire subclause and in lieu thereof insert the following:*

### **PBA trust documents**

Upon execution, the PBA Trust Deed Poll forms part of this Contract.

Within 28 days of the award of the Contract, the Contractor must deliver to the Principal:

- (a) a PBA Trust Deed Poll duly executed by the Contractor prior to delivery; and
- (b) a PBA Agreement which complies with the PBA Trust Deed Poll, duly executed by the Contractor and the Bank,

in each case delivered unconditionally on the basis that the Principal may execute and date the documents; and

- (c) if the Contractor is subject to a registered security interest over all or substantially all of its assets (as identified under the "*Personal Property Securities Register*" maintained pursuant to the *Personal Property Securities Act 2009* (Cth)), a duly executed deed of release or priority deed poll (in a form and substance acceptable to the Principal) pursuant to which the trust arrangements effected pursuant to the PBA Trust Deed Poll and the PBA Agreement are to be released from, or take priority over, any such security; and
- (d) evidence to the satisfaction of the Principal that the Project Bank Account has been opened.

The Contractor must not make any claim for payment until such time as all of the above documents have been delivered to the Principal.

### **Notice of PBA trust – Subcontractors**

Upon request by any Subcontractor, the Contractor must provide to that Subcontractor:

- (a) a copy of the executed PBA Trust Deed Poll; and
- (b) a copy of the executed PBA Agreement which must include details of the relevant account number and name of the Project Bank Account.

### **Notice of PBA trust – right to participate**

Prior to any person being contracted by the Contractor to:

- (a) undertake:
  - (i) work or services; or
  - (ii) work or services and supply goods or materials,

in connection with the Works, where the total aggregate value of such work or services or supply of goods or materials in connection with the Works **is less than** \$20,000 (GST inclusive); or

- (b) supply goods or materials without undertaking any design, fabrication, construction work or service of any kind in connection with the Works where the value of such goods or materials is \$20,000 (GST inclusive) or more,

the Contractor must provide reasonable written notice of the trust created and contemplated by the PBA Trust Deed Poll and PBA Agreement and of the rights that person has to participate in the same. The Contractor must notify all potential Subcontractors that they are bidding for a PBA project and direct them to the PBA information available on the Department of Communities website at:

<http://prodhousing/contractors/ProjectBankAccounts/Pages/default.aspx>

### **PBA trust – contracted value increases**

If a person that is contracted by the Contractor in relation to part of the Works is not a Subcontractor because the agreed total aggregate value of the 'work or services' or 'work or services and supply of goods or materials' by that person is less than \$20,000 (GST inclusive), then on and from the point in time that value threshold is equalled or exceeded:

- (a) such person will be a Subcontractor for the purposes of this Contract; and
- (b) the Contractor must, in the following Payment Report, notify the Principal that such person has become a Subcontractor.

To avoid doubt, the requirement of the Contractor to allocate and pay retentions into the Project Bank Account is not retrospective, and will only apply once that person becomes a 'Subcontractor' and from the time that value threshold is equalled or exceeded.

### **Opt-in Subcontractor**

The Contractor will ensure that:

- (a) any Opt-in Subcontractor is promptly provided with the form of an Opt-In Notice (which must be within seven days of the Opt-In Subcontractor expressly stating to the Contractor that they wish to participate in the trust created by the PBA Trust Deed Poll); and
- (b) copies of all duly signed Opt-in Notices received by it are forthwith supplied to the Principal.

Upon the supply of a duly signed Opt-in Notice to the Contractor, the Opt-in Subcontractor that has signed that notice will be deemed a Subcontractor (on and from that point) for all purposes of the Contract and shall be paid via the Project Bank Account pursuant to the operation of the PBA Trust Deed Poll.

### **Payment claims**

At the times for payment claims stated in Annexure Part A and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor must deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and any such information as the Superintendent may reasonably require.

Claims for payment must include:

- (a) the value of work carried out by the Contractor in the performance of the Contract to that time; and
- (b) all amounts then due to the Contractor arising out of or in connection with the Contract or any alleged breach thereof.

Where applicable, claims shall be based on prices and rates shown in the Bill of Quantities. The individual items in the Bill of Quantities shall be used for the

calculation of progress payments and the determination of variations where applicable.

If the time for any payment claim under the preceding paragraph falls on a day which is not a Business Day, the Contractor shall submit the claim on the day before that date which is a Business Day. If the Contractor submits a payment claim before the time for lodgement of that payment claim described in the Contract, such early lodgement shall not require the Superintendent to issue the payment certificate in respect of that payment claim earlier than would have been the case had the Contractor submitted the payment claim in accordance with the Contract.

### **Payment certificate**

Within 14 days after receipt of a claim for payment, the Superintendent must issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or the Contractor to the Principal. The Superintendent must set out in the certificate the calculations employed to arrive at the certified amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

The Superintendent must allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a certificate issued pursuant to Clause 44.6:

- (a) amounts previously paid under the Contract;
- (b) amounts otherwise due from the Principal to the Contractor and / or due from the Contractor to the Principal;
- (c) the value of the work performed to the date of the payment claim;
- (d) amounts previously deducted for retention moneys pursuant to Annexure Part A; and
- (e) retention moneys to be deducted pursuant to Annexure Part A,

arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

If no payment certificate has been issued by the Superintendent within the required time, the Contractor's claim, but excluding:

- (a) any amounts in such claim in respect of variations not expressly approved in writing by the Superintendent;
- (b) any amounts (other than those included in a variation expressly approved in writing by the Superintendent) for claims under Clauses 12, 35 or 36 or in respect of changes in statutory requirements; and
- (c) any other claim for damages arising under or in connection with the Contract or breach thereof,

will, notwithstanding the absence of a payment certificate, be deemed to be the amount due as if it were set out in a payment certificate and as if such payment certificate were to have been issued on the 14th day after receipt of the claim for payment. In the Contract, a reference to an amount identified in a payment certificate must include any amount deemed to be set out in a payment certificate.

## **Progress Payment Instructions**

Subject to the provisions of the Contract and where any certificate certifies amounts due from the Principal to the Contractor, within 19 calendar days from the date that the Contractor's payment claim is submitted, the Contractor must issue to the Principal the completed Progress Payment Instruction(s), consisting of either:

- (a) a single PPI - Consolidated Allocation; or
- (b) any one or more of:
  - (i) a PPI - Contractor Allocation;
  - (ii) a PPI - Subcontractor Allocation; and / or
  - (iii) a PPI - Retention Allocation.

The aggregate total amounts of the Progress Payment Instruction(s) provided to the Principal must be equal to the amount set out in the payment certificate to which the Progress Payment Instruction(s) relate.

At the same time as the Contractor issues the Progress Payment Instruction(s) to the Principal, the Contractor must:

- (a) if the Progress Payment Instruction is not a PPI – Consolidated Allocation, inform the Principal of the total number of Progress Payment Instructions that the Contractor intends to provide in relation to the payment certificate to which the Progress Payment Instruction(s) relate;
- (b) provide a Payment Report to the Principal;
- (c) if requested by the Principal, provide to the Principal invoices issued by any Subcontractor in relation to the payment claim; and
- (d) provide the Progress Payment Instruction(s) to the Bank.

## **Shortfall of moneys**

To the extent that:

- (a) the total amount due and owing from (or otherwise payable by) the Contractor to a Subcontractor is greater than the amount identified in the relevant Progress Payment Instructions for that Subcontractor; and/or
- (b) amounts are due and owing from the Contractor to a Subcontractor and the amounts are not referable to any previously issued Progress Payment Instructions,

the Contractor must pay into the Project Bank Account any amount required to make payment of the total amount due to the Subcontractor. Any such payment into the Project Bank Account must:

- (a) be accompanied by a Contractor Deposit Instruction; and
- (b) be made in sufficient time so as to allow the Bank to apply the relevant funds to that Subcontractor at the same time as acting on the relevant Progress Payment Instructions and in any event, no less than two days prior to the scheduled date of payment for such Progress Payment Instructions,

and the moneys deposited by such payment into the Project Bank Account will be held on trust for the benefit of the relevant Subcontractor.

## **Payment**

Subject to the provisions of the Contract, where a payment certificate issued by the Superintendent certifies an amount payable from the Contractor to the Principal, the Contractor must, within 14 days of the issue of the payment certificate, pay to the Principal an amount not less than the amount shown on the payment certificate.

Subject to the provisions of the Contract, where any certificate certifies amounts due from the Principal to the Contractor, following receipt by the Principal of a properly completed and valid Progress Payment Instruction(s) and Payment Report, the Principal must pay the amount shown in the payment certificate into the Project Bank Account. The Principal must pay the amount within 28 days of receipt of the relevant payment claim.

Where any certificate certifies amounts due from the Contractor to the Principal, subject to the provisions of the Contract, within 14 days of issue by the Superintendent of the Superintendent's payment certificate the Contractor shall pay to the Principal, an amount not less than the amount shown in the certificate as due to the Principal.

In the Contract, where a date for payment is not a day upon which the banks in Perth are open, the obligation to pay shall be on the next day upon which the banks in Perth are open.

Within five days of the date of its payment into the Project Bank Account, the Principal must issue to the Contractor a Recipient Created Tax Invoice in respect of GST for the total amount of the relevant payment certificate or Final Certificate or Certificate issued pursuant to Clause 44.6 and paid by the Principal into the Project Bank Account.

## **Withholding payment / revoking and reissuing**

Notwithstanding any other provision of this Contract, the Contractor shall not be entitled to any payment under the Contract until it has:

- (a) provided the Principal with the security required under Clause 5.2;
- (b) provided the Principal with proof of insurances under Clause 21.1;
- (c) executed the Formal Instrument of Agreement issued by the Principal and returned it to the Principal;
- (d) provided any other information requested in writing by the Superintendent pursuant to the Contract;
- (e) where requested by the Superintendent, provide evidence of its compliance with the OSH Accreditation Scheme where compliance is required under this Contract;
- (f) lodged a 'Recipient Created Tax Invoice Agreement' with the Superintendent;
- (g) complied with clause 5.10 if applicable; and
- (h) complied with the requirements of Clause 43 with respect to the supply of statutory declarations and documentary evidence (as required).

The Contractor is not entitled to payment and the Principal may (in its sole discretion) withhold payment of moneys due to the Contractor if the statutory declaration supplied pursuant to Clause 43 identifies, or the Principal reasonably believes that:

- (a) the Progress Payment Instructions are not true and accurate, do not properly allocate amounts payable to Subcontractors pursuant to their subcontracts, or otherwise do not comply with the Contract;
- (b) the Payment Report is not true and accurate, does not properly allocate amounts payable to Subcontractors pursuant to their subcontracts, or otherwise does not comply with the Contract;
- (c) there are manifest errors (including arithmetic errors) in any of the Progress Payment Instructions or in the Payment Report;
- (d) there are Opt-in Subcontractors who wish to become a 'Subcontractor' but have not yet been provided with an Opt-in Notice;
- (e) there are persons that should have been deemed to be a Subcontractor pursuant to the Contract, and this information has not been provided to the Principal;
- (e) the Contractor is liable for amounts due and owing to Subcontractors or Opt-in Subcontractors or any other subcontractor or supplier (regardless of subcontract value) in respect of works carried out and completed and such amounts:
  - (i) relate to works under the Contract that have already been the subject of a payment certificate under the Contract; and
  - (ii) remain unpaid as at the date of the statutory declaration;
- (f) there has been a change (after the date of this Contract) in the security interests registered over the Contractor (as identified under the *Personal Property Securities Register*) and a duly executed deed of release or priority deed poll in relation to that security interest (in form and substance acceptable to the Principal) has not been supplied to the Principal;
- (g) the Contractor has breached the PBA Trust Deed Poll and that breach has not been remedied to the reasonable satisfaction of the Principal;
- (h) there is any inconsistency or ambiguity between the invoices issued by the Subcontractors and the calculations set out in the Progress Payment Instructions; and/or
- (i) the \$1 payment as required by clause 3.1(c) of the PBA Trust Deed Poll has not been successfully made through the Project Bank Account.

Without limiting its right to withhold payment, the Principal may (in its sole discretion) direct the Contractor to revoke and reissue any Progress Payment Instruction to both the Principal and the Bank if:

- (a) there are manifest errors (including arithmetic errors) in any of the Progress Payment Instructions or in the Payment Report; or
- (b) that Progress Payment Instruction does not comply with the requirements of the Contract.

If the Principal has provided comments on the Progress Payment Instructions, the reissued Progress Payment Instructions must properly take into account those comments.

## **Effect of payment**

Payments made into the Project Bank Account by the Principal are deemed to be payments made to the Contractor under the Contract.

A payment made into the Project Bank Account pursuant to this Clause does not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, is liable to pay the difference between the amount of such payment and the amount so properly due and payable. If the Principal is liable to pay the difference, it must (subject to the rights of the Principal pursuant to Clauses 42.1 and 43) be paid into the Project Bank Account by the Principal upon receipt from the Contractor of a properly completed Progress Payment Instruction.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

## **Unfixed plant and materials**

Except as provided in the Contract, the Principal shall not be obliged to pay for any item of unfixed plant and materials which is not incorporated in the Works.

Without limitation to Clause 42.4, upon payment into the Project Bank Account of any amount which includes the value of an item of unfixed plant and materials, the item shall be the property of the Principal free of any lien or charge.

## **Retention Release Events**

The Contractor acknowledges the provisions of the PBA Trust Deed Poll, including in relation to the occurrence of Retention Release Events. The Contractor agrees to comply with the PBA Trust Deed Poll and to forthwith provide the Principal with a copy of any Retention Release Instruction issued pursuant to the PBA Trust Deed Poll.

## **Construction Contracts Act**

The Contractor acknowledges the provisions of the *Construction Contracts Act 2004* (WA) (**CCA**) and (in particular) section 9 of the CCA. The Contractor hereby confirms that nothing in the Contract, the PBA Trust Deed Poll or the PBA Agreement shall be construed as permitting or otherwise allowing the Contractor to implement an arrangement with its Subcontractors that would result in provisions of its Subcontracts having no effect by virtue of the application of section 9 or any other provision of the CCA.

## **CLAUSE 43 PAYMENT OF WORKERS AND SUBCONTRACTORS**

*Delete the entire clause and in lieu thereof insert the following:*

- (a) At the same time as (and no earlier than) any Progress Payment Instruction(s) is issued to the Principal and the Bank, and before the Principal makes that payment into the Project Bank Account, or at any other time requested by the Superintendent, the Contractor shall—
  - (i) give the Superintendent a statutory declaration (in a form approved by the Principal) by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all workers who have at any time



been employed by the Contractor on WUC have at the date of the request been paid all moneys due and payable to them in respect of their employment on the WUC; and

- (ii) if requested by the Superintendent, provide documentary evidence to the Superintendent that at the date of the declaration all workers who have been employed by a subcontractor or supplier of the Contractor have been paid all moneys due and payable to them in respect of their employment on the WUC.
- (b) At the same time as (and no earlier than) any Progress Payment Instruction(s) is issued to the Principal and the Bank, and before the Principal makes that payment into the Project Bank Account, or at any other time requested by the Superintendent, the Contractor must give to the Principal a statutory declaration (in the form approved by the Principal) by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that:
- (i) the Progress Payment Instruction(s) are true and accurate and comply with the Contract (and to avoid doubt and without limitation, properly allocate amounts payable to Subcontractors pursuant to their subcontracts);
  - (ii) all Opt-in Subcontractors who wish to become a 'Subcontractor' have been provided with an Opt-in Notice;
  - (iii) to the extent that any previously issued Progress Payment Instruction was not correct or for any other reason, the Contractor has no outstanding liabilities to Subcontractors or any other subcontractor or supplier (regardless of subcontract value) in connection with the Works, other than the payments the subject of the Progress Payment Instruction;
  - (iv) the Payment Report issued with the Progress Payment Instruction(s) is true and accurate; and
  - (v) there has been no change (after the date of this Contract) in the security interests registered over the Contractor (as identified under the *Personal Property Securities Register*) or if there has been a change, the Contractor has provided a duly executed deed of release or priority deed poll (in form and substance acceptable to the Principal) to the Principal, or will provide such deed of release or priority deed poll within 1 days of the change,

in each case as at (and no earlier than) the date of the Progress Payment Instruction(s) issued under Clause 42.1.

- (c) The statutory declaration referred to in Clause 43(b) must not be signed and dated earlier than the date of the relevant Progress Payment Instruction(s).
- (d) If the Contractor fails to comply with this clause 43 and notwithstanding Clause 42.1, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration or documentary evidence (as the case may be) is received by the Superintendent.

If the Contractor provides to the Superintendent satisfactory proof of the maximum amount due and payable to workers and Subcontractors by the

Contractor, the Principal shall not be entitled to withhold any amount in excess of the maximum amount.

For the avoidance of doubt, the Contractor consents to the Superintendent and the Principal contacting the Contractor's workers, subcontractors and suppliers for the purpose of auditing a statutory declaration provided under this clause.

### **Payments directly to workers, subcontractors and suppliers**

At the written request of the Contractor and out of moneys payable to the Contractor, the Principal may on behalf of the Contractor make payments directly to any worker, subcontractor or supplier.

If any worker, subcontractor or supplier obtains a court order or determination, pursuant to s 31(2)(b) of the *Construction Contracts Act 2004* (WA) in respect of moneys referred to in Clause 43(a) or (b) and produces to the Principal the court order or determination and a statutory declaration that it remains unpaid, the Principal may pay the amount of the order or determination, and costs included in the order or determination, to the worker, subcontractor or supplier and the amount paid shall be a debt due from the Contractor to the Principal.

## **CLAUSE 44.2      DEFAULT BY THE CONTRACTOR**

*Delete the entire subclause and in lieu thereof insert the following:*

If the Contractor commits a substantial breach of contract, the Principal may, by hand or by certified post, give the Contractor a written notice to show cause.

Substantial breaches include, but are not limited to:

- (a) failing to:
  - (i) provide security;
  - (ii) provide evidence of insurance;
  - (iii) provide a Construction Program where require by Clause 33.2;
  - (iv) comply with a direction of the Superintendent pursuant to subclause 30.3; or
  - (v) use the materials or standards of work required by the Contract;
  - (vi) ensure the currency of any insurances; or
  - (vii) execute and provide a Deed of Guarantee and Indemnity where requested pursuant to Clause 5.10 of the Contract;
- (b) wrongful suspension of work;
- (c) substantial departure from a construction program without reasonable cause or the Superintendent's approval;
- (d) where there is no construction program, failing to proceed with due expedition and without delay;
- (j) in respect of Clause 42.1, failing, within 28 days of the award of the Contract, to deliver to the Principal a duly executed deed of release or priority deed poll when required to do so by that Clause;
- (k) if there is a change (after the date of this Contract) in the security interests registered over the Contractor (as identified under the *Personal Property*

*Securities Register*) failure to provide a duly executed deed of release or priority deed poll (in form and substance acceptable to the Principal) to the Principal within 14 days of the change;

- (l) any breach of the PBA Trust Deed Poll or the PBA Agreement which (in the opinion of the Principal) is not minor or inconsequential in nature;
- (m) in respect of Clause 43, knowingly providing documentary evidence containing an untrue statement;
- (n) failing to comply with all payment obligations to workers and subcontractors in accordance with the provisions of the Contract;
- (o) the termination or dissolution of any partnership, joint venture or consortium the Contractor may have entered into for the purposes of the Contract;
- (p) any failure by the Contractor or any subcontractor or any person employed directly or indirectly by the Contractor to comply with all applicable health and safety legislation and building codes and standards;
- (q) where the Contractor uses dumped goods in the performance of the Contract without the express written consent of the Principal (for the purposes of this sub-clause 'dumped goods' means goods from overseas that are imported into Australia at less than their normal value, causing or threatening to cause material injury to an Australian industry producing like goods or materially hindering the establishment of such industry);
- (r) failure to comply with the Priority Start Policy where applicable;
- (s) failure to become accredited or maintain accreditation under, or otherwise to comply with, the OSH Accreditation Scheme where required under this Contract;
- (t) any failure to comply with provision of government procurement policies set out in the Tender Documents and/or the Contract documents; and
- (u) any other breach expressly identified in the Contract as being a breach for the purposes of Clause 44.

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## **ANNEXURE E**

### **Statutory Declaration**

**[Note: This statutory declaration must be issued at the same time as (and no earlier than) the Progress Payment Instruction(s) is issued pursuant to clause 42.1.]**

## Statutory Declaration

I, **[insert name]**

of **[insert address]**

**[insert occupation]**

Sincerely declare as follows:

1. I hold the position of **[insert position title]** and am duly authorised by the Contractor to make this declaration in accordance with the provisions of clause 43 of the General Conditions of Contract as amended (**Contract**).
2. In respect of **[insert name of Contract]** and Progress Payment Instruction(s) PPI Nos **[insert PPI numbers]** of **[insert dates the PPIs were authorised]**:
  - (a) the Progress Payment Instruction(s) are true and accurate and comply with the Contract (and to avoid doubt and without limitation, properly allocate amounts payable to Subcontractors pursuant to their subcontracts);
  - (b) all Opt-in Subcontractors have supplied an Opt-in Notice to the Contractor;
  - (c) to the extent that any previously issued Progress Payment Instruction was not correct or for any other reason, the Contractor has no outstanding liabilities to Subcontractors or any other subcontractor or supplier (regardless of subcontract value) in connection with the Works, other than the payments the subject of the Progress Payment Instruction;
  - (d) the Payment Report issued with the Progress Payment Instruction(s) is true and accurate; and
  - (e) there has been no change (since the date of the PBA Trust Deed) in the identity of the party with any registered security interests over the Contractor (as identified under the "Personal Properties Securities Register" maintained pursuant to the *Personal Properties Securities Act 2009* (Cth)) or if there has been, a duly executed deed of priority or deed of subordination (in form and substance acceptable to the Principal) has been executed,

in each case as at the date of the Progress Payment Instructions issued pursuant to clause 42.1 of the Contract, where terms defined in the Contract have the same meaning in this statutory declaration.

This declaration is true and I know that it is an offence to make a declaration knowing that it is false in a material particular.

This declaration is made under the *Oaths, Affidavits and Statutory Declaration Act 2005* at:

[insert location]

On [insert date the declaration is being made which MUST NOT be made before the date the PPIs were authorised]

by:

.....  
[Signature of person making the declaration]

In the presence of

.....  
[Signature of authorised witness]

.....  
[Name of authorised witness and qualification as such a witness]

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## **ANNEXURE F**

### **Special Conditions for Tier 2 Subcontracts for Project Bank Accounts**

## **EXPLANATORY NOTES FOR SUBCONTRACTORS**

*These draft conditions are provided as a suggestion to head contractors and subcontractors as to what they may choose to incorporate in subcontracts where a project bank account is to be utilised. Any decision to use these provisions is at the risk of the contractor and subcontractor. In these explanatory notes, a 'subcontractor' means a subcontractor to the head contractor and also includes any subcontractor who also supplies goods or materials to the head contractor, in each case where the value of the contract for the project is equal to or greater than \$20,000 (including GST).*

*The Principal and the State Government recommend that each party seek its own legal advice on matters connected with project bank accounts and contracting generally and accepts no responsibility for these draft conditions.*

*Subcontractors with an aggregate value of \$20,000 or more under their relevant subcontracts will automatically participate in the PBA and will not be required to provide an Opt-In Notice. However, subcontractors with an aggregate value of less than \$20,000, and all suppliers of goods and materials only will be required to provide an Opt-in Notice in order to participate in the PBA.*

*The PBA will facilitate head contractors in making payment to subcontractors from the relevant project bank account. The funds deposited by the Principal are held on trust for the subcontractors until the relevant subcontractor becomes entitled under its relevant subcontract to be paid.*

The Contractor must inform all potential subcontractors that they are bidding for work on a PBA project.

When engaging with any potential subcontractor, any tender document, requests for quotation, requests for bid or other similar correspondence which invites a subcontractor to quote in relation to the Project, the Contractor must inform the potential subcontractor that further information in relation to PBA projects can be found from the Department of Communities website at: <http://prodhousing/contractors/ProjectBankAccounts/Pages/default.aspx>.

## **SPECIAL CONDITIONS FOR TIER 2 SUBCONTRACTS FOR PROJECT BANK ACCOUNT**

***[To be inserted at the beginning of the Subcontractor payment clause.]***

### **1.1 PBA Acknowledgements**

- (a) The Subcontractor acknowledges that payment into the Project Bank Account (where the Subcontractor is identified as a Beneficiary under the PBA Trust Deed Poll) shall discharge the Contractor's obligation to make payment under this Subcontract, to the extent of that payment into the Project Bank Account.
- (b) Each party acknowledges the provisions of the PBA Trust Deed Poll.

### **1.2 Payment Claims**

- (a) Within [● days]<sup>1</sup> of the 'Claim Date' (being the date the Contractor makes a payment claim to the Principal), the Subcontractor shall deliver a claim for payment to the Contractor for the value of works and all amounts then due to the Subcontractor.
- (b) Within [● days]<sup>2</sup> of receipt of a claim for payment, the Contractor shall certify the amount that is to be paid to the Subcontractor and such amount shall be paid by the Contractor within 28 days of the Claim Date.

### **1.3 PBA Trust Deed Poll**

- (a) A payment made to the Subcontractor by the Contractor from the Project Bank Account pursuant to Clause [●] shall not prejudice the right of either party to dispute under this Subcontract

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<sup>1</sup> Identify the date that is five days prior for the date for the Contractor to make its payment claim under the head contract.

<sup>2</sup> Identify the date that is five days after certification under the head contract.



whether the amount so paid is the amount properly due and payable. On agreement or determination of any such dispute:

- (i) if the Contractor is liable to pay the difference between an amount actually paid and the amount properly due and payable, the difference shall be paid by the Contractor to the Subcontractor from the Project Bank Account; or
  - (ii) if the Subcontractor is liable to refund to the Contractor the difference between an amount paid to it and the amount properly due and payable, the Subcontractor shall return such amount to the Contractor in the manner directed by the Contractor.
- (b) The Subcontractor acknowledges the provisions of the *Construction Contracts Act 2004* (WA) (**CCA**) and (in particular) section 9 of the CCA. The Subcontractor hereby confirms that nothing in this Subcontract or the PBA Trust Deed Poll shall be construed as permitting or otherwise allowing the Subcontractor to implement an arrangement with its sub-subcontractors that would result in provisions of its sub-subcontracts having no effect by virtue of the application of section 9 or any other provision of the CCA.

In this Clause [●], the following terms have the following meanings:

**PBA Trust Deed Poll** means the document of that name which is entered into between the Contractor and the Principal, in connection with the [insert project name] project and tender number [insert tender number], pursuant to which the Project Bank Account is to be established and moneys due to the Contractor from the Principal are to be paid and held on trust.

**Project Bank Account** means the bank account established by the Contractor as a trust account as more particularly defined in the PBA Trust Deed Poll.



## RECIPIENT CREATED TAX INVOICE AGREEMENT

This Agreement is submitted in relation to Tender RFT No: \_\_\_\_\_ for the:  
(ENTER RFT NUMBER)

\_\_\_\_\_  
(STATE CORRECT TITLE OF THE WORKS AS GIVEN IN THE TENDER DOCUMENTS)

In accordance with the Australian Tax Office's (ATO's) Goods and Services Tax Ruling (GSTR) 2000/10 paragraph 13(e) the following is agreed for and on behalf of The Principal (The Housing Authority) and

\_\_\_\_\_  
(ENTER THE FULL NAME OF THE CONTRACTOR)

1. The Housing Authority will issue tax invoices to the Contractor in respect of the payment certificate issued by the Superintendent to the Principal under this Contract;
2. The Contractor shall not issue tax invoices in respect of claims for payment issued by the Contractor under this Contract;
3. The Contractor is registered for the GST at the time of this agreement and that it will notify the Housing Authority if it ceases to be registered.
4. The Contractor's Australian Business Number (ABN) is:

(The Contractor is to enter its ABN and if applicable its GST Branch registration number)

5. The Housing Authority is currently registered for the GST and will notify the Contractor if it ceases to be registered.
6. The Housing Authority's ABN is **56 167 671 885**

Name of Contractor: \_\_\_\_\_

(IN BLOCK LETTERS)

This Agreement is signed by a person authorised to do so on behalf of the Contractor.

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

Full Name: \_\_\_\_\_  
(IN BLOCK LETTERS)

Position with Contractor: \_\_\_\_\_  
(IN BLOCK LETTERS)

Email Remittance Address: \_\_\_\_\_