

**Town of Gawler**

**Works Agreement for**

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**Insert short description of works**

**Agreement Number: insert agreement number.**

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## Schedule

<b>Item 1</b> Council	Town of Gawler Address: 43 High Street Gawler East SA 5118 ABN 29 861 749 581 Email: <a href="mailto:council@gawler.sa.gov.au">council@gawler.sa.gov.au</a> Phone: (08) 8522 9211
<b>Item 2</b> Contractor	Name: [Name] Address: [Address] ABN: [ABN] Email: [Email] Phone: [Phone no]
<b>Item 3</b> Agreed Sum	<p><i>[Choose former option if lump sum, latter is not lump sum]</i></p> \$ _____ (exclusive of GST) \$ _____ (GST) \$ _____ (Total – including GST) <p>(being a fixed lump sum price and not subject to any rise and fall escalation)</p> <p><b>OR</b></p> <p>Refer Schedule of Rates in 0</p>
<b>Item 4</b> Works	Insert name of works
<b>Item 5</b> Site	[Site]
<b>Item 6</b> Date for Commencement	[Commencement Date]
<b>Item 7</b> Date for Completion	Insert date for completion
<b>Item 8</b> Defects Liability Period	52 calendar weeks commencing on Practical Completion of the Works
<b>Item 9</b> Security	Form of Security: Bank Guarantee  Security amount: [percentage of Contract Sum]% of the Agreed Sum, as adjusted from time to time, exclusive of GST  Two Bank Guarantees, (No Expiry Date - Open Ended Unconditional irrevocable guarantee by a bank or other authorised deposit taking institution (within the meaning of the banking Act 1959) in favour of the Council.)

	<p>Each to a value equal to <b>insert % eg 5%</b> of the Agreed Sum (2 x <b>\$insert amount</b> exclusive of GST each)</p> <p>One to be handed back at Practical Completion (PC). The second Bank Guarantee will be handed back at the end of Defects Liability Period at which point a Final Certificate (FC) will be issued.</p>
<p><b>Item 10</b> Contractor's Representative</p>	<p><b>[Contractor's Representative]</b>, and any other person as may be advised by the Contractor in writing</p>
<p><b>Item 11</b> Working hours</p>	<p><b>eg Monday to Friday 7.00 am to 5.00 pm</b> Australian Central Standard Time (ACST)</p>
<p><b>Item 12</b> Rates for valuation of Variations</p>	<p><b>[Rates for valuation of Variations]</b> (All expressed exclusive of any GST)</p> <p>OR</p> <p><b>Not Applicable</b></p>
<p><b>Item 13</b> Provisional Sum</p>	<p><b>insert</b></p>
<p><b>Item 14</b> Payment of Agreed Sum</p>	<p><i>[Delete options as applicable:]</i> <b>Option 1</b></p> <ol style="list-style-type: none"> <li>1. Where the Agreed Sum is a lump sum the Contractor may at monthly intervals (or as otherwise specified in this Agreement) submit a written claim for:             <ol style="list-style-type: none"> <li>1.1 the portion of the Agreed Sum referable to the work then completed; and</li> <li>1.2 the portion of the total of any Variation sum existing at that time that directly corresponds with the percentage level to which that Variation existing at that time is complete.</li> </ol> </li> <li>2. The Contractor must issue a correctly rendered tax invoice for the amount approved by the Council in paragraph 2, clearly identifying each taxable supply or disbursement.</li> <li>3. The Council must pay the assessed amount (including payment for GST) but less any retention sum within thirty (30) days of the end of the month in which the Council receives the correctly rendered tax invoice referred to in paragraph 2.</li> <li>4. Any difference arising between the parties in respect of the quantum of progress payments must be resolved in accordance with Clause 25.</li> </ol>

	<p><b>Option 2</b></p> <p>The Council must pay to the Contractor, within thirty (30) days of the end of the month in which the Certificate of Practical Completion is issued, the Agreed Sum as adjusted by this Agreement.</p>
<p><b>Item 15</b> Council's Representative</p>	<p><b>Insert Council's Representative name and title</b> and any other person as may be advised by the Council in writing</p>
<p><b>Item 16</b> Superintendent</p>	<p><b>Insert Superintendent's details</b></p>
<p><b>Item 17</b> Confidential Sections</p>	<p>Refer Annexure B – Special Conditions and Annexure C – Schedule of Rates</p>
<p><b>Item 18</b> Liquidated Damages</p>	<p><b>Insert liquid damages eg \$200 per day</b></p>
<p><b>Item 19</b> Rate for Clean Up</p>	<p>At Cost</p>
<p><b>Item 20</b> Insurance requirements</p>	<p><b>Public Liability Insurance</b> Amount: \$20 million for any one occurrence</p> <p><b>Professional Indemnity Insurance</b> Amount: \$ <b>Click here to insert amount</b></p> <p><b>Product Liability Insurance</b> Amount: \$ <b>Click here to insert amount</b></p> <p><b>Property &amp; Facilities</b> Amount: \$ <b>Click here to insert amount</b></p> <p><b>Contents</b> Amount: \$ <b>Click here to insert amount</b></p> <p><b>Vehicle, Plant &amp; Equipment Insurance</b> Amount: \$ <b>Click here to insert amount</b></p> <p><b>Return to Work SA – Current Registration</b></p>

## Parties

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The council specified in Item 1 of the Schedule (**Council**)

and

The person specified in Item 2 of the Schedule (**Contractor**)

## Background

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- A. Pursuant to a request for **insert tender OR quote** the Council sought tenders from suitably qualified parties for the Works.
- B. The Contractor submitted a **insert tender, quote, etc** for the Works, and the Council has accepted that quote.
- C. The Contractor agrees to perform the Works on the terms in this Agreement.

## Agreed Terms

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### 1. Definitions and Interpretation

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#### 1.1 Definitions

In this agreement:

**Agreed Sum** means the sum specified in Item 3 of the Schedule, as adjusted from time to time in accordance with this Agreement.

**Agreement** means the agreement between the Council and the Contractor and includes the tender documents, these Agreed Terms, the Specification, and any other items in the Agreement, Schedule and Annexures.

**Annexure** means an Annexure of this Agreement.

**Authorisation** means any authorisation, agreement, approval, licence, permit, consent, qualification, accreditation, filing, registration, certificate, resolution, direction, declaration or exemption and any renewal and variation of them by or with a Governmental Agency.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in the State of South Australia.

**Certificate of Practical Completion** means the certificate of practical completion issued under clause 14.2.

**Confidential Information** means any documentation or information of a confidential nature supplied by either of the parties to the other in connection with this Agreement and includes all scientific, technical, manufacturing, performance, sales, financial,

commercial, contractual or marketing information possessed by each party, but specifically excludes any documentation or information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by Law.

**Confidential Sections** means those clauses, Schedules and/or Annexures specified in specified in Item 17 of the Schedule that are deemed to be confidential for the purposes of the FOI Act.

**Contractor** means the person bound to carry out the Works.

**Contractor's Representative** means any person specified in Item 10 of the Schedule appointed by the Contractor, and notified to the Council, in writing, as an authorised officer of the Contractor pursuant to this Agreement.

**Council** means the Council specified in Item 1 of the Schedule.

**Council's Representative** means any person nominated in Item 15 of the Schedule to these General Conditions of Agreement or any other person authorised by the Council and notified to the Contractor in writing as an authorised officer for the purpose of the Agreement

**Date for Commencement** means the date specified in Item 6 of the Schedule.

**Date for Completion** means the date specified in Item 7 of the Schedule, as adjusted from time to time in accordance with this Agreement.

**Defect** means any defect, error or omission in the Works.

**Defects Liability Period** means the period specified in Item 8 of the Schedule.

**Defects Notice** means a written defects notice issued pursuant to clause 15.2.

**Existing Conditions** means the conditions as described in 2.1, a summary of which is described in Annexure E.

**Final Certificate** means the final certificate issued pursuant to clause 15.8.

**FOI Act** means the *Freedom of Information Act 1991 (SA)*.

**Force Majeure Event** means an unforeseeable and unknown event occurring after the date of this Agreement beyond the reasonable control of the parties which precludes a party from performing on time an obligation under this Agreement. Such circumstances include:

- (a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; and
- (b) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution;
- (c) a pandemic is declared by a Governmental Agency and measures are implemented by the Governmental Agency to address the pandemic; and/or



- (d) a suspension or termination of services or works is necessitated by legislative requirement or is ordered by a Governmental Agency;

but does **not** include any event or circumstance which the Contractor ought to have reasonably foreseen from or as a result of the Existing Conditions.

**Governmental Agency** means any government or any government, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity including any self-regulatory organisation established under statute or any stock exchange.

**GST** means goods and services tax as imposed by the *A New Tax System (Goods and Services Tax) Act 1999*.

**Latent Condition** means any physical condition on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by the Contractor prior to entering into this Agreement if the Contractor had:

- (a) examined all information made available in writing by the Council to the Contractor;
- (b) examined all information relevant to the risks, contingencies and other circumstances affecting this Agreement and obtainable by reasonable enquiries; and
- (c) inspected the Site and its surroundings.

**Law** means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation.

**Non-completion Notice** means a written notice of non-completion of the Works issued under clause 14.2.

**Notice** means a notice, demand, consent, approval or communication under this Agreement.

**Plans** means any plans and drawings of the Works which are attached as part of Annexure A.

**Practical Completion of the Works** and like expressions is the stage when the Works are complete except for minor Defects and are fit for use and occupation by the Council for their intended use.

**Programme** means the programme for the conduct of the Works in Annexure D.

**Recipient** means a party who receives a supply pursuant to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Reportable Incident** means any accident, injury, property or environmental damage or any potential breach of any Law that occurs during or as a result of this Agreement.

**Risk Plan** means the plan required to be provided by the Contractor under clause 3.2, the applicable version of which as at the date of this Agreement is attached as Annexure F.

**Schedule** means the Schedule of this Agreement.

**Security** means the security in the amount and form specified in Item 9 of the Schedule.

**Site** means the site of the Works specified in Item 5 of the Schedule.

**Special Conditions** mean the special conditions set out in Annexure B, if any.

**Superintendent** means the superintendent appointed as an agent of the Council as set out under Item 16 of the Schedule and clause 27, if applicable.

**Supplier** means a party who makes any supply under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Variation** means any change in the Works as specified in this Agreement, including:

- (a) any increase of, decrease in, or omission from such works/services;
- (b) any change in the character, quality, origin or the materials for such works/services; or
- (c) Any supply of additional works/services.

**Works** means all work necessary for the completion of the Agreement as specified in Item 4 of the Schedule and Annexure A and any authorised Variation.

## 1.2 Interpretation

In this Agreement, unless the context otherwise requires:

- 1.2.1 a reference to a party includes its executors, administrators, successors and permitted assigns;
- 1.2.2 words importing persons shall include individuals, partnerships, bodies corporate or unincorporated;
- 1.2.3 a reference to this Agreement includes any schedules and annexures to this Agreement;
- 1.2.4 an agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- 1.2.5 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 1.2.6 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;

- 1.2.7 an expression defined in the *Corporations Act 2001* (Cth) has the meaning given by that Act at the date of this Agreement;
- 1.2.8 an expression defined in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) has the meaning given by that Act at the date of this Agreement.

## 2. Contractor's warranty

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- 2.1 The Contractor acknowledges and agrees that it enters into this Agreement with knowledge of the existence and impact of the COVID-19 pandemic in the State of South Australia, Australia and the world as at the date of this Agreement (Existing Conditions), and has had regard to those Existing Conditions in entering into this Agreement.
- 2.2 The Contractor warrants to the Council that it has not relied on any advice or statements by the Council regarding the Existing Conditions and has taken appropriate advice in respect of the Existing Conditions or chosen not to seek or receive such advice. The Council has relied on the Contractor's warranties in entering into this Agreement.

## 3. Execution of Works

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- 3.1 General
- 3.1.1 In consideration for the payment of the Agreed Sum, the Contractor, at its cost in all things, must:
- 3.1.1.1 execute and complete the Works in accordance with this Agreement to Practical Completion by no later than the Date for Practical Completion and to the reasonable satisfaction of the Council, and perform its other obligations under this Agreement;
- 3.1.1.2 in executing and completing the Works, do so in a proper and professional manner, in accordance with best industry practice, and with the diligence and care expected of an experienced, competent and specialist contractor in carrying out work in the nature of work under this Agreement;
- 3.1.1.3 supply at the Contractor's expense all facilities, supervision, labour, materials, plant, transport and services required at or about the Site for the execution of the Works. Those facilities and services must comply with all Authorisations and the standards and other requirements of all applicable Laws and of any relevant Governmental Agency;
- 3.1.1.4 comply with reasonable directions of the Council in the execution of the Works;
- 3.1.1.5 comply with all Laws and Authorisations affecting or applicable to the Works or the execution of the Works;

- 3.1.1.6 be appropriately licensed and/or registered and hold all necessary Authorisations for the performance of the Works and maintain such licence and/or registration until the Council issues the Final Certificate;
- 3.1.1.7 perform the Works in an environmentally responsible manner and must implement an environmental management plan for the Works which:
- a) includes a risk assessment of all processes and activities on the Site which may have a detrimental impact on the environment;
  - b) determines and implements appropriate control measures for such processes and activities;
  - c) provides for regular reports to the Council; and
  - d) implements an induction process for all people working on or visiting the Site outlining environmental hazards, policies, rules and procedures and instructions;
- 3.1.1.8 where it is a requirement of the Agreement, the Contractor will:
- a) plan, establish and maintain a quality system which conforms to the requirements specified;
  - b) provide the Council's Representative with access to the quality system of the Contractor and each of the sub-contractors to enable monitoring and quality auditing;
- 3.1.1.9 not interfere with or damage property on or adjacent to the Site;
- 3.1.1.10 repair all damage caused to property on or adjacent to the Site by the Contractor, its employees, agents or sub-contractors or their respective employees, and provide any necessary temporary protection;
- 3.1.1.11 pay all fees in respect of the execution of the Works to any Governmental Agency, and procure any Authorisation required in respect of the execution of the Works;
- 3.1.1.12 before Practical Completion and during the Defects Liability Period and any operational maintenance period specified:
- a) keep the Works and the Site clean and tidy;
  - b) regularly remove from the Site all surplus materials;
  - c) clean up rubbish on a daily basis;
  - d) place all rubbish in a bin provided on-site or other areas as directed by the Council.

Failure to do so may result in the Council carrying out this work at the cost of the Contractor without notice;

- 3.1.1.13 unless otherwise agreed with the Council in writing, carry out the Works only between the working hours set out in Item 11 of the Schedule.

## 3.2 Risk Plan

3.2.1 The Contractor acknowledges that:

3.2.1.1 the Works must be performed in accordance with the Programme; and

3.2.1.2 the Programme has been prepared in consideration of, and with reference to, the Risk Plan.

3.2.2 From the date of this Agreement until the issue of the Final Certificate, the Contractor must update the Risk Plan in a manner and at times directed by the Council in writing.

3.2.3 If the Council at any time reasonably forms the view that the Risk Plan does not adequately deal with the risks relevant to the Works and/or this Agreement, the Council may require a meeting with the Contractor to refine and update the Risk Plan to the Council's reasonable satisfaction.

## 4. Access, Work Health and Safety

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### 4.1 Access to Site and Works

4.1.1 The Council must provide the Contractor with sufficient access to the Site to enable the Contractor to undertake and complete the Works.

4.1.2 The Contractor must allow the Council access to the Site and the Works at all times.

### 4.2 Work Health and Safety

In complying with its obligations pursuant to this Agreement, the Contractor agrees to:

4.2.1 comply with any environmental requirements of the Council communicated from time to time by the Council to the Contractor;

4.2.2 comply with all requirements of the *Work Health and Safety Act 2012 (SA) (WHS Act)* and any regulations made under it;

4.2.3 comply with any reasonable requests of the Council in relation to the Contractor's performance of its obligations pursuant to this Agreement;

4.2.4 promptly notify the Council of any accident, injury, property or environmental damage or any potential breach of any law (reportable incident) that occurs during or as a result of this Agreement. Within 24 hours of a reportable incident, the Contractor must provide a report to the Council's Representative giving details, including the result of investigations into its

cause and recommendations or strategies for prevention in the future, and the Contractor acknowledges that the Council has non-delegable duties imposed upon it by the WHS Act and as such the Council has the right:

- 4.2.4.1 to ensure that the Contractor complies with the WHS Act;
- 4.2.4.2 to inspect safety measures and documentation; and
- 4.2.4.3 to interrupt or suspend the Works if safety standards are violated.

#### 4.3 Contractor responsible

- 4.3.1 Without limiting its other obligations under this Agreement, the Contractor has complete responsibility and liability for health and safety on the Site. In this regard the Contractor must develop and implement appropriate rules, systems and procedures and generally monitor, manage and administer the operations of the Site and the Works in a proper and professional manner and, without limiting this, the Contractor must take and enforce all necessary or desirable measures to ensure safety in respect of persons and property while performing its obligations under this Agreement.
- 4.3.2 The Contractor will be responsible for the care, storage and protection of unfixed items, items provided to the Contractor by the Council, and items brought onto the site by any sub-contractors.
- 4.3.3 The Contractor shall provide, erect and maintain all barricades, guards, fencing, signs, lighting, temporary roadways and footpaths, necessary for the protection of the Works, other property and for the safety and convenience of the public in accordance with accepted Standards or Codes of Practice and shall remove them when no longer required.
- 4.3.4 As part of the induction process for the Site, the Contractor must ensure that personnel entering the Site are made aware of relevant safety hazards, policies, rules, procedures and instructions. Induction records must be kept and made available to Council's Representative or the Superintendent on request.
- 4.3.5 Without limiting clause 4.3.1, the Contractor must at its own cost:
  - 4.3.5.1 erect and at all times during the day and night maintain in or around the Site suitable signs warning the public of the execution of the Works; and
  - 4.3.5.2 during all hours of darkness keep all machinery and other obstructions or traps created in the course of the Works adequately illuminated for the protection of the public.

#### 4.4 Suspension of Works

- 4.4.1 If the Council considers that the suspension of the whole or part of the Works is necessary because of a breach of this clause by the Contractor or for any other reason (with the Council acting reasonably in all things and provided that clause 4.3.1 does not apply), the Council may direct the

Contractor to suspend the progress of the whole or part of the Works for such time as the Council thinks fit (acting reasonably in all things).

- 4.4.2 As soon as the Council becomes aware that the reason for suspension no longer exists, the Council must direct the Contractor to recommence work on the whole or relevant part of the Works.
- 4.4.3 If caused (whether directly or indirectly) by any act or omission of the Contractor, the Contractor bears any cost incurred by it by reason of a suspension under this clause.
- 4.4.4 Suspension under this clause does not affect the Date for Completion, but the cause of the suspension may be a ground for time extension under clause 12.3.

#### 4.5 Urgent Protection

If urgent action is necessary to protect property, members of the public or any of the Works under the Agreement and the Contractor fails to take the necessary action then the Council may take such action as it sees fit. Where such action should have been taken at the Contractor's expense then any costs incurred by the Council will be a debt due to the Council by the Contractor.

## 5. Records and Audits

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- 5.1 The Contractor must make and keep, and must ensure that all personnel, subcontractors and consultants make and keep all records as are typically prepared and maintained in relation to a project of the type and nature of the Contract Works (**Records**). The Records will comprise:
  - 5.2 all documents referred to in this Agreement and the Annexures;
  - 5.3 records as to progress of the work under this Agreement including diary records of daily tasks;
  - 5.4 quality system documents and records, results of the examination and testing of any Contract Work under this Agreement; and
  - 5.5 any substantiating materials relevant to a progress claim or variation claim.
- 5.6 The Council has the right to inspect and to copy the whole or any part of any Records, and to conduct an audit of the Records and the work under this Agreement (other than Records relating generally to the financial conduct of the Contractor's whole business, internal estimates of costs and board minutes) during usual business hours and upon giving prior reasonable notice in writing.
- 5.7 Where records are in electronic format, the Contractor must provide an inspecting party with a non-exclusive licence to use the software necessary to view and, where relevant, analyse the information.
- 5.8 The Contractor will procure a right of inspection and copying of any and all Records in the possession or control of any subcontractors and personnel on terms mirroring the provisions of this clause.

- 5.9 The Contractor is not entitled to unreasonably refuse inspection of any Records. For the purpose of this clause, it will be reasonable for the Contractor to refuse inspection and copying on the basis of legal professional privilege.
- 5.10 The Contractor must act reasonably and cooperate with the Council when they are conducting an inspection. For the purposes of this clause, the Contractor may be required to explain all filing and costing systems and the extraction of requested categories of documentation from files.
- 5.11 The Contractor must keep the Council as and when requested to do so, about the location of the Records.
- 5.12 The Records may only be destroyed ten (10) years after the last to occur of:
- 5.13 the issue of the Final Certificate;
- 5.14 the termination of this Agreement if that occurs before the issue of the Certificate of Practical Completion;
- 5.15 the resolution of all claims and disputes under or arising out of this Agreement.

## **6. Materials and Work**

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- 6.1 Unless otherwise specified in this agreement, the Contractor must supply at its own cost everything necessary for the proper completion of the Works under this Agreement and the proper performance of its obligations under this Agreement.
- 6.2 Unless otherwise specified in this Agreement, materials used in the Works and the standard of workmanship must be suitable for their purpose and consistent with the nature and character of the Works.
- 6.3 Unless otherwise specified in this Agreement, materials to be incorporated in the Works must be new and, where applicable, materials and workmanship must comply with the relevant standard of Standards Australia International Limited.
- 6.4 At any time before the issue of the Final Certificate, the Council may reject any material or work which does not comply with this Agreement and may direct its removal, correction or replacement, whether it has been the subject of a payment or not. The Council must make any such rejection or give any such direction as soon as practicable after discovering the non-compliance.
- 6.5 If the removal, correction or replacement directed by the Council requires the removal of, or damage to, works or materials of other contractors, the Contractor must also remove, replace and/or reinstate those other works or materials.
- 6.6 If the Council directs the Contractor to correct or replace any material or work, the Contractor must commence the work of correction or replacement within seven days after the receipt by the Contractor of the direction (or such other period as the Council may reasonably determine) and must complete the work properly and to the satisfaction of the Council. If the Council directs the Contractor to remove from the Site any material which does not comply with this Agreement, the Contractor must do so promptly.



- 6.7 The Contractor must bear the cost of all such removals, corrections, replacements and reinstatements.
- 6.8 If the Contractor fails to comply with this clause the Council may have the removal, correction or replacement carried out by other persons. The cost incurred by the Council in having the work so carried out is a debt due from the Contractor to the Council.
- 6.9 All valuable minerals, fossils, articles or objects of antiquity or of anthropological or archaeological interest and articles of value found on Site belong to the Council. Immediately upon discovery of such things, the Contractor must take precautions to prevent the loss, removal or damage of such materials and must immediately notify the Council in writing.

## **7. Documents and Plans**

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- 7.1 The Contractor acknowledges that all documents provided by the Council are not to be used, copied or reproduced for any purpose other than the execution of the Works.
- 7.2 During the performance of the Works, one (1) complete set of the Plans and other relevant contractual documentation must be kept by the Contractor at the Site.

## **8. Provisional Sums**

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The Council need not pay any provisional sum specified in Item 13 of the Schedule unless the relevant work or item is performed or supplied by the Contractor at the direction of the Council. In that case, the Council must pay the provisional sum (subject to adjustment) to the Contractor as an addition to the Agreed Sum in the same manner and at the same time as the Agreed Sum.

## **9. Subcontracting and Assigning**

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- 9.1 The Contractor must not assign or subcontract this Agreement or any right or obligation under it without the prior written consent of the Council, which may be granted or withheld in the Council's absolute discretion.
- 9.2 With any application for such consent, the Contractor must provide all information required by the Council, including evidence that the proposed assignee or subcontractor is capable of performing the Works to be assigned or subcontracted.
- 9.3 Unless otherwise agreed in writing by the Council, no such assignment or subcontract relieves the Contractor from any liability under this Agreement or at Law in respect of the performance or purported performance of this Agreement and the Contractor is responsible for the acts and omissions of any assignee or subcontractor or any assignee's or subcontractor's employees and agents as if they were the acts or omissions of the Contractor.
- 9.4 Prior to the Date for Commencement, the Contractor must submit to the Council a list of its proposed subcontractors, for approval by the Council.

- 9.5 The Contractor must not engage any subcontractors who have not been approved by the Council.
- 9.6 The Contractor is responsible for ensuring that any subcontractors responsible for or engaged to undertake the Works by the Contractor are made aware of the requirements of the Agreement.
- 9.7 For the purpose of this clause, if the Contractor is a company, an assignment of this Agreement includes any change in the beneficial ownership of the share capital of the Contractor, or the resignation, death or appointment of any director of the company, which alters the effective control of the Contractor.

## **10. Workforce**

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- 10.1 Control of employees
- 10.1.1 The Contractor must employ and must ensure that its subcontractors employ only persons who are careful, skilled and experienced in their respective trades and callings.
- 10.1.2 The Council may object and direct the Contractor to remove or have removed from the Site or from any activity connected with the Works within such time as the Council directs any person employed by the Contractor or by any subcontractor who (in the Council's opinion) is incompetent or negligent in the performance of that person's duties or whose conduct is (in the Council's opinion) prejudicial to the competent, safe and timely execution of the Works.
- 10.1.3 The Contractor must comply with such direction and any such person must not again be employed on the Site or on activities connected with the Works without the prior approval of the Council.
- 10.2 Industrial relations
- 10.2.1 The Contractor is responsible for industrial relations with all workers engaged in and about the execution of the Works.
- 10.2.2 The Contractor must keep the Council fully informed of any disputes with or demands by workers or their representatives and any other circumstances which could result in industrial action affecting the normal working of the Site or otherwise affecting the competent and timely execution of the Works.
- 10.2.3 If the workers of the Contractor or the workers of any subcontractor of the Contractor take industrial action which affects the normal working of the Site or otherwise affects the competent and timely execution of the Works and that industrial action is prohibited by Law, then the Contractor must at its own cost take all action necessary to seek urgent injunctive relief preventing such industrial action and must at all times keep the Council fully informed of the progress of such action.
- 10.2.4 If the Contractor fails to seek injunctive relief in accordance with this clause, or if the Contractor does not do so with all expedience, the Council may take

such action, and the Contractor is liable to the Council for all costs incurred in so doing.

## **11. Variations**

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### 11.1 Variations

No Variation invalidates this Agreement.

### 11.2 No unauthorised variation

11.2.1 The Contractor must not, and is not authorised to, make any Variation of the Works except:

11.2.1.1 a Variation instructed by the Council; and/or

11.2.1.2 a Variation requested by the Contractor, which has been approved by the Council.

11.2.2 Variations by the Contractor arising from, or related or attributable to the Existing Conditions which were, or ought to have been, reasonably foreseen as at the date of this Agreement are not permitted.

### 11.3 Execute Variations

The Contractor must carry out as part of the Works or omit from the Works (as is required) any Variation instructed by the Council.

### 11.4 Variations in Writing

All Variations must be documented in writing and must be signed by both the Council's and the Contractor's Representatives.

### 11.5 Adjustment of Agreed Sum

For the purpose of any adjustment of the Agreed Sum for a Variation:

11.5.1 if practicable, the value of a Variation must be agreed by the Contractor and the Council before the Contractor commences to execute the Variation;

11.5.2 if the value of a Variation is not agreed by the Contractor and the Council, the value must be determined by the Council in accordance with the rates and the criteria set out in Item 12 of the Schedule;

11.5.3 if the Council gives the Contractor a written instruction that a matter is so urgent that the Contractor should proceed with the Variation before it is valued, the Contractor may proceed with the Variation and the Council's Representative and the Contractor's Representative will jointly negotiate a reasonable value for the Variation; and

11.5.4 a Variation must be valued as soon as practicable, and the Contractor must promptly and diligently supply to the Council all information relevant to the valuation.

## **12. Time**

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12.1 Commencement of Works

The Contractor must commence the execution of the Works on or before the Date for Commencement and must execute the Works with due diligence, and maintain a rate of progress appropriate to bring the Works to Practical Completion in accordance with this Agreement.

12.2 Practical Completion of Works

The Contractor must attend to the Works in accordance with the Programme, and bring the Works to Practical Completion on or before the Date for Practical Completion.

12.3 Claim for time extension

12.3.1 The Contractor by written notice to the Council may claim a time extension if progress of the Works is delayed or will be delayed by:

12.3.1.1 a breach of this Agreement by the Council;

12.3.1.2 construction and execution of a Variation where it is not caused or contributed to by an act or omission of the Contractor;

12.3.1.3 subject always to clause 12.3.1.7, civil commotion, any combination of workmen on or off site, lockouts or similar actions undertaken by employers of labour, provided such actions have not been caused or contributed to by an act or omission of the Contractor or a company related to the Contractor:

12.3.1.4 a Latent Condition;

12.3.1.5 subject always to clause 12.3.1.7 a strike, ban or other industrial action affecting the progress of the Works which is of general application throughout the relevant industry or industries;

12.3.1.6 inclement weather or its consequences affecting the Works at the Site; or

12.3.1.7 an event arising from, or related or attributable to the Existing Conditions, but which were not and could not have been, reasonably foreseen as at the date of this Agreement.

12.3.2 The Contractor may only claim a time extension made reasonably necessary by the delays caused by the factors specified in clause 12.3.1.

12.3.3 The claim must state with reasonable particularity the cause of delay, and an estimate (if practicable) of the extent or likely extent of the delay in bringing the Works to Practical Completion.

12.3.4 The claim must be made before or within seven days after the commencement of the delay, whether or not it is practicable to estimate the delay or its consequences.

12.3.5 The Contractor may provide to the Council any information the Contractor considers appropriate for any ongoing review by the Council of the time extension.

12.3.6 The Contractor must promptly provide to the Council all information requested by the Council for any ongoing review by the Council of the time extension.

#### 12.4 Extension of time

12.4.1 Subject always to clause 12.4.2, if progress of the Works is delayed by a cause beyond the control of the Contractor and listed in clause 12.3.1, and if Practical Completion of the Works is thereby delayed, the Contractor is entitled, subject to clauses 12.5 and 12.6, to a fair and reasonable extension of the time for bringing the Works to Practical Completion, and the Date for Practical Completion must be extended under clause 12.6.

12.4.2 For the avoidance of doubt, the Contractor is not entitled to an extension of time for any delays or disruptions arising from the Existing Conditions which could, or ought to have been, reasonably foreseen at the date of this Agreement.

#### 12.5 Conditions precedent

The Contractor is entitled to a time extension only if:

12.5.1 the Contractor claimed a time extension in strict compliance with clause 12.3;

12.5.2 the Contractor took reasonable steps to minimise the delay in Practical Completion of the Works; and

12.5.3 the delayed activities are critical to the Programme.

#### 12.6 Council's determination

The Council must determine what (if any) fair and reasonable extension of time for bringing the Works to Practical Completion should be allowed to the Contractor in respect of each claim, and must give written notice of every such determination to the Contractor, and the Date for Practical Completion must be extended accordingly.

#### 12.7 Documentation

All extensions of time must be documented in writing and must be signed by both the Council's and the Contractor's Representatives.

#### 12.8 Extraordinary grant

With the Contractor's consent, before or after Practical Completion, the Council may by written notice allow to the Contractor an extension of time for bringing the Works to Practical Completion, and the Date for Practical Completion of the Works must be extended accordingly.

#### 12.9 No costs or damages

The Contractor accepts the risk of all costs, losses and expenses incurred because of a delay in progress or Practical Completion of the Works (including a delay caused by a Variation directed by the Council). The Contractor's sole remedy for such a delay is an extension of time approved by the Council under this clause. No costs or damages are payable by the Council in respect of such a delay.

### 13. Liquidated Damages

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- 13.1 If the Works do not reach Practical Completion by the Date for Practical Completion, and no extension of time has been granted, liquidated damages will be due and payable to the Council as set out in Item 18 for every day after twenty-one (21) days from the Date for Practical Completion to and including the earliest of the date of Practical Completion or termination of this Agreement or the Council taking all remaining Works out of the hands of the Contractor.
- 13.2 The Council may recover liquidated damages:
- 13.2.1 on demand from the Contractor; or
- 13.2.2 by deducting such amount from any security held
- at any time after the Date for Practical Completion even though Practical Completion has not occurred.
- 13.3 The payment of liquidated damages does not relieve the Contractor from its obligation to carry out the Works or from any other of its warranties, obligations and liabilities under of in connection with this Agreement.
- 13.4 If an extension of time is granted after the Contractor has paid or the Council has set off or deducted liquidated damages, the Council shall forthwith repay to the Contractor such of those liquidated damages as represent the dates subject of the extension of time.
- 13.5 The Contractor acknowledges and agrees that the amount of liquidated damages specified in Item 18 is a genuine pre-estimate of the loss and damage the Council is likely to incur as a result of the Contractor's failure to carry out the Works by the Date for Practical Completion.
- 13.6 Nothing in this clause, including the recovery of liquidated damages by the Council shall prejudice the Council's right to direct a variation at any time in accordance with this Agreement.

### 14. Practical Completion of Works

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- 14.1 Inspection of Works
- The Contractor must notify the Council in writing to arrange an inspection or inspections of the Works when, or as soon as practicable after, they are brought to Practical Completion. The Contractor must at that time provide to the Council all warranties, certificates, operating and maintenance manuals and other information necessary for the use, operation and maintenance of the Works, including a copy of the 'as built' drawings, the Plans and specifications for the Works.
- 14.2 Certificate of Practical Completion
- The Council must then inspect the Works and:
- 14.2.1 if satisfied that the Works have been brought to Practical Completion, must give to the Contractor a Certificate of Practical Completion of the Works stating the date upon which the Works were brought to Practical Completion; or

14.2.2 if not so satisfied, must give to the Contractor a Non-completion Notice specifying the Defects which the Contractor must attend to before the Council will issue a Certificate of Practical Completion of the Works.

If the Council fails to give to the Contractor either a Certificate of Practical Completion or a Non-completion Notice within ten (10) days after receipt of the written notice from the Contractor under clause 14.1, the Contractor may give the Council a further written notice requiring the Council to issue a Certificate of Practical Completion or a Non-completion Notice within seven (7) days after receipt of that further notice. If the Council fails to do so, the Council is deemed to give a Certificate of Practical Completion of the Works upon the expiration of seven days.

The Contractor may give the Council a notice under clause 14.1 more than once.

#### 14.3 Completion of Works

Unless the Contractor by written notice to the Council disputes the Certificate of Practical Completion of the Works within seven days after receipt of the Certificate of Practical Completion, the Works are deemed to have been brought to Practical Completion on the date stated in the Certificate of Practical Completion. The Certificate of Practical Completion must not be otherwise disputed.

### 15. Defects Liability

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#### 15.1 Defects Liability Period

The Defects Liability Period for the Works commences upon Practical Completion of the Works and continues until expiry of the period stated in Item 8 of the Schedule.

#### 15.2 Remedy Defects

If before the expiry of the Defects Liability Period, in the Council's opinion a Defect is apparent or has been detected in the Works, the Council may give written notice to the Contractor in the form of a Defects Notice requiring the Contractor to remedy that Defect. The Defects Notice must state:

15.2.1 the Defect which is required to be remedied; and

15.2.2 the date by which the Defect is to be remedied.

#### 15.3 Carry out instructions

The Contractor must promptly and competently carry out instructions of the Council given in a Defects Notice, in strict accordance with that Defects Notice.

#### 15.4 Council may rectify

If a Defect is not rectified within the time specified in the Defects Notice, the Council may rectify the Defect at the Contractor's cost, without prejudice to any other rights that the Council has against the Contractor in respect of that Defect. The costs incurred by the Council in so rectifying the Defect are a debt due from the Contractor to the Council.

#### 15.5 Further Defects Liability Period

If the Contractor executes remedial work under this clause, the Council may by written notice to the Contractor fix a further Defects Liability Period in respect of the remedial work (being no longer than the initial Defects Liability Period) commencing upon the date of completion of the remedial work. This clause applies to that remedial work as if the further Defects Liability Period was the Defects Liability Period referred to in clause 15.2.

#### 15.6 Access for remedial works

The Council must provide reasonable access to the Works for the Contractor to execute remedial works at times reasonably convenient to the Council and occupiers of the Works. The Contractor must execute remedial works in such manner as minimises inconvenience to the Council and occupiers of the Works.

#### 15.7 Deemed Variation

If it is established that a Defect identified as such by the Council is not a Defect or is a Defect in the design of the Works as prepared by any consultant of the Council, the works carried out by the Contractor pursuant to an instruction under clause 15.2 are deemed a Variation.

#### 15.8 Final Certificate

Upon the expiry of the Defects Liability Period, and when the Contractor has completed the Works including all remedial works to the reasonable satisfaction of the Council and has provided to the Council all documents and other information required by the Council under this Agreement, the Council must issue to the Contractor a Final Certificate stating the Council must pay to the Contractor within twenty-one (21) days any remaining balance of the Agreed Sum as adjusted under this Agreement.

Issue of the Final Certificate and payment of the Agreed Sum do not release or discharge any liability of the Contractor to the Council for any breach of this Agreement (including any Defect) or for any other conduct in relation to the Works or this Agreement.

### 16. Adjustment of Agreed Sum

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#### 16.1 No adjustment unless authorised

If the Agreed Sum is a fixed lump sum, it is not subject to rise and fall, and includes allowance for all works incidentally or contingently necessary to execute and complete the Works and for all the Contractor's risks and responsibilities. Without limiting this, it includes allowance for all the Contractor's costs of and incidental to any special payment or allowance made to or for the benefit of workers engaged upon execution of the Works including any project or site allowance, any disability allowance, any redundancy payment or redundancy pay scheme, or any payment or contribution or allowance for or on account of superannuation or long service leave.

The Agreed Sum will not be adjusted or varied except in accordance with provisions of this Agreement providing expressly for an adjustment of the Agreed Sum.

#### 16.2 Adjustment for Variations



If the Council instructs a Variation, the Agreed Sum is adjusted by adding or deducting (as the case requires) the value of the Variation as agreed between the Contractor and the Council. However, the Agreed Sum must not be increased unless:

- 16.2.1 the Council has expressly stated in writing that the instruction is a Variation;
- 16.2.2 the Council has expressly stated in writing that the Agreed Sum will be adjusted for the Variation; or
- 16.2.3 the works carried out are deemed a Variation under clause 15.7.

## 17. Payment of Agreed Sum

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- 17.1 Where the Agreed Sum is a fixed lump sum, the Council must pay the Agreed Sum in accordance with Item 14 of the Schedule.
- 17.2 Where the Agreed Sum is determined by the Schedule of Rates in Annexure C, the Council must pay the Agreed Sum at the time and in the manner specified in Annexure C.
- 17.3 A Payment Schedule and milestones to be agreed between the Contractor and Council shall be attached as Annexure G.

## 18. Security

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- 18.1 Bank Guarantee
  - 18.1.1 If the Security is a bank guarantee, then the Contractor must provide the Security to the Council before the Date for Commencement as security for the due performance of the Contractor's obligations under this Agreement.
  - 18.1.2 The Contractor must provide the bank guarantee and any replacement of it as security for the payment of all moneys from time to time payable by the Contractor pursuant to this Agreement. If the Contractor is in default under this Agreement, the Council may claim under the bank guarantee for all moneys then and subsequently due and payable under this Agreement and all loss, damage, costs and expenses incurred by the Council as a consequence of the default.
  - 18.1.3 The Council may claim and the bank must make payment under the bank guarantee without reference to the Contractor and notwithstanding any objection, claim or direction by the Contractor to the contrary.
  - 18.1.4 Whenever the Council has recourse to the bank guarantee, the Council may, by written notice to the Contractor, require the Contractor to reinstate the amount of the bank guarantee or provide an additional bank guarantee in relation to the amount of the claim (and any previous claims) made by the Council (**Deficiency**). Within seven days of receipt by the Contractor of each notice, the Contractor must:
    - a) provide evidence to the Council of the reinstatement of the existing bank guarantee to its full amount; or

- b) provide to the Council an additional bank guarantee equal to the amount of the Deficiency. This clause applies (changed as necessary) to that additional bank guarantee.

18.1.5 The rights of the Council under this clause do not derogate from the other rights and remedies available to the Council under this Agreement or at law or in equity in relation to any default of the Contractor.

18.1.6 If the benefit of this Agreement is assigned by the Council to any person, the benefit of the Bank Guarantee extends to and is taken to be assigned to the assignee. The Contractor must do all things necessary to give effect to that assignment including providing a replacement Bank Guarantee in favour of the assignee if requested to do so by the Council.

18.1.7 The amount of the Bank Guarantee does not limit the amount the Council may recover from the Contractor.

## 18.2 Retention Sum

If the Security is a retention sum, then the Council may deduct and retain an amount up to the Security amount from each payment by the Council to the Contractor under this Agreement as security for the due performance of the Contractor's obligations under this Agreement.

18.3 The Security (whether retention sum or bank guarantee) must be released to the Contractor as follows:

18.3.1 upon the issue of the Certificate of Practical Completion, 50% of the Security (as adjusted under this Agreement) must be released; and

18.3.2 upon the issue of the Final Certificate, any remaining Security (as adjusted under this Agreement) must be released.

## 19. Right of Council to Recover Money

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Without limiting the Council's other rights, the Council may deduct any debt due from the Contractor to the Council under this Agreement from any money which is or becomes payable to the Contractor by the Council, including the Security. This clause does not affect the Council's right to recover from the Contractor the whole of the debt or any balance that remains owing after deduction.

## 20. Risks, Indemnities and Insurances

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### 20.1 Contractor's risk

20.1.1 The Works are at the Contractor's risk until the Works are brought to Practical Completion.

20.1.2 The Council's insurance does not cover material loss or damage to any property, plant or equipment or materials of the Contractor. The Contractor must take out appropriate insurance to cover these items.

20.1.3 Security for plant, equipment and unfixed materials on Site is the sole responsibility of the Contractor.

## 20.2 Property damage

20.2.1 The Contractor must indemnify the Council against any loss or liability (including the payment of excesses on insurance effected by the Council) incurred by the Council in respect of the loss or destruction of, or damage to, or interference with, any property of the Council or of any person, if and to the extent that it is caused or contributed to by the Contractor or its employees or agents or any subcontractor or any person supplying work or services in and about the execution of the Works by the Contractor.

20.2.2 If the Contractor fails to replace or repair any damage to any property of the Council or any other person caused by the Contractor, the Council may carry out such replacement or repair works on behalf of the Contractor and recover such costs from the Security.

## 20.3 Public risk

The Contractor must indemnify the Council against any liability incurred by the Council in respect of personal injury to, or death of, any person arising out of, or in the course of, the execution of the Works if and to the extent that it is caused or contributed to by the Contractor or its employees or agents or any subcontractor or any person supplying work or services in and about the execution of the Works.

## 20.4 Indemnities

The Contractor agrees to indemnify and to keep indemnified the Council, its employees, servants and agents and each of them from and against all actions, costs, claims, charges and expenses whatsoever which may be brought or made or claimed against them or any of them arising out of any negligent act or omission of the Contractor or its employees, servants and agents in relation to this Agreement and the Works, except to the extent caused or contributed to by the Council.

## 20.5 Contractor's insurance

The Contractor must effect and maintain at all material times during the currency of this Agreement insurance in the joint names or otherwise for the benefit of the Council, the Contractor and all subcontractors and suppliers (**Insured**). The insurance must at all times cover liability to the public (including the Council) for the amount specified in Item 20 of the Schedule in respect of personal injury to or death arising by accident to any person and in respect of any injury loss or damage arising by accident to any property real or personal including property (other than the Works) belonging to the Council or in which the Council is interested and where the accident arises out of or is caused by the execution of the Works.

20.5.1 The Contractor must keep the insurance current until the expiry of the Defects Liability Period.

20.5.2 The Contractor must ensure that each policy of insurance required by this clause contains provisions acceptable to the Council that:

20.5.2.1 require the insurer to accept the term 'insured' as applying to each of the persons comprising the Insured as if a separate

policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby); and

20.5.2.2 require the insurer, whenever the insurer gives to the Contractor a notice of cancellation or any other notice under or in relation to the policy, at the same time to inform the Council in writing that the notice has been given to the Contractor; and

20.5.2.3 provide that a notice of the occurrence of an event out of which the particular Insured giving the notice alleges that it has suffered or could suffer a loss or damage must be accepted by the insurer as a notice of the occurrence given by the Insured. If an event occurs which in the opinion of the Contractor may give rise to a claim involving the Council or the Contractor under the policy of insurance effected by the Contractor it must notify the Council and must ensure that the Council is kept fully informed of subsequent action and developments concerning the claim.

20.5.3 If on demand, the Contractor fails to produce evidence of compliance with the insurance requirements under this clause, the Council's Representative, on behalf of the Council, may effect such insurance and recover the costs thereof from money otherwise payable by the Council to the Contractor.

## 20.6 Return To Work SA

20.6.1 Subject to clause 20.6.2, the Contractor must ensure that it is at all times registered as an employer under the *Return to Work Act 2014 (SA)* (**RTW Act**) and that it pays all monthly levies due under it in respect of its employees engaged in and about the Works. The Contractor must produce to the Council on execution of this Agreement a current Certificate of Registration as an employer under the RTW Act. The Contractor must ensure that all subcontractors engaged by it have at all times current Certificates of Registration as employers under the RTW Act, and must produce them to the Council upon request in writing by the Council.

20.6.2 Notwithstanding clause 20.6.1, if the Contractor (or any sub-contractor) is unable to register as an employer under the RTW Act, then the Contractor must instead adequately insure against accident, personal injury and disability. The Contractor must maintain such insurance at all times during the currency of this Agreement (including the Defects Liability Period) and must produce evidence of:

20.6.2.1 the existence and adequacy of such insurance; and

20.6.2.2 the Contractor's (and/or any sub-contractor's) inability to register as an employer under the RTW Act.

20.6.3 The Contractor indemnifies the Council in respect of any action, claim, demand, suit or proceedings made by any employee brought in connection with the RTW Act.

- 20.6.4 Insurance effected by the Contractor pursuant to this clause is limited only by the amount stated in any statute and is in all other respects unlimited.
- 20.7 Inspection of insurance policies
- 20.7.1 Whenever requested by the Council, the Contractor must produce evidence (to the satisfaction of the Council) of the insurances effected and maintained by the Contractor pursuant to this clause.
- 20.7.2 If the Contractor fails to do so, the Council may effect and maintain any such insurance and pay the premiums. The amount paid is a debt due from the Contractor to the Council.
- 20.8 Contributory Negligence and Apportionment of Liability Act 2001
- 20.8.1 To the extent permitted by law, the operation of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* in relation to any claim arising out of or in connection with this Agreement is excluded.
- 20.8.2 To the extent that the operation of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* cannot be excluded for any reason, the parties agree that, for the purposes of determining the extent of the Contractor's responsibility for loss or damage, the Contractor:
- 20.8.2.1 is solely responsible for any of the subcontractors, contractors, consultants or other people engaged by the Contractor to act in connection with the work under this Agreement (whether or not under the Contractor's direction, supervision or control) (in this clause, a **Relevant Person**), failing to take reasonable care; and
- 20.8.2.2 assumes an obligation, at the request of the Council, to prevent, any Relevant Person from failing to take reasonable care.
- 20.9 Worker's Lien
- 20.9.1 The Contractor agrees that in the event that any worker, contractor or sub-contractor within the meaning of the *Worker's Liens Act 1893 (SA)* (**WL Act**) claims a lien over the Site, the Contractor must (at its own cost and expense in all things):
- 20.9.1.1 where the worker, contractor or sub-contractor has registered a lien over the Site, use its best endeavours to have such lien withdrawn or discharged from the Site as soon as possible; and
- 20.9.1.2 where the worker, contractor or sub-contractor has issued proceedings under the WL Act and the Council is a party to those proceedings, use its best endeavours including making application to the relevant court, to ensure that the proceedings are discontinued against the Council as soon as possible.
- 20.9.2 The Contractor agrees to indemnify and save harmless the Council from all costs, losses and damages including legal fees on a solicitor client basis arising out of the registration of a lien and/or the issue of legal proceedings

instituted pursuant to the WL Act, irrespective of whether such claim had any merit.

## 21. Force Majeure

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- 21.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this Agreement:
- 21.1.1 neither party is liable for such delay or failure; and
  - 21.1.2 all obligations of a party under this Agreement are suspended until the Force Majeure Event ceases to apply.
- 21.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this Agreement must:
- 21.2.1 notify the other party as soon as possible giving:
    - 21.2.1.1 reasonably full particulars of the Force Majeure Event;
    - 21.2.1.2 the date of commencement of the Force Majeure Event and an estimate of the time required to enable it to resume full performance of its obligations; and
    - 21.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
  - 21.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
  - 21.2.3 resume performance as soon as possible after termination of the Force Majeure Event or after the Force Majeure Event abates to an extent which permits resumption of performance;
  - 21.2.4 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
  - 21.2.5 notify the other party when resumption of performance occurs.
- 21.3 If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this Agreement by written notice to the Contractor (**Termination Date**).
- 21.4 In the event of the Council terminating this Agreement pursuant to clause 21.3:
- 21.4.1 the Council remains liable to pay the Contractor any unpaid progress claims already submitted; and
  - 21.4.2 within twenty (20) Business Days of the Termination Date the Contractor must give the Council a final progress claim for Works completed up to and including the Termination Date and not the subject of a prior progress claim.
- 21.5 The Council will not otherwise be liable to the Contractor for any cost, loss, expense or damage incurred by the Contractor in connection with the exercise by the Council of its rights under clause 21.3 including, without limitation, any claim relating to loss of anticipated profits or unperformed Works.

## 22. Termination by Council

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- 22.1 If:
- 22.1.1 the Contractor becomes an externally-administered body corporate or an insolvent under administration;
  - 22.1.2 execution is levied against the Contractor or its assets for more than \$1,000 and execution is not stayed or satisfied within fourteen (14) days;
  - 22.1.3 the Contractor fails, or ceases, to hold an Authorisation required by Law for carrying out the Works;
  - 22.1.4 any industrial action affects the execution or progress of the Works or any industrial action which may affect the execution or progress of the Works is threatened, except industrial action of a general application throughout the relevant industry or industries;
  - 22.1.5 the Contractor's engagement under any other agreement with the Council in respect of the Site or any adjacent site is terminated or if the Council lawfully excludes the Contractor from the Site or any adjacent site under any such agreement;
  - 22.1.6 the Contractor:
    - 22.1.6.1 fails to provide the Security;
    - 22.1.6.2 fails to proceed diligently and competently with the execution of the Works;
    - 22.1.6.3 commits a breach of this Agreement;
    - 22.1.6.4 fails to provide a Risk Plan reasonably satisfactory to the Council; or
    - 22.1.6.5 fails to comply with an instruction or direction of the Council; and the Council gives written notice to the Contractor specifying the breach and requiring it to be remedied within seven days of receipt or any other reasonable period specified in the notice and stating the Council's intention to terminate the Contractor's engagement under this Agreement if the breach is not remedied within that period, and the Contractor does not so remedy the breach within that period;without limiting its other rights, the Council may:
    - 22.1.7 take over the whole or any part of the Works remaining to be completed; and/or
    - 22.1.8 terminate the Contractor's engagement under this Agreement by written notice to the Contractor.
- 22.2 If the Council exercises these rights, insofar as is necessary, the Council may exclude from the Site the Contractor and any other person concerned in the performance of the Works.
- 22.3 If the Council takes over the whole or any part of the Works remaining to be completed, the Council may:

- 22.3.1 complete them or part of them;
  - 22.3.2 let a contract for them or part of them; or
  - 22.3.3 engage or employ any person other than the Contractor to carry out them or part of them.
- 22.4 After taking over the Works or part of them, on Practical Completion the Council must ascertain the cost of the works to the Council, comprising payments to the Contractor and all losses, costs, charges and expenses incurred by the Council in carrying out the Works. The Council must certify that amount to the Contractor. A certificate signed by the Council stating the costs of the Works to the Council is prima facie evidence of the matters stated in the certificate. If the amount certified is greater than the amount which would have been paid to the Contractor if the whole of the Works had been completed by the Contractor pursuant to this Agreement, the difference between the two amounts is a debt due from the Contractor to the Council.
- 22.5 Upon termination of the Contractor's engagement under this clause, the Contractor is liable to the Council for all losses, costs and expenses caused by the termination of the Contractor's engagement, as if this Agreement had been repudiated by the Contractor and rescinded by the Council's acceptance of such repudiation.

### **23. Termination by Contractor**

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- 23.1 The Contractor may terminate this Agreement by written notice to the Council if the Council breaches a material term of this Agreement and fails to remedy the breach within a reasonable time after receiving written notice requiring it to do so.
- 23.2 Termination of this Agreement under this clause does not affect any accrued rights or remedies of other party.

### **24. Confidential Information and Freedom of Information**

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- 24.1 Each party agrees that it will not use any Confidential Information of the other party or allow any Confidential Information of the other party to be used for any purpose, except for the purposes of and in the manner contemplated by this Agreement, and agrees that it will:
  - 24.1.1 keep confidential;
  - 24.1.2 take reasonable steps to ensure that the party's officers and employees do not disclose to a third party;
  - 24.1.3 maintain proper and secure custody of; and
  - 24.1.4 not use or reproduce in any form;any Confidential Information belonging to the other party. Any departure from a party's obligations pursuant to this clause may only be with the written consent of the other party or as required by law or the terms of this Agreement.
- 24.2 The Consultant consents to any disclosures made as a result of the Council complying with its obligations under the FOI Act, subject to any legally required consultation.



- 24.3 Unauthorised disclosure of any Confidential Sections constitutes a breach of a party's obligations under this Agreement.

## **25. Dispute Resolution**

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- 25.1 A party claiming that a dispute has arisen under this Agreement must give written notice to the other party specifying the nature and details of the dispute.
- 25.2 On receipt of that notice by the other party, the parties must negotiate in good faith to resolve the dispute.
- 25.3 If the parties are unable to resolve the dispute within ten (10) Business Days, they must promptly refer the dispute:
- 25.3.1 in the case of the Council to the Chief Executive Officer; and
- 25.3.2 in the case of the Consultant to the Consultant's Representative.
- 25.4 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute.
- 25.5 All disputes or differences between the Council and the Contractor must be referred to an arbitrator, agreed by the parties or in the absence of agreement appointed by the Chairperson for the time being of the South Australian Chapter of the Institute of Arbitrators and Mediators Australia.
- 25.6 If possible, each party must perform its obligations under this Agreement during negotiations, mediation and arbitration proceedings.

## **26. Representatives**

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- 26.1 The Council nominates the Council's Representative as its agent for the purpose of this Agreement.
- 26.2 The Contractor nominates the Contractor's Representative as its agent for the purposes of this Agreement.
- 26.3 Each party's representative has the authority to make or give instructions, approvals and decisions in respect of the Works, unless a party notifies the other in writing of limits on the powers of its representative.

## **27. Superintendent**

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- 27.1 This clause only applies if a Superintendent has been named in Item 16 of the Schedule.
- 27.2 The Contractor acknowledges that the Superintendent is an agent of the Council, and the Contractor agrees that:
- 27.2.1 no action of the Superintendent will be called into question merely by reason of this fact; and
- 27.2.2 the Contractor will not have any action against the Council by reason of this fact.

- 27.3 The Contractor must provide the Superintendent with access to the Site and the Works.
- 27.4 The Superintendent may give a direction to the Contractor requiring the Contractor to comply with a provision of this Agreement. The Contractor's obligation to comply with a provision of this Agreement is not dependent on the Superintendent giving such a direction. The failure of the Contractor to comply with such a direction will be a material breach of this Contract.
- 27.5 The Council and the Contractor expressly agree:
- 27.5.1 that the Superintendent is authorised to do all or any of the following acts:
- 27.5.1.1 to issue instructions to the Contractor in respect of any of the following matters:
- a) the Works;
  - b) Variations;
  - c) any ambiguity or discrepancy in any document prepared (including the Plans) for the purpose of executing the Works;
  - d) matters arising from Site conditions;
  - e) the identification of nominated sub-contractors and suppliers;
  - f) omission or execution of the Works;
  - g) the removal from the Works of any person employed thereon;
  - h) substitute materials or workmanship;
  - i) the opening-up of work covered up and testing of materials or goods;
  - j) the removal and/or re-execution of any work executed by or for the Contractor;
  - k) the making good of Defects in the Works;
  - l) non-correction of Defects;
  - m) the postponement of any work to be executed;
- 27.5.1.2 to supply to the Contractor copies of any documents required to be supplied pursuant to this Contract;
- 27.5.2 that the Superintendent is authorised to act as the assessor, valuer or certifier in respect of the following matters:
- 27.5.2.1 the proper execution and completion of the Works;

- 27.5.2.2 quality of materials and workmanship and, if applicable, certain associated costs;
  - 27.5.2.3 Defects to be made good;
  - 27.5.2.4 applications for time extensions;
  - 27.5.2.5 Practical Completion;
  - 27.5.2.6 payment claims;
  - 27.5.2.7 costs and expenses resulting from delay in the progress of the Works;
  - 27.5.2.8 liquidated damages; and
  - 27.5.2.9 expenses of postponement of Works.
- 27.6 Where the Superintendent is empowered to give a direction under the Contract, the Superintendent may, as part of the direction or subsequent to the direction, prescribe a time within which the direction must be complied with. The Contractor must comply with the direction within the prescribed time.
- 27.7 Notwithstanding any other provision of this Contract, if the Contractor considers that any direction of the Superintendent amounts to a Variation, the Contractor must, prior to carrying out any work to which the direction relates, notify the Superintendent in writing that it considers the work to be a Variation. If the Contractor fails to give such written notice, the Contractor cannot claim later that the work was a Variation and the Contractor will not be entitled to claim an extension of time or additional payment on the basis that the Superintendent's direction was a Variation.
- 27.8 No direction or response to a request for information by the Superintendent with respect to the Works will amount or be deemed to amount to an acceptance or approval of any workmanship or materials which is not strictly in accordance with this Agreement or which is otherwise defective, and any such direction or response to a request for information will not relieve the Contractor of any of its obligations under this Contract.
- 27.9 Without limiting the generality of this clause, the Superintendent has no authority to alter or waive any terms of the Contract, nor authority to discharge or release the Contractor from any of its obligations pursuant to this Contract.

## **28. Relationship**

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This Agreement does not create a relationship of employment, agency or partnership between the parties.

## **29. Miscellaneous**

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### **29.1 Special Conditions**

If there is an inconsistency between a Special Condition set out in Annexure B and the rest of this Agreement, the Special Condition governs to the extent of the inconsistency.

## 29.2 Business Days

Except for the commencement carrying out or completion of any works, if the day on which an act is to be done under this Agreement is not a Business Day, that act may be done on the next Business Day.

## 29.3 Alteration

This Agreement may be altered only in writing signed by each party.

## 29.4 Approvals and consents

Unless otherwise provided, a party may in its discretion give (conditionally or unconditionally) or withhold any approval or consent under this Agreement.

## 29.5 Entire agreement

This Agreement:

29.5.1 constitutes the entire agreement between the parties about its subject matter;

29.5.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.

## 29.6 Waiver

A waiver of a provision of or right under this Agreement must be in writing signed by the party giving the waiver and is effective only to the extent set out in the written waiver.

## 29.7 Exercise of power

29.7.1 The failure, delay, relaxation or indulgence by a party in exercising a power or right under this Agreement is not a waiver of that power or right.

29.7.2 An exercise of a power or right under this Agreement does not preclude a further exercise of it or the exercise of another right or power.

## 29.8 Survival

Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this Agreement, remains in force after the expiration or termination of this Agreement.

## 29.9 Counterparts

This Agreement may be executed in any number of counterparts each of which is taken to be an original. All of those counterparts taken together constitute one (1) instrument. An executed counterpart may be delivered by email.

## 29.10 Conflict of Interest

The Contractor must disclose in writing to the Council all actual and potential conflicts of interest that exist, arise or may arise in the course of performing its obligations under this Agreement as soon as practical after it becomes aware of that conflict.

## 29.11 Severance

Should any term of this Agreement be found to be invalid or unenforceable then that provision will be severed and the remainder of this Agreement would continue in force, unless this would materially change the intended effect of this Agreement.

#### 29.12 Further action

Each party must do all things necessary to give full effect to this Agreement and the transactions contemplated by this Agreement.

#### 29.13 Governing law

29.13.1 This Agreement is governed by the law in South Australia.

29.13.2 The parties irrevocably submit to the exclusive jurisdiction of the courts in South Australia.

#### 29.14 Ombudsman

The Contractor acknowledges that the *Ombudsman Act 1972 (SA)* empowers the Ombudsman to investigate matters in the public interest. The Contractor must ensure compliance with all obligations arising under that or any other Act as regards this Agreement.

#### 29.15 ICAC

The Contractor acknowledges and agrees that by entering into this Agreement with the Council the Contractor will be considered to be a public officer for the purposes of the *Independent Commission Against Corruption Act, 2012 (SA) (ICAC Act)* and is obliged to comply with the ICAC Act and the Directions and Guidelines issued pursuant to the ICAC Act as regards this Agreement.

### 30. Goods and Services Tax

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#### 30.1 Consideration does not include GST

Unless specifically described as 'GST inclusive', any payment or consideration under this Agreement does not include GST.

#### 30.2 Gross up of consideration

Where a supply by one party (**Supplier**) to another party (**Recipient**) under this Agreement is subject to GST (other than a supply specifically described as 'GST inclusive'):

30.2.1 the expressed consideration for that supply must be increased by, and the Recipient must pay to the Supplier, an amount equal to the GST payable by the Supplier in respect of that supply; and

30.2.2 the Recipient must pay that additional amount at the same time and in the same manner as the expressed consideration.

#### 30.3 Reimbursements

If a payment to a party under this Agreement is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that party, then the amount of the payment must be reduced by the amount of any input tax credit to which that

party is entitled for that expense or other liability, such reduction to be effected before any increase in accordance with the previous subclause.

#### 30.4 Tax invoices

Notwithstanding any other provision of this Agreement, the Recipient need not make any payment for a taxable supply made by the Supplier under this Agreement until the Supplier has given the Recipient a tax invoice in respect of that taxable supply.

#### 30.5 Adjustments

If an adjustment event has occurred in respect of a taxable supply made under this Agreement, any party that becomes aware of the occurrence of that adjustment event must notify each other party to that taxable supply as soon as practicable, and all of those parties agree to take whatever steps are necessary (including to issue an adjustment note), and to make whatever adjustments are required, to ensure that any GST or additional GST on that taxable supply, or any refund of GST (or part thereof), is paid no later than twenty-eight (28) days after the Supplier first becomes aware that the adjustment event has occurred.

### 31. Security of Payment

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- 31.1 If the Building and Construction Industry Security of Payment Act 2009 (SA) (**SP Act**) applies to this Agreement:
- 31.1.1 the SP Act prevails to the extent of any inconsistency; and
  - 31.1.2 the parties agree to comply with the SP Act.
- 31.2 The Contractor must immediately give the Council, by handing to the Council's Representative, a copy of any notice or any written communication of any nature the Contractor receives or issues pursuant to the SP Act. This includes a copy of any notice(s) or written communication(s) of any nature that the Contractor receives from any other party in relation to the Works, including from any subcontractor or subconsultant of the Contractor.
- 31.3 If the Council receives a copy of a notice or other written communication from a subcontractor or subconsultant of the Contractor indicating an intention to suspend or actually suspending any aspect of the Works, the Council may, in its absolute discretion, pay the subcontractor or subconsultant the whole or part of the money the subcontractor or subconsultant states that it is owed by the Contractor and the amount of the payment made by the Council will be a debt due from the Contractor to the Council.
- 31.4 The Contractor indemnifies the Council against all liabilities, damages, losses, costs and expenses (including legal costs on a full indemnity basis) incurred by the Council arising from a suspension of the Works pursuant to the SP Act.
- 31.5 If the Contractor suspends the whole or any part of the Works pursuant to the SP Act, then to the extent permitted by law, the Contractor shall not be entitled to any extension of time for Practical Completion of the Works or any adjustment of the Agreed Sum.

### 32. Notices

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32.1 A Notice must be:

- 32.1.1 in writing, in English and signed by a person authorised by the sender; and
- 32.1.2 hand delivered or sent by pre-paid post or electronic communication to the recipient's address specified in the Schedule, as varied by any Notice given by the recipient to the sender.

32.2 A Notice is deemed to be received:

- 32.2.1 if hand delivered, on delivery;
- 32.2.2 if sent by prepaid mail, two Business Days after posting (or seven Business Days after posting if posting to or from a place outside Australia); or
- 32.2.3 if sent by electronic communication, at the time deemed to be the time of receipt under the *Electronic Transactions Act 2000* (SA) if the notice was being given under a law of this jurisdiction.

However, if the Notice is deemed to be received on a day that is not a Business Day or after 5:00pm, the Notice is deemed to be received at 9:00am on the next Business Day.

32.3 If two or more people comprise a party, Notice to one is effective Notice to all.

### **33. Costs**

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Each party must pay its own costs of preparing this Agreement and any document required by it.

## Annexure A Works

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Insert Works – attach drawings, plans, etc. ie specification from RFT to be inserted

DRAFT



## Annexure B Special Conditions

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To be inserted

DRAFT

## Annexure C Schedule of Rates

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To be inserted

DRAFT

## Annexure D Programme

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To be inserted

DRAFT

## Annexure E Existing Conditions

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Emergency Management Directions were made pursuant to Section 25 of the Emergency Act 2004 and declared on 22 March 2020. These Emergency Management Directions are applicable for the duration of this Agreement.

On 24 May 2022 the Major Emergency Directions were lifted, and amendments made to the South Australian Public Health Act 2011 to enable public health measures to be maintained to limit the spread of COVID-19.

Despite the lifting of the Major Emergency Declaration, Emergency Management Directions continue to be in force under Section 90C of the South Australian Public Health Act.

In order to comply with the requirements of this Agreement, please ensure that you are up to date with the relevant directions – refer to the Government of South Australia website (see following link) for directions and updates to these Emergency Directions:

[www.legislation.sa.gov.au/legislation/CV19](http://www.legislation.sa.gov.au/legislation/CV19)

DRAFT

## Annexure F Risk Plan

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To be inserted

DRAFT



## Annexure G Payment Schedule and Agreed Milestones

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To be inserted

DRAFT



**EXECUTED as an agreement**

**By the Council**

<p><b>SIGNED</b> by <b>insert name and title</b> under delegated authority in the presence of:</p>	
<p>.....</p> <p>Signature</p> <p>Date: ___/___/___</p>	<p>.....</p> <p>Signature of witness</p> <p>.....</p> <p>Name of witness (print)</p> <p>Date: ___/___/___</p>

**By the Contractor**

If the Contractor is a company, the document must be executed as follows:

<p><b>Executed by</b> <b>insert name</b> pursuant to section 127 of the <i>Corporations Act 2001</i></p>	
<p>.....</p> <p>Signature of Director</p> <p>.....</p> <p>Name of Director (print)</p> <p>Date: ___/___/___</p>	<p>.....</p> <p>Signature of Director/Company Secretary <i>(Please delete as applicable)</i></p> <p>.....</p> <p>Name of Director/Company Secretary (print)</p> <p>Date: ___/___/___</p>
<p><b>OR</b></p> <p>.....</p> <p>Signature of Sole Director and Sole Company Secretary</p>	



.....  
 Name of Sole Director and Sole Company Secretary  
 (print)

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

**OR**

**Signed for **insert company name** by an authorised representative in the presence of:**

.....  
 Signature of witness

.....  
 Name of witness (print)

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

.....  
 Signature of authorised representative

.....  
 Name of authorised representative (print)

.....  
 Position of authorised representative (print)

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

**If the Contractor is an individual, the document must be executed as follows:**

**Signed by **insert name** in the presence of:**

.....  
 Signature of witness

.....  
 Name of witness (print)

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

.....  
 Contractor

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

**If the Contractor is a Discretionary Trust, the document must be executed as follows:**

**Executed by **insert names of Trustees** as Trustees for the **insert names of Trust****





.....  
Signature of Trustee

.....  
Name of Trustee (print)

.....  
Signature of Trustee

.....  
Name of Trustee (print)

If the Contractor is a partnership, the document must be executed as follows:

**Partner 1:**

Signed by **insert name** in the presence of:

.....  
Signature of witness

.....  
Name of witness (print)

.....  
Signature of partner

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

**Partner 2:**

Signed by **insert name** in the presence of:



.....  
Signature of witness

.....  
Name of witness (print)

.....  
Signature of partner

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

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