



Government of **Western Australia**  
Department of **Communities**  
**Housing**

# **General Conditions for Engagement of a Consultant**

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ANNEXURE A

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# 1. DEFINITIONS AND INTERPRETATION

## 1.1 Definitions

In these General Conditions, except where the context otherwise requires:

<b>Act</b>	means a statute (State or Federal) including amendments and re-enactments and any by-laws or regulations made pursuant to it;
<b>Building Contract</b>	means the contract for construction of the project the subject of the Services;
<b>Business Day</b>	means any day except a Saturday, Sunday or public holiday in Perth, Western Australia;
<b>Client Information</b>	means all information supplied to the Consultant for the purposes of this Contract;
<b>Commencement Date</b>	means the commencement date for the performance of the Services specified in the Letter or, if not otherwise specified in the Letter, in the Request;
<b>Confidential Information</b>	means: <ul style="list-style-type: none"><li>(i) the Client Information;</li><li>(ii) any information specified to be confidential in the Contract; and</li><li>(iii) any information the Consultant knows or ought to know is confidential;</li></ul>
<b>Consequential Loss</b>	means: <ul style="list-style-type: none"><li>(i) any indirect loss or damage;</li><li>(ii) loss of opportunity;</li><li>(iii) loss of profit, anticipated profit, business, business opportunities or revenue;</li><li>(iv) direct expenditure of time by managers and employees consequential upon any loss; or</li><li>(v) damage to reputation;</li></ul>
<b>Consultant</b>	means the person or entity identified as the Consultant in the Letter;
<b>Consultant's Covenants</b>	means the covenants and obligations expressed or implied in this Contract to be observed or performed by the Consultant;
<b>Consultant's Personnel</b>	means the Consultant's officers, employees, agents, subconsultants and subcontractors;
<b>Consultant's Records</b>	means records and information of any kind, including originals and duplicate copies of all accounts, financial statements, books, files reports, records, correspondence, documents and other materials created for, or relating to, or used in connection with, the supply of the Services, whether or not it contains Confidential Information, and however such records and information are kept, held, stored or recorded;
<b>Contract</b>	means the contract between the Principal and the Consultant for the supply of the Services by the Consultant, the terms and conditions of which are contained in the Letter, the Request, the General Conditions and the Offer;
<b>Contractor</b>	means the party which enters into the Building Contract with the Principal;

<b>Event of Default</b>	<p>means any of the following events:</p> <ul style="list-style-type: none"> <li>(i) the Consultant breaches an obligation under this Contract that cannot be remedied;</li> <li>(ii) the Consultant breaches or fails to observe or perform any other of the Consultant's Covenants and that breach or failure continues after the expiration of 14 days (or any longer period as the Principal may in its absolute discretion specify in the notice) of notice to the Consultant to remedy it;</li> <li>(iii) an Insolvency Event occurs, subject to any restrictions on their enforcement under Part 5.1, Part 5.2 or Division 17 of Part 5.3A <i>Corporations Act 2001</i> (Cth);</li> <li>(iv) the Consultant makes a false representation or breaches a warranty under this Contract;</li> <li>(v) the Consultant ceases, or threatens to cease to carry on the Services; or</li> <li>(vi) the Consultant or its employees or sub-Consultants is convicted of a criminal or statutory offence that is punishable by a fine or penalty of, or exceeding, \$10,000;</li> </ul>
<b>Force Majeure Event</b>	<p>means any of the following events, acts or causes beyond the reasonable control of the Consultant:</p> <ul style="list-style-type: none"> <li>(i) act of God, lightning, storm, flood, fire, earthquake, or cyclone;</li> <li>(ii) strike, lockout or other labour dispute; or</li> <li>(iii) act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion, national emergency (whether in fact or law), martial law, quarantine or epidemic,</li> </ul> <p>except where:</p> <ul style="list-style-type: none"> <li>(iv) the cause is the inability to obtain, use or pay moneys for any reason; or</li> <li>(v) the consequence of the cause could have been prevented, overcome or remedied by the exercise by the Consultant of care and diligence normally exercised by duly qualified persons in the performance of comparable work;</li> </ul>
<b>General Conditions</b>	means these General Conditions for Engagement of a Consultant;
<b>Indemnified Event</b>	<p>means any of the following events arising from or in connection with the Services or this Contract:</p> <ul style="list-style-type: none"> <li>(i) loss of or damage to property of the Principal;</li> <li>(ii) loss of or damage to property of any third party;</li> <li>(iii) death or injury to any person;</li> <li>(iv) breach of the Consultant's obligations under clause 5 (warranties);</li> <li>(v) breach of the Consultant's obligations under clause 8 (intellectual property);</li> <li>(vi) breach of the Consultant's obligations under clause 9 (confidentiality);</li> <li>(vii) an Insolvency Event; or</li> <li>(viii) any negligent, malicious, fraudulent or unlawful act or omission of the Consultant or the Consultant's Personnel;</li> </ul>
<b>Indemnified Payment</b>	means any money paid or incurred by the Principal in respect of an Indemnified Event, including legal and out-of-pocket expenses which may be suffered or incurred in connection with the exercise of a remedy conferred on the Principal under this Contract;
<b>Insolvency Event</b>	means any of the following events:

- (i) the Consultant goes into liquidation or becomes bankrupt or enters into any composition arrangement with or assignment for the benefit of the Consultant's creditors;
- (ii) a manager, administrator, trustee, receiver, receiver and manager or liquidator is appointed under any Act or instrument or by order of any court in relation to any part of the Consultant's undertakings assets or property; or
- (iii) anything analogous to or of a similar effect to anything described above under the law of any relevant jurisdiction;

**IP Rights**

means any statutory and other proprietary right in respect of inventions, innovations, patents, utility models, designs, circuit layouts, mask rights, copyright (including future copyright), confidential information, trade secrets, know-how, trademarks and any other right in respect of intellectual property;

**Legislative Requirements**

means:

- (i) any legislation or subordinate legislation;
- (ii) any approvals or permits;
- (iii) any codes or standards

applicable to the Services and/or the Site.

**Letter**

means the letter from the Principal to the Consultant accepting the Consultant's Offer;

**New Material**

means anything created by the Consultant pursuant to or in respect of this Contract in which IP Rights subsist;

**Offer**

means the offer for the supply of the Services provided by the Consultant to the Principal in response to the Request;

**Price**

means the price for the Services agreed by the parties and specified in the Contract;

**Principal**

means the Housing Authority, a body corporate constituted under the *Housing Act 1980 (WA)*;

**Request**

means:

- (i) the written request for tender or request for quotation issued by the Principal to the Consultant for the supply of the Services; or
- (ii) if no written request for tender or quotation is issued by the Principal, the verbal request for quotation issued by the Principal to the Consultant for the supply of the Services;

**Services**

means the services to be performed by the Consultant as described in the Contract;

**Site**

means the site for construction of the project the subject of the Services; and

**Term**

means the term of this Contract set out in the Letter or, if not otherwise specified in the Letter, in the Request, and includes any renewal or extension of that term.

**1.2 Interpretation**

In this Contract, 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 a reference to a clause or paragraph in, or a schedule or an annexure to, this Contract and a reference to this Contract includes any schedule or annexure;
- (d) a reference to dollars or \$ is to Australian currency;
- (e) a reference to time is to time in Perth, Western Australia;
- (f) a reference to a party is to a party to this Contract, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (g) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
- (h) 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;
- (i) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
- (j) 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;
- (k) 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;
- (l) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Contract or any part of it;
- (m) 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
- (n) headings are for ease of reference only and do not affect interpretation.

## **2. FORMATION OF CONTRACT AND TERM**

### **2.1 Formation of Contract**

The Contract between the Principal and the Consultant comes into existence as set out in the Letter.

### **2.2 Order of precedence**

If there is any inconsistency between the documents comprising this Contract, then this Contract will be read in the order of precedence (in descending order of priority) as set out in the Letter, or if not specified in the Letter, in the following order of precedence (in descending order of priority):

- (a) the Letter;
- (b) the Request;

- (c) the General Conditions; and
- (d) the Offer.

### **2.3 Term**

- (a) The Principal engages the Consultant to provide the Services pursuant to the terms and conditions contained in this Contract for the Term, commencing on the Commencement Date.
- (b) The Principal may extend the Term, by giving the Consultant notice in writing at any time prior to the expiration of the Term, for the further period specified in the Contract (if any) and otherwise on the same terms and conditions contained in this Contract, other than this right of renewal.

## **3. SCOPE OF WORK**

### **3.1 Services**

- (a) The Consultant must perform the Services in accordance with all applicable Legislative Requirements and comply with all instructions given by the Principal in respect of this Contract. The Principal is not responsible for any costs resulting from any unauthorised act of the Consultant.
- (b) The Consultant must promptly notify the Principal of any matter which will or is likely to change or has changed the scope or timing of the Services.

### **3.2 Additional Works**

- (a) If the Principal requests in writing that the Consultant performs work in addition to the Services, then the Principal will pay the Consultant for the additional works as expressly agreed by the Parties for the additional Services.
- (b) If the parties are unable to agree to a rate within 14 days from the date of the Principal's request, then the rate will be a reasonable rate determined by the Principal. To the extent that there are rates and prices expressly identified in this Contract, the Principal shall, acting reasonably, have regard to those rates and prices in determining what is a reasonable rate or price.

### **3.3 Standard of Services**

- (a) The Consultant must supply the Services in accordance with the Contract and if no standards for the Services are specified the Consultant must supply the Services in accordance with the highest standards that usually apply to the supply of the Services from a competent consultant exercising proper skill, care and diligence.
- (b) The Consultant warrants that the Services, including any documents, reports or other things to be provided to the Principal by the Consultant as part of the Services, will be fit for their stated purpose.
- (c) For the purposes of clause 3.3(b), the stated purpose shall be the purpose expressly stated or otherwise implied from the documents comprising the Contract.

### **3.4 Time for performing Services**

- (a) Subject to clause 3.4(b), the Consultant must complete the Services by the time or, if the Contract specifies that different parts of the Services are to be completed by different times, the times, stated in the Contract. Where the Contract does not specify a time for performance then the Consultant must perform the Services diligently and with due expedition and without delay.
- (b) The Principal must grant the Consultant a reasonable extension of time for any delay to

completion of the Services caused by:

- (i) an act or omission of the Principal or its officers, employees, agents or other consultants or contractors;
  - (ii) a Force Majeure Event; or
  - (iii) any event or circumstance for which another provision of this Contract provides that the Consultant may be entitled to an extension of time,
  - (iv) provided that, as a condition of the grant of an extension of time, the Consultant notifies the Principal of the potential delay and its cause promptly after the Consultant becomes aware of the potential delay or its cause;
  - (v) is actually delayed in carrying out the Services; and
  - (vi) provides reasonable evidence of the cause and duration of the delay within 7 days of the delay concluding.
- (c) The Consultant shall not be entitled to an adjustment to the Price, or any additional payment, merely by reason of being granted an extension of time under this Contract or otherwise being delayed in the provision of the Services. Where the Consultant is granted an extension of time under this Contract the Consultant will be entitled to its actual costs reasonably incurred by reason of the delay provided that:
- (i) the delay was caused by the Principal;
  - (ii) the delay is one for which the Consultant is entitled to an extension of time under clause 3.4(b);
  - (iii) the Consultant makes a claim for payment of its delay costs within 14 days of the delay concluding.

Compliance with this subclause (c) is a condition precedent to any entitlement to costs arising from delayed or prolonged Services. Compensation under this clause is the Consultant's sole remedy for any claim relating to delay or prolongation of Services.

### **3.5 Consultant's employees or sub-Consultants**

- (a) The Consultant must ensure that its employees or sub-consultants are competent and able to carry out the Services.
- (b) The Consultant must remove any of its employees or sub-consultants from providing the Services if the Principal provides a written notice to the Consultant requiring that person be removed. The Principal must provide a reason for the removal of the person in the notice.

### **3.6 Key Personnel**

The Consultant must provide the key personnel stated in the Offer (if any) to perform the Services. If any key person is not available due to circumstances beyond the reasonable control of the Consultant, the Consultant must promptly notify the Principal and arrange a replacement approved by the Principal (such approval not to be unreasonably withheld or delayed).

## **4. SUSPENSION**

- (a) The Principal may suspend the performance of all or any part of the Services at any time by notice in writing to the Consultant.
- (b) The Consultant must recommence the Services when reasonably directed to do so by the Principal.
- (c) Unless the suspension has been directed due to the Consultant's wrongful conduct, the Principal must pay the Consultant any direct costs and expenses reasonably incurred by the Consultant as a result of the suspension.



## 5. WARRANTIES AND UNDERTAKINGS

### 5.1 General Warranties

The Consultant warrants that:

- (a) it has no conflict of interest arising out of or in connection with this Contract;
- (b) it is authorised and has the power to enter into this Contract and perform the Services under this Contract;
- (c) the Consultant's obligations under this Contract are valid and binding and are enforceable against the Consultant;
- (d) all information provided by the Consultant to the Principal is true and correct;
- (e) there is no litigation or arbitration, and there are no administrative proceedings, taking place, pending or threatened against the Consultant which could have a materially adverse effect on the Consultant's ability to provide the Services in accordance with this Contract;
- (f) neither it, nor any of its employees, have been convicted of a criminal offence that is punishable by imprisonment or detention; and
- (g) there is nothing that prevents the Consultant from complying with the Consultant's obligations under this Contract.

### 5.2 Undertakings

The Consultant must:

- (a) take proper care and safe custody of all the Consultant's Records that are in the possession or control of the Consultant;
- (b) promptly notify the Principal if there is any breach of the warranties in clause 5.1;
- (c) act ethically and in accordance with good corporate governance practices in connection with this Contract at all times;
- (d) comply with all State and Commonwealth laws relevant to the provision of the Services and this Contract;
- (e) cooperate with the Principal in respect of the administration of this Contract; and
- (f) use its best endeavours to ensure that the Consultant's employees or sub-consultants do not breach this Contract.

## 6. PAYMENT AND INVOICING

- (a) The Consultant may make a claim for payment of the Price in accordance with, and at the times set out in this Contract.
- (b) The payment claim must:
  - (i) identify the Services performed
  - (ii) separately identify any variations for which payment is claimed;
  - (iii) set out details of the Price, the amount being claimed for payment and amounts previously paid;

- (iv) be in the form of a valid tax invoice (and include, without limitation, a clear invoice number for unique identification).
- (c) Subject to clauses 6(c) and 6(d), the Principal will pay the full amount claimed in respect of each account within 30 days of the receipt of the valid payment claim. If the Principal disputes that the Consultant is entitled to the amount claimed, , the Principal will, prior to the time for payment required under this Contract, advise the Consultant of the undisputed amount. Without limiting either party’s rights under clause 15, subject to receipt of an amended invoice to reflect the undisputed amount, the Principal shall pay the undisputed amount within 14 days of receipt of the amended invoice or 30 days from receipt of the payment claim, whichever is the later. Where the Principal fails to pay all or part of the amount claimed by the Consultant by the due date, that unpaid amount will be deemed to be disputed.
- (d) The Principal shall not be obliged to make any payment for Services that are defective or deficient.
- (e) Payment of moneys will not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but will be a payment on account only.
- (f) The Consultant’s final claim for payment of Services shall be issued on completion of the Services and noted as being the “Final Claim for Payment”. The Final Payment Claim must:
  - (i) set out the final amount claimed by the Consultant under the Contract;
  - (ii) separately identify any variations for which payment is claimed;
  - (i) set out details of the Price, the amount being claimed for payment and amounts previously paid;
  - (ii) set out any issues in dispute between the parties, which may impact on the amount due and payable to the Consultant under or in connection with this Contract
  - (iii) be in the form of a valid tax invoice (and include, without limitation, a clear invoice number for unique identification).
- (g) Upon the issue of a valid Final Claim for Payment, and subject to subclause **Error! Reference source not found.**, the Principal will pay the amount of the Final Payment Claim within 30 days of receipt of the valid Final Payment Claim. .
- (h) If the Principal disputes that the Consultant is entitled to the amount claimed in the Final Payment Claim, the Principal will prior to the time for payment required under the Contract, advise the Consultant of the undisputed amount. Without limiting either party’s rights under clause 15, subject to receipt of an amended invoice to reflect the undisputed amount, the Principal shall pay the undisputed amount within 14 days of receipt of the amended invoice or 30 days from receipt of the payment claim, whichever is the later. . Where the Principal fails to pay all or part of the amount claimed by the Consultant by the due date, that unpaid amount will be deemed to be disputed
- (i) Subject to payment, the submission of the Final Payment Claim will be evidence in any proceedings of whatsoever nature and whether under this Contract or otherwise that the Consultant is not owed any further payment under the Contract.
- (j) The Consultant shall not be entitled to claim payment for any disbursements except where expressly stated otherwise in this Contract.

## 7. GST

- (a) In this clause 7, reference to the words '**GST**', '**consideration**', '**supplier**', '**recipient**', '**supply**', '**tax invoice**' and '**taxable supply**' have the same meaning as in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- (b) Unless otherwise specified in the Contract, any sum payable or consideration due under this Contract is inclusive of GST.

- (c) If any sum payable or consideration due under this Contract is expressed as being exclusive of GST, the recipient must pay to the supplier an amount equal to the GST payable on the taxable supply.
- (d) If a GST amount is charged or varied under this Contract, the supplier must provide to the recipient a valid tax invoice on or before the time of payment or variation.
- (e) If the amount of GST paid or payable by the supplier on any supply made under this Contract differs from the amount of GST paid by the recipient as a result of the adjustment made by the Commissioner of Taxation, then the amount of GST paid by the recipient will be adjusted accordingly by a further payment by the recipient to the supplier or the supplier to the recipient, as applicable.
- (f) The Consultant will pay to the Principal all duties, taxes and charges other than GST imposed or levied in Australia or overseas in connection with the supply of the Services.

## 8. INTELLECTUAL PROPERTY RIGHTS

- (a) The Consultant automatically assigns all IP Rights in all New Material to the Principal upon their creation.
- (b) To the extent the IP Rights in or relating to the New Material are not capable of being vested in the Principal because the Consultant does not own the IP Rights, the Consultant must obtain an irrevocable licence for the Principal to use those IP Rights for any purpose for which the Services are provided.
- (c) The Principal grants to the Consultant a revocable, royalty-free, non-exclusive licence to use the Client Information and the New Material to the extent necessary to provide the Services. The licence will terminate on the expiration or termination of the Contract.
- (d) This clause 8 does not affect the IP Rights of the Consultant for existing material created outside the terms of this Contract and used in performing the Services. The Consultant retains the IP Rights in such materials and grants to the Principal a royalty-free, non-exclusive irrevocable licence to use such IP Rights for any purpose for which the Services are provided.
- (e) The Consultant's obligations under this clause 8 are a continuing obligation and must survive the expiration or earlier termination of this Contract.

## 9. CONFIDENTIALITY

- (a) The Consultant must keep the Confidential Information confidential. The Consultant must not use or disclose to any person the Confidential Information except:
  - (i) where necessary for the purpose of supplying the Services;
  - (ii) as authorised in writing by the Principal or the Customer (as applicable);
  - (iii) to the extent that the Confidential Information is public knowledge (other than because of a breach of this clause by the Consultant);
  - (iv) as required by any law, judicial or parliamentary body or governmental agency; or
  - (v) when required (and only to the extent required) to the Consultant's professional advisers, and the Consultant must ensure that such professional advisers are bound by the confidentiality obligations imposed on the Consultant under this clause 9.
- (b) The Consultant's obligations under this clause 9 are a continuing obligation and will survive the expiration or earlier termination of this Contract.

## 10. ACCESS

- (a) If the Consultant has custody or control of State records in the supply of the Services in accordance with the *State Records Act 2000* (WA), the Consultant must, to the extent necessary, comply with

the Principal's record keeping plan. "State record" has the meaning given to it in the *State Records Act 2000* (WA).

- (b) Subject to the Principal providing reasonable prior notice to the Consultant, the Consultant must provide access to the Principal to inspect, audit, examine, copy and use all or any Consultant's Records in its possession and control at its premises or if requested by the Principal deliver the Consultant's Records to the Principal.

## 11. CONFLICT OF INTEREST

- (a) For the duration of this Contract, the Consultant will not provide services to any other party if to do so would, or would potentially, create a conflict of interest, without the Principal's written consent.
- (b) If an actual, potential or perceived conflict of interest arises the Consultant must:
  - (i) promptly notify the Principal and any relevant parties that the conflict has arisen and provide full details; and
  - (ii) take reasonable steps in consultation with the Principal and any relevant parties to resolve the conflict.

## 12. INSURANCE

- (a) The Consultant must, prior to commencing the Services and as a condition precedent to any entitlement to payment under this Contract, effect and maintain the following insurances:
  - (i) for the duration of this Contract, public liability insurance covering the legal liability of the Consultant and the Consultant's Personnel arising out of the Services for an amount set out in the Letter, or if not specified in the Letter, in the Request, for any one occurrence and unlimited in the number of occurrences happening in the period of insurance, and noting the Principal's interests;
  - (ii) for the duration of this Contract, workers' compensation insurance in accordance with the provisions of the *Workers' Compensation and Injury Management Act 1981* (WA), including cover for common law liability for an amount of not less than \$50 million for any one occurrence in respect of workers of the Consultant. The insurance policy must be extended to cover any claims and liability that may arise with an indemnity under section 175(2) of the *Workers' Compensation and Injury Management Act 1981*; and
  - (iii) professional indemnity insurance covering the legal liability of the Consultant and the Consultant's Personnel under this Contract arising out of any act, negligence, error or omission made or done by or on behalf of the Consultant, or any subcontractor in connection with this Contract for an amount of not less than \$1 million (or any greater amount specified in the Request) for any one claim and in the annual aggregate, with a provision of one automatic reinstatement of the full sum insured in any one period of insurance.
- (b) The professional indemnity insurance referred to in clause 12(a) must be maintained for a period of 6 years following the expiration or earlier termination of this Contract and without limiting (a)(iii) must include:
  - (i) fraud and dishonesty;
  - (ii) defamation;
  - (iii) infringement of intellectual property rights;
  - (iv) loss of or damage to documents and data; and
  - (v) breach of the Australian Consumer Law.
- (c) The Consultant must:

- (i) punctually pay all premiums and amounts necessary for effecting and keeping current the insurance required under clause 12(a);
  - (ii) not vary or cancel any insurance required under clause 12(a) or allow it to lapse during this Contract; and
  - (iii) not do or allow to be done anything which may void or render void the insurance or entitle the insurer to refuse a claim.
- (d) The Consultant must give to the Principal a copy of the insurance policies specified in clause 12(a) or a certificate of currency if requested by the Principal at any time.
- (e) If the Consultant fails to provide a copy of an insurance policy or a certificate of currency under clause 12(d), the Principal may withhold payment of any money due under this Contract to the Consultant until the Consultant has complied with clause 12(d).
- (f) Where, subject to clause 18, the Consultant subcontracts any part of the Services, the Consultant shall ensure that the sub-consultants effect insurance on similar terms to that set out in this clause. The Consultant shall, on request by the Principal, provide evidence of the insurances effected by the sub-consultant.

## **13. INDEMNITY, LIMITATION OF LIABILITY AND SET OFF**

### **13.1 Indemnity**

- (a) The Consultant irrevocably and continually indemnifies the Principal in respect of any and all actions, claims, proceedings, losses, costs, expenses and damage that may be made, brought against, suffered or incurred by the Principal directly or indirectly in connection with any Indemnified Event and for any Indemnified Payments.
- (b) The Consultant's liability under the indemnity in clause 13.1(a) will be reduced proportionally to the extent that any costs, losses, expenses, claims, damages or other liabilities result from the negligence of the Principal or its respective officers, employees or agents.

### **13.2 Limitation of Liability**

To the extent permitted by law, the liability of the Consultant to the Principal arising under or in connection with this Contract is limited in the aggregate to the amount expressly specified in the Request (if any), except with respect to:

- (a) personal injury (including psychological injury) or death;
- (b) infringement of IP Rights;
- (c) fraudulent, malicious or criminal conduct;
- (d) wilful default; or
- (e) conduct with reckless disregard for the consequences, of or by the Consultant or the Consultant's Personnel.

Where no amount is specified in the Request, the Consultant's liability is not capped.

### **13.3 Liability of Principal**

- (a) If the Principal breaches this Contract, the remedies of the Consultant are limited to damages except where:
  - (i) the Principal repudiates the Contract; or

- (ii) the Consultant seeks an injunction on the grounds that damages are not an appropriate remedy.
- (b) The Principal is not liable to the Consultant for any Consequential Loss suffered or incurred as a result of any act or omission by the Principal.

#### **13.4 Right of Set Off**

The Principal may set off or deduct any amount claimed by the Consultant from any amount owing by the Principal to the Consultant on any account under this Contract or any other agreement between the Principal and the Consultant.

#### **13.5 Survival**

This clause 13 will survive the expiration or earlier termination of this Contract.

### **14. DEFAULT AND TERMINATION**

#### **14.1 Performance of Services by Principal**

- (a) If, acting reasonably, the Principal is not satisfied with the Services, then, without limiting any other remedy available to the Principal, the Principal may by notice to the Consultant require the Consultant to re-supply the Services at no cost to the Principal.
- (b) If the Consultant fails to provide the Services as required by clause 14.1(a), the Principal may engage another consultant to provide the Services and the Consultant must reimburse the Principal for any additional costs and expenses incurred by the Principal as a result of engaging another consultant.

#### **14.2 Termination for cause**

Without limitation to clause 14.3, the Principal may terminate this Contract with immediate effect by notice to the Consultant if:

- (a) an Event of Default occurs;
- (b) in the reasonable opinion of the Principal the Services will not be completed by the Consultant in accordance with this Contract due to any event or circumstances; or
- (c) the Consultant fails, refuses or neglects to comply with any instruction or direction lawfully given to it by the Principal pursuant to this Contract.

#### **14.3 Termination for convenience**

- (a) The Principal may terminate this Contract by serving a notice on the Consultant requiring that this Contract terminate on a date specified in the notice being not less than 30 days from the date of the notice.
- (b) If the Principal terminates the Contract under clause 14.3(a), the Principal must pay the Consultant the proportion of the Price equivalent to the Services provided up to the date of termination and any costs and expenses reasonably incurred by the Consultant as a result of the termination. This shall be the Consultant's sole compensation arising from or in connection with termination pursuant to this clause 14.3.

#### **14.4 Yield up**

On the expiry or earlier termination of this Contract, the Consultant must:

- (a) deliver to the Principal all the Consultant's Records as required by the Principal;

- (b) not represent that the Consultant is any way connected to the Principal;
- (c) return all of the Confidential Information to the Principal;
- (d) in every other respect co-operate with the Principal as reasonably required by the Principal in order to minimise any loss, damage or inconvenience to the Principal and Consultant resulting from the expiration or termination of this Contract.

#### **14.5 Principal's further rights on Termination**

- (a) Nothing in clause 14 in any way restricts any right of the Principal to set-off any sum or to claim and institute proceedings for damages arising out of any breach of this Contract by the Consultant.
- (b) The Principal shall be entitled to engage any other entity to carry out all or part of the Services upon termination of this Contract

### **15. DISPUTE RESOLUTION**

- (a) If a dispute between the parties arises in connection with this Contract, then either party may give the other party a written notice of the dispute, adequately identifying and providing details of the dispute.
- (b) Within 10 Business Days after service of a notice of dispute, the parties must confer at least once to resolve the dispute. Each party must be represented by a person having authority to settle the dispute or agree to the method of resolution. All conferences under this clause must be conducted in good faith and without prejudice.
- (c) If the dispute has not been resolved within 20 Business Days of service of the notice of dispute, either party may commence legal proceedings or, if agreed in writing by the parties, commence alternative dispute resolution proceedings.

### **16. NO ASSIGNMENT**

- (a) The Consultant must not sell, assign, novate, transfer, mortgage, charge or otherwise dispose of or deal with any of its rights or obligations under this Contract without the written consent of the Principal.
- (b) The obligations on the part of any assignee expressed or implied in any deed of assignment and in favour of the Principal are supplementary to those contained in this Contract and do not in any way relieve the Consultant from the Consultant's Covenants. Despite any assignment by the Consultant of the benefit of this Contract the Consultant must remain liable to observe and perform the Consultant's Covenants.

### **17. NOVATION**

- (a) Where directed by the Principal, the Consultant shall execute a Deed of Novation in the form attached to this Contract, being a deed between the Principal, the Consultant and the Contractor.
- (b) Unless agreed otherwise, the Principal shall pay the Consultant for Services performed to the date of novation. The Consultant shall not be entitled to any payment or compensation arising out of or in connection with this clause.

## 18. SUB-CONSULTANT/CONTRACTOR

- (a) If circumstances arise which require expertise outside the field of practice of the Consultant, the Consultant may, with the prior written approval of the Principal (which approval is at the Principal's discretion), engage an appropriate sub-consultant to perform relevant Services under this Contract. The Consultant will be responsible for the engagement of and payment for any Services provided by sub-consultants, and will accept responsibility for those Services. For the avoidance of doubt, the Consultant shall not be entitled to any adjustment to the Price arising out of or in connection with this subclause (a) unless expressly agreed otherwise with the Principal.
- (b) The Consultant must ensure that it is a term of any agreement to subcontract that the remuneration and terms of employment of any employee employed by a sub-consultant for the performance of the agreement to subcontract will, for the duration of the agreement to subcontract, be consistent with the remuneration and terms of employment that reflect the industry standard as expressed in awards and agreements and any code of practice that may apply to a particular industry.
- (c) The Consultant must, if requested by the Principal, supply to the Principal a copy of any subcontract, which copy may exclude commercially sensitive information but must indicate that the Consultant has complied with this clause 18.
- (d) The engagement by the Consultant of a sub-consultant does not relieve the Consultant from its obligation to perform the Consultant's obligations under this Contract.

## 19. RELATIONSHIP

- (a) The Contract does not create a relationship of employment, trust, agency, partnership or joint venture between the parties.
- (b) The Consultant must not represent that the Consultant is the employee, agent, partner or joint venture partner of the Principal.

## 20. NOTICES AND OTHER COMMUNICATIONS

### 20.1 Service of Notices

A notice, demand, consent, approval or communication under this Contract (**Notice**) must be:

- (a) in writing, in English and given by a person duly authorised by the sender; and
- (b) hand delivered or sent by prepaid post or facsimile to the recipient's address for Notices specified in the Letter (as varied by any Notice given by the recipient to the sender) or if no address has been specified, to the recipient's registered office.

### 20.2 Effective on Receipt

A Notice given in accordance with clause 20.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, on the third Business Day after the date of posting (or on the seventh Business Day) after the date of posting if posted to or from a place outside Australia);
- (c) if sent by facsimile, when the sender's facsimile system generates a message confirming successful transmission of the entire Notice unless, within eight Business Hours after the transmission, the recipient informs the sender that it has not received the entire Notice,



but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the Notice is taken to be received at 9.00am on the next Business Day.

## **21. GENERAL PROVISIONS**

### **21.1 Waiver**

A party does not waive a right, power, or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the party giving the waiver.

### **21.2 Entire Agreement**

The Contract 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.

### **21.3 Counterparts**

The Contract may be executed in counterparts. All executed counterparts together constitute one document.

### **21.4 Variation**

The Contract may not be varied unless agreed in writing by both parties.

### **21.5 No Merger**

Any right or obligation of any party that is expressed to operate, or will have effect, on or after the completion, expiration or termination of this Contract for any reason, will not merge on the occurrence of that event, but will remain in full force and effect.

### **21.6 Severability**

- (a) The parties agree that a construction of this Contract results in all provisions being enforceable is to be preferred to a construction that does not so result.
- (b) If, despite the application of clause 21.6(a), a provision of this Contract is illegal or unenforceable, that provision may be severed, and the remainder of this Contract will otherwise continue in full force and effect.

### **21.7 Applicable Law**

The Contract is governed by the law of Western Australia and each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Western Australia.

### **21.8 Cumulative Rights**

The rights powers and remedies in this Contract are in addition to and not exclusive of the rights powers and remedies existing at law or in equity.

### **21.9 Auditor General**

- (a) The powers and duties of the Auditor General are not limited or otherwise affected by the terms and conditions of this Contract.

- (b) The Consultant must allow the Auditor General or an authorised representative of the Auditor General to have access to and examine the Consultant's Records concerning this Contract.

**21.10 Consent**

Except where this Contract expressly states otherwise, a party may, in its absolute discretion, give (conditionally or unconditionally) or withhold any approval or consent under this Contract. Nothing in this Contract requires the party to provide a reason or reasons for giving or refusing its consent.

**21.11 Further Assurance**

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

**21.12 Costs**

- (a) Each party must pay its own costs of negotiating, preparing and executing this Contract (including, if applicable, duty on this Contract).
- (b) Unless otherwise stated in this Contract, the Consultant must comply with its obligations under this Contract at the Consultant's cost.

**Annexure A – Deed of Novation**

## Deed of Novation

Housing Authority, a body corporate constituted under the Housing Act 1980  
(WA)

ACN [Insert ACN]

Outgoing Party

and

[Insert Name]

ACN [Insert ACN]

Incoming Party

and

[Insert Name]

ACN [Insert ACN]

Continuing Party

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Date 2020  
Parties

**Outgoing Party** Housing Authority a body corporate constituted under the Housing Act 1980 (WA) of 5 Newman Court, Fremantle, Western Australia

**Incoming Party** [Insert name] [Insert ACN] [Insert address]

**Continuing Party** [Insert name] [Insert ACN] [Insert address]

### Recitals

- A. The Outgoing Party and the Continuing Party are parties to the Contract.
- B. The Outgoing Party has agreed to assign its rights and transfer its obligations under the Contract to the Incoming Party.
- C. The Parties have agreed to novate the Contract upon the terms of this deed.
- D. This deed is supplemental to the Contract.

### This deed provides

#### 1. Definitions and interpretation

##### 1.1 Definitions

In this deed:

**Building Contract** means the design and construct contract between the Outgoing Party and the Incoming Party.

**Business Day** means a day which is not a Saturday, Sunday, public holiday or bank holiday in the city of Perth, Western Australia.

**Contract** means the contract between the Outgoing Party and the Continuing Party dated [insert date].

**Effective Date** means the date of this deed.

**Party** means a party to this deed.

##### 1.2 Interpretation

- (a) This interpretation clause applies unless inconsistent with the context.
- (b) If a word or phrase is defined, then its other grammatical forms have a corresponding meaning.
- (c) The singular includes the plural and vice versa.

- (d) A reference to a gender includes any gender.
- (e) A reference to a clause, schedule or annexure is a reference to a clause, schedule or annexure to this deed.
- (f) The word *includes* and similar words are not words of limitation and do not restrict the interpretation of a word or phrase in this deed.
- (g) A reference to a document includes a variation or replacement of it.
- (h) A reference to a statute includes its subordinate legislation and a modification, replacement or re-enactment of either.
- (i) A reference to this deed includes an annexure.
- (j) A reference to person includes a reference to:
  - (i) an individual, a body corporate, a trust, a partnership, a joint venture, an unincorporated body or other entity, whether or not it is a separate legal entity;
  - (ii) if the person is an individual, the person's personal representatives and assigns; and
  - (iii) if the person is not an individual, the person's successors and assigns.
- (k) A reference to a thing, including a right, is a reference to either the whole thing or a part of the thing.
- (l) Part performance of an obligation does not constitute performance of an obligation.
- (m) An agreement, representation or term of this deed in favour of or on the part of two or more people, benefits or binds them jointly and severally.
- (n) A reference to time is to Perth, Western Australia time.
- (o) If the date on which a thing must be done is not a Business Day, then that thing must be done on the next Business Day.
- (p) A reference to a day is a reference to the period which starts at midnight and ends 24 hours later.
- (q) If a period of time runs from a given date, act or event, then the time is calculated exclusive of the date, act or event.

## **2. Novation**

On and from the Effective Date, the Parties novate the Contract so that:

- (a) the Incoming Party is substituted in place of the Outgoing Party under the Contract;
- (b) all references to the Outgoing Party in the Contract shall be read as a reference to the Incoming Party;
- (c) the Incoming Party undertakes to perform the obligations and be bound by the liabilities of the Outgoing Party under the Contract to the extent they are not performed;

- (d) the Continuing Party has the same rights against and owes the same obligations to the Incoming Party under the Contract as it did against the Outgoing Party prior to the Effective Date, as if the Incoming Party were an original party to the Contract in place of the Outgoing Party.

### **3. Release**

With effect on and from the Effective Date the Continuing Party releases and discharges the Outgoing Party from all obligations, liabilities, damages, losses, costs and expenses, and all claims, actions or proceedings, against the Outgoing Party, under or in respect of the Contract arising on or after the Effective Date.

### **4. Consent**

- (a) The Continuing Party consents to the novation of the Contract under the Contract to the Incoming Party on the terms of this deed.
- (b) The Outgoing Party consents to being substituted by the Incoming Party as a party to the Contract and agrees to comply with all of the obligations of the Outgoing Party and be bound by the liabilities of the Outgoing Party due and arising under the Contract before the Effective Date.

### **5. Warranties and representations**

Each party represents and warrants to that at the date of this deed:

- (a) it has the power and authority to enter into and perform its obligations under this deed;
- (b) it is duly incorporated and validly exists under the law of its place of incorporation;
- (c) it has taken all necessary action to authorise the execution, delivery and performance of this deed; and
- (d) this deed constitutes its legal, valid and binding obligations and is enforceable on it in accordance with its terms.

### **6. Taxes, costs and expenses**

Each party must pay its own legal and other costs and expenses in relation to preparation and execution of this deed and a related document.

### **7. Notices**

#### **7.1 Delivery**

- (a) Subject to a written agreement, which expressly states that the parties may communicate in a different way, the parties must communicate by written notice.
- (b) A party must send a notice to the other party at the address listed on page 1.
- (c) A party may vary its address by sending a written notice to the other party.
- (d) A party must use the new address from the time that it receives the notice.

- (e) To deliver a notice under this deed, a party must hand deliver or post it to the other party's address, or if a party has authorised notice by facsimile, then by facsimile to the facsimile number so authorised.

## **7.2 Effect and delivery**

- (a) A notice takes effect at the time stated in the notice.
- (b) If no time is stated then a notice sent by post is deemed to be received:
  - (i) 3 days after posting if within Australia; and
  - (ii) 7 days after posting if posted to or from a place outside Australia;
- (c) If no time is stated, a notice sent by fax is deemed to be received:
  - (i) at 5.00pm on the Business Day that the notice is sent; or
  - (ii) if sent after 5.00pm, then on the next Business Day.

## **8. Governing clauses**

### **8.1 Governing law and jurisdiction**

- (a) The law of Western Australia governs this deed.
- (b) The parties submit to the exclusive jurisdiction of the courts of Western Australia, the Federal Circuit Court and the Federal Court of Australia.

### **8.2 Variation**

The parties can only vary this deed if the variation is in writing and each party signs.

### **8.3 Rights are cumulative**

A party's rights under this deed are in addition to its rights at law.

### **8.4 Severance**

- (a) If a provision of this deed 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 deed.
- (b) The remaining provisions of this deed remain in full force and effect.

### **8.5 No waiver**

- (a) A party granting a waiver of a right relating to this deed must give written notice of that waiver to the party that benefits from the waiver.
- (b) A party's failure, partial failure or delay in exercising a right relating to this deed is not a waiver of that right.
- (c) A party may not claim that another party's delay or failure to exercise a right relating to this deed:



- (i) constitutes a waiver of that right; or
  - (ii) is a defence to its own action or inaction.
- (d) The parties may not waive or vary this clause.

**8.6 Entire agreement**

This deed constitutes the entire agreement in respect of its subject matter between the parties and supersedes all previous discussions, undertakings and agreements.

**8.7 Further assurance**

Each party must do everything necessary to give full effect to this deed.

**8.8 Counterparts**

- (a) The parties may execute this deed in any number of counterparts, which taken together constitute one instrument.
- (b) The parties may exchange counterparts by scanning the entire duly executed counterpart and emailing it to the other party.

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Executed as a deed

**Outgoing Party**

**The common seal of Housing Authority ABN  
56 167 671 885** was hereunto affixed to this  
agreement in the presence of: )  
)  
)

---

Appointed Officer

---

Appointed Officer

---

Full Name (please print)

---

Full Name (please print)

---

Position

---

Position

**Incoming Party**

**Executed as a deed by [insert]** )  
**ACN [insert]** under s 127 of the Corporations )  
Act: )

---

Signature of Director

---

Signature of Director/Company Secretary  
(Delete title which does not apply)

---

Print name in full

---

Print name in full

**Continuing Party**

**Executed as a deed by [insert]** )  
**ACN [insert]** under s 127 of the Corporations )  
Act: )

---

Signature of Director

---

Signature of Director/Company Secretary  
(Delete title which does not apply)

---

Print name in full

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Print name in full