

## Subcontract Terms and Conditions

### 1. Definitions and interpretation

#### 1.1. Definitions

**Associate** has the meaning given to that term by the Corporations Act.

**Australian Standards** means standards relevant to the Subcontractors' performance of the Subcontract Works, as approved by the Council of, and published from time to time by, Standards Australia International Limited (ACN 087 326 690), trading as Standards Australia, or any successor body.

**Authority** is any government department, local government council, government or statutory authority or other body, which has a statutory right to impose a requirement or whose consent is required with respect to the performance of the Subcontract Works and the covenants and obligations set out in this Subcontract.

**Confidential Information** means any information, documents and communications provided by the Contractor to the Subcontractor that is either:

- (i) related to the Subcontract Works; or
- (ii) designated by the Contractor as confidential,

and, without limitation, includes any notes, documents, formula, plans, drawings, designs, models, trade secrets and includes any of the aforesaid which may be oral, written, stored in electronic form, translated from original form, re-compiled, copied, made into a compilation or altered from original form.

**Contract Date** means the date of the Subcontract.

**Contractor** means the party defined as the Contractor on the second page of this Subcontract.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Defects Liability Period** means the period of 12 months from the completion of the Subcontract Works.

**Environment** means:

- (a) ecosystems and their constituent parts, including people and communities;
- (b) all natural and physical resources;
- (c) the qualities and characteristics of locations, places and areas, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, harmony and sense of community; and
- (d) the social, economic, aesthetic and cultural conditions that affect or are affected by things mentioned in paragraphs (a), (b) and (c).

**Fee** means the fee agreed between the Contractor and the Subcontractor.

**Force Majeure Event** is any event or circumstance or combination of events and circumstances which:

- (a) is beyond the control of the Party affected by that event or circumstance or both and is not a risk for which that Party is responsible under this Subcontract; and
- (b) cannot, or the effects of which cannot, be prevented, overcome or remedied by the exercise by the affected Party of a standard of care and diligence expected of that Party (including the expenditure of all reasonable sums of monies).

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**Good Industry Practice** means the exercise of that degree of skill, diligence, prudence and foresight that reasonably would be expected from a competent contractor performing services comparable to the Subcontract Works, consistent with Law.

**Governing Law Jurisdiction** means the laws of the jurisdiction of the State in which the Subcontract Works are to be performed.

**GST** means goods and services tax imposed by the GST Act.

**GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Insolvent** means with respect to the Subcontractor that:

- (a) it is (or states that it is) insolvent (as defined in the Corporations Act);
- (b) it is in receivership, in receivership and management, in liquidation, in provisional liquidation, under administration or wound up or has had a receiver appointed to any part of its property; or
- (c) it is otherwise unable to pay its debts when they fall due.

**Law** is:

- (a) any applicable Commonwealth or Governing Law Jurisdiction government legislation including regulations, by-laws or other legislation;
- (b) common law and equity; and
- (c) relevant Authorities' requirements.

**Parties** means the Contractor and the Subcontractor (as defined on the first page of this Subcontract).

**Plant and Equipment** means plant, equipment, tools, appliances or other property and items the Subcontractor requires to fulfil the Subcontractor's obligations under this Subcontract.

**Practical Completion** means that stage in the execution of the Subcontract Works when:

- (a) the Subcontract Works are complete except for minor omissions and minor defects;
  - (i) which do not prevent the Subcontract Works from being reasonably capable of being used for their intended purpose; and
  - (ii) which the Contractor determines the Subcontractor has reasonable grounds for not promptly rectifying; and
  - (iii) rectification of which will not inconvenience the Principal or prejudice the convenient use of the Subcontract Works;
- (b) all certificates, as built documents, drawings and any other deliverables required under the Subcontract have been submitted to the Contractor and approved by the Contractor.

**Related Body Corporate** has the meaning given to that term by the Corporations Act.

**Security** means the security so detailed in clause 2 of this Subcontract.

**Serious Breach** means where the Subcontractor:

- (i) breaches clauses 2.1, 3.2, 3.3, 3.4, 8, 12 or 15 of this Subcontract or
- (ii) engages in any dishonest or fraudulent activity.

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**Subcontract** or **this Subcontract** means the Subcontract executed by the Contractor and the Subcontractor and these Terms and Conditions.

**Subcontract Works** means the works agreed by the Sub-Contractor and the Contractor to be the Subcontract Works.

**Subcontractor** means the party defined as the Subcontractor on the second page of this Subcontract.

**Subcontractor's Personnel** means any and all personnel engaged by the Subcontractor, including its directors, officers, employees, agents, invitees, key personnel, sub-subcontractors and any director, officer, employee, agent or invitee of any sub-subcontractor, in performing the Subcontractor's obligations under this Subcontract.

**Tax Invoice** means a tax invoice within the meaning of the GST Act.

**Withholding Amount** means the amount that the Contractor is required by Law to withhold or deduct with respect to or which relates to any tax.

### 1.2. Interpretation

In this Subcontract:

- (a) a reference to including, includes or include must be read as if it is followed by without limitation;
- (b) where an expression is defined, any other part of speech or grammatical form of that expression has a corresponding meaning;
- (c) words importing the singular includes the plural and vice versa;
- (d) headings do not affect the interpretation of this Subcontract;
- (e) words denoting a natural person include a corporation and vice versa;
- (f) a reference to \$, AUD or dollar is to the lawful currency of the Commonwealth of Australia;
- (g) all measurements of physical quantities shall be in Commonwealth legal units of measurements within the meaning of the Weights and Measures (National Standards) Act 1960-1966 of the Commonwealth of Australia all of that Act as amended or re-enacted with or without modification;
- (h) references to any party to this Subcontract include its successors or permitted assigns;
- (i) the *contra proferentum* rule does not apply; and
- (j) References to any legislation or to any section or provision of any legislation include any:
  - (i) Statutory modification or re-enactment of or any statutory provision substituted for that legislation, section or provision; and
  - (ii) Ordinances, bi-laws, regulations and any other statutory instruments issued under that legislation, section or provision.

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## 2. Security

### 2.1. Provision of Security

- (a) The Subcontractor must prior to the Contract Date provide security to the Contractor in the form of a 5% retention of the Fee ("Security").
- (b) The Contractor is not obliged to pay the Subcontractor interest on:
  - (i) The Security;
  - (ii) The proceeds of the Security if it is converted into cash; or

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- (iii) Any monies retained under clause 2.2.
- (c) The Contractor does not hold the Security on trust for the Subcontractor.

### 2.2. Retention Monies

Where the security required to be provided by the Subcontractor is in the form of retention monies:

- (a) The Contractor may make deductions from each of the Subcontractor's progress payments of 10% until the total amount retained is equal to 5% of the Fee;
- (b) Upon the issue of a notice of Practical Completion pursuant to clause 5.3, the Contractor shall reduce the amount of retention monies so retained by one half; and
- (c) The balance of the retention monies shall become payable within twenty eight (28) days of the issue of the final certificate pursuant to clause 5.3.

### 2.3. Release

Unless the Contractor has made or intends to make a demand against any Security the Contractor must release the Security once the Subcontractor has complied with all of its obligations under the Subcontract.

### 2.4. Bank Guarantee

Where the security required to be provided by the Subcontractor is in the form of bank guarantee, all bank guarantees must be provided by a bank, building society, credit union or insurance company acceptable to the Contractor.

### 2.5. Secured Obligations

Any security required of the Subcontractor by the Contractor pursuant to the foregoing clauses shall be retained as security that the Subcontractor shall carry out its obligations under the Subcontract, and any debts due to the Contractor by the Subcontractor as a result of the Subcontractor's failure to carry out any and all of its obligations shall be recoverable by the Contractor from such security, without limitation or offset.

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## 3. Insurance

### 3.1. Subcontractor Insurance Obligations

Before the Contract Date the Subcontractor must effect or cause to be effected the following insurances with insurers and on terms satisfactory to the Contractor (and in doing so bears the sole responsibility for determining the requirements of those Laws relating to insurance):

- (a) Public and product liability insurance for \$20,000,000 during any one 12 month period of insurance which covers the liability of the Subcontractor and any of the Subcontractor's Personnel (including to the Contractor) in respect of:
  - (i) loss of, damage to, or loss of use of, any real or personal property; and
  - (ii) the bodily injury of, disease or illness (including mental illness) to, or death of, any person,

arising out of the performance of or in connection with this Subcontract by the Subcontractor.

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- (b) Workers compensation insurance to cover the maximum extent of the Subcontractor's liability under the Workers Compensation legislation of the State or Territory in which the Subcontract Works are to be completed;
- (c) Motor vehicle insurance for any vehicle involved in the Subcontract Works including:
  - (i) insurance that is compulsory under applicable Laws governing the use of motor vehicles and liability for personal injury or death; and
  - (ii) liability insurance for third party property damage with a sum insured of not less than the amount set out in the Schedule per occurrence.
- (d) Professional indemnity insurance for an amount of \$20,000,000 to cover liability for breach of professional duty, whether in contract or otherwise, arising out of any negligence, whether in relation to errors in design, documentation, supervision or other professional duties of the Subcontractor, whether in contract or otherwise, and extended to include cover for any breach of all such professional duties carried out on behalf of the Subcontractor by further subcontractors, suppliers or consultants;
- (e) A policy of insurance to cover the Subcontract Works which shall at all times cover the whole of the Subcontract Works including any associated temporary works and including material incorporated or to be incorporated therein for which the Subcontractor is responsible and whilst on or adjacent to the Site in respect of loss, destruction or damage of or to the property insured for the full reinstatement and replacement cost;
- (f) Property insurance covering the Subcontractor's plant and equipment against the risks of loss, damage or destruction by all insurable risks to the reasonable satisfaction of the Contractor for not less than its market value;
- (g) If any work for or in connection with the Subcontract Works includes asbestos decontamination, and asbestos liability policy of insurance to cover risks with asbestos decontamination work; and
- (h) Any other forms of insurance in addition to the above required by the Contractor from time to time.

### 3.2. Proof of Insurance

- (a) Before the Contract Date and whenever requested in writing by the Contractor, the Subcontractor shall provide to the Contractor a copy of any certificates of currency required pursuant to this Subcontract and further evidence satisfactory to the Contractor that the policy is current as required by the Contractor from time to time.
- (b) If the Subcontractor fails to provide evidence of the Subcontractor's insurances, then without prejudice to other rights or remedies, the Contractor may effect such insurances in the name of the Subcontractor and the cost thereof shall be monies due and payable from the Subcontractor to the Contractor. The Contractor may recover from the Subcontractor or deduct from any payment due from the Contractor to the Subcontractor the cost of the insurance premiums and the Contractor's reasonable costs of effecting and maintaining the insurances, including at the Contractor's discretion as a deduction from the fee.

### 3.3. Excesses

The Subcontractor must bear all excesses under the policies of insurance taken out by the Contractor pursuant to the Subcontractor Works.

### 3.4. Period of Insurance

The Subcontractor must maintain the insurances required of them pursuant to this Subcontract during the term of this Subcontract.

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### 3.5. Insurances Generally

All insurances which the Subcontractor effects or causes to be effected under this Subcontract (except for motor vehicle insurance) must:

- (a) Name the Contractor and where applicable the Principal as a named insured; and
- (b) Be construed to provide that insurers shall have no right of subrogation against the Contractor or the Principal.
- (c) Be effected with reputable insurers with a financial security rating of A- or better by Standard & Poors or the equivalent rating with another recognised rating agency.

### 3.6. Notification

The Subcontractor must inform the Contractor promptly in writing of any occurrence or accident giving rise to or likely to give rise to a claim under any of the insurances required pursuant to this Subcontract and where relevant provide all such assistance to the Contractor as may be required for the preparation and negotiation of insurance claims.

### 3.7. Payment

The Subcontractor must ensure that all insurance premiums are paid on time and that all other conditions of insurance are otherwise complied with.

### 3.8. Vicarious Liability

The Subcontractor must ensure that the public and product liability insurance referred to in clause 3.1(a) is endorsed so that it covers the Contractor for its vicarious liability for the acts or omissions of the Subcontractor.

### 3.9. Interaction With Indemnities

The insurance policies under this Subcontract are primary, and not secondary, to the indemnities referred to in this Subcontract. It is the intention of the Parties that the insurer cannot require any Party to exhaust a claim under an indemnity referred to in this Subcontract before the insurer considers or pays the relevant claim.

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## 4. Subcontract Works

### 4.1. Primary Obligation

The Subcontractor acknowledges that it is contractually responsible for the Subcontract Works in accordance with this Subcontract, and that any part of the Subcontract Works that the Subcontractor may subcontract out to any person does not relieve the Subcontractor of any of its obligations or warranties under this Subcontract.

### 4.2. Scope of Subcontract Works

- (a) The Subcontract Works are as agreed in writing by the Contractor and the Subcontractor.
- (b) The Subcontractor shall carry out and complete the whole of the Subcontract Works including variations to the Subcontract Works and all minor items of work obviously to be inferred therefrom for the proper execution and completion of the Subcontract Works on or before the Date for Completion as the same may be extended pursuant to these conditions and to the satisfaction of the Contractor.

### 4.3. Subcontract Works Requirement

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The Subcontractor must supply all materials and complete the Subcontract Works in accordance with all of the following:

- (a) The Subcontract;
- (b) The Contractor's instructions concerning the Subcontract Works;
- (c) Statutory requirements;
- (d) Applicable industry codes and relevant Australian Standards;
- (e) the Contractor Systems and Procedures; and
- (f) If no other standard is specified in the Subcontract, then Good Industry Practice applicable to the Subcontract Works.

### 4.4. Responsibility for Subcontract Works

From the Contract Date until the end of the Defects Liability Period the Subcontractor shall be responsible for the Subcontract Works including:

- (a) All materials and plant which are the property of the Subcontractor or his servants or agents which are used or intended to be used for the purpose of carrying out the Subcontract Works; and
- (b) All materials and plant provided to the Subcontractor or his servants or agents by the Contractor for the purpose of carrying out the Subcontract Works.

### 4.5. General

- (a) The Subcontractor agrees and accepts the obligation to fully inform itself on Site conditions, all relevant commercial and other circumstances and any documents furnished by the Contractor prior to it commencing the Subcontract Works, and the Subcontractor agrees to fully satisfy itself of all conditions, risks, contingencies and other circumstances which might affect its performance of the Subcontract Works. No increase in the Fee will be allowed for the Subcontractor's failure to ensure that it is fully informed regarding all the circumstances relating to the performance of the Subcontract Works.
- (b) The Subcontractor agrees that it has included in the Fee any associated and complementary services which are not shown in the Subcontract Works but which are necessary for the satisfactory completion and performance of the Subcontract Works in accordance with Good Industry Practice.
- (c) The Subcontractor must obtain, at its own expense, any necessary licences, permits, qualifications, registrations and other statutory requirements necessary for performance of the Subcontract Works under this Subcontract and must comply with any applicable Laws in performing the Subcontract Works.

### 4.6. Variations

- (a) The Contractor may vary the Subcontract Works or any condition of the Subcontract Works, and the Subcontractor must carry out any such variation as directed by the Contractor. If the variation requires the omission of any part of the Subcontract Works, the Contractor may have the omitted Subcontract Works carried out itself, or by others or not carried out at all at its absolute discretion. The Subcontractor's fee for any variation is to be agreed between the Parties in writing prior to the Subcontractor carrying out any such variation. However, in the event that agreement cannot be reached, then the Contractor may direct the Subcontractor to proceed with the variation and the variation will be valued by the Contractor at cost. A variation may include increases in or additions to, reductions in or omissions from, or variations in the character or the quality of the Subcontract Works.

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- (b) The Subcontractor must not vary the Subcontract Works or any condition of the Subcontract Works, except as directed and approved by the Contractor in writing.
- (c) If a variation requires the omission of work, then where a lump sum (or part of it) applies to that work, there must be a proportionate deduction in the amount payable in respect of that work and the deduction must include a reasonable amount in respect of loss of profit and on-Site and off-Site overheads.
- (d) If the variation relates to additional costs incurred by the Subcontractor for delay or disruption, the price of the variation may include a reasonable amount for on-Site overheads but must not include off-Site overheads, profit or loss of profit.

### 4.7. Right of Inspection and Defective Services

- (a) At all reasonable times, the Contractor or the Principal will have the right, itself or through an agent, to inspect and monitor the performance of the Subcontract Works, and the Subcontractor must give the Contractor and the Principal access to the Subcontractor's premises or the Site for such purpose during its normal working hours. The Subcontract Works will not be accepted by the Contractor until inspected and approved by the Contractor. Any inspection by the Contractor or the Principal will not relieve the Subcontractor from its obligations to comply with the requirements of this Subcontract.
- (b) The Subcontractor warrants that it will provide the Subcontract Works free of any defects, faults or omissions. The Contractor may at any time (and notwithstanding that payment may have already been made for certain parts of the Subcontract Works), issue a notice in writing, directing the Subcontractor to rectify, replace or rework any part of the Subcontract Works that it considers is not in accordance with this Subcontract. The Subcontractor must at its own cost promptly commence and complete the rectification, replacement or rework as directed by the Contractor.

### 4.8. Defects Liability

- (a) In addition to the preceding subclause, the Subcontractor will be responsible, at its own cost, for the rectification of any defects, shrinkages, faults or omissions in the Subcontract Works during the Defects Liability Period. At any time, prior to the expiration of the Defects Liability Period, the Contractor may direct the Subcontractor to rectify any defect, shrinkage, fault or omission. The direction shall:
  - (i) Specify the defect and the date by which it must be rectified by the Subcontractor; and
  - (ii) At the Contractor's option, may require a further Defects Liability Period for the rectified defect (which shall be no greater than the original Defects Liability Period).
- (b) The Subcontractor shall promptly remedy any defects or omissions in the Subcontract Works.
- (c) If any defect or omission is not rectified within the time stipulated by the Contractor, in a notice issued in accordance with this clause, the Contractor may rectify any such defect or omission, without prejudice to any other rights that the Contractor may have against the Subcontractor in respect of those defects or omissions. The cost of any such rectification shall be a debt due and recoverable from the Subcontractor and may be deducted from any monies owing to the Subcontractor by the Contractor.
- (d) The Defects Liability Period commences when the Contractor receives the Certificate of Practical Completion and shall continue for 12 months.
- (e) Nothing in this clause or the failure of the Contractor to exercise any rights under this clause:



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- (i) reduces the Subcontractor's warranties or other liabilities and obligations under the Subcontract; or
- (ii) affects any other remedy or right of the Contractor, including the Contractor's common law right damages;

whether before or after the expiration of the Defects Liability Period:

- (f) If it becomes necessary for the Subcontractor to execute any remedial works the provision of this Subcontract shall apply to the remedial works as if such works were part of the Subcontract Works.
- (g) If the Contractor decides to accept work with a defect, this decision does not bind the Contractor to accept any other work with a defect and does not affect any of the Contractor's other rights under this Subcontract or at Law, including the right to claim for any damage or loss it may suffer because of the Subcontractor's failure to fulfil any of its obligations under this Subcontract.
- (h) The rights and obligations under this clause 4.8 continue after the Completion Date.

### 4.9. Cooperation with Other Contractors

The Subcontractor must:

- (a) Permit other contractors to carry out their work;
- (b) Fully cooperate with other contractors;
- (c) Comply with any direction of the Contractor given for the purposes of Site coordination;
- (d) Avoid unnecessary interference with the passage of people and vehicles and not obstruct or hinder the safe and convenient movement of such persons or their use or occupation of the Site;
- (e) Carefully coordinate and interface the Subcontract Works with the work carried out or to be carried out by other contractors; and
- (f) Carry out the Subcontract Works so as to avoid interfering with, disrupting or delaying the work of other contractors.

### 4.10. Protection of Persons and Property

Where appropriate to the execution of the Subcontract Works the Subcontractor shall:

- (a) Provide, erect and maintain all barricades, guards, fencing, temporary roadways and footpaths, signs and lightings and maintain all watching and traffic flagging, lawfully required by any public or municipal authority, or necessary for the protection of the subcontract works, or of other property, or for the safety and convenience of the public, and shall remove the same when no longer required.
- (b) Avoid obstruction or damage to roadways and footpaths, drains and water courses and public utility and other services on or adjacent to the site which are visible or the location of which can be ascertained by the Subcontractor from the appropriate authority or from the Subcontract documents and shall have any obstruction removed immediately and at the Subcontractor's own cost have reinstated all damage caused by the Subcontractor, its servants or agents.
- (c) In the event of the Subcontractor's failure to reinstate damage caused by him as aforesaid the Contractor shall have the right to carry out remedial works and to deduct the cost thereof from any moneys due or thereafter to become due to the Subcontractor by the

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Contractor under the Subcontract and to recover any deficiency then remaining as a debt due to the Contractor by the Subcontractor.

- (d) Avoid interference with or damage to property on or adjacent to the Site and shall provide temporary protection for and shall repair and reinstate all damage caused by the Subcontractor, its servants or agents.
- (e) Prevent nuisance or inconvenience to the owners, tenants and occupiers of properties adjoining the Site and to the public and shall comply in all respects with the requirements of any agreements that may be made from time to time with adjoining owners or for the protection of adjoining property, to which the Contractor may be subject.

### 4.11. Performance Warranties and Covenants

Without limiting the generality of the foregoing and following clauses, the Subcontractor warrants and covenants that:

- (a) In agreeing to perform the Subcontract Works, it has the necessary skills, resources and experience to successfully perform the Subcontract Works;
- (b) With respect to the Subcontract Works, it will perform the Subcontract Works:
  - (i) in a proper and workmanlike manner, and with the skill care and diligence that would be expected of a Subcontract Works provider experienced in projects or activities of a similar nature to those the subject of the Subcontract Works;
  - (ii) using new and undamaged materials suitable for the purpose for which they are required;
- (c) It will perform the Subcontract Works so that they comply with the requirements of this Subcontract, all Authorities, relevant Australian Standards, Good Industry Practice and any of the Contractor's or the Principal's policies (as advised from time to time);
- (d) It must comply with the Law in performing its obligations under this Subcontract;
- (e) It will obtain all the necessary licences and permits required in the execution of the Subcontract Works and the payment of all associated taxes, levies and charges;
- (f) In respect of other contractors generally, or in respect of the employees of the Principal both whom may be present on the Site during the performance of the Subcontract Works, it will mutually co-operate with any such contractors or employees and not unreasonably obstruct, delay, disrupt or otherwise interfere with or damage such contractor's or employee's work or property;
- (g) It will manage all aspects of industrial relations for the performance of the Subcontract Works, including without limitation, to:
  - (i) ensure that the rates of pay and conditions of employment specified in the relevant awards and enterprise and project agreements and relevant legislation, for all employees of the Subcontractor are always observed in full; and
  - (ii) keep the Contractor fully and promptly informed of industrial relations problems or issues which affect or are likely to affect the performance of the Subcontract Works;
- (h) It must comply with all requirements of Law and this Subcontract for protection of the Environment;
- (i) It must familiarise itself and its employees with relevant occupational health and safety legislation, the Site's safety rules and regulations, and associated permit-to-work systems and ensure that they are understood, observed, maintained and complied with in the execution of the Subcontract Works;

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- (j) It must, at its own expense, keep the Site clean and tidy, regularly removing rubbish and surplus material from the Site to the approval of the Contractor;
  - (k) It will take all steps to minimise and prevent unnecessary delay in the performance of the Subcontract Works;
  - (l) It will be responsible for the security of its own tools, plant and equipment; and
  - (m) It must ensure that it and its employees, subcontractors and agents do not make, receive, provide or offer substantial gifts, entertainment, payments, loans or other consideration to either the Contractor or the Principal (or either the Contractor's or the Principal's employees and agents) for the purpose of influencing those persons to act contrary to the best interests of the Contractor or the Principal.
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## 5. Time

### 5.1. Progress and Time for Completion

The Subcontractor must:

- (a) Complete the Subcontract Works by the Date for Completion as agreed in writing by the Contractor and the Subcontractor; and
- (b) Use its best endeavours to avoid delay in the progress of the Subcontract Works and shall take all proper and reasonable steps to avoid or minimise the consequences of any delay in exceeding the Date for Completion.

### 5.2. Delay and Extension of Time

- (a) If it becomes evident to the Subcontractor that completion of the Subcontract Works is likely to be delayed beyond the Date for Completion (other than by the execution of a variation) the Subcontractor shall if he desires to claim an extension of time for completion of the Subcontract Works, as soon as practicable and in any event not later than three (3) days after the cause of delay arose give notice in writing to the Contractor setting out the cause of delay and stating a fair and reasonable period by which in the Subcontractor's opinion the Date for Completion of the Subcontract Works should be extended.
- (b) The Subcontractor is not entitled to an extension of time for any delay beyond the Contractor's control, including but not limited to:
  - i. Industrial action;
  - ii. Inclement weather; or
  - iii. Act of god.
- (c) If the Contractor determines that the cause of delay is beyond the control of the Subcontractor and is such as to justify an extension to the Date for Completion of the Subcontract Works the Contractor shall grant the Subcontractor such extension of time to practically complete the Subcontract Works as the Contractor thinks fit and the Contractor shall as soon as practicable advise the Subcontractor in writing of his determination as to a fair and reasonable period by which the Date for Completion of the Subcontract Works should be extended.
- (d) If the Contractor determines that the cause of delay is not such as to justify an extension of time for completion of the Subcontract Works the Contractor shall, as soon as practicable thereafter, notify the Subcontractor of that determination and the reasons for it.

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- (e) If in the opinion of the Subcontractor the execution of a variation directed pursuant to clause 4.6 is likely to cause a delay in completion of the Subcontract Works the Subcontractor shall notify the Contractor in writing prior to commencing the execution of that variation or as soon as the likelihood of delay becomes evident to the Subcontractor of the extent or likely extent of the delay. If an extension of time is accepted by the Contractor when the variation is instructed or subsequently the extension of time so accepted shall constitute the extended time for completion of the Subcontract Works.
- (f) Where the execution of a variation the subject of an instruction issued by the Contractor to the Subcontractor pursuant to 4.6 is likely to result in a reduction in the time required for completion of the Subcontract Works the Contractor may at any time before the issue of such instruction give a notice in writing to the Subcontractor detailing the proposed variation and stating the reduction in time which the Contractor considers fair and reasonable and the Date for Completion shall be adjusted accordingly.
- (g) The Subcontractor shall not be entitled to reimbursement, recovery or payment of extra cost, loss, expense or damage borne or incurred by the Subcontractor by reason of or as a result of or arising from the exercise by the Contractor of the power to grant, allow or refuse in whole or in part any extension of time under any provisions of this clause under any circumstances whatsoever.

### 5.3. Practical Completion

- (a) When the Subcontractor is of the opinion that Practical Completion has been reached, the Subcontractor shall in writing request from the Contractor a Certificate of Practical Completion.
- (b) The Contractor within fourteen (14) days must accept or reject Practical Completion in writing.
- (c) When the Contractor is satisfied that Practical Completion has been achieved, the Contractor must provide the Subcontractor with a Certificate of Practical Completion.

### 5.4. Liquidated Damages

- (a) If the Subcontractor shall fail to complete the Subcontract Works on or before the Date for Completion in accordance with this Subcontract or any adjusted time fixed pursuant to this Subcontract the Subcontractor shall pay to the Contractor the sum calculated at the rate of 1% of the Fee for every day that the Subcontract Works are not completed by the Date for Completion as liquidated and ascertained damages for the period during which the Subcontract Works shall so remain not practically completed and any such sum may be deducted progressively from time to time from moneys then due and owing or thereafter to become due and owing to the Subcontractor by the Contractor. In the event of no further moneys being payable to the Subcontractor, or in the event that the sum of the liquidated and ascertained damages exceeds the amount remaining payable or to become payable to the Subcontractor the Contractor shall be entitled to recover such sum, or any excess, as a debt due and payable by the Subcontractor to the Contractor.
- (b) The Contractor, in its absolute discretion, may demand payment of the liquidated damages amount from the Subcontractor or may deduct, withhold or set-off the liquidated damages amount from any amount otherwise payable to, or security provided by the Subcontractor. A failure by the Contractor at any time to demand payment or to deduct, withhold or set-off the liquidated damages will not amount to a waiver of or otherwise affect the Contractor's rights and entitlements.
- (c) The Subcontractor acknowledges that the rate for liquidated damages set out above represents a genuine pre-estimate of the amount of loss and/or damage, as calculated at the Contract Date, which the Contractor is likely to suffer. The Subcontractor warrants that it will not challenge the rate for liquidated damages as being in the nature of a penalty.

### 5.5. Indemnity

## Subcontract Terms and Conditions

If:

- (a) The Subcontract Works do not reach Practical Completion on or before the Date for Completion; or
- (b) On or before the extended Date for Completion adjusted in accordance with this Subcontract;

the Subcontractor shall indemnify the Contractor against:

- (i) Liquidated damages under the Head Contract; and
- (ii) Damages, other than liquidated damages, which have or may become due and payable by the Contractor to the Principal.

The Subcontractor's indebtedness under this subclause is not included in the liquidated damages applicable to the preceding subclause.

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## 6. Payment

### 6.1. Payment Obligation

Subject to:

- (a) clause 6;
- (b) any other right to set-off which the Contractor may have; and
- (c) the compliance by the Subcontractor with the terms of this Subcontract;

the Contractor shall pay the Subcontractor the Fee as agreed in writing by the Contractor and the Subcontractor.

### 6.2. Subcontractor Fee Acknowledgment and Warranty

The Subcontractor acknowledges and warrants that the Fee includes all costs and expenses it may incur in performing the Subcontract Works and complying with all of its obligations under this Subcontract, including but not limited to, any adjustments for the rise in the cost of labour or materials provided by the Subcontractor, any changes or increases in taxes, duties or other costs.

### 6.3 Payment Claim

- (a) At the intervals and or dates agreed in writing by the Contractor and the Subcontractor, the Subcontractor is entitled to seek from the Contractor progress payments via the making of a Progress Payment Claim.
- (b) A Progress Payment Claim must be given in writing to the Contractor and must:
  - (i) Identify in detail the work and materials to which the claim relates;
  - (ii) Indicate the amount of the progress payment that the Subcontractor claims; and
  - (iii) The applicable Reference Date.
- (c) Where a Contractor has been issued with a Progress Payment Claim from a Subcontractor in accordance with this Subcontract, the progress payment will be due and

## Subcontract Terms and Conditions

payable within the number of days agreed in writing between the Contractor and the Subcontractor.

- (d) By submitting a Progress Payment Claim to the Contractor, the Subcontractor warrants to the Contractor that:
  - (i) There are no defects in the work which is the subject of the Progress Payment Claim;
  - (ii) The amounts claimed are accurate;
  - (iii) The Subcontractor has complied with all of the obligations imposed on the Subcontractor by the Subcontract where those obligations have fallen to be complied with at the time of the making of the Progress Payment Claim; and
  - (iv) The Subcontractor is not aware of any claim against the Contractor which is not identified in the Progress Payment Claim or in an earlier Progress Payment Claim.
- (e) For the purposes of this clause any reference to an amount of days is to include all days including weekends, public holidays, local holidays and the like.
- (f) Any failure by the Contractor to meet its obligations pursuant to this clause as to payment will not give rise to any liability for the Contractor to pay interest.
- (g) No payment of monies by the Contractor to the Subcontractor pursuant to this clause shall be deemed evidence that any work, materials and/or goods in relation to which such payment relates are in accordance with this Subcontract.
- (h) As a condition precedent to payment by the Contractor to the Subcontractor, the Subcontractor must provide to the Contractor the following with each Progress Payment Claim:
  - (i) A Tax Invoice that complies in all respects with the requirements under the GST Act;
  - (ii) A statutory declaration certifying that all amounts owing to any consultants, subcontractors, suppliers and employees engaged with respect to the work undertaken pursuant to this Subcontract have been paid; and
  - (iii) Anything else that the Contractor requests from time to time with regard to assessing Progress Payment Claims.

### 6.4 Right of Set-Off

The Contractor may deduct from monies otherwise due to the Subcontractor any debt or other monies due from the Subcontractor to the Contractor, and any claim to money which the Contractor may have against the Subcontractor whether for damages (including liquidated damages) or otherwise, whether under the Subcontract or otherwise at all relating to the Subcontract Works.

### 6.5 Subcontractor's Subcontractor Payment Provisions

In the event that the Subcontract Works are to be completed in New South Wales then the following clause applies:

- (a) The Subcontractor must:
  - (i) Promptly and without delay give the Contractor a copy of any notice the Subcontractor receives from a subcontractor; and

## Subcontract Terms and Conditions

- (ii) Promptly and without delay give the Contractor a copy of any notice that the Subcontractor receives from another party,

under any of sections 15, 16 or 24 of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

- (b) If the Contractor becomes aware that a subcontractor is entitled to suspend work (which forms part of the Subcontract Work) pursuant to section 27 of the *Building Construction Industry Security of Payment Act 1999* (NSW), the Contractor may (at its absolute discretion) pay the subcontractor such money that is or may be owing to the subcontractor in respect of work forming part of the Subcontract Works, and any amount paid by the Contractor is recoverable from the Subcontractor as a debt due to the Contractor.
  - (c) The Subcontractor indemnifies the Contractor against all damage, expense (including lawyers' fees and expenses on a solicitor/client basis), loss (including financial loss) or liability of any nature suffered or incurred by the Contractor arising out of:
    - (i) A suspension by a subcontractor of work which forms part of the Subcontract Works pursuant to section 27 of the *Building and Construction Industry Security of Payment Act 1999* (NSW); and
    - (ii) A failure by the Subcontractor to comply with its obligations under clause (a).
  - (d) For the purposes of this clause, a reference to:
    - (i) A subcontractor refers to any party engaged by the Subcontractor, its subcontractors or any other party to carry out work which forms part of the Subcontract Works; and
    - (ii) Work refers to work which the Subcontractor is or will, in the future, be required to execute or provide under this Subcontract and includes equipment, services, materials, plant and temporary services.
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## 7. Personnel

### 7.1. Subcontractor's Representative

- (a) The Subcontractor's Representative is the person appointed as the Subcontractor's Representative by the Subcontractor upon one (1) week's prior notice in writing to the Contractor.
- (b) The Subcontractor must ensure that the Subcontractor's Representative is present on the Site at all times reasonably necessary to ensure that the Subcontractor is compliant with its obligations under this Subcontract.
- (c) The Subcontractor must ensure that the Subcontractor's Representative is an individual who shall be authorised to take and carry out such instructions as the Contractor may give regarding the Subcontract Works.
- (d) A direction is deemed to be given to the Subcontractor if it is given to the Subcontractor's Representative.
- (e) Without limiting the Contractor's rights, the Contractor's Representative may exercise all of the Contractor's rights and functions under this Subcontract (including giving directions), other than the right to terminate this Subcontract, or resolve a Dispute which is the subject of the dispute resolution procedure in clause 14.

### 7.2. Control of Employees

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- (a) The Subcontractor shall employ and ensure that its subcontractors employ in connection with the Subcontract Works only such persons as are careful, skilled and experienced in their respective trades and occupations.
  - (b) The Contractor may object to and direct the Subcontractor to remove or have removed from within the Site within such time as the Contractor directs any person employed by the Subcontractor or by any of its subcontractors who, in the opinion of the Contractor misconducts itself or is incompetent or negligent in the performance of its duties.
  - (c) The Subcontractor shall immediately comply with such direction and any such person shall not be further employed in upon or about the Site without the prior approval of the Contractor. The Contractor shall not give any direction pursuant to this clause which is unreasonable or vexatious. The Subcontractor must provide, at its own expense, a suitable replacement.
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### 8. Safety and Quality

- (a) The Subcontractor shall comply with the requirements of all relevant Codes, Regulations, Rules, Industry Practice and the Contractor's policies and procedures in relation to safety and quality.
  - (b) If the Subcontractor fails to comply with any safety requirements the Contractor shall be entitled to direct that execution of the particular section of the works where the safety requirements have not been complied with be suspended, until the safety requirements are adhered to.
  - (c) During progress of the Subcontract Works the Contractor may call and conduct on-site safety meetings during such hours as the Contractor deems appropriate. The Subcontractor is required to be represented by the Subcontractor's Representative at such safety meetings of which it receives prior notice.
  - (d) The Subcontractor shall immediately notify the Contractor of all incidents and near misses involving its employees or employees of its subcontractors.
  - (e) The Subcontractor shall, within one (1) working day of an incident as described in the preceding sub-clause occurring, provide to the Contractor a copy of an accident report in compliance with the requirements of any applicable statutes or statutory regulations.
  - (f) The Subcontractor shall ensure that its employees or employees of its subcontractors have a current and valid the Contractor induction and are fully inducted with regard to the Site under this Subcontract.
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### 9. Limitation of Liability, Release and Indemnity

#### 9.1. Limitation of Liability

- (a) Notwithstanding any other provision of this Subcontract:
  - (i) In no circumstances will the Contractor be liable to the Subcontractor or any assigned party in contract, tort (including, without limitation, negligence or breach of statutory duty) or otherwise and whatever the cause to compensate the Subcontractor or other party for any special, indirect or consequential loss or



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damage whatsoever, including but not limited to loss of production, loss of revenue, loss of profit or anticipated profit, or business interruption.

- (ii) The total liability of the Contractor in relation to this Subcontract is limited to the amount of the Fee.
- (b) Clause (a)(ii) shall not apply for the benefit of the Contractor for the following liability:
- (i) Liability out of which by law the party liable cannot contract;
  - (ii) Liability for fraud or malicious or deliberate criminal acts or omissions on the part of the Contractor; and
  - (iii) For gross negligence (being any act or failure to act by a party which was intended to cause, or which was in reckless disregard of, or wanton indifference to, the harmful consequences which that party knew, or ought reasonably to have known, that act or failure to act would have on the safety, property or interests of the other party) on the part of the Contractor.

### 9.2. Release

The Subcontractor releases the Contractor and its officers, employees, contractors and agents from any liability or obligation to the Subcontractor (or any person claiming through or on behalf of the Subcontractor) in respect of:

- (a) Loss (including consequential loss) of or damage to any real or personal property;
- (b) Personal injury, disease or illness to, or death of, persons;
- (c) Financial loss or expense;
- (d) Damage to the Environment; and
- (e) Economic loss;

arising out of the performance or non-performance of the Subcontract Works and its other covenants and obligations under this Subcontract.

### 9.3. Indemnity

The Subcontractor indemnifies the Contractor and its officers, employees, contractors and agents against all actions, proceedings, judgments, damages, losses, costs, expenses (including legal fees and charges), or liabilities of any nature, which may be incurred by, billed, made or recovered against the Contractor or its officers, employees, contractors or agents in connection with, either directly or indirectly, the performance or non-performance of the Subcontract Works and observance of its obligations contained or implied in this Subcontract, including but not limited to:

- (a) Loss of or damage to property of the Contractor;
- (b) Damage, expense, loss or liability in respect of loss or damage to any other property (including without limitation, the Contractor's property);
- (c) Damage, expense, loss or liability in respect of personal injury, disease, illness (including mental injury) or death;
- (d) Financial loss or expense;
- (e) Breach of third party intellectual property rights;
- (f) Failure by the Subcontractor to comply with any relevant legislation or standard applicable to the Subcontract Works;

## Subcontract Terms and Conditions

- (g) Any industrial disputes caused or contributed to by any act or omission of the Subcontractor, arising directly or indirectly from any breach of any terms or conditions of this Subcontract, by the Subcontractor or the Subcontractor's Personnel;
- (h) Damage to the Environment; and
- (i) Economic loss.

### 9.4. Liability Unaffected by Other Events

The liability of the Subcontractor is not affected by anything which but for this provision, might release, prejudicially affect or discharge it or in any way relieve the Subcontractor from any obligation including the following (whether with or without the consent of the Subcontractor):

- (a) The grant to the Subcontractor any/or any other person at any time, waiver or other indulgence, or the discharge or release of them;
- (b) Any transaction or arrangement that may take place between the Contractor and/or the Subcontractor and/or any other person;
- (c) The Liquidation of the Subcontractor and/or any other person;
- (d) The Contractor becoming a party to or bound by any compromise, moratorium, assignment of property, scheme or arrangement, composition of debts or scheme of reconstruction by or relating to the Subcontractor and/or any other person;
- (e) The Contractor exercising or delaying or refraining from exercising any right, power or remedy given to it by law or by this Subcontract or by any other document or agreement with the Subcontractor and/or any other person;
- (f) The amendment, variation, novation, replacement, rescission, invalidity, extinguishment, repudiation, avoidance, unenforceability, frustration, failure, expiry, termination, loss, release, discharge, abandonment, assignment or transfer in whole or in part and with or without consideration, of this Subcontract at any time or of any right, obligation, power or remedy;
- (g) The failure by the Subcontractor and/or any other person to notify either Subcontractor of any default by the Subcontractor and/or any other person under this Subcontract;
- (h) The Contractor obtaining a judgment against the Subcontractor and/or any other person for the payment of any money under this Subcontract or any other document or agreement with the Contractor;
- (i) Any legal limitation, disability, incapacity or other circumstance relating to the Subcontractor, either Subcontractor an/or any other person;
- (j) Any change in circumstance (including of a person or in the members of constitution of a partnership); and
- (k) This Subcontract not being valid or executed by or binding on any person.

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## 10. Termination

### 10.1. Termination by Contractor

If the Contractor in its sole discretion considers that the Subcontractor:

## Subcontract Terms and Conditions

- (a) Is in breach or default of this Subcontract, including but not limited to, by wholly suspending the carrying out of the Subcontract Works or any part thereof, failing to proceed with the Subcontract Works with reasonable diligence or in a competent manner, refuses or consistently neglects to comply with a written notice from the Contractor requiring the Subcontractor to remove defective or improper work, materials or goods or any other direction properly given; or
- (b) Has breached a Warranty which it gives to the Contractor under this Subcontract,

the Contractor may give the Subcontractor a notice in writing requiring the Subcontractor to rectify that default or remedy that breach (or overcome their effects) within a reasonable time specified in the notice, being a period of no more than 7 days. If the Subcontractor fails within the period of time stated in the notice to rectify the default or remedy the breach the Contractor may without prejudice to any other rights or remedies that it may have under this Subcontract or at common law or in equity deliver a written notice to the Subcontractor terminating this Subcontract.

### 10.2. Termination for Convenience

Notwithstanding the preceding clause and whether or not the Subcontractor has breached this Subcontract, the Contractor may at any time, and without reason, terminate this Subcontract by giving the Subcontractor written notice of such intention. Termination pursuant to this clause will be without prejudice to any other rights or remedies that the Contractor may have under this Subcontract or at common law or in equity.

### 10.3. Termination for Insolvency

If the Subcontractor becomes Insolvent then the Contractor may without prejudice to any other rights or remedies it may have under this Subcontract or at common law or in equity by written notice to the Subcontractor terminate this Subcontract forthwith and without the need for any other notice.

### 10.4. Termination for Serious Breach

If the Subcontractor is in Serious Breach of this Subcontract then the Contractor may terminate this Subcontract immediately by giving written notice to the Subcontractor without prejudice to any other rights or remedies that it may have under this Subcontract or at common law or in equity.

### 10.5. Termination of Head Contract

If the Head Contract is terminated for whatever reason, then the Contractor may terminate this Subcontract with immediate effect. In the event of termination under this clause, the Subcontractor is only entitled to receive amounts owing up until the date of termination, and is not otherwise entitled to claim any other damages or consequential loss in respect of the termination.

### 10.6. Contractor's Rights After Termination

- (a) If the Contractor terminates this Subcontract pursuant to this clause 10 it may:
  - (i) Complete the whole or any part of the Subcontract Works remaining to be completed and for that purpose may employ and pay other persons to carry out and complete the Subcontract Works;
  - (ii) Take possession of and use and permit other persons to use any materials, plant and other things which are owned by the Subcontractor and located on the Site and as are required or may be necessary for the purpose of carrying out and completing the said Subcontract Works;
  - (iii) Require the Subcontractor to assign to the Contractor or its nominees within five (5) days with or without payment, the benefit of any agreement to supply materials for or to perform any works under the Subcontract;

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- (iv) Upon completion of the Subcontract Works, retain for its own use or otherwise dispose of all plant and other things which are owned by the Subcontractor and located on the site in order to make good any difference between the Fee and the final cost to the Contractor of performing the Subcontract Works. Otherwise the same shall be returned to the Subcontractor, but without payment and with allowance for fair wear and tear that may have been sustained in the meantime;
  - (v) Not be obliged to make any further payments to the Subcontractor, including any money the subject of a Progress Payment Claim. Any additional monies required by the Contractor to complete the Subcontract Works in excess of what the Subcontractor would have been paid under this Subcontract will be a debt due and payable by the Subcontractor to the Contractor.
  - (vi) Be entitled to recover from the Subcontractor any costs, losses or damages incurred or suffered by it as a result of, or arising out of, or in any way in connection with, such termination;
- (b) If the Subcontractor terminates this Subcontract the Subcontractor must immediately upon demand hand over to the Contractor all copies of documents provided by the Contractor arising from this Subcontract.

### 10.7. Preservation of Rights

If the Contractor terminates this Subcontract pursuant to this clause 10 it does so without prejudice to any other rights or remedies that the Contractor may have under this Subcontract or common law or in equity.

### 10.8. Quantum Meruit After Termination

If either party terminates this Subcontract or repudiates this Subcontract the Subcontractor will not be entitled to a quantum meruit. This clause will survive the termination of this Subcontract.

### 10.9. Death of Subcontractor

If the Subcontractor being an individual shall die during the execution of the Subcontract Works then unless arrangements satisfactory to the Contractor are made for the continuance of the work, within fourteen (14) days after the date of death, the Contractor may terminate the Subcontract by notice in writing addressed to the name of the deceased Subcontractor at his last known place of abode, or at the address provided in the Subcontract in which case allowance shall be made to the executors or administrators of the Will of the Estate of the Subcontractor in due course in respect of the part of the Subcontract Works already completed by the Subcontractor prior to his death as shall be determined by the Contractor PROVIDED THAT any loss incurred by the Contractor arising from such termination and the reletting of the Subcontract shall be set off against any such allowance.

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## 11. Force Majeure

- (a) If either party is prevented from or delayed in performing any of its obligations under this Subcontract by a Force Majeure Event, the affected party must immediately give the other party a written notice containing the:
  - (i) Full particulars of the Force Majeure Event;
  - (ii) Nature and likely duration of the Force Majeure Event;
  - (iii) Obligations of the party, the performance of which is prevented or delayed; and
  - (iv) Nature and extent of the effect of the Force Majeure Event on those obligations.

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- (b) The obligations of the party affected by the Force Majeure Events are suspended to the extent that they are affected by the Force Majeure Event, from the date the affected party gives the written notice under the above clause until cessation of the Force Majeure Event. To the extent that a Force Majeure Event applies to the Subcontractor while performing the Subcontract Works in accordance with a Service Order, such a suspension will in effect amount to an extension of time allowable for the completion of the Subcontract Works required under the Service Order (but will not constitute grounds for a variation or extra payment), although such an extension of time will cease upon the cessation of the Force Majeure Event.
  - (c) On the cessation of the Force Majeure Event which is the subject of a written notice under this clause, the party affected by the Force Majeure Event must:
    - (i) Immediately give written notice to the other party of the cessation of the Force Majeure Event; and
    - (ii) Resume performance of any obligations suspended as a result of the Force Majeure Event.
  - (d) The party affected by a Force Majeure Event must use its best endeavours to remove the effect of that Force Majeure Event affecting its obligations under this Subcontract.
  - (e) A Force Majeure Event does not relieve a party from liability for any breach which occurred before the occurrence of that Force Majeure Event.
- 

## 12. Confidentiality

- (a) Any Confidential Information supplied by the Contractor to the Subcontractor must not be disclosed by the Subcontractor or its Personnel to any third party without the written consent of the Contractor.
  - (b) The Subcontractor must not take any photographs of the Subcontract Works or issue for public release any information, publication or document related to the Subcontract Works, without first obtaining the written approval of the Contractor.
  - (c) The obligations under this clause are continuing obligations and will survive the termination of this Subcontract for a period of two (2) years.
  - (d) The Subcontractor must, within 10 business dayss (or any other period agreed in writing by the Parties) after a direction by the Contractor to do so, return or destroy all Confidential Information in the Subcontractor's possession, custody or control.
  - (e) The rights and obligations under this clause 12 continue after the Completion Date.
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## 13. Notices

- (a) Unless otherwise stated herein, any notice or other communication required under this Subcontract must be in writing (to the addresses stated for each party in the Subcontract) except that the Contractor may give verbal instructions or directions to the Subcontractor on the Site in relation to the Subcontract Works. If the Contractor deems appropriate, any such verbal instructions or directions may be confirmed in writing by the Contractor to the Subcontractor within a reasonable time.
- (b) A notice sent by mail will be deemed received by the party to whom it is addressed on the second business days after the date of its posting. Notices transmitted by email will be

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deemed received on the day of sending (subject to sent report evidencing thereof), except that if the notice is sent after 5:00pm on a business days then the notice shall be deemed to have been received on the next business days, while an email notice sent on a non-business days will be deemed to have been received on the next business days.

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### 14. Dispute Resolution

#### 14.1. Early Resolution

Disputes or differences arising between the Contractor and the Subcontractor in relation to this Subcontract must preferably be settled quickly and by negotiation.

#### 14.2. Continuation of the Subcontract Works

In the event of any unresolved dispute between the Contractor and the Subcontractor in relation to this Subcontract, the Subcontractor must ensure that the progress of the Subcontract Works is continued without any delay.

#### 14.3. Settlement of Unresolved Disputes

- (a) The preferred method of determination of unresolved disputes will be by amicable agreement at the senior management level of the Contractor and the Subcontractor. Accordingly, if a dispute under this Subcontract arises, the parties agree to try to resolve the dispute at the senior management level of both parties.
  - (b) If the parties cannot resolve a dispute within twenty-one (21) days of the dispute first being raised by the parties, the parties agree that the dispute must then be referred to mediation to the Institute of Arbitrators and Mediators Australia. The dispute referred to the body for mediation must be heard by that body within thirty (30) days after the dispute is referred.
  - (c) The parties agree to adhere to the procedures set out in this clause before enforcing any other rights permitted by Law in the resolution of any disputes under this Subcontract.
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### 15. Compliance with the National Code of Practice for the Construction Industry and the Australian Government Implementation Guidelines (where applicable)

This clause 15 applies where the Commonwealth Government National Code of Practice for the Construction Industry (the Code) and the Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry, August 2009 (Guidelines) are applicable and as these documents may be amended from time to time or any document which may replace them.

- (a) The Subcontractor must comply with the Code and Guidelines. Copies of the Code and Guidelines are available at [deewr.gov.au/building](http://deewr.gov.au/building).
- (b) Compliance with the Code and Guidelines shall not relieve the Subcontractor from responsibility to perform the Subcontract, or from liability for any defect in the Subcontract works arising from compliance with the Code and Guidelines.

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- (c) Where a change in the Subcontract is proposed and that change would affect compliance with the Code and Guidelines, the Subcontractor must submit a report to the Commonwealth specifying the extent to which the Subcontractor's compliance with the Code and Guidelines will be affected.
- (d) The Subcontractor must maintain adequate records of the compliance with the Code and Guidelines by:
  - (i) the Subcontractor;
  - (ii) its subcontractors;
  - (iii) its consultants; and
  - (iv) its Related Entities (see Guidelines for meaning including section 3.5 of the Guidelines).
- (e) If the Subcontractor does not comply with the requirements of the Code or the Guidelines in the performance of this Subcontract such that a sanction is applied by the Minister for Employment and Workplace Relations, the Code Monitoring Group or the Commonwealth, without prejudice to any rights that would otherwise accrue, those parties shall be entitled to record that non-compliance and take it, or require it to be taken, into account in the evaluation of any future tenders that may be lodged by the Subcontractor in respect of work funded by the Commonwealth or its agencies.
- (f) While acknowledging that value for money is the core principle underpinning decisions on Government procurement, when assessing tenders, the Subcontractor may give preference to subcontractors and consultants that have a demonstrated commitment to:
  - (i) adding and/or retaining trainees and apprentices;
  - (ii) increasing the participation of women in all aspects of the industry; or
  - (iii) promoting employment and training opportunities for Indigenous Australians in regions where significant indigenous populations exist.
- (g) The Subcontractor must not appoint a subcontractor or consultant in relation to the Project where:
  - (i) the appointment would breach a sanction imposed by the Minister for Employment and Workplace Relations; or
  - (ii) the subcontractor or consultant has had a judicial decision against them relating to employee entitlements, not including decisions under appeal, and has not paid the claim.
- (h) The Subcontractor agrees to require that it and its subcontractors or consultants and its related entities provide the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian Building and Construction Commissioner, with access to:
  - (i) inspect any work, material, machinery, appliance, article or facility;
  - (ii) inspect and copy any record relevant to the project and Subcontract the subject of this Subcontract; and
  - (iii) interview any person as is necessary to demonstrate its compliance with the Code and Guidelines,
- (i) Additionally, the Subcontractor agrees that the Subcontractor and its related entities will agree to a request from the Commonwealth or any person authorised by the Commonwealth, including a person occupying a position in the Office of the Australian

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Building and Construction Commissioner, to produce a specified document within a specified period, in person, by fax or by post.

- (j) For the avoidance of doubt, Clause (h) applies in relation to the Subcontractor's new privately funded construction work.
  - (k) The Subcontractor must ensure that all subcontracts impose obligations on subcontractors equivalent to the obligations under these Subcontract Clauses.
  - (l) In addition, the Subcontractor shall also comply with any other Government codes or guidelines which may apply to the Subcontract Works and with any lawful direction of the Contractor in respect of the management of industrial relations in connection with the Subcontract Works.
  - (m) If required by the Contractor, the Subcontractor must prepare and provide to the Contractor an industrial relations management plan which complies with the Code and which is reasonably satisfactory to the Contractor.
  - (n) Failure to comply with this clause 15 shall be a substantial breach of the Subcontract.
- 

## 16. General

### 16.1. Law of this Subcontract

- (a) The law of this Subcontract is the law in force in the Governing Law Jurisdiction.
- (b) The parties submit to the jurisdiction of the courts in the Governing Law Jurisdiction.

### 16.2. Rights and Remedies Not Affected

The rights, powers and remedies provided in this Subcontract are cumulative and not exclusive of the rights, powers or remedies provided by Law independently of this Subcontract.

### 16.3. Entire Agreement and Interpreting Any Ambiguity

- (a) This Subcontract constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.
- (b) If there is a discrepancy, inconsistency or ambiguity within or between the documents comprising the Subcontract between the parties, the parties must resolve the discrepancy, inconsistency or ambiguity by applying the following order of precedence:
  - i. Formal Instrument of Subcontract;
  - ii. General Conditions;
  - iii. Specifications;
  - iv. Scope of Work;
  - v. Drawings; and
  - vi. Other Appendices.
- (c) For the avoidance of doubt, the Contractor is not entitled to a variation, an extension of time or any compensation in relation to a direction under this clause.



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### 16.4. Waivers and Variations

- (a) A provision of or a right created under this Subcontract may not be waived, except in writing signed by the party granting the waiver.
- (b) A failure or delay in the exercise, or the partial exercise of a right under this Subcontract by a party does not result in a waiver of that right.
- (c) Unless otherwise stated in this Subcontract, a party may exercise a right, power or remedy at its discretion, and separately or concurrently with another right, power or remedy.
- (d) Unless otherwise stated in this Subcontract, a variation of any terms of this Subcontract must be in writing and signed by the parties.

### 16.5. Nature of the Relationship

Nothing in this Subcontract constitutes a joint venture, agency, partnership, employment or other fiduciary relationship between the Contractor and the Subcontractor, and at all times under this Subcontract the Subcontractor is an independent contractor.

### 16.6. Conflict of Interest

- (a) The Subcontractor warrants that at the date of this Subcontract, there is no conflict of interest existing between:
  - (i) The Subcontractor performing the Subcontract Works; and
  - (ii) The Subcontractor performing any other work for third parties.
- (b) The Subcontractor must not engage in any activity which might conflict with the Contractor's interest under this Subcontract.

### 16.7. Counterparts

This Subcontract may be executed in any number of counterparts which, when taken together, will constitute one instrument.

### 16.8. Non-Exclusive

This Subcontract is non-exclusive. The Contractor retains the right to engage any other person to provide the same type of Subcontract Works without any liability to the Subcontractor.

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## 17. Information

The Subcontractor must:

- (a) inform the Contractor if any aspects of any of the performance of the Subcontract Work will not be in accordance with this Subcontract;
- (b) provide to the Contractor any details of or information about such aspects of the Subcontract Work as the Contractor may reasonably request;

## Subcontract Terms and Conditions

- (c) notify the Contractor of any industrial disputes connected with or impacting upon the performance of the Subcontract Work.
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### 18. Suspending this Subcontract

- (a) The Contractor or the Contractor's Representative may, at any time and for any reason, suspend this Subcontract or any part of this Subcontract.
  - (b) Without limiting clause 18(a), the Contractor or the Contractor's Representative may suspend this Subcontract or any part of this Subcontract immediately if, in its opinion, an unsafe act has occurred or is likely to occur or an unsafe condition exists.
  - (c) When the Subcontractor receives a written notice of suspension from the Contractor or the Contractor's Representative, the Subcontractor must suspend the performance of its obligations under this Subcontract from the time and date in the written notice until the Contractor or the Contractor's Representative directs the Subcontractor in writing to continue, at which time the Subcontractor must promptly recommence the performance of the Subcontractor's obligations under this Subcontract.
  - (d) Where the suspension of this Subcontract is not a result of any breach of this Subcontract by the Subcontractor or any act or omission by the Subcontractor or the Subcontractor's Personnel not authorised by this Subcontract, the Contractor must reimburse the Subcontractor for the Subcontractor's reasonable additional costs provided that those costs are verified and have been incurred as a direct consequence of the suspension of this Subcontract.
  - (e) If the Contractor or the Contractor's Representative suspends this Subcontract or any part of it in accordance with clause 18(a) (other than where such suspension is due to breach of this Subcontract by the Subcontractor or any act or omission by the Subcontractor or the Subcontractor's Personnel not authorised by this Subcontract), the Completion Date and the Completion Date are extended by the period of that suspension.
  - (f) The remedies set out in clauses 18(d) and (e) are the Subcontractor's sole and exclusive remedy in respect of the Contractor suspending this Subcontract and the Subcontractor expressly waives any or legal action against the Contractor that could arise because of the Contractor suspending this Subcontract, whether in contract, warranty, tort (including negligence), equity, strict liability, products liability, professional liability, indemnity, contribution or any other cause of action.
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### 19. Privacy

- (a) The Subcontractor agrees to be bound by applicable privacy and data protection Laws with respect to any act done or practice engaged in by the Subcontractor for the purposes of this Subcontract in the same way and to the same extent as the Contractor would have been bound by them in respect of that act or practice had it been directly done or engaged in by the Contractor.
  - (b) Each Party must (and must procure that its Personnel) comply with any applicable privacy or data protection Laws and all guidelines issued by applicable privacy offices (and any similar regulatory bodies).
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### 20. Taxes

- (c) The Subcontractor must pay all taxes to the relevant Authority. If the Subcontractor pays any Taxes on behalf of the Contractor, the Subcontractor must provide the Contractor with documentary evidence of the payment of those Taxes.

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- (d) Without limiting clause 20(a), the Subcontractor will be solely liable for tax imposed on the Subcontractor in respect of income derived by the Subcontractor in the provision of any goods or services.
- (e) Where the Contractor believes it is required by Law to withhold or deduct any Withholding Amount from any payment due to the Subcontractor, the Subcontractor:
  - (i) authorises the Contractor to withhold or deduct the Withholding Amount; and
  - (ii) acknowledges and agrees that when the Contractor pays the Withholding Amount to the relevant Authority, the Contractor is deemed to have paid an amount equal to the Withholding Amount to the Subcontractor,

and when the Contractor withholds or deducts that amount from any payment due to the Subcontractor, the Contractor must give the Subcontractor written notice of the Withholding Amount.

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### 21. Assignment and Subcontracting

- (a) The Subcontractor must not assign, transfer, charge, subcontract or otherwise deal with its rights or obligations under this Subcontract without the Contractor's prior written consent (which consent must not be unreasonably withheld). Such consent may be conditional.
- (b) The Contractor may assign, transfer, novate or otherwise deal with any or all of its rights or obligations under this Subcontract at any time to any party that is financially capable of meeting the Contractor's obligations under this Subcontract.
- (c) The Subcontractor must ensure that any subcontract contains terms that oblige the sub-subcontractor to perform its obligations under the subcontract in a way that ensures that the Subcontractor complies with its obligations under this Subcontract.
- (d) Where the Subcontractor has subcontracted the whole or any part of this Subcontract, the Subcontractor continues to be liable:
  - (i) for the Subcontractor's obligations under this Subcontract; and
  - (ii) to the Contractor for the acts and omissions of any sub-subcontractors and any sub-subcontractor's Personnel as if they were the Subcontractor's acts or omissions.
- (e) The Subcontractor must:-
  - (i) ensure that any of its sub-subcontractors are suitably experienced and qualified and perform according to this Subcontract;
  - (ii) provide the Contractor's Representative with any information about any sub-subcontractor reasonably requested by the Contractor's Representative within 5 business days of receipt of the Contractor's Representative's request (or such other period as the Contractor's Representative and Subcontractor's Representative agree); and
  - (iii) remove the sub-subcontractor if requested by the Contractor or the Contractor's Representative in accordance with clause 21(f).
- (f) The Contractor or the Contractor's Representative may, on reasonable prior written notice to the Subcontractor, request the removal of a sub-subcontractor:

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- (i) if it reasonably considers the sub-subcontractor's performance is defective or the Contractor or Contractor's Representative has reasonable grounds to believe that the Subcontractor's future performance will be defective; or
- (ii) if the sub-subcontractor assigns performance of its obligations to a third party without the Contractor's prior written approval.

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### 22. Acknowledgements

- (b) By entering into this Subcontract, except to the extent stated in this Subcontract, the Subcontractor does not rely on any representation, warranty, condition or other conduct which may have been made by the Contractor or any person purporting to act on behalf of the Contractor.
- (c) The Subcontractor has read this Subcontract and has made all necessary and independent inquiries in relation to all matters relevant to the entry into, and the performance of the Subcontractor's obligations under, this Subcontract.

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### 23. Severability

Any provision in this Subcontract which is invalid or unenforceable in any jurisdiction:

- (d) is to be:
  - (i) read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable; and
  - (ii) severed to the extent of the invalidity or unenforceability; and
- (e) does not affect the remaining provisions of this Subcontract or the validity or unenforceability of that provision in any other jurisdiction.

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### 24. Restraint

The Subcontractor must not for a period of 3 years from the Contract Date be involved in any way in the sale or supply to the Principal (or any Associate or Related Body Corporate of the Principal) of goods or services which are:

- (a) the same as any of the goods or services to be supplied by the Subcontractor to the Contractor pursuant to this Subcontract; or
- (b) similar to any of the goods or services to be supplied by the Subcontractor to the Contractor pursuant to under this Agreement.

For the purposes of this clause 24, "involved in any way" includes being involved in the business alone or as a partner, joint venturer, manager, agent, clerk, assistant or consultant of any person or corporation as a director or a majority shareholder or shareholder who has the capacity to exercise substantial control of any corporation or as a trustee or beneficiary of any trust.