



Australian Government

**Department of Families, Housing,
Community Services and Indigenous Affairs**

Terms and Conditions for the FaHCSIA Capital Works Funding Agreement

BETWEEN THE

Commonwealth of Australia as represented by and acting through the Department of Families, Housing, Community Services and Indigenous Affairs

ABN 36 342 015 855

AND

[Insert name of Funding Recipient]

ABN [insert ABN]

for the **[Insert name of Capital Works Project for which Funding is being provided]** under the Commonwealth's **[Insert name of relevant funding Program]** Program

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Capital Works Funding Agreement made at _____ on _____

Parties Commonwealth of Australia, as represented by and acting through the Department of Families, Housing, Community Services and Indigenous Affairs ABN 36 342 015 855 of Tuggeranong Office Park, Athllon Drive, Greenway ACT 2905 ("Department", "Us", "We" or "Our")

[Insert legal name of funding recipient] ABN [Insert ABN] of [Insert registered address] ("You" or "Your")

Recitals

- A. We are committed to the Program.
- B. You own the Site and are committed to helping achieve the Program Aims, through Your conduct of the Capital Works Project at the Site and through making the Site and the completed Capital Works available for the Designated Use throughout the Designated Use Period.
- C. As a result of Our commitment to the Program, We have agreed to provide Funding to You to undertake the Capital Works Project at the Site and to ensure that the Capital Works and the Site are available to be used for the Designated Use throughout the Designated Use Period, on the terms and conditions of this Agreement.
- D. We are required by law and policy to ensure accountability for the Funding, and You are required to be accountable for all Funding received under this Agreement.
- E. You accept the Funding for the Capital Works Project for the achievement of the Capital Works Project Goals on the terms and conditions of this Agreement.

The parties agree

Part A Understanding this Agreement

1. Definitions

In this Agreement, if the context permits:

"Agreement" means this document including the Schedule and the Annexures to the Schedule, and any documents incorporated by reference by the clauses or the Schedule.

"Agreement Material" means all Material:

- (a) brought into existence by You in performing this Agreement; and
- (b) copied or derived from Material referred to in paragraph (a) above.

"Approval" means any licence, permit, consent, approval, determination, certificate or other requirement of any authority, body or other organisation having any jurisdiction in connection with the Capital Works or the carrying out of Your activities or under any other applicable Statutory Requirement, which must be obtained or satisfied to:

- (a) carry out Your activities under this Agreement; or
- (b) occupy and use the completed Capital Works or a completed Stage.

"Approved Auditor" means a person who is either:

- (a) a registered company auditor under the *Corporations Act 2001*;
- (b) a Certified Practising Accountant;
- (c) a member of the National Institute of Accountants; or
- (d) a member of the Institute of Chartered Accountants;

but who is not a principal, member, shareholder, officer or employee of You, or of a Related Body Corporate within the meaning of that term as given in the *Corporations Act 2001*.

"Asset" means any item of personal, real or incorporeal property, with a price or value of \$5,000 or more, inclusive of GST, and which has been created, acquired or leased wholly or in part with the Funding. However, Asset does not include the Capital Works or any building or facility forming part of the Site, or part of such building or facility, whether resulting from the Capital Works or otherwise.

"Auditor-General" means the office established under the *Auditor-General Act 1997* and includes any other entity that may, from time to time, perform the functions of that office.

"Budget" means the budget, if any, set out at Item J of the Schedule.

"Business Day" in relation to the doing of any action in a place, means any day other than a Saturday, Sunday, public or bank holiday in that place.

"Capital Works" means the capital works to be completed as part of the Capital Works Project.

"Capital Works Project" means the capital works project described in Item B to be completed by You in accordance with this Agreement.

"Capital Works Project Goals " means the goals set out in sub-sub-Item B2 of the Schedule.

"Capital Works Project Manager" means the person responsible for supervising the Capital Works Project appointed in accordance with clause 4.

"Certificate of Practical Completion" is a written notice from Us to You that Practical Completion has been achieved.

"Claim for Payment" means the form of a claim set out in sub-Item G3 of the Schedule and to be provided to Us pursuant to clause 15.3.

"Code" means the National Code of Practice for the Construction Industry as amended from time to time.

"Code Guidelines" means the Australian Government Implementation Guidelines for the Code, as they are amended from time to time.

"Code Monitoring Group" has the same meaning as given to that term in paragraph 1.4 of the Code Guidelines.

"Commonwealth" means the Commonwealth of Australia represented and acting through the Department, and includes the officers, delegates, employees, other contractors and agents of the Commonwealth.

"Confidential Information" means Our Confidential Information and Your Confidential Information.

"Contamination" means the presence in, on or under the land, air or water of a substance (whether solid, liquid, gas, odour heat, sound, vibration or radiation) at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land, air or water in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the Environment, or could otherwise give rise to a risk of non-compliance or breach of any Statutory Requirements relating to the Environment.

"Date for Practical Completion" means the date specified in Item P of the Schedule by which You must achieve Practical Completion.

"Defects" means any defect, shrinkage, fault or omission in the Capital Works including any aspect of the Capital Works which is not in accordance with the requirements of this Agreement or otherwise is not fit for its intended purpose.

"Defects Liability Period" means the period which commences on Practical Completion and which continues for the period described in Item D as extended by clause 6.9.

"Department" means the Commonwealth Department of Families, Housing and Community Services or such other Commonwealth Department as may be responsible from time to time for the administration of this Agreement.

"Departmental Officer" means the person for the time being holding, occupying or performing the duties of an officer of the Department, as specified in sub-Item Q1 of the Schedule, or any other persons specified by the Commonwealth and notified in writing to You from time to time as being the Departmental Officer.

"Designated Use" means the use specified in sub-Item B7 of the Schedule, or such other purpose as is determined by Us (at Our sole discretion) and notified to You in writing.

"Designated Use Period" means the period specified in sub-Item B7 of the Schedule.

"Designated Use Period Annual Report" means the report required from You annually during the Designated Use Period and referred to in sub-Item F5 of the Schedule.

"Dispose" means to sell, lease or sub-lease, licence or sub-licence, or otherwise transfer or give up ownership or the right to occupy or use, or to enter into an agreement to do any of the preceding acts.

"Electronic Communication" has the same meaning as in the *Electronic Transactions Act 1999* (Cth).

"Encumbrances" means any mortgage, charge, lien, caveat or easement over, in relation to, or affecting the Site.

"End Date" means the last day of the Designated Use Period.

"Environment" means components of the earth, including:

- (a) land, air and water;
- (b) any layer of the atmosphere;
- (c) any organic or inorganic matter and living organism; and
- (d) human-made or modified structures and areas,

and includes interacting natural ecosystems that include components referred to in paragraphs (a) to (d) above.

"Existing Material" means all Material in existence prior to the execution of this Agreement or developed independently of this Agreement:

- (a) incorporated in;
- (b) supplied with, or as part of; or
- (c) required to be supplied with, or as part of,

the Agreement Material.

"Final Acquittal Report" means the report referred to in clause 14.11(a)(ii) of this Agreement.

"Funding" or "Funds" means the money or any part of it paid by Us to You pursuant to this Agreement as set out in sub-Item G1 of the Schedule, and includes any interest earned on that money.

"Information System" has the meaning given to that term in the *Electronic Transactions Act* 1999 (Cth).

"Interest" means interest calculated at an interest rate equal to the general interest charge rate as specified in section 8AAD of the *Taxation Administration Act* 1953, on a daily compounding basis, plus 1%.

"Latent Condition" means any ground conditions at the [Site](#), excluding ground conditions resulting from inclement weather wherever occurring, which differ materially from those which should have been anticipated by a prudent, competent and experienced contractor.

"Material" includes documents, equipment, software (including source code and object code versions), goods, information and data stored by any means including all copies and extracts of the same.

"Other Contractors" means any contractor, consultant, artist, tradesperson or other person (if any) engaged to do work in connection with the Capital Works Project or the Program other than You or a Subcontractor.

"Our Confidential Information" has the meaning set out in clause 22.1.

"Our Material" has the meaning given in clause 20.1.

"Party" means You or Us and **"Parties"** has the plural meaning as the context indicates.

"Plant, Equipment and Work" means those things used, or work undertaken, by You to construct the Capital Works or a Stage, but which will not form part of the Capital Works or the Stage.

"Practical Completion" means the date on which We issue You with a Certificate of Practical Completion in accordance with clause 5.3.

"Pre-conditions for Practical Completion" has the meaning given to the term in clause 5.3(a).

"Premises" means premises occupied by You or where any obligation under this Agreement is undertaken, and includes, without limitation, the Site.

"Privacy Act" means the *Privacy Act* 1988.

"Privacy Commissioner" means the Office of the Privacy Commissioner established under the Privacy Act and includes any other entity that may, from time to time, perform the functions of that office.

"Program" means the program of the Department set out in Item A of the Schedule under which You receive the Funding for the Capital Works Project.

"Program Aims" means the aims of the Program as set out in sub-Item A2 of the Schedule.

"Purposes Deed" means a deed substantially in the form set out at Annexure 1 to the Schedule.

"Recipient Contribution" means the amount or amounts (if any) of funds specified as being contributed by You towards the Capital Works Project as set out in Item I.

"Related Entity" has the same meaning as is given to that term in the Code Guidelines.

"Reports" means the reports referred to in clause 14.11(a) of this Agreement.

"Site" means the site described in sub-Item B6 of the Schedule where the Capital Works Project is being carried out, and any item which is affixed to that site.

"Specified Personnel" means the personnel, if any, (whether officers, employees, subcontractors or volunteers of You) required to undertake the Capital Works Project or any part of the Capital Works Project as set out in Item C of the Schedule.

"Stage" means a stage (if any) of the Capital Works described in sub-Item B3 of the Schedule.

"Start Date" means the date on which this Agreement is signed by the last party to do so.

"Statutory Requirements" means all:

- (a) laws applicable to the Capital Works or the carrying out of Your activities, including Acts, ordinances, regulations, by-laws and other subordinate legislation; and
- (b) Approvals (including any condition or requirement under them).

"Subcontractor" means any contractor, supplier, or consultant who is contracted or otherwise engaged by You to undertake the Capital Works (and any of that person's officers, employees, agents and subcontractors). **"Subcontracts"** has a corresponding meaning.

"Term" has the meaning set out in clause 33.

"Variation" means any change to the Capital Works including any addition, increase, decrease, omission, deletion, demolition or removal to or from the Capital Works.

"You" and **"Your"** where the context allows, includes Your officers, employees, agents, subcontractors and Your successors, and a reference to one or more of these persons in addition to You in a provision of this Agreement does not limit the application of this definition in that or any other context.

"Your Confidential Information" has the meaning set out in clause 22.1

"Your Contact Officer" means the person nominated in sub-Item Q2 of the Schedule or such other person as You may from time to time nominate, by written notice to Us, to act as Your Contact Officer.

2. Interpretation

In this Agreement:

- (a) headings (including Part, clause and Schedule headings) are for convenience only and do not affect the interpretation of this Agreement; and
- (b) where this Agreement requires Us to agree to something, approve something or has similar effect, We may subject to any express restriction provided in the relevant provision, withhold at Our sole discretion such agreement or approval,

and unless the context indicates a contrary intention:

- (c) a reference to a **"person"** includes a reference to a partnership or incorporated body as well as an individual;
- (d) words importing a gender include any other gender;
- (e) words in the singular include the plural and words in the plural include the singular;
- (f) all reference to clauses are clauses of this Agreement;
- (g) **"includes"** in any of its forms is not a word of limitation;
- (h) where any word or phrase has been given a defined meaning, any other part of speech or other grammatical form about that word or phrase has a corresponding meaning;
- (i) a reference to any statute or other legislation (whether primary or subordinate) is to a statute or other legislation of the Commonwealth and, if it has been or is amended, is a reference to that amended statute or other legislation;
- (j) a reference to **"\$"** or **"dollars"** is a reference to Australian currency;
- (k) if an example is given of any thing (including a right, obligation or concept), the example does not limit the scope of that thing;
- (l) each provision of this Agreement will be interpreted without disadvantage to the Party who (or whose representative) drafted that provision, that is, the *contra proferentem* rule does not apply to this Agreement;
- (m) if there is any inconsistency between the clauses of this Agreement and the Schedule, then the clauses of this Agreement will prevail; and
- (n) if there is any inconsistency between any document (not being the Schedule) referred to in this Agreement and the clauses of this Agreement, or the Schedule, then the clauses of this Agreement, or the Schedule (as the case may be) will prevail.

3. Your obligations in carrying out the Capital Works Project

3.1 Your obligations

You must carry out the Capital Works Project:

- (a) in accordance with this Agreement;
- (b) to help Us achieve the Program Aims;
- (c) by undertaking the activities or work specified in sub-Item B3 of the Schedule, at the times and in the way specified in sub-Item B4 of the Schedule;
- (d) using the Specified Personnel (if any);
- (e) diligently, effectively and to a high professional standard; and
- (f) so as to ensure that Capital Works will be fit for the Designated Use during the Designated Use Period.

3.2 You are fully responsible for Your obligations

You are responsible for the Capital Works Project, and for ensuring that You comply with the requirements of this Agreement, and You will not be relieved of that responsibility because of any:

- (a) involvement by Us in the performance of this Agreement, including (without limitation) any review, comment or approval by Us of any plans or reports submitted by You, issue by Us of a Certificate of Practical Completion, any Recipient Contribution or, to the extent permitted by law, exercise of our rights under clause 7;
- (b) payment made to You under this Agreement; or
- (c) subcontracting by You of any part of this Agreement.

3.3 You must comply with all special conditions

You must comply with each special condition (if any) set out in Item T of Schedule 1. A breach of any special condition by You constitutes a fundamental breach of this Agreement.

4. Capital Works Project Manager

4.1 You must appoint a Capital Works Project Manager

If specified in sub-Item Q3 of the Schedule, You must appoint a Capital Works Project Manager to supervise the performance of the Capital Works Project on and from the Start Date until Practical Completion.

4.2 Our requirements for Your Capital Works Project Manager

If specified in sub-Item Q3 of the Schedule, You must ensure that the Capital Works Project Manager:

- (a) holds one or more of the professional qualifications and accreditations specified in sub-Item Q3 of the Schedule;
- (b) is independent from You and the performance of the Capital Works; and
- (c) undertakes only a supervisory role and does not perform any aspect of the Capital Works.

4.3 Our right to approve the Capital Works Project Manager

If specified in sub-Item Q4 of the Schedule, You must only appoint a person as Capital Works Project Manager that We have approved in writing. You must not replace a person approved by Us as Capital Works Project Manager without Our prior written approval (which may be granted or withheld in Our absolute discretion). Where requested by Us, You must provide Us with full details of any proposed replacement Capital Works Project Manager including details of his or her qualifications and experience.

5. Capital Works

5.1 Construction Standards

- (a) You must ensure that all aspects of the Capital Works are undertaken by qualified tradespeople that are registered with relevant Australian State or Territory accreditation bodies to the extent that such bodies exist to regulate the activities of members of that particular trade.
- (b) You warrant that all activity relating to the Capital Works will be carried out in accordance with the requirements and standards of all Statutory Requirements applicable to the building, construction and fit out of the Site.

5.2 Capital Works Plans

- (a) You must provide Us with all plans specified in sub-Item F4 of the Schedule in accordance with the content requirements and timeframes specified in sub-Item F4 of the Schedule.
- (b) You must, within seven (7) Business Days of a written request by Us, or such longer time as is allowed by Us when making the request, provide Us with any plans for the Capital Works (or related documents) that are not referred to in clause 5.2(a), but which We require.
- (c) You must make all changes to the plans referred to in clauses 5.2(a) and 5.2(b) above as We may reasonably require and in the timeframes that We reasonably require. You must provide Us with a copy of any new plans incorporating all changes required by Us once the changes We require have been effected.
- (d) We will notify You in writing once We have approved plans that You have provided Us in accordance with this clause 5.2. You must conduct the Capital Works in accordance with all plans once approved by Us unless We otherwise agree or require by notice in writing to You.
- (e) You must not make any substantial or material change to the Capital Works plans once they are approved by Us, without Our prior written consent.

5.3 Completion of Capital Works

- (a) You agree within seven (7) Business Days, after completion of the Capital Works Project, to:
 - (i) provide Us with written certification by Your Project Manager or by such other person as We specify, that:
 - A. the Capital Works are completely free of errors or omissions and in conformity with Our requirements as set out in this Agreement; and
 - B. the Site is able to be used, or is being used, for the Designated Purpose;
("Pre-conditions for Practical Completion"); and
 - (ii) provide Us with such other information or material that We may require by written notice to You (including if We require all Approvals including where relevant certificates of occupancy and/or use), demonstrating that the Pre-conditions for Practical Completion have been met.
- (b) We will consider the written certification and other Approvals, information or material You provide Us under paragraph (a), and will, within 10 Business Days of all such information being provided to Us, either:
 - (i) if We are satisfied that the Pre-conditions for Practical Completion have been met, issue You with a Certificate of Practical Completion; or
 - (ii) provide written notice to You setting out the further matters which We require You to address in order to achieve the Pre-conditions for Practical Completion.
- (c) You must address any matters which We identify in a written notice to You issued under paragraph (b)(ii) within the timeframes We require, or if We do not specify a timeframe, as quickly as is reasonably possible, and submit to Us certification (by such person as We specify), Approvals, information and material as We require and in the form We require, demonstrating that You have addressed the matters identified in Our notice to You under paragraph (b)(ii), and that the Pre-Conditions for Practical Completion have been met. Upon Your submission to Us of such certification, Approvals, information and/or material, the provisions at paragraph (b) will reapply as if the reference to the certification, Approvals, information and/or material provided under paragraph (a), was a reference to certification, Approvals, information and/or material provided under this paragraph (c).
- (d) It is a fundamental term of this Agreement that You must achieve Practical Completion by the Date for Practical Completion.

5.4 Construction Requirements

- (a) If sub-Item B4.2 of the Schedule states that any Stages of the Capital Works must be completed by a particular date, You must complete that Stage of the Capital Works on or before the date specified in sub-Item B4.2 of the Schedule for completion of that Stage.
- (b) You are responsible for the proper and efficient conduct of the Capital Works.

5.5 Material variation of Capital Works

You must not vary, or enter into an agreement with any person (including, without limitation, a Subcontractor) to vary a material requirement or specification of the Capital Works without Our prior written approval.

5.6 You must co-operate with Other Contractors

You must:

- (a) permit Other Contractors to carry out their work;
- (b) fully co-operate with Other Contractors;
- (c) carefully co-ordinate and interface the Capital Works Project with the work carried out, or to be carried out, by the Other Contractors; and
- (d) carry out the Capital Works Project so as to avoid interfering with, disrupting or delaying the work of Other Contractors.

5.7 Survey

Prior to Practical Completion and in relation to each Stage the completion of that Stage, You must submit to the Departmental Officer a certificate signed by a licensed surveyor stating that:

- (a) the whole of the Capital Works Project or the Stage are within any particular boundaries stipulated in this Agreement except only for parts of the Capital Works or Stage specifically required to be outside those boundaries; and
- (b) where so required by the description of the Capital Works, structural elements of the Capital Works or the Stage are within the tolerances specified.

5.8 Safety

- (a) You must carry out the Capital Works Project safely and so as to protect persons and property and in accordance with all Statutory Requirements as they relate to safety.
- (b) Without in any way limiting or affecting Your obligations under clause 5.8(a), if We reasonably consider that there is a risk of injury to people or damage to property arising from Your activities, the Departmental Officer may by written notice direct You to change the manner of working, or to cease working, and You must comply with any such direction.

5.9 Cleaning Up

In carrying out the Capital Works Project, You must:

- (a) keep the Site and the Capital Works clean and tidy and free of refuse; and
- (b) prior to Practical Completion or as is relevant completion of a Stage, remove all rubbish, materials and Plant, Equipment and Work from the part of the Site relevant to the Capital Works or the Stage.

5.10 The Environment

You must:

- (a) ensure that in carrying out the Capital Works Project:
 - (i) You comply with all Statutory Requirements and other requirements of the Agreement for the protection of the Environment and that You do not Contaminate or otherwise damage the Environment; and
 - (ii) Your Subcontractors comply with the requirements set out in this clause 5.10; and
- (b) make good any Contamination or damage to the Environment arising out of, or in any way in connection with, the Capital Works Project, whether or not You have complied with all Statutory Requirements or other requirements of the Agreement for the protection of the Environment.

5.11 We may take action to protect the Capital Works or the Environment

Without in any way limiting or affecting Our rights under clause 7 of this Agreement, We may take any action necessary to protect:

- (a) the Capital Works;
- (b) other property;
- (c) the Environment; or
- (d) third parties,

which You must take, but do not take. All costs, expenses and liabilities that We suffer or incur as a result of taking action pursuant to this clause 5.11 will be a debt due from You to Us.

5.12 Valuable objects found on Site

- (a) Any things which We determine are of value (including of heritage value) or archaeological or special interest found on or in the Site will, as between the parties, be Our property.
- (b) Where a thing of value (including of heritage value) or archaeological or special interest is found on or in the Site, You must:
 - (i) immediately notify the Departmental Officer;
 - (ii) protect the item and not disturb it further; and
 - (iii) comply with any instructions of the Departmental Officer in relation to that item.

5.13 Latent Site Conditions

- (a) You acknowledge and agree that You are solely responsible for ensuring that the Site is suitable for the carrying out of the Capital Works Project and that there are no Latent Conditions existing at the Site that may affect Your ability to complete the Capital Works Project in accordance with, or otherwise fulfil Your obligations under, this Agreement.
- (b) Without limiting paragraph (a) above, if, at any time during the performance of the Capital Works, a condition (whether a Latent Condition or otherwise) is discovered at the Site, You must:

- (i) immediately notify Us to that effect;
 - (ii) provide Us with details of that condition, its causes and its effect on the Capital Works Project as We may reasonably require;
 - (iii) allow Us, and any person authorised by Us, access to the Site at all reasonable times to inspect and investigate the relevant condition; and
 - (iv) take all steps and measures necessary to avoid or, if You are unable to avoid, to mitigate, the impacts of the condition on the performance of the Capital Works.
- (c) Without limiting Our rights under paragraph (d) below, We may, in Our absolute discretion, direct You to vary the Capital Works in accordance with clause 5.14 in order to overcome the impacts of any condition at the Site that would, or might be expected to, adversely affect Your ability to complete the Capital Works in accordance with, or otherwise comply with Your obligations under, the Agreement.
- (d) If, in Our reasonable opinion, a condition referred to in paragraph (b) above is a Latent Condition:
- (i) all steps and measures taken by You (and any third party on Your behalf) to avoid or mitigate the impacts of the Latent Condition in accordance with paragraph (b)(iv) are entirely at Your own risk and expense and must not be paid for using any of the Funding; and
 - (ii) without limiting Your obligations under paragraph (b) above, We may (in Our absolute discretion), at any time following the identification of the Latent Condition terminate this Agreement in accordance with clause 27.1 where We consider that:
 - A. the impacts of the Latent Condition are unable to be avoided or mitigated so as to achieve the Capital Works Project Goals; or
 - B. that You have failed to avoid or mitigate the impacts of the Latent Condition in accordance with paragraph (b)(iv) within a reasonable time.

5.14 Variations

- (a) You acknowledge and agree that We may, by written notice, at any time, in Our absolute discretion, direct You to vary the Capital Works in such manner as specified in that notice as We consider (in Our absolute discretion) appropriate having regard to the Program Aims or the Capital Works Project Goals.
- (b) If We give You a direction under paragraph (a), You must, prior to undertaking any work on the variation in accordance with that direction, provide Us with:
 - (i) a detailed schedule itemising the changes to the Capital Works required as a result of the variation; and
 - (ii) if the variation will have an effect on the cost of the Capital Works, an itemised cost variation (an increase or decrease) resulting from the variation.

- (c) If, following Our consideration of the material provided under paragraph (b), We by written notice confirm the variation (which may include a modification of the changes proposed in Your documents provided under paragraph (b)), the amount of Funding will be adjusted where the variation causes a decrease or increase in the cost of the Capital Works:
- (i) by a reasonable amount agreed by Us and You (whether an increase or decrease is applicable) that represents the increase or decrease in the cost of implementing the variation, and any reasonable costs and expenses incurred by You arising from the variation or delaying of the Capital Works, or
 - (ii) if We and You are unable to agree on the amount under paragraph (c)(i) within 5 Business Days of our confirmation to vary the Capital Works, by a reasonable amount (whether an increase or decrease as applicable) as determined by Us; or
 - (iii) if, within 5 Business Days of our determination under paragraph (c)(ii), You disagree that the amount as determined by Us represents a reasonable amount arising from the variation, by a valuer appointed by the president of the Institute of Valuers in Australia at the request of Us or You.
- (d) The amount determined by the valuer under paragraph (c)(iii) is binding on both Us and You.
- (e) No variation will invalidate this Agreement, irrespective of the nature, extent or value of the work the subject of the variation.

6. Quality of the Capital Works

6.1 Construction

You must, in carrying out the Capital Works:

- (a) use workmanship:
 - (i) of:
 - A. the standard prescribed in this Agreement; or
 - B. to the extent it is not so prescribed, a standard consistent with the best industry standards for work of a nature similar to the Capital Works; and
 - (ii) which is fit for its purpose (and in particular is fit for the Designated Use for the duration of the Designated Use Period);
- (b) use materials:
 - (i) which:
 - A. comply with the requirements of this Agreement; or
 - B. if not fully described in this Agreement, are new and consistent with the best industry standards for work of a nature similar to the Capital Works; and

- (ii) of merchantable quality, which are fit for their purpose and consistent with the nature and character of the Capital Works;
- (c) comply with the requirements of this Agreement; and
- (d) comply with the requirements of the Building Code of Australia and all relevant standards of Standards Australia.

6.2 Departmental Officer's Right to Inspect

- (a) The Departmental Officer, or any person authorised by the Departmental Officer, may at any time inspect Your activities relating to this Agreement, including without limitation the Capital Works.
- (b) Notwithstanding paragraph (a), You acknowledge that:
 - (i) the Departmental Officer (or any person authorised by the Departmental Officer) owes no duty to You to:
 - A. inspect Your activities; or
 - B. review construction for errors, omissions or compliance with the requirements of this Agreement if it does so inspect; and
 - (ii) no inspection of Your activities or review of construction by the Departmental Officer or a person authorised by the Departmental Officer will in any way lessen or otherwise affect:
 - A. Your obligations whether under this Agreement or otherwise according to law; or
 - B. Our rights against You whether under this Agreement or otherwise according to law.

6.3 Testing

- (a) You must carry out all tests relating to the Capital Works or any part of the Capital Works, as are required by this Agreement, or as directed by the Departmental Officer or as directed by any person authorised by the Departmental Officer to require testing.
- (b) All tests are to be carried out in accordance with any procedure:
 - (i) set out in this Agreement which may apply to the tests; or
 - (ii) if no procedure exists, as reasonably directed by the Departmental Officer or any person authorised by the Departmental Officer to require testing, or otherwise in a manner generally accepted by industry for testing of that type.

6.4 Costs of Testing

If:

- (a) the Departmental Officer, or person authorised by the Departmental Officer, directs You to carry out a test which:
 - (i) is not otherwise required by this Agreement; or

(ii) does not relate to a Defect in respect of which the Departmental Officer gave an instruction under clause 6.5; and

(b) the results of the test show the work is in accordance with this Agreement,

the reasonable costs incurred by You in carrying out the test will be determined by the Departmental Officer and reimbursed to You. In all other circumstances, You are responsible for bearing the costs of any tests conducted pursuant to this clause 6.

6.5 Defects

Subject to paragraphs (b) and (c), You must correct all Defects. If, prior to the expiration of the Defects Liability Period, the Departmental Officer, or a person authorised by the Departmental Officer to inspect Defects, discovers or believes there is a Defect, the Departmental Officer or authorised person may give You an instruction specifying the Defect and doing one or more of the following:

- (a) requiring You to correct the Defect, or any part of it, and specifying the time within which this must occur; or
- (b) requiring You to carry out a Variation to overcome the Defect, or any part of it, and specifying the time within which this must be carried out; or
- (c) advising You that We will accept the work, or any part of it, despite the Defect.

6.6 Correction of Defect or Variation

If an instruction is given under clause 6.5(a) or 6.5(b), You must correct the Defect or carry out the Variation:

- (a) within the time specified in the Departmental Officer's (or authorised person's) instruction; and
- (b) if after Practical Completion or completion of a relevant Stage, at times and in a manner which cause as little inconvenience to the occupants of the Capital Works or the Stage as is reasonably possible.

6.7 Claim for Correction of Defect or Variation

Where an instruction is given under clause 6.5(a) or 6.5(b), You will only be entitled to make a Claim for Payment for correcting the Defect (or the relevant part) or making the Variation if the Defect (or the relevant part) is something for which You are not responsible.

6.8 Acceptance of Work

If:

- (a) an instruction is given under clause 6.5(c) prior to the expiration of the Defects Liability Period; and
- (b) You are responsible for the Defect (or the relevant part),

the Funding will be reduced by the amount determined by Us which represents the cost of correcting the Defect (or the relevant part).

6.9 Extension of Defects Liability Period

If:

- (a) the Departmental Officer gives You an instruction under clause 6.5(a) or 6.5(b) during the Defects Liability Period; and
- (b) You are responsible for the Defect (or the relevant part),

the Defects Liability Period will be extended by the period taken by You to complete the work required to rectify the Defect.

6.10 Common Law Rights not Affected

Neither Our rights, nor Your liability, whether under this Agreement or otherwise according to law in respect of Defects, whether before or after the expiration of the Defects Liability Period, will be affected or limited by:

- (a) the rights conferred upon the Parties by this clause 6 or any other provision of this Agreement;
- (b) the failure by Us or the Departmental Officer to exercise any such rights; or
- (c) any instruction of the Departmental Officer under clause 6.5.

7. Our rights to Step In

7.1 Our rights to step in

Without prejudice to any other right or remedy that We may have under this Agreement, at common law, in equity or under any statute, if, in Our opinion, You have breached any obligation under this Agreement, We may ourselves or through a third party, at Our option:

- (a) step-in and take control or management of part or the whole of the Capital Works Project (including at Our discretion by performing any or all of Your obligations under this Agreement Ourselves or through Our nominee); or
- (b) make any other arrangements considered necessary by Us to complete all or part of the Capital Works Project or to otherwise ensure the completion of all obligations under this Agreement.

7.2 Your obligations if We step in

- (a) You must do everything necessary to give effect to Our rights under clause 7.1 when We exercise them, including, but not limited to:
 - (i) where requested to do so by Us, in the timeframes (if any) required by Us and, if We do not specify a timeframe, promptly, as directed by Us, novating or assigning to Us or Our nominee on such terms (if any) specified by Us, any contracts with third parties (including any Subcontracts) relating to the Capital Works Project;
 - (ii) assigning to Us, or (where You are unable at law to obtain an assignment) otherwise assisting Us or Our nominee to obtain all licences (including licences to Intellectual Property) consents and Approvals that are required to enable Us or Our nominee to fully exercise Our rights under clause 7.1;

- (iii) in the timeframes (if any) required by Us and, if We do not specify a timeframe, promptly at Our request:
 - A. assigning to Us or Our nominee, any leases or licences relating to the Capital Works Project that are, in Our opinion, required for the due and proper completion of the Capital Works or the Capital Works Project; or
 - B. providing to Us or Our nominee and contractors and subcontractors of Us or Our nominee (as the case may be) with unfettered access to the Site for the purposes of exercising Our rights under clause 7.1,

(or both as the case may be); and
 - (iv) at Our discretion, repaying to Us, or paying to Our nominee, all Uncommitted Funds or such part of the Uncommitted Funds identified by Us within the timeframes specified by Us (or, where We do not specify a timeframe, promptly).
- (b) For the purposes of this clause 7 "Uncommitted Funds" means all Funds that are, at the time of Our request, unspent or uncommitted, or cannot be shown to the reasonable satisfaction of Us to have been spent or committed in accordance with this Agreement.
 - (c) Without limiting or affecting Our rights under this Agreement, We may recover all Our costs associated with exercising Our rights under this clause 7 (including our costs associated with recovering any amount of Uncommitted Funds from You under clause 7.2(a)(iv)) as a debt due from You.
 - (d) We will have no liability to You arising out of or in connection with the exercise of Our rights under this clause 7.

8. National Code of Practice and Building and Construction Industry Improvement (BCII) Act

8.1 Application of this clause 8

This clause 8 applies if sub-Item R1 of the Schedule states that it is applicable.

8.2 Compliance with the Code

You must comply, in the performance of the Capital Works, with the requirements of:

- (a) the Code; and
- (b) the Code Guidelines.

Copies of the Code and the Code Guidelines are available at <http://www.workplace.gov.au>.

8.3 Compliance with the BCII Act

- (a) You acknowledge and agree that the Capital Works Project is subject to the application of the Australian Government Building and Construction OHS Accreditation Scheme ("**Scheme**"). You must comply, at all times during the Term, with the requirements of the *Building and Construction Industry Improvement Act 2005* ("**BCII Act**"), including the Scheme and clause 8.3(b).

- (b) You must ensure that all Subcontracts for building work (as that term is defined under the BCII Act) that You propose to enter into in relation to the Capital Works that are valued at \$3 million or more:
 - (i) are notified to the Office of the Federal Safety Commissioner at the earliest possible opportunity (that is, when approaching the market);
 - (ii) contain a requirement that the relevant Subcontractor:
 - A. is accredited under the Scheme;
 - B. maintains Scheme accreditation for the life of the contract; and
 - C. must comply with all conditions of the Scheme accreditation.

8.4 Your responsibilities

Compliance with the Code, the Code Guidelines or the BCII Act does not relieve You from responsibility to perform Your obligations under this Agreement, or from liability for any defect in the Capital Works arising from compliance with the Code, the Code Guidelines or the BCII Act.

8.5 Changes to this Agreement

Where a change in this Agreement is proposed and that change would affect Your compliance with the Code, the Code Guidelines or the BCII Act, You must submit a report to Us specifying the extent to which Your compliance with the Code, the Code Guidelines or the BCII Act will be affected.

8.6 Records

- (a) You must maintain adequate records of the compliance with the Code, the Code Guidelines and the BCII Act by Yourself, Your Subcontractors and Your Related Entities.
- (b) You must ensure that Your Related Entities maintain adequate records of their compliance with the Code and the Code Guidelines
- (c) You must permit Us or any person authorised by Us, including any person occupying a position in the Office of the Australian Building and Construction Commissioner, to have full access to the Site and other places covered by the Code and Code Guidelines to:
 - (i) inspect any work, material, machinery, appliance, article or facility;
 - (ii) inspect and copy any record relevant to the Capital Works Project or otherwise relevant to this Agreement;
 - (iii) interview any person; or
 - (iv) request the production of documents within a specified period, being not less than 14 days in person, fax or post,

as is necessary to allow validation of Your and Your Subcontractor's or Related Entities' progress in complying with the Code and the Code Guidelines.

- (d) You must, and must ensure that Your Subcontractors and Your Related Entities, comply with any request from Us or any person authorised by Us, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, for You to produce a specified document within a specified period, in person, by fax or by post.
- (e) For the avoidance of doubt, this clause also applies in relation to Your construction sites which are privately funded or funded by any means other than by funding under this Agreement.

8.7 Subcontractors records

In all Subcontracts You must require the Subcontractors to maintain and provide access for Us or any person authorised by Us to the Subcontractor's records and premises to the same extent as required from You by clause 8.6.

8.8 Effect of non-compliance

If You do not comply with the requirements of the Code, the Code Guidelines or the BCII Act in the performance of Your obligations under this Agreement such that sanction is applied by the Code Monitoring Group, We, without prejudice to any rights that would otherwise accrue, are entitled to record that non-compliance and take it into account in the evaluation of any future tenders that may be lodged by You or a Related Entity in respect of work for any part of the Commonwealth or its agencies.

8.9 Compliance with sanctions

You must not appoint a contractor, Subcontractor, consultant or supplier in relation to the Capital Works where the appointment would breach a sanction imposed by the Code Monitoring Group.

8.10 Subcontractors' responsibilities

You shall ensure that all Subcontracts impose obligations on the Subcontractors equivalent to the obligations under this clause.

9. Ownership of the Site

- (a) You represent and warrant to Us that You are as at the Start Date, and will remain at all times during the Term of this Agreement (including at all times during the Designated Use Period) the registered owner of the Site.
- (b) You acknowledge and agree that We have relied, and will continue to rely, on Your representation and warranty in paragraph (a) above in entering into this Agreement and in providing the Funding to You for the purposes of performing the Capital Works Project, and to achieve the Program Aims in relation to the Project and the Capital Works Project Goals.

10. Purposes Deed

10.1 Execution of Purposes Deed

- (a) You must, if required to do so by Item S of the Schedule, execute and provide to Us a Purposes Deed in a form satisfactory to Us, by the date specified in Item S.

- (b) Notwithstanding any other clause in this Agreement, You acknowledge and agree that You are not entitled to receive, and We are not obliged to pay, any part of the Funding, and no Funding is to be expended by You, unless and until You have complied with clause 10.1(a).

10.2 Compliance with Purposes Deed

You must, as a fundamental term of this Agreement, comply with any Purposes Deed which You enter into pursuant to clause 10.1(a).

10.3 If Purposes Deed is not required

- (a) If you are not required by Item S of the Schedule to enter into a Purposes Deed, You must nevertheless ensure that the Capital Works and the Site are, at all times during the Designated Use Period, available to be used, and except to the extent We first otherwise allow in writing, only used, for the Designated Use.
- (b) If you are not required by Item S of the Schedule to enter into a Purposes Deed, and at any time during the Designated Use Period, the Capital Works or Site are without Our written permission to do so, used for a purpose or purposes other than the Designated Use, then We may at Our absolute discretion recover from You, as a debt due to Us, the Funding, or such portion of the Funding as We determine at Our absolute discretion.

11. You must keep Us informed

You must in addition to Your Reporting requirements under this Agreement:

- (a) communicate with and provide information to the Departmental Officer as reasonably required by the Departmental Officer;
- (b) comply, in a timely fashion, with all reasonable requests or directions of the Departmental Officer; and
- (c) promptly advise the Departmental Officer in writing about any relevant matters that might affect Your ability to meet Your obligations under this Agreement.

12. You must acknowledge Our support

- (a) You must acknowledge in a positive manner Our financial and other support in all publications, promotional Material, and activities relating to this Agreement.
- (b) You must acknowledge Our financial and other support in the form which is set out at Item E of the Schedule, or, if no form is set out at Item E, in a form which We must first approve in writing.

13. You must comply with all relevant laws and policies and prevent fraud upon Us

You must, in carrying out Your obligations under this Agreement:

- (a) comply with all Statutory Requirements and any other requirements of any Commonwealth, State, Territory, or local authority;
- (b) comply with any of Our policies that we notify You of in writing; and

- (c) prevent fraud upon Us.

14. You must keep records, provide Reports and allow Us access

14.1 You must keep certain records

- (a) You must keep and maintain, and ensure Your subcontractors keep and maintain, accurate and detailed records and accounts (including receipts and invoices) as necessary to provide a complete record of:
 - (i) the expenditure of Funding and whether that Funding was spent in accordance with this Agreement;
 - (ii) other expenditure on the Capital Works Project; and
 - (iii) implementation and progress of the Capital Works Project.
- (b) You must keep the records referred to in paragraph (a) in accordance with the accounting principles generally applied in commercial practice and as required by law.
- (c) You must retain and require Your subcontractors to retain for a period of seven years after termination or expiration of this Agreement, all books and records relating to the Capital Works Project.
- (d) You must bear Your own costs of complying with this clause.

14.2 You must produce records to Us upon Our request

If the Departmental Officer asks You to, You must provide originals or copies of receipts and invoices (including Claims for Payment) relating to this Agreement to Us within 10 Business Days of the date of the request.

14.3 Our rights to audit Your performance of this Agreement

We, or Our nominee, may conduct audits relevant to the performance of Your obligations under this Agreement. Audits may be conducted of:

- (a) Your operational practices and procedures as they relate to this Agreement, including security procedures;
- (b) the accuracy of Your invoices and reports in relation to the performance of this Agreement;
- (c) Your compliance with Your obligations under this Agreement, including in relation to the Funding;
- (d) Material (including books and records) which is in Your possession and is relevant to the Capital Works or this Agreement; and
- (e) any other matters We determine to be relevant to the Capital Works or this Agreement.

14.4 Our rights to access Your Premises

We, or Our nominee may, at reasonable times and on giving reasonable notice to You:

- (a) access Your premises and the Site to the extent relevant to the performance of this Agreement;
- (b) require You (or Your employees, agents and subcontractors) to provide records and information in a data format and storage medium accessible by Us by use of Our existing computer hardware and software;
- (c) inspect and copy documentation, books and records, however stored, in the custody or under control of You or Your employees, agents or subcontractors; and
- (d) require assistance in respect of any inquiry into or concerning the Capital Works or this Agreement. For these purposes an inquiry includes any administrative or statutory review, audit or inquiry (whether within or external to Us), any request for information directed to Us, and any inquiry conducted by Parliament or any Parliamentary committee.

You must provide access to the Your computer hardware and software to the extent necessary for Us to exercise Our rights under this clause, and provide Us with any reasonable assistance requested by Us to use that hardware and software.

14.5 Conduct of audit and access

We will use reasonable endeavours to ensure that:

- (a) audits performed pursuant to clause 14.3; and
- (b) the exercise of the general rights granted by clause 14.4 by Us,

do not unreasonably delay or disrupt in any material respect Your performance of Your obligations under this Agreement.

14.6 Costs

Each party must bear its own costs of any reviews and/or audits conducted pursuant to this clause 14.

14.7 Auditor-General and Privacy Commissioner

Our rights under clauses 14.4(a) to 14.4(c) apply equally to the Auditor-General or a delegate of the Auditor-General, or the Privacy Commissioner or a delegate of the Privacy Commissioner, for the purpose of performing the Auditor-General's or Privacy Commissioner's statutory functions or powers.

14.8 You must comply with Auditor-General's requirements

You must do all things necessary to comply with Our requirements and the Auditor-General's or his or her delegate's or the Privacy Commissioner's or his or her delegate's requirements, notified under clause 14, provided such requirements are legally enforceable and (in relation to requirements of the Auditor-General or the Privacy Commissioner) are within the power of the Auditor-General, the Privacy Commissioner, or his or her respective delegate.

14.9 Application of clauses 14.3 to 14.8

Clauses 14.3 to 14.8 apply for the Term and for a period of seven years from the termination or expiry of this Agreement.

14.10 Acquittals

Within 60 Business Days of the end of each financial year in which You have received, expended or retained Funds pursuant to this Agreement, or within 60 Business Days of the earlier termination of this Agreement, You must provide Us with:

- (a) a certificate signed by Your representative with the authority to make representations on Your behalf stating whether:
 - (i) the Funds have been used for the purpose they were provided; and
 - (ii) all terms and conditions of this Agreement have been complied with.
- (b) an income and expenditure statement in respect of the Funding provided under this Agreement, including details of the expenditure of the Funds against the Budget (where applicable) or, where there is no Budget, providing full details of the expenditure of the Funds; and
- (c) any other information required by Us for accountability purposes as we may advise you in writing from time to time.

14.11 You must provide Us with Reports

- (a) You must prepare and give to the Departmental Officer these Reports:
 - (i) the reports set out in sub-Item F1 of the Schedule; and
 - (ii) a final audited report ("**Final Acquittal Report**") verifying:
 - A. that You have spent the Funding provided on the Capital Works Project and in accordance with this Agreement;
 - B. income and expenditure in respect of the Funding provided under this Agreement with expenditure to be reported against the approved Budget (where applicable) or, where there is no approved Budget, against major account code items; and
 - C. any other matters required by Us for accountability purposes, including, without limitation, the matters set out in sub-Item F2 of the Schedule.
- (b) The Final Acquittal Report must:
 - (i) cover the period up to Practical Completion; and
 - (ii) be prepared in accordance with Australian Accounting Standards.
- (c) You must provide the Reports at the times set out in sub-Item F3 of the Schedule.
- (d) All Reports must be in English and in a form acceptable to Us. If, in the Departmental Officer's opinion, either the form or the content of a Report is not adequate for Our purposes, without limiting Our rights, the Departmental Officer may require You to submit a revised Report. You must submit the revised Report within 30 days, or such other time as is specified by the Departmental Officer (such other time may be less than 30 days).

14.12 You must ensure that the Final Acquittal Report is audited

- (a) You must ensure that the Final Acquittal Report is independently audited by an Approved Auditor. You are responsible for paying for this audit.
- (b) The Final Acquittal Report submitted to Us must be accompanied by a report from Your Approved Auditor that includes an opinion on:
 - (i) whether the Final Acquittal Report presents the financial transactions fairly in accordance with the Funding Agreement and Guidelines, applicable Australian Accounting Standards and other mandatory professional reporting requirements and is based on proper accounts and records;
 - (ii) whether Your organisation's management has ensured that the rules and legislation governing Your organisation have been complied with; and
 - (iii) where there is an audit qualification or limitation of scope, an outline of the reasons for the qualification or limitation of scope, and any related recommendations.
- (b) Where required by Us, You agree to pass on to Your Approved Auditor any request from Us detailing additional audit requirements.

14.13 If required, You must ensure that other Reports are audited

If We require, You must ensure that any other Reports that relate to the expenditure and acquittal of Funding are independently audited by an Approved Auditor. You are responsible for paying for any such audit.

14.14 You must keep copies of all Reports, records and account books

You must keep a copy of all Reports, records and account books in their original form for at least 5 years after the End Date or after the earlier termination of this Agreement.

Part C About the Funding

15. Payment of the Funding

15.1 Payment of Funding to You

If there are sufficient funds available for the Program, and if You comply with this Agreement, We will pay You the Funding at the times and in the manner set out in Item G of the Schedule.

15.2 Your Australian Business Number

- (a) You must provide Us with Your Australian Business Number ("ABN") and immediately notify Us if You cease to be registered with an ABN.
- (b) You must correctly quote Your ABN on all documentation that You provide to Us.

15.3 Your bank account

- (a) We will provide the Funding to You by electronic transfer to Your bank account, details of which are set out in sub-Item G4 of the Schedule or otherwise to such other bank account that is agreed to in writing by You and the Departmental Officer.

- (b) If Your bank account details change, You must notify the Departmental Officer in writing. You must do this at least 5 Business Days before the next payment is due, and in any event within 15 Business Days of the change occurring.

15.4 Where We are not required to make payments

Without limiting any other rights We may have under this Agreement, or at general law, We are not required to pay You Funding if You are in breach of this Agreement. This includes if You:

- (a) do not undertake or perform the Capital Works Project as required by this Agreement;
- (b) undertake or perform the Capital Works Project other than as allowed for by this Agreement;
- (c) do not provide a financial security (if You are required to do so) in accordance with clause 15.7;
- (d) do not provide a Purposes Deed (if You are required to do so) in accordance with clause 9;
- (e) do not provide Reports or other information as required by, or pursuant to, this Agreement; or
- (f) expend the Funding other than in accordance with the requirements of this Agreement.

15.5 Where We may defer, suspend, reduce or withhold payments

Without limiting any other rights We may have under this Agreement, or at general law, We may defer, suspend, reduce or withhold all or part of a Funding payment:

- (a) until You have performed to Our satisfaction the obligation to which the Funding payment relates; or
- (b) where We form the reasonable opinion that the full payment is not properly required by You because of Funding surpluses or underspends.

15.6 Other funding

You agree that We are not obliged to provide any further or future funding to You of any kind, unless expressly set out in this Agreement. In addition, any future or further funding is payable subject to our rights to offset amounts at clause 17.3(c).

15.7 Financial Security

If specified in Item H of the Schedule, You must provide an unconditional financial security from a financial institution We approve in the form We provide You with and for an amount acceptable to Us, within 10 Business Days of the Start Date or of the date We provide the form to You (whichever is the later).

15.8 Other Commonwealth Funding

- (a) A serious breach of any other agreement You may have with the Commonwealth under which You receive Commonwealth funding is taken to be a breach of this Agreement for the purposes of clause 15.4. To avoid doubt, this means that if You

commit a serious breach of another agreement You have with the Commonwealth, We will not be required to pay You Funding under this Agreement.

- (b) For the purposes of paragraph (a) "serious breach" means a breach which We, in Our sole discretion, consider is serious.

16. Recipient Contribution

- (a) You agree to provide the Recipient Contribution (if any) for the Capital Works Project in accordance with the requirements of Item I of the Schedule.
- (b) If You do not provide Your Recipient Contribution as required, then We may:
 - (i) suspend, reduce (by an amount determined at Our sole discretion) or withhold the Funding; or
 - (ii) terminate this Agreement under clause 27.

17. Spending and Refunding the Funding

17.1 Spending the Funding

You must spend the Funding only on the Capital Works Project, and only in accordance with this Agreement.

17.2 You may not use the Funding as security

You may not use the Funding as security for any purpose without Our first agreeing to this in writing.

17.3 You must pay Us Funding You do not spend in accordance with this Agreement

If, at the Practical Completion, or upon earlier termination of this Agreement, there is an amount of the Funding that You have not spent, or have spent other than in accordance with this Agreement, ("**Recoverable Amount**") then:

- (a) subject to paragraph (b), You must pay the Recoverable Amount to Us in full within 20 Business Days of the Practical Completion or date of earlier termination (whichever is the earlier); or
- (b) if We agree in writing that You do not have to pay all or some of the Recoverable Amount to Us, then You do not have to pay Us that amount that We agree to; but
- (c) We may recover all or some of the amount referred to in paragraph (b) from You by offsetting the amount against any amount subsequently due to You under this Agreement, or any other arrangement or agreement between You and Us or between You and the Commonwealth generally; or
- (d) We may direct You in writing to deal with all or some of the amount referred to in paragraph (b), and You must deal with such amount as We direct.

17.4 What happens if You do not pay Us as required or deal with Funds as We direct

If:

- (a) You do not pay Us an amount owing under clause 17.3(a); or
- (b) We are not able to recover an amount that We wish to recover under clause 17.3(c); or
- (c) You do not deal with an amount as We direct under clause 17.3(d);

then:

- (d) You must pay the amount arising under paragraphs (a), (b) or (c) of this clause 17.4 to Us and must also pay Us Interest on such amount from the date it was due to be paid, or offset or dealt with as the case may be, and then for the period of time it remains unpaid to Us; and
- (e) the relevant amount, and Interest owed under paragraph (d), will be recoverable by Us as a debt due to Us by You.

17.5 You must spend the Funding in accordance with the Budget

If there is a Budget, You must spend the Funding in accordance with the Budget.

18. Using the Funding to acquire Assets

18.1 When does this clause 18 apply to You?

This clause 18 applies to You if specified to apply by sub-Item K1 of the Schedule.

18.2 You must not use the Funding to acquire Assets unless We agree

If this clause 18 applies to You, You must not use the Funding to acquire any Asset, other than those Assets (if any) specified in sub-Item K2 of the Schedule, without first getting Our approval in writing. We may place any conditions We consider appropriate on Our approval, and You must comply with any such conditions.

18.3 You own the Assets unless the Schedule states otherwise

If this clause 18 applies to You, then, unless sub-Item K3 of the Schedule provides otherwise, You must own or lease any Assets.

18.4 Your obligations in regard to Assets

If this clause 18 applies to You, You must:

- (a) use any Asset only in accordance with this Agreement;
- (b) not encumber or dispose of any Asset, or deal with or use any Asset other than in accordance with this clause 18, without first getting Our approval in writing;
- (c) hold all Assets securely and safeguard them against theft, loss, damage or unauthorised use;
- (d) keep all Assets in good working order;

- (e) maintain all appropriate insurances for all Assets;
- (f) if required, maintain registration and licensing of all Assets;
- (g) be fully responsible for, and bear all risks relating to, the purchase, use or disposal of all Assets; and
- (h) if it is required by sub-Item K4 of the Schedule, maintain an Assets register.

18.5 What is the meaning of Depreciation Rate?

In this Clause 18, "**Depreciation Rate**" means the depreciation rate nominated by Us from time to time for:

- (a) Assets of a particular type; or
- (b) for a particular Asset.

18.6 What happens if You sell an Asset?

If this clause 18 applies to You, and You own or lease the relevant Asset, then:

- (a) if You sell or dispose of that Asset in any way during the Term, You must immediately notify Us of this in writing;
- (b) if, at the time of sale or disposal, the Asset has not been fully depreciated using the Depreciation Rate, We may require You to pay Us an amount equal to the proportion of the value of the Asset following depreciation using the Depreciation Rate, that is equivalent to the proportion of the purchase price of the Asset that was funded from the Funding; and
- (c) You must comply with any such request within 15 Business Days of the request being made.

18.7 What happens to the Asset at the end of the Agreement?

If this clause 18 applies to You, then, at the Practical Completion or upon earlier termination of this Agreement, if an Asset has not been fully depreciated using the Depreciation Rate, We may require You to:

- (a) pay Us an amount equal to the proportion of the value of the Asset following depreciation using the Depreciation Rate, that is equivalent to the proportion of the purchase price of the Asset that was funded from the Funding; or
- (b) deal with the Assets in any way which We notify You in writing.

You must comply with any such request within 20 Business Days of the request being made.

18.8 What happens if You do not pay Us as required?

If this clause 18 applies to You, then, if You do not pay Us an amount as required by either clauses 18.6 or 18.7 within the timeframe required by those clauses:

- (a) You must pay that amount to Us and must also pay Us Interest on the relevant amount from the date it was due, for the period it remains unpaid to Us; and
- (b) the relevant amount, and Interest owed under this clause 18.8, will be recoverable by Us as a debt due to Us by You.

19. Goods and Services Tax

19.1 When does this clause 19 apply?

This clause 19 will apply if You are registered or are required to be registered for GST.

19.2 Definitions

"GST", "Adjustment Notes", "Input Tax Credit", "Recipient Created Tax Invoice", "Tax Invoice" and "Taxable Supplies" have the meanings given to those terms in the *A New Tax System (Goods and Services Tax) Act 1999*, or any other relevant legislation, regulations, or applicable rulings by the Australian Taxation Office ("GST Law").

19.3 Funding includes GST

The Funds payable to You under this Agreement include an amount in respect of Your liability for GST on any Taxable Supplies under this Agreement.

19.4 Our access to Your GST records

If We require, You must provide Us with access to GST returns and any GST assessments and accounting records relating to the Funding, so that We can be satisfied that GST is payable and has been paid under this Agreement in accordance with GST Law.

19.5 Input Tax Credits

You agree that You are responsible for claiming all Input Tax Credits to which You are entitled pursuant to this Agreement. We will not be responsible for any additional costs You may incur as a consequence of failing to claim such Input Tax Credits.

19.6 Recipient Created Tax Invoice

- (a) You agree to allow Us to issue You with a Recipient Created Tax Invoice ("RCTI") for any Taxable Supplies made under this Agreement, if We choose to do so.
- (b) Where We choose to issue a RCTI, We will issue such a RCTI within 28 days of determining the value of the Taxable Supplies to which the RCTI relates and may do this by facsimile. You must not issue a tax invoice for the supply to which the RCTI relates.
- (c) If, for any reason, We do not issue You with a RCTI within the time period specified in paragraph (b), You must provide Us with a Tax Invoice, which may be sent to Us by facsimile. You must issue any Adjustment Notes relating to Taxable Supplies for which You previously issued a valid tax invoice within 28 days of the date of adjustment.

19.7 You must notify us if Your GST status changes

You must immediately notify Us in writing of any changes to Your GST status.

19.8 We are registered for GST

We are registered in accordance with GST Law and will notify You of any change in Our GST registration status.

19.9 Changes to Taxable Supplies or the rate of GST

You agree that:

- (a) if an activity undertaken in connection with the Project, or part of an activity undertaken in connection with the Project, is not, or ceases to be, a Taxable Supply after the Start Date; or
- (b) the rate of GST applying to an activity undertaken in connection with the Project, or part of an activity undertaken in connection with the Project, as at the Start Date is reduced,

then any amounts that would be payable by Us to You under this Agreement in respect of that activity will be reduced by an amount that is equivalent to the reduction in the GST applicable to that activity.

Part D Material and Information

20. Our Material

20.1 What is Our Material?

"**Our Material**" means any Material We provide to You for the purposes of this Agreement or which is copied or derived from that Material. "**Our Material**" does not however include Agreement Material (the definition of "**Agreement Material**" is in clause 1).

20.2 Who owns Our Material?

We own and will continue to own Our Material.

20.3 You must return Our Material

At the Practical Completion or at the earlier termination of this Agreement, You must return to Us all Our Material remaining in Your possession, or under Your control, unless We before this time otherwise agree in writing.

20.4 How You may use Our Material

- (a) You must ensure that You only Use Our Material for the purposes of this Agreement. Subject to paragraph (b), We licence You to Use Our Material for, and only for, these purposes. This licence is not exclusive and in no way restricts Our rights with respect to Our material.
- (b) You agree to Use Our Material strictly in accordance with any conditions or restrictions which We may notify You from time to time in writing.
- (c) For the purposes of paragraphs (a) and (b) "**Use**" means copying, supplying and reproducing Our Material where this is necessary for the purposes of this Agreement.

20.5 You must keep Our Material safe

You will be responsible for the safe keeping and maintenance of Our Material and bear all risks relating to such Material.

21. Intellectual Property Rights

21.1 What is the meaning of particular terms used in this clause 21?

"Intellectual Property Rights" or "IPR" means all copyright (including Moral Rights), neighbouring rights, rights in relation to inventions (including patent rights), registered and unregistered trademarks (including service marks), registered designs, and other rights resulting from the intellectual activity in the industrial, scientific, literary or artistic fields.

"IPR Licensee" means the Party that is not the IPR Owner.

"IPR Owner" means:

- (a) subject to paragraph (b), You; or
- (b) if indicated at Item L of the Schedule, Us.

"Licence" means a permanent, irrevocable, free, world-wide non-exclusive licence and includes a right of sublicense.

"Moral Rights" means the right of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship granted to authors under the *Copyright Act 1968*.

"Specified Acts" means those acts or omissions by or on behalf of Us which would, but for this clause 21, infringe the author's right of attribution of authorship or the author's right of integrity of authorship, but excludes acts or omissions which would infringe the author's right not to have authorship falsely attributed.

"Use" includes reproducing, publishing, adapting and exploiting.

21.2 Who owns Intellectual Property Rights under this Agreement?

- (a) Subject to paragraph (b), the IPR Owner owns the IPR in all Agreement Material.
- (b) This clause 21 does not affect the ownership of IPR in any Existing Material that is included in Agreement Material.

21.3 Licensing of Intellectual Property Rights

- (a) If You are the IPR Owner then You grant Us a Licence to Use the IPR in Agreement Material and in Existing Material owned or controlled by You or a subcontractor for any Commonwealth purpose.
- (b) If We are the IPR Owner then:
 - (i) You grant Us a Licence to Use Existing Material owned or controlled by You or a subcontractor for any Commonwealth purpose;
 - (ii) We grant You a royalty free, non-exclusive licence (excluding the right of sublicense) to Use the IPR in Agreement Material and in Existing Material owned or controlled by Us for the purposes of performing this Agreement and any other purposes approved in writing by Us under clause 21.3(c), but not for any other purpose.

- (c) We may, upon a written request by You, grant written approval for You to sublicense all or any specified part of Agreement Material of which We are the IPR Owner and/or Existing Material which We own or control:
 - (i) to a specified person;
 - (ii) for a specified use or purpose; and
 - (iii) subject to any other specified terms and conditions or limitations.
- (d) We are under no obligation to approve any request made by You under clause 21.3(c), and We may at Our discretion impose any limitations or requirements on Our approval.

21.4 You must arrange for third parties to licence Intellectual Property Rights to Us

Whether or not You or We are the IPR Owner, if a third party has IPR in Existing Material (not owned or controlled by You or a subcontractor):

- (a) You must notify Us of this before providing Agreement Material to Us (including providing all details We require of such a third party and the nature of their IPR) and use Your best efforts to arrange for that third party to grant to Us a licence on the same terms as the Licence You grant Us to Existing Material under clause 21.3(a); and
- (b) If You cannot obtain all of the rights from a third party to Existing Material in accordance with clause 21.4(a), You must:
 - (i) promptly notify Us of this in writing; and
 - (ii) arrange for the third party to grant to Us a licence which:
 - A. as a minimum includes a right for Us to Use the Existing Materials in conjunction with the Agreement Material so that We can enjoy the full benefit of Our rights to the Agreement Material; and
 - B. is otherwise on the same terms as the third party licenses its IPR in the Existing Material to You.
- (c) You must immediately after negotiating a licence with such a third party for the purposes of this clause 21.4, notify Us in writing of the terms and conditions You have so negotiated.

21.5 You agree to give effect to this clause 21

If We ask You to, You agree, in a timely manner, to do such things as are necessary (including creating or signing documents) to give effect to this clause 21.

21.6 You will protect Intellectual Property Rights if You are the IP Licensee

You agree that, if We are the IPR Owner, You will take all reasonable steps to protect the IPR in Agreement Material.

21.7 You warrant that the author of Agreement Material has given consent to Specified Acts

You warrant and undertake that:

- (a) the author of any Agreement Material, other than Existing Material, has given, or will on or before the creation of the Agreement Material give, a written consent to the Specified Acts (whether occurring before or after the consent is given) which extends directly or indirectly for Our benefit; and
- (b) the author of any Existing Material has given, or will give, before the creation of the Agreement Material, a written consent to the Specified Acts (whether occurring before or after the consent is given) which extends directly or indirectly for Our benefit in relation to such material Used in conjunction with Agreement Material.

21.8 You warrant that You are entitled to deal with IPR in Material

You warrant that You are now entitled, or that You will be entitled at the relevant time, to deal with the IPR in the Agreement Material and any Existing Material in the way that this clause 21 provides.

22. Confidential Information

22.1 What is Confidential Information?

Subject to clause 22.2:

- (a) **"Our Confidential Information"** means information that:
 - (i) is described in sub-Item M1 of the Schedule;
 - (ii) We identify, by notice in writing to You after the date of this Agreement, as confidential information for the purposes of this Agreement; or
 - (iii) You know or ought to know is confidential; and
- (b) **"Your Confidential Information"** means any information described in sub-Item M2 of the Schedule.

22.2 What is not Confidential Information?

"Our Confidential Information" and **"Your Confidential Information"** does not include information which:

- (a) is or becomes public knowledge other than by:
 - (i) breach of this Agreement; or
 - (ii) any other unlawful means;
- (b) was already in the possession of the Party who receives the information (the **"Receiving Party"**) without restriction in relation to disclosure before the other Party gave it to the Receiving Party; or
- (c) had already been independently developed or acquired by the Receiving Party before the other Party gave it to the Receiving Party.

22.3 When can the parties disclose Confidential Information?

- (a) Unless We first agree in writing, You must not disclose Our Confidential Information to any person.
- (b) Subject to paragraph (c), Unless You first agree in writing, We must not disclose Your Confidential Information to any person.
- (c) We may disclose Your Confidential Information to:
 - (i) any Commonwealth department, agency, authority, or Minister; and
 - (ii) any third person, including any court, tribunal, or governmental committee, where such disclosure would be permitted or required by law, or otherwise would be consistent with Commonwealth government policy.

22.4 Conditions may be placed on disclosure of Confidential Information

If a Party agrees to the disclosure of Confidential Information under clause 22.3, that Party may impose any conditions or restrictions it considers appropriate.

22.5 We may require You to give confidentiality deeds

- (a) We may, at any time, require You to give, and/or to arrange for any or all of Your subcontractors, employees, and volunteers engaged in the performance of the Capital Works Project to give, a written deed-poll relating to the non-disclosure of Confidential Information ("**Confidentiality Deed**").
- (b) We will provide you with the form of the Confidentiality Deed.
- (c) You must arrange for all such Confidentiality Deeds to be given promptly and in the form We provide.

23. You must protect Personal Information

23.1 When does this clause 23 apply?

This clause 23 applies only if You deal with Personal Information when You conduct the Capital Works Project under this Agreement.

23.2 What is Personal Information?

"**Personal Information**" has and will continue to have the same meaning as under the Privacy Act which at the Start Date is:

"information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a Material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

23.3 Other definitions relating to Personal Information

In this clause 23, the terms "**agency**", "**Approved Privacy Code**" (or "**APC**"), "**Information Privacy Principles**" (or "**IPPs**"), and "**National Privacy Principles**" (or "**NPPs**") have the same meaning as they have in section 6 of the Privacy Act, and "**subcontract**" and other grammatical forms of that word has the meaning given in section 95B(4) of the Privacy Act.

23.4 Your obligations about Personal Information

You agree:

- (a) if You obtain Personal Information while You are conducting the Capital Works Project, to use or disclose that Personal Information only for the purposes of this Agreement unless required by law to do otherwise or if We otherwise allow by written notice to You;
- (b) to comply with the IPPs as if You were an agency under the Privacy Act;
- (c) not to use or disclose Personal Information or engage in an act or practice that would breach section 16F (direct marketing), a NPP (particularly NPPs 7 to 10) or an APC, where that section, NPP or APC is applicable to You, unless:
 - (i) in the case of section 16F of the Privacy Act - the use or disclosure is necessary, directly or indirectly, to discharge Your obligations under this Agreement; or
 - (ii) in the case of an NPP or an APC - where the activity or practice is engaged in for the purpose of discharging, directly or indirectly, Your obligation under this Agreement, and the activity or practice which is authorised by this Agreement is inconsistent with the NPP or APC;
- (d) to otherwise comply with the Privacy Act;
- (e) to immediately tell Us if You become aware of a breach or possible breach of any of the obligations in this clause 23, whether by You or any of Your officers, employees, agents or subcontractors;
- (f) to comply with any directions of the Privacy Commissioner except if those directions are inconsistent with the requirements of this clause 23; and
- (g) to ensure that any of Your employees or agents who are required to deal with Personal Information for the purposes of this Agreement are made aware of Your obligations set out in this clause 23

23.5 What about Your subcontractors?

If You subcontract Your obligations under this Agreement, You must ensure that the subcontract places the same obligations about Personal Information on the subcontractor as this clause 23 (including this clause 23.5) places on You.

Part E Dealing with risk

24. Indemnity

24.1 You agree to indemnify Us

You agree to indemnify (and to keep indemnified) Us (which in this clause 24 includes Our officers, employees, and agents) against any:

- (a) loss or liability incurred by Us;
- (b) loss of or damage to Our property; or

- (c) loss or expense incurred by Us in dealing with any claim against Us, including legal costs and expenses on a solicitor/own client basis,

arising from:

- (d) any acts or omissions done by You, or Your employees, agents or subcontractors in connection with this Agreement, where those acts or omissions were negligent or unlawful or where there was wilful misconduct;
- (e) any breach by You of Your obligations or warranties under this Agreement;
- (f) the use by Us of the Agreement Material;
- (g) the use by Us of Existing Material in accordance with the terms of the licence given to Us pursuant to clause 21.4; or
- (h) the failure by You to obtain the written consents from authors in accordance with clause 21.7.

24.2 Risk of Capital Works

You will bear the risk of, and indemnify Us against any loss or damage to:

- (a) the Capital Works or a Stage;
- (b) Plant, Equipment and Work; and
- (c) unfixed goods or materials (whether on or off Site), including anything provided by Us to You or brought onto the Site by a Subcontractor, used or to be used in carrying out the Capital Works.

24.3 Reinstatement

- (a) You must promptly replace or otherwise make good any loss of, or repair the damage to, the Capital Works or a Stage, any Plant Equipment and Work or any unfixed goods and materials used or to be used in carrying out the Capital Works Project.
- (b) You will bear the cost of such replacement, making good or repair.

24.4 Procedure upon loss or damage

If loss or damage to any part of the Capital Works or a Stage occurs You must:

- (a) make the Capital Works, or the Stage, and the Site safe and secure;
- (b) notify the relevant insurers and comply with their instructions; and
- (c) promptly consult with the Departmental Officer to discuss the steps to be taken to:
 - (i) comply with Your obligations under clause 24.3; and
 - (ii) ensure, to the greatest extent possible, that You continue to comply with Your other obligations under this Agreement.

24.5 Your liability to Us will be reduced if We are at fault

Your liability to indemnify Us under this clause 24 will be reduced proportionally to the extent that We, or Our officers, employees or agents acted negligently or unlawfully and this contributed to Our loss.

24.6 This indemnity does not exclude Our other rights

The indemnity given under this clause 24 does not exclude or limit any other rights We have under this Agreement or at general law.

25. Insurance

25.1 You must have insurance

You must have the insurance set out in Item N of the Schedule with an insurance company authorised by the Australian Prudential Regulation Authority for the Term and then as long as You have obligations under this Agreement. Your public liability insurance must note the interests of the Commonwealth.

25.2 You must give Us a copy of Your insurance policy

If We ask You, You must promptly give Us a copy of any insurance policy and/or certificate of currency related to Your obligation under clause 25.1.

26. The Site

26.1 This clause does not limit or affect Our rights under the Purposes Deed

If You are required to provide a Purposes Deed in accordance with clause 9 of this Agreement, You acknowledge and agree that this clause 26 in no way limits or affects Our rights or Your obligations under the executed Purposes Deed. To the extent of any inconsistency between the terms of this clause 26 and the executed Purposes Deed, the terms of the Purposes Deed will take precedence.

26.2 Encumbrances

- (a) You warrant that the Site is only subject to those Encumbrances notified in writing to Us before the Start Date, and no such Encumbrances prevent the performance of the Capital Works Project.
- (b) You acknowledge and agree that We have relied on Your warranty in paragraph 26.2(a).
- (c) You must not, without Our prior written agreement, Encumber the Site without Our prior written approval in any way at any time during the Term.

26.3 Our Security

You agree that We may, if We wish to, secure Our interest in the Site, in the manner We determine and including, without limitation, in any manner specified in the Schedule or in the Purposes Deed. In such a case, You agree that You will provide such assistance as is necessary for Us to secure Our interest.

26.4 You warrant certain things about the Site

You warrant that:

- (a) the Site is, and will at all times be, fit for the purposes of carrying out the Capital Works Project and, on and from commencement of the Designated Use Period, fit for use for the Designated Use;
- (b) the undertaking of the Capital Works Project and the use of the Site for the Designated Use does not, and will not, infringe any condition of ownership or occupation of the Site;
- (c) the use of the Site for the Capital Works Project and for the Designated Use has not and will not infringe any Statutory Requirements; and
- (d) the Site (after completion of the Capital Works) will comply with all Australian Standards and any other standards or requirements which relate to the ongoing use of the Site for the purposes of this Agreement (including the Designated Use).

26.5 What You must do during the Term

- (a) At all times during the Term You must:
 - (i) safeguard the Site against loss, damage or unauthorised use;
 - (ii) maintain the Site in good condition; and
 - (iii) without limiting Your obligations under clause 25, in consultation with the Departmental Officer, determine and implement the appropriate method of insurance in relation to the Site.
- (b) At all times during the Designated Use Period, You must ensure that the Site and the Capital Works are available to be used, and except to the extent We otherwise allow in writing, only used, for the Designated Use and so as to achieve the Project Goals and the Program Aims.

26.6 You must not dispose of the Site without Our approval

You must not without Our prior written approval (which We may withhold at Our sole discretion), Dispose of the Site, at any time during the Term. Our approval may be given subject to any conditions that We impose, including subject to any repayment obligations arising under this Agreement or a Purposes Deed as a result of the Disposal, being met.

26.7 When clause 26.6 does not apply

Clause 26.6 does not apply to prevent the Disposal or replacement of any item affixed to or forming part of the Site where that item has a value of less than \$5,000.

26.8 Your Capital Works Project Manager must be on Site where reasonably necessary

You must ensure that the Capital Works Project Manager is present on the Site at all times reasonably necessary to ensure that You are complying with Your obligations under this Agreement.

26.9 Industrial Relations

You must, in carrying out the Capital Works Project:

- (a) assume sole responsibility for, and manage all aspects of, industrial relations;
- (b) ensure that the rates of pay and conditions of employment specified in all relevant industrial awards, enterprise and project agreements and any relevant Statutory Requirements, for all employees engaged by any person, are always observed in full; and
- (c) keep the Departmental Officer fully and promptly informed of industrial relations problems or issues which affect or are likely to affect the carrying out of the Capital Works Project.

Part F Terminating this Agreement

27. Termination for default

27.1 We may terminate this Agreement if You default

We may immediately (or at such other time as We in Our sole discretion determine) terminate this Agreement by giving You notice in writing if:

- (a) We are satisfied that any statement made is incorrect, incomplete, false or misleading in a way which may have affected Our original decision to provide You with the Funding;
- (b) You commit a breach of this Agreement or of any provision of the Purposes Deed (if You are required to provide a Purposes Deed under clause 9) which is not capable of remedy;
- (c) You fail to remedy to Our satisfaction a breach of this Agreement or of any provision of the Purposes Deed (if You are required to provide a Purposes Deed under clause 9) which is capable of remedy, within 10 Business Days (or such further period of time specified by Us in writing) of Our notifying You in writing that You must do so;
- (d) another provision of this Agreement or of any provision of the Purposes Deed (if You are required to provide a Purposes Deed under clause 9) gives Us the right to terminate this Agreement; or
- (e) You become bankrupt or insolvent or subject to any form of administration, or We in our sole discretion form the view that You are, or may become, insolvent or are suffering financial difficulty which We consider is affecting or may affect, Your ability to perform or meet Your obligations under this Agreement.

27.2 Consequences of termination under clause 27.1

If We terminate this Agreement under clause 27.1. then We will:

- (a) be entitled to take over and use, or require You to remove from the Site, the Plant, Equipment and Work and all materials, equipment and other things intended for the Capital Works;
- (b) be entitled to require You to novate to Us or Our nominee, any or all subcontracts between You and Your subcontractors as required by Us;

- (c) not be obliged to make any further payments to You; and
- (d) be entitled to recover from You any costs, losses or damages incurred or suffered by Us as a result of, or arising out of, or in any way in connection with, such termination.

28. We may terminate or reduce the scope of this Agreement and compensate You

28.1 We may terminate, or reduce the scope of, this Agreement

- (a) We may terminate, or reduce the scope of, this Agreement at any time by giving You notice in writing.
- (b) If We terminate, or reduce the scope of, this Agreement under paragraph (a), We will only be liable to You for:
 - (i) payments that were due to You, before the date of termination or reduction; and
 - (ii) subject to clauses 28.3 and 28.4, any reasonable costs that You incur which are a direct result of the termination or reduction of this Agreement.

28.2 What You must do if We terminate, or reduce the scope of, this Agreement

If we terminate, or reduce the scope of, this Agreement under this clause 28 You must:

- (a) immediately stop performing Your obligations under this Agreement (or if this Agreement is reduced in scope those obligations removed in the reduction of scope);
- (b) immediately do everything that You can to lessen all losses, costs and expenses, that You or others may suffer arising from the termination or reduction; and
- (c) comply with Your obligations under clause 17.3.

28.3 Our payment to You for costs

We will only pay You the reasonable costs referred to in clause 28.1(b)(ii) if You:

- (a) strictly comply with this clause 28; and
- (b) give Us written evidence that is satisfactory to Us of any amount You claim under clause 28.1(b)(ii).

28.4 What we will not pay You

If We terminate the Agreement under this clause 28, We will not, and are not liable to, pay You compensation for any loss by You of profits or benefits that You would have received had the termination not occurred.

Part G Other legal matters

29. Conflict of interest

29.1 You warrant that no conflict of interest exists

- (a) You warrant that, at the Start Date, no "conflict of interest" exists or is likely to arise.
- (b) In this clause 29, a "**conflict of interest**" means a situation where You engage in an activity or have an interest which would conflict with (or appear to others as if it conflicts with) You performing Your obligations to Us under this Agreement or which would restrict You undertaking the Capital Works Project fairly and independently.

29.2 If a conflict of interest does arise, You will let Us know

- (a) If, during the Term, a conflict of interest does arise, or appears to You to be likely to arise, You agree to:
 - (i) notify the Departmental Officer immediately in writing; and
 - (ii) take the steps that the Departmental Officer reasonably requires You to take to deal with the conflict of interest, within the time frame the Departmental Officer requires.
- (b) If You do not notify the Departmental Officer, or if You are unable or unwilling to deal with the conflict of interest as the Departmental Officer requires, We may terminate this Agreement under clause 27.

30. Resolving any disputes between Us and You

30.1 How will disputes be resolved?

The Parties agree that if any dispute or difference ("**dispute**") arises during the course of this Agreement, it will, subject to clause 30.3, be dealt with in this way:

- (a) the Party claiming that there is a dispute will send to the other Party a notice setting out the nature of the dispute;
- (b) the Parties will try to resolve the dispute by direct negotiation by persons to whom the Parties have given authority to resolve the dispute;
- (c) the Parties have 10 Business Days from the sending of the notice to resolve the dispute or to agree that the dispute will be submitted to mediation or some other form of alternative dispute resolution procedure;
- (d) if:
 - (i) the dispute is not resolved; or
 - (ii) there is a submission to mediation or some other form of alternative dispute resolution procedure but the dispute is not resolved within 15 Business Days of that submission, or an extended time that the Parties agreed in writing before the expiration of the 15 Business Days,

then either Party may start legal proceedings.

30.2 The Parties must continue to perform their obligations during a dispute

Even though there may be a dispute, each Party must continue to perform its obligations under this Agreement.

30.3 When this clause 30 does not apply

- (a) If a Party seeks urgent interlocutory relief¹ from a court, that Party does not need to follow the dispute resolution procedures set out in this clause 30.
- (b) If We take action or try to take action under clauses 15, 27 or 28, We do not need to follow the dispute resolution procedures set out in this clause 30.

31. Your legal relationship with Us

31.1 You are not Our partner, agent or employee

This Agreement does not mean that You are Our:

- (a) partner;
- (b) agent; or
- (c) employee,

and You must not represent to anyone that You are.

31.2 One Party does not have the authority to bind the other Party

- (a) Neither We nor You have the authority to bind or represent the other Party in any way or for any purpose.
- (b) Neither We nor You will attempt to bind or represent the other Party in any way or for any purpose.

32. Subcontractors

32.1 You may not subcontract without getting Our approval

- (a) You must not, without first getting Our approval in writing, subcontract the whole, or any part, of Your obligations under this Agreement.
- (b) Any subcontractors We have approved as at the Start Date are set out in Item O of the Schedule.

32.2 Your obligations about Subcontractors

You are responsible for making sure that Subcontractors are suitable and that any part of the Capital Works Project performed by the Subcontractor meets the requirements of this Agreement.

¹ Interlocutory relief occurs where, following application by a party, the court makes a preliminary order for urgent relief prior to the court deciding the case and a final order being made.

32.3 We may impose terms and conditions on subcontracts

- (a) We may impose any terms and conditions We think fit when giving any approval under clause 32.1. You must comply with any such terms or conditions that We impose.
- (b) However, as a minimum, You must ensure that any subcontract contains clauses equivalent to clauses 14, 20 to 28 (inclusive), 38 and 39 of this Agreement.

32.4 We may revoke Our approval of subcontractors

- (a) We may revoke Our approval of a subcontractor on any reasonable ground.
- (b) If We revoke Our approval of a subcontractor, You remain liable under this Agreement for the past acts or omissions of that subcontractor as if that subcontractor was a current subcontractor.
- (c) If You receive a written notice from Us revoking Our approval of a subcontractor, You must immediately replace the subcontractor and arrange their replacement with personnel or another subcontractor acceptable to Us.

Part H Some general matters about this Agreement

33. Term of this Agreement

This Agreement starts on the Start Date and ends on the End Date, unless terminated earlier in accordance with this Agreement or the law ("Term").

34. This is the entire Agreement

- (a) This Agreement is the entire agreement between the Parties about the subject matter of this Agreement.
- (b) This Agreement supersedes all prior communications, negotiations, arrangements, and agreements, whether oral or written, between the Parties about the subject matter of this Agreement.

35. What is the governing law of this Agreement?

This Agreement will be governed by and interpreted in accordance with the laws of the Australian Capital Territory and the Parties submit to the non-exclusive jurisdiction of the courts of that Territory.

36. How may this Agreement be varied?

This Agreement may only be varied in writing, signed by both Parties.

37. What happens if a Party does not enforce part of this Agreement?

If a Party does not enforce a provision of this Agreement, this does not mean that the Party will not, or cannot, enforce any other provision of the Agreement, or that same provision at a later time.

38. You must not assign Your rights under this Agreement

You must not assign, either wholly or partly, Your rights under this Agreement without first getting Our approval in writing.

39. You must not agree with others to novate this Agreement

- (a) You must not consult with any other person for the purposes of entering into an arrangement which will require novation of the Agreement, without first consulting with Us.
- (b) For the purposes of paragraph (a), "**novation**" includes the transfer of Your obligations, rights and/or liabilities under this Agreement to another person.

40. What happens if part of this Agreement is invalid?

If any provision of this Agreement is found to be invalid, in whole or in part, this does not affect the other provisions.

41. Notices under this Agreement

41.1 Address for Notice

- (a) If You give Us any notice or other communication under or about this Agreement, it must be:
 - (i) in writing;
 - (ii) signed by Your Contact Officer; and
 - (iii) addressed and forwarded to the Departmental Officer at the address set out in Item Q of the Schedule, or as We may otherwise notify You in writing.
- (b) If We give You any notice or other communication under or about this Agreement, it must be:
 - (i) in writing;
 - (ii) signed by the Departmental Officer; and
 - (iii) addressed and forwarded to Your Contact Officer at the address set out in Item Q of the Schedule, or as You may otherwise notify Us in writing.

41.2 How must notices be delivered?

Any notice or other communication under or about this Agreement must be delivered by hand or sent by prepaid security post or Electronic Communication to the address of the Party to which it is sent.

41.3 When are notices deemed to be received?

Any notice or other communication will be deemed to be received:

- (a) if delivered by hand, on the date of delivery;

- (b) if sent by prepaid security post within Australia, upon the expiry of 2 Business Days after the date on which it was sent; and
- (c) if sent by Electronic Communication, at the time that would be the time of the receipt under the *Electronic Transactions Act 1999* (Cth) if a notice was being given under the law of the Commonwealth (which is currently when the Electronic Communication enters the addressee's Information System).

42. Which clauses continue after this Agreement ends?

Termination or expiry of this Agreement for any reason does not extinguish or otherwise affect the provisions of this Agreement which by their nature survive expiry or termination, including clauses 14 [You must keep records and provide Reports], 18 [Using the Funding to acquire Assets], 19 [Goods and Services Tax], 20 [Our Material], 21 [Intellectual Property Rights], 22 [Confidential Information], 23 [You must protect Personal Information], 24 [Indemnity] and 26 [The Site].

Executed as an agreement.

Signed for and on behalf of **Commonwealth of Australia** by **[insert name of Departmental representative and their position]**, represented by and acting through the Department of Families, Housing, Community Services and Indigenous Affairs **ABN 36 342 015 855**, in the presence of:

(Signature of Witness)

(Signature of Departmental Representative)

(Name of Witness in full)

(Name of Departmental Representative)

[If the funding recipient is a company]

Signed by **[insert name of funding recipient]** **[ABN]**, in accordance with its Constitution:

(Signature of Director)

(Signature of other Director/Secretary)

(Name of Director in full)

(Name of other Director/Secretary)

[If the funding recipient is an individual]

Signed by **[insert name of funding recipient]**
[ABN], in the presence of:

(Signature of Witness)

(Name of Witness in full)

(Signature of Funding Recipient)

(Name of Funding Recipient)

[If the funding recipient is a partnership]

Signed by **[Insert name of partnership]**
[ABN], in the presence of:

(Signature of Witness)

(Name of Witness in full)

(Signature of Partner)

(Name of Partner)

[OR, if the funding recipient is an Incorporated Association]

The Common Seal of **[Insert name of Funding Recipient] [ABN][Insert name of Funding Recipient] [ABN]** was affixed here in accordance with its rules in the presence of:



(Signature of Public Officer/Secretary)

(Signature of committee member/secretary)

(Name of Public Officer/Secretary in full)

(Name of committee member/secretary in full)

