**CONSULTANCY AGREEMENT (SHORT FORM)
RELATED TO CONSTRUCTION**

[***Guidance Note: This Consultancy Agreement (Short Form) is intended for Services below the VIPP threshold, namely less than $1m or more for regional Victoria and less than $3m for metropolitan Melbourne or for state-wide activities.***]

[***Guidance Notes (located throughout this document) and items that you need to complete are shown in yellow shading. Ensure you remove guidance notes before releasing this document.]***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Revision:** | **Date:** | **Clause reference:** | **Details:** | **Endorsed by:** |
| October 2013 | October 2013 | Not applicable | Version 1 |  |
| June 2018 | 28/June 2018 | Throughout | Update Consultancy Agreement (Short form) as part of multi-agency working group | DTF |

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**CONSULTANCY AGREEMENT (SHORT FORM)
RELATED TO CONSTRUCTION**

|  |  |
| --- | --- |
| **Project Name** | [***Insert***] |

|  |  |  |
| --- | --- | --- |
| **Principal** | ***Principal's Name***[***Insert***] | ***ABN/ACN*** [***Insert***] |
| ***Address***[***Insert***] |
| ***Principal's Representative***[***Insert***] |
| ***Email***[***Insert***] |

|  |  |  |
| --- | --- | --- |
| **Consultant** | ***Consultant's Name***[***Insert***] | ***ABN/ACN***[***Insert***] |
| ***Address***[***Insert***] |
| ***Consultant's Representative***[***Insert***] |
| ***Email***[***Insert***] |

|  |  |
| --- | --- |
| **Agreement** | The Consultant must carry out the Services and otherwise comply with and be bound by this Agreement.This Agreement comprises the following documents:this execution page;the Schedule;the Terms and Conditions; the Brief; the Letter of Acceptance; and[***insert***]. The documents comprising the Agreement will be given the order of precedence shown above in the case of ambiguity, discrepancy or inconsistency.[***Drafting Note: Under (f), include other relevant correspondence or material which forms part of the contract Agreement.***] |

**Executed** as a deed.

**Date:** [***insert***]

[***Drafting Note: The Delegate inserts the date of execution. Note, the Delegate always signs last.***]

**This Agreement is made between the Principal and the Consultant upon and subject to the Terms and Conditions attached.**

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed, sealed and delivered** for and on behalf of the **Principal** by its authorised representative in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of authorised representative |
|  |  |  |  |
| Full name of witness |  |  | Full name of authorised representative |

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed, sealed and delivered** for and on behalf of the **Consultant** by its authorised representative who warrants that he or she is a duly authorised representative able to execute on behalf of the Consultant in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of authorised representative |
|  |  |  |  |
| Full name of witness |  |  | Full name of authorised representative |

**Schedule - Details of Agreement**

The details are:

| **Item** | **Description**  | **Details** |
| --- | --- | --- |
| 1.
 | Project:(Clause 1.1) | [***Insert***] |
| 1.
 | Services:(Clause 1.1) | [***Insert brief description of Services***] |
| 1.
 | Brief: (Clause 1.1) | [***Insert consultancy brief***] |
| 1.
 | Commencement Date: (Clause 1.1) | [***Insert***]*(If nothing stated, the date of the Letter of Acceptance or such other date stated in the Letter of Acceptance): ………………* |
| 1.
 | Completion Date:(Clause 1.1) | *(This must be an actual date and not a reference to a tender submission or tender documentation)* |
| 1.
 | Confidential Information:(Clause 1.1) | [***Insert Principal specific Confidential Information***] |
| 1.
 | Not used | Not used |
| 1.
 | Consultant's Representative: (Clause 4.1(a)) |  |
| 1.
 | Key People(Clause 4.1(a)) | ***Name*** | ***Role*** |
| [***Insert***] | [***Insert***] |
|  |  |
| 1.
 | Principal’s Representative(Clause 4.2) |  |
| 1.
 | Amount of Public Liability Insurance:(Clause 13(a)) | Amount: [***Insert***]*(If nothing* *stated, default amount is $10,000,000)*  |
| 1.
 | Amount of Professional Indemnity Insurance: (Clauses 13(a) and 13(c)) | Is Professional Indemnity Insurance required?**Yes** **No** *(If nothing selected, Professional Indemnity Insurance is required)*Amount:[***Insert***]*(If nothing stated, default amount is $5,000,000)*  |
| 1.
 | Fees and Expenses[***Guidance Note: only 1 of the 3 Fee Options should be included in the Agreement.***] | **Fees payable for the Services:****Option 1: Lump Sum** **Option 2: Instalments** **Option 3: Rates** **Option 4: Percentage****Option 1** - $[***insert a lump sum amount***] upon acceptance by the Principal that the Services have been completed as required under this Agreement.**Option 2** - $[***insert a total fixed price amount***] in instalments (for example, upon achieving certain milestones or design stages etc): (a) [***Insert***](b) [***Insert***]**Option 3** - An amount calculated using the following Rates up to the Maximum Amount Payable (if applicable) .

|  |  |
| --- | --- |
| **Role / Task** | **Rate $ /** [***insert hour/day/week***] |
|  |  |

**Option 4** - [***insert***]% of [***insert amount***] (GST exclusive)**Rates and prices for the valuation of Variations:**For additional requests made by the Principal which the parties agree do not form part of the Services: [***insert amount per hour or other basis***]**Expenses that may be claimed by Consultant:** [***Drafting Note: If Consultant is entitled to claim Expenses, insert items that may be claimed and limits per item. Alternatively, insert “none”.***]*(If nothing stated, default position is "none")**(All fees and Expenses are GST exclusive)* |
| 1.
 | Time for Payment Claims(Clause 8(b)) | (*If nothing stated, monthly in arrears*) |
| 1.
 | Time for Payment of Payment Statements(Clauses 8(e) and 8(f)) | [***Insert***]*(If nothing stated, 44 days)* |
| 1.
 | Maximum Amount Payable(Clause 8) | The Maximum Amount Payable for Fees and Expenses is: $[***Insert***](excluding GST)*(If nothing selected, no Maximum Amount Payable applies)* |
| 1.
 | Intellectual Property Rights(Clause 11.1) | **Option 1: Licence** **Option 2: Ownership** *(If nothing selected, Alternative 2 applies)* |
| 1.
 | Not used | Not used |
| 1.
 | Not used | Not used |
| 1.
 | Person responsible for nominating mediator(Clause 14(d)) | (*If nothing stated, by the Resolution Institute*) |
| 1.
 | Rules for mediation(Clause 14(d)) | (*If nothing stated, the Resolution Institute Mediation Rules*) |
|  | Rules for arbitration(Clause 14(f)) | (*If nothing stated, the ACICA Arbitration Rules 2016 except in lieu of Article 11.2 of the ACICA Arbitration Rules 2016, the sole arbitrator shall be appointed by ACICA if the parties:*1. *have not agreed on the choice of sole arbitrator; and*
2. *have not provided written evidence of their agreement to ACICA within 14 days of the referral of the Dispute to arbitration or an extended period that the parties may agree upon.*)
 |
| 1.
 | Information to be included in Regular Performance Reports(Clause 18.2(a)) |  |
| 1.
 | Threshold for Shared Performance Reporting:(Clause 18.3(a)) | $200,000 |

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Terms and Conditions

# Definitions and Interpretation

## Definitions

1. In this Agreement:
2. **Business Day** means a day (not being a Saturday or Sunday) on which banks are open for general banking business in Melbourne.
3. **Brief** means the consultancy brief for the Services as set out in Item 3.
4. **Cladding Guideline** means the guideline titled "Minister’s Guideline MG-14: Issue of building permits where building work involves the use of certain cladding products" issued pursuant to section 188(1)(c) of the *Building Act 1993* (Vic) on 13 March 2018, as amended or replaced from time to time.
5. **Code of Conduct** means the Code of Conduct for Victorian Public Sector Employees 2015 (as amended from time to time) issued by the Victorian Public Sector Standards Commissioner pursuant to section 61 of the *Public Administration Act 2004* (Vic).
6. **Code of Practice** means any code of practice as defined in, and approved under, the *Privacy and Data Protection Act 2014* (Vic) or the *Health Records Act 2001* (Vic) (as applicable).
7. **Commencement Date** means the date stated in Item 4.
8. **Completion Date** means the date stated in Item 5.
9. **Confidential Information** means:
	1. the Deliverables; and
	2. any other document, drawing, information, data or communication, including Personal Information, Health Information (as applicable),
10. whether in written, oral or electronic form disclosed to the Consultant by the Principal (or on the Principal's behalf) at any time during the term of this Agreement, whether or not owned by the Principal which is in any way connected with the Project which, by its nature is confidential, is designated as being confidential or which the Consultant knows, or ought to know, is confidential, but does not include information in the Consultant's possession without restriction in relation to its disclosure or use before the date of its receipt from the Principal (or anyone on the Principal's behalf) or is in the public domain other than as a result of a breach of this Agreement.
11. **Consultant's Records** has the meaning given in clause 18.1.
12. **Consultant's Representative** means the person stated in Item 8.
13. **Deliverables** means all documents and materials brought, or required to be brought, into existence by the Consultant, as part of, or for the purposes of, the performance of the Services including drawings, designs, sketches, diagrams, advices, statements, specifications, models, samples, patterns, equipment, reports, technical information, plans, charts, calculations, computations, tables, schedules, data (stored by any means), software, photographs and finishes boards.
14. **Existing IP Rights** means the Intellectual Property Rights in any original ideas, equipment processes or systems of the Consultant that were brought into existence before the Commencement Date and were not created for the performance of the Services under the Agreement.
15. **Expenses** means the out of pocket expenses, if any, to be paid pursuant to clause 8(h) and set out in Item 13.
16. **GST** means GST within the meaning of the GST Legislation.
17. **GST Legislation** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax.
18. **Health Information** has the meaning set out in section 3 of the *Health Records Act 2001* (Vic).
19. **Input Data** has the meaning given in clause 11.3(a)(i).
20. **Intellectual Property** **Rights** means all copyright and analogous rights, all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks or names (including service marks), designs (whether or not registered or registrable), confidential information (including trade secrets and know-how), circuit layouts and all other rights throughout the world resulting from intellectual activity in the industrial, scientific or artistic fields and all rights to register, rights in applications for the registration of and rights to extend or renew the registration of any of the foregoing, whether created before, on or after the date of this Agreement and whether existing in Australia or otherwise.
21. **Invoice** means an invoice that complies with the requirements for a valid tax invoice under the GST Legislation.
22. **Item** means an item in the Schedule.
23. **Letter of Acceptance** means a letter of acceptance issued by the Principal to the Consultant accepting the Consultant's tender for the Services, subject to and in accordance with the Letter of Acceptance .
24. **Maximum Amount Payable** means the amount stated (if any) in Item 16, as adjusted (if at all) pursuant to the terms of this Agreement.
25. **Moral Rights** has the meaning given in section 189 of the *Copyright Act 1968* (Cth), and if any work is used in any jurisdiction other than in Australia, any similar rights capable of protection under the laws of that jurisdiction.
26. **Notice of Dispute** has the meaning given in clause 14(b).
27. **OH&S Law** means all laws in connection with occupational health and safety including the *Occupational Health & Safety Act (2004)* (Vic), the *Occupational Health & Safety Regulations (2017)* (Vic), all other regulations made under the *Occupational Health & Safety Act (2004)* (Vic) and any related codes of practice, guidelines and advisory standards applicable to the Services.
28. **Payment Claim** has the meaning given in clause 8(c).
29. **Payment Statement** means a payment statement in accordance with clause 8(d).
30. **Personal Information** means information or an opinion (including information or an opinion forming part of a database) that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.
31. **Principal’s Representative** means the person nominated by the Principal in accordance with clause 4.2 and stated in Item 10.
32. **Privacy Principles** means the:
	1. information privacy principles so identified and set out in the *Privacy and Data Protection Act 2014* (Vic); and
	2. if applicable, health privacy principles so identified and set out in the *Health Records Act 2001* (Vic).
33. **Project** means the project to be undertaken as described in Item 1 in respect of which the Services are to be provided.
34. **Public Sector Employee** has the same meaning as set out in section 4 of the *Public Administration Act 2004* (Vic).
35. **Regular Performance Reports** has the meaning given in clause 18.2(a).
36. **Schedule** means a schedule to this Agreement.
37. **Services** mean the Services to be provided by the Consultant as briefly set out in Item 2 and more fully set out in the Brief, as varied by clause 7.
38. **Shared Reporting Contract** has the meaning given in clause 18.3(a).
39. **Shared Reporting Information** has the meaning given in clause 18.2(b)(ii).
40. **Shared Reporting Process** has the meaning given in clause 18.3(b).
41. **Third Party IP Rights** means any Intellectual Property Rights in or relating to the Deliverables that are not capable of being vested in the Principal because the Consultant does not own and is unable to acquire those Intellectual Property Rights.
42. **Variation** means any change, modification, alteration or variation to the Services, including any addition, increase, decrease, omission, deletion, demolition or removal to or from the Services.

## Interpretation

1. Unless the context requires otherwise:

### headings and subheadings are for convenience only and do not affect interpretation;;

### words in the singular include the plural and words in the plural include the singular and words denoting a gender include every gender;

### a reference to a person includes any other entity recognised by law and vice versa;

### a party includes the party's executors, administrators, successors and permitted assigns;

### a reference to days means calendar days and a reference to time means the time in Melbourne, Victoria;

### time for doing any act or thing under this Agreement will, if it ends on a day other than a Business Day, be deemed to end on the day next following which is a Business Day;

### a reference to dollars or $ means Australian dollars and all amounts payable under this Agreement are payable in Australian dollars;

### a reference to a statute, ordinance, code or other law includes subordinate legislation, consolidations, amendments, re-enactments, and replacements of it;

### a reference to "include", "including" or "includes" (or any derivative of these words) are not words of limitation; and

### no rule of construction applies to the disadvantage of one party on the basis that that party put forward or drafted the Agreement or any provision of it.

# Obligations of the Consultant

## General

1. The Consultant must:

### perform the Services in accordance with the Brief and the remainder of this Agreement and otherwise comply with all of its other obligations under this Agreement;

### comply with all reasonable directions of the Principal or the Principal's Representative given or purported to be given under this Agreement; and

### do all things necessary and necessarily incidental for the performance of the Services.

## Responsibilities and obligations of the Consultant

### The Consultant must:

#### exercise the standard of care, diligence and expertise in the performance of the Services that would be expected of a professional and experienced provider of services equivalent to the Services;

#### prepare any Deliverables so they are fit for the purposes set out in or reasonably inferred or ascertained from the Brief or if no such purposes are set out or reasonably inferred or ascertained from the Brief then fit for the purpose for which they are required;

#### ensure that any person employed by the Consultant to perform any Services under this Agreement exercises the standard of skill, care, diligence and expertise in the performance of that part of the Services performed by that person that would be expected of a professional and experienced provider of services equivalent to the relevant part of the Services;

#### comply with all applicable laws, regulations and standards in performing Services;

#### comply with all policies of the Principal (as notified by the Principal from time to time) in performance the Services;

#### perform the Services in a timely and efficient manner and by the Completion Date; and

#### exercise good faith and act in the best interests of the Principal and keep the Principal fully and regularly informed about all matters affecting, likely to affect or otherwise relating to the Services.

### If the Principal's Representative discovers or believes that any of the Services have not been performed in accordance with this Agreement, the Principal may give the Consultant a notice specifying the non-complying Services and doing one or more of the following:

#### require the Consultant to, at its cost, re-perform or remedy any non-complying Services within a specified period of time; or

#### advise the Consultant that the Principal accepts the non-complying Services, in which event any loss suffered or incurred by the Principal as a result of the non-compliance will be a debt due and payable from the Consultant to the Principal.

### If the Consultant becomes aware of the use of any Prescribed Combustible Product (as that term is defined in the Cladding Guideline) on the Project, the Consultant must immediately notify the Principal's Representative.

# Design

### Where the Services require the Consultant to perform any design activities, the Consultant must:

#### prepare any design in accordance with the Brief and the other requirements of this Agreement;

#### submit any design documentation to the Principal's Representative progressively and, when reasonably directed by the Principal's Representative to do so, for review;

#### without limitation to clause 2, prepare any design documentation

##### so that it is free from any errors, omissions, inconsistencies, discrepancies, ambiguities, inadequacies, contradictions or deficiencies; and

##### so as not to infringe the Intellectual Property Rights or Moral Rights of any person; and

#### ensure that any design solution must not include the installation into any building of Type A or Type B Construction a Prescribed Combustible Product as part of an External Wall (including as an attachment) unless the Consultant has obtained a determination of the Building Appeals Board that the installation of the Prescribed Combustible Product complies with the *Building Act 1993* (Vic) and the regulations made under that Act; and

#### indemnify the Principal from and against any loss, damage, expense or claim (including any third party claim against the Principal) arising out of or in connection with any breach by the Consultant of its obligations under clause 3(a)(iv).

Terms which have a defined or special meaning in the Cladding Guideline have that meaning where used in clauses 3(a)(iv) and 3(a)(v).

### The Consultant acknowledges and agrees that:

#### any permission to use any design documentation by the Principal's Representative does not relieve the Consultant of its obligations under this Agreement;

#### any review of, comment on, or failure to comment on the design documentation by the Principal's Representative does not relieve the Consultant of its obligations under this Agreement; and

#### it has not relied on any information, or the accuracy, adequacy, suitability or completeness of any information, provided by the Principal for the purposes of the Project.

# Personnel

## Key People and Consultant's Representative

### The Services must be carried out by the persons named in Item 9 and in the roles specified (**Key People**) (including the Consultant's Representative named in Item 8).

### The Consultant's Representative will represent the Consultant and be available at all reasonable times for consultation with the Principal.

### Subject to clause 4.1(d), the Consultant must ensure that the Key People are used by the Consultant and must not replace Key People without the prior written consent of the Principal's Representative's, which approval will not be unreasonably withheld.

### The Consultant may replace any Key People who are no longer available to perform the Services due to resignation, illness or death.

### Where clauses 4.1(c) or 4.1(d) permit Key People to be replaced, the Consultant must replace Key People with person(s) of equivalent skills and experience.

### The Principal's Representative may by notice in writing direct the Consultant to remove any person from the performance of the Services.

## Principal’s Representative

### The Principal’s Representative will administer this Agreement on behalf of the Principal and:

#### will exercise all rights, powers, authority and functions of the Principal's Representative under this Agreement; and

#### may exercise all rights, powers, authority and functions of the Principal under this Agreement,

#### and does so as the agent of the Principal (and not as an independent certifier, assessor or valuer).

### The Consultant must comply with all directions of the Principal's Representative given or purported to be given under a provision of this Agreement.

### The Principal may at any time replace the person appointed as Principal's Representative and must notify the Consultant in writing of any such replacement.

## Compliance with Code of Conduct

1. Where, in the course of providing the Services or working on the Project, the Consultant, or its subconsultants and any other person engaged by the Consultant for the performance of the Services:

### supervise Public Sector Employees;

### undertake work that is of a similar nature to the work undertaken by Public Sector Employees at premises or a location generally regarded as a public sector workplace; or

### use or have access to public sector resources or information that are not normally accessible or available to the public,

1. the Consultant must comply, and must ensure that its subconsultants and any other person engaged by the Consultant for the performance of the Services, comply, with the Code of Conduct.

# Occupational health and safety

1. The Consultant must

### comply, and ensure that its officers, employees, subconsultants and agents comply, with the requirements of the OH&S Law; and

### immediately comply with any direction, instruction or requirement by the Principal arising under or given pursuant to any OH&S Law.

# Time

1. The Consultant must:

### perform the Services in a proactive, diligent and expeditious manner; and

### use reasonable endeavours to perform the Services by the Completion Date.

# Variations

### The Principal may at any time direct the Consultant to carry out a Variation to the Services.

### The Fee and the Maximum Amount Payable (if applicable) to the Consultant under this Agreement will be adjusted for Variations by:

#### if there are hourly rates or other rates and prices set out in Item 13, a reasonable amount determined by the Principal's Representative using those rates or prices; or

#### to the extent that clause 7(b)(i) does not apply, a reasonable amount agreed between the parties or failing agreement, determined by the Principal's Representative.

### No Variation will vitiate or void this Agreement.

# Payment

### The Principal must pay the Consultant for the Services subject to and in accordance with this Agreement.

### The Consultant acknowledges that the Fee, the Expenses and the Maximum Amount Payable (if applicable) contain allowances for:

#### the performance by the Consultant of its obligations under this Agreement, including the performance of the Services; and

#### the allocation of risks to the Consultant under this Agreement.

### The Consultant must:

#### subject to clause 8(h), submit Invoices for payment on account of the Fee and the Expenses described in Item 13 (each a **Payment Claim**), at the times stated in Item 14 and in the format reasonably required by the Principal's Representative;

#### provide information in support of the value of any Invoice if requested by the Principal's Representative; and

#### detail the amount of any GST included in the Invoice.

### The Principal's Representative must within 10 Business Days of receiving a Payment Claim give the Consultant on behalf of the Principal, a payment statement setting out the amount (if any) that the Principal proposes to pay and, if such amount is less than the amount claimed, the reasons for the difference (**Payment Statement**).

### Subject to clauses 8(h), 8(i) and 8(k) and receipt of an Invoice, the Principal must within the time period stated in Item 15 after receiving a Payment Claim, pay the Consultant the amount set out as then payable under in the Payment Statement.

### If a Payment Statement shows an amount owing by the Consultant to the Principal, the Consultant must pay the Principal that amount within the time period stated in Item 15 after the date that the Consultant submitted the Payment Claim in accordance with clause 8(c).

### Any payment of moneys under this clause 8 is not:

#### evidence of the value of the Services or that the Services have been satisfactorily carried out in accordance with this Agreement;

#### any admission of liability; or

#### approval by the Principal of the Consultant's performance and compliance with this Agreement,

* 1. but is only to be taken as payment on account.

### The Consultant may only claim Expenses on the basis of actual Expenses incurred, in respect of items and in accordance with the limits set out in Item 16, as evidenced to the satisfaction of the Principal, and only if the Principal agrees in writing before the Expense is incurred.

### If a Maximum Amount Payable is included in Item 16:

#### the Consultant acknowledges and agrees that the aggregate value of all Payment Claims and the maximum aggregate amount payable by the Principal to the Consultant under this Agreement, including all Fees and Expenses, will not be more than the Maximum Amount Payable; and

#### the Maximum Amount Payable will be adjusted by the Principal's Representative in accordance with clause 7.

### The Consultant acknowledges and agrees that:

#### the portion of each payment made by the Principal to the Consultant on account of the Fees and Expenses which are for amounts payable to subconsultants under their subcontracts are held by the Consultant on trust for those subconsultants; and

#### the Consultant must pay all subconsultants promptly in accordance with the relevant subcontracts.

### The Principal may at any time and from time to time deduct from moneys otherwise due to the Consultant:

#### any debt or other moneys due from the Consultant to the Principal; or

#### the amount of any claim to money which the Principal may have against the Consultant (whether for damage or otherwise),

#### whether under this Agreement or otherwise at law relating to the Services.

### Subject to clause 8(m), where any supply arises out of or in connection with this Agreement or the Services for which GST is not otherwise provided, the party making the supply (**Supplier**) is entitled to increase the amount payable for the supply by the amount of any applicable GST.

### Where an amount is payable to the Supplier arising out of or in connection with this Agreement or the Services which is based on the actual or reasonable costs incurred by the Supplier, the amount payable for the supply is to be reduced by the amount of any input tax credits available to the Supplier (or a representative member on the Supplier's behalf) in respect of such costs before being increased for any applicable GST under clause 8(l).

### As a condition precedent to any amount on account of GST being due from the recipient to the Supplier in respect of a taxable supply, the Supplier is to provide a tax invoice to the recipient in respect of that supply.

### If the amount paid to the Supplier in respect of the GST (whether because of an adjustment or otherwise):

#### is more than the GST on the supply, then the Supplier must refund the excess to the recipient; or

#### is less than the GST on the supply, then the recipient must pay the deficiency to the Supplier.

### In clauses 8(l) to 8(o) terms defined in the GST Legislation have the meaning given to them in the GST Legislation.

# Confidentiality

### The Consultant must keep all Confidential Information confidential and must not communicate, publish or release, or permit the communication, publication or release of any Confidential Information without the prior written consent of the Principal, except to the extent required, without limitation to the Consultant's obligations under clause 10:

#### for the Consultant to perform their obligations under this Agreement;

#### to comply with any applicable law or any requirement of any regulatory body (including any relevant stock exchange); or

#### to enable the Consultant to obtain professional legal, financial or insurance advice.

### The Consultant must:

#### ensure that all recipients of Confidential Information comply with the requirements of this clause 9 as if they were a counterparty to this Agreement;

#### keep all Confidential Information secure for so long as that Confidential Information is within its control, and in so doing must ensure that the Confidential Information is protected at all times from access, use or misuse, damage or destruction, by any person not authorised by this Agreement to have access to it; and

#### promptly delete, destroy or return to the Principal all copies of the Principal’s Confidential Information at the Completion Date, or if the Agreement is terminated earlier, the date of termination..

### Without limiting clause 9(a), the Consultant must:

#### not:

##### disclose any information concerning the Agreement for distribution through any communications media;

##### make any public disclosures, announcements or statements (including on any website) in relation to the Agreement without the prior written consent of the Principal; or

##### display any information on any site in relation to the Agreement or the Project,

without the prior written consent of the Principal; and

#### refer to the Principal any enquiries from any media concerning the Agreement.

### The Principal may publish (on the internet or otherwise) the name of the Consultant and the Fees together with conditions of this Agreement generally.

# Privacy

1. The Consultant agrees that in respect of Personal Information or Health Information (as applicable) held in connection with this Agreement that it:

### will be bound by the Privacy Principles and any applicable Code of Practice with respect to any act done or practice engaged in by the Consultant for the purposes of this Agreement, in the same way and to the same extent as the Principal would have been bound by the Privacy Principles and any applicable Code of Practice in respect of that act or practice had it been directly done or engaged in by the Principal; and

### must immediately notify the Principal's Representative if the Consultant becomes aware of a breach or possible breach of the obligations referred to in clause 10 by the Consultant or any of its officers, employees, subconsultants or agents.

# Intellectual Property

## Intellectual Property Rights

### The alternative applying for this clause 11.1 is as set out in Item 17.

1. **ALTERATIVE 1: LICENCE**

### The Consultant:

#### retains the Intellectual Property Rights in or in relation to the Deliverables; and

#### subject to clause 11.2, grants (or must procure the grant) to the Principal of an irrevocable, royalty-free, perpetual and fully assignable licence (including the right to sublicense) to use, reproduce, modify, adapt, develop, communicate to the public or otherwise exploit the Deliverables and to exercise Intellectual Property Rights in the Deliverables and for any purpose related to the Services.

### The licence under clause 11.1(b) arises immediately on creation of the Deliverables.

1. **ALTERATIVE 2: OWNERSHIP**

### The Intellectual Property Rights in or relating to the Deliverables (excluding Existing IP Rights and Third Party IP Rights) vest absolutely in the Principal immediately on creation of the Deliverables and the Consultant must do everything necessary to perfect that vesting.

### The Principal grants to the Consultant a royalty-free, non-exclusive licence (including the right to sublicense) to use the Deliverables and to exercise Intellectual Property Rights in the Deliverables solely for the purpose of carrying out the Services.

## Existing IP and Third Party IP Rights

1. To the extent the Intellectual Property Rights in or relating to the Deliverables are Existing IP Rights or Third Party IP Rights, the Consultant grants, or must procure the grant, to the Principal of an irrevocable, royalty-free, perpetual and fully assignable licence (including the right to sublicense):

### to use, reproduce, modify, adapt, develop, communicate to the public or otherwise exploit the Deliverables and to exercise Existing IP Rights and Third Party IP Rights in the Deliverables in connection with any purpose whatsoever whether or not related to the Services; and

### without limitation to clause 11.2(a), including to the extent necessary for the Principal to access, use, publish or store any Data vested in the Principal in accordance with clause 11.3.

## Data

### In this clause 11, '**Data**' means all point and array information, text, drawings, statistics, tests, analysis and other materials (including geological, geotechnical and environmental information, maps, images, survey results, drill core and cutting samples) embodied in any form which is:

#### supplied by or on behalf of the Principal in connection with this Agreement (**Input Data**); or

#### generated, recorded, placed, stored, processed, retrieved, printed, accessed or produced utilising the Input Data or for the purpose of this Agreement.

### All Data hereby vests in the Principal, and the Principal grants to the Consultant an irrevocable licence with the right to sub-license to its contractors the right to use Data for the work under the Agreement.

### The Consultant must do everything possible to perfect such vesting including assign to the Principal from the date of creation all Intellectual Property Rights in Data.

### The Consultant must only use, copy or supply Data to the extent necessary to perform its obligations under this Agreement.

## Moral Rights

### The Consultant must:

#### ensure that it does not infringe any Moral Right of any author of any work in performing the Services;

#### to the extent permitted by law and on terms reasonably required by the Principal, obtain an irrevocable and unconditional:

##### written consent for the benefit of the Principal, signed by the author of any work to be incorporated in the Deliverables, or used during, or as part of the Services, to doing or authorising the doing of an act or making or authorising the making of an omission, anywhere is the world which, but for this consent, infringes or may infringe that author's Moral Rights in the work; and

##### waiver of any and all Moral Rights to which that author may be entitled anywhere in the world in relation to the work.

### Where used in this clause 11, the term '**work**' has the meaning given to it in section 189 of the *Copyright Act 1968* (Cth).

# Indemnity and limitation of liability

## General indemnity

### The Consultant must indemnify the Principal on demand from and against any claim loss, damage, cost (including legal costs on a full indemnity basis) or expense suffered or incurred by the Principal by reason of any:

#### breach of this Agreement by the Consultant;

#### loss of (including loss of use of) or damage to property of the Principal (whether owned, leased or licensed); or

#### liability to or claims by any person against the Principal in respect of loss of or damage to any property or injury to or death of persons,

arising out of or in connection with the performance of the Services or any act or omission of the Consultant or its subconsultants, employees or agents.

### The Consultant's liability to indemnify the Principal under clause 12(a) will be reduced proportionately to the extent that any negligent or unlawful act or omission of the Principal contributed to any such claim, loss, damage, cost or expense.

## Intellectual Property and Moral Rights indemnity

### The Consultant must indemnify the Principal on demand from and against any claim loss, damage, cost (including legal costs on a full indemnity basis) or expense suffered or incurred by the Principal by reason of any actual or alleged infringement or violation of any Intellectual Property Rights, Moral Rights or other rights of any person by:

#### the Consultant, its subconsultants or any of their officers, employees, servants or agents arising out of or in connection with the Services or the Deliverables;

#### the use by the Principal (or by any sub-licensee or sub-sub-licensee) of the Deliverables; or

#### any change, distortion, destruction, alteration, relocation or destruction of the Deliverables or the work or any 2 or 3 dimensional reproduction of the Deliverables or the work.

### Where used in this clause 12.2, the term '**work**' has the meaning given to it in section 189 of the Copyright Act.

## Not used

## Not used

# Insurance

### Before commencing any work under this Agreement, the Consultant must effect and maintain:

#### a public liability insurance coverage for an amount not less than the amount indicated in Item 11 for any one occurrence;

#### unless otherwise stated in item 12 in the Schedule, professional indemnity insurance coverage for an amount not less than the amount indicated in Item 12 for any one claim; and

#### workers compensation insurance and any other insurance that the Consultant is required to effect under any statutory requirement for an amount or amounts required by law.

### The Consultant must:

#### maintain the insurance policies required under this clause 13 with an insurer and on terms both approved in writing by the Principal; and

#### upon request from the Principal's Representative, provide certificates of currency, or such other documentary evidence, to the satisfaction of the Principal, with respect to the currency and the details of insurances it is required to effect under this Agreement.

### The Consultant must maintain:

#### the policies of public liability insurance and workers compensation insurance until completion of the Services; and

#### the policy of professional indemnity insurance for at least 6 years after expiration or earlier termination of this Agreement.

# Dispute Resolution

### Each of the parties must use its best endeavours to co-operatively resolve a dispute.

### If a dispute arises, either party may give notice of a dispute in writing to the other party (**Notice of Dispute**). Within 10 Business Days of a Notice of Dispute, the parties must meet at least once to attempt to resolve the dispute or to agree on methods of resolving the dispute by other means. Each party must be represented by a person having the authority to agree a resolution of the dispute.

### If a dispute is not resolved by the expiry of 20 Business Days after a Notice of Dispute is given under clause 14(b), either party may refer the dispute to mediation.

### The mediation is to be conducted by a mediator independent of the parties, appointed by agreement between the parties or, failing agreement within 5 Business Days of referral of the dispute to mediation, by a person nominated by the person or organisation stated in Item 18. The mediation must be conducted in accordance with the rules in Item 20 and any agreement between the parties.

### If a dispute is not resolved within 20 Business Days after the date of which it is referred to mediation, either party may refer to dispute to arbitration.

### The parties are to agree the rules of arbitration or failing agreement within 5 Business Days of referral of the dispute to arbitration, the arbitration must be conducted in accordance with the rules in Item 21. The seat of the arbitration will be Melbourne, Australia. The language of the arbitration will be English. The number of arbitrators will be one. Any award will be final and binding on the parties.

###  Notwithstanding anything else, to the extent permissible by law, the arbitrator will not have power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any dispute referred to arbitration pursuant to this clause 14.

# Termination

### The Principal may, at its sole and absolute discretion, terminate this Agreement for convenience at any time by giving 10 Business Days' prior written notice to the Consultant.

### If the Principal terminates this Agreement under clause 15(a), the Principal must pay the Consultant for the Services carried out prior to the date of termination, as determined by the Principal's Representative, less any amounts that the Principal is entitled to retain, deduct, withhold or set-off under this Agreement or otherwise at law.

### Upon termination of this Agreement and where clause 15(b) applies, as a condition of payment, the Consultant must immediately deliver to the Principal all documents, including drawings, reports or other documentation provided to the Consultant by the Principal or produced by or on behalf of the Consultant under this Agreement.

### Any termination of this Agreement will not prejudice or affect the accrued rights, claims or liabilities of either party under this Agreement.

### The amounts to which the Consultant is entitled under this clause 15 will be a limitation upon the Principal's liability to the Consultant arising out of or in connection with the termination of this Agreement and to the extent permitted by law, the Consultant will not be entitled to make any claim arising out of or in connection with the termination of this Agreement, other than the amount payable under clause 15(b).

# Notices

### Each communication (including each notice, consent, approval, request and demand) to be given or served upon the Principal or the Consultant under or in connection with the Agreement must be in writing and may be delivered by express post or sent electronically by electronic mail to the addresses or electronic addresses specified in Items 8 or 10 (as applicable).

### Each communication must be in legible writing and in English.

### Each communication:

#### that has been posted will be deemed to have been duly received on the sixth Business Day after the date of posting; or

#### sent electronically by electronic mail will be deemed to have been given by the sender and received by the recipient upon receipt by the sender of an electronic acknowledgement from the recipient's information system showing that the electronic mail or any of its attachments have been opened by the recipient, provided that any electronic acknowledgement receive on a day that is not a Business Day or is after 6.00pm on a Business Day, it is taken to be received at 8.00am the next Business Day.

# Conflicts of Interest

### The Consultant warrants to the Principal that neither it, nor any contractor, consultant or employee of the Consultant has, at the Commencement Date, any conflict of interest or duty in relation to the Services.

### If the Consultant becomes aware of any circumstances, arrangements, corporate relationships or understandings that constitute, or may reasonably be considered to constitute, an actual, potential or perceived conflict of interest or duty of the Consultant or any contractor, consultant or employee of the Consultant, the Consultant must immediately notify the Principal and describe how it proposes to manage any such actual, potential or perceived conflict of interest or duty.

### The Principal may direct the Consultant in relation to a conflict of interest or duty of the Consultant in relation to the Services. The Consultant must comply with any direction of the Principal given under this clause 17. The Consultant will not be entitled to make any claim against the Principal for complying with the requirements of, or a direction given under, this clause 17.

# Records, Reporting and Financial Information

## Consultant’s Records

1. The Consultant must create and maintain complete and accurate accounts and records relating to the performance of the Services and otherwise in connection with the Agreement, as would be expected of a professional and experienced, provider of services engaged in respect of services of a similar nature to the Services (**Consultant’s Records**). The Consultant will ensure that the Consultant's Records are available to the Principal and any person authorised by the Principal at any time during business hours for examination, audit, inspection, transcription and copying. The Consultant must keep the Consultant’s Records for a minimum of 7 years, or any other period directed in writing by the Principal's Representative, after the earlier to occur of:

### the expiry of the Completion Date; and

### the termination of the Agreement.

## Reporting

### The Consultant must submit written reports regarding the Consultant's performance under the Agreement (**Regular Performance Reports**) to the Principal's Representative regularly, and at least monthly at the end of each calendar month (or as otherwise directed by the Principal) while the Services is being undertaken in such form as the Principal requires from time to time and which must include at a minimum the information listed in Item 23.

### If the Agreement is a Shared Reporting Contract under clause 18.3(a), the Consultant must:

#### cooperate with, and provide any assistance reasonably required by, the Principal in relation to the Shared Reporting Process; and

#### without limiting clause 18.3(a), provide to the Principal any information required by the Principal from time to time, within the time requested, for the purposes of the Shared Reporting Process (**Shared Reporting Information**).

### If required by the Principal, the Consultant must:

#### meet monthly (or at such other times as the Principal's Representative may require) with the Principal's Representative and any other person nominated by the Principal's Representative; and

#### discuss the report it has prepared under clause 18.2(d) and such other matters as are required by the Principal's Representative from time to time.

### If required by the Principal, at least 5 Business Days prior to each meeting under clause 18.2(c), the Consultant must provide the Principal's Representative with a monthly report in such form as the Principal's Representative requires from time to time and which must include as a minimum include the information set out in Item 7.

## Shared Reporting Process

1. The Consultant acknowledges and agrees that:

### the Agreement will be subject to the Shared Reporting Regime if the Fees exceeds the threshold identified in Item 24 (**Shared Reporting Contract**); and

### if the Agreement is a Shared Reporting Contract under clause 18.3(a), then details of the Consultant's performance under the Agreement, including the Regular Performance Reports and the Shared Reporting Information, may be made available by the Principal to other government departments or agencies or municipal, public or statutory authorities (**Shared Reporting Process**), and taken into account by the Principal or those other government departments or agencies or authorities when considering the Consultant for future tendering and contracting opportunities.

## Evidence of financial standing or financial arrangements

### The Consultant warrants to the Principal that the Consultant at all times will have sufficient financial capacity to meet all of its obligations under the Agreement.

### Without limiting clause 18.2(a), the Consultant must provide the Principal with certified copies of the audited financial statements for the previous financial year for the Consultant or other evidence of the Consultant's financial standing which demonstrates its financial capacity to meet all of its obligations under the Agreement.

# General

### (**Survival**): All provisions of this Agreement which, expressly or by implication from their nature, are intended to survive rescission, termination or expiration of this Agreement will survive the rescission, termination or expiration of this Agreement, including any provision in connection with the Principal's rights to set-off and recover money, intellectual property, confidentiality and privacy, insurance, any indemnity, release or financial security given under this Agreement, any limitation of liability and any right or obligation arising on termination of this Agreement.

### (**Audit**): The Consultant agrees that:

#### the Principal, or any person nominated by the Principal, may for so long as the Consultant retains liability under this Agreement, inspect, audit, or investigate any documents and other information prepared or maintained by or on behalf of the Consultant in connection with the Services; and

#### it will provide whatever documents, other information, access, facilities or assistance is necessary to conduct whatever audit, inspection or investigation is required by the Principal or any person nominated by the Principal.

### (**Governing Law**): This Agreement is governed by, and must be construed according to, the Laws of Victoria, Australia.

### (**Amendments**): This Agreement may only be varied with the written consent of each party.

### (**Waiver**): None of the terms of this Agreement can be waived, discharged or released unless the parties agree in writing.

### (**Joint and several liability**): Where a party comprises two or more persons, each person will be jointly and severally bound by the party’s obligations under the Agreement.

### (**Counterparts**): This Agreement may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

### (**Entire agreement**): This Agreement constitutes the entire agreement between the parties in connection with the performance of the Services and will take effect according to its terms despite any prior agreement or prior representations, understandings or arrangements made between the parties whether orally or in writing.

### (**Relationship between the parties**): This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties. The Consultant is engaged as an independent contractor. Nothing in this Agreement creates any employment relationship between the Consultant and the Principal.

### (**Authority to act**): Other than as expressly authorised, the Consultant has no authority to, and must not:

#### enter into any contracts, commitments or other legal documents or arrangements in the name of, or on behalf of, the Principal; or

#### take any act or step to bind or commit the Principal in any manner, whether as a disclosed agent of the Principal or otherwise.

### (**Subcontracting**): The Consultant must not subcontract the whole or any part of the Services without the Principal's Representative prior written approval. The Consultant will be wholly responsible for all acts and omissions of its subcontractors, and subcontracting will not relieve the Consultant of any responsibility or liability for the performance of the Services.

### (**Assignment**): The parties agree that:

#### the Consultant must not assign, novate or transfer any of the Consultant's rights or obligations under this Agreement, nor permit any change in control, without the Principal's prior written consent; and

#### the Principal may assign or transfer any of the Principal's rights or obligations under this Agreement at any time, without the consent of the Consultant.

### (**Novation**): The Principal may at any time, without the consent of the Consultant, novate this Agreement to a third party. If the Principal elects to novate this Agreement, the Consultant must execute and deliver to the Principal 3 copies of a deed of novation, as prepared by the Principal (acting reasonably), to give effect to the novation within 5 Business Days of receipt of the deed of novation from the Principal.

### (**Prior work**): The Consultant acknowledges and agrees that this Agreement applies to any Services performed by the Consultant before the Commencement Date, as if those Services were performed under this Agreement.

### (**Severance**): Any provision of this Agreement, which is illegal, void or unenforceable, will be ineffective to the extent only of such illegality, voidness or unenforceability, and such illegality, voidness or unenforceability will not invalidate any of the other provisions of this Agreement.