



## **General Conditions of Contract – Provision of Goods and Services**

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# 1 DEFINITIONS

In this Contract, except where the context otherwise requires:

**'Acceptance'** has the meaning given in Clause 22.2.

**'Approval'** means any certificate, licence, consent, permit, approval, authority or requirement of any Legal Requirement or any organisation having jurisdiction in connection with the provision of the Goods and/or Services.

**'Approximate Quantities'** has the meaning given in Clause 16.

**'Australian Statistician'** means the person appointed as the Australian Statistician under the *Australian Bureau of Statistics Act 1975* (Cth) (and acting in that capacity).

**'Authority'** means any government or governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, agency, Minister or entity in Western Australia or the Commonwealth of Australia.

**'Business Days'** means a day that is not a Saturday, Sunday, a public holiday in Western Australia, or 27, 28, 29, 30 or 31 December.

**'Clause'** means a clause of this document.

**'Completion'** means delivery of Goods to the Delivery Point and the completed performance of Services in accordance with this Contract.

**'Completion Date'** means the date for Completion specified in the Contract Specifics or, if no date is specified, the End Date.

**'Confidential Information'** means all of the Principal's information which:

- (a) is disclosed or otherwise made available to, or acquired directly or indirectly by, the Contractor at any time;
- (b) relates to the Principal's or any Local Government's past, existing or future business, strategic plans or operations, finances, or customers (including any information that is derived from such information); and
- (c) is in oral or visual form, or is recorded or stored in a Document,

and includes this Contract, but does not include information which:

- (d) is or becomes generally and publically available other than as a result of a breach of this Contract;
- (e) is in the possession of the Contractor without restriction in relation to disclosure on or before the date on which it is disclosed to or acquired by the Contractor; or
- (f) has been independently developed by the Contractor or acquired from a third party not the subject to a duty of confidence to the Principal.

**'Consequential Loss'** means any loss of production, loss of revenue, loss of profit, loss of business reputation, business interruptions, loss of opportunities, loss of anticipated savings or wasted overheads.

**'Construction Contracts Act'** means the *Construction Contracts Act 2004* (WA).

**'Consumer Price Index'** means the index published by the Australian Bureau of Statistics known as the table 2 index - 6401.0 (weighted average of eight cities for all groups) or if that index is suspended or discontinued, the index substituted for it by the Australian Statistician.

**'Contract'** means this document (including all schedules, attachments, annexures and clarifications) and any Order. For the avoidance of doubt, if this Contract is a Framework Agreement then each Order issued under this Contract constitutes an individual Contract (comprising this document and that Order). [

**'Contract Price'** means the prices or rates specified as such in the Contract Specifics but excluding any additions or deductions, which may be required to be made pursuant to this Contract.

**'Contract Specifics'** means the contract information attached at Schedule 1.

**'Contractor Maximum Liability Amount'** means the amount specified as such set out in the Contract Specifics.

**‘Contractor’s Personnel’** means any and all personnel engaged by the Contractor or a related body corporate, including its directors, officers, employees, agents, representatives, Subcontractors and any director, officer, employee, agent or representatives of any Subcontractor, and any other person engaged or employed by, or on behalf of, the Contractor.

**‘Contractor’s Representative’** is the person named as such in the Contract Specifics or any replacement person notified to the Principal.

**‘Contractor’s Technical Material’** means all Technical Material which is:

- (a) prepared, or required to be prepared, by or on behalf of the Contractor under this Contract;
- (b) delivered, or required to be delivered, by or on behalf of the Contractor to the Principal under this Contract; or
- (c) incorporated into Technical Material described in paragraph (a) or (b) of this definition.

**‘Defective Goods’** means Goods of an inferior quality or which are otherwise inconsistent with this Contract.

**‘Defective Services’** means Services of an inferior quality or which are otherwise inconsistent with this Contract.

**‘Defects Liability Period’** means, subject to Clause 23.3, the period of time beginning on the date of Completion and ending on the expiry of the time stated in the Contract Specifics.

**‘Delivery Point’** means the Site or such other place as is specified in the Contract Specifics as the place for the delivery of the Goods.

**‘Dispute’** means any dispute or difference between the Parties arising in connection with the subject matter of this Contract.

**‘Document’** includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan, computer program, computer record, drawing, specification, material or any other means by which information may be stored or reproduced.

**‘End Date’** has the meaning given in the Contract Specifics.

**‘Fixed Quantities’** has the meaning given in Clause 16.

**‘Force Majeure Event’** means any one of the following events which is beyond the control of a Party, could not have been reasonably foreseen by the affected Party and which prevents that Party from discharging an obligation under this Contract, which, in the case of the Contractor, is critical to the Contractor delivering the Goods and/or providing the Services by the Completion Date:

- (a) a civil war, insurrection, riot, fire, flood, explosion, earthquake, operation of the forces of nature of catastrophic proportion or an act of a public enemy;
- (b) a general strike or general industrial action of Western Australia wide application, which did not arise at the Contractor’s premises and has not been caused by the Contractor; or
- (c) the enactment of any statute or regulation by the parliaments of the Commonwealth of Australia or Western Australia, which the Contractor could not have been aware of prior to the execution of this Contract,

but is not an event which arises from any of the following:

- (d) a breach of a contract, including this Contract, or Law by the Contractor;
- (e) negligence by the Contractor relating to the performance of its obligations under this Contract;
- (f) an occurrence that is a risk assumed by the Contractor under this Contract;
- (g) a shortage or delay in the supply of Goods and/or Services required under this Contract; or
- (h) wet or inclement weather.

**‘Framework Agreement’** means a Contract designated as such in the Contract Specifics.

**‘Goods’** means the goods specified as such in the Contract Specifics (including any part of the goods so identified and particularised).

**‘Goods and/or Services’** means all of the Goods (if any) and all of the Services (if any) specified in the Contract Specifics.

**'GST'** means goods and services tax applicable to any taxable supplies as determined under the GST Law.

**'GST Law'** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related Act imposing such tax and includes any subordinate legislation in respect of these acts.

**'Insurance'** means the insurances which the Contractor is required to obtain under Clause 43 and the Contract Specifics.

**'Insurance End Date'** means the date set out in the Contract Specifics as an Insurance End Date for a specific Insurance.

**'Intellectual Property Right'** means all intellectual and industrial property rights and interests throughout the world, whether registered or unregistered, including trademarks, designs, patents, inventions, semi conductor, circuit and other eligible layouts, copyright and analogous rights, trade secrets, know how, processes, concepts, plant breeder's rights, confidential information and all other intellectual property rights as defined in Article 2 of the Convention establishing the World Intellectual Property Organisation on 14 July 1967 as amended from time to time.

**'Invoice'** means an invoice which meets all the requirements of a valid tax invoice for GST purposes under the GST Law.

**'Law'** means:

- (a) any act, ordinance, regulation, by-law, order, award and proclamation of the Commonwealth and the State of Western Australia and any Local Government (including the Principal); and
- (b) any common or customary law and equity.

**'Legal Requirement'** means:

- (a) Laws;
- (b) Approvals; and
- (c) fees and charges payable in connection with the foregoing.

**'Liquidated Damages'** means the liquidated damages described as such in the Contract Specifics.

**'Local Government'** means any local government established under the *Local Government Act 1995* (WA) other than the Principal.

**'Loss'** means liability, loss, damage (of any nature, including aggravated and punitive), cost (including all litigation costs on a full indemnity basis), claim, suit, charge, diminution in value, action, statutory or equitable compensation, demand, expense or proceeding or loss of any nature and of any kind whatsoever whether present or future, actual, contingent or prospective and whether known or unknown, and howsoever arising including under any Legal Requirement or any Authority.

**'Order'** means a purchase order from the Principal to the Contractor which requires the supply of specific Goods and/or Services under this Contract where this Contract is a Framework Agreement.

**'Party'** means the Principal and/or the Contractor (as the context requires).

**'Plant and Equipment'** means all materials, plant, equipment, tools, vehicles and machinery necessary and incidental to the performance of the Contractor's obligations under this Contract.

**'PPS Law'** means the PPSA and any amendment made at any time to the *Corporations Act 2001* (Cth) or any other legislation as a consequence of the PPSA.

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

**'Principal Maximum Liability Amount'** means the amount specified as such in the Contract Specifics.

**'Principal's Personnel'** means directors, employees, agents, contractors or subcontractors of the Principal but does not include the Contractor or the Contractor's Personnel.

**'Principal's Representative'** is the person named as such in the Contract Specifics or any replacement person notified to the Contractor.

**'Principal's Technical Material'** means any Technical Material provided by the Principal to the Contractor for the purposes of this Contract, or which is copied or derived from Technical Material so provided.

**‘Progress Claim’** means a document in a form approved by the Principal evidencing the delivery of Goods and/or performance of Services and which includes the information set out in the Contract Specifics.

**‘RCTI Agreement’** means an agreement in the form provided by the Principal pursuant to which the Parties have agreed that the Principal will issue Recipient Created Tax Invoices in respect of all Goods and/or Services.

**‘Recipient Created Tax Invoice (or RCTI)’** has the meaning prescribed in the GST Law.

**‘Representative’** means the Principal’s Representative or the Contractor’s Representative.

**‘Review Date’** means each 12 month anniversary of the execution of this Contract.

**‘Schedule of Rates’** means the schedule of rates attached in Schedule 6.

**‘Scope of Services’** means the scope of the Services set out in Schedule 3.

**‘Services’** means the services identified as such in the Contract Specifics including:

- (a) any part of the services so identified and particularised;
- (b) any ancillary services; and
- (c) services required to be performed to deliver the Goods.

**‘Site’** has the meaning given in the Contract Specifics.

**‘Specification’** means the technical specification for the Goods attached in Schedule 2.

**‘Standards and Procedures’** means the documents listed in Schedule 4 and any other guidelines, rules, requirements or Site specific conditions which the Principal makes available to the Contractor from time to time.

**‘Start Date’** has the meaning given in the Contract Specifics.

**‘State of Emergency’** has the meaning given in Clause 24.

**‘Subcontractor’** means any person engaged by the Contractor in connection with the Goods and/or Services and includes consultants, subcontractors, suppliers and other contractors.

**‘Tax’** means any income (including payroll), land, indirect and other taxes, excise, levies, imposts, deductions, charges, duties, compulsory loans and withholdings, including withholding payments, financial institutions duty, debits tax or other taxes whether incurred by, payable by return or passed on to another person and includes any interest, penalties, charges, fees, fines or other amounts imposed in respect of any of the above, but does not include GST or stamp duty.

**‘Technical Material’** includes plans, designs, drawings, engineering information, data, specifications, reports, processes, concepts, manuals, specifications, accounts and any other material specified in this Contract.

**‘Tender’** means the offer submitted by the Contractor to supply the Goods and/or Services under this Contract and includes associated documentation.

**‘Term’** means the period of time between (and including) the Start Date and the End Date.

**‘Variable Quantities’** has the meaning given in Clause 16.

**‘Variation’** means any change to the Goods and/or Services, including any addition to, reduction in, omission from or change in the character, quantity or quality of the Goods and/or Services.

**‘Variation Form’** means a notice substantially in the form set out in Schedule 5 under which the Principal has directed a Variation in accordance with Clause 27.

**‘Wilful Misconduct’** means any act or failure to act which was a deliberate and wrongful act or omission, or involved reckless disregard or wanton indifference to the likely consequences, including an intentional breach of this Contract.

## 2 INTERPRETATION

In this Contract (unless the context otherwise requires):

- (a) a reference to this Contract means this Contract as amended, novated, supplemented, varied or replaced from time to time;

- (b) a reference to 'including', 'includes' or 'include' must be read as if it is followed by '(without limitation)';
- (c) a reference to 'approved' or 'approval' will be deemed to mean 'approved in writing' or 'approval in writing';
- (d) where a word or an expression is defined, any other part of speech or grammatical form of that word or expression has a corresponding meaning;
- (e) words in the singular include the plural and vice-versa;
- (f) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any sub-ordinate legislation issued under, that legislation or legislative provision;
- (g) a reference to any Party includes that Party's executors, administrators, substitutes, successors and permitted assigns;
- (h) a reference to a 'day', 'month', 'quarter' or 'year' is a reference to a calendar day, calendar month, a calendar quarter or a calendar year;
- (i) headings are for convenience only and do not affect interpretation of this Contract;
- (j) a promise on the part of 2 or more persons binds them jointly and severally; and
- (k) no rule of construction applies to the disadvantage of a Party on the basis that the Party put forward this Contract or any part of it.

### **3 ORDER OF PRECEDENCE**

To the extent of any inconsistency between the several parts of this Contract, the following parts are listed in order of precedence:

- (a) this document;
- (b) in the case of the Goods, the Specification and, in the case of the Services, the Scope of Services;
- (c) any other schedules, attachments or annexures to this document; and
- (d) any Order.

### **4 SEVERABILITY**

Should any part of this Contract be invalid or unenforceable, that part shall be:

- (a) read down, if possible, so as to be valid and enforceable; and
  - (b) severed from this Contract to the extent of the invalidity or unenforceability,
- and the remainder of this Contract shall not be affected by such invalidity or unenforceability.

### **5 NOTICES**

5.1 Any notice or other communication under this Contract shall be in legible writing, in English and signed and shall be given or served by:

- (a) hand delivery or prepaid post to the address of the recipient specified in this Contract or at such other address as may from time to time be notified in writing to the Party giving the notice by the intended recipient but in any event to the last notified address;
- (b) facsimile transmission to the facsimile number of the recipient specified in this Contract or at such other number as may from time to time be notified in writing to the Party giving the notice by the intended recipient but in any event to the last notified number; or
- (c) email to the email address of the recipient specified in this Contract or at such other email address as may from time to time be notified in writing to the Party giving the notice by the intended recipient but in any event to the last notified email address.

5.2 Any notice or other communication to or by a Party is regarded as being given by the sender and received by the addressee:



- (a) if by delivery in person, when delivered to the address of the recipient;
- (b) if by post, 3 Business Days from and including the date of postage;
- (c) if by facsimile transmission, when a facsimile confirmation receipt is received indicating successful delivery; and
- (d) if sent by email, when a delivery confirmation report is received by the sender which records the time that the email was delivered to the recipient's email address (unless the sender receives a delivery failure notification indicating that the email has not been delivered to the recipient),

but if the delivery or receipt is on a day which is not a Business Day or is after 5.00pm (recipient's time) it is regarded as received at 9.00am on the following Business Day.

5.3 In this Clause 5, reference to a recipient includes a reference to a recipient's officers, agents or employees.

5.4 A notice or other communication must not be given by electronic means of communication (other than facsimile and email as permitted in Clause 5.1).

5.5 A printed or copied signature will be sufficient for the purpose of sending any notice or other communication.

## **6 CONTRACTOR TO HAVE INFORMED ITSELF**

6.1 The Contractor shall be deemed to have:

- (a) examined carefully this Contract and any other information made available by the Principal to the Contractor in connection with the Tender or this Contract;
- (b) examined the Site and its surroundings (if applicable);
- (c) satisfied itself as to the correctness and sufficiency of its Tender and that the Contract Price covers the cost of complying with all its obligations under this Contract and of all matters and things necessary for the due and proper performance and completion of this Contract; and
- (d) obtained and properly examined all information (including information provided by or on behalf of the Principal) relevant to the risks, contingencies and other circumstances that may have had an effect on its Tender and which was provided or obtainable by the making of reasonable enquiries.

6.2 Failure by the Contractor to do all or any of the things it is deemed to have done under this Clause will not relieve the Contractor of its obligation to perform and complete this Contract in accordance with this Contract.

## **7 COMPLYING WITH LEGAL REQUIREMENTS**

7.1 The Contractor shall (at its own cost) comply with all Legal Requirements in any way affecting or applicable to the Goods and/or Services and/or the performance of this Contract.

7.2 Without limiting in any way the generality of the foregoing or Clause 8, the Contractor shall identify and duly and punctually observe, perform and comply with the provisions of any Legal Requirements for workplace safety and health, including but not limited to the *Occupational Safety and Health Act 1984* (WA) and all improvement notices, prohibition notices and codes of practice (if any) issued thereunder and having application to this Contract.

7.3 If a Legal Requirement is at variance with a term of this Contract the Contractor shall notify the Principal in writing. If such Legal Requirement necessitates a change to the Goods and/or the Services and/or the way in which they must be provided, the Principal may direct the Contractor as to how the inconsistency must be addressed. Such inconsistency shall be at the Contractor's risk and the direction will not entitle the Contractor to any adjustment of the Contract Price or to make any other claim for relief.

## **8 SAFETY OBLIGATIONS**

- 8.1 The Contractor must perform all relevant functions and fulfil all relevant duties of an employer, occupier and all other obligations as a duty holder under all Legal Requirements applicable to workplace health and safety.
- 8.2 The Contractor must supply or arrange to be supplied all things necessary to ensure the Services are carried out and the Goods are provided in a manner that is safe and without risks to health.
- 8.3 The Contractor must ensure that the Services are performed and the Goods are provided in a manner that is safe and without risks to any person, including by ensuring that the Contractor's Personnel entering the Delivery Point perform in a safe manner.
- 8.4 The Contractor must:
- (a) as soon as practicable, but in any event, within 24 hours, notify the Principal of any accident, incident which is notifiable under any Legal Requirement, injury or property damage which:
    - (i) occurs during the provision of the Goods and/or Services; or
    - (ii) is associated with the Goods and/or Services; and
  - (b) provide the Principal with any further information when requested by the Principal.
- 8.5 In performing its obligations under this Contract, the Contractor must ensure the health, safety and welfare of the following people when they are on, or immediately adjacent to, the Principal's premises over which it has control:
- (a) the Principal and the Principal's Personnel;
  - (b) the Contractor's Personnel; and
  - (c) the public.
- 8.6 The Contractor must provide all assistance reasonably requested by the Principal in connection with any workplace health and safety investigation related to this Contract or the Goods and/or Services.
- 8.7 The Contractor must, at its cost, comply with any direction from the Principal to modify or stop any activity that the Principal considers breaches this Clause 8.
- 8.8 If the Principal observes or becomes aware of a condition that breaches this Clause 8, the Principal or the Principal's Representative may direct the Contractor to remove or, to the extent reasonably possible, mitigate the effect of that condition, and the Contractor must (at its cost) comply with that direction and modify the Contractor's method of work in order to avoid that condition arising.
- 8.9 The Contractor acknowledges and agrees that any direction given by the Principal or the Principal's Representative under Clause 8.7 or 8.8 does not relieve the Contractor from complying with its obligations under this Clause 8.

## **9 ASSIGNMENT AND SUBCONTRACTING**

The Contractor shall not:

- (a) assign this Contract, or any part thereof or any payment thereunder; or
- (b) subcontract the whole or any part of this Contract,

without the Principal's prior written approval (not to be unreasonably withheld or delayed). The Principal's approval to assign or subcontract shall not relieve the Contractor from any liability or obligation under this Contract.

## **10 CONTRACTOR'S PERSONNEL**

The Contractor must, and must ensure the Contractor's Personnel, comply with:

- (a) all directions given by the Principal's Representative or any person authorised by Law or the Standards and Procedures to give directions to the Contractor in relation to this Contract or the Goods and/or Services; and
- (b) the Standards and Procedures that are applicable to this Contract.

## **11 INDEMNITY**

11.1 The Contractor shall indemnify and keep indemnified the Principal and the Principal's Personnel from and against all Loss and other liabilities of any kind arising directly or indirectly from:

- (a) any breach of any warranty or any of the other terms and conditions of this Contract by the Contractor or the Contractor's Personnel;
- (b) any Wilful Misconduct or a negligent act or omission of the Contractor or the Contractor's Personnel; and
- (c) any claim made by a third party against the Principal or the Principal's Personnel, to the extent that the claim arose out of the act or omission of the Contractor or the Contractor's Personnel,

except to the extent of liability which is caused by the Wilful Misconduct or a negligent act or omission of the Principal or the Principal's Personnel.

11.2 The Principal need not incur any cost or make any payment before enforcing any right of indemnity under this Clause 11.

## **12 INTELLECTUAL PROPERTY RIGHTS**

12.1 The Contractor warrants that the Goods and/or Services and any design, documents or methods of working provided by the Contractor do not infringe any Intellectual Property Right.

12.2 The Contractor shall indemnify the Principal against any Loss resulting from any alleged or actual infringement of any Intellectual Property Right.

12.3 All payments and royalties payable in respect of any Intellectual Property Rights required in respect of performance of the obligations under this Contract shall be included in the Contract Price and shall be paid by the Contractor to the person, persons, or body to whom they may be due or payable.

12.4 Except as otherwise provided in this Contract, ownership of Intellectual Property Rights (other than third party Intellectual Property Rights) associated with the Goods and/or Services and any documentation provided by the Contractor pursuant to this Contract vests in and shall remain vested in the Contractor.

12.5 Ownership of the Principal's Intellectual Property Rights (other than third party Intellectual Property Rights) vests in and shall remain vested in the Principal.

12.6 The Contractor grants to the Principal an irrevocable, perpetual, worldwide, royalty free and transferrable licence to use and reproduce all Intellectual Property Rights associated with the Goods and/or Services and any documentation provided pursuant to this Contract.

## **13 ORDERS**

13.1 If this Contract is a Framework Agreement, this Clause 13 applies:

13.2 The Principal:

- (a) may require the Contractor to provide Goods and/or Services from time to time by giving the Contractor an Order; and
- (b) may order requirements of any one type or item of the Goods and/or Services either in one single lot or instalments or in such quantities as may be required.

13.3 Within 5 Business Days after receipt of an Order the Contractor must give notice to the Principal if it:

- (a) disagrees with any of the information and/or requirements contained in the Order, and include in the notice details of the aspects in which it disagrees with the information and/or requirements; or
- (b) recommends any change to any of the information and/or requirements contained in the Order and include in the notice the Contractor's reasons for the recommendation.

13.4 If the Contractor:

- (a) gives notice under Clause 13.3, the Parties must attempt to agree on the information and requirements. Once the information and requirements have been agreed, the Principal must re-issue an Order containing the agreed information and requirements and the Contractor must perform its obligations under the Order in accordance with this Contract; or
- (b) does not give notice pursuant to Clause 13.3 the Contractor must perform its obligations under the Order in accordance with this Contract.

13.5 If, pursuant to a notice issued under Clause 13.3, the Parties cannot agree on the Contract Price or any other information or requirements for an Order, the Principal, acting reasonably (and having regard to the Schedule of Rates to the extent applicable), may determine:

- (a) the contract price applicable to that Order and such contract price will be deemed to be the Contract Price for that Order; and
- (b) the other information and requirements of the Order provided that such information and requirements fall within the scope of, and do not breach, the Framework Agreement.

13.6 The Principal is not obliged to issue Orders or otherwise purchase Goods and/or Services.

13.7 The Principal or the Principal's Representative may cancel any Order by providing written notice to the Contractor for any reason, but the Principal must pay for any part of the Goods delivered to the Delivery Point and any Services provided prior to the date the cancellation is notified to the Contractor.

## **14 QUALITY OF GOODS**

14.1 The Contractor must ensure that all Goods supplied under this Contract:

- (a) conform to the description specified in this Contract and to samples provided (if any) by the Principal;
- (b) where no standards are specified in this Contract, the Goods shall comply with the appropriate and current standard of the Standards Association of Australia and if there is no such standard then with the appropriate and current standard of the International Standards Organisation;
- (c) are fit for their intended purpose;
- (d) are properly, safely and securely packaged and labelled for identification and safety; and
- (e) are new and of merchantable quality.

14.2 The Contractor must ensure that the Principal has the full benefit of any manufacturer's warranties that may be applicable to the Goods (and the Contractor must, at its cost, pursue any manufacturer's warranties on the Principal's behalf if the Principal so requests).

## **15 QUALITY OF SERVICES**

15.1 The Contractor must ensure that:

- (a) the Services match the description of the Services in this Contract;
- (b) if the Contractor provided the Principal with a demonstration of the Services or represented that a result could be achieved by the Services before the Principal entered into this Contract or issued an Order for any of those Services, the Services correspond in nature and quality with the Services demonstrated or the services that achieved result (as the case may be);
- (c) the Services are fit for their intended purpose; and

- (d) to the extent that the Services are design Services, the works being designed will be fit for their intended purpose as described in this Contract.

15.2 The Contractor warrants that the Contractor's Personnel engaged to perform the Services:

- (a) have all the necessary skills, training and qualifications (proof of which, along with an up-to-date resume, must be supplied to the Principal within 2 Business Days of request) to carry out the Services in accordance with this Contract; and
- (b) are able to:
  - (i) perform the Services without the supervision of the Principal's Personnel; and
  - (ii) resolve any matters arising from the performance of the Services.

## **16 SUPPLY OF GOODS AND SERVICES**

16.1 The Contractor must supply the Goods and/or Services to the Principal in accordance with this Contract during the Term.

16.2 The Contractor must obtain, at the Contractor's expense, any Approvals necessary for the supply of the Goods and/or Services to the Principal.

16.3 Where this Contract is for the supply of Goods by reference to:

- (a) **'Variable Quantities'**, the Principal shall not be required to purchase all or any Goods listed except such of the Goods as may be ordered by the Principal;
- (b) **'Approximate Quantities'**, the quantities stated shall be regarded as an estimate only of the quantity which may be required. The Principal shall not be bound to purchase the exact nominated quantity of Goods, but the quantity ordered may vary within a margin not exceeding 25 percent above or below the nominated approximate quantity and any such variance shall not affect the unit price of the Goods; or
- (c) **'Fixed Quantities'**, the Principal shall purchase the actual quantity shown.

16.4 Where this Contract does not specify whether the required quantities are Fixed Quantities, Approximate Quantities or Variable Quantities, the Parties agree that they shall be deemed to be Variable Quantities.

16.5 The Principal may order requirements of any one type or item of the Goods either in one single lot or instalments or in such quantities as may be required.

16.6 The Principal shall not be required to take or accept all or any of the Services listed except such of the Services as may be ordered by the Principal from time to time during the Term.

16.7 Where the quantity or value set out in Scope of Services is described as 'approximate' it shall be regarded only as an estimate of the quantity or value which may be required under this Contract and the Principal shall not be required to take or accept said nominated approximate quantity or value of Services.

16.8 The Contractor acknowledges and agrees that the Principal may enter into arrangements or agreements with third parties for the purchase of goods or services the same as and/or similar to the Goods and/or Services.

16.9 If the Contractor:

- (a) delivers more Goods than the quantity specified in this Contract, the Principal may return any quantity of Goods provided by the Contractor in excess of that specified in this Contract to the Contractor at the Contractor's sole risk and expense; or
- (b) performs more Services than the quantity specified in this Contract, the Principal is not liable to pay for the additional quantity.

## **17 PLANT AND EQUIPMENT**

- 17.1 The Contractor must provide (at its cost) all Plant and Equipment, labour and haulage necessary for the performance of the Contractor's obligations under this Contract.
- 17.2 The Contractor must ensure that all Plant and Equipment and any other items which the Contractor uses or supplies in conjunction with the Services are of merchantable quality, comply with this Contract and all Legal Requirements, and are fit for their usual and intended purpose.

## **18 TIME FOR PERFORMANCE AND EXTENSIONS OF TIME**

- 18.1 The Contractor shall deliver the Goods in full to the Delivery Points and perform the Services at the times stated in this Contract. In this respect time shall be of the essence of this Contract.
- 18.2 Subject to Clauses 18.3, 18.4 and 18.5 and if the Services are unlikely to be completed and/or that the Goods will not be delivered to the Delivery Point by the Completion Date the Contractor is entitled to an extension to the Completion Date if the delay is due to:
- (a) breach by the Principal of its obligations under this Contract;
  - (b) delay or disruption caused by the Principal or the Principal's Representative, but does not include any delay or disruption caused by the Principal or the Principal's Representative acting in accordance with this Contract;
  - (c) a Force Majeure Event occurring before the Completion Date;
  - (d) suspension of this Contract under Clause 28, other than suspension of this Contract for breach of this Contract by the Contractor or the Contractor's Personnel; or
  - (e) a Variation being granted under Clause 27.
- 18.3 The Contractor may only claim an extension to the Completion Date if the Contractor:
- (a) could not reasonably have been expected to foresee the delay at the date of signing this Contract;
  - (b) has taken all reasonable steps to mitigate the delay and the effect of the delay; and
  - (c) or the Contractor's Personnel, did not cause the delay, whether by breach of this Contract or otherwise.
- 18.4 The Contractor's claim for an extension to the Completion Date must:
- (a) be made within 10 Business Days (or any other period agreed in writing by the Parties) after the cause of delay has arisen; and
  - (b) include the facts on which the claim to the extension to the Completion Date is based.
- 18.5 If the Principal's Representative reasonably considers that:
- (a) the claim for an extension of time under Clause 18.4 relates to an event listed in Clause 18.2; and
  - (b) Clauses 18.3 and 18.4 have been satisfied,
- the Principal must notify the Contractor within 10 Business Days of the claim for an extension of time under Clause 18.4 (or such other time agreed by the Parties) that an extension of time to the Completion Date is granted. The notice must include the period of extension granted by the Principal, which will be reasonable having regard to the nature of the event specified in Clause 18.2 (as determined by the Principal, acting reasonably).
- 18.6 The Principal may by written notice to the Contractor direct an extension of time to the Completion Date at:
- (a) any time that the Principal directs a Variation; or

(b) at any other time at the absolute discretion of the Principal,

notwithstanding that the Contractor has not submitted, and/or is not entitled to submit, a claim for an extension to the Completion Date. The Contractor acknowledges that the mechanism in this Clause 18.6 is a discretionary right of the Principal which may be exercised by the Principal for the sole benefit of the Principal and does not:

(c) impose any obligations on the Principal;

(d) to the maximum extent permitted by Law, give rise to any duty to act in good faith;

(e) in any way constitute a waiver or relaxation of any of the requirements under this Clause 18; or

(f) entitle the Contractor to claim any Loss of whatever nature arising out of, or in connection with, any extension of time granted by the Principal in accordance with this Clause 18.6.

18.7 If the Principal, considers (acting reasonably) that the Contractor is not entitled to an extension of time, the Principal's Representative must notify the Contractor within 10 Business Days (or any other period agreed in writing by the Parties) of receipt of the claim under Clause 18.4 that the Completion Date remains unchanged.

18.8 If the Contractor fails to comply with Clause 18.4 the Contractor will have no entitlement to an extension of time of the Completion Date.

18.9 If an extension of time is granted in accordance with this Clause 18, provided that those costs are not also reimbursable pursuant to Clauses 27 or 28, the Principal will reimburse the Contractor for any costs reasonably incurred and directly attributable to the delay, but without regard to overheads, profit or any other cost, loss, expense or damage.

## **19 LIQUIDATED DAMAGES**

19.1 Subject to Clauses 18, 27 and 28, if the Contractor does not perform the Services in full, and/or deliver the Goods in full to the Delivery Points by the Completion Date, the Contractor must pay to the Principal, Liquidated Damages for every day after the Completion Date to and including the earliest of:

(a) the date the Services and/or Goods are actually performed or delivered in full to the Delivery Points; or

(b) termination of this Contract.

19.2 If an extension of time is granted in accordance with Clause 18.5 after the Contractor has paid or the Principal has set off the Liquidated Damages payable under Clause 19.1, the Principal shall repay to the Contractor such of those Liquidated Damages as represent the days the subject of the extension of time.

19.3 The payment of Liquidated Damages will not relieve the Contractor from its obligations to perform the Services in full and/or deliver the Goods in full to the Delivery Points or from any of its obligations and liabilities under this Contract.

19.4 Liquidated Damages shall become due upon the issue of a notice by the Principal setting out the amount of Liquidated Damages payable by the Contractor to the Principal.

19.5 The Principal may recover the amount of Liquidated Damages:

(a) on demand from the Contractor; or

(b) by deducting such amount from any amount owed to the Contractor by the Principal,

after the elapse of the Completion Date.

19.6 The Contractor acknowledges that all sums payable by the Contractor to the Principal pursuant to this Clause 19 represent the Principal's genuine pre-estimate of the damages likely to be suffered by it if the Services are not performed in full and/or the Goods are not delivered in full to the Delivery Points, by the Completion Date and such sums shall not be construed as a penalty.

## **20 INSPECTION AND INFORMATION**

- 20.1 The Contractor must keep the Principal fully informed on all aspects of the Goods and/or Services, and must supply on request:
- (a) progress reports on the performance of the Goods and/or Services and in such detail as will allow the Principal to ascertain whether such are in conformity with this Contract; and
  - (b) the Contractor's Technical Material, reports, data and a detailed supply program, relating to the Goods and/or Services.
- 20.2 Subject only to providing reasonable notice, the Principal may itself or through an agent:
- (a) review, inspect, examine and witness tests of, any Goods and/or Services, or the performance of any Goods and/or Services; and
  - (b) inspect any equipment used in measuring any Goods and/or Services at any time up to 12 months after the measurement of the Goods and/or Services occurs,
- at the Delivery Point, the Site, the Principal's premises, the Contractor's premises and/or at the premises of any Subcontractors, as the case may be, and the Contractor must ensure that the Principal is granted the necessary access required for them to review, inspect, examine or witness tests of the Goods and/or Services.
- 20.3 The Contractor must give the Principal 10 Business Days' notice (or such other period as the Parties agree) prior to the date the Goods and/or Services will be ready for delivery, inspection or testing.
- 20.4 Any review, inspection, examination or witnessing of testing by the Principal or their results does not relieve the Contractor of its responsibilities under this Contract.
- 20.5 If, as a result of any review, inspection, examination or witnessing of testing, the Principal is not satisfied that the Goods and/or Services will comply with this Contract and the Contractor is notified in writing of such dissatisfaction, the Contractor agrees to take such steps as are necessary to ensure compliance.

## **21 DELIVERY OBLIGATIONS**

The Contractor must, in delivering the Goods to the Delivery Point:

- (a) not interfere with the Principal's activities or the activities of any other person at the Delivery Point; and
- (b) leave the Delivery Point secure, clean, orderly and fit for immediate use having regard to the condition of the Delivery Point immediately prior to the delivery of Goods.

## **22 RECEIPT AND ACCEPTANCE OF GOODS AND SERVICES**

- 22.1 Delivery and receipt of the Goods and/or Services shall not of itself constitute Acceptance of the Goods and/or Services by the Principal.
- 22.2 Acceptance of the Goods and/or Services occurs on the earlier of:
- (a) the Principal's Representative notifying the Contractor in writing that the Goods and/or Services have been accepted; or
  - (b) when after the lapse of 14 days after delivery of the Goods to the Delivery Points without the Principal notifying the Contractor in writing that the Goods have been rejected.
- 22.3 The risk of any damage, deterioration, theft or loss of the Goods after delivery but prior to Acceptance remains with the Contractor except where the damage, deterioration, theft or loss is caused by a negligent act or omission of the Principal or its agents or employees.
- 22.4 Where Goods are found to be Defective Goods, the Principal may reject any or all of the Defective Goods in accordance with Clause 23.



## **23 REJECTION AND REMOVAL OF DEFECTIVE GOODS OR DEFECTIVE SERVICES**

- 23.1 During the Defects Liability Period the Principal's Representative shall notify the Contractor in writing of the Defective Goods and/or Defective Services and may:
- (a) in the case of Defective Goods:
    - (i) direct that the Defective Goods be either replaced or rectified by the Contractor (at the Contractor's expense) within such reasonable time as the Principal's Representative may direct; or
    - (ii) elect to accept the Defective Goods whereupon the Contract Price shall be reduced by the extra costs the Principal incurs as a result of accepting those Goods; and/or
  - (b) in the case of Defective Services:
    - (i) reject the Defective Services, in which case the Contractor must re-perform the Services free of charge; or
    - (ii) make good or engage another contractor to make good the Defective Services whereupon the Contract Price shall be reduced by the extra costs the Principal incurs as a result of making good those Defective Services.
- 23.2 Should the Contractor fail to comply with a notice issued under Clause 23.1(a)(i) or 23.1(b)(i) within the time specified in that notice, the Principal shall be entitled to:
- (a) replace the Defective Goods or the Defective Services with goods/services (as applicable) of the same or similar quality;
  - (b) sell the Defective Goods; and/or
  - (c) have the Defective Goods redelivered at the Contractor's risk and expense to the Contractor's premises,
- and recover its costs losses and expenses of so doing from the Contractor.
- 23.3 Where the Contractor has made good any Defective Goods or Defective Service under this Clause 23, those Goods and/or Services will be subject to the same Defects Liability Period as the original Goods and/or Services, from the date the Contractor made good the Defective Goods or Defective Services (as applicable).
- 23.4 The Principal shall not be responsible for the care or custody of any Defective Goods after the Contractor has been notified that they are defective.
- 23.5 Upon a refund of the price paid for the Defective Goods which had previously been Accepted, property in those Goods shall revert to the Contractor.
- 23.6 Without limiting Clause 11, any cost or expense incurred by the Principal in connection with the Defective Goods and/or the Defective Services under this Clause 23, shall be a debt due from the Contractor to the Principal.
- 23.7 Nothing in this Contract shall prejudice any other right which the Principal may have against the Contractor arising out of the failure by the Contractor to provide Goods and/or Services in accordance with this Contract.

## **24 FAILURE TO PROVIDE GOODS AND SUPPLY SERVICES**

Where a State of Emergency is declared under the *Emergency Management Act 2005 (WA)* or where the Contractor is unable or fails (for whatever reason) to provide the Goods and/or Services in accordance with this Contract, the Principal may, for as long as determined by the Principal (acting reasonably) and without being liable in any way to the Contractor (including for that part of the Contract Price which relates to the relevant Goods and/or Services), obtain or acquire such goods and services as it requires from a third party.

## **25 PROPERTY AND RISK IN THE GOODS**

- 25.1 Risk in Goods will pass from the Contractor to the Principal on Acceptance of those Goods.
- 25.2 Upon payment for the Goods, property in the Goods shall pass to the Principal. Payment shall include credit by way of set off.
- 25.3 The Contractor warrants that:
- (a) it has complete ownership of the Goods free of any liens, charges and encumbrances and that it sells the Goods to the Principal on that basis; and
  - (b) the Principal will be entitled to clear title to and complete and quiet possession of the Goods upon payment for them.

## **26 REPRESENTATIVES**

- 26.1 Each Party must appoint a Representative who will be authorised to act on behalf of the relevant Party in relation to this Contract.
- 26.2 The Principal's Representative may exercise all of the Principal's rights and functions under this Contract (including giving directions), except in connection with terminating this Contract, or resolving a Dispute which is the subject of the Dispute resolution procedure in Clause 38 or in respect of any matter that the Principal's Representative does not have delegated authority to bind the Principal in respect of.
- 26.3 The Contractor's Representative is responsible for the quality, timeliness, cost and provision of the Goods and/or Services in accordance with this Contract. The Contractor is liable for all acts and omissions of the Contractor's Representative.

## **27 VARIATION**

- 27.1 A direction to the Contractor to perform a Variation may only be effected in accordance with this Clause 27.
- 27.2 If the Principal or the Principal's Representative requests the Contractor must prepare and submit a variation proposal addressing any proposed Variation ('**Variation Proposal**'). The Principal agrees to provide such further information as reasonably requested by the Contractor to enable the Contractor to prepare the Variation Proposal. The Contractor must submit the Variation Proposal to the Principal within 5 Business Days (or within such other period as the Parties agree) of the Principal's request for the proposal.
- 27.3 If a Variation requires the omission of Goods and/or Services, the Principal's Representative may have the omitted Goods and/or Services provided by others or not as the Principal sees fit.
- 27.4 The Variation Proposal must specify:
- (a) the effect the Contractor anticipates the proposed Variation will have on the Completion Date and the Contract Price (if any); and
  - (b) any other relevant matters that might assist the Principal to make a decision regarding the Variation Proposal.
- 27.5 Following receipt of the Variation Proposal by the Principal, subject to Clause 27.2, the Parties must seek to agree on the price for the Variation and the impact of the Variation on the relevant Completion Date.
- 27.6 The Principal or the Principal's Representative is not obliged to direct a Variation after receiving the Variation Proposal from the Contractor.
- 27.7 The Contractor acknowledges and agrees that, subject to Clause 27.10, the Principal or the Principal's Representative may direct the Contractor in accordance with Clause 27.13 to perform the Variation even if the Parties are unable to agree on the price for the Variation or the impact of the Variation on the relevant Completion Date.

- 27.8 The Contractor must not commence performing the proposed Variation unless and until the Principal or the Principal's Representative directs the Contractor in accordance with Clause 27.13.
- 27.9 If the Parties agree on the details in the Variation Form, the Principal will sign and issue the Variation Form and the Contractor will be entitled to be paid the agreed amount set out in the Variation Form once the Variation has been performed.
- 27.10 If the Parties are unable to agree on:
- (a) the price for the Variation within 10 Business Days after the date of receipt of the Variation Proposal from the Contractor, the Variation must be valued by the Principal's Representative as follows:
    - (i) if this Contract prescribes rates or prices to be applied in respect of the Goods and/or Services, those rates or prices must be used; or
    - (ii) if Clause 27.10(a)(i) does not apply, using reasonable rates or prices, having regard to all circumstances which the Principal's Representative (acting reasonably) considers to be relevant; and
  - (b) the impact of the Variation on the Completion Date,  
then the Principal's Representative must determine a reasonable impact and amend the relevant Completion Date by notice in writing to the Contractor.
- 27.11 A Variation does not invalidate this Contract.
- 27.12 The Contractor may request that the Principal direct a Variation and the Principal or the Principal's Representative may, in its absolute discretion, direct a Variation under this Clause 27 or elect not to direct a Variation.
- 27.13 A direction is not a Variation unless a Variation Form has been signed by the Principal.

## **28 SUSPENDING THIS CONTRACT**

- 28.1 The Principal or the Principal's Representative may, at any time and for any reason, suspend this Contract or any part of this Contract.
- 28.2 When the Contractor receives a written notice of suspension from the Principal or the Principal's Representative, the Contractor must suspend the performance of its obligations under this Contract until such time that the Principal or the Principal's Representative directs that this Contract is no longer suspended. At such time the Contractor must promptly recommence the performance of the Contractor's obligations under this Contract.
- 28.3 Where the suspension of this Contract is not a result of any default or action by the Contractor or the Contractor's Personnel, the Principal will reimburse the Contractor for the Contractor's verified reasonable additional costs incurred as a direct consequence of the suspension of this Contract. For the avoidance of doubt, such costs must not include Consequential Losses.
- 28.4 If the Principal or the Principal's Representative suspends this Contract or any part of it in accordance with Clause 28.1 (other than where such suspension is due to default or action by the Contractor or the Contractor's Personnel), the Completion Date and the End Date are extended by the period of that suspension.
- 28.5 The remedies set out in Clauses 28.3 and 28.4 are the Contractor's sole and exclusive remedy in respect of the Principal suspending this Contract.

## **29 WARRANTIES**

The Contractor shall obtain all warranties specified in this Contract including any warranties that are obtained by any Subcontractor, and shall ensure that the Principal will have the benefit of the said warranties.

## **30 VARIATION TO CONTRACT TERMS**

None of the terms of this Contract shall be varied, waived, discharged or released either under any Legal Requirement, except by the express written agreement of the Principal.

## **31 PRICE BASIS**

31.1 Unless otherwise stated in this Contract, the Contract Price shall be firm and not subject to rise and fall.

31.2 Unless otherwise provided in this Contract, the Contractor shall pay all packaging, freight, Taxes, insurances, and other charges whatsoever, in connection with this Contract and the Goods and/or Services including delivery of Goods to the Delivery Point and the return of Goods wrongly supplied and all packaging.

31.3 On each Review Date, the Contractor shall be entitled to adjust the Contract Price for the Goods and /or Services in accordance with this Clause 31.3. The Contract Price shall be reviewed and adjusted by the percentage movement as published in the Consumer Price Index since the last Review Date. The Contractor shall only be entitled to review the Contract Price for the Goods and/or Services on the Review Date and following such review the Contract Price shall be deemed to be fixed until the next Review Date.

## **32 INVOICING AND PAYMENT**

32.1 As soon as reasonably practicable following the end of each calendar month (or as otherwise agreed by the Parties), the Contractor must provide to the Principal a Progress Claim or if the Principal directs, an Invoice.

32.2 Upon approval of a Progress Claim by the Principal:

(a) if the Contractor has entered into an RCTI Agreement, the Principal will, generate a Recipient Created Tax Invoice. References to 'Invoice' in the remainder of this Clause 32 should be taken to include RCTI where applicable; or

(b) if the Contractor has not entered into an RCTI Agreement, the Contractor will submit an Invoice, in respect of the Goods and/or Services that are the subject of the approved Progress Claim.

32.3 A Progress Claim and any Invoice must include the details set out in the Contract Specifics.

32.4 Subject to any right of the Principal to retain, withhold, reduce or set-off any amount due to the Contractor, the Principal must pay all Invoices that comply with Clause 32.3 within 20 Business Days (or such other period as the Principal's Representative and Contractor agree) of their generation or receipt (as the case may be), except where the Principal:

(a) is required by any Legal Requirement to pay within a shorter time frame, in which case the Principal must pay within that time frame;

(b) exercises any right to retain, withhold, reduce or set-off any amount due to the Contractor; or

(c) disputes the Invoice, in which case:

(i) to the extent permitted by any Legal Requirement, the Principal may withhold payment of the disputed part of the relevant Invoice pending resolution of the Dispute; and

(ii) if the resolution of the Dispute determines that the Principal must pay an amount to the Contractor, the Principal must pay that amount upon resolution of that Dispute.

32.5 A payment made pursuant to this Contract will not be taken or construed as proof or admission that the Goods delivered or the Services performed (or any part thereof) were to the satisfaction of the Principal but will only be taken to be payment on account.

32.6 Failure by the Principal to pay the amount payable at the due time will not be grounds to invalidate or avoid this Contract.

32.7 The Contractor shall not be entitled to any interest or charge for extending credit or allowing time for the payment of the Contract Price.

### **33 CONFIDENTIAL INFORMATION AND PUBLICITY**

33.1 The Contractor must not advertise, publish or release to the public:

- (a) the Confidential Information; or
- (b) other information concerning the Goods and/or Services, or this Contract, without the prior written approval of the Principal.

33.2 The Contractor must not, and must ensure that the Contractor's Personnel do not, without the prior written approval of the Principal:

- (a) use Confidential Information except as necessary for the purposes of fulfilling its obligations under this Contract; or
- (b) disclose the Confidential Information:
  - (i) other than (to the extent they require the information to enable the Contractor to fulfil its obligations under this Contract) to the Contractor's legal advisors, accountants or auditors; or
  - (ii) where disclosure is required by Law (including disclosure to any stock exchange).

33.3 The rights and obligations under this Clause 33 continue after the End Date.

### **34 GOODS AND SERVICES TAX**

34.1 Any reference in this Clause to a term defined or used in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.

34.2 Unless expressly included, the consideration for any supply made under or in connection with this Contract does not include an amount on account of GST in respect of the supply ('**GST Exclusive Consideration**') except as provided under this Clause.

34.3 Any amount referred to in this Contract (other than an amount referred to in Clause 34.8) which is relevant in determining a payment to be made by one of the Parties to the other is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.

34.4 To the extent that GST is payable in respect of any supply made by a Party ('**Supplier**') under or in connection with this Contract, the consideration to be provided under this Contract for that supply (unless it is expressly stated to include GST) is increased by an amount equal to the relevant part of the GST Exclusive Consideration (or its GST exclusive market value if applicable) multiplied by the rate at which GST is imposed in respect of the supply.

34.5 The recipient must pay the additional amount payable under Clause 34.4 to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.

34.6 The Supplier must issue a tax invoice to the recipient of the taxable supply at or before the time of payment of the consideration for the supply as increased on account of GST under Clause 34.4 or at such other time as the Parties agree.

34.7 Whenever an adjustment event occurs in relation to any taxable supply made under or in connection with this Contract the Supplier must determine the net GST in relation to the supply (taking into account any adjustment) and if the net GST differs from the amount previously paid under Clause 34.5, the amount of the difference must be paid by, refunded to or credited to the recipient, as applicable.

34.8 If one of the Parties to this Contract is entitled to be reimbursed or indemnified for a loss, cost, expense or outgoing incurred in connection with this Contract, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit to which the Party being reimbursed or indemnified (or its representative member) is entitled in relation to that loss, cost, expense

or outgoing and then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of GST in accordance with Clause 34.4.

## **35 CONSEQUENTIAL LOSS**

In relation to Consequential Loss:

- (a) subject to Clauses 11 and 35(b) but notwithstanding any other Clause, neither Party will be liable to the other Party in any circumstances for any Consequential Loss, to the extent permitted by Law; and
- (b) Clause 35(a) does not exclude liability of the Contractor for Consequential Loss, if, but for Clause 35(a) the Contractor would have insurance cover for that Consequential Loss under an Insurance.

## **36 LIMITS ON LIABILITY**

- 36.1 The Contractor's liability to the Principal in respect of Loss under this Contract in the aggregate for all claims is limited to the Contractor Maximum Liability Amount.
- 36.2 To the extent that the Principal is liable to the Contractor under any Legal Requirement or under this Contract, the Principal's liability to the Contractor in respect of Loss under this Contract in the aggregate for all claims is limited to the Principal Maximum Liability Amount.
- 36.3 The limitation of liability in Clause 36.1 does not apply in respect of any fraud, deliberate default, gross negligence or Wilful Misconduct or any act or omission done or not done with a reckless disregard for the consequences by the Contractor, the Contractor's Personnel, or for any loss arising from any claim by a third party against the Principal arising out of any act or omission of the Contractor or the Contractor's Personnel.

## **37 FORCE MAJEURE EVENT**

- 37.1 A Party must give timely notice to the other Party of any Force Majeure Event that precludes the Party (whether partially or wholly) from complying with its obligations under this Contract ('**Affected Obligations**') and must either:
  - (a) to the extent practicable, specify in the notice the length of delay in the Completion Date that will result from the Force Majeure Event; or
  - (b) where it is impracticable to specify the length of delay at the time the notice is delivered, provide the Principal with periodic supplemental notices during the period over which the Force Majeure Event continues.
- 37.2 The Party's obligation to supply the Affected Obligations is suspended for the duration of the actual delay arising out of the Force Majeure Event.
- 37.3 The Parties must use their reasonable endeavours to remove or relieve the Force Majeure Event and to minimise the delay caused by any Force Majeure Event.
- 37.4 If a Force Majeure Event continues to affect the supply of the Goods and/or Services for a continuous period of 180 days, the Principal may terminate this Contract by serving written notice on the Contractor and neither Party has liability to the other except in respect of any event arising prior to the date of this Contract being terminated.

## **38 SETTLEMENT OF DISPUTES**

- 38.1 In the event of a Dispute either Party may deliver a written notice to the other Party that identifies the Dispute ('**Notice of Dispute**').
- 38.2 The Party that delivers the Notice of Dispute should also provide enough information about the Dispute for the other Party to reasonably understand the:
  - (a) alleged facts on which the claim is based;

- (b) legal basis on which the claim is made; and
  - (c) relief that is claimed.
- 38.3 Within 10 Business Days of a Notice of Dispute being delivered, the receiving Party must deliver a written response to the other Party stating:
- (a) its position in relation to the Dispute; and
  - (b) the basis for its position.
- 38.4 Within 10 Business Days of receipt of the response referred to in Clause 38.3, the Parties agree to attempt in good faith to resolve through negotiation any Dispute arising under or in relation to this Contract.
- 38.5 If the Parties are unable to resolve the Dispute within the 10 Business Days of attempting in good faith negotiations in accordance with Clause 38.4, either Party may initiate proceedings in a court of competent jurisdiction.
- 38.6 Either Party may, with the agreement of the other Party, at any time, refer the Goods and/or Services (or any part thereof) to an appropriate independent expert, agreed to by the Parties, for examination and report as to their compliance with this Contract. The decision of the expert shall be final and binding upon both Parties, and the expense of such reference shall be paid by the unsuccessful Party.

## **39 TERMINATION OF CONTRACT**

- 39.1 If a Party breaches or repudiates this Contract, nothing in this Contract prejudices the right of the other Party to recover damages (including loss of bargain damages) or exercise any other right under this Contract or under any applicable Legal Requirement.
- 39.2 The Principal may, in its absolute discretion, and without being obliged to give any reasons, terminate this Contract at any time by giving not less than 5 Business Days written notice to the Contractor. The Principal shall pay to the Contractor:
- (a) the amount due to the Contractor evidenced by all unpaid Invoices and approved Progress Claims; and
  - (b) the cost of materials and equipment reasonably ordered by the Contractor for the Goods and/or Services and which the Contractor is liable to accept, but only if they will become the Principal's property on payment,
- and shall have no further liability to the Contractor.
- 39.3 If the Contractor:
- (a) subject to Clause 38, fails to duly and punctually observe, perform and comply with any term, condition or stipulation contained or implied in this Contract and such failure continues for a period of 14 days (or such other period as having regard to the circumstances the Principal may reasonably allow) after service on the Contractor of a written notice requiring the Contractor to observe, perform and comply with such term, condition or stipulation or otherwise to remedy the breach;
  - (b) (being a corporation) goes into liquidation (except for the purpose of reconstruction or amalgamation of which the Contractor has given the Principal 5 Business Days prior written notice of such reconstruction or amalgamation) or is otherwise dissolved or if a receiver or receiver/manager of the whole or any part of the assets and undertaking of the Contractor is appointed or if the Contractor enters into any composition or scheme of arrangement with its creditors or if an inspector or like official is appointed to examine the affairs of the Contractor or the Contractor enters into voluntary or other external administration;
  - (c) (being a natural person) commits an act of bankruptcy or if an order is made for the sequestration in bankruptcy of the estate of the Contractor, or if the Contractor assigns its estate or enters into a scheme of arrangement or composition for the benefit of its creditors;
  - (d) assigns or subcontracts this Contract or any part thereof without the prior written consent of the Principal;

- (e) or any Contractor's Personnel, are found guilty of any criminal act related to the Goods and/or Services that may bring the Principal into disrepute;
- (f) includes in its Tender any statement, representation, fact, matter, information or thing which is false, untrue, incorrect or inaccurate, whether known to the Contractor or not; or
- (g) or the Contractor's Personnel:
  - (i) cause a safety issue, condition or any risk to health in breach of this Contract; and
  - (ii) the Contractor, within 5 Business Days of a notice from the Principal advising the Contractor that it has caused a safety issue, condition or any risk to health in breach of this Contract, does not show cause to the Principal's satisfaction why the Principal should not end this Contract,

then the Principal may by notice in writing to the Contractor immediately terminate this Contract whether any Orders remain outstanding or not and thereafter the Principal may engage or contract with any person or corporation other than the Contractor to perform and complete this Contract.

- 39.4 The Principal shall ascertain the amount of all damages and expenses suffered or incurred by the Principal in consequence of any of the matters referred to in Clause 39.3 and all such amounts may be deducted from amounts then owing to the Contractor or may be recovered in court by the Principal.
- 39.5 When this Contract is terminated, the Contractor must promptly return to the Principal any of the Principal's property or documents which the Principal owns or in which the Principal has an interest.
- 39.6 The termination of this Contract does not affect:
  - (a) any rights of the Parties accrued before the End Date; and
  - (b) the rights and obligations of the Parties under this Contract which, expressly or by implication from its nature, are intended to continue after the End Date.

## **40 WAIVERS AND AMENDMENTS**

- 40.1 This Contract may only be amended, or its provisions waived, in writing by the Parties.
- 40.2 No forbearance, delay or indulgence by the Principal in enforcing the provisions of this Contract shall prejudice, restrict or limit the rights of that Party, nor shall any waiver of those rights operate as a waiver of any subsequent breach.

## **41 ENTIRE AGREEMENT**

- 41.1 To the extent permitted by Law, this Contract embodies the entire agreement between the Parties and supersedes all prior conduct, arrangement, agreements, understandings, quotation requests, representations, warranties, promises, statements, or negotiations, express or implied, in respect of the subject matter of this Contract.
- 41.2 To the extent permitted by Law and to the extent the Contractor's terms and conditions are supplied to the Principal in respect of the Goods and/or Services, those terms and conditions will be of no legal effect and will not constitute part of this Contract.

## **42 RIGHTS AND REMEDIES**

The Principal may exercise the rights herein conferred in addition to all or any other rights or remedies which the Principal shall or may be entitled to against the Contractor whether under a Legal Requirement or this Contract.

## **43 INSURANCE**

- 43.1 The Contractor must, at its own cost and expense, as a minimum procure and maintain the Insurances:
  - (a) on the terms and conditions set out in this Clause and otherwise on terms acceptable to the Principal; and



- (b) from insurers approved by the Principal which either:
  - (i) carry on business in Australia and are authorised by the Australian Prudential Regulation Authority; or
  - (ii) if an overseas insurer, covers claims lodged and determined in the jurisdiction of Australia. Any limitations regarding this requirement must be notified and agreed to by the Principal.

43.2 The Principal must not unreasonably withhold or delay its approval of an insurer or the terms and conditions of the Insurance.

43.3 Without limiting Clause 43.1, the Contractor must:

  - (a) pay all premiums and all deductibles applicable to the Insurance when due; and
  - (b) promptly reinstate any Insurance required under this Clause 43 if it lapses or if cover is exhausted.

43.4 To the extent available at the times of placement and each renewal, each Insurance must:

  - (a) provide that the Insurance is primary with respect to the interests of the Principal and any other insurance maintained by the Principal is excess to and not contributory with the Insurance;
  - (b) except for compulsory statutory workers' compensation insurance, compulsory motor vehicle insurance and professional indemnity insurance, include a cross liability endorsement that all agreements and endorsements except limits of liability must operate in the same manner as if there was a separate policy of insurance covering each Party insured and a failure by any insured Party to observe and fulfil the terms and conditions will not affect any other Party;
  - (c) provide that where the Principal is not a named insured the insurer must waive rights of subrogation against the Principal;
  - (d) provide that a notice of claim given to the insurer by an insured under the Insurance must be accepted by the insurer as a notice of claim given by the Principal; and
  - (e) state that it is governed by the Laws of the Commonwealth of Australia and that courts of Australia shall have exclusive jurisdiction in any dispute under the policy.

43.5 The effecting and maintaining of the Insurance by the Contractor does not, in any way, affect or limit the liabilities or obligations of the Contractor under this Contract.

43.6 The Contractor must maintain *public and product liability insurance*. The public and product liability policy must:

  - (a) come into effect on or before the Start Date and be maintained until the Insurance End Date;
  - (b) be in the joint names of the Contractor and the Principal and the Principal's Personnel;
  - (c) be for an amount of not less than the amount set out in the Contract Specifics in respect of any one claim and not less than the amount set out in the Contract Specifics in the aggregate during any one 12 month period of insurance;
  - (d) cover the liability of the Contractor, the Contractor's Personnel and the Principal in respect of:
    - (i) loss of, damage to, or loss of use of, any real or personal property; and
    - (ii) the bodily injury of, disease or illness (including mental illness) to, or death of, any person (other than liability which is required by any Legal Requirement to be insured under a workers compensation policy),arising out of or in connection with the performance of this Contract (including the provision of the Goods and/or Services) by the Contractor; and
  - (e) be endorsed to cover:

- (i) the use of unregistered motor vehicles or unregistered mobile plant and equipment used in connection with this Contract; and
- (ii) sudden and accidental pollution.

43.7 In addition to any *compulsory motor vehicle third party insurance* required to be taken out by the Contractor under any Legal Requirement, the Contractor must also maintain *vehicle and equipment insurance* for the Contractor's vehicles, registered plant and equipment used in connection with this Contract whether owned, hired or leased ('**Contractor's Vehicles**'). The vehicle and equipment liability policy must:

- (a) come into effect on or before the Start Date and be maintained until the Insurance End Date;
- (b) cover against all loss and/or damage to the Contractor's Vehicles;
- (c) cover third party personal injury or death and third party property damage liability (and include bodily injury gap protection) involving the Contractor's Vehicles;
- (d) be for an amount of not less than the market value of the plant and equipment, and otherwise for not less than the amount set out in the Contract Specifics for any one claim or occurrence and unlimited in the aggregate; and
- (e) other than compulsory motor vehicle third party insurance required by virtue of any Legal Requirement, to the extent available from the insurance market from time to time, be endorsed to contain a principal's indemnity extension in favour of the Principal.

43.8 The Contractor must insure against *liability for death of or injury to persons employed by or deemed by a Legal Requirement to be employed by the Contractor* including liability by statute and at common law. This insurance cover must:

- (a) come into effect on or before the Start Date and be maintained until the Insurance End Date;
- (b) to the extent permitted by any Legal Requirement, be extended to indemnify the Principal and Principal's Personnel for their statutory and common law liability to natural persons employed or engaged by the Contractor; and
- (c) be for not less than the amount set out in the Contract Specifics in respect of any one event.

43.9 The Contractor must maintain *professional indemnity insurance*. The professional indemnity policy must:

- (a) come into effect on or before the Start Date and be maintained without interruption until the date set out in the Contract Specifics;
- (b) be for not less than the amount set out in the Contract Specifics in respect of any one claim and not less than the amount set out in the Contract Specifics in the aggregate for all claims arising in any one 12 month period of insurance;
- (c) include one full automatic reinstatement of the limit of liability;
- (d) cover liability arising from any act or omission in connection with or arising out of the professional activities and duties under this Contract;
- (e) cover claims in respect of this Contract under the *Competition and Consumer Act 2010* (Cth), *Fair Trading Act 2010* (WA) and any similar legislation in any other state or territory, insofar as they relate to the provision of professional advice; and
- (f) be endorsed to contain a principal's indemnity extension in favour of the Principal.

43.10 The Contractor must not do or omit to do any act that would be grounds for an insurer to refuse to pay a claim made under any of the Insurance.

43.11 The Contractor must give the Principal at least 20 Business Days prior notice of cancellation, non-renewal or a material alteration of the Insurance.

43.12 The Contractor must ensure that its Subcontractors are insured as required by this Clause 43, as appropriate (including as to amounts of insurance and type of insurance) given the nature of work to be performed by them, as if they were the Contractor.

- 43.13 The Contractor must, on or prior to the Start Date and otherwise when requested by the Principal, promptly satisfy the Principal that each Insurance it is required to procure and maintain under this Contract is current by providing to the Principal evidence reasonably required by the Principal including terms to the extent necessary to demonstrate compliance with this Contract. Nothing in this Clause will fix the Principal with notice of the contents of any policy and must not be raised as a defence to any claim by the Principal against the Contractor.
- 43.14 If the Contractor fails to procure and maintain the Insurance in accordance with this Contract, the Principal may, but is not obliged to procure and maintain any such Insurance and the cost of doing so will be a debt due and immediately payable from the Contractor to the Principal.
- 43.15 Whenever a claim is made under any of the Insurance, the Contractor is liable for any excess or deductible payable as a consequence.
- 43.16 The Contractor must:
- (a) inform the Principal in writing immediately if it becomes aware of any actual, threatened or likely claims in connection with this Contract under any of the Insurances, except claims which the Principal may have against the Contractor; and
  - (b) where relevant provide all such assistance to the Principal as may be required for the preparation and negotiation of insurance claims.
- 43.17 The Insurances are primary, and not secondary, to the indemnities referred to in this Contract. The Principal is not obliged to make a claim or institute proceedings against any insurer under the Insurance before enforcing any of its rights or remedies under the indemnities referred to in this Contract. In addition, the Parties acknowledge that if a claim is made under an Insurance policy by the Principal, it is their intention that the insurer cannot require the Principal to exhaust any indemnities referred to in this Contract before the insurer considers or meets the relevant claim.
- 43.18 The Contractor at the discretion of the Principal may be required to provide the Principal with a risk management plan relating to this Contract in accordance with AS/NZS 4360-2004 Risk Management.

#### **44 INDUSTRIAL AWARDS**

- 44.1 With respect to all work done in Western Australia under this Contract, the Contractor shall observe, perform and comply in all material respects with all relevant industrial awards, industrial agreements and orders of courts or industrial tribunals applicable to the Services and this Contract.
- 44.2 Failure by the Contractor to comply with Clause 44.1 hereof shall entitle the Principal by notice in writing to the Contractor to immediately terminate this Contract, but without prejudice to any other rights or remedies of the Principal.

#### **45 GOVERNING LAW**

This Contract and any dispute arising out of or in connection with it or its subject matter or formation (including non-contractual disputes) shall be governed by, construed and take effect in accordance with the Laws of the State of Western Australia and the Parties hereby irrevocably agree that the courts of the State of Western Australia will have exclusive jurisdiction to settle any dispute that arises out of or in connection with this Contract or its subject matter or formation (including non-contractual disputes).

#### **46 PROPORTIONATE LIABILITY**

Each Party agrees that Part 1F of the *Civil Liability Act 2002 (WA)*, to the extent that the same may be lawfully excluded, is excluded from operation with respect to any Dispute, claim or action brought by one Party against the other Party arising out of or in connection with:

- (a) this Contract; and
- (b) any of the Contractor's Subcontractors or the Subcontractor's personnel.

## **47 CONSTRUCTION CONTRACTS ACT**

- 47.1 The Contractor must promptly and without delay, give the Principal's Representative a copy of any written communication of whatever nature in relation to the Construction Contracts Act that the Contractor gives to the Principal or receives from a Subcontractor.
- 47.2 If the Principal's Representative becomes aware that a Subcontractor engaged by the Contractor is entitled to suspend or has suspended work pursuant to the Construction Contracts Act, the Principal may in its absolute discretion pay the Subcontractor such money that may be owing to the Subcontractor in respect of that work and any amount paid by the Principal will be a debt due from the Contractor to the Principal.
- 47.3 The Contractor must ensure that none of its subcontracts contain terms which are prohibited by the Construction Contracts Act.

## **48 PERSONAL PROPERTY SECURITIES ACT**

- 48.1 For the purposes of this Clause 48:
- (a) the **'Principal's Personal Property'** means all personal property the subject of a security interest granted under this Contract; and
  - (b) words and phrases used in this Clause 48 that have defined meanings in the PPS Law have the same meaning as in the PPS Law unless the context otherwise indicates.
- 48.2 If the Principal determines that this Contract (or a transaction in connection with it) is or contains a security interest for the purposes of the PPS Law, the Contractor agrees to do anything (including obtaining consents, signing and producing documents, getting documents completed and signed and supplying information) which the Principal asks and considers necessary for the purposes of:
- (a) ensuring that the security interest is enforceable, perfected and otherwise effective;
  - (b) enabling the Principal to apply for any registration, complete any financing statement or give any notification, in connection with the security interest; and/or
  - (c) enabling the Principal to exercise rights in connection with the security interest.
- 48.3 The Principal need not give any notice under the PPSA (including notice of a verification statement) unless the notice is required by the PPSA to be given.
- 48.4 The Contractor must notify the Principal as soon as the Contractor becomes aware of any of the following:
- (a) if any personal property which does not form part of the Principal's Personal Property becomes an accession to the Principal's Personal Property and is subject to a security interest in favour of a third party, that has attached at the time it becomes an accession; or
  - (b) if any of the Principal's Personal Property is located or situated outside Australia or, upon request by the Principal, of the present location or situation of any of the Principal's Personal property.
- 48.5 The Contractor must not:
- (a) create any security interest or lien over any of the Principal's Personal Property whatsoever (other than security interests granted in favour of the Principal);
  - (b) sell, lease or dispose of its interest in the Principal's Personal Property;
  - (c) give possession of the Principal's Personal Property to another person except where the Principal expressly authorises it to do so;
  - (d) permit any of the Principal's Personal Property to become an accession to or commingled with any asset that is not part of the Goods; or

- (e) change its name without first giving the Principal 15 Business Days' notice of the new name or relocate its principal place of business outside Australia or change its place of registration or incorporation.

48.6 Everything the Contractor is required to do under this Clause 48 is at the Contractor's expense.

48.7 Neither the Principal nor the Contractor will disclose information of the kind mentioned in section 275(1) of the PPSA and the Contractor will not authorise, and will ensure that no other Party authorises, the disclosure of such information. This Clause 48 does not prevent disclosure where such disclosure is required under section 275 of the PPSA because of the operation of section 275(7) of the PPSA.

#### **49 APPLICATION OF THIS CONTRACT**

This Contract applies to the performance of the Contractor's obligations under this Contract whether performed before, on or after the Start Date.