



FORMAL INSTRUMENT OF AGREEMENT¹

[## INSERT PROJECT DETAILS]²

THIS AGREEMENT made the _____ day of _____ 2015

BETWEEN

HOUSING AUTHORITY (ABN 56 167 671 885) care of Housing Authority, 5 Newman Court,
Fremantle WA 6160 (**Principal**)

AND

[##ENTITY DETAILS]³ [##ABN] of **[###ADDRESS]** (**Contractor**)

RECITALS

- A. The Principal requires the **[##design]⁴** and construction of **[##DESCRIBE WORKS]⁵** as further defined by and set out in the Contract (**Works**).
- B. The Principal and the Contractor agree to enter into this Contract for the delivery of the Works.

NOW IT IS AGREED

1. In consideration of payment of **[##insert \$]** inclusive of GST (**Contract Sum**), or such other sums as shall become payable at the time and in the manner set forth in the General Conditions to be paid by the Principal to the Contractor, the Contractor will execute and complete the Works in compliance with the Contract and in accordance with and within the time frames stated in the Contract.
2. The Contract constitutes the entire agreement between the parties and supersedes all previous agreements, undertakings and communications, whether written or oral, relating to the subject matter of the Contract⁶

¹ All footnotes are to be deleted before this document is sent externally.

² This should be a general reference to the project name (something that is likely to be how it is referred to internally within the Housing Authority)

³ Make sure correct entity is completed with reference to ABN or ACN number. If the entity is a trust there are separate provisions that should be considered: see clauses 7 and 8.

⁴ This should be deleted when not a design and construct contract

⁵ The description can be quite general for example "construction of 5 two storey residences"

⁶ The effect of this clause is that it excludes other documents from being considered a "contract"

3. It is agreed that this Formal Instrument of Agreement together with the documents listed below (**Contract Documents**) shall together constitute the entire and concluded agreement and the Contract between the Contractor and the Principal (**Contract**).

- (a) This Formal Instrument of Agreement (including all annexures⁷);
- (b) Letter of acceptance dated [##insert];
- (c) **Special Conditions – Module Procurement**; ⁸
- (d) General Conditions of Contract **AS 2124-1992**⁹ as amended and inclusive of all Annexures (**General Conditions**);¹⁰
- (e) Documents comprising the Preliminary Design and Principal's Project Requirements where referred to at Item 11 of Annexure Part A;¹¹

The order of precedence in the event of a discrepancy between the documents comprising the Principal's Project Requirements shall be as set out in Item 11 of Annexure Part A to the General Conditions;¹²

- (f) Design Guidelines and Specifications applicable to this project.
 - a. Schedule of Inclusions - Class 1 and 2 Developments
 - b. Part B: Functional Brief - Single and Grouped Dwellings (GROH and Key Worker Housing)
 - c. Construction Specification Supplement 1 - Wind Regions C and D
 - d. Construction Specification Supplement 2 - GROH
 - e. Construction Specification Supplement 3 - Aboriginal Communities and North West Housing Fund
 - f. Construction Specification - Prefabricated Housing
 - g. Construction Specification - BCA Classes 1a and 10 for Single and Grouped Dwellings
 - h. Construction Specification - BCA Classes 2 and 3

document". If there are letters or other documents which contain terms which the Housing Authority wishes to rely on, those terms must either be incorporated into other contract documents or the document itself included as a contract document. Careful consideration needs to be given if there is a risk that parts of the document might be inconsistent with other provisions of the contract.

⁷ This includes all agreed clarifications, exclusions, post tender negotiations etc..

⁸ Delete if not applicable.

⁹ If the General Conditions of contract being used are other than AS2124 (for example AS4300) then the correct General Conditions should be inserted here.

¹⁰ If there are more Annexures than Part A and B (which would be only in unusual circumstances) then those additional annexures should be referenced here.

¹¹ Principal Project Requirements and Preliminary Designs only apply where a design and construct contract is involved. This should be removed if the Formal Instrument of Agreement is being used for a construct only contract (such as AS2124).

¹² Consideration should be given to the list of documents described in Annexure Part A at Item 11. If it is the case that one document is more detailed or more accurate than the other then that document should be listed first so that it is given greater priority in the event of a discrepancy. If there is no priority between the documents then this sentence could be removed.

- i. Demolition Specification - BCA Classes 1 and 10 for Single and Grouped Dwellings
- j. Demolition Specification - BCA Classes 2 and 3
- k. Landscaping Brief for Design and Construct Projects (Single, Grouped and Low Rise Multiple Dwellings)
- l. Landscaping Specification
- m. Landscaping Design Brief
- n. Landscaping Technical Brief
- o. Landscaping Technical Brief for Design and Construction
- p. Design Brief - Apartments
- q. Design Brief - Northwest Regional Social Housing
- r. Design Brief - Single and Grouped Dwellings
- s. Standard Details: Universal and Mobility Designed Housing
- t. Technical Specification Sustainability Alterations

(g) Tender Submission;

(h) Addendum to the Tender Documents as follows ¹³:

1. Addendum Number #1 dated Day/Month/Year; and

(i) Preliminary Construction Programme, titled [##insert];¹⁴

(j) Drawings as described in the document titled Contract Drawings;

(k) Tender Specification as attached to the Request for Tender;

(l) Aboriginal Employment Plan¹⁵; and

(m) [##Other documents].¹⁶

4. In the event of any ambiguity, discrepancy or inconsistency between the documents comprising the Contract Documents the documents shall rank in the order of precedence listed above to the extent of the discrepancy or inconsistency.¹⁷

¹³ Delete if not applicable

¹⁴ Where a construction programme has been submitted as part of the tender and is considered to be a contract document then it should be referenced here – ensure that the construction programme is clearly described eg “titled “Preliminary Construction Programme Revision 1 dated ??”

¹⁷ Only for contracts in the Kimberley and Pilbara

¹⁵ Where a construction programme has been submitted as part of the tender and is considered to be a contract document then it should be referenced here – ensure that the construction programme is clearly described eg “titled “Preliminary Construction Programme Revision 1 dated ??”

¹⁶ This should be used carefully – for example if there are Geotechnical reports or other expert reports that might be part of the contract terms then they should be clearly defined in terms of title, author and date. If there are no other documents that form part of the terms of the contract other than the General Conditions of Contract and the PPR, then there is no need to add reference to tender documents etc and this item should be deleted. This should not be used simply to annex the tender documents for example

¹⁷ It is important that the documents listed above are placed in order of priority so that in the event of information in two documents being inconsistent, the parties know which one to rely on. It is usual for the Formal instrument of Agreement and the General Conditions of contract to be high priority documents and these should not be moved lower down without legal advice. Documents with a greater level of detail are commonly given higher priority but this may vary depending on the specific

Warranties

5. Each party represents and warrants to the other party that:
 - (a) It has full power and authority to execute the Contract and to perform its obligations under the Contract;
 - (b) The Contract has been duly executed by it; and
 - (c) The obligations undertaken by it and set out in the Contract are valid and binding in accordance with the terms of the Contract.
6. The Contractor warrants that it is entering into this Contract:
 - (a) solely on the basis of its own investigations and determinations as to the obligations and liabilities assumed or to be assumed by the Contractor and risks involved in performing its obligations under the Contract; and
 - (b) without relying on any representation by the Principal or any other person purporting to represent the Principal.

[Delete clauses 7 and 8 if the Contractor is not a trustee]

Warranty where Contractor is a trustee¹⁸

7. The Contractor enters into and is bound by this agreement both:
 - (a) in its personal capacity; and
 - (b) in its capacity as trustee of the **##insert trust name** (Trust).
8. The Contractor represents and warrants to the Principal that, in respect of the Trust:
 - (a) it is the only trustee;
 - (b) no action is proposed to remove it as trustee of the Trust;
 - (c) there is no default under the trust deed constituting the Trust;
 - (d) it has the power to enter into and perform its obligations and incur liabilities under this agreement;
 - (e) the beneficiaries of the Trust have consented to and benefit from, the entry into and performance of this agreement;
 - (f) it has a right of indemnity out of the assets of the Trust for all liabilities incurred by it under this agreement and the assets of the Trust are sufficient to satisfy that right; and
 - (g) it will not, without the Principal's consent (not to be unreasonably withheld or delayed):

project.

¹⁸ Delete where there is no trust involved.

- (i) resign;
- (ii) allow the appointment of a substitute or additional trustee;
- (iii) terminate the trust or vary the terms of the Trust; or
- (iv) resettle the Trust.

Governing Law

- 9. The law of Western Australia governs this Contract.
- 10. The parties submit to the exclusive jurisdiction of the courts of Western Australia, the Federal Circuit Court of Australia and the Federal Court of Australia.

Rights are Cumulative

- 11. A party's rights under this Contract are in addition to its rights at law.

Execution of counterparts

- 12. This Contract may be executed in any number of counterparts. Each counterpart is an original but the counterparts together are one and the same agreement.

Severance

- (a) If a provision of this agreement is invalid, illegal or unenforceable, then to the extent of the invalidity, illegality or unenforceability, that provision must be ignored in the interpretation of this agreement.
- (b) The remaining provisions of this agreement remain in full force and effect.

EXECUTED BY:

PRINCIPAL

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^{*19}

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.*

CONTRACTOR

Executed by)
[**##insert Contractor's full name**])
([**##insert Contractor's ACN**])
Pursuant to section 127 of the)
Corporations Act 2001 (Cth))

Signature of Director

Signature of Director/Secretary*

Name of Director

Name of Director/Secretary*

**Delete that which does not apply, specify if sole Director.*

¹⁹ Delete the execution clause that does not apply. If in doubt seek advice from LLS as to which execution clause should be used.

Annexure 1 to the Formal instrument of Agreement

Contract Sum Breakdown²⁰

The Contract Sum breakdown will be used by the Superintendent for the purposes of assessing progress claims.

²⁰ *The trade breakdown might be the completed Housing Authority trade breakdown that was issued with the tender. This should be attached to the Formal Instrument of Agreement if applicable.*

Annexure 2 to the Formal instrument of Agreement²¹

Agreed Clarifications / Exclusions²²

- (a) Post tender negotiations as follows²³:

[To be completed on award of tender]

²¹ Where a tenderer has submitted a list of clarifications or exclusions as part of its tender, and the Housing Authority accepts those clarifications/exclusions, then that list should form an Annexure to the Formal Instrument of Agreement. Careful consideration should be given to whether every item on the list is accepted. If not, then the parties may agree to strike out those that are not agreed and initial each strike out.

²² Attach all agreed clarifications / exclusions and/or post tender negotiation correspondences such as emails.

²³ Delete if not applicable.

Annexure 3 to the Formal instrument of Agreement²⁴
**HOUSING AUTHORITY ABORIGINAL EMPLOYMENT TARGETS IN CONSTRUCTION AND
CIVIL WORKS CONTRACTS PRACTICE GUIDE**
ANNEXURE TO CONTRACT
KIMBERLEY AND PILBARA REGIONS²⁵

1 Definitions

For the purposes of this Annexure, the following words have the following meanings:

- (a) “**Aboriginal Employment Plan**” means the plan submitted by the Contractor and approved by the Principal that sets out how the Contractor will meet the requirements of the Practice Guide in respect of the Contract, a copy of which is included as Attachment 1 to this Annexure;
- (b) “**Aboriginal Employment Report**” means the report to be provided by the Contractor to the Principal for each Reporting Period in accordance with the Practice Guide and clause 5 of this Annexure;
- (c) “**Aboriginal Employment Target**” means the employment target for Aboriginal Workers specified in the Aboriginal Employment Plan or such other target as agreed by the parties to the Contract in writing;
- (d) “**Aboriginal Workers**” has the meaning given in the Practice Guide;
- (e) “**Contractor**” means the head contractor engaged by the Principal under the Contract to perform the Works;
- (f) “**Contract**” means any contract attaching or otherwise subject to this Annexure;
- (g) “**Practice Guide**” means the *Housing Authority Aboriginal Employment Targets in Construction and Civil Works Contracts Practice Guide* in effect as at the date of the Contract;
- (h) “**Principal**” means the Housing Authority and any other person named as the principal under the Contract;
- (i) “**Reporting Period**” means each calendar month from the date of the Contract until the completion of the Works, or such other period specified in the Practice Guide;
- (j) “**Site**” means the land and other places made available to the Contractor by the Principal for the purpose of the Contract; and
- (k) “**Works**” means the works to be undertaken under the Contract.

²⁴ Where a tenderer has submitted a list of clarifications or exclusions as part of its tender, and the Housing Authority accepts those clarifications/exclusions, then that list should form an Annexure to the Formal Instrument of Agreement. Careful consideration should be given to whether every item on the list is accepted. If not, then the parties may agree to strike out those that are not agreed and initial each strike out.

²⁵ Delete this Clause if the works are being undertaken in the Gascoyne; Mid-West; Wheatbelt; Peel; South West; Great Southern; Goldfields/Esperance and Metro regions.

2 Application of Annexure

- (a) This Annexure forms part of the Contract.
- (b) To the extent of any inconsistency between the terms of this Annexure and any of the other terms of the Contract, the terms of this Annexure prevail.

3 The Principal

The Principal is committed to implementing the Practice Guide and adhering to the principles contained in the Practice Guide.

4 Contractor Obligations

The Contractor must comply with the Practice Guide and the terms contained in this Annexure. Without limiting the application of the Practice Guide the Contractor must:

- (a) do all things reasonably necessary to meet the Aboriginal Employment Target;
- (b) within 10 business days after the end of each Reporting Period, submit to the Principal an Aboriginal Employment Report in the manner required by the Principal;
- (c) keep and provide access to the Principal or its agents, all supporting information, documents and evidence used to prepare the Aboriginal Employment Report for each Reporting Period; and
- (d) comply with the dispute resolution process in clause 8 of this Annexure.

5 Aboriginal Employment Report

Unless otherwise agreed by the Principal in writing, each Aboriginal Employment Report submitted by the Contractor must be in the form prescribed by the Principal and contain the following information:

- (a) the Contract name, number and description;
- (b) date of award and date the Works commenced on the Site;
- (c) full legal entity name, business name, Australian Business Number for the Contractor and each of its Relevant Subcontractors;
- (d) the names, dates of birth and addresses of, and total number of hours worked by, Aboriginal Workers in connection with the performance of the Works during the Reporting Period;
- (e) the total number of employees and contractors engaged by the Contractor and its Relevant Subcontractors and the total number of hours worked by these persons in connection with the performance of the Works during the Reporting Period; and
- (f) any other information reasonably requested by the Principal.

6 Verification of Compliance

- (a) The Principal reserves the right to verify and audit compliance with the Practice Guide and this Annexure.
- (b) The Contractor must, upon reasonable notice, provide the Principal or its agents, with access at any reasonable time and from time to time to the Site, the Contractor's premises, financial records, other documents, equipment and other property for the purpose of audit and inspection by the Principal in order to verify compliance by the Contractor with the Practice Guide and this Annexure.

7 Breach of Contract

- (a) A failure to comply with the requirements of the Practice Guide or this Annexure is deemed a substantial breach of the Contract.
- (b) Subject to compliance with the dispute resolution provisions in clause 8 with respect to the Contractor's failure to meet the Aboriginal Employment Target, but otherwise without limitation to any other right of the Principal under the Contract, the Principal may at its absolute discretion do any or all of the following:
 - (i) suspend the Contractor from further contracting opportunities with the Principal for a period of time determined by the Principal;
 - (ii) downgrade or suspend the Contractor's status for works contracts with the Principal;
or
 - (iii) withhold payment of money due to the Contractor until the Contractor satisfies the Principal that it has complied with the requirements of the Practice Guide, or is making a bona fide attempt to ensure compliance with the Practice Guide.

8 Dispute Resolution

- (a) If at any time the Principal or the Contractor reasonably believes that the Contractor is, or will be, unable to meet the Aboriginal Employment Target, the party holding this belief must give a notice in writing to the other party under this clause.
- (b) On receipt of a notice under clause 8(a), the parties agree to use reasonable commercial efforts to agree a resolution:
 - (i) by a conference to be held within 14 days of receipt of a notice under clause 8(a) between the Superintendent appointed under the Contract (if any) on behalf of the Principal and a representative of the Contractor; and
 - (ii) if no resolution is achieved under clause 8(b)(i), by a conference to be held within 28 days of receipt of a notice under clause 8(a) between the management representatives of each of the Principal and the Contractor.
- (c) The discussions during any conference convened in accordance with this clause will be on a without prejudice basis.
- (d) The Principal will not exercise its remedies under the Contract for failing to meet the Aboriginal Employment Target unless it has made reasonable efforts to comply with the dispute resolution procedures set out in this clause 8.
- (e) Notwithstanding this clause 8, the Principal and the Contractor shall continue to perform the Contract, and the Contractor shall continue with the Works.

**HOUSING AUTHORITY ABORIGINAL EMPLOYMENT TARGETS IN CONSTRUCTION
AND CIVIL WORKS CONTRACTS PRACTICE GUIDE**

ANNEXURE TO CONTRACT

**GASCOYNE, MID WEST, WHEATBELT, PEEL, SOUTH WEST, GREAT SOUTHERN,
GOLDFIELDS/ESPERANCE AND METRO REGIONS²⁶**

1 Definitions

For the purposes of this Annexure, the following words have the following meanings:

- (a) “**Aboriginal Employment Plan**” means the plan submitted by the Contractor and approved by the Principal in accordance with clause 4 of this Annexure;
- (b) “**Aboriginal Employment Report**” means the report to be provided by the Contractor to the Principal for each Reporting Period in accordance with the Practice Guide and clause 5 of this Annexure;
- (c) “**Aboriginal Workers**” has the meaning given in the Practice Guide;
- (d) “**Contractor**” means the head contractor engaged by the Principal under the Contract to perform the Works;
- (e) “**Contract**” means any contract attaching or otherwise subject to this Annexure;
- (f) “**Practice Guide**” means the *Housing Authority Aboriginal Employment Targets in Construction and Civil Works Contracts Practice Guide* in effect as at the date of the Contract;
- (g) “**Principal**” means the Housing Authority and any other person named as the principal under the Contract;
- (h) “**Reporting Period**” means each calendar month from the date of the Contract until the completion of the Works, or such other period specified in the Practice Guide;
- (i) “**Site**” means the land and other places made available to the Contractor by the Principal for the purpose of the Contract; and
- (j) “**Works**” means the works to be undertaken under the Contract.

²⁶ Delete this Clause if the works are being undertaken in the Kimberley or Pilbara.

2 Application of Annexure

- (a) This Annexure forms part of the Contract.
- (b) To the extent of any inconsistency between the terms of this Annexure and any of the other terms of the Contract, the terms of this Annexure prevail.

3 Contractor Obligations

The Contractor must comply with the Practice Guide and the terms of this Annexure. Without limiting the application of the Practice Guide the Contractor must:

- (a) submit the Aboriginal Employment Plan in accordance with clause 4 of this Annexure;
- (b) within 10 business days after the end of each Reporting Period, submit to the Principal an Aboriginal Employment Report in the manner required by the Principal; and
- (c) keep and provide access to the Principal or its agents, all supporting information, documents and evidence used to prepare the Aboriginal Employment Report for each Reporting Period.

4 Aboriginal Employment Plan

- (a) Within 30 calendar days after entering into the Contract (or such longer period as agreed by the Principal), the Contractor must submit to the Principal for approval the Aboriginal Employment Plan which complies with the Practice Guide.
- (b) After receiving the Aboriginal Employment Plan from the Contractor, the Principal must notify the Contractor if it approves the plan or if it requires amendments to the plan.

5 Aboriginal Employment Report

Unless otherwise agreed by the Principal in writing, each Aboriginal Employment Report submitted by the Contractor must be in the form prescribed by the Principal and contain the following information:

- (a) the Contract name, number and description;
- (b) date of award and date the Works commenced on the Site;
- (c) full legal entity name, business name, Australian Business Number for the Contractor and each of its Relevant Subcontractors;
- (d) the names and total number of hours worked by, Aboriginal Workers in connection with the performance of the Works during the Reporting Period;
- (e) the total number of employees and contractors engaged by the Contractor and its Relevant Subcontractors and the estimated total number of hours worked by these persons in connection with the performance of the Works during the Reporting Period; and
- (f) any other information reasonably requested by the Principal.

6 Verification of Compliance

The Principal reserves the right to verify and audit compliance with the Practice Guide and this Annexure.

Annexure 4 to the Formal instrument of Agreement

NOTIFICATION OF APPOINTMENT OF SUPERINTENDENT'S REPRESENTATIVE

Pursuant to Clause 24 of the General Conditions, take notice that the Superintendent has appointed [*name] as Superintendent's Representative.

The Superintendent's Representative has been delegated [*all the functions of the Superintendent under the Contract OR list functions and any limitations here].

[*To be completed on award of tender]