

CONDITIONS OF CONTRACT

1. DEFINITIONS AND INTERPRETATION

1.1 DEFINITIONS

In these conditions of contract:

Background IP means any intellectual property rights developed by a party other than for the WUC, the Works, otherwise in respect of the Contract or prior to the date of the Contract that is used for the WUC.

Claim includes any claim, proceeding, cause of action, action, demand or suit (including by way of contribution or indemnity);

Commencement Date means the date described as such in the Contract Details as the date on which the Works must commence, or if no date is specified, within 14 days of the Principal giving the Contractor possession of sufficient access to the Site to enable the Contractor to commence work;

Constructional Plant means appliances and things used in the execution of the WUC which do not form part of the Works;

Contract means the contract between the Principal and the Contractor for the Works, which is constituted by these conditions of contract and the other Contract Documents;

Contract Details means the document of that name to which these conditions of contract are attached.

Contract Price means the lump sum described as such in the Contract Details including provisional sums, but excluding any additions or deductions which may be required by the Contract;

Contract Documents means the documents described as such in the Contract Details;

Coronavirus (COVID-19) means the disease commonly known as the novel coronavirus disease or COVID-19 caused by the virus SARS-CoV-2;

Date for Practical Completion means the date specified in the Contract Details, as adjusted in accordance with the Contract;

Defect includes any defect, error, omission, deficiency or other imperfection in the Works or the Temporary Works and any failure to execute and complete the WUC in accordance with the Contract;

Defects Liability Period means the period commencing on the Date of Practical Completion and expiring at the end of the period set out in Item 11;

Direction includes any agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement given by the Principal to the Contractor;

Drawings means the drawings referred to in the Contract and any modification of such drawings notified to the Contractor, and includes any other drawings supplied to the Contractor from time to time;

Freight Broker means a broker or agent in the business of procuring or arranging the engagement of independent contractors by hirers including a person who provides an online platform that facilitates the engagement of contractors by hirers;

GST means the same as it does in the *A New Tax System (Goods and Services) Act 1999* (Cth) and includes any Act or Regulation that deals with goods and services tax;

Insolvency Event means any of the following:

- (a) a party makes a statement that it is insolvent or from which it may be reasonably deduced that the person is insolvent, or a person stops or suspends payment of all or a class of its debts, or threatens to stop or suspend payment of all or a class of its debts;
- (b) a party states that it is unable to pay its debts when they fall due or otherwise suspends payment of its debts;
- (c) a party informs the other party in writing that the party is insolvent or is financially unable to proceed with the Contract;
- (d) a party commits an act of bankruptcy, files or is served with a petition in bankruptcy or bankruptcy notice, or is made bankrupt;
- (e) a party enters into official management, any deed of assignment, scheme of arrangement or composition with creditors or any class or group of creditors;
- (f) an administrator, receiver, controller, provisional liquidator or liquidator is appointed to a party or any of its assets;
- (g) a winding up order is made against a party;
- (h) a party has secured or other creditors take possession, or appoint an agent to take possession, of any assets; or
- (i) any other event or circumstance exists which has an analogous effect to any of the events specified in paragraph (a) to (h) above;

Law means any legislative requirement and includes each of the following as enacted, amended or repealed from time to time:

- (a) Acts, Ordinances, regulations, by laws, orders, awards and proclamations of:
 - (i) the Commonwealth of Australia;
 - (ii) States or Territories; and
 - (iii) any local government authorities;
- (b) the Building Code of Australia;
- (c) requirements, standards and specifications of the Principal in connection with the Works or the carrying out of the WUC, including any Government Code of Practice for the construction industry applicable in the State in which the Works are to be carried out;
- (d) certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction in connection with the performance of the Works;
- (e) Federal or State Awards, or enterprise agreements;
- (f) Principal's Policies and Procedures; and
- (g) any fees and charges payable in connection with the above;

Liability means any debt, obligation, cost (including legal costs), expense, loss, damage, compensation, charge, penalty or liability of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable;

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

Notice means a notice in writing;

OHS Law means the *Occupational Health & Safety Act 2004* (Vic), the *Occupational Health and Safety Regulations 2017* (Vic) and all other applicable occupational health and safety legislation, regulations, rules, Codes of Practice and Australian Standards as amended from time to time;

Open Book Basis means providing, and procuring from subcontractors, a reasonable breakdown in a clear, auditable and transparent manner of the calculation of all relevant costs, including preliminaries, labour, equipment, materials, finance, insurance, discount rates and other costs, including reasonable available source documents and receipts to enable verification of such calculation.

Practical Completion means the stage in execution of the Works when:

- (a) the Works are complete except for minor omissions and defects which, in the opinion of the Principal, do not prevent the Works from being used for their intended purpose, and the rectification of which will not inconvenience the Principal, and
- (b) any permits, certificates, consents, authorities or approvals that are contemplated or called for to undertake or complete the Works or by the Contract Documents or any Law have been delivered to the Principal;

Principal Contractor has the meaning given under the OHS Law;

Principal Contractor Obligations means the obligations required to be discharged or functions required to be performed by a Principal Contractor and all fees and costs associated with those obligations and functions.

Site means the land and other places to be made available to the Contractor by the Principal for the purposes of the Contract;

Specification means the specification referred to in the Contract and identified as a Contract Document in the Contract Details and any modification of such specification thereafter directed pursuant to powers contained in the Contract;

Supplier Code of Conduct means the Supplier Code of Conduct issued by the Victorian Government for suppliers providing works or services to the Victorian Government (as amended from time to time);

Temporary Works means works used in the execution of the WUC but not forming part of the Works;

Tip Truck Owner Driver means an independent contractor who drives a tip truck in connection with excavation work in the building and construction industry;

Variation means any:

- (a) increase, decrease, omission or substitution of any part of the WUC;
- (b) change to the character or quality of any work or materials;
- (c) additional works; and/or
- (d) the removal of any material or work forming part of the Works;

Works means the work to be carried out by the Contractor in accordance with the Contract, including the work described in the Drawings, Specifications and other Contract Documents, and variations allowed by the Contract;

Working Days means Monday to Friday, but not including public holidays.

WUC means the work which the Contractor is or may be required to execute under the Contract, including work described in Drawings, Specifications and other Contract Documents, together with any other minor work which, in the opinion of the Principal, is reasonably necessary for the completion of the Contract or which is reasonably

capable of inference from any of the Contract Documents, and includes variations, remedial work, Constructional Plant and Temporary Works;

1.2 INTERPRETATION

In the Contract:

- (a) the law of Victoria governs the Contract and its interpretation; and
- (b) if any clause of the Contract is deemed to become or becomes void, voidable or unenforceable, it should be read down, or if incapable of being read down, severed and the remaining provisions of the Contract shall continue to have full force and effect.

2. CONTRACT AND ADMINISTRATION

2.1 CONTRACTOR'S PRIMARY OBLIGATIONS

- (a) The Contractor must commence the Works at the earlier of:
 - (i) the date agreed between the Principal and the Contractor; and
 - (ii) the Commencement Date.
- (b) The Contractor must perform and complete the WUC:
 - (i) in accordance with the Contract and any Directions authorised by the Contract;
 - (ii) exercising skill, care and diligence, to the standard expected of a competent and skilled Contractor providing similar works;
 - (iii) without limiting the obligation imposed on the Contractor by clause 2.1(b), do so to the best of its ability;
 - (iv) complying with all of the obligations imposed on it by the Contract and any Law; and
 - (v) so that the Works, when completed, shall be fit for their intended purpose.
- (c) The Contractor accepts all risks arising out of or in connection with the performance and completion of the WUC (except those expressly accepted by the Principal pursuant to the Contract) and shall not be entitled to make any Claim and the Principal shall have no Liability to the Contractor in respect of any such matter.
- (d) **Latent Conditions** - without limiting clause (c), the Contractor shall not be entitled to any payment or extension of time for any physical conditions on the Site or its surroundings, irrespective of whether or not those conditions could have been known or contemplated by an experienced and competent contractor at the date of acceptance of the tender or otherwise.
- (e) **Design** – if specified in the Contract Details, the Contractor must carry out all tasks necessary to design and specify the Works required by the Contract, including preparing any design documentation required by the Contract to the satisfaction of the Principal.

2.2 PRINCIPAL'S PRIMARY OBLIGATIONS

- (a) The Principal must pay the Contractor the amounts owing to the Contractor as prescribed by the Contract at the time and in the manner specified in the Contract.

2.3 ENTIRE CONTRACT

- (a) These conditions of contract together with the other Contract Documents constitute the entire agreement between the parties as to its subject matter.
- (b) The Contract supersedes any prior understanding, communication or agreement between the parties and any prior condition, warranty, indemnity or representation imposed, given or made by a party in relation to the subject matter.

2.4 SUB-CONTRACTING & ASSIGNMENT

- (a) The Contractor must not, without prior written consent of the Principal, subcontract any part of the Works or assign the Contract or any right, title or interest under the Contract. The Principal's consent to subcontract any part of the Works will not relieve the Contractor of any of its obligations under the Contract.

2.5 SUPPLIER CODE OF CONDUCT

- (a) The Contractor acknowledges that:
- (i) the Supplier Code of Conduct is an important part of the State's approach to procurement and describes the State's minimum expectations regarding the conduct of its suppliers;
 - (ii) it has read the Supplier Code of Conduct; and
 - (iii) the expectations set out in the Supplier Code of Conduct are not intended to reduce, alter or supersede any other obligations which may be imposed on the Contractor, whether under the Contract or at law.

2.6 SOCIAL PROCUREMENT FRAMEWORK

- (a) Schedule 1 to this Contract does not apply unless Item 17 states that it applies.

2.7 MODERN SLAVERY

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

3. SITE

- (a) The Principal must give the Contractor, its agents and sub-contractors possession of the Site or sufficient possession of the Site to enable the Works to be carried out by the Date for Practical Completion, but may from time to time impose necessary restrictions on access to the Site and limitations on possession of various parts of the Site.
- (b) The Contractor must apply for and obtain all permits and pay all fees and charges necessary to undertake or complete the Works.
- (c) The Contractor must make good any damage caused to any areas or structures affected by the Works so as to leave them in as good a state of repair as they were in when the Works commenced.

4. VARIATIONS

- (a) The Contractor must not vary the Works other than pursuant to a written request from the Principal explicitly requesting a variation of the Works (**Variation Order**) and has no claim against the Principal if it does so.
- (b) All Variations, other than those due to the Contractor's default, will be valued by:

- (i) prior written agreement between the Principal and the Contractor; or
 - (ii) if there is not prior written agreement, a reasonable amount determined by the Principal,
- and the Contract Price will be adjusted accordingly.

5. QUALITY

- (a) The Contractor must supply all the labour, materials, equipment and utilities (including connections) required to carry out the WUC in accordance with the Contract Documents and any Directions.
- (b) The labour supplied by the Contractor must be suitably qualified and experienced to oversee and carry out the WUC.
- (c) All materials used in the Works must be new (unless otherwise specified), meet recognised industry standards, be free of Defects and comply with the requirements of Law.

6. SECURITY

6.1 PROVISION AND FORM OF SECURITY

- (a) Prior to commencing the Works the Contractor must provide the Principal with security in the amount stated in the Contract Details in the form of an unconditional and irrevocable bank guarantee approved by the Principal from a bank approved by the Principal.

6.2 RECOURSE FOR UNPAID MONEYS

- (a) If:
- (i) the Contractor fails to pay the Principal an amount due and payable pursuant to the Contract within the time provided by the Contract;
 - (ii) the Principal becomes entitled to exercise a right under the Contract in respect of the security; or
 - (iii) the Principal considers it is entitled to damages for breach of Contract,

then the Principal may have recourse to the security provided by the Contractor under the Contract and any remaining deficiency may be deducted or recovered by the Principal from the Contractor as a debt due and payable.

6.3 REDUCTION AND RELEASE OF SECURITY

- (a) The Principal's entitlement to security is reduced, upon Practical Completion, to the percentage stated in the Contract Details, or if no percentage is stated to 50% thereof.
- (b) Within 14 days of Practical Completion, the Principal will, subject to its rights under the Contract, return to the Contractor the percentage of security in excess of its entitlement.
- (c) Within 14 days of the end of the Defects Liability Period (provided the Contractor has complied with all its obligations under the Contract), the Principal must, subject to this Contract, return to the Contractor the balance of the security.

7. RISK, INDEMNITY AND INSURANCE

7.1 OCCUPATIONAL HEALTH & SAFETY

- (a) In performing the Works, the Contractor must comply, and must ensure that its employees, contractors or agents undertaking the Work or attending the Site comply, with all Laws relating to the safety of persons on or about the Site, and the carrying out of Works, including without limitation the OHS Law.
- (b) If specified in Item 13 of the Contract Details, the Contractor accepts appointment as the Principal Contractor and must comply with the obligations imposed on a Principal Contractor and discharge all of the Principal Contractor Obligations.

7.2 RISK

- (a) The Contractor shall transfer and the Principal shall hold title in all materials and equipment forming part of the Works from when the materials and equipment are installed or affixed to the Site.
- (b) From the Commencement Date to the Date of Practical Completion, the Contractor is responsible for and must do all that is reasonably necessary to protect the Works and on-site property (including plant and equipment).
- (c) After the Date of Practical Completion the Contractor remains responsible for the removal of any work or items from the Site or which remain on Site during the Defects Liability Period, and shall be liable for any damage occasioned by the Contractor in the course of completing outstanding work or complying with its obligations under clause 10.

7.3 REINSTATEMENT

- (a) If loss or damage occurs to anything for which the Contractor is responsible under clause 7.2, the Contractor shall at the Contractor's own cost and with all possible expedition, rectify such loss or damage or, at the option of the Principal, indemnify the Principal for the cost of rectifying such loss or damage so that (where applicable) the WUC conforms in every respect with the provisions of the Contract.
- (b) If the Contractor rectifies loss or damage pursuant to clause (a), and such loss or damage is caused by:
 - (i) a breach of the Contract by the Principal;
 - (ii) any negligent act or omission of the Principal, its agents, employees, or consultants;
 - (iii) war, invasion, act of foreign enemies, hostilities (whether war be declared or not), terrorism, civil war, rebellion, revolution, insurrection or military or usurped power, martial law, or confiscation by order of any Government or public authority; or
 - (iv) use or occupation by the Principal, its agents or employees or other contractors (not being employed by the Contractor) of any part of the Works or the Temporary Works where such use or occupation is not in accordance with the Contract,

then such rectification by the Contractor shall be deemed a variation and valued in accordance with clause 4(b).

- (c) To the extent that loss or damage is occasioned by a combination of the causes stated in clause 7.3(b) and other causes, valuation made under clause 4(b) shall take into account the proportional responsibility of the Contractor and the Principal.

7.4 RELEASE AND INDEMNITY

- (a) The Contractor indemnifies the Principal, its officers, employees, servants, agents (including in this clause 7.4 the Principal's consultants, sub-consultants and their respective employees and agents) against all Claims and Liabilities that may be taken or made against the Principal:
 - (i) for physical loss of or damage to the property of the Principal;
 - (ii) for personal injury to or death of any person or damage; and
 - (iii) any losses or third party claims against the Principal pursuant to section 157 of the *Water Act 1989* (Vic), that may be incurred or suffered in connection with any act, matter or thing done, permitted or omitted to be done by the Contractor in the execution or purported execution of the Contractor's rights or obligations under the Contract, including that:
 - (iv) arising from the carriage of goods and materials by the Contractor or any subcontractor;

- (v) incurred by the Principal due to disturbance to or interference with its use of the Site or the carrying on of its business or the work to be carried out by it at the Site during the performance of the WUC by the Contractor (including loss of profit, loss of use, cost and replacement, production, business interruption and other indirect or consequential costs); and

- (vi) incurred by reason of any failure by the Contractor or the Contractor's subcontractors, employees or agents to comply with the Law or this Contract.

- (b) The Contractor's liability to indemnify the Principal shall be reduced proportionately only to the extent that any negligent act or omission of the Principal, its servants or agents, contributed to the loss or liability.

- (c) The Contractor shall not be entitled to make any Claim and the Principal shall have no Liability to the Contractor where such a Claim arises from or is in connection with the failure by the Contractor to comply with its obligations under this Contract.

7.5 INSURANCE

- (a) **Insurance of the Works** – Before the Contractor commences the WUC, The Principal must insure the WUC and shall provide the Contractor with a certificate of currency upon request.

- (b) **Insurance of Employees** – Before commencing the WUC, the Contractor must insure, and ensure that every subcontractor is similarly insured, against statutory and common law liability for death of or injury to persons employed by the Contractor. Where permitted by law, the insurance policy must be extended to provide indemnity for the Principal's statutory liability to the Contractor's employees.

- (c) **Public Liability Insurance** – Where stated in Item 9 of the Contract Details, before commencing the WUC, the Contractor shall effect and maintain, a public liability insurance policy for the amount and duration set out in the Contract Details. The public liability insurance policy must be in the joint names of the Principal and the Contractor and in a form acceptable to the Principal.

- (d) **Professional Indemnity Insurance** – Where stated in Item 9 of the Contract Details, before commencing the WUC, the Contractor shall effect and maintain professional indemnity insurance for the amount and duration set out in the Contract Details, and in a form acceptable to the Principal.

8. CORONAVIRUS (COVID-19)

- (a) The Contractor must:
 - (i) proactively monitor the potential impacts of Coronavirus (COVID-19) on the WUC;
 - (ii) without limiting its other obligations under this Contract, advise and consult with the Principal if it becomes aware of any activities which may possibly be impacted by Coronavirus (COVID-19) or related matters;
 - (iii) implement reasonable mitigation measures to minimise any potential impact of Coronavirus (COVID-19) on the WUC;
 - (iv) sequence the WUC and employ construction methodologies and practices (including the procurement of materials) that minimise the impacts of Coronavirus (COVID-19) on the WUC;
 - (v) cooperate with the Principal to achieve the objectives in subclauses (i) to (iv) above; and
 - (vi) proactively and progressively provide all information to the Principal in connection with

Coronavirus (COVID-19) and the impacts of Coronavirus (COVID-19) on the WUC.

- (b) Without limiting clause 8(a), the Contractor represents and warrants to the Principal that as at the date of this Contract, the Contractor has taken into account (and the Contract Price includes full allowance for) the impacts of Coronavirus (COVID-19) on the WUC known to the Contractor or which should have been known to an experienced, prudent and competent contractor engaged in respect of works of a similar nature to the Works.
- (c) The Contractor acknowledges and agrees that despite anything to the contrary in this Contract (including under clause 9), its sole entitlement to additional time or cost relief arising out of or in connection with Coronavirus (COVID-19) and the impacts of that disease are set out in this clause 8.
- (d) Provided that the Contractor:
- (i) is delayed by a cause described in Item 14 whether occurring before, on or after the Date for Practical Completion;
 - (ii) complies with its obligations under clause 9;
 - (iii) or its subcontractors have not caused or contributed to the event giving rise to the delay; and
 - (iv) has complied with this clause 8,
- then the Contractor will be entitled to claim an extension of time for Practical Completion pursuant to clause 9.
- (e) Where the Contractor has been granted an extension of time under clause 9 for delay or disruption caused by an event referred to in clause 8(d)(i) which expressly identified in Item 14 as giving rise to an entitlement under clause 8(e), the Principal shall pay to the Contractor the fixed percentage in Item 15 of such extra direct costs as are necessarily incurred by the Contractor by reason of the delay (excluding any amount on account of profit or overheads), demonstrated on an Open Book Basis which shall be capped on a daily basis and in the aggregate at the amount set out in Item 16.
- (f) Nothing in this clause 8 shall oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract.
- (g) If a Law in connection with Coronavirus (COVID-19):
- (i) comes into effect after the date of this Contract; and
 - (ii) necessitates a change to the Contractor's method of working or its obligations under this clause 8,
- the Contractor must notify the Principal and the Superintendent and wait for a direction from the Principal prior to performing the change (**Change of Requirement Notice**).
- (h) Any Change of Requirement Notice shall be in writing and detail:
- (i) the increased or reduced cost to the Contractor (if any) of performing the change, directly resulting from the change in Laws;
 - (ii) the impact (if any) that performing the change would have on the Contractor achieving Practical Completion by the Date for Practical Completion; and
 - (iii) the obligations under the Contract that the Contractor would not be able to comply with (if any) if the Principal does not direct the Contractor to perform the change (including any part of the Works which would be prohibited as a consequence of the change in Laws).
- (i) Following receipt of a Change of Requirement Notice or in the absence of a Change of Requirement Notice, if the Principal

elects, the Principal may (in the Principal's absolute discretion) direct the Contractor to either:

- (i) perform the whole or part of the change, in the manner directed by the Principal (if any); or
 - (ii) not perform the change, to the extent permitted by law.
- (j) Where the Principal directs the Contractor to perform the change, to the extent that complying with a direction from the Principal causes the Contractor to incur more or less cost than otherwise would have been incurred, the difference will be valued by the Superintendent as a variation in accordance with clause 4 and will be limited to any additional on-site preliminaries and shall not include profit or overheads.
- (k) Where the Principal directs the Contractor not to perform the change to the Works, the Contractor shall not perform that change and shall be relieved of its obligations under the Contract to the extent:
- (i) arising from the change the subject of the relevant Change of Requirement Notice; or
 - (ii) where the Principal does not agree with the Change of Requirement Notice, to the extent the Principal determines that any obligations cannot be complied with as a result of the Principal's direction not to perform the change.
- (l) The reduction in the scope of the Works resulting from the Contractor being relieved of its obligations under clause 8(k) will be valued as a variation in accordance with clause 4.
- (m) Except to the extent that the Contract provides for reimbursement in respect of a Law referred to in clause 8(j) the Contractor shall bear the cost of complying with the Law, whether the Law existed at the time of tendering or not.

9. TIME

9.1 COMPLETION

- (a) The Contractor will commence Work on the Commencement Date and must bring the Works to Practical Completion by the Date for Practical Completion.
- (b) Upon Practical Completion the Contractor shall give possession of the Site and the Works to the Principal.

9.2 EXTENSION OF TIME

- (a) **Notification** - The Contractor must, as soon as it reasonably foresees that anything may delay the Works, promptly Notify the Principal of the cause and likely length of the possible delay.
- (b) **Extension** - If (and as a condition precedent to its entitlement) the Contractor, within seven days of the date on which it knew or ought to have known of a delay commencing, gives the Principal a claim for an extension of time, stating the number of days claimed, and the cause of the delay is any of the following:
- (i) delay or disruption (other than that permitted by the Contract) caused by the Principal, or any of the Principal's agents, employees, consultants or other contractors;
 - (ii) any breach of contract by the Principal;
 - (iii) a Variation, other than one due to the Contractor's default;
 - (iv) a suspension of the Works under the *Building and Construction Industry Security of Payment Act 2002* (Vic) or suspension by the Principal under clause 9.3, provided the suspension is not a consequence of any act, omission or default by the Contractor, any of its employees, consultants or subcontractors,

then the Contractor shall be entitled to an extension of time for Practical Completion.

- (c) If the Contractor is entitled to an extension of time, the Principal shall, within 14 days after receipt of the Contractor's Notice claiming an extension of time, grant a reasonable extension of time for Practical Completion, or if no such extension is granted, Notify the Contractor of the reasons why the claim was denied.
- (d) An extension of time granted pursuant to this clause 9.2 shall be the Contractor's sole remedy in respect of any delay or disruption in connection with the Works and the Contractor shall not be entitled to make any Claim and the Principal shall have no Liability to the Contractor in respect of any delay or disruption, whether in respect of a delay for which an extension of time has been granted under this clause 9.2 or not.

9.3 SUSPENSION

- (a) The Principal may, at any time during the execution of the WUC, Direct the Contractor to suspend whole or part of the WUC for any reason whatsoever, and such suspension will not entitle the Contractor to any additional payment but may be grounds for an extension of time under clause 9.2.

9.4 LIQUIDATED DAMAGES

- (a) The Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Contract Details for every day after the Date for Practical Completion (as extended) until Practical Completion is achieved. The Contractor's liability for liquidated damages shall be a debt due from the Contractor to the Principal. The Contractor's liability for liquidated damages under this clause (a) is not contingent upon the Principal having issued a Notice to the Contractor certifying the liquidated damages due and payable.
- (b) The Contractor acknowledges that the rate of liquidated damages represents a genuine pre-estimate of the Principal's loss and does not constitute a penalty.

10. DEFECTS RECTIFICATION

- (a) The Principal may, at any time up to Practical Completion and during the Defects Liability Period, conduct performance reviews of the Works. The Principal may Notify the Contractor of any failure by the Contractor to comply with the Contract.
- (b) The Contractor must, within a reasonable time (but not later than 30 days) from receipt of a Notice from the Principal, rectify any Defect Notified to it before or at Practical Completion, or during the Defects Liability Period.
- (c) If the Contractor fails to rectify any Defect in accordance with clause (b), the Principal may rectify the Defect and any resulting Liability incurred by the Principal in so doing will be a debt due from the Contractor to the Principal.

11. FINANCIAL MATTERS

11.1 INVOICING AND PAYMENTS

- (a) **Payment of Contract Price** – The Principal must pay the Contractor the Contract Price. The parties acknowledge and agree that the Contract Price is a fixed lump sum payable in accordance with the Contract, and notwithstanding anything to the contrary in the Contract, may only be increased as a result of a Variation.
- (b) **Payment Claims** – The Contractor must submit a valid payment claim to the Principal by the time specified in Item 12 of the Contract Details identifying:
 - (i) the Works performed to which the payment claim relates;
 - (ii) the amounts previously paid by the Principal to the Contractor;
 - (iii) the amount that the Contractor claims to be due in relation to the work to which the payment claim relates; and

- (iv) any other information that the Principal reasonably requires.

The payment claim must include a statutory declaration in the form set out in Schedule 3 certifying that all subcontractors and employees engaged by the Contractor in connection with the Works have been paid.

- (c) Within 10 Working Days of receipt of a payment claim from the Contractor pursuant to clause 11.1(b), the Principal must issue the Contractor with a payment certificate which:
 - (i) identifies the invoice to which it relates;
 - (ii) states the amount of the payment the Principal assesses and intends to pay the Contractor;
 - (iii) states any amount the Principal assesses is due to it from the Contractor; and
 - (iv) if the amount of the payment certificate is less than the amount claimed in the Contractor's payment claim, indicates why the amount is less.

Notwithstanding any other term of this Contract, the Principal is not obliged to make any payment unless the Principal receives a payment claim that complies with clause 11.1(b).

- (d) The Contractor must, within 2 Working Days of the issue of the payment certificate, give to the Principal a valid Tax Invoice for the amount of the payment certificate.
- (e) The Principal is not obliged to make a payment under clause 11.1(d) unless the Contractor has:
 - (i) provided the Principal with security for the amount (if any) required under clause 6.1; and
 - (ii) effected the insurance required by the Contract and (if requested) provided evidence of this to the Principal.
- (f) Subject to clauses 11.1(g) and 11.1(h), the Principal must, within 10 Working Days of the issue of the Tax Invoice in compliance with this Contract, pay to the Contractor the amount of the Tax Invoice.
- (g) In respect of an Overdue Amount, that has been outstanding for more than 10 Business Days from the date of receipt of the Tax Invoice, the Principal will, on demand by the Contractor, pay interest on any Overdue Amount at the rate set out in Item 13.
- (h) In the event that any amount set out in a Tax Invoice under clause 11.1(d) is disputed:
 - (i) the parties must use best endeavors to co-operatively resolve the dispute otherwise clause 14 applies;
 - (ii) the time period stated in clause 11.1(d) is suspended until the amount payable under the Tax Invoice is agreed between the parties; and
 - (iii) once resolved, the Contractor must issue an updated Tax Invoice within 2 Working Days and the Principal must make payment for the updated amount on the Tax Invoice within 10 Working Days.

- (i) **Effect of Payment of Invoices** - The issuing of a valuation certificate or payment of any amount of an invoice by the Principal is not evidence or an admission that the Works have been performed in accordance with the Contract, but is to be taken only as a payment on account only.

11.2 RIGHT OF THE PRINCIPAL TO RECOVER MONEY

- (a) The Principal may deduct from moneys due to the Contractor the amount of any entitlement of the Principal from the Contractor, whether under the Contract or otherwise and if those moneys are insufficient, the Principal may, subject to clause 6.2, have recourse to the security provided by the Contractor under the Contract.

11.3 TIME FOR PAYMENT BY THE CONTRACTOR

- (a) Where money is due from the Contractor to the Principal (including money due otherwise than under this Contract), the Contractor must pay such money to the Principal within 10 Working Days of receipt of a written request for payment from the Principal.

11.4 MINIMUM RATE OF PAY FOR TIP TRUCK OWNER DRIVERS

- (a) Irrespective of who engages them, the Contractor must ensure that any Tip Truck Owner Driver carrying out the WUC is paid according to the following:
- (i) an hourly rate that is at least at the relevant rate in the Rates and Cost Schedules for Tip Truck Owner Drivers developed by the Transport Industry Council (**Relevant Rate**) plus any road tolls and Freight Broker fees;
 - (ii) a per load rate based on a reasonable estimate of the number of hours likely to be required to complete the specific job, taking into account all relevant circumstances and based on what a competent and experienced person in the position of the person engaging the Tip Truck Owner Driver would consider to be reasonable, multiplied by the Relevant Rate, plus any agreed incentive component which may be reduced in proportion to any shortfall in the load moved, plus any road tolls and Freight Broker fees; and
 - (iii) if the Tip Truck Owner Driver is underpaid, the Contractor must make good that underpayment or otherwise ensure that it is paid.

12. INTELLECTUAL PROPERTY

- (a) Intellectual property in the Contract Documents, the Contractor's methods of working for the Works (and related documents) and the documents prepared by the Contractor in the performance of the Works vest in the Principal, and the Contractor must do everything necessary to perfect such vesting.
- (b) Each party retains ownership of intellectual property rights in any Background IP.
- (c) The Contractor grants to the Principal an irrevocable, non-exclusive, perpetual, transferable, royalty-free license (including the right for the Principal to sub-license such rights to a third party) to use the Contractor's Background IP for the WUC and to obtain the benefit of the Works. Such licence must also include any subsequent repairs to, maintenance or servicing of (including the supply of replacement parts), or additions or alterations to, the Works.
- (d) The Principal grants the Contractor a non-exclusive licence to use the Principal's Background IP to the extent necessary for the Contractor to perform the WUC.

13. CONFIDENTIALITY

- (a) This Contract and the Contract Documents are confidential. The Contractor must not disclose any of this Contract or the Contract Documents without the prior written consent of the Principal, except to the extent that the disclosure is required for the Contractor to:
- (i) carry out its obligations under the Contract;
 - (ii) comply with any applicable laws or any requirement of any regulatory body (including any relevant stock exchange); or
 - (iii) enable the Contractor to obtain professional legal, financial or insurance advice.
- (b) The Contractor must promptly return to the Principal all copies of the Contract Documents at the end of this Contract.
- (c) Without limiting clause 13(a), the Contractor must:
- (i) not:

- (A) disclose any information concerning the Contract or the Contract Documents for distribution through any communications media;
 - (B) not make any public disclosures, announcements or statements (including on any website) in relation to the Contract or the Contract Documents; or
 - (C) not display any information on the Site in relation to the Contract or the Contract Documents, without the prior written consent of the Principal;
- and
- (ii) refer to the Principal any enquiries from any media concerning the Contract or the Contract Documents.
- (d) The Principal may publish (on the internet or otherwise) the name of the Contractor and the Contract Price together with conditions of this Contract generally.

14. DEFAULT AND TERMINATION

- (a) **Termination for Contractor's default** - If the Contractor is in breach of the Contract and the Contractor has failed, within seven days of a Notice by the Principal to the Contractor specifying the alleged breach, to remedy the breach, the Principal may by Notice:
- (i) suspend all payments or terminate the Contract; or
 - (ii) take the whole or part of the work which remains to be completed out of the Contractor's control and complete the Works by any method.
- (b) If the Principal exercises its rights under clause 13(a), any resulting Liability incurred by the Principal will be a debt due from the Contractor to the Principal under clause 11.3.
- (c) **Termination for Insolvency Event** - Either party may terminate the Contract, with immediate effect, by written Notice to the other party if an Insolvency Event occurs with respect to that other party.
- (d) **Termination by the Principal** - If the Principal terminates the Contract, it may:
- (i) exercise all legal and equitable rights available to the Principal; and
 - (ii) require the Contractor to:
 - (i) novate or assign any subcontracts to the Principal;
 - (ii) deliver all documentation necessary to enable the Principal to perform the Contractor's obligations under this Contract; and
 - (iii) comply with the provisions of clause 12.

15. DISPUTES

15.1 DISPUTE RESOLUTION

- (a) If a difference or dispute between the parties arises in connection with the subject matter of the Contract then either party shall, by hand or by registered post, give the other party a written Notice of dispute adequately identifying and providing details of the dispute.
- (b) Within 14 days after receiving a Notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on methods of doing so.
- (c) If the dispute has not been resolved within 28 days of service of the Notice of dispute, that dispute may be referred to litigation.
- (d) Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the Contract or to seek injunctive or urgent declaratory relief.

15.2 CONTINUING OBLIGATIONS

Notwithstanding any dispute or difference that arises between the parties in relation to the Contract, or any

proceeding issued in respect thereof, the Principal and the Contractor shall continue to perform the Contract.

SCHEDULE 1 – SOCIAL PROCUREMENT FRAMEWORK

This Schedule 1 does not apply unless Item 17 states that it applies

1 DEFINITIONS

In this Schedule:

Kinaway means Kinaway Chamber of Commerce Victoria Limited (ACN 600 066 199).

Map for Impact means the online map produced by the Victorian Social Enterprise Mapping Project (accessible at <https://mapforimpact.com.au/>), as amended from time to time.

Social Benefit Supplier means a business that operates and has business premises in Victoria and meets one or more of the following criteria: it is a Victorian Social Enterprise; it provides 'supported employment services' as defined in section 7 of the *Disability Services Act 1986* (Cth), and operates and has a business premises in Victoria; or it is a Victorian Aboriginal business and is verified by Supply Nation or Kinaway.

Social or Sustainable Outcome means an outcome listed in Tables 1 and 2 of the Social Procurement Framework.

Social Procurement Commitment means a commitment to deliver a Social or Sustainable Outcome through an individual procurement activity, as identified in the Social Procurement Commitment Schedule.

Social Procurement Commitment Schedule means the plan set out in Attachment 1 to this Schedule (and includes the Social Procurement Commitments).

Social Procurement Framework means Victoria's Social Procurement Framework, as amended from time to time (accessible at <https://www.buyingfor.vic.gov.au/victorias-social-procurement-framework>).

Social Procurement Performance Report means a report submitted by a Contractor to the Superintendent, which details the Contractor's performance against the Social Procurement Commitments made in the Contractor's Social Procurement Commitment Schedule.

Social Traders means Social Traders Limited (ACN 132 665 804).

Supply Nation means Australian Indigenous Minority Supplier Office Limited (trading as Supply Nation) (ACN 134 720 362).

Victorian Aboriginal business means a business that is at least 50 per cent Aboriginal and/or Torres Strait Islander-owned, undertakes commercial activity and operates and has business premises in Victoria.

Victorian Social Enterprise means an organisation that is certified by Social Traders, and operates and has a business premises in Victoria; or is listed on the Map for Impact.

2 SOCIAL PROCUREMENT COMMITMENT SCHEDULE

- (a) The Contractor must, in performing its obligations under this Contract, comply with the Social Procurement Commitment Schedule (including the Social Procurement Commitments).
- (b) The Contractor acknowledges and agrees that the Social Procurement Commitment Schedule (including the Social Procurement Commitments) applies during the term of the Contract, any extensions to the term and until all of its reporting obligations as set out in clause 3 of this Schedule are fulfilled.
- (c) The Contractor agrees that the Social Procurement Commitments will bind the Contractor in relation to:
 - (i) the Contract as a whole (or to all of the works specified in the Contract), including any change of scope during the term of the Contract; and
 - (ii) all work conducted off site provided that the work has been specified as part of the Contract.
- (d) The Contractor's failure to undertake all reasonable measures to achieve compliance with clauses 2 to 4 of this

Schedule may be determined by the Principal to constitute a substantial breach of this Contract.

- (e) The Contractor must ensure that any sub-contracts entered into by the Contractor, or by sub-contractors of any tier, in relation to WUC, contain clauses requiring sub-contractors of any tier to:
 - (i) comply with the Social Procurement Commitments to the extent that it applies to work performed under the sub-contract;
 - (ii) provide all necessary information to the Contractor so that the Contractor can fulfil its reporting obligations under clause 3 of this Schedule; and
 - (iii) permit the Principal to exercise its verification and inspection rights under clause 4 of this Schedule.

3 REPORTS

- (a) The Contractor must submit written Social Procurement Performance Reports to the Superintendent outlining its performance against the Social Procurement Commitment Schedule at the frequency set out in Item 17.
- (b) The Social Procurement Performance Report submitted in accordance with clause 3(a) of this Schedule must:
 - (i) be in a form satisfactory to Principal (acting reasonably); and
 - (ii) include all supporting information reasonably required by the Principal to verify the contents of the Social Procurement Performance Report.
- (c) Social Procurement Performance Reports must include:
 - (i) details specifying the Contractor's performance in complying with the Social Procurement Commitment Schedule; and
 - (ii) any reasons for deviations from the Social Procurement Commitment Schedule.
- (d) In addition to the Social Procurement Performance Reports, the Contractor must submit:
 - (i) a final Social Procurement Performance Report within 2 months of the Date of Practical Completion or the date the Contract is completed, whichever is earlier; and
 - (ii) a statutory declaration made by the Contractor declaring that the contents of the final Social Procurement Performance Report are true and correct, which must be submitted together with the final Social Procurement Performance Report.
- (e) Where maintenance or ongoing service components form part of the WUC, the final Social Procurement Performance Report must be submitted at the time at which the primary substance of the WUC has been practically completed (excluding any ongoing maintenance or service work).

4 VERIFICATION OF CONTRACTOR'S COMPLIANCE WITH SOCIAL PROCUREMENT COMPLIANCE PLAN

- (a) The Contractor agrees that the Principal will have the right to inspect the Contractor's records in order to verify compliance with the Social Procurement Commitment Schedule.
- (b) The Contractor must:
 - (i) permit the Principal, or its duly authorised representative, from time to time during ordinary business hours and upon reasonable notice, to inspect, verify and make copies at the Principal's expense of all records maintained by the Contractor

for the purposes of this Contract at the Contractor's premises, or provide copies of those records to the Superintendent at the Principal's request;

- (ii) permit the Principal, or its duly authorised representative, from time to time to undertake a review of the Contractor's performance in accordance with the Social Procurement Commitment Schedule; and
 - (iii) ensure that its employees, agents and sub-contractors give all reasonable assistance to any person authorised by the Principal to undertake such audit or inspection as described in (i) and (ii) above.
- (c) The Contractor acknowledges and agrees that the Principal and the Principal's duly authorised representative are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Contractor's compliance with the Social Procurement Commitment Schedule.
- (d) The obligations set out in this clause 4 are in addition to and do not derogate from any other obligation under this Contract.

5 USE OF INFORMATION

The Contractor acknowledges and agrees that the statistical information contained in the Social Procurement Commitment Schedule and the measures of the Contractor's compliance with the Social Procurement Commitment Schedule as reported will be:

- (a) provided by the Principal to the Department of Treasury and Finance; and
- (b) considered in the assessment or review of the Contractor's eligibility to tender for future Victorian Government Contracts.

