

Development Victoria Consultancy Agreement (Major Services)

PPI REF	TRIM REF	VERSION	DATE
B02.04	20/8931	1.5	December 2022

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BETWEEN	Development Victoria (ABN 61 868 774 623) of Level 9, 8 Exhibition Street, Melbourne, Victoria, 3000	(‘the Principal’)
AND	#[INSERT NAME OF CONSULTANT] ABN: #[INSERT] Registration Number: [Insert if architect] Address: #[INSERT]	(‘Consultant’)

AGREEMENT (General Conditions):

1. Definitions and Interpretation

1.1 Definitions

Agreement means the following documents in the following order of precedence:

- (a) these terms and conditions;
- (b) Schedule 1; and
- (c) all Schedules other than Schedule 1.

Approval means any consent, licence, permit, authorisation, determination, certificate, permission, requirement, approval or the like issued or required by or to be obtained from any Authorities, or required under any Legal Requirements, for or in connection with the performance of the Services.

Associate means any officer, employee, agent, contractor, subcontractor, licensee, consultant, subconsultant, nominee, invitee, client or adviser of the Principal or the Consultant (as the context requires) but does not include the Principal or the Consultant.

Australian Standard means any Australian Standard issued from time to time by Standards Australia Ltd.

Authorities means all Commonwealth, State and local government departments, bodies, instrumentalities and other public or statutory authorities having jurisdiction in connection with the Services.

BCA Volume One means Volume One of the National Construction Code Series including any variations or additions in the Appendix Victoria set out in the Appendices to that Volume.

Business Days has the same meaning as set out in the Security of Payment Act.

Code of Practice means any code of practice as defined in, and approved under, the PDP Act or the *Health Records Act 2001* (Vic) (as applicable).

Collateral Deed means a collateral deed in the form of Schedule 3 or such other form reasonably required by the Principal.

Commencement Date means the earlier of:

- (a) the date upon which the Consultant commenced performance of the Services; or
- (b) the Commencement Date set out in Item 7.

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Commissioner means the Commissioner for Privacy and Data Protection appointed under the PDP Act.

Competent Consultant means a prudent, qualified, competent, professional consultant experienced in performing services of a similar size, nature and complexity to the Services for projects similar to the Project.

Completion means the stage when the Services have been completed in accordance with the Agreement.

Confidential Information means:

- (a) all information treated by the Principal as confidential;
- (b) all information disclosed by the Principal to the Consultant or of which the Consultant becomes aware, before or after the date of this Agreement;
- (c) Personal Information and Health Information; and
- (d) any other information which is confidential under common law principles;
- (e) except information:
 - (i) the Consultant creates (whether alone or jointly with any third person) independently of the Principal;
 - (ii) that is public knowledge (otherwise than as a result of a breach of confidentiality by the Consultant or any of its permitted discloses); or
 - (iii) that is required to be disclosed by Legislative Requirements.

Consequential Loss means loss of revenue and loss of profit, loss of business opportunity, loss of contract or loss of production.

Consultant Associate means each of the Consultant's officers, agents, advisers, subconsultants, subcontractors or employees (each only when acting in connection with the Services).

Consultant Representative means the person listed at Item 4.

Contamination means a waste or substance present in or on land, air, soil or water including groundwater in quantities that is present above background levels and is capable of creating a risk of harm to human health or the environment, and includes any matter defined as pollution or contamination in any applicable Environmental Law, including the *Environment Protection Act 2017* (Vic).

Data means all data (including Geoscience Data Collected for the Project), information, text, drawings, statistics, analysis and other materials embodied in any form which is:

- (a) supplied by or on behalf of the Principal in connection with this Agreement (**Input Data**); or
- (b) generated, placed, stored, processed, retrieved, printed, accessed or produced utilising the Input Data, the Services or the Deliverables.

Day means calendar day.

Deed of Novation means a deed of novation in the form of Schedule 4 or such other form reasonably required by the Principal.

Deliverables means any document or thing required to be created, produced or provided by the Consultant under this Agreement in the performance of the Services.

Environment has the meaning given in the *Environment Protection Act 2017* (Vic) and includes:

- (a) the physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours and tastes
- (b) the biological factors of animals and plants; and
- (c) the social factor of aesthetics.

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Environmental Law means:

- (a) any Legal Requirement or common law principle applicable to the Environment or Contamination;
- (b) any legislation applicable to the Environment or Contamination;
- (c) any regulations made under such legislation; and
- (d) any directions or notices relating to the Environment or Contamination issued by any relevant authority or any code of practice, compliance code or standard relevant to the Services undertaken by the Consultant,

as amended from time to time.

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 date of this Agreement and were not created for the performance of the Services under the Agreement.

Fair Jobs Code Obligations means the obligations set out in Schedule 9.

Fee means the fee for the Services set out in Item 1.

Force Majeure Event means any war, act of foreign enemies, invasion, rebellion, revolution, insurrection, commotion, malicious damage, sabotage, military or usurped power, act of terrorism, act of public enemy or natural catastrophe such as earthquake, hurricane, typhoon, lightning, flood or fire) but only to the extent that the event:

- (a) is beyond the reasonable control of the Consultant;
- (b) could not reasonably have been anticipated or avoided by the Consultant at the date of this Agreement; and
- (c) having arisen could not have been avoided, remedied or overcome by the Consultant.

Geoscience Data includes geological, geotechnical and environmental information, reports, maps, images, recordings, survey results and drill core, drill cutting and associated material embodied in any form.

Geoscience Data Collected for the Project includes Geoscience Data generated, placed, stored, processed, retrieved, printed, accessed, or produced using data supplied by the Principal for the purpose of the Agreement.

GST has the meaning given to that expression in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) (as amended) unless, under or in relation to the National Taxation Reform (Consequential Provisions) Act 2000 (Vic) (NTR Act) or a direction given under section 6 of the NTR Act, the Principal is obliged to make voluntary or notional payments, in which case:

- (a) **GST** also means those voluntary or notional payments, and
- (b) expressions containing the term **GST** have a corresponding meaning.

Health Information has the meaning set out in section 3 of the *Health Records Act 2001* (Vic).

Intellectual Property Rights means all present and future intellectual and industrial property rights conferred by statute, at common law or in equity and wherever existing, including:

- (a) patents, designs, copyright and analogous, rights in circuit layouts and all other rights throughout the world resulting from intellectual activity in the industrial, scientific or artistic fields, trade and service marks (including goodwill in those marks), know how, brand names, domain names, inventions, product names, confidential information (including trade secrets and know how), plant varieties and any other rights subsisting in the results of intellectual effort in any field, whether or not registered or capable of registration;
- (b) any application or right to apply for registration of any of those rights;
- (c) any registration of any of those rights or any registration of any application referred to in paragraph (b); and

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(d) all renewals and extensions of these rights.

Information include all text, drawings, statistics, tests, analysis and other materials embodied in any form which is supplied by or on behalf of the Principal in connection with this Agreement and includes that information which is generated, recorded, placed, stored, processed, retrieved, printed, accessed or produced utilising the Information for the purpose of the Agreement.

Item means an item number in Schedule 1.

Key Personnel means the Consultant's key personnel identified in Item 5, and such other of the Consultant's personnel identified by the Principal as key personnel.

Legal Requirements includes:

- (a) any statute, regulation or subordinate legislation in force in the State of Victoria;
- (b) Approvals;
- (c) relevant Australian Standard; and
- (d) the common law and the principles of equity as applied from time to time in the State of Victoria.

Liability Cap means the cap specified (if any) in item 11 of Schedule 1.

Local Jobs First Obligations means the obligations set out in Schedule 6.

Materials means anything supplied to the Principal by the Consultant under this Agreement and anything created or produced or otherwise coming into existence in connection with the performance of the Services including the Deliverables.

Modern Slavery Legislation means the *Modern Slavery Act 2018* (Cth) and any similar legislation in force from time to time in Victoria.

Moral Rights has the meaning given in the Copyright Act.

Moral Rights Consent means a written consent in the form set out in Schedule 5

Other Contractor means any person, firm, consultant or contractor engaged by the Principal to provide any services or perform any work in respect of the Project, other than the Consultant and its sub-consultants.

PDP Act means the *Privacy and Data Protection Act 2014* (Vic).

Personal Information has the meaning given in the PDP Act.

Principal's Representative means the person listed at Item 3.

Privacy Laws means *Privacy and Data Protection Act 2014* (Vic), the *Health Records Act 2001* (Vic), the *Privacy Act 1988* (Cth), and any laws that regulate the handling of Personal Information in Australia.

Privacy Principles means the:

- (a) information privacy principles so identified and set out in the PDP Act; and
- (b) health privacy principles so identified and set out in the *Health Records Act 2001* (Vic), as applicable.

Probity Event means the occurrence of an event that relates to the Consultant or an Associate of the Consultant which:

- (a) has or may have a material adverse effect on, or on the perception of, the character, integrity or honesty of the Consultant or the relevant Associate of the Consultant;
- (b) has or may have a material adverse effect on:
 - (i) the public interest;
 - (ii) public confidence in the Project; or

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- (iii) the reputation of the Principal or the Project.

Prohibited Cladding Products means:

- (a) aluminium composite panels with a core of less than 93% inert mineral filler (inert content) by mass in external cladding as part of a wall system; and
- (b) expanded polystyrene products used in an external insulation and finish (rendered) wall system.

Project means the project described in the Project Brief.

Project Brief means the document of that description at Schedule 2 which includes a description of the Principal's objectives in relation to the Project.

Project Contract means a contract between the Principal and another Contractor in relation to the Project where the Consultant is required to act as Superintendent.

Proposal means the proposal (including any tender) and associated documents submitted by the Consultant for the Services prior to the award of the Agreement.

Protective Data Security Standards has the meaning given to that term in the PDP Act.

Public Audit means any audit, investigation or enquiry conducted by a Public Auditor or pursuant to any Public Audit Legislation.

Public Audit Legislation means Section 94A of the *Constitution Act 1975* (Vic) and the *Audit Act 1994* (Vic) or any other applicable legislation.

Public Auditor means any auditor or officer appointed under any Public Audit Legislation or any authorised nominee or representative of such auditor or officer.

Public Disclosure Requirements means the disclosure of any information (including Confidential Information)

- (a) where that disclosure is:
- (i) required by the *Freedom of Information Act 1982* (Vic);
- (ii) mandatory by reason of the Principal being a public entity;
- (iii) prudent or desirable in order to facilitate and support transparent open governance;
- (iv) required due to any requirement of law or any policy of the Victorian Government;
- (v) required to comply with the disclosure requirements of the Auditor-General, the Ombudsman, Independent Broad-based Anti-corruption Commission, Victorian Information Commissioner or parliamentary accountability; or
- (vi) required for the Principal's annual report or other reporting requirements;
- (b) to any contractor, consultant or employee of the Principal by the Principal to the extent necessary in relation to the Principal's rights and obligations under the Agreement provided that the party to whom the information is disclosed agrees to maintain the confidentiality of any such information;
- (c) to another government department or agency or a municipal, public or statutory authority, provided that the party to whom the information is disclosed agrees to maintain the confidentiality of any such information;
- (d) where a Minister of the Crown, the secretary or deputy secretary of a government department or the chief officer (or equivalent) of a government agency, or a representative or delegate of any of them, is required to or considers it prudent or desirable to disclose the information; or
- (e) a licensee, or any sublicensees to the extent necessary for, or in connection with, the exercise of any licence granted under clause 19.1 (Intellectual Property Rights).

Public Sector Data has the meaning given to that term in the PDP Act.

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Safety Legislation means:

- (a) any legislation applicable to work health and safety, dangerous goods, building safety and electrical safety including the *Occupational Health and Safety Act 2004* (Vic);
- (b) any regulations made under legislation referred to in paragraph (a); and
- (c) any directions on health and safety or notices issued by any relevant authority or any code of practice or compliance code appropriate or relevant to the Services undertaken by the Consultant,

as amended from time to time.

Safety Requirements means any requirement relevant or necessary for compliance by the Principal or the Consultant with any applicable Safety Legislation.

Social Procurement Framework Obligations means the obligations set out in Schedule 7.

Scope of Services means the scope of services in Schedule 2.

Security of Payment Act means the *Construction Industry Security of Payment Act 2002* (Vic), as amended from time to time.

Services means the services which the Consultant is required to provide under this Agreement, as described the Scope of Services and this Agreement.

Shared Reporting Contract has the meaning given to that term in clause 38.

Shared Reporting Information has the meaning given to that term in clause 38.1(b).

Shared Reporting Process has the meaning given to that term in clause 38.2.

Site means, where relevant to the Agreement, any land to which the Consultant will have access in connection with the Services.

Special Conditions means the special conditions set out in Schedule 8.

Stage means an event or stage of the Services (if any) described or referred to in the column headed 'Stage Description' in Item 8.

Stage Completion Date means the relevant date or, where a period of time is specified, the date occurring immediately after the expiration of such period of time (if any) set out in the column headed 'Stage Completion Date' in in Item 8.

Supplier Code of Conduct means the code of conduct issued by the Victorian Government for a supplier providing goods or services to the Victorian Government as may be amended from time to time.

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.

Type A Construction has the meaning given to it in Part C1 of the BCA Volume One.

Type B Construction has the meaning given to it in Part C1 of the BCA Volume One.

1.2 Interpretation

- (a) In this Agreement, except where the context otherwise requires:
 - (i) the singular includes the plural and vice versa, and a gender includes other genders;
 - (ii) another grammatical form of a defined word or expression has a corresponding meaning; and
 - (iii) a reference to this Agreement includes any schedule.
- (b) The Proposal (including any qualifications or exclusions in it) does not form part of the Agreement except to the extent that it is expressly included in a particular part of the Agreement.

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2. Responsibilities and obligations of the Consultant

- (a) The Consultant must, and undertakes that it will, perform the Services:
 - (i) in accordance with the Agreement;
 - (ii) in accordance with all applicable Legal Requirements; and
 - (iii) exercising the standard of professional skill, care and diligence to be expected of a Competent Consultant;
- (b) The Consultant must:
 - (i) perform the Services to achieve the Principal's objective for the Project set out in the Project Brief and in accordance with the Scope of Services and this Agreement;
 - (ii) carry out the Services with due expedition and without delay;
 - (iii) provide all professional skill and advice required for carrying out the Services including all things necessary and necessarily incidental for the performance of the Services;
 - (iv) comply with all directions of the Principal given pursuant to a provision of this Agreement;
 - (v) remain fully responsible for the Services carried out by the Consultant notwithstanding any review, acceptance or approval of those Services by the Principal;
 - (vi) engage sub-consultants with appropriate qualifications and experience to carry out the Services so that each sub-consultant engaged by the Consultant is suitably qualified and experienced;
 - (vii) have the capacity and resources necessary to carry out the relevant part of the Services;
 - (viii) make reasonable enquiries to ascertain the requirements of the Principal regarding the Services and regularly consult and update the Principal regarding the carrying out of the Services; and
 - (ix) do all things necessary and necessarily incidental for the proper performance of the Consultant's obligations under this Agreement.
- (c) Except as otherwise provided in this Agreement, the Consultant performs the Services at its own cost and risk.
- (d) The Consultant has no authority to bind the Principal or act on the Principal's behalf at any time unless expressly stated otherwise elsewhere in this Agreement or in the Scope of Services.
- (e) The Consultant is an independent contractor and is not the Principal's agent, employee or a partner of the Principal.

3. Responsibilities and obligations of the Principal

The Principal shall:

- (a) pay the Consultant in accordance with clause 10;
- (b) provide the Consultant with such access to the Principal's premises as is reasonably necessary for the Consultant to carry out the Services;
- (c) give or cause to be given to the Consultant in writing timely directions, instructions, decisions and information sufficient to define the Services and facilitate the provision of the Services by the Consultant in accordance with this Agreement; and
- (d) provide the Consultant with such access to premises or sites of the Principal as is reasonably necessary for the Consultant to carry out the Services.

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4. Representatives

- (a) The Principal has appointed the Principal's Representative.
- (b) The Principal may replace the Principal's Representative at any time and notify the Consultant in writing of that appointment.
- (c) The Consultant Representative must act as the representative of the Consultant under the Agreement.
- (d) The Consultant agrees that:
 - (i) any direction given by the Principal or the Principal's Representative to the Consultant Representative will be taken to be have been given to the Consultant; and
 - (ii) matters within the knowledge of the Consultant Representative will be taken to be within the knowledge of the Consultant.

5. Consultant's undertakings and performance standards

- (a) The Consultant must and undertakes that it will:
 - (i) possess the qualifications, expertise, experience and licences appropriate or required to perform the Services.
 - (ii) if Item 8:
 - (A) includes a Date for Completion of the Services, Completion of the Services by that date; and
 - (B) achieve completion of each Stage of the Services by its corresponding Stage Completion Date (where relevant);
 - (iii) comply with all Legal Requirements (including Safety Legislation and Environmental Law), Safety Requirements, the requirements of all relevant Authorities and any relevant policies of the Principal as notified to the Consultant from time to time;
 - (iv) obtain all the consents, permits, authorities, approvals, registrations or permissions necessary under any Environmental Law in order for the Consultant to carry out the Services (other than any consent, permit, authority approval, registration or permissions which, pursuant to an express provision of the Agreement, the Principal is required to obtain);
 - (v) ensure that the Consultant is familiar with, and has the capabilities (including internal environmental management procedures and environmental risk registers) to comply with, all Environmental Laws as they apply to carrying out the Services under this Agreement;
 - (vi) not recommend, endorse or specify a product or services to the Principal if the Consultant receives or expects to receive an inducement from a third party to do so unless the nature and value of the inducement is first disclosed to the Principal; and
 - (vii) produce and provide all information and data that is to be produced under this Agreement in an accurate and correct form and in the form required by the Principal.
- (b) In performing the Services, the Consultant must:
 - (i) co-operate with Other Contractors and co-ordinate the Services with the work of those Other Contractors;
 - (ii) not act:
 - (A) dishonestly, fraudulently or illegally; or
 - (B) in a manner which brings the Principal or the Project into disrepute or adversely affects the reputation of the Principal or the Project;

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- (iii) immediately notify the Principal if the Consultant becomes aware of any circumstances that may affect the performance of the Services, the Consultant's ability to carry out the Services, the Project, or the Principal's budget and give written notice to the Principal detailing the matter or circumstance and its anticipated effect on the Services and its anticipated effect on the Services, the Project or the Principal's budget;
 - (iv) employ appropriate cost control techniques (including making any amendments to the Materials as may be necessary or desirable) so that the Project budget as advised by the Principal from time to time is not exceeded unless approved by the Principal;
 - (v) if during the course of the provision of the Services, circumstances arise which may result in the Project budget advised by the Principal from time to time being exceeded, promptly notify the Principal in writing and recommend remedial action for the Principal's approval and amend the Deliverables to achieve the Project budget.
- (c) The Consultant acknowledges that it has not in any way relied, and will not rely, upon any review, advice or comment in relation to the Services by the Principal or the Principal's Associates and any such review, advice or comment will not in any way:
- (i) affect or reduce the obligations of the Consultant under this Agreement;
 - (ii) constitute acceptance by the Principal of the performance of the Consultant's obligations under this Agreement; or
 - (iii) give rise to any duty of care on the part of the Principal or any claim at law, in equity or pursuant to statute on the part of the Consultant.

6. Security

- (a) If stated in Item 6, the Consultant must provide security to the Principal in the form of an unconditional undertaking in a form and from a financial institution acceptable to the Principal and for an amount equal to 10% of the Fee.
- (b) If the unconditional undertaking required to be provided under clause 6(a) is not supplied by the Consultant, the Principal may elect to withhold as cash retention an amount of 10% of each instalment of the Fee up to a maximum of 10% of the Fee.
- (c) The Principal may have recourse to the security taken under either clauses 6(a) or 6(b) in respect of:
 - (i) any amount the Consultant is required to pay under this Agreement or otherwise; and
 - (ii) any reasonable costs the Principal necessarily incurs by doing something the Consultant is required to do under this Agreement and which the Consultant has failed to do having been given reasonable written notice.
- (d) Within 30 Business Days of Completion of the Services and payment of all amounts due to the Principal the Consultant may request the Principal release any security held under this Agreement and upon receipt of such request the Principal shall promptly return to the Consultant any remaining security held by the Principal under clauses 6(a) or 6(b).

7. Documentation

- (a) The Consultant must prepare all documentation necessary to give effect to the performance of the Services.
- (b) The Principal's review, approval of or comment on any documentation prepared by the Consultant shall not relieve the Consultant of responsibility for the documentation and performance of the Services.

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- (c) If the Consultant finds an error, inconsistency or ambiguity in or between any documentation specifying the Services to be provided by the Consultant, the Consultant must:
 - (i) promptly notify the Principal in writing as soon as possible;
 - (ii) act in accordance with any direction the Principal may provide as to the resolution of the error, inconsistency or ambiguity; and
 - (iii) except where the error, inconsistency or ambiguity results from incorrect information provided by the Principal to the Consultant, comply with the direction and remedy the error, inconsistency or ambiguity at the Consultant's expense and within the time instructed by the Principal.
- (d) The Consultant shall maintain backup copies of all documents and Deliverables in a secure location and make available to the Principal for inspection and review any documentation prepared by the Consultant in relation to the performance of the Services.
- (e) Unless agreed otherwise with the Principal in writing, all Materials created by the Consultant in relation to the Services must be capable of being used and understood without the need to refer to extrinsic information, sources or software packages.
- (f) The Consultant shall:
 - (i) use the document management system required by the Principal when performing the Services including the issue and receipt of all documents associated with the Project; and
 - (ii) require that its Associates are appropriately trained to use the document management system required by the Principal.
- (g) The Principal shall be responsible for payment for all software costs and charges necessary to facilitate the Consultant's use of any required document management system provided that such costs and charges have been agreed in advance.
- (h) The Consultant acknowledges and agrees that:
 - (i) the document management system is provided for the convenience of the Principal;
 - (ii) transmission of a document through the document management system does not constitute valid delivery or notification pursuant to clause 31;
 - (iii) The Principal may elect not to use the document management system or replace the document management system at any time; and
 - (iv) the document management system may be unavailable for use from time to time and the Consultant will not have any claim as a consequence of any of the unavailability of the document management system and the Consultant shall at its cost use alternative methods to transmit documents (including, without limitation, email, courier or registered post as appropriate) until such time as the document management system is available again.

8. Quality System

The Consultant must establish and maintain a documented quality system in respect of the Services in accordance with the standard nominated in the Scope of Services. All documentation prepared and all Deliverables to be delivered by or on behalf of the Consultant in the course of providing the Services shall be checked and approved for accuracy by the Consultant, comply with relevant laws and meet the requirements of the Project Brief and Scope of Services.

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9. Time

9.1 General

The Consultant must complete the Services with due expedition and without delay and in accordance with the time requirements set out in this Agreement, subject to adjustment in accordance with this clause 9.

9.2 Time for Submission of Program

- (a) Where the Consultant is required under Item 8(b) to provide a program the Consultant shall, within the time stipulated in Item 8(b), submit to the Principal, a program for the carrying out of the Services which:
 - (i) includes the contents required under clause 9.3; and
 - (ii) demonstrates how the Consultant intends to undertake its tasks to achieve the program and complete the Services in accordance with the Agreement.
- (b) The Principal may either approve the program or give notice to the Consultant of its required amendments. The Consultant must amend and resubmit the program until such time as it is approved by the Principal and must then not depart from the endorsed program.
- (c) The Principal's receipt of, or review of, rejection of, or comment on, the program shall not relieve the Consultant from responsibility for the Consultant's obligations under the Agreement.

9.3 Contents of Program

The program shall:

- (a) take account of all design and review stages including (as applicable) concept design, schematic design, design development and final design relevant to the Services;
- (b) include a separate timeline for each discrete component part of the Services and a completion date for each of those components;
- (c) indicate the interdependencies of each component part of the Services;
- (d) indicated when inputs are required from the Principal or any third parties;
- (e) allow appropriate periods for the Principal's review of the Deliverables;
- (f) clearly indicate any allowances made in the program for delays to the carrying out of the Services or any component parts of the Services outside the Consultant's control; and
- (g) demonstrate the allocation of the Consultant's resources to enable it to diligently perform the Services and to meet the Program;

9.4 Liquidated damages

If Item 8(a) specifies a Date for Completion of the Services and a rate for liquidated damages for delay, the Consultant must pay as liquidated damages the amount stated in Item 8(c) for each Day that Completion of the Services or part of the Services is delayed beyond the relevant Date for Completion (as may be adjusted under clause 9.6) of the Services.

9.5 Notification of delay

If the Consultant believes that any cause beyond the control of the Consultant will delay the performance of the Services, the Consultant must notify the Principal in writing within 5 Business Days of the cause of delay arising.

9.6 Extension of time

- (a) If the cause of the delay to the performance of the Services is:
 - (i) an act, default or omission of the Principal (including the ordering of a variation, or a delay caused by a third party); or

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- (ii) a Force Majeure Event,

and such delay is beyond the reasonable control of the Consultant and which could not reasonably have been anticipated or avoided at the date of this Agreement, the Date for Completion of the Services and / or Stage Completion Date shall be extended by a reasonable period determined by the Principal. The Consultant agrees that an extension of time to the Date for Completion of the Services and Stage Completion Date is its exclusive remedy for delays.

- (b) The Consultant must take all reasonable measures to prevent and minimise delay, and if the Consultant is delayed, it must take all reasonable steps to mitigate the delay and the loss, costs and expenses arising from the delay.
- (c) The Principal may at any time and from time to time by notice in writing to the Consultant extend the time for Date for Completion of the Services and / or the Stage Completion Date. the Principal is not under any circumstances obliged to exercise this discretion reasonably or for the benefit of the Consultant.

9.7 Commencement of a Stage of the Services

With the exception of the first Stage of the Services, the Consultant must not commence performing any part of the Services which relate to any Stage of the Services unless and until the previous Stage of the Services has achieved Completion, except with the prior written consent of the Principal. The Principal's consent may be given or withheld at the Principal's sole discretion and may be given on conditions.

10. Payment

10.1 General

- (a) The Principal shall pay the Consultant the Fee in accordance with this clause 10.
- (b) Subject to clause 10.1(d), the Fee is fixed and inclusive of all costs, fees and disbursements incurred by the Consultant in carrying out the Services.
- (c) Each payment will be based on the value of the Services completed by the Consultant and will only be made if:
 - (i) the Consultant submits the claim in accordance with clause 10.2;
 - (ii) the Consultant is not in breach of this Agreement; and
 - (iii) the Services with respect to which the claim is made comply with the requirements of this Agreement.
- (d) The Principal will reimburse the Consultant for out-of-pocket expenses if Item 1(b) allows for the payment of certain disbursements and the Consultant:
 - (i) obtains the Principal's written consent before incurring the expenses; and
 - (ii) provides evidence to the satisfaction of the Principal of the expenses incurred.

10.2 Claims for payment

- (a) At the times stated in Item 2, the Consultant may submit written claims for payment of the Fee.
- (b) If a claim for payment is to be made on a progressive basis and is submitted after the date for making the progress claim, then the claim for payment shall be deemed to be received at the time of the next date for submitting a progress claim.
- (c) Any written claim for payment must:
 - (i) set out the Consultant's valuation of the Services performed;
 - (ii) identify the relevant stage of the Services performed;
 - (iii) set out the amount and details of any adjustments applicable pursuant to this Agreement up to the end of the claim period;

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- (iv) state any applicable purchase order numbers;
- (v) clearly identify and describe any amounts claimed that relates to variations to the Services carried out by the Consultant;
- (vi) be accompanied by such supporting documents as are necessary to value and verify the claim as required by the Principal;
- (vii) where the Consultant is required to provide a monthly report, be accompanied by a copy of that report; and
- (viii) be accompanied by an invoice for the amount claimed.

10.3 Payment certificate

- (a) The Principal may, within 10 Business Days of receipt of a payment claim from the Consultant, issue a certificate valuing the claim, setting out:
 - (i) The Principal's opinion of money's due from the Principal to the Consultant pursuant to the Agreement; and
 - (ii) where the amount set out in the certificate as due from the Principal to the Consultant is less than the amount claimed, the reasons why the amount set out as due is less and (if it is less because the Principal is withholding or setting-off payment for any reason) the Principal's reasons for withholding or setting-off payment.
- (b) The Principal may, in any payment certificate:
 - (i) set off from any amount due, such amount as is the subject of a bona fide dispute between the parties (whether or not such a dispute is subject to clause 30); and
 - (ii) correct any error in, or otherwise modify, any previous payment certificate.

10.4 Payment by the Principal

- (a) Payment of the Fee or any part of the Fee by the Principal shall be deemed to be on account only and shall not imply that the Services or any part of the Services is approved by the Principal.
- (b) Where the Principal has issued a payment certificate under clause 10.3 certifying an amount is payable by the Principal to the Consultant, the Principal shall pay the amount due within 20 Business Days from receipt of a tax invoice for such amount or within 30 Business Days from the later of the Consultant issuing a payment claim and providing a tax invoice for such amount where the Principal has not issued a payment certificate under clause 10.3.
- (c) Where the Principal has issued a payment certificate under clause 10.3 certifying an amount is payable by the Consultant to the Principal, the Consultant shall pay the Principal the amount due within 20 Business Days from the date of the payment certificate.
- (d) The Consultant acknowledges that:
 - (i) The Principal is not liable under this Agreement for the payment of Pay as You Go taxes, superannuation guarantee payments, WorkCover levy, payroll tax or other similar tax, levy or payment in respect of the Consultant (**Taxes or Other Payments**);
 - (ii) the Consultant has no claim against the Principal in respect of personal disability, accident or workers compensation in respect of its engagement under this Agreement;
 - (iii) the Consultant has no claim against the Principal in respect of annual leave, public holidays, sick leave and long service leave in respect of its engagement under this Agreement;
 - (iv) if the Principal is required by any state or federal law to pay any Taxes or Other Payments in respect of the Consultant (**Consultant Liability**), the Principal does so

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only to comply with the relevant legislation and any obligations under common law and for all other purposes the Consultant is and shall remain an independent contractor and agrees that any Consultant Liability shall be due and payable to the Principal and may be set-off against any Fees due and payable by the Principal to the Consultant under this Agreement.

10.5 Application of Security of Payment Act

If the Security of Payment Act applies to this Agreement:

- (a) a payment claim for the purposes of the Security of Payment Act is a valid payment claim pursuant to clause 9.2;
- (b) the times prescribed in this Agreement as the times for delivering payment claims by the Consultant are, for the purposes of the Security of Payment Act, the 'reference date';
- (c) a payment schedule for the purposes of the Security of Payment Act is the assessment by the Principal of the Consultant's claim under clause 10.3(a);
- (d) if the amount in a payment schedule is less than amount claimed in the payment claim, then the payment schedule shall state why the scheduled amount is less and if it less because the Principal is withholding payment for any reason, the Principal's reasons for withholding payment;
- (e) failure by the Principal to set out in a payment certificate an amount which the Principal is entitled to retain, deduct, withhold or set-off (whether under this Agreement or otherwise) from the amount which would otherwise be payable to the Consultant by the Principal will not prejudice the Principal's right to subsequently exercise that right to retain, deduct, withhold or set-off any amount;
- (f) The Principal and the Consultant agree that clause 30 is a method for resolving disputes for the purposes of section 10A(3)(d) of the Security of Payment Act;
- (g) in the event of an adjudication application under the Security of Payment Act, the Consultant must make an adjudication application to one of the authorised nominating authorities referred to in Item 13; and
- (h) if the Principal becomes aware that a sub-consultant is entitled to suspend services pursuant to the Security of Payment Act, the Principal may (in its absolute discretion) pay the sub-consultant such money that is or may be owing to the sub-consultant in respect of those services, and any amount paid by the Principal shall be a debt due from the Consultant to the Principal.

10.6 Subconsultants and the Security of Payment Act

- (a) In relation to sub-consultants engaged by the Consultant in the performance of the Services, the Consultant shall:
 - (i) immediately give the Principal a copy of any notice the Consultant receives from a subconsultant under the Security of Payment Act;
 - (ii) ensure that each subconsultant immediately gives the Principal a copy of any notice that the subconsultant receives from another party under the Security of Payment Act (including the Consultant); and
 - (iii) immediately notify the Principal if it becomes aware that a subconsultant intends to suspend work or services under a subcontract pursuant to the Security of Payment Act or exercise a statutory lien over unfixed plant or materials.
- (b) To the maximum extent permitted by law, the Consultant indemnifies the Principal against all damage, loss or liability suffered or incurred by the Principal arising out of:
 - (i) a suspension pursuant to the Security of Payment Act by a subconsultant of work or services which forms part of the Services;
 - (ii) a failure by the Consultant to comply with clause 10.6(a);

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- (iii) any lien claimed over unfixed plant or equipment forming part of the Services under s 12A of the Security of Payment Act by a subconsultant; and
 - (iv) a notice or claim under the Security of Payment Act being served on the Principal by a subconsultant exercising a lien or charge over any part of the Services.
- (c) The Consultant's liability under clause 10.6(b) will be reduced proportionately to the extent that liability is caused or contributed to by the negligent or unlawful act or omission of the Principal.

10.7 Adjudicator's determination

For the purposes of s 23(2)(b) of the Security of Payment Act, the adjudicator shall, to the extent permitted by law, in determining the adjudicated amount, consider any set-offs the Principal may be able to make against the amount of the progress payment (if any) to be paid by the Principal to the Consultant including, without limitation, any amount due from the Consultant to the Principal arising out of or in connection with this Agreement.

10.8 Interest

- (a) The Principal will, on demand by the Consultant, pay simple interest on a daily basis on any overdue amount, at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983 (Vic)*.
- (b) For the purposes of clause 10.8(a), "overdue amount" means an amount (or part thereof) that is not, or is no longer, disputed in accordance with this Agreement:
 - (i) that is due and owing under a tax invoice (as defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*) properly rendered by the Consultant in accordance with this Agreement
 - (ii) which has been outstanding for more than 30 days from the date of invoice or the date that the amount ceased to be disputed, as the case may be.

11. GST

- (a) Words or expressions used in this clause 10 which are defined in the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* have the same meaning in this clause 11.
- (b) Any consideration to be paid or provided for a supply made under or in connection with this Agreement unless specifically described in this Agreement as 'GST inclusive', does not include an amount on account of GST.
- (c) Despite any other provision in this Agreement, if a party (**Supplier**) makes a supply under or in connection with this Agreement on which GST is imposed (not being a supply the consideration for which is specifically described in this Agreement as 'GST inclusive'):
 - (i) the consideration payable or to be provided for that supply under this Agreement, but for the application of this clause (**GST exclusive consideration**), is increased by, and the recipient of the supply (**Recipient**) must also pay to the Supplier, an amount equal to the GST payable on the supply (**GST Amount**); and
 - (ii) the GST Amount must be paid to the Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable or to be provided.
- (d) If a payment to a party under this Agreement is a reimbursement or indemnification, calculated by reference to a loss, cost or expense incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party, or the representative member of a GST group of which that party is a member, is entitled for that loss, cost or expense.
- (e) The Recipient need not pay the GST Amount in respect of a taxable supply made under or in connection with this Agreement until the Supplier has given the Recipient a tax invoice in respect of that taxable supply.

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- (f) If a payment is calculated by reference to or as a specified percentage of another amount or revenue stream, that payment shall be calculated by reference to or as a specified percentage of the amount or revenue stream exclusive of GST.

12. Variations

12.1 Direction to vary

- (a) The Principal may, by written notice to the Consultant stated to be issued pursuant to this clause 12.1, direct the Consultant to vary the scope or the extent of the Services (including by omitting or deleting any part of the Services) and the Consultant shall comply with that direction.
- (b) The Consultant must not vary the scope of the Services without having received a direction in writing from the Principal directing the variation under clause 12.1(a). If the Consultant carries out extra work without receiving a direction from the Principal under this clause 12.1, the Consultant will bear the entire cost of such work regardless of whether the work confers a benefit on the Principal or the Principal was aware that the work was being performed.
- (c) If a variation the subject of a direction by the Principal omits or delete any part of the Services, the Principal may thereafter carry out that omitted or deleted part of the Services (either itself or by engaging other consultants).
- (d) If the Consultant considers it has been directed to carry out a variation, but the Principal's notice is not expressly identified as a direction for a variation under this clause 12.1, the Consultant must, if it wishes to make a claim against the Principal arising out of or in any way connected with the direction:
 - (i) within 5 Business Days of receiving the direction and before commencing the variation, give written notice to the Principal that it considers the direction constitutes or involves a variation; and
 - (ii) within 5 Business Days of giving notice under clause 12.1(d)(i), submit a written claim to the Principal setting out details of the basis of the claim.
- (e) If the Consultant fails to comply with clause 12.1(d), the Principal shall not be liable upon any claim by the Consultant and the Consultant will be absolutely barred from making any claim against the Principal arising out of or in any way connected with the purported variation.

12.2 Valuation of variations

Any variation in the Fee that arises as a consequence of a direction by the Principal pursuant to this clause 12:

- (a) shall be agreed between the Principal and the Consultant prior to commencing the variation; or
- (b) if agreement cannot be reached, the Principal shall determine the value of the variation in the Fee acting reasonably.

12.3 Variations due to a change in law

If a new law or change in law after the date of this Agreement necessitates:

- (a) a change to the scope of the Services;
- (b) has effect after the date of this Agreement; and
- (c) could not reasonably have been anticipated at the date of this Agreement,

then the Consultant shall notify the Principal of such change in law and upon such notification it shall be deemed to be a variation directed by the Principal pursuant to clause 12.1.

12.4 Variations to remove part of the Services

The Principal may at any time vary the Services to remove any part of the Services upon written notice to the Consultant. If this power is exercised by the Principal:

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- (a) the Consultant shall immediately cease the performance of the Services removed under the notice;
- (b) the Consultant shall not be entitled to treat the removal of part of the Services as a breach or repudiation of this Agreement by the Principal;
- (c) the Consultant's liability to the Principal and the Principal's right to damages for any breach of this Agreement (including where such breach would have entitled the Principal to terminate for default) by the Consultant shall not be affected;
- (d) the Consultant shall continue to perform all the Services that have not been removed under the notice in accordance with the terms of this Agreement;
- (e) the Principal shall pay to the Consultant as full compensation in relation to the removed Services an amount for such Services performed up to the date of removal and shall have no liability for any further payment for the removed Services; and
- (f) the Consultant and the Principal acknowledge and agree that the Principal may have the removed Services performed by a third party.

13. Site safety

- (a) The Consultant must comply with all Safety Legislation, Safety Requirements, site safety rules and regulations and industry standards when on the Principal's premises or when using the Principal's facilities.
- (b) Without limiting clause 13(a), the Consultant must comply with and require its Associates comply with:
 - (i) all Safety Legislation and Safety Requirements;
 - (ii) the requirements and directions of any 'Principal Contractor' (as that term is defined under Safety Legislation); and
 - (iii) Australian Standards in relation to safety.
- (c) Without limiting clauses 13(a) or 13(b) the Consultant must:
 - (i) promptly notify the Principal of any accident, injury, property or environmental damage which occurs during the carrying out of, or is associated, with any part of the Service under this Agreement;
 - (ii) maintain records and make reports concerning the health, safety and welfare of people, and damage to property as the Principal reasonably requires; and
 - (iii) inform the Principal of all relevant information which becomes known to the Consultant concerning any risks to the safety or health of any person.

14. Environmental Laws

This clause 14 applies if indicated in Item 9.

14.1 Consultant's Obligations with respect to Environmental Laws

The Consultant must:

- (a) comply, and must ensure that its Associates comply, with Environmental Laws that are in any way applicable to carrying out the Services;
- (b) be responsible for controlling, managing and supervising the performance of the Services to ensure they are performed in a manner that minimises, so far as reasonably practicable, any risks to human health or the Environment;
- (c) consult, cooperate and communicate with all concurrent duty holders under any Environmental Law;

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- (d) promptly notify the Principal's Representative if the Consultant discovers or suspects that it has discovered any Contamination:
 - (i) in, on, over or under the Site;
 - (ii) that has emanated or migrated from, or is emanating or migrating to, to the Site; or
 - (iii) in the direct vicinity of the Sitewhether or not the Consultant has caused or contributed to that Contamination;
- (e) not allow any damage to, deterioration in or degradation of the Environment to occur in the course of delivering the Services, unless the Consultant is permitted to do so by a Legal Requirement and then only to the extent permitted;
- (f) immediately make good, contain and remove (as may be appropriate) any damage to the Environment or Contamination caused, disturbed or contributed to by the Consultant or its Associates or as a consequence of or as an incident to carrying out the Services, to the extent required to:
 - (i) comply with any Environmental Law;
 - (ii) ensure that there is no unacceptable risk to human health or the Environment;
 - (iii) prevent the migration of any Contamination to any adjoining properties; and
 - (iv) ensure that the Site is fit for purpose (and where the Contamination is located in the direct vicinity of the Site, that other area is fit for its purpose);
- (g) promptly provide the Principal's Representative with a copy of any statutory notice served on the Consultant under an Environmental Law, and copies of all related correspondence which precedes or follows the issuing of that notice;
- (h) as far as reasonably practicable, and to the extent permitted by law, consult and cooperate with the Principal to ensure a coordinated approach to complying with any notification requirements under any Environmental Law;
- (i) co-operate with, do all things necessary to assist, and refrain from doing anything that may impede, the Principal in discharging their obligations under any Environmental Law; and
- (j) immediately notify the Principal's Representative of any breach of any Environmental Law of which the Consultant or its Associates become aware.

14.2 Consultant's Acknowledgements

The Consultant acknowledges that, in undertaking the Services, it may engage in activities that:

- (a) attract the general environmental duty; and
- (b) attract duties relating to notifying and taking action in respect of Contamination or pollution caused by the Consultant,

under the Environment Protection Act 2017 (Vic).

15. Confidentiality

- (a) The Consultant in receiving, possessing or otherwise acquiring any Confidential Information acknowledges that the Confidential Information is the property of and confidential to or a trade secret of the Principal.
- (b) Subject to clause 15(c), the Consultant must and must require that its Associates:
 - (i) keep the Confidential Information confidential and not directly or indirectly disclose, divulge or communicate that Confidential Information to, or otherwise place that Confidential Information at the disposal of, any other person without the prior written approval of the Principal;

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- (ii) take all reasonable steps to secure and keep secure all Confidential Information coming into its possession or control;
 - (iii) not memorise, use, modify, reverse engineer or make copies, notes or records of the Confidential Information for any purpose other than in connection with the performance by the Consultant of its obligations under this Agreement; and
 - (iv) not claim authorship of any matter or disclose to any person other than the Principal any findings relating to the Services without the Principal's prior written consent.
- (c) The obligations of confidentiality under this clause 14 do not apply to any information that, subject to the Consultant having first obtained the Principal's prior written consent, is disclosed by the Consultant for the purposes of the Consultant entering its design into competitions for professional awards or marketing or promotional materials.
- (d) The Consultant may disclose Confidential Information to its professional advisors (**Advisor**) provided that:
- (i) at the time of such disclosure the relevant Advisor needs to know the Confidential Information so the Consultant is able to perform its obligations; and
 - (ii) before any disclosure of Confidential Information the relevant Advisor has undertaken to keep the Confidential Information confidential as set out in this clause 14.
- (e) Prior to receiving any Confidential Information the Consultant must enter into and require any third party that the Principal permits the Consultant to disclose the Confidential Information to enters into, a confidentiality deed or acknowledgement in a form satisfactory to the Principal. Notwithstanding any other clause of this Agreement, the Principal may withhold any payment under this Agreement until the Consultant has complied with this clause 15(e).
- (f) The Consultant acknowledges the special requirements of confidentiality set out in sections 71 to 73 of the *Development Victoria Act 2003* (Vic).
- (g) This clause 14 survives termination or Completion of the Agreement.

16. Media and publications

- (a) The Consultant shall not:
- (i) release any document or article or divulge any information gained in the course of performing the Agreement (regardless of whether or not it is Confidential Information) or related to the Project to a third party (including media or any professional publications) without the prior written approval of the Principal.
 - (ii) make any negative or disparaging statements in relation to or otherwise prejudicial to the Principal or the Project.
- (b) If the Consultant wishes to submit for publication in journals, exhibitions or entry for awards any work produced by the Consultant in providing the Services to the Principal, the Consultant shall obtain prior approval in principle and then obtain final written approval from the Principal by submitting, for a decision, a final copy of the material proposed to be published. Such approval shall not be unreasonably withheld by the Principal provided the Principal may impose any conditions that it considers appropriate in the circumstances on the granting of any such approval including (where required) identifying and acknowledging the Principal.
- (c) This clause 16 survives termination or Completion of the Agreement.

17. Privacy

- (a) Without limiting any obligation the Consultant is bound by under any Privacy Laws, the Consultant must comply and must require that its Associates comply, with all Privacy Laws

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as they apply to the Principal, and must not do or allow the doing of anything that would cause the Principal to breach any Privacy Laws.

- (b) The Consultant agrees 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.
- (c) If any Personal Information or Health Information is accessed by or made available to the Consultant in connection with the performance by the Consultant of its obligations under this Agreement, the Consultant must:
 - (i) protect the Personal Information and Health Information against unauthorised access, use, modification or disclosure and against other misuse;
 - (ii) collect, store, use, disclose and otherwise deal with the Personal Information and Health Information only for the purpose of providing the Services, or as otherwise directed in writing by the Principal;
 - (iii) provide all assistance required by the Principal to assist the Principal to respond to any complaint or enquiry or assist in any investigation relating to Personal Information and Health Information, and to otherwise comply with its obligations under any Privacy Law; and
 - (iv) comply with all Privacy Laws.
- (d) The Consultant must immediately notify the Principal if it becomes aware of:
 - (i) any request for access to any Personal Information and Health Information, or any circumstances where the Consultant becomes aware that use or disclosure of any Personal Information, other than in providing the Services, is required or authorised by or under law;
 - (ii) any accidental or unauthorised access to any Personal Information and Health Information, or any other disclosure of Personal Information not for the purpose of providing the Services;
 - (iii) any loss of any Personal Information and Health Information;
 - (iv) any breaches of its security and/or network, whether or not the breach involves any Personal Information and Health Information; and
 - (v) any breach of this clause 17.
- (e) The Consultant must actively monitor and, if requested by the Principal in writing, permit the Principal or its authorized auditor to audit compliance with Privacy Laws and this clause 17, provided that the Consultant is not required to provide any level of access to any premises, materials, systems or personnel:
 - (i) outside business hours; or
 - (ii) for purposes exceeding what is reasonably required for audit purposes.
- (f) The Consultant will indemnify and hold harmless the Principal for any loss or damage suffered or incurred arising from the Consultant being in breach of its obligations under this clause 17.
- (g) The Consultant agrees to ensure that any sub-contract entered into for the purpose of fulfilling its obligations under this Agreement contains provisions to ensure that the subconsultant has the same obligations as the Consultant under this clause 17.
- (h) This clause 17 survives termination or Completion of the Agreement.

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18. Information, Data Protection and Protective Data Security Standards

18.1 Consultant Must Provide Information

The Consultant must provide to the Principal any Information reasonably requested by the Principal in connection with the Services.

18.2 Protection of Information

The Consultant must:

- (a) do all things that a reasonable and prudent consultant would do to ensure that all Information held by the Consultant in relation to the Services and the Principal (**Information Data**) is protected at all times from unauthorised access or use by a third party or misuse, damage or destruction by any person;
- (b) provide protective measures for the Information Data that are no less rigorous than accepted industry standards and commensurate with the consequences and probability of unauthorised access to, or use, misuse or loss of, the Information Data; and
- (c) without limiting clauses 18.2(a) or 18.2(b), comply with all security regulations or procedures given by the Principal from time to time regarding any aspect of security of, or access to, the Principal's Information, material or premises.

18.3 Actual or Potential Information Data Protection Breach

If the Consultant becomes aware of any actual or suspected action taken through the use of computer networks that result in an actual or potentially adverse effect on the Information Data or any other unauthorised access or use by a third party or misuse, damage or destruction by any person (**Incident**), the Consultant must:

- (a) notify the Principal in writing immediately (and no longer than 12 hours after becoming aware of the Incident); and
- (b) comply with any directions issued by the Principal in connection with the Incident including in relation to obtaining evidence about how, when and by whom the Consultant's information system and/or Information Data has or may have been compromised, providing it to the Principal on request, and preserving and protecting that evidence for a period of up to 12 months;
- (c) implementing any mitigation strategies to reduce the impact of the Incident or the likelihood or impact of any future similar incident; and
- (d) preserving and protecting Information Data (including as necessary reverting to any backup or alternative site or taking other action to recover Information Data).

18.4 Protective Data Security Standards

The Consultant:

- (a) acknowledges that the Principal is bound by the Protective Data Security Standards.
- (b) must not do any act or engage in any practice that would contravene or give rise to a breach of a Protective Data Security Standard in respect of Public Sector Data collected, held, used, managed, disclosed or transferred by the Consultant on behalf of the Principal, under or in connection with this Agreement.

18.5 Consultant's Associates Compliance

The Consultant must ensure that those of its Associates who have access to Information Data comply with this clause 18.

18.6 Survive termination

Clause 18 will survive any termination or Completion of the Agreement.

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19. Intellectual Property Rights

19.1 Ownership

The alternative in Item 10 applies in relation to this clause 19.1.

Alternative 1

The Intellectual Property Rights in all things produced by or on behalf of the Consultant in the performance of the Services (including the Deliverables) vest in the Principal upon creation. The Consultant must do everything necessary to perfect such vesting. The Principal grants to the Consultant a royalty free, non-exclusive, revocable, non-transferable licence to use such Intellectual Property Rights only to the extent necessary for the performance of the Services.

Alternative 2

The Intellectual Property Rights in all things produced by or on behalf of the Consultant in the performance of the Services (including the Deliverables) remains vested in the Consultant. The Consultant grants to the Principal an irrevocable, perpetual, worldwide, royalty free licence to use, reproduce, publish, communicate to the public, modify, adapt, develop, communicate to the public, exploit and sub-license (including those rights referred to in clause 19.4) the Intellectual Property Rights in all things produced by or on behalf of the Consultant in the performance of the Services (including the Deliverables) for any purpose including any subsequent project, repairs, maintenance or servicing, the supply of replacement parts, additions or alterations. The licence arises immediately on creation of the Deliverables.

19.2 Existing IP Rights or Third Party IP Rights

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):

- (a) 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 or the Works; and
- (b) without limiting clause 19.2(a), to use the Existing IP Rights and the Third Party IP Rights to the extent necessary for the Principal to access, use, publish or store any Data vested in the Principal in accordance with clause 19.5.

19.3 Intellectual Property Right Warranty

The Consultant undertakes that:

- (a) the Consultant owns all Intellectual Property Rights in the Deliverables or, to the extent that it does not, is entitled to grant the assignments and licences required by this Agreement;
- (b) it will develop and complete any Materials and perform the Services such that the use by the Principal or any sub-licensee or sub-sub-licensee of the Deliverables in accordance with this Agreement will not infringe the rights (including any Intellectual Property Rights and Moral Rights) of any third party;
- (c) subject to clauses 19.6 and 19.7, it has obtained valid Moral Rights Consents from all relevant authors in the creation of any Materials so that the use by the Principal or its assignees of such Materials will not infringe any Intellectual Property Rights or any copyright, including any author's moral rights under the *Copyright Act 1968* (Cth) and any other Intellectual Property Rights held by a third party;
- (d) the consents referred to in clause 19.3(c) permit the Principal (in its absolute discretion) to reproduce, publish, copy, adapt, perform, communicate to the public, materially distort and in any other way to change and use the Materials (or a substantial part or adaptation of the Materials) including using without attribution of authorship;

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- (e) no design process or construction method, procedure or system adopted by the Consultant will require the Principal to pay any royalties or licence fees;
- (f) neither the Principal nor any sub-licensee or sub-sub-licensee is liable to pay any third party any licence or other fee in respect of the use of the Deliverables, whether by reason of Intellectual Property Rights or Moral Rights of that third party or otherwise; and
- (g) the use by the Principal or by any sub-licensee or sub-sub-licensee of the Deliverables in accordance with this Agreement will not breach any laws.

19.4 Use of information by the Principal

The Principal will be entitled in its absolute discretion and at no cost either directly or through any other party to make use of any ideas, designs, data, reports or other products or outcomes used or developed by the Consultant in conjunction with this Agreement which are not subject to royalties or patent rights for carrying out additional or similar work at any location. The Consultant will not be liable to the Principal or any third party in any way for such use of these outcomes or products.

19.5 Data

- (a) Notwithstanding any other provision in the Agreement, all Data hereby vests in the Principal and the Principal grants to the Consultant an irrevocable licence with the right to sublicense to its contractors the right to use the Data for the purpose of carrying out the Services.
- (b) The Consultant must do everything possible to perfect such vesting including:
 - (i) assign to the Principal from the date of creation all Intellectual Property Rights in the Data created or obtained by or on behalf of the Principal for the purpose of the Agreement; and
 - (ii) upon Completion of the Services, give the Principal possession of all the Data in such form and by such means as the Principal reasonably requires.
- (c) The Consultant must only use, copy or supply the Data to the extent necessary to perform its obligations under the Agreement.

19.6 Moral Rights Consent

Prior to and as a condition of Completion (or within 10 Business Days after the expiry or termination of the Agreement, whichever first occurs), the Consultant must procure a Moral Rights Consent duly executed by each Author and provide such Moral Rights Consent to the Principal.

19.7 Moral Rights Representation

The Consultant by submitting a Deliverable to the Principal, represents and is taken to represent to the Principal that:

- (a) the use, disclosure, reproduction, transmission, exhibition, communication, adaption, publication or otherwise the exercise of rights in relation to the Deliverable anywhere in the world in whatever form by or on behalf of the Principal or its Associates:
 - (i) will not infringe the Moral Rights of any Author; and
 - (ii) is consented to by all relevant Authors; and
- (b) each Author possessed of Moral Rights arising in relation to or connection with the relevant Deliverable agrees that its Moral Rights are not and will not be infringed by acts or omissions of the Principal or the Principal's Associates which would otherwise constitute an infringement under Part IX of the Copyright Act (including where identification of the relevant Author is not made) and in procuring any Moral Rights Consents, the Consultant has not applied any duress to any person or made a statement to any person knowing that:
 - (i) the statement is false or misleading in a material way; or
 - (ii) a matter or thing has been omitted from the statement, without which the statement is false or misleading in a material way.

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19.8 Survive termination

Clause 19, and the assignments and licences granted to the Principal under them, will survive any termination or Completion of the Agreement.

20. Limitation of Liability and Indemnity

20.1 Consultant's Indemnity

The Consultant indemnifies the Principal against any and all losses, costs, expenses, claims, demands or any other actions in each case of any kind whatsoever (collectively 'liability') which are suffered or incurred by the Principal arising out of or in connection with:

- (a) without limiting sub-clauses 20.1(b) or 20.1(c), any liability for any negligent act, error or omission on the part of the Consultant or a Consultant Associate arising out of the performance of the Services;
- (b) any liability in respect of personal injury, death or property damage arising out of the performance of the Services; or
- (c) any liability arising out of a breach by the Consultant of this Agreement.

20.2 Principal's Contribution

The Consultant's liability under clause 20.1 shall be reduced to the extent that the liability in question is caused, or contributed to, by a breach of this Agreement by the Principal or negligence by the Principal, the Principal's officers, employees or agents.

20.3 Application of the *Wrongs Act*

The Consultant and the Principal agree that, for the purposes of section 24AI of the *Wrongs Act 1958 (Vic)*, the Consultant is entirely responsible for the Consultant's failure to take reasonable care and any failure to take reasonable care by a Consultant Associate.

20.4 Liability Cap

Subject to clause 20.5, to the extent permitted by law:

- (a) the aggregate liability of the Consultant to the Principal arising out of or in connection with the Agreement, (whether arising in contract, under an indemnity, in tort (including negligence), under statute or otherwise in law or equity) is limited to the Liability Cap; and
- (b) neither party will be liable to the other for Consequential Loss.

20.5 Exclusions

Clause 20.4 does not apply to any loss or liability of the Consultant to the Principal:

- (a) which is covered by a policy of insurance required to be taken out by the Consultant under the Agreement;
- (b) which is offset by insurance proceeds payable (or which should have been payable) to a party under a policy of insurance required to be taken out by the Consultant under the Agreement including any proceeds that should have been payable but for:
 - (i) any act or omission of the Consultant or the Consultant Associates (including a failure to effect, maintain or comply with such insurances); or
 - (ii) the inclusion of this Clause 20.5(b) in the Agreement;
- (c) the abandonment of the Services or the repudiation of the Agreement;
- (d) fraud or criminal conduct by the Consultant or any Consultant Associate;
- (e) wilful default or wilful misconduct by the Consultant or any Consultant Associate;
- (f) any claims of a third party for personal injury, death or property damage;

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- (g) any other intentional, malicious or reckless act or omission by the Consultant or any Consultant Associate;
- (h) any infringement by the Consultant or any Consultant Associate of any Intellectual Property Rights or the 'moral rights' (as defined in the *Copyright Act 1968* (Cth)) of a third party; or
- (i) which cannot be limited or excluded at law.

21. Insurance

- (a) Before commencing the performance of the Services and as a condition of entitlement to payment of any part of the Fee, the Consultant must arrange the following insurances:
 - (i) workers' compensation insurance for any of the Consultant's employees or anyone treated as an employee of the Consultant under any legislation
 - (ii) public liability insurance in the name of the Consultant which covers the:
 - (A) Consultant for its rights, interests and liabilities to third parties arising out of, or in any way in connection with, the performance of the Services; and
 - (B) liability of the Consultant to the Principal for loss of or damage to property (including loss of use of property, whether damaged or not) and the death of or injury to any person (other than liability which the law requires to be covered under a workers compensation insurance policy); andfor the amount set out in Item 12;
 - (iii) professional indemnity insurance for the amount set out in Item 6; and
 - (iv) such other insurance required by law or any Authorities in order to perform the Services for the amount set out in Item 12.
- (b) The professional indemnity policy must include provisions for at least one automatic reinstatement of the sum insured.
- (c) The Consultant must notify the Principal in the event that any of the following events occur in respect of any insurance required by clause 21(a):
 - (i) cancellation and/or lapse of the policy; and/or
 - (ii) non-renewal of the policy; and/or
 - (iii) a significant claim or claims (nominally over \$100,000 in value) have been made under the policy which may impact the Consultant's ability to provide the Services or make a claim under the relevant insurance policy.
- (d) The terms of the insurance must not contain any terms (including limitations, exclusions or terms and conditions) that are not commonly found in the relevant type. The Consultant must provide to the Principal upon request evidence reasonably acceptable to the Principal that the insurances required have been effected in accordance with this Agreement have been taken out.
- (e) During the term of the Agreement, the Consultant must upon request provide the Principal with copies of certificates of currency evidencing continued currency of the insurances required to be effected under this clause 20.1 and must provide written answers in reasonable detail to any reasonable questions raised by the Principal regarding such insurances.
- (f) The Consultant must keep the worker's compensation and public liability insurance in force at all times while this Agreement continues and keep the professional indemnity insurance in force for the number of years after the performance of the Services set out in Item 12 (**the run off period**).
- (g) The Consultant's liability to the Principal shall not be limited or affected in any way by the terms of the professional indemnity insurance policy.

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- (h) The Consultant must not cancel, reduce, fail to renew or materially alter any of the insurance policies required by this clause during the currency period without the prior written consent of the Principal.
- (i) The Consultant must punctually pay all premiums and rectify anything which might prejudice any insurance.
- (j) The Consultant acknowledges and agrees that if it fails to comply with this clause 20.1:
 - (i) this shall constitute a breach of a material term for the purpose of clause 28(a)(vii); and
 - (ii) the Consultant shall not be entitled to submit a payment claim under clause 10.2.

22. Conflict of Interest, Consultant's Tender, Probity Event, Supplier Code of Conduct and Modern Slavery

22.1 Avoiding Conflicts of Interest

The Consultant must not and must require that the Consultant's Associates do not, undertake any activities related to, or be interested in (directly or indirectly) any business or activity which concerns or purports or proposes to concern, any business or activity of the Principal or which is likely to give rise to a conflict of interest.

22.2 Notification and Management of Conflicts of Interest

The Consultant warrants that as at the date of submission of the Consultant's tender in respect of the Agreement, to the best of its knowledge and belief having made all reasonable and diligent inquiries, no actual or potential conflict of interest exists or is likely to arise between the Principal and the Consultant in relation to the performance of the Consultant's obligations arising out of the Agreement. If the Consultant becomes aware that it is at risk of being placed in a position of conflict or a conflict of interest arises, the Consultant must:

- (a) immediately notify the Principal in writing and do all things necessary to remove itself from any such position and co-operate with the Principal to resolve the conflict; and
- (b) take all steps required by the Principal to remove, avoid or minimise the conflict or risk.

The Principal may give its written permission (on such terms as the Principal determine) that the Consultant may commence or continue to provide the Services if the Consultant has a potential conflict of interest. If the Principal gives its written permission, the Consultant must at all times strictly comply with the terms and conditions specified by the Principal in addition to complying this Agreement.

22.3 Consultant's Tender

The Consultant warrants that all representations made in the Consultant's tender, including the tender schedules, are true.

22.4 Probity Event

- (a) The Consultant must give notice to the Principal immediately upon becoming aware that a Probity Event has occurred or is likely to occur. The notice must, at a minimum, describe the Probity Event, when the Probity Event occurred or is likely to occur and the circumstances giving rise the Probity Event.
- (b) Within 10 Business Days after receipt of a notice under clause 22.4(a) or either party becoming aware of a Probity Event:
 - (i) the Principal and the Consultant must meet and attempt to agree a course of action to cure or address the Probity Event and the timeframe in which that will occur; and
 - (ii) subject to clause 22.4(c), the Consultant must comply with any agreement made under clause 22.4(b)(i) (if any) including in accordance with any timeframe agreed.

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- (c) If the Principal and the Consultant fail to agree to a course of action under clause 22.4(b)(i), the Consultant must take any action as required by the Principal to cure or address the Probity Event immediately upon being required to do so (including where the Probity Event is in respect of a Consultant's Associate, removing or not engaging that Consultant's Associate in respect of the Services) and in accordance with any timeframe determined by the Principal.

22.5 Supplier Code of Conduct

The Consultant acknowledges that:

- (a) the Supplier Code of Conduct is an important part of the State of Victoria's approach to procurement and describes the State's expectations regarding the conduct of its suppliers;
- (b) it has read and aspires to comply with the Supplier Code of Conduct;
- (c) the expectations set out in the Supplier Code of Conduct are not intended to reduce, alter or supersede any other obligations which may be imposed on the Consultant, whether under the Agreement or at law.

22.6 Modern Slavery

The Consultant acknowledges and agrees that the Consultant must:

- (a) comply with the Modern Slavery Legislation to the extent that such legislation is applicable to the Consultant;
- (b) in any event, facilitate the Principal complying with any of the Modern Slavery Legislation applicable to the Principal, by reporting in a timely manner and providing all information concerning its supply chain and that of its subconsultants and suppliers which the Principal may acting reasonably require, such reporting and other information being provided no later than 60 days after expiry of the period to which the reporting relates to, or earlier where required in order for the Principal to meet its obligations under the applicable Modern Slavery Legislation; and
- (c) ensure that such reporting and other information is accurate, complete and in such form as the Principal in its discretion requires.

23. Assignment and novation

- (a) The Consultant must not assign this Agreement, the Services or any part of this Agreement or the Services without the Principal's written consent (which consent may be subject to any conditions which the Principal considers appropriate).
- (b) Approval of any assignment under clause 23(a) does not relieve the Consultant from its obligations under this Agreement.
- (c) The Principal may by notice in writing to the Consultant assign this Agreement or any part of it to any other person at any time.
- (d) The Principal may novate this Agreement to another person or corporation for any reason. If the Principal gives notice in writing to the Consultant pursuant to this clause 23 that it has decided to novate this Agreement, the Consultant must execute a Deed of Novation.
- (e) A Deed of Novation shall be deemed to be effective upon the party to whom the Agreement is being novated executing the Deed of Novation.

24. Consultant's Associates and Subconsultants

- (a) The Consultant shall be responsible for the Consultant's Associates:
 - (i) complying with the terms of this Agreement;
 - (ii) having the appropriate skills and other required qualifications and have the required level of understanding of their health and safety responsibilities inherent in the work they will be required to undertake;

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- (iii) on request by the Principal, signing a confidentiality undertaking in a form acceptable to the Principal; and
 - (iv) being removed from the provision of the Services where the Principal considers there has been a breach of this clause 24(a).
- (b) The Consultant shall be responsible for the Consultant's subconsultants:
 - (i) on request by the Principal, executing an assignment of Intellectual Property Rights in a form acceptable to the Principal;
 - (ii) taking out levels of professional indemnity insurance of at least the same amount as required under this Agreement, and any other insurances that would be reasonably considered to be prudent given the nature of the services being undertaken by the subconsultant;
 - (iii) on request by the Principal, signing a Collateral Deed in favour of the Principal; and
 - (iv) undergoing a review by the Consultant of the capacity (including financial capacity) of the sub-consultant to provide any part of the Services.
- (c) If the Services are being provided by the Consultant's employee or subconsultant the Principal may (without affecting any of the Consultant's obligations under this Agreement):
 - (i) deal directly with the employee or subconsultant for the purposes of instruction and supervision; and
 - (ii) reject the employee or subconsultant. The Consultant must replace the employee or subconsultant if the Principal so wishes.
- (d) The Consultant must not, without first obtaining the Principal's prior written consent, use an employee or contractor in relation to the Services who has worked with the Principal in relation to the Project in the 12 months before the date of this Agreement.
- (e) Notwithstanding any sub-consulting, the Consultant will be entirely responsible for and vicariously liable for the acts, defaults and omissions of its subconsultants and employees and approval of any sub-consultant does not relieve the Consultant from this obligation. The Consultant and the Principal agree that, for the purposes of section 24A1 of the *Wrongs Act 1958* (Vic), the Consultant is entirely responsible for any failure on the part of any of its subconsultants or agents to take reasonable care.

25. Key Personnel

- (a) The Consultant shall ensure all Key Personnel are dedicated to the performance of the Services until the Services have been completed.
- (b) The Consultant must not disengage Key Personnel without the prior approval of the Principal (which approval shall not be unreasonably withheld) and shall advise the Principal as soon as it becomes aware of any proposed disengagement of Key Personnel.
- (c) The Principal may direct removal of Key Personnel if it is reasonably of the view that any Key Personnel are unsatisfactory.
- (d) If it is necessary to replace any Key Personnel, the Consultant must immediately arrange for replacement, at no additional cost to the Principal, by a person of comparable experience to be approved by the Principal. If the Consultant cannot provide a replacement who is acceptable to the Principal then clause 28(a)(ix) applies.

26. Superintendent under Project Contract

26.1 Appointment

Where the Scope of Services requires the Consultant to act as Superintendent in relation to a Project Contract or where the Principal otherwise requires the Consultant to act as Superintendent under a Project Contract then:

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- (a) the Consultant accepts that, in accordance with the Project Contract, it shall perform the role of Superintendent; and
- (b) subject to clause 26.3, the Principal authorises the Consultant to act as its agent in the performance of the role of Superintendent to the extent required to discharge the obligations of the Superintendent under the Project Contract, and to perform acts which are necessarily or ordinarily incidental to this express authority only. For the avoidance of doubt, the parties agree that no further authority is to be implied.

26.2 Obligations of the Consultant

In discharging the role of Superintendent and subject to clause 26.3, the Consultant must:

- (a) regularly consult with the Principal;
- (b) comply with all directions of the Principal in relation to matters where it is not required to act independently;
- (c) comply with all policies and procedures notified by the Principal from time to time;
- (d) perform the obligations of the Superintendent under the Project Contract;
- (e) not put the Principal in breach of its obligations under the Project Contract;
- (f) not exercise any discretion of the Superintendent under the Project Contract without the Principal's prior consent unless the Superintendent is required to act independently under the Project Contract; and
- (g) perform the role of Superintendent in accordance with this Agreement and all laws.

26.3 Role of the Superintendent

- (a) The Consultant acknowledges that as Superintendent it will be required to assess and certify claims by Other Contractors in relation to the Project Contract (including claims for payment, extensions of time, delay costs and variations).
- (b) In performing the function referred to in clause 26.3(a), the Consultant must:
 - (i) subject to clause 26.3(b)(ii) and 26.3(b)(iii), comply with its obligations under clause 26.2;
 - (ii) act honestly; and
 - (iii) assess and certify claims in accordance with the relevant requirements in the Project Contract.

26.4 Security of Payment Act and Project Contract

- (a) The Consultant acknowledges that the Security of Payment Act may apply to the Project Contract.
- (b) The Consultant undertakes that it is aware of and understands the Security of Payment Act (including the payment regime) and the relationship between the Security of Payment Act and the Project Contract.
- (c) The Consultant agrees that as Superintendent it must comply with the obligations of the Principal under the Security of Payment Act (if any) in relation to:
 - (i) receiving valid payment claims;
 - (ii) issuing valid payment schedules; and
 - (iii) otherwise administering the payment regime,
 - (iv) in accordance with the Security of Payment Act including the timing requirements set out in the Security of Payment Act.
- (d) The Consultant must:
 - (i) immediately give the Principal a copy of any document:

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- (A) the Consultant receives, as Superintendent, from an Other Contractor arising out of or in connection with the Security of Payment Act (including payment claims) and a Project Contract; and
- (B) the Consultant, as Superintendent, supplies to an Other Contractor arising out of or in connection with the Security of Payment Act (including payment schedules) and a Project Contract; and
- (ii) in the event that an adjudication application is issued by an Other Contractor against the Principal under the Security of Payment Act, at its own cost, provide the Principal with all assistance reasonably required to prepare the adjudication response and otherwise participate in the adjudication process (including any review or appeal of an adjudication determination).
- (e) The Consultant acknowledges that, if it fails to comply with its obligations under this clause 26, the Principal may suffer liability to Other Contractors.

27. Suspension of the Services

- (a) The Principal may by notice in writing at any time to the Consultant suspend or defer the Services in whole or in part. Upon receipt of the notice, the Consultant must suspend the Services in whole or in part until further written notice from the Principal.
- (b) If the suspension is due to an act, default or omission of the Consultant, the Principal is not required to make any payment to the Consultant in relation to the suspension. Otherwise, the Principal must pay the Consultant its reasonable costs up to the date of the suspension and costs reasonably incurred because of the suspension. Such costs shall be agreed by the parties but if agreement cannot be reached, the Principal must pay the Consultant reasonable costs as determined by the Principal.
- (c) The Principal must give the Consultant reasonable notice of recommencement of the Services.
- (d) In the event that the Services are suspended under clause 27(a) for longer than three months, either party may end this Agreement upon one month's written notice to the other party.
- (e) If the Services provided under this Agreement are architectural services and the Consultant reasonably considers that the provision of the Services requires the Consultant to breach the *Architects Act 1991* (Vic), *Architects Regulations 2015* (Vic) or Victorian Architects Code of Professional Conduct, the Consultant may suspend the provision of the Services for the period that the Consultant reasonably considers that the Services constitutes a breach the *Architects Act 1991* (Vic), *Architects Regulations 2015* (Vic) or the Victorian Architects Code of Professional Conduct. Any suspension of the Services under clause 27(d) is at the Consultant's cost and risk and the Consultant shall have no claim against the Principal in the event of a suspension under this clause.

28. Default and termination

- (a) The Principal may end this Agreement by notice to the Consultant at any time with immediate effect if:
 - (i) the Consultant enters or threatens to enter into bankruptcy, liquidation or other analogous type of insolvency or if the Consultant ceases to conduct business;
 - (ii) the Principal becomes aware that the Consultant has a real or potential conflict of interest and the matter is not resolved within 5 Business Days of the Principal giving notice to the Consultant of the Principal's concerns;
 - (iii) the Consultant or any of its Associates are charged with any criminal offence which, in the Principal's reasonable opinion, brings the Consultant or the Principal into disrepute;

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- (iv) the Consultant acts dishonestly, fraudulently or illegally;
 - (v) the Consultant acts in a manner which brings the Principal or Project into disrepute or adversely affects the Principal's or the Project's reputation or may have the effect of bringing the Principal or the Project into disrepute or adversely affecting the Principal's or the Project's reputation;
 - (vi) the Consultant fails to execute a deed of confidentiality upon request by the Principal pursuant to clause 15(e);
 - (vii) the Consultant is in breach of any of its obligations under clause 22;
 - (viii) the Consultant breaches any other material term of this Agreement, including a material breach relating to Safety Legislation and Safety Requirements; or
 - (ix) the Principal considers that the Consultant is incapable of performing the Services, does not have the appropriate skills and other required qualifications to provide the Services or is unable to replace Key Personnel under clause 27(d).
- (b) Any costs or expenses incurred or damage sustained by the Principal in remedying any breach of the Consultant or in any way arising out of the Consultant's default shall become a debt due and payable to the Principal by the Consultant and may be recoverable from the Consultant by deduction from any moneys held on account of the Consultant or by action at law.
- (c) The Principal may end this Agreement for convenience by 20 Business Days written notice to the Consultant. If this power is exercised by the Principal:
- (i) the Consultant shall not be entitled to treat the ending of this Agreement as a breach of this Agreement by the Principal;
 - (ii) the Consultant's liability to the Principal and the Principal's right to damages for any breach of this Agreement (including where such breach would have entitled the Principal to terminate for default) by the Consultant shall not be affected; and
 - (iii) subject to the Consultant's compliance with clause 28(d), the Principal shall pay to the Consultant (as full compensation but without prejudice to any accrued rights of the Consultant) the portion of the Fee due to the Consultant at the time of ending this Agreement, plus a sum for the reasonable direct costs and expenses (but not losses, whether loss of profit or otherwise) the Consultant incurs solely as a consequence of the Principal ending this Agreement.
- (d) If the Principal ends this Agreement or takes over any part of the Services, the Principal may engage others to carry out any part of the Services at the Consultant's expense.
- (e) At the end of this Agreement, the Consultant must immediately provide to the Principal any Confidential Information and all Materials and all copies of the Materials in a form capable of re-use by the Principal (except for one copy of the Materials which, subject to clause 14, may be retained by the Consultant for record keeping purposes). The Principal may withhold payment of any part of the Fee that is owing to the Consultant until the Consultant has complied with this clause 28(f).
- (f) The Consultant may only end this Agreement if the Principal does not pay any money owing to the Consultant under this Agreement within 20 Business Days after the Principal has received written notice from the Consultant advising the Principal that the money is overdue for payment in accordance with this Agreement and that the Consultant intends to terminate this Agreement.

29. Clauses surviving termination

Any indemnity and all obligations of confidence under this Agreement are independent and survive termination of this Agreement. Any other term by its nature intended to survive termination of this Agreement survives termination of this Agreement including clauses 14, 16, 17, 18, 19, 20, 29, 30, 32, 33, 34, 35 and 44.

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30. Dispute resolution

- (a) If a dispute arises under or in connection with this Agreement, either party may give written notice to the other requiring a meeting between nominated senior representatives (being at or not less than general manager level) of both parties with authority to resolve the dispute. The nominated senior representatives must meet within 5 Business Days of the notice and endeavour to resolve the dispute in good faith.
- (b) If the dispute remains unresolved 5 Business Days after the settlement meeting, the parties must engage in a mediation prior to referral of the dispute to arbitration where:
 - (i) the amount in dispute exceeds \$500,000 (indexed to CPI as at execution of this Agreement); or
 - (ii) the Principal requests in writing that a mediation be held.
- (c) Any mediation conducted under clause 30(b) must be conducted:
 - (i) by a mediator appointed by the parties within 10 Business Days of referral of the dispute to mediation or failing which the mediator will be appointed on the application of either party, to the Chairperson of the Resolution Institute (Victorian Chapter); and
 - (ii) to the extent not inconsistent with this Agreement, in accordance with and subject to the Resolution Institute Mediation and Rules commencing 8 September 2016.
- (d) If a settlement meeting does not take place by the time required under clause 30(a) or the dispute remains unresolved 5 Business Days after the settlement meeting under clause 30(a) or conclusion of the mediation under clause 30(b) either party may refer the dispute to arbitration.
- (e) If, within 10 Business Days of the dispute being referred to arbitration, the parties have not agreed upon an arbitrator, the arbitrator shall be nominated by the Chairperson of the Resolution Institute (Victorian Chapter). The arbitration shall be conducted in accordance with the Resolution Institute Arbitration Rules 2020.
- (f) Notwithstanding the existence of a dispute, the Consultant must continue to perform the Services in accordance with this Agreement.

31. Notices

- (a) Where any notice, direction, request or other communication is required to be given in writing pursuant to this Agreement, service thereof shall be effected by its delivery by hand or sent by post or email to the address set out in this Agreement, or a substitute address that has been notified to the other party.
- (b) Service of any notice, direction, request or other communication pursuant to clause 31(a) shall be deemed to have been given or made when:
 - (i) if delivered by hand, at the time of the delivery
 - (ii) if sent via email, at the time the email containing the notice left the sender's email system, unless the sender receives notification that the email containing the notice was not received by the recipient or
 - (iii) if posted as provided under clause 31(a), two Business Days after the posting of the notice, direction, request or other communication.

32. Bar on claims

- (a) Except as provided for elsewhere in this Agreement, the Consultant does not have any right to make a claim for money against the Principal arising out of or in connection with the Services or this Agreement unless the Consultant gives to the Principal a written notice within 20 Business Days after the earlier of when the Consultant became aware or should reasonably have become aware of the occurrence of the circumstances on which the claim is based, providing detailed particulars of the basis for and the quantification of the claim.

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- (b) Nothing in clause 32(a) shall disentitle, limit or restrict the Consultant from:
 - (i) defending or bringing a cross claim or action which is in substance a defence against any claim, action, suit or proceeding brought by the Principal against the Consultant; or
 - (ii) joining or exercising any right against the Principal in relation to any claim, action, suit or proceeding against the Consultant by a third party.

33. Set off

The Principal may, at any time, set off any of the following amounts against any amount the Principal owes the Consultant under this Agreement:

- (a) any amount the Consultant is required to pay under this Agreement or otherwise; and,
- (b) any reasonable costs the Principal necessarily incurs by doing something the Consultant is required to do under this Agreement and which the Consultant has failed to do having been given reasonable written notice to do.

This clause 33 survives termination or Completion of the Agreement.

34. Records, audit rights and public audit

- (a) Whilst providing the Services and for a minimum of seven years, or any other period directed in writing by the Principal, after the earlier to occur of termination or Completion of this Agreement, the Consultant must keep accurate and up to date accounting records and any other documents or papers which show all reasonable details in relation to:
 - (i) costs incurred or expended by the Consultant and any Consultant's Associate in undertaking the Services, including any variations;
 - (ii) all Fees and/or charges rendered or to be rendered by the Consultant to the Principal; and
 - (iii) the Consultant's compliance with the provisions of this Agreement;
- (b) The Consultant must make the records referred to in clause 34(a) and any Information referred to in this Agreement available for audit, inspection, verification and copying by the Principal, its agents or the Auditor-General of Victoria at any time or times requested by the Principal.
- (c) The Consultant must ensure that each Consultant Associate cooperates with and gives reasonable assistance to any persons authorised under clause 34(b) to undertake any such audit, inspection or verification.
- (d) The Consultant must, at its cost and without any additional entitlement under this Agreement:
 - (i) permit a Public Audit required by any Public Auditor;
 - (ii) procure that the Consultant's Associates permit a Public Audit required by any Public Auditor;
 - (iii) comply with the requirements or requests of, and cooperate with any Public Auditor during the conduct of a Public Audit;
 - (iv) procure that the Consultant's Associates comply with the requirements or requests of, and cooperate with any Public Auditor during, the conduct of a Public Audit; and
 - (v) provide to the Public Auditor reasonable working accommodation and associated facilities and services required by the Public Auditor for the purposes of undertaking a Public Audit.
- (e) Any obligations of confidence which one party has to the other under the Agreement or by reason of the entering into of the Agreement or the performance of the Agreement shall be

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subject to the obligations, duties, rights and entitlements of the parties in relation to any Public Audit.

- (f) This clause 34 survives termination or Completion of the Agreement.

35. Public Disclosure Requirements

- (a) The Principal, or a representative or nominee of the Principal:
- (i) may disclose any information (including any Confidential Information) if such disclosure is required by or is consistent with the Public Disclosure Requirements; and
 - (ii) publish (on the internet or otherwise) the name of the Consultant and the Fee together with conditions of this Agreement generally (including the Schedules).
- (b) Any obligations of confidence which one party has to the other under the Agreement or by reason of the entering into of the Agreement or the performance of the Agreement shall be subject to the right of the Principal under this clause 35.
- (c) This clause 35 survives the termination or Completion of the Agreement.

36. Design and Quality

- (a) Without limiting the Consultant's obligations under any other provision of this Agreement, the Consultant must:
- (i) design the parts of the Project which the Agreement requires it to design in accordance with the Project Brief and the other requirements of the Agreement, including by the preparation of all relevant Deliverables;
 - (ii) prepare the Deliverables so that the Works when constructed in accordance with the Deliverables meet all applicable Legal Requirements and the purposes stated in or which can be reasonably inferred from the Scope of Service;
 - (iii) ensure that any design solution must not include the installation of Prohibited Cladding Products into any building work in connection to buildings of Type A or Type B Construction and
 - (iv) 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 36(a)(iii).
- (b) If the Consultant becomes aware of the use of any Prohibited Cladding Products on the Project, the Consultant must immediately notify the Principal's Representative.

37. Compliance with Government Policy

37.1 Local Jobs First Policy

- (a) This clause 37.1 applies if indicated in Item 14.
- (b) The Consultant must comply with the Local Jobs First Obligations.

37.2 Social Procurement Framework

- (a) This clause 37.2 applies if indicated in Item 16.
- (b) The Consultant must comply with the Social Procurement Framework Obligations.

37.3 Fair Jobs Code

- (a) This clause 37.3 applies if indicated in Item 17.
- (b) The Consultant must comply with the Fair Jobs Code Obligations.

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38. Shared Reporting

This clause will apply, and the Agreement will be subject to the Shared Reporting Regime, if the Fee exceeds the threshold identified in Item 15 (**Shared Reporting Contract**).

38.1 Shared Reporting Information

The Consultant must:

- (a) cooperate with, and provide any assistance reasonably required by the Principal's Representative in relation to the Shared Reporting Process; and
- (b) provide to the Principal's Representative any information required by the Principal's Representative from time to time, within the time requested, for the purposes of the Shared Reporting Process (**Shared Reporting Information**).

38.2 Shared Reporting Process

The Consultant acknowledges and agrees that if the Agreement is a Shared Reporting Contract, then details of the Consultant's performance under the Agreement, including 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.

39. Special Conditions

This clause 39 applies if indicated in Item 18.

The Special Conditions form part of this Agreement. If the Special Conditions are inconsistent with the General Conditions or any other part of this Agreement, the Special Conditions prevail to the extent of any inconsistency.

40. Electronic Exchange

40.1 Entering into this Agreement Using Electronic Means

The parties agree that this Agreement may be executed and entered into using electronic means.

40.2 Method of Exchange of Agreement

The parties acknowledge and agree that the execution and exchange of this Agreement will be effected as follows:

- (a) first, the Consultant will execute this Agreement by way of electronic signature;
- (b) second, the Principal will execute this Agreement by way of an electronic signature; and
- (c) lastly, the Agreement will be exchanged by email or other electronic means,

with the date of exchange being the date of the Agreement.

40.3 Ensuring Enforceability of Agreement

If, at any time, as a result of this Agreement being entered into using electronic means the Agreement or any of its terms and conditions are invalid or unenforceable or the Principal or Consultant are not bound by them, the parties agree to execute and exchange printed copies of the Agreement (in the same form and with the same date of exchange as described in clause 40.2) and to take such other steps or provide such assurances as are reasonably necessary to confirm that the Agreement is binding upon the parties and enforceable.

40.4 Exchange of Physical Copies of Agreement Permitted

Nothing in this clause 40 prevents or restricts the parties from executing and exchanging physical copies of the Agreement.

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41. Non-reliance

- (a) The Consultant undertakes that it did not in any way rely upon:
- (i) any information, data, representation, statement or document made by or provided to the Consultant by the Principal or anyone on behalf of the Principal; or
 - (ii) the accuracy or adequacy of any such information, data, representation, statement or document,

for the purposes of entering into this Agreement, except to the extent that any such information, data, representation, statement or document forms part of this Agreement.

- (b) The Consultant undertakes that it enters into this Agreement based on its own investigations, interpretations, deductions, information and determinations, and all information provided by the Consultant to the Principal prior to entering into this Agreement (including in any tender) is accurate and complete.
- (c) The Consultant acknowledges that it is aware that the Principal has entered into this Agreement relying upon the undertakings in clause 41(b) and in this Agreement.

42. Applicable law

This Agreement is governed by the laws of Victoria. Any legal proceedings commenced by the Principal or the Consultant to enforce rights under this Agreement must be brought in the appropriate Court in Victoria.

43. Entire agreement

This Agreement is the entire agreement between the parties relating to the Services and cancels and supersedes all previous offers and negotiations between the Principal and the Consultant in relation to the Services.

44. Variation to Agreement

The parties may only vary this Agreement in writing signed by both the Principal and the Consultant.

45. Severability

Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability but that shall not invalidate the remaining provisions of this Agreement or affect such provision in any other jurisdiction.

46. Counterparts

If this Agreement consists of a number of signed counterparts, each is an original and all of the counterparts together constitute the same document.

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EXECUTED AS AN AGREEMENT on the, 20

[Drafting Note: the date of execution needs to be inserted by hand when all parties have executed the document.]

Executed for and on behalf of **Development Victoria**

under delegation of the Board in accordance with section 11 of the *Development Victoria Act 2003 (Vic)*

by **[insert name of authorised signatory]**

Signature:

[Drafting Note:

There are 5 execution clauses for the other party.

If the Consultant is a company with multiple directors and a company secretary, insert the name of the company and retain execution clauses 1 and 2 letting the company choose between these execution clauses.

If the other party is a proprietary company with 1 person as sole director and sole company secretary, insert the name of the person and retain execution clause 3.

If the other party is signing by its attorney pursuant to a power of attorney, insert the name of the attorney and the date of the power of attorney in the fourth execution clause, and retain execution clause 4. DV Legal needs to review the power of attorney.

if the person is signing as the company's authorised signatory, execution clause 5 must be used if the person is signing as the company's authorised signatory.]

No 1.

Executed by **[insert name of other party]** by being executed in accordance with section 127 of the *Corporations Act 2001 (Cth)*

Signature of director / secretary

Signature of director / secretary

Name of director / secretary

Name of director / secretary

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OR
No 2.

The official seal of **[insert name of other party]** is affixed in accordance with its constitution in the presence of:

Signature of director

Signature of director/company secretary
(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

No 3.

Executed by **[insert name of other party]** by being executed in accordance with section 127 of the *Corporations Act 2001 (Cth)*

Signature of sole director / sole secretary

Name of sole director / sole secretary

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No 4. – To be used only after consultation with DV Legal

Executed by **[insert name of other party]** by its)
Attorney **##full name of Attorney** under a Power of)
Attorney dated **##date** in the presence of:)
)

.....
Witness

.....
Full name of Witness

No 5. Execution by authorised signatory

Executed for and on behalf of **[insert**)
name of corporation] [insert ACN] by)
[insert name of other party] as its)
duly authorised signatory in the)
presence of:)

.....
Witness

.....
Full name of Witness

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Schedule 1 - Particulars

#[DEVELOPMENT VICTORIA to complete information in this Schedule]

Item	Clause	Details												
1.	FEE: (clause 1.1)	<p>(a) Lump Sum Fee \$ excluding GST#</p> <table border="1"> <thead> <tr> <th>Stage</th> <th>% Fee per Stage</th> <th>Amount of Fee payable (excluding GST)</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table> <p>(b) Out of pocket expenses for which Consultant will be reimbursed: [Note: Insert if any.] <i>If no items are stated, then no out of pocket expenses of the Consultant will be reimbursed</i></p>	Stage	% Fee per Stage	Amount of Fee payable (excluding GST)									
Stage	% Fee per Stage	Amount of Fee payable (excluding GST)												
2.	PAYMENT: (clause 10)	<p><input type="checkbox"/> Claim made on [insert] of each month OR <input type="checkbox"/> Claim to be made on Completion of the Service</p> <p><i>If no Item selected, the payment claims shall be submitted on the 25th of each month for Services provided to that date.</i></p>												
3.	PRINCIPAL'S REPRESENTATIVE: (clause 4) [DV to insert details of Principal's Representative]	<p>Name: Address: Email: Telephone:</p>												
4.	CONSULTANT REPRESENTATIVE: (clause 4) [Consultant to insert details of Consultant Representative]	<p>Name: Address: Email: Telephone:</p>												
5.	KEY PERSONNEL: (clause 25)													

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Item	Clause	Details															
	[Insert roles and names of key personnel]																
6.	SECURITY: (clause 6)	Security is required <input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i>															
7.	COMMENCEMENT DATE: (clause 1.1)	[Insert]															
8.	COMPLETION OF THE SERVICES: (clause 9)	<p>(a) Time for completion</p> <table border="1"> <thead> <tr> <th>Stage</th> <th>Stage description</th> <th>Stage Completion Date</th> </tr> </thead> <tbody> <tr> <td>1</td> <td></td> <td></td> </tr> <tr> <td>2</td> <td></td> <td></td> </tr> <tr> <td>3</td> <td></td> <td></td> </tr> <tr> <td>4</td> <td></td> <td></td> </tr> </tbody> </table> <p>or where there are no Stages, the Period / Date for Completion is [##Insert]</p> <p>(b) Program is required <input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i> If a program is required, the program shall be submitted by [date]</p> <p>(c) Liquidated Damages Liquidated damages for delay in Completion of the Services by the Date for Completion of the Services: \$...../Day If 'Nil' or 'Not applicable' is inserted, or no amount is inserted, it is the Principal's intention that its rights to common law damages for delay is not affected. [Note: Complete or mark 'Nil' or 'Not applicable'.]</p>	Stage	Stage description	Stage Completion Date	1			2			3			4		
Stage	Stage description	Stage Completion Date															
1																	
2																	
3																	
4																	
9.	ENVIRONMENTAL OBLIGATIONS applies to this agreement? (clause 14)	<input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, Yes)</i>															

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Item	Clause	Details
10.	OWNERSHIP OF INTELLECTUAL PROPERTY RIGHTS: (clause 19.1)	<input type="checkbox"/> Alternative 1 <input type="checkbox"/> Alternative 2 <i>(If nothing stated, Alternative 1 applies)</i>
11.	LIABILITY CAP: (clause 20)	Amount: [\$20] million [Amount needs to be the greater of \$20 million or contract value – any reduction of this must be approved by DV Legal and recorded in PIMS]
12.	INSURANCE: (clause 20.1)	Professional Indemnity Insurance: [\$20] million Run off period for Professional Indemnity Insurance: 10 years after this Agreement has ended [Please consider whether run off cover is appropriate. If it is, the period should be not less than 10 years] Public Liability Insurance: [\$20] million
13.	AUTHORISED NOMINATING AUTHORITIES: (clause 10.5(g))	Authorised nominating authorities: (a) The Chapter of the Resolution Institute (Victorian Chapter); (b) RICS Dispute Resolution Services; and (c) Rialto Adjudications Pty Ltd.
14.	LOCAL JOBS FIRST OBLIGATIONS applies to this Agreement? (clause 37.1 and Schedule 6) Local Jobs First reporting – are 6 monthly reports required? (Schedule 6 clause 2.3(c)) Other reporting dates for the Local Jobs First Policy (Schedule 6 clause 2.3(d))	<input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, Yes)</i> <input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No.</i> [Guidance Note: 6 monthly reports are required if this Agreement is part of a project valued at \$20 million or more (exclusive of GST).] [Insert] <i>(If nothing stated, there are no other reporting dates)</i>
15.	THRESHOLD FOR SHARED PERFORMANCE REPORTING: (clause 38)	\$200,000 (inclusive of GST)

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Item	Clause	Details						
16.	<p>SOCIAL PROCUREMENT FRAMEWORK OBLIGATIONS</p> <p>applies to this Agreement? (clause 37.2 and Schedule 7)</p> <p>Frequency when Social Procurement Framework Reports are required to be submitted: (Schedule 6 clause 3(b))</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i></p> <p>[Insert] <i>(If nothing stated, 6 monthly)</i></p>						
17.	<p>FAIR JOBS CODE OBLIGATIONS</p> <p>applies to this Agreement? (clause 37.3 and Schedule 9)</p> <p>Does an FJC Plan apply to this Agreement? (Schedule 9 clause 4)</p> <p>Does the requirements for Significant Subcontractors apply to this Agreement? (Schedule 9 clause 6)</p> <p>Frequency to submit FJC Performance Reports (Schedule 9.clause 4)</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, Yes)</i></p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i></p> <p><input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i></p> <p>[Insert] <i>(If nothing stated, Yearly)</i></p>						
18.	<p>SPECIAL CONDITIONS (clause 39)</p>	<p><input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i></p>						
19.	<p>APPROVED SUBCONSULTANTS (Schedule 8 Special Condition 1)</p>	<p>Is this applicable? <input type="checkbox"/> Yes <input type="checkbox"/> No <i>(If nothing stated, No)</i></p> <table border="1" data-bbox="603 1738 1394 1910"> <thead> <tr> <th data-bbox="603 1738 999 1816">SERVICE</th> <th data-bbox="999 1738 1394 1816">APPROVED SUBCONSULTANT</th> </tr> </thead> <tbody> <tr> <td data-bbox="603 1816 999 1865"> </td> <td data-bbox="999 1816 1394 1865"> </td> </tr> <tr> <td data-bbox="603 1865 999 1910"> </td> <td data-bbox="999 1865 1394 1910"> </td> </tr> </tbody> </table>	SERVICE	APPROVED SUBCONSULTANT				
SERVICE	APPROVED SUBCONSULTANT							

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Schedule 2 – Project Brief

[A detailed services brief is required. This must be prepared and reviewed by DV. The scope of services needs to document what the consultant will do and specify the deliverables. It is effectively a checklist that can be used to confirm that the consultant has delivered on what was agreed. The scope needs to be a single document so all amendments must be consolidated.]

[Do not insert the Consultant's tender response or the RFQ/RFP as things may have changed.]

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Schedule 3 – Collateral Deed

BY: (Service Provider)

IN FAVOUR OF: Development Victoria (Development Victoria)

Background

- A. Development Victoria has entered into an agreement dated [Insert#] with the Consultant (Agreement) for the provision of the Services.
- B. The Consultant has engaged the Service Provider to perform some or all of the Services (Relevant Services).
- C. Development Victoria consents to the engagement of the Service Provider on condition that the Service Provider executes this document in favour of Development Victoria.

Agreed Terms

1. The Service Provider undertakes that it will provide the Relevant Services with due skill and care and (without limiting the Agreement) to that standard to be expected of a consultant who regularly acts in the capacity in which the Service Provider is engaged, to the best of the Service Provider's knowledge and expertise, and must comply with all relevant policies of Development Victoria in carrying out such Relevant Services including, without limitation, any policy implemented with respect to privacy, occupational health and safety, information technology and industrial relations.
2. The Service Provider undertakes to Development Victoria that the Service Provider:
 - (a) will develop and complete the Deliverables:
 - (i) so that the Deliverables are accurate, suitable, appropriate and adequate for the Project and fit for the purposes stated in or reasonably inferred from the Scope of Services having due regard to the Project Brief and the assumptions that the Consultant can reasonably be expected to make in accordance with sound professional principles;
 - (ii) to comply with Safety Legislation, Safety Requirements and the requirements of this Agreement;
 - (iii) to comply with all the requirements of this Agreement;
 - (iv) so that the Deliverables will:
 - (A) be fit for purpose;
 - (B) be fit for inclusion in the construction contract as the 'Drawings' or 'Specification' (as applicable) as defined in the relevant construction contract for the Project and that Deliverables will not contain any ambiguities or discrepancies;
 - (C) be fully coordinated and integrated with all other design and documentation (including the Materials) produced in relation to the Project so as to eliminate design conflict, omissions or discrepancies; and
 - (D) comply with all the requirements of the Agreement.
 - (b) will carry out, or arrange the carrying out of, any calculations, analysis, testing or examination that may be necessary so that the design is without risks to health and safety when used for the purpose for which it was designed;

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- (c) will, on request, so far as is reasonably practicable, give current relevant information to Development Victoria in relation to any results from any calculations, analysis, testing or examination as referred to in the preceding paragraph;
 - (d) will when providing the Relevant Services and for a period of ten years after completion of the Relevant Services, the Service Provider must keep and maintain accurate and comprehensive records:
 - (i) maintained by the Service Provider for the purposes of the Agreement; or
 - (ii) relating to the carrying out of the Relevant Services; and
 - (iii) of all fees and/or charges rendered or to be rendered by the Service Provider in relation to the Relevant Services;
 - (e) will make the records and information referred to in 2(d) available on reasonable notice for inspection and copying by Development Victoria, its agents or the Auditor-General of Victoria; and
 - (f) will give adequate information to Development Victoria in respect of the conditions necessary so that anything designed under or for the purpose of this Agreement is without risks to health and safety when used for a purpose for which it has been designed.
3. Terms capitalised but not defined in this Deed Poll have the same meaning as they do in the Agreement.

EXECUTED AS A DEED POLL

Executed by Service Provider in accordance with Section 127 of the *Corporations Act 2001*

Signature of director



Signature of director/company secretary
(Please delete as applicable)



Name of director (print)

Name of director/company secretary (print)

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Schedule 4 – Deed of Novation

Date

Parties

Name **Development Victoria**

Short form name **Principal**

Notice details Level 9, 8 Exhibition Street, Melbourne, Victoria 3000

Name **[Note: ensure legal (not trading) name of party]**

Short form name **Incoming Party**

Notice details **[Note: physical address (not PO Box)]**

Name **[Insert]**

Short form name **Consultant**

Notice details **[Insert]**

Background

- A. The Principal and the Consultant are parties to the Contract.
- B. The Principal and the Incoming Party are parties to the Building Contract.
- C. The parties have agreed that the Incoming Party will replace the Principal under the Contract from the Effective Date.

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Agreed terms

1. Definitions & Interpretation

1.1 Defined terms

In this Deed:

Business Day has the meaning given in the *Building and Construction Industry Security of Payment Act 2002* (Vic).

Contract means the contract between the Principal and the Consultant dated *[insert date]*.

Building Contract means the contract between the Principal and the Incoming Party dated *[insert date]*.

Claim means any action, claim, demand or proceeding.

Effective Date means *[the Execution Date]*.

Execution Date means the date on which this Deed is executed by the last of the parties.

Loss includes any damage, liability, loss, charge, cost (including professional costs and legal costs on a solicitor-client basis), expense, fine or penalty (where permitted by law), whether direct, indirect, consequential (including pure economic loss), present or future, ascertained or unascertained, actual, prospective or contingent and whether arising from breach of contract, in tort (including negligence), in restitution, under statute or otherwise at law.

Payment Sum means the amount of \$*[insert]* (GST exclusive).

Services means the works or services that the Consultant is required to perform under the Contract.

1.2 Interpretation

Capitalised terms used but not defined in this Deed have the meanings given in the Contract.

2. Novation

From the Effective Date:

- (a) the Incoming Party is a party to the Contract instead of the Principal;
- (b) all references to the Principal in the Contract are references to the Incoming Party;
- (c) the Incoming Party:
 - (i) enjoys all of the rights and benefits of the Principal under the Contract;
 - (ii) is bound by the terms of the Contract as if the Incoming Party had originally been a party to the Contract; and
 - (iii) must perform all obligations of the Principal under the Contract which are to be performed after the Effective Date; and
- (d) the Consultant is bound by the Contract as if the Contractor had originally been a party to the Contract.

3. Rights and liabilities

- (a) Promptly after the Execution Date, the Principal will pay to the Consultant the Payment Sum (if any).
- (b) The Consultant acknowledges and agrees that the Payment Sum is on account of and satisfies all entitlements to payment which the Consultant had accrued prior to the Execution Date.

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4. Releases

From the Effective Date:

- (a) the Consultant releases and discharges the Principal from the further performance of the Contract and from all Claims in connection with the Contract; and
- (b) the Principal releases and discharges the Consultant from:
 - (i) the further performance of the Contract; and
 - (ii) any claim, action, demand, proceeding or suit (including by way of contribution or indemnity) for any Loss or other relief or remedy that the Principal has or may have against the Consultant (or might, but for this Deed, have against the Consultant for breach of contract).

5. Pre-existing Claims

Nothing in this Deed affects or prejudices any rights or liabilities which the Principal may have against the Consultant in connection with matters arising before the Effective Date.

6. Contract confirmed

- (a) The Contract is confirmed and remains in full force and effect.
- (b) If there is an inconsistency between this Deed and the Contract, the provisions of this Deed prevail to the extent of that inconsistency.

7. Representations

The Consultant represents to the Principal and the Incoming Party that in the performance of the Services prior to the Execution Date, it has fully complied with its obligations arising out of the Contract.

8. GST

8.1 Definitions

In this clause:

- (a) words and expressions that are not defined in this Deed but which have a defined meaning in the GST Law have the same meaning as in the GST Law; and
- (b) **GST Law** has the meaning given to that term in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

8.2 GST exclusive

Except as otherwise provided in clause 8, all consideration payable under this Deed in relation to any supply is exclusive of GST.

8.3 Increase in consideration

If GST is payable in respect of any supply made by a supplier under this Deed (**GST Amount**), the recipient must pay to the supplier an amount equal to the GST payable on the supply. Subject to clause 8.4, the recipient must pay the GST Amount at the same time and in the same manner as the consideration for the supply is to be provided under this Deed in full and without deduction, set off, withholding or counterclaim (unless otherwise provided in this Deed).

8.4 Tax invoice

The supplier must provide a tax invoice to the recipient before the supplier will be entitled to payment of the GST Amount under clause 8.3.

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8.5 Reimbursements

If this Deed requires a party to pay, reimburse or contribute to any expense, loss or outgoing suffered or incurred by another party, the amount which the first party must pay, reimburse or contribute is the sum of:

- (a) the amount of the payment, reimbursement or contribution, less any input tax credit in respect of the payment, reimbursement or contribution to which the other party is entitled; and
- (b) if the payment, reimbursement or contribution is subject to GST, an amount equal to that GST.

8.6 Adjustment events

If an adjustment event occurs in relation to a taxable supply under this Deed:

- (a) the supplier must issue an adjustment note to the recipient within 7 days after becoming aware of the adjustment; and
- (b) any payment necessary to give effect to that adjustment must be made within 7 days after the date of receipt of the adjustment note.

9. Notices

9.1 Delivery of notice

- (a) A notice or other communication required or permitted to be given to a party under this Deed must be in writing and may be delivered:
 - (i) personally to the party;
 - (ii) by leaving it at the party's address or, if the party is a company, at the company's registered office;
 - (iii) by posting it by prepaid post addressed to the party at the party's address;
 - (iv) by facsimile to the party's facsimile number; or
 - (v) by email to the party's email address.
- (b) The address, facsimile number and email address of each party are set out on page 1 of this Deed. A party may change its address, facsimile number or email address by giving notice to the other parties.

9.2 Time of delivery

A notice or other communication is deemed delivered:

- (a) if delivered personally or left at the person's address, upon delivery;
- (b) if posted within Australia to an Australian address, 2 Business Days after posting and in any other case, 5 Business Days after posting;
- (c) if delivered by facsimile, subject to subclause 9.2(d), at the time indicated on the transmission report produced by the sender's facsimile machine indicating that the facsimile was sent in its entirety to the recipient's facsimile;
- (d) if delivered by email, subject to subclause 9.2(d), at the time the email containing the notice left the sender's email system, unless the sender receives notification that the email containing the notice was not received by the recipient; and
- (e) if received after 5.00pm or on a day which is not a Business Day in the place it is received, at 9.00am on the next Business Day in that place.

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10. Governing law

This Deed is governed by the law applying in Victoria and the parties submit to the exclusive jurisdiction of the courts of that state or territory.

11. Interpretation

11.1 General

In this Deed, unless expressed to the contrary:

- (a) words denoting the singular include the plural and vice versa;
- (b) the word 'includes' in any form is not a word of limitation;
- (c) where a word or phrase is defined, another part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (d) headings and sub-headings are for ease of reference only and do not affect the interpretation of this Deed; and
- (e) no rule of construction applies to the disadvantage of the Principal on the basis that it prepared or put forward this Deed or any part of it.

11.2 Specific references

In this Deed, unless expressed to the contrary, a reference to:

- (a) a gender includes all other genders;
- (b) any legislation (including subordinate legislation) is to that legislation as amended, re-enacted or replaced and includes any subordinate legislation issued under it;
- (c) any document (such as a deed, agreement or other document) is to that document (or, if required by the context, to a part of it) as amended, novated, substituted or supplemented at any time;
- (d) writing includes writing in digital form;
- (e) 'this Deed' is to this Deed as amended from time to time;
- (f) 'A\$', '\$', 'AUD' or 'dollars' is a reference to Australian dollars;
- (g) a clause, schedule or attachment is a reference to a clause, schedule or attachment in or to this Deed;
- (h) any property or assets of a person includes the legal and beneficial interest of that person of those assets or property, whether as owner, lessee or lessor, licensee or licensor, trustee or beneficiary or otherwise;
- (i) a person includes a firm, partnership, joint venture, association, corporation or other body corporate;
- (j) a person includes the legal personal representatives, successors and permitted assigns of that person, and in the case of a trustee, includes any substituted or additional trustee; and
- (k) any body (**Original Body**) which no longer exists or has been reconstituted, renamed, replaced or whose powers or functions have been removed or transferred to another body or agency, is a reference to the body which most closely serves the purposes or objects of the Original Body.

12. General

12.1 Variation

This Deed may only be varied by a document executed by the parties.

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12.2 Counterparts

This Deed may be executed in counterparts, all of which taken together constitute one document.

12.3 Liability

An obligation of any 2 parties binds them jointly and severally.

12.4 Severability

- (a) Any provision of this Deed that is held to be illegal, invalid, void, voidable or unenforceable must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.
- (b) If it is not possible to read down a provision as required by this clause, part or all of the clause of this Deed that is unlawful or unenforceable will be severed from this Deed and the remaining provisions continue in force.

12.5 Waiver

The failure of a party at any time to insist on performance of any provision of this Deed is not a waiver of their right at any later time to insist on performance of that or any other provision of this Deed.

12.6 Further assurance

Each party must promptly execute and deliver all documents and take all other action necessary or desirable to effect, perfect or complete the transactions contemplated by this Deed.

12.7 Survival and enforcement of indemnities

- (a) Each indemnity in this Deed is a continuing obligation, separate and independent from the other obligations of the parties and survives termination of this Deed.
- (b) It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity conferred by this Deed.

12.8 No merger

The warranties, undertakings, agreements and continuing obligations in this Deed do not merge on completion.

12.9 Business Day

If a payment or other act is required by this Deed to be made or done on a day which is not a Business Day, the payment or act must be made or done on the next following Business Day.

Signing Page

EXECUTED as a deed.

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Executed by Development Victoria by being signed by its authorised delegate

Signature of witness

Signature of authorised delegate

Name of witness (print)

Name of authorised delegate (print)

Executed by [Consultant Party] ABN [Insert ABN] in accordance with Section 127 of the *Corporations Act 2001*

Signature of director

Signature of director/company secretary

(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

Executed by [Incoming Party] ABN [Insert ABN] in accordance with Section 127 of the *Corporations Act 2001*

Signature of director

Signature of director/company secretary

(Please delete as applicable)

Name of director (print)

Name of director/company secretary (print)

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Schedule 5 - Moral Rights Consent

(clauses 1.1 and 19.6)

THIS DEED POLL is made on the _____ day of _____ 20.....

BY: *[Insert name of individual]* of *[Insert address]*, *[Insert occupation]*
(Author)

IN FAVOUR OF: **Development Victoria ABN 61 868 774 623** of Level 9, 8 Exhibition Street, Melbourne, Victoria 3000
(Principal)

WHEREAS:

- A. The Principal is undertaking the **[Insert]** project (**Project**).
- B. The Author may create or have created material (regardless of the form in which it is expressed or stored), ideas or concepts which may be used in connection with the Project (**Copyright Material**).

THE AUTHOR COVENANTS as follows:

The Author, in consideration of the Principal agreeing to pay the Author one dollar (\$1) (receipt of which is hereby acknowledged):

- 1. will not sue, enforce any claim, bring any action or exercise any remedy in respect of any, or any alleged, breach, infringement or other wrongdoing, howsoever or whensoever occurring including, without limitation, for the breach or alleged breach of the Author's 'moral rights' under the *Copyright Act 1968* (Cth) (as amended) by:
 - (a) the Principal;
 - (b) any contractor which the Principal engages (**Contractor**);
 - (c) any third party to whom the Principal sub-licenses (whether express or implied) or grants any other right to use, possess, modify, vary or amend any Copyright Material (**Sub-Licensee**); or
 - (d) any third party to whom the Principal assigns rights it has in, or in relation to any Copyright Material (**Assignee**);
- 2. without limiting clause 1 above, consents to the Principal, the Contractor, any Sub-Licensee or any Assignee:
 - (a) failing to acknowledge the Author's or any other Person's authorship of any Copyright Material;
 - (b) falsely and unintentionally attributing authorship of any Copyright Material (other than in a way which is fraudulent or which would be actionable as misleading and deceptive conduct if the false attribution were done by a corporation); and
 - (c) modifying, varying or amending any Copyright Material; and
- 3. without limiting clauses 1 or 2 above, the Author consents to the Principal, any Contractor, any Sub-Licensee or any Assignee:

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- (a) altering any Copyright Material by adding to, removing elements from, or rearranging elements of, the Copyright Material, including without limitation by combining elements of the Copyright Material with any other material; and/or
- (b) changing, relocating, demolishing or destroying any building which incorporates, is based on, or is constructed in accordance with, any Copyright Material.

Nothing in this Deed amounts to an obligation on the Principal to comply, or a warranty by the Principal that it will comply, with the *Competition and Consumer Act 2010* (Cth).

Executed as a deed poll

Signed sealed and delivered by [*insert full name of Author*] in the presence of

Signature of witness

Signature of [*full name of author*]

Full name of witness

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Schedule 6 - Local Jobs First Obligations

This Schedule only applies where Item 14 has been completed to state that clause 37.1 applies.

1. Local Jobs First Definitions

In this Schedule 6:

Apprentice means a person whom an employer has undertaken to train under a Training Contract.

Cadets means those persons enrolled in a recognised tertiary level organisation and who receive structured learning opportunities as part of their engagement to a Local Jobs First project (e.g. cadets in architecture, quantity surveying, or engineering) but which is not under a Training Contract.

Department has the meaning given in s 3(1) of the *Local Jobs First Act 2003*.

Industry Capability Network (Victoria) means Industry Capability Network (Victoria) Limited of Level 11, 10 Queens Road, Melbourne VIC 3004 ACN 007 058 120.

LIDP means the Local Industry Development Plan submitted by the Consultant at the time of the proposal and certified by Industry Capability Network (Victoria) by providing an acknowledgement letter.

LIDP Commitments means the obligations and undertakings of the Consultant as detailed in its LIDP.

LIDP Monitoring Table means the table of milestones and LIDP Commitments contained in the LIDP.

Local Content has the meaning given in s 3(1) of the *Local Jobs First Act 2003*.

Local Jobs First Commissioner means the person appointed under s 12 of the *Local Jobs First Act 2003*.

Local Jobs First Policy means the policy of the Victorian Government made under s 4 of the *Local Jobs First Act 2003*.

Notice means a notice given, delivered or served in accordance with this Agreement.

Responsible Minister means the Minister with responsibility for administering the *Local Jobs First Act 2003*.

Trainee means a person (other than an Apprentice) employed under a Training Contract.

Training Contract has the meaning given in the *Education and Training Reform Act 2006*.

Victorian Management Centre (VMC) is a cloud based secure online platform that enables the registration of projects and associated tenders, the submission of LIDPs, collection, analysis and reporting of local content and jobs data, including supply chain monitoring and reporting.

2. Local Jobs First Policy

2.1 Local Industry Development Plan

- (a) The Consultant must, in performing its obligations under this Agreement:
 - (i) comply with the LIDP;
 - (ii) perform all obligations required to be performed under the LIDP, including the LIDP Commitments, by the due date for performance; and
 - (iii) comply with the Local Jobs First Policy.
- (b) The Consultant acknowledges and agrees that its obligations as set out in the LIDP apply during the term of this Agreement, any extensions to the term and until all of its reporting obligations as set out in clause 2.3 of this Schedule are fulfilled.

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- (c) The Consultant's failure to comply with this clause 2.1 may, in the Principal's discretion, constitute a material breach of this Agreement.

2.2 Revised LIDP

- (a) If at any time a variation to this Agreement is proposed which involves or effects a change in the nature of any of the LIDP Commitments, the Consultant must prepare a revised LIDP in collaboration with and certified by Industry Capability Network (Victoria) (**Revised LIDP**).
- (b) When requested by the Principal's Representative, the Consultant must provide the Revised LIDP to the Principal.
- (c) The Revised LIDP must be agreed by the parties before any variation to the Agreement can take effect unless the parties agree that a Revised LIDP is unnecessary.
- (d) Once the Revised LIDP is agreed by the parties, the Revised LIDP replaces the LIDP and forms part of this Agreement.

2.3 Reporting

- (a) The Consultant must prepare and maintain records demonstrating its compliance with the LIDP and performance of the LIDP Commitments.
- (b) The Consultant must use the Victorian Management Centre (VMC) for Local Jobs First monitoring and reporting.
- (c) If indicated in Item 14, the Consultant must provide a six monthly report demonstrating its progress towards implementing the LIDP through reporting on the VMC.
- (d) Upon completion of the Services and at such other reporting dates for the purposes of this clause 2.3(d) as indicated in Item 14, the Consultant must provide to the Principal's Representative:
 - (i) the LIDP Monitoring Table identifying LIDP commitments and actual achievements. The LIDP Monitoring Table must identify and explain any departures from the LIDP Commitments and the aggregated outcomes as reported in the LIDP Monitoring Table; and
 - (ii) a statutory declaration in the form set out as part of the online LIDP to confirm that the information contained in the LIDP Monitoring Table is true and accurate. The statutory declaration must be made by a director of the Consultant, the Consultant's Chief Executive Officer or Chief Financial Officer.
- (e) At the request of the Principal's Representative, the Consultant must provide further information or explanation of any differences between expected and achieved LIDP outcomes.
- (f) The reporting obligations in this clause 2.3 are in addition to and do not derogate from any other reporting obligations as set out in this Agreement.

2.4 Verification of Consultant's compliance with LIDP Plan

- (a) The Consultant agrees that the Principal, and if nominated by the Principal, the Department, has the right to inspect its records in order to verify compliance with the LIDP.
- (b) The Consultant must:
 - (i) permit the Principal's Representative, an accountant or auditor on behalf of the Principal or the Department, or any other person authorised by the Principal or the Department, from time to time during ordinary business hours and upon Notice, to inspect and verify all records maintained by the Consultant for the purposes of this clause 2.4;
 - (ii) permit the Principal or the Department from time to time to undertake a review of the Consultant's performance in accordance with the LIDP; and

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- (iii) ensure that its Associates give all reasonable assistance to any person authorised by the Principal or the Department to undertake such audit or inspection.
- (c) The Consultant acknowledges and agrees that the Principal, the Department, the Principal's and Department's duly authorised representatives and Industry Capability Network (Victoria) are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Consultant's compliance with the LIDP.
- (d) The obligations set out in this clause 2.4 are in addition to and do not derogate from any other obligation under this Agreement.

2.5 Use of information

The Consultant acknowledges and agrees that:

- (a) Industry Capability Network (Victoria) will assess the Consultant's performance against the LIDP;
- (b) the statistical information contained in the LIDP and the measures of the Consultant's compliance with the LIDP as reported in the LIDP Monitoring Table:
 - (i) will be included in the Principal's report of operations under Part 7 of the *Financial Management Act 1994* in respect of the Principal's compliance with the Local Jobs First Policy in the financial year to which the report of operations relates;
 - (ii) will be provided to the Responsible Minister for inclusion in the Responsible Minister's report to the Parliament for each financial year on the compliance and performance of the LIDP during that year; and
 - (iii) may be disclosed in the circumstances authorised or permitted under the terms of this Agreement or as otherwise required by law.

3. Subcontracting

- (a) The Consultant must ensure that any subcontracts entered into by the Consultant in relation to work under this Agreement contain clauses requiring subcontractors:
 - (i) to comply with the Local Jobs First Policy and the LIDP to the extent that it applies to work performed under the subcontract;
 - (ii) to provide necessary information that allows the Consultant to comply with its reporting obligations under clause 2.3 of this Schedule; and
 - (iii) to permit the Principal and the Department to exercise their inspection and verification rights under clause 2.4 of this Schedule.
- (b) The subcontracting obligations set out in this clause 3 are in addition to and do not derogate from any other obligations under this Agreement.
- (c) The Consultant's failure to comply with this clause 3 may, in the Principal's discretion, constitute a material breach of this Agreement.

4. Local Jobs First Commissioner

- (a) The Consultant acknowledges that:
 - (i) it is required to comply with any information notice issued to it by the Local Jobs First Commissioner in accordance with s 24 of the *Local Jobs First Act 2003*;
 - (ii) it is required to comply with any compliance notice issued to it by the Local Jobs First Commissioner in accordance with s 26 of the *Local Jobs First Act 2003*;

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- (iii) its failure to comply with the compliance notice referred to in this clause 4(a) may result in the issue of an adverse publicity notice by the Responsible Minister under s 29 of the *Local Jobs First Act 2003*; and
- (iv) the Local Jobs First Commissioner may:
 - (A) monitor and report on compliance with the Local Jobs First Policy and LIDP; and
 - (B) request the Principal to conduct an audit in relation to the Consultant's compliance with the Local Jobs First Policy and the LIDP.
- (b) The Consultant acknowledges that the Commissioner may recommend that the Principal take enforcement proceedings against the Consultant if the Consultant has failed to comply with the Local Jobs First Policy or the LIDP by:
 - (i) applying to a court to obtain an injunction; or
 - (ii) taking action available under this Agreement.

5. Local by Nature LIDP

This clause 5 of Schedule 6 applies when the Consultant has submitted a Local by Nature LIDP to the Industry Capability Network (Victoria) in compliance with the Local Jobs First Policy.

- (a) The Consultant commits to using only labour and services supplied that represent 100% local content in delivering the Services under this Agreement and will fully comply with its obligations under its Local by Nature LIDP submitted to the Industry Capability Network (Victoria).

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Schedule 7 - Social Procurement Framework Obligations

This Schedule only applies where Item 16 has been completed to state that clause 37.2 applies.

1. Social Procurement Framework Definitions

In this Schedule 7:

Industry Capability Network (Victoria) means Industry Capability Network (Victoria) Limited of Level 11, 10 Queens Road, Melbourne VIC 3004 ACN 007 058 120.

Notice means a notice given, delivered or served in accordance with this Agreement.

Social Procurement Commitment means an obligation required to be performed by the Consultant, as set out in the Social Procurement Commitment Schedule in relation to delivering a Social Procurement Framework Outcome.

Social Procurement Commitment Schedule means the document set out in Attachment 1 to Schedule 7 which includes the Social Procurement Commitments. **Social Procurement Framework** means Victoria's Social Procurement Framework published 26 April 2018 by the Victorian Government, as amended from time to time.

Social Procurement Performance Report means a report submitted by a Consultant to the Principal's Representative, which details the Consultant's performance against the Social Procurement Commitments made within the Consultant's Social Procurement Commitment Schedule.

Victorian Management Centre (VMC) means the information management platform that collects data to support government and industry with the Social Procurement Framework and Local Jobs First policy, project delivery and performance, administered by the Industry Capability Network (Victoria).

2. Social Procurement Commitment Schedule

- (a) The Consultant must, in performing its obligations under this Agreement:
 - (i) comply with the Social Procurement Commitment Schedule; and
 - (ii) perform all Social Procurement Commitments by the due date for performance as set out in the Social Procurement Commitment Schedule, or otherwise as agreed between the parties in writing.
- (b) The Consultant acknowledges and agrees that the Social Procurement Commitment Schedule (including the Social Procurement Commitments) applies during the term of the Agreement, any extensions to the term and until all of its reporting obligations as set out in clause 3 of this Schedule are fulfilled.
- (c) The Consultant's failure to undertake all reasonable measures to achieve compliance with clause 2(a) of this Schedule may be determined by the Principal to constitute a material breach of this Agreement.

3. Reporting

- (a) The Consultant must prepare and maintain records demonstrating its:
 - (i) compliance with the Social Procurement Commitment Schedule; and
 - (ii) performance against the Social Procurement Commitments.
- (b) The Consultant must, during the term of this Agreement, submit written Social Procurement Performance Reports to the Principal's Representative demonstrating its performance against the Social Procurement Commitment Schedule at the frequency set out in Item 16.

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- (c) The Principal may request the Consultant to meet to discuss the contents of the Social Procurement Commitment Report and other issues concerning the progress towards the Social Procurement Commitments including any identified reporting deficiencies and timeframes for rectification.
- (d) The Social Procurement Performance Report submitted in accordance with clause 3(b) of this Schedule must:
 - (i) be submitted (where possible) by the Consultant using the Victorian Management Centre (VMC) – or as otherwise agreed by the Principal.
 - (i) be in a form satisfactory to the Principal (acting reasonably); and
 - (ii) include all supporting information reasonably required by the Principal to verify the contents of the Social Procurement Performance Report.
- (e) In addition to the Social Procurement Performance Reports, within 2 months after the date the Agreement is completed or terminated, whichever is earlier, the Consultant must provide the Principal:
 - (i) a final Social Procurement Performance Report; and
 - (ii) a statutory declaration in the form approved by the Principal declaring that the contents of the final Social Procurement Performance Report is true and correct. The Consultant must ensure that the statutory declaration is made by a director of the Consultant or the Consultant's Chief Executive Officer or Chief Financial Officer.
- (f) At the request of the Principal, the Consultant must provide further information about, or explanation of, any:
 - (i) non-compliance with the Social Procurement Commitment Schedule; and
 - (ii) failure to perform the Social Procurement Commitments by the due date for performance.
- (g) The obligations set out in clause 3 of this Schedule are in addition to, and do not derogate from, any other obligations set out in this Agreement.

4. Verifying Compliance

- (a) The Consultant acknowledges and agrees that the Principal will have the right to inspect the Consultant's records in order to verify compliance with the Social Procurement Commitment Schedule.
- (b) The Consultant must:
 - (i) permit the Principal, a duly authorised nominee of the Principal, from time to time during ordinary business hours and upon reasonable Notice, to inspect and verify all records maintained by the Consultant for the purposes of clause 4 of this Schedule;
 - (ii) permit the Principal, a duly authorised nominee of the Principal, from time to time to undertake a review of the Consultant's performance in accordance with the Social Procurement Commitments; and
 - (iii) ensure that its Associate and sub-contractors give all reasonable assistance to any person authorised by the Principal to undertake such inspection, verification or review.
- (c) The Consultant acknowledges and agrees that the Principal, a duly authorised nominee of the Principal are authorised to obtain information from any relevant persons, firms or corporations, including third parties, in connection with the Consultant's compliance with the Social Procurement Commitments.

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- (d) The obligations set out in clause 4 of this Schedule are in addition to and do not derogate from any other obligation under this Agreement.

5. Use of Information

- (a) The Consultant acknowledges and agrees that the statistical information contained in the Social Procurement Performance Reports and the measures of the Consultant's compliance with the Social Procurement Commitment Schedule as reported :
 - (i) will be reported by the Principal to other departments such as the departments responsible for the Social Procurement Framework;
 - (ii) may be considered in the assessment or review of the Consultant's eligibility to tender for future Victorian Government contracts; and
 - (iii) may be disclosed in the circumstances authorised or permitted accordance with this Agreement or as otherwise required by law.

6. Subcontracting

- (a) The Consultant must ensure that any subcontracts it enters into in relation to this Agreement contain clauses requiring its subcontractors to:
 - (i) comply with the Social Procurement Commitment Schedule to the extent that it applies to work performed under the subcontract;
 - (ii) provide any necessary information that allows the Consultant to comply with its obligations under this Schedule 7;
 - (iii) permit the Principal to exercise its rights under clause 4 of this Schedule.
- (b) The obligations set out in clause 6 if this Schedule are in addition to, and do not derogate from, any other obligations as set out in this Agreement.
- (c) The Consultant's failure to comply with its obligations in clause 6 of this Schedule may be determined by the Principal to constitute a material breach of this Agreement.

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Attachment 1 to Schedule 7 – Social Procurement Commitment Schedule

[Drafting note: Attach Social Procurement Commitment Schedule.]

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Schedule 8 - Special Conditions

This Schedule only applies where Item 18 has been completed to state that clause 39 applies.

1. Subcontracting

This Special Condition shall only apply if marked applicable in Item 19.

1.1 General

- (a) The Consultant may subcontract the performance of any part of the Services to a Subconsultant provided it has obtained the Principal's prior written approval to do so.
- (b) The Subconsultants listed in Item 19 are approved as at the Commencement Date.
- (c) The Consultant must procure that each Subcontract:
 - (i) contains such provisions as are necessary or prudent to enable the Consultant to comply with its obligations arising out of the Contract; and
 - (ii) requires the Subconsultant to comply with a direction from the Principal (given in accordance with clause 23(c) to novate its Subcontract.

1.2 Responsibility for Consultant's Associates

- (a) Any approval to subcontract the performance of part of the Services will not relieve the Consultant of its obligations or liabilities arising out of the Contract.
- (b) The Consultant will be liable to the Principal for the acts and omissions of its Associates as if they were the acts and omissions of the Consultant.

1.3 Novation of Subconsultants

The Principal may, in the event of termination of the Contract for any reason, direct the Consultant to novate to the Principal or its nominee any of the Subcontracts and if the Principal so directs, the Consultant must:

- (a) execute, and ensure the execution by the relevant Subconsultant of, a deed of novation in a form provided by or acceptable to the Principal; and
- (b) provide all assistance necessary to facilitate that novation.

1.4 Removal

The Principal may direct the Consultant to remove from any activity in connection with the Services any Person who, in the reasonable opinion of the Principal, is incompetent, negligent, guilty of misconduct or is otherwise unduly interfering with the Project.

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Schedule 9 – Fair Jobs Code Obligations

This Schedule only applies where Item 17 has been completed to state that clause 37.3 applies.

In this Schedule 9:

- (a) an FJC Plan applies if indicated in Item 17.
- (b) the requirements for Significant Subcontractors apply if indicated in Item 17.

1. Fair Jobs Code Definitions

In this Schedule 9:

Adverse Ruling means a ruling (by any court, tribunal, board, commission or other entity with jurisdiction or legal authority to determine the matter) that the Consultant has breached an applicable employment, industrial relations or workplace health and safety law.

DJPR means the Department of Jobs Precincts and Regions (and its successor Government department) as the Department responsible for the FJC.

Enforceable Undertaking means a promise or agreement made by the Consultant with a regulator, Court or other body (including the Fair Work Ombudsman, WorkSafe Victoria and Wage Inspectorate Victoria) in respect of a breach or alleged/suspected breach of an applicable employment, industrial relations or workplace health and safety law.

FJC Guidelines means Fair Jobs Code Guidelines, available at <https://www.buyingfor.vic.gov.au/fair-jobs-code-suppliers-and-businesses>.

FJC means the Fair Jobs Code issued by the State of Victoria available at <https://www.buyingfor.vic.gov.au/fair-jobs-code>.

FJC Unit means the Fair Jobs Code Unit, an administrative group within DJPR with responsibilities in relation to the FJC.

Notice means a notice given, delivered or served in accordance with this Agreement.

Pre-Assessment Certificate means a certificate issued to the Consultant by the FJC Unit prior to entering into this Agreement, or which is renewed during the term of this Agreement.

2. Fair Jobs Code

- (a) The Consultant warrants that at the time of entering this Agreement it holds a valid Pre-Assessment Certificate.
- (b) In performing its obligations under this Agreement the Consultant acknowledges and agrees that it shall:
 - (i) continue to hold a valid Pre-Assessment Certificate;
 - (ii) comply with the FJC;and if indicated in Item 17 that an FJC Plan applies:
 - (iii) comply with its FJC Plan; and
 - (iv) perform all obligations required to be performed under the FJC Plan by the due date.
- (c) If at any time during the term of this Agreement the Consultant's Pre-Assessment Certificate is revoked by the FJC Unit that revocation will constitute a breach of clause 2 of this Schedule which will enable the Principal to exercise its rights under clause 8 of this Schedule.

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- (d) The Consultant acknowledges and agrees that the obligations for holding and maintaining a Pre-Assessment Certificate apply during the term of this Agreement and any extensions to the term and until all of its reporting obligations set out in clause 4 of this Schedule are fulfilled.

3. Verification of Consultant's compliance with the Fair Jobs Code

- (a) The Consultant must, on request by the Principal, provide a copy of the Pre-Assessment Certificate or any related correspondence with the FJC Unit.
- (b) If, during the term of this Agreement, the Consultant's Pre-Assessment Certificate expires the Consultant must provide Notice to the Principal of the expiry within 10 Business Days.
- (c) If the Consultant fails to promptly take steps to renew an expired Pre-Assessment Certificate after notifying the Principal of the expiration, the expiration will constitute a breach of clause 3 of this Schedule which will enable the Principal to exercise its rights under clause 8 of this Schedule.

4. Reporting against FJC Plan

- (a) Clause 4 of this Schedule applies if indicated in Item 17.
- (b) In this clause 4:

FJC Plan means the Consultant's Fair Jobs Code Industrial Relations and Occupational Health and Safety Plan, addressing industrial relations, occupational health and safety requirements and commitments and standards as required by the FJC, as attached at Attachment 1 to Schedule 9.

FJC Performance Report means a report submitted by the Consultant to the Principal's Representative, which details the Consultant's performance against the FJC Plan.

- (c) The Consultant must prepare and maintain records demonstrating its compliance with, and implementation of, the FJC Plan.
- (d) The Consultant must provide FJC Performance Reports during this Agreement which demonstrate the Consultant's progress towards implementing the FJC Plan at a time or times indicated in Item 17.
- (e) In addition to the FJC Performance Reports, upon completion of the Services and at such other reporting dates for the purposes of clause 4 of this Schedule as indicated in Item 17, the Consultant must provide to the Principal's Representative:
 - (ii) a final report identifying FJC Plan commitments and actual achievements; and
 - (iii) a statutory declaration to confirm that the information contained in the final FJC Plan report is true and accurate. The statutory declaration must be made by a director of the Consultant or the Consultant's Chief Executive Officer or Chief Financial Officer.
- (f) At the request of the Principal's Representative, the Consultant must provide further information or explanation of any differences between expected and achieved FJC Plan outcomes.
- (g) The reporting obligations in clause 4 of this Schedule are in addition to and do not derogate from any other reporting obligations as set out in this Agreement.

5. Ongoing duty of disclosure and cooperation and audits

- (a) If during the term of this Agreement, the Consultant is the subject of an Adverse Ruling or Enforceable Undertaking it must provide Notice to the Principal and the FJC Unit within 10 Business Days of the Adverse Ruling or Enforceable Undertaking being made.
- (b) During the term of this Agreement the Consultant must:

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- (i) cooperate with all reasonable requests from the Principal seeking evidence of the Consultant's compliance with the FJC and the FJC Plan (if applicable);
 - (ii) permit the Principal's Representative, an accountant or auditor on behalf of the Principal, DJPR or any other person authorised by the Principal or DJPR, from time to time during ordinary business hours and upon Notice, to inspect and verify all records maintained by the Consultant relating to compliance with the FJC and FJC Plan (if applicable) under this Agreement; and
 - (iii) ensure that its employees, agents and subcontractors give all reasonable assistance to any person authorised by the Principal or DJPR to undertake such audit or inspection.
- (c) The Principal will bear all costs for any audit in accordance with clause 5 of this Schedule.
 - (d) The Consultant acknowledges and agrees that the Principal, DJPR, the Principal's and DJPR's duly authorised representatives (including the FJC Unit) are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Consultant's compliance with the FJC.
 - (e) The obligations set out in clause 5 of this Schedule are in addition to and do not derogate from any other obligation under this Agreement.
 - (f) A failure to comply with clause 5 of this Schedule will constitute a breach of this Schedule 9 which will enable the Principal to exercise its rights under clause 8 of this Schedule.

6. Significant Subcontracting

- (a) Clause 6 of this Schedule applies if indicated in Item 17.
- (b) In this clause 6:
Significant Subcontractor means an entity engaged, or to be engaged, under a subcontract directly with the Consultant, where the value of that subcontract is \$10 million or more (exclusive of GST).
- (c) The Consultant warrants that any Significant Subcontractors engaged or proposed to be engaged to perform work under this Agreement hold a valid Pre-Assessment Certificate when they are engaged or proposed to be engaged.
- (d) The Consultant must ensure that any subcontracts entered into by the Consultant with Significant Subcontractors in relation to work under this Agreement contain clauses requiring Significant Subcontractors to:
 - (i) comply with the FJC;
 - (ii) hold a valid Pre-Assessment Certificate;
 - (iii) notify the Consultant if its Pre-Assessment Certificate is revoked, or if its Pre-Assessment Certificate expires without being replaced with a new Pre-Assessment Certificate;
 - (iv) comply with the ongoing duty of disclosure and cooperation set out in clause 6, as if references to the Consultant were references to the Significant Subcontractor;
 - (v) comply with the FJC Plan (if applicable), to the extent that it applies to work performed under the subcontract;
 - (vi) provide necessary information that allows the Consultant to comply with its reporting obligations under clause 5 of this Schedule; and
 - (vii) permit the Principal and DJPR to exercise their inspection and audit rights under clause 5 of this Schedule.

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- (e) The subcontracting obligations set out in clause 6 of this Schedule are in addition to and do not derogate from any other obligations under this Agreement.
- (f) The Consultant's failure to comply with clause 6 of this Schedule will constitute a breach of clause 6 of this Schedule which will enable the Principal to exercise its rights under clause 8 of this Schedule.

7. Use of information

The Consultant acknowledges and agrees that:

- (a) the FJC Unit will assess the Consultant's compliance with the FJC.
- (b) information regarding the Consultant's compliance with the FJC including any disclosures regarding Adverse Rulings or Enforceable Undertakings:
 - (i) will be reported by the Principal to the FJC Unit in compliance with the Principal's obligations under the FJC; and
 - (ii) may be disclosed in the circumstances authorised or permitted under the terms of this Agreement or as otherwise required by Law.
- (c) Nothing in this provision removes the obligation for the Consultant to report Adverse Rulings or Enforceable Undertakings to the FJC Unit as per clause 5 of this Schedule.

8. Consequences of breach

Any breach of the provisions of this Schedule 9 will enable the Principal, in its absolute discretion, to do any or all of the following:

- (a) suspend the Agreement until such time as the breach has been remedied to the satisfaction of the Principal and within a timeframe acceptable to the Principal;
- (b) by written Notice immediately terminate the Agreement; or
- (c) exercise any rights that it has under this Agreement.

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Attachment 1 to Schedule 9 – Fair Jobs Code Plan

[Drafting note: Attach Fair Jobs Code Plan]

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