



Contract No. [Click here to enter text.](#)

Formal Instrument of Agreement

[Click here to enter text.](#)

CONTRACT EXECUTION

DATED [CLICK HERE TO ENTER A DATE.](#)

BETWEEN

Hepburn Shire Council of Daylesford, Victoria, 3460 (Council)

AND

[Click here to enter text.](#) (the Contractor)

It is agreed that this Formal Instrument of Agreement, the Standard Contract - Goods and/or Services and the Request for Tender - Conditions and Response Form together comprise and evidence the Contract between the parties (the Contract).

ENTIRE AGREEMENT

The Contract constitutes the entire agreement between Council and the Contractor with respect to the subject matter of the Contract. The Contract supersedes and extinguishes all prior agreements, representations and understandings between the parties.

CONTRACT INFORMATION

The Supervisor is: [Click here to enter text.](#)

The persons who must perform the Services are: [Click here to enter text.](#)

The amount of the bank guarantee (if requested) is: [\\$Click here to enter text.](#)

CONTRACT PAYMENTS

The basis on which the payments are to be made to the Contractor for the performance of the Services, other than with respect to variations, is set out below.

Alternative A

Council is not required to make any payment to the Contractor until the completion of the Services in accordance with the Contract. On completion of the performance of the Services in accordance with the Contract, the Contractor must issue to Council a valid tax invoice for the amount payable to the Contractor. Council must make payment to the Contractor within thirty days of the commencement of the month following the month in which the tax invoice is received by Council.

Alternative B

Council must make the payments set out below to the Contractor on the achievement of each milestone indicated in accordance with the Contract.

| Milestone | Amount (exclusive of GST) or percentage of lump sum payable |
|---|---|
| Click here to enter text. | \$Click here to enter text. |

The Contractor must issue to Council a tax invoice for the amount payable to the Contractor following the achievement of each milestone. Council must make payment to the Contractor within thirty days of the commencement of the month following the month in which the tax invoice is received by Council.

TRUSTEE WARRANTY

If the Contractor has entered into the Contract as trustee of a trust ("Trust"), the Contractor warrants that:

it is the only trustee of the Trust and is not aware of any action to remove it as trustee of the Trust and will not take any action to resign as trustee before the completion of all obligations of the Contractor under the Contract;

the trust deed of the Trust discloses all of the terms of the Trust;

it has power under the trust deed of the Trust to enter into and observe its obligations under this Contract and it has entered into this Contract in its capacity as the trustee of the Trust and has formed the view that it is prudent to enter into this Contract;

it has in full force and effect the authorisations necessary to enter into this Contract, perform obligations under this Contract and allow this Contract to be enforced;

it is not in material default under the trust deed of the Trust and is not aware of any action proposed to terminate the Trust;

the entry into and the performance of this Contract is for the benefit of the beneficiaries of the Trust, whose consents (if necessary) have been obtained; and

it has a right to be indemnified fully out of the trust assets in respect of all of the obligations and liabilities incurred by it under this Contract.

This clause shall operate whether or not the Contractor has also entered into the Contract in its own right.

Executed by the parties on the date set out at the commencement of this Formal Instrument of Agreement:

Executed by the parties on the date set out at the commencement of this Formal Instrument of Agreement:

1 Execution clause for Council (strike out alternatives which do not apply):

1.1 If the Contract must be signed under seal:

THE COMMON SEAL of)
HEPBURN SHIRE COUNCIL was)
affixed on this)

day of 2015

on the authority of the Council and
signed by:

Mayor:

Chief Executive Officer:

1.2 If the Contract can be signed under delegation:

Executed by HEPBURN SHIRE COUNCIL

Pursuant to Instrument of Delegation dated 16 June 2015:-

Aaron van Egmond

Chief Executive Officer

2 Execution clause for the Contractor (strike out alternatives which do not apply):

2.1 If the Contractor is a company it must execute this Contract under seal:

EXECUTED by _____ in accordance with _____)
section 127 of the *Corporations Act 2001*)
by: _____)

Director:

Full Name:

Usual Address:

Director:

Full Name:

Usual Address:

2.2 If the Contractor is an individual:

SIGNED SEALED AND DELIVERED by _____)
in the presence of: _____)
_____)

Witness:

2.3 If the Contractor is a partnership (add extra execution clauses as necessary):

_____)
SIGNED SEALED AND DELIVERED by _____)
in the presence of: _____)
_____)

Witness:

_____)
SIGNED SEALED AND DELIVERED by _____)
in the presence of: _____)
_____)

Witness:



Contract No. [Click here to enter text.](#)

Standard Contract - Goods and/or Services

[Click here to enter text.](#)

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1 DEFINITIONS

In this Contract, the following terms shall, if not inconsistent with the context, have the meanings indicated:

Adjustment has the meaning set out in section 195-1 of the GST Act;

Adjustment Note has the meaning set out in section 195-1 of the GST Act;

Business Day means a day that is not a Saturday or Sunday or a day that is wholly or partly observed as a public holiday throughout Victoria;

Conflict of Interest means any circumstance, condition or thing which may adversely affect the Contractor's ability to perform the Services efficiently, effectively and in accordance with the highest standards of probity, integrity and honesty, including, without limitation, any interest of a Relevant Party;

Contractor's Representative has the meaning ascribed to it by clause 6.1;

Contract means the Contract evidenced by the Contract Documents;

Contract Documents means the documents specified in the Formal Instrument of Agreement;

GST means the goods and services tax within the meaning of the GST Act;

GST Act means the *A New Tax System (Good and Services Tax) Act 1999* (Cth);

Insurance Act means the *Insurance Act 1973* (Cth);

Intellectual Property means copyrights, patents, trademarks, designs (registered or unregistered), trade secrets and know how;

Municipal District means the municipal district of Council;

OH&S means occupational health and safety;

Party's Representative means the Supervisor in respect of Council and the Contractor's Representative in respect of the Contractor;

Personal Information means information or an opinion (including information or an opinion forming part of a database) whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion;

Public Holiday means a public holiday under the *Public Holidays Act 1993* applying in the Municipal District;

Relevant Party means:

the Contractor and the Contractor's employees, agents or sub-contractors;

an associate of the Contractor or the Contractor's employees, agents or sub-contractors;

a company in which the Contractor or the Contractor's employees, agents or sub-contractors are involved, whether as an officer, shareholder, employee or otherwise; or

any other person with whom the Contractor or Contractor's employees, agents or sub-contractors has or have a financial or business association, whether directly or indirectly;

Security of Payment Act means the *Building and Construction Industry Security of Payment Act 2002*;

Services means the performance of work, the supply of materials and all other things required to be done under this Contract by the Contractor as indicated in the Contract Documents and includes any matters reasonably to be inferred from this Contract or trade usage;

Supervisor means -

the person nominated as such in the Formal Instrument of Agreement; or

any other person nominated by Council from time to time in writing -

and includes any person:

to whom powers or functions have been delegated by a person referred to in the definition of Supervisor;

the authority of whom the Contractor has been notified; and

in respect of whom no notice of the revocation of his or her authority has been given to the Contractor;

Tax Invoice has the meaning set out in section 195-1 of the GST Act; and

Taxable Supply has the meaning set out in section 195-1 of the GST Act.

2 CONSTRUCTION OF TERMS

In this Contract, unless inconsistent with the context:

headings and underlinings are for convenience only and do not affect interpretation;

words expressed in the singular include the plural and vice versa;

a reference to a gender includes a reference to each other gender;

where a term is assigned a particular meaning, other grammatical forms of that term have a corresponding meaning;

a reference to a person includes a reference to a firm, corporation or other corporate body and vice versa;

a reference to a party in a document includes that party and its legal representatives, successors, permitted assigns, receivers, receivers and managers, liquidators and administrators;

a reference to any Act includes all regulations, proclamations, planning schemes, local laws and by-laws made under that Act, a reference to any Act, regulation, planning scheme, proclamation, local law or by-law includes all Acts, regulations, planning schemes, proclamations, local laws and by-laws amending, consolidating or replacing same;

a reference to any document includes a reference to that document as amended, rectified or replaced from time to time and to any document so amending, rectifying or replacing the document; and

a reference to the Contractor includes, where appropriate, the Contractor's employees and sub-contractors and the employees of such sub-contractors.

3 INTERPRETATION

3.1 Precedence

Should this Contract contain any discrepancy or inconsistency, the Supervisor must make a determination resolving the discrepancy or inconsistency.

No determination by the Supervisor under this clause shall be construed as giving rise to a variation under clause 11.1.

3.2 Whole understanding

This Contract constitutes the whole understanding between the parties and embodies all terms and conditions under which the Services are to be performed by the Contractor. All previous negotiations and understandings between the parties on this subject matter shall cease to have effect from the date of this Contract.

3.3 Governing law

The law of the State of Victoria governs this Contract and any legal proceedings under this Contract.

3.4 Status of Contractor

If the Contractor consists of two or more parties, this Contract shall bind each of them severally and jointly.

3.5 No waiver

No time or other indulgence granted by Council to the Contractor or any variation of the terms and conditions of this Contract or any judgment or order obtained by Council against the Contractor will in any way amount to a waiver of any of the rights or remedies of Council in relation to the terms of this Contract.

3.6 No fettering of Council's powers

It is acknowledged and agreed that this Contract does not fetter or restrict the powers or discretions of Council in relation to any powers or obligations it has under any Act, regulation or local law that may apply to the Services, the Contractor or the Municipal District.

3.7 The Supervisor

The Supervisor must exercise any powers conferred on the Supervisor (including the making of a determination on any issue) under clauses 3.1, 7.2, 11.2, 12.3.1, 12.3.2 and 18.2.3 reasonably and independently of the parties. Except as expressly provided in this clause or elsewhere in this Contract, the Supervisor may exercise any powers conferred, and perform any other duties imposed or functions conferred on the Supervisor in Council's interests.

3.8 Survival of rights and obligations

The rights and obligations of the parties under clauses 5.8, 8, 9, 10.2, 10.5, 12.3, 14.1.3, 14.2, 14.3, 14.4, 14.5, 16.2, 17 and 18 shall survive the termination or expiry of this Contract.

3.9 Contract interpretation

No rule of contract interpretation must be applied in the interpretation of this Contract to the disadvantage of a party on the basis that it prepared or put forward any document comprising part of this Contract.

3.10 Amendments

This Contract may be amended only by a written instrument duly executed by the parties.

3.11 Severance

If a provision, or part of a provision, in this Contract is held to be illegal, invalid, void, voidable or unenforceable, that provision, or part of a provision, must be read down to the extent necessary to ensure that it is not illegal, invalid, void, voidable or unenforceable.

If it is not possible to read down a provision, or part of a provision, as required in this clause, that provision, or part of a provision, is severable without affecting the validity or enforceability of the remainder of this Contract.

3.12 Counting of days

Where under any provision of this Contract, any notice is to be given or any payment is to be made on a Saturday, Sunday or Public Holiday, the notice may be given or the payment made on the next day which is not a Saturday, Sunday or Public Holiday.

3.13 Counterparts

This Contract may be executed in any number of counterparts, all of which taken together constitute one (1) instrument.

3.14 Currency

In this Contract, a reference to "\$" or "dollars" is a reference to Australian dollars.

3.15 No partnership

Nothing in this Contract shall operate or be deemed to create a partnership between any of the parties to this Contract.

3.16 Agency

The Contractor must not:

- 3.16.1 hold itself out as being an agent of Council or being in any other way entitled to make any contract on behalf of Council or to bind Council to the performance, variation, release or discharge of any obligation; or
- 3.16.2 hold out its employees, sub-contractors or agents, or allow its employees, sub-contractors or agents to hold themselves out, as being employees or agents of Council.

3.17 Contractor to examine information

The Contractor is deemed to have examined all information and to have made all enquiries relevant to its obligations under this Contract and to be aware of all risks, contingencies, costs, difficulties and other circumstances in any way connected with the performance of its obligations under this Contract.

4 NOTICES

4.1 Method of giving notices

A notice required or permitted to be given by a party to another party under this Contract must be in writing, addressed to the other party and:

- 4.1.1 handed to the Party's Representative for that party;
- 4.1.2 delivered to that party's address;
- 4.1.3 sent by pre paid mail to that party's address; or
- 4.1.4 transmitted by facsimile to that party's facsimile number.

4.2 Time of receipt

A notice given to a party in accordance with clause 4.1 shall be treated as having been duly given and received:

- 4.2.1 if handed to the Party's Representative for that party, immediately;
- 4.2.2 if delivered to a party's address, on the day of delivery;
- 4.2.3 if sent by pre paid mail, on the third day after posting; or
- 4.2.4 if transmitted by facsimile to a party's facsimile number and a correct and complete transmission report is received, on the day of transmission.

4.3 Addresses of parties

For the purposes of clauses 4.1 and 4.2, the address or facsimile number of a party is the address or facsimile number stated in the Formal Instrument of Agreement unless notice of another address or facsimile number has been given to the other party.

5 THE GOODS AND/OR SERVICES

5.1 Work to be performed

The Contractor must perform the Services in accordance with this Contract from the commencement date of the Contract.

5.2 Liaison

The Contractor's Representative must liaise with the Supervisor during the performance of the Services. The Contractor's Representative must keep the Supervisor fully informed as to the progress of the Services and any critical decisions, factors or circumstances which may influence the performance of the Services.

If it is necessary for the Contractor to consult with any members of Council's staff or any third parties to perform the Services, contact must be made with such staff or third parties through the Supervisor unless otherwise agreed in writing by the Supervisor.

5.3 Standard of services

- 5.3.1 The Contractor must provide the Services:
 - (a) in a diligent manner;
 - (b) in conformity with all applicable standards issued by Standards Australia and the International Organization for Standardisation;
 - (c) in accordance with the principles of quality assurance;
 - (d) in accordance with the highest professional standards; and

- (e) with a level of care, skill, knowledge and judgement in accordance with best industry practice.

5.3.2 The Contractor will remain responsible for the performance of Services notwithstanding the acceptance or review of the Services, or any element of the Services, by the Supervisor, Council or any member of Council's staff.

5.3.3 The Contractor warrants that:

- (a) it has examined and carefully checked the documents comprising the Contract and satisfied itself that the documents adequately and appropriately describe the Services in sufficient detail to enable the Contractor to properly perform the Services;
- (b) Council's intended purpose in commissioning the Services is ascertainable from the Contract; and
- (c) the Services will be executed in a manner which meets and is fit for Council's intended purpose.

5.4 Standard of goods

5.4.1 The Contractor warrants to Council that the goods:

- (a) must be delivered by the Contractor to the place stated in the Contract and unloaded in accordance with any directions given by Council.
- (b) (except as otherwise provided in the Formal Instrument of Agreement) are new;
- (c) are fit for the purpose stated in the Formal Instrument of Agreement (or, if no purpose is stated, the purpose for which the goods would ordinarily be used);
- (d) conform to the description, model number and the sample (if any) provided by the Contractor;
- (e) conform in all other respects with the requirements of this Contract;
- (f) are free from defects (including defects in installation);
- (g) carry any applicable manufacturer's warranties (which will be passed to Council on supply of the goods).
- (h) are of merchantable quality; and
- (i) have been manufactured, constructed or assembled at the location and in the facility disclosed by the Contractor in the Contract (or as otherwise advised to Council) as the place of manufacture, construction or assembly of the goods.

5.4.2 All representations made by the Contractor or in connection with the Contractor are and remain accurate and the Contractor has and will maintain at all relevant times the quality assurance arrangements set out in the Formal Instrument of Agreement.

5.4.3 Title to the goods, free of encumbrances and all other adverse interests, will pass to Council upon the goods coming into the possession of Council or its employees or agents. The Contractor

warrants that it is able to provide title to the goods to Council in accordance with this clause.

5.4.4 Council may test the goods to determine whether they meet or exceed the standards required under this Contract by the means specified in the Formal Instrument of Agreement or by other appropriate means including selection of samples for testing and analysis. Where goods have been sold by sample the goods must reasonably comply with such sample. Council may employ such reasonable further tests at its own cost and where the goods fail such further tests the Contractor must pay the cost of such tests as incurred by Council.

5.5 Fees

The Contractor must pay all fees, charges and costs incurred in its performance of the Services, unless otherwise stated in the Formal Instrument of Agreement.

5.6 Statutory and Council requirements

The Contractor must obey and must ensure that its employees, sub-contractors and agents obey any Acts, regulations, local laws, by-laws and Council policies in any way applicable to the performance of the Services or this Contract.

5.7 Reports

The Contractor must provide the Supervisor with written reports on any aspect of the Services if requested to do so by the Supervisor in writing.

5.8 The Media

The Contractor must:

- 5.8.1 not either itself or through its employees, agents or sub-contractors make any statement to the media on behalf of Council or in relation to the performance of the Services;
- 5.8.2 refer all enquiries from the media relating to the performance of the Services to the Supervisor; and
- 5.8.3 notify the Supervisor immediately of any event arising in the course of performing the Services which may receive media attention.

5.9 Notice of Default

If the Contractor fails to meet any of its obligations under clauses 5.1, 5.3 and 5.4 for any reason, the Supervisor may, without limiting any other power of the Supervisor or the Council under this Contract or otherwise, give notice to the Contractor to remedy the default. Any notice given by the Supervisor under this clause may specify a time within which the default must be remedied.

5.10 Remedying of Default

- 5.10.1 If the Contractor fails to remedy a default in accordance with a notice issued by the Supervisor under clause 5.9, the Supervisor may arrange for the default to be remedied by others.
- 5.10.2 Any costs or charges incurred by the Council in the remedying of a default under clause 5.10, as determined by the Supervisor, must be paid on demand by the Contractor to the Council or may be deducted

either from any moneys due or becoming due to the Contractor under this Contract or from the Performance Security, at the option of the Council.

5.11 Better Performance

The Supervisor may give such directions for the better performance of this Contract as the Supervisor considers appropriate. The Contractor must give effect to such directions as if they constituted express terms of this Contract, provided, however, that any directions giving rise to variations must be given under clause 11.1.

6 CONTRACTOR'S STAFF

6.1 Contractor's representative

The Contractor must appoint a competent person to be responsible for the day to day performance of the Services and the supervision of all persons employed or engaged in carrying out the Services ("**Contractor's Representative**").

The Contractor must notify the Supervisor of the name of the Contractor's Representative prior to the commencement date of the Contract and must notify the Supervisor immediately should a new Contractor's Representative be appointed.

6.2 Key staff

Except with the prior written consent of the Supervisor or as provided in clause 6.3, the Contractor must ensure that the Services are performed by and only by the persons named in the Formal Instrument of Agreement.

6.3 Staff not to be employed

The Supervisor may give notice that any person not be employed or engaged in the performance of the Services by the Contractor. The Contractor must:

6.3.1 comply with any such notice from the Supervisor; and

6.3.2 within seven (7) days of the service of the notice, nominate in writing to the Supervisor another person to perform the Services. The Contractor must provide the Supervisor with details of the experience and qualifications of the person nominated. The person nominated must be approved in writing by the Supervisor prior to commencing the performance of the Services.

If the Contractor fails to nominate a person who is acceptable to the Supervisor under clause 6.2, Council may immediately terminate this Contract. If this Contract is terminated under this clause, clause 12.3 shall, to the extent that it is applicable, operate as if the termination had been made by Council under clause 12.1.

7 TIME

7.1 Time limits

The Contractor must provide the Services within any time limits stated in the Contract Documents.

7.2 Delays

If the Contractor is delayed in performing the Services by any act or omission of Council or Council's staff or agents, the Contractor may apply to the Supervisor for an extension of time for completing the Services, or any element of the Services, within 28 days of the act or omission. The Supervisor may, if he or she considers that an extension of time is warranted having regard to the nature of the act or omission and its impact on the performance of the Services, grant the Contractor such extension of time to complete the Services, or an element of the Services, as the Supervisor considers appropriate.

7.3 No additional payments

Council is not liable to make any additional payment to the Contractor in respect of any delay in the performance of the Services.

8 INTELLECTUAL PROPERTY

8.1 Intellectual Property of Council

The Intellectual Property in any documents or information supplied to the Contractor by Council for the purposes of performing the Services remains the property of Council. Any such documents must be returned to Council by the Contractor on the conclusion of the performance of the Services or the earlier termination of this Contract.

8.2 Intellectual Property

Ownership of, and the Intellectual Property in, any documents, data, designs, models, computer software and other information created by the Contractor in the course of performing the Services vests in Council.

The Contractor must deliver all such documents, data, designs, models, computer software and other information to Council at the conclusion of the performance of the Services, or earlier termination of this Contract, if they have not previously been delivered to Council in accordance with this Contract.

The Contractor must, on demand, execute any waivers, notices or assignments necessary to enable Council to register or otherwise obtain title to the Intellectual Property in such documents, data, designs, models, computer software and other information.

9 CONFLICTS OF INTEREST, CONFIDENTIALITY AND PRIVACY

9.1 Conflicts of Interest

9.1.1 The Contractor warrants that it is unaware at the date of this Contract of any Conflict of Interest existing or likely to arise during the performance of its obligations under this Contract.

9.1.2 The Contractor must:

- (a) not enter into any contract or arrangement, or do any other thing, which may give rise to a Conflict of Interest with respect to its obligations under this Contract; and
- (b) use its best endeavours to ensure that no Relevant Party enters into any contract or arrangement, or does any other thing, which may give rise to a Conflict of Interest with respect to the Contractor's obligations under this Contract.

- 9.1.3 The Contractor must immediately make a full disclosure in writing to Council of the existence, nature and extent of any actual or potential Conflict of Interest with respect to the Contractor's obligations under this Contract.

9.2 Confidentiality

The Contractor must not and must ensure that its employees, sub-contractors and agents do not disclose any information or documents obtained in the course of performing the Services to any third party without the prior written consent of the Supervisor.

9.3 Personal Information

9.3.1 The Contractor agrees with respect to any information held or obtained by the Contractor under or in connection with this Contract:

- (a) to use Personal Information only for the purposes of fulfilling its obligations under this Contract;
- (b) to comply at all times with the *Privacy Act 1988 (Cth)* and the *Information Privacy Act 2000 (Vic)* and all other legislation in force at any time while this Contract is operative relating to the privacy of Personal Information;
- (c) at the time of collecting Personal Information, to obtain all necessary consents and authorisations from the persons to whom that Personal Information relates to enable any use of the Personal Information necessary for the performance of the Services; and
- (d) to take all reasonable measures to ensure that Personal Information is protected against loss and unauthorised access, use, modification or disclosure.

9.3.2 The Contractor indemnifies Council in respect of any loss, liability or expense suffered or incurred by Council arising out of or in connection with a breach of the obligations of the Contractor under this clause, or any misuse of Personal Information by the Contractor or any of its employees, sub-contractors or agents, or any disclosure by the Contractor or any of its employees, sub-contractors or agents in breach of an obligation of confidence, whether arising under the *Privacy Act 1988 (Cth)*, the *Information Privacy Act 2000 (Vic)* or otherwise.

10 FINANCIAL PROVISIONS

10.1 Payments

If the Contractor complies with its obligations under this Contract, Council must make the payment or payments specified in the Formal Instrument of Agreement on the basis stated in the Formal Instrument of Agreement.

The Contractor may submit a payment claim to the Supervisor where entitled to do so under the Formal Instrument of Agreement (on the occurrence of a date, completion of specified work or other stated basis). The Supervisor must assess each payment claim and issue to the Contractor and Council, within 10 Business Days of the receipt of the payment claim, a payment schedule stating:

- 10.1.1 any amount due from Council to the Contractor under the Contract;
- 10.1.2 any amount due from the Contractor to Council under the Contract;
and
- 10.1.3 taking into account the amounts referred to in clauses 10.1.1 and 10.1.2, the sum payable by Council to the Contractor or the Contractor to Council, as the case may be.

The party to which payment must be made under a payment schedule issued by the Supervisor, must issue a Tax Invoice, in accordance with clause 10.6, for the sum stated in the payment schedule to the party to make the payment within five (5) Business Days of its receipt of the payment schedule. The party receiving the Tax Invoice, must pay the sum specified in the Tax Invoice to the party to which payment is due within 10 Business Days of its receipt of the Tax Invoice, subject to clause 10.2.

In so far as necessary to ensure compliance with the *Security of Payment Act*, the Supervisor is deemed to issue any payment schedule as the agent of Council.

If the Contractor makes any payment claim under the *Security of Payment Act*, the Contractor must separately identify any excluded amount (within the meaning of the *Security of Payment Act*) and state that the excluded amount is not claimed under the *Security of Payment Act*.

If the Contractor does not issue a payment claim to the Supervisor in accordance with clause 10.1, the Supervisor may nonetheless issue a payment schedule.

10.2 Set Off

Council may set off any amount payable by the Contractor to Council under this Contract or otherwise against any amount payable by Council to the Contractor under, in relation to or in connection with this Contract.

10.3 Payment on account only

The making of any payment by Council to the Contractor under this Contract is made on account only and payment of any amount is not:

- 10.3.1 evidence or an admission that the Services have been performed in accordance with this Contract;
- 10.3.2 evidence of the value of the Services performed;
- 10.3.3 an admission that the Services were satisfactorily performed;
- 10.3.4 an admission of liability; or
- 10.3.5 acceptance or approval of the Contractor's performance of the Services.

10.4 Goods and Services Tax

To the extent that the performance of the Services constitutes a Taxable Supply:

- 10.4.1 if a payment under clause 10.1 is calculated on a basis which is described as exclusive of GST, the payment must be increased by the applicable amount of GST ("GST Amount") (which will be calculated by multiplying the amount upon which GST is payable by the prevailing rate of GST);
- 10.4.2 the Contractor must provide to Council a valid Tax Invoice prior to the time of, and as a condition of, payment of any GST Amount; and
- 10.4.3 if any Adjustment occurs in relation to the Taxable Supply, the Contractor must issue an Adjustment Note to Council within seven (7) days of becoming aware of the Adjustment, and any payment necessary to give effect to such Adjustment must be made within seven days (7) after the date of receipt of the Adjustment Note.

10.5 Records

Where any payment to be made to the Contractor under clause 10.1 is calculated by reference to time spent by the Contractor performing the Services ("**Chargeable Time**"), the Contractor must maintain detailed records (including, without limitation, daily individual time sheets) and retain such records for a period of at least five (5) years.

The Supervisor, or any person nominated by the Supervisor, may inspect and audit the Contractor's documents which record the Chargeable Time. For this purpose, the Contractor must make available to the Supervisor, or any person appointed by the Supervisor, all documents and information relating to the performance of the Services necessary to establish or verify the Chargeable Time.

10.6 Tax Invoices

Any Tax Invoice submitted to Council for the purposes of clause 10.4.2 must include:

- 10.6.1 the ABN of Council and the Contractor;
- 10.6.2 the total value of the Taxable Supply including the applicable GST;
- 10.6.3 the words "Tax Invoice";
- 10.6.4 the date of issue of the Tax Invoice;
- 10.6.5 the name of the Contractor;
- 10.6.6 the name of Council as the recipient of the Taxable Supply;
- 10.6.7 a brief description of each element of the Taxable Supply; and
- 10.6.8 if relevant, the quantity or volume of the Taxable Supply.

11 VARIATIONS

11.1 Direction of variations

At any time prior to the completion of the Services, the Supervisor may direct the Contractor to:

- 11.1.1 alter the extent of the Services;
- 11.1.2 alter the character, quality or mode of performance of the Services; or
- 11.1.3 carry out any work of a character similar to the Services.

11.2 Valuation of variations

The value, if any, of any variation under clause 11.1 must be added to or subtracted from any payment to the Contractor under clause 10.1. The value of each variation must be determined by the Supervisor:

- 11.2.1 by applying any relevant rates or prices contained in the Formal Instrument of Agreement; or
- 11.2.2 by applying reasonable rates or prices if there are no relevant rates or prices contained in the Formal Instrument of Agreement.

If the variation involves a decrease in the Services or the omission of part of the Services, the Supervisor must make a reasonable allowance for the Contractor's profit and overheads.

12 DEFAULTS AND TERMINATION

12.1 Default by Contractor

If the Contractor defaults in the performance or observance of any obligation it has under this Contract, the Supervisor may give notice to the Contractor to show cause why the powers contained in this clause should not be exercised.

Such notice must:

- 12.1.1 not be unreasonably given;
- 12.1.2 state that it is a notice under this clause; and
- 12.1.3 specify the default, on the part of the Contractor upon which it is based.

If, within seven (7) days after receipt of the notice, the Contractor fails to show, to the satisfaction of the Supervisor, that the default will be rectified, Council (without prejudice to any other rights that it may have under this Contract or at common law against the Contractor) may:

- 12.1.4 suspend payment under this Contract; or
- 12.1.5 terminate this Contract.

12.2 Contractor's right to terminate

If, within 14 days of any period for payment stated in, or determined in accordance with, the Contract, Council has failed to pay to the Contractor any amount due under clause 10.1 (other than an amount being the subject of a dispute or difference under this Contract), the Contractor may by notice to Council either suspend the performance of the Services or terminate this Contract.

12.3 Payments on termination

12.3.1 Limit of Payments

If this Contract is terminated under clauses 12.1 or 12.2, Council shall be liable to make payments to the Contractor only in respect of any

portion of the Services which have been properly performed and not paid for at the date of termination, as determined by the Supervisor.

12.3.2 Payment for Losses and Expenses

If this Contract is terminated under clause 12.1, the Contractor must, within 14 days, or such longer period as the Supervisor may specify, pay to Council the amount of the loss and expenses incurred by Council due to, or in connection with, the termination (including, without limitation, indirect losses, consequential losses and all legal costs on a full indemnity basis, and any amount by which the cost to Council of completing the Services exceeds the amount which would otherwise have been payable to the Contractor), as determined by the Supervisor.

12.3.3 Council May Retain Moneys

Council may retain the moneys payable to the Contractor under clause 12.3.1 until any amount payable by the Contractor to Council under clause 12.3.2 has been determined by the Supervisor and paid by the Contractor.

12.4 Insolvency of Contractor

If the Contractor -

12.4.1 being a person:

- (a) becomes bankrupt, or files or is served with a petition in bankruptcy;
- (b) is served with a bankruptcy notice;
- (c) makes an assignment for the benefit of his or her creditors;
- (d) becomes bound as a debtor by any scheme of arrangement;
- (e) executes, as a debtor, any deed of assignment or deed of arrangement; or
- (f) has a mortgagee or other creditor take possession of any of his or her assets;

12.4.2 being a partnership:

- (a) is dissolved;
- (b) any of the partners becomes bankrupt, or files or is served with a petition in bankruptcy;
- (c) any of the partners is served with a bankruptcy notice;
- (d) any of the partners makes an assignment for the benefit of his or her creditors;
- (e) any of the partners becomes bound as a debtor by any scheme of arrangement;
- (f) any of the partners executes, as a debtor, any deed of assignment or deed of arrangement; or
- (g) any of the partners has a mortgagee or other creditor take possession of any of his or her assets; or

- 12.4.3 being a company or other body corporate:
- (a) takes or has taken or instituted against it any action or proceeding, whether voluntary or compulsory, having as its object the winding up of the company or other body corporate;
 - (b) enters into a composition or other arrangement with its creditors, other than a voluntary winding up by members for the purpose of reconstruction or amalgamation;
 - (c) has a mortgagee or other creditor take possession of any of its assets;
 - (d) an administrator is appointed, or steps are taken for the appointment of an administrator, under Part 5.3A of the *Corporations Act 2001 (Cth)* in respect of it;
 - (e) a receiver or receiver and manager is appointed, or steps are taken for the appointment of a receiver or receiver and manager, in respect of it; or
 - (f) in the case of an incorporated association, takes or institutes, or has taken or instituted against it, any action or proceeding having as its object the cancellation of the incorporation of the incorporated association -

Council may terminate this Contract immediately and clause 12.3 shall, to the extent that it is applicable, operate as if the termination had been made by Council under clause 12.1.

13 SUB-CONTRACTING AND ASSIGNMENT

13.1 Sub-Contracting

13.1.1 General

The Contractor must not sub-contract the whole or any portion of its obligations under this Contract, except with the prior written consent of the Supervisor, which may be given subject to such conditions as the Supervisor considers appropriate. Except in so far as any consent given by the Supervisor under clause 13.1.1 expressly provides otherwise, no sub-contractors will have any rights under this Contract against Council or be entitled to receive any payments under this Contract from Council.

13.1.2 Contractor to provide information

With any application for the consent of the Supervisor to any sub-contracting, the Contractor must provide any information required by the Supervisor, including, but not limited to, evidence that a proposed sub-contractor will be capable of performing any obligations of the Contractor under this Contract that it may be required to perform.

13.1.3 Contractor still to be liable

Unless otherwise agreed in writing by the Supervisor, no sub-contracting of any obligations of the Contractor under this Contract will relieve the Contractor from any liability under this Contract or at law in respect of the performance or purported performance of this Contract and the Contractor will be responsible for the acts and

omissions of any sub-contractor, or any sub-contractor's employees and agents, as if they were the acts or omissions of the Contractor.

13.2 Assignment

13.2.1 General

The Contractor must not assign the whole or any of its rights under this Contract, except with the prior written consent of the Supervisor, which may be given subject to such conditions as the Supervisor considers appropriate. Except in so far as any consent given by the Supervisor under clause 13.2.1 expressly provides otherwise, no assignees will have any rights under this Contract against Council or be entitled to receive any payments under this Contract from Council.

13.2.2 Change in beneficial ownership

For the purpose of this clause, an assignment of the Contractor's rights under this Contract includes any change in the beneficial ownership of the share capital of the Contractor, if it is a company, which alters the effective control of the Contractor.

14 INSURANCES AND INDEMNITY

14.1 Insurances and Indemnities

14.1.1 Accident Compensation Act

The Contractor must -

- (a) itself effect; and
- (b) ensure that each of its sub-contractors effects -

a WorkCover policy of insurance complying with the provisions of the *Accident Compensation (WorkCover Insurance) Act 1993* in respect of all of its employees.

14.1.2 Other legislation

The Contractor must -

- (a) itself comply; and
- (b) ensure that each of its sub-contractors complies -

with any other workers' compensation legislation in force from time to time and must, in the absence of any such legislation, or if so directed by the Supervisor, insure against any claims that may be made in respect of the death of or injury to any of their employees.

Any such insurance must be -

- (c) for an amount;
- (d) with an insurer; and
- (e) in a form -

to the satisfaction of the Supervisor.

14.1.3 Indemnity

The Contractor must indemnify, keep indemnified and hold harmless Council and all of Council's staff, sub-contractors or agents against any liabilities, costs, penalties or additional premiums they may incur arising, whether directly or indirectly, from any provision of the *Accident Compensation Act 2004* (including, without limitation, section 10A of that Act) which:

- (a) deems any employees or agents of the Contractor, or any employees or agents of any sub-contractor to the Contractor, to be employees or workers of Council or Council's employees, sub-contractors or agents; or
- (b) otherwise makes Council, or any of Council's staff, sub-contractors or agents, in any way responsible for, or liable to pay any moneys to or in respect of, such persons, except for liabilities arising directly from the negligence of Council or any of Council's staff, sub-contractors or agents.

14.2 Other insurance

The Contractor must, at all times while performing the Services, obtain and maintain the insurances specified in the Formal Instrument of Agreement. Any such insurance must be -

14.2.1 for an amount;

14.2.2 with an insurer; and

14.2.3 in a form -

to the satisfaction of the Supervisor.

14.3 Evidence of insurance

14.3.1 Provision of evidence

The Contractor must produce to the Supervisor policies of insurance and receipts showing that the insurances referred to in clauses 14.1 and 14.2 have been paid not less than seven (7) days before the commencement date of the Contract.

14.3.2 Certificates of currency

The Contractor must provide the Supervisor with certificates of currency in respect of the insurances referred to in clauses 14.1 and 14.2 within two (2) days after a written request being made by the Supervisor.

14.3.3 Failure to insure

If the Contractor fails to comply with its obligations under clauses 14.1 or 14.2, Council may:

- (a) in the case of a failure by the Contractor to comply with its obligations under clause 14.2, effect or maintain the relevant insurance policy, as the case may be, and pay the premiums thereof, the cost of which must be paid on demand by the Contractor to Council or may be deducted by Council from any

moneys due or becoming due to the Contractor under this Contract, at the option of Council; or

- (b) immediately terminate this Contract. If this Contract is terminated under this clause, clause 12.3 will operate, to the extent that it is applicable, as if the termination had been made by Council under clause 12.1.

14.3.4 Proof of failure to insure

Any failure by the Contractor to comply with its obligations under clause 14.3.1 or clause 14.3.2 will constitute conclusive proof of its failure to effect or maintain the insurances, as the case may be, for the purposes of clause 14.3.3.

14.3.5 Powers not restricted

The exercise of a power by Council under clause 14.3.3(a) in relation to a breach of clause 14.1 or 14.2 does not prevent Council terminating the Contract under clause 14.3.3(b) in respect of that or any subsequent breach of clause 14.1 or 14.2.

14.4 Sub-Contractors

The Contractor must ensure that any sub-contractor to the Contractor complies with clauses 14.2 and 14.3 as if it were the Contractor. For the avoidance of doubt, clauses 14.3.3, 14.3.4 and 14.3.5 apply to any failure of a sub-contractor to the Contractor as if the failure was made by the Contractor.

14.5 Council indemnified

14.5.1 Indemnity

The Contractor must indemnify, keep indemnified and hold harmless Council, and its Councillors and staff, from and against all actions, claims, losses, damages, penalties, demands or costs (including, without limitation, all indirect losses, consequential losses and legal costs on a full indemnity basis) consequent upon, occasioned by, or arising from any negligent act or omission, breach of statute, breach of intellectual property rights or breach of this Contract in the performance or purported performance of the Contractor's obligations under this Contract. The Contractor's obligation to indemnify Council under clause 14.5.1 shall not apply to the extent that any liability is caused by any negligent act or omission of Council.

14.5.2 Acts of employees and others

The indemnity of the Contractor under clause 14.5.1 extends to any acts or omissions of the Contractor's agents, employees, assignees and sub-contractors.

14.5.3 Not to affect other obligations

The effecting of insurances by the Contractor under this Contract does not affect the obligations of the Contractor under this or any other clause of this Contract.

15 OCCUPATIONAL HEALTH AND SAFETY

15.1 General occupational health and safety requirements

The Contractor must itself, and must ensure that any sub-contractors of the Contractor, at all times identify and take all necessary precautions for the health and safety of all persons, including the Contractor's employees and sub-contractors, staff of Council and members of the public, who may be affected by the performance of the Services.

The Contractor must inform itself of all OH&S policies, procedures or measures implemented or adopted by Council. The Contractor must comply with all such policies, procedures or measures.

The Contractor must immediately comply with any and all directions by the Supervisor relating to OH&S.

15.2 Legislative compliance

The Contractor must -

15.2.1 comply with; and

15.2.2 ensure that its employees, sub-contractors and agents comply with -

any Acts, regulations, local laws, codes of practice and Australian Standards which are in any way applicable to OH&S and the performance of the Services.

15.3 Contractor OH&S Management System

The Contractor must establish and implement an OH&S management system which ensures compliance with all duties of an employer under the *Occupational Health and Safety Act 2004* ("**OH&S Management System**").

The OH&S Management System must be submitted to the Supervisor for approval prior to the commencement date of the Contract.

The Contractor must make any amendments to the OH&S Management System submitted for the approval of the Supervisor, which the Supervisor may direct.

The Contractor must implement the OH&S Management System.

The Contractor must, when requested by the Supervisor, provide evidence of the Contractor's ongoing implementation of the OH&S Management System.

16 SECURITY

16.1 Bank guarantee

Upon the execution of this Contract, and if requested by the Supervisor, the Contractor must deliver to the Supervisor an unconditional and irrevocable bank guarantee payable to Council for the sum stated in the Formal Instrument of Agreement ("**Performance Security**").

16.2 Recourse to security

In the event of any failure by the Contractor to carry out and complete its obligations under this Contract, Council may have recourse to the Performance Security in respect of any moneys for which the Contractor may be liable to

Council under this Contract or otherwise. Without limiting the rights of Council under this clause, Council may deduct from the Performance Security any sum payable to Council under clause 12.3.

16.3 Return of security

Unless Council has exercised a right under clause 16.2, the Performance Security must be returned to the Contractor at the conclusion of the performance of the Services.

16.4 Further rights and obligations

If Council has exercised a right under clause 16.2 and the Contract has:

16.4.1 been terminated or the Services have been completed, Council must, after making any deductions from the Performance Security that it is entitled to make under this Contract, pay to the Contractor the remainder of the Performance Security, provided that Council is not required to make any payment to the Contractor under this clause until all payments due on termination of the Contract under clause 12.3 have been made; or

16.4.2 not been terminated and the Services have not been completed, the Contractor must provide a supplementary unconditional and irrevocable bank guarantee payable to Council for an amount equivalent to the moneys paid to Council by the bank in accordance with clause 16.2.

16.5 Council's right to terminate

If the Contractor fail to meet any of its obligations under clause 16.1 or 16.4.2 Council may immediately terminate this Contract. If this Contract is terminated under clause 16.5, clause 12.3 will operate, to the extent that it is applicable, as if the termination had been made by Council under clause 12.1.

17 DISPUTE RESOLUTION

17.1 Notice of dispute

In the event of any dispute or difference arising between Council and the Contractor, either during the period of this Contract or after the termination, abandonment or breach of this Contract, as to any matter or thing connected with this Contract or arising under this Contract, Council or the Contractor may give to the other party notice of the dispute or difference.

Such notice:

17.1.1 must not be unreasonably given; and

17.1.2 must signify that it is a notice under this clause; and

17.1.3 must give sufficient details of the dispute or difference as to enable the party receiving the notice to ascertain the nature of the dispute or difference alleged.

17.2 Alternative dispute resolution

Within seven (7) days of the receipt of any notice of dispute under clause 17.1 by either party, a representative of each party must meet to discuss ways of resolving the dispute or difference. The representatives may resolve the dispute or

difference themselves or refer the dispute or difference to any form of alternative dispute resolution procedure on which they agree. The representatives must be authorised by the parties to resolve the dispute or difference on their behalf should this prove to be practicable.

17.3 Referral to litigation

Unless a dispute or difference of which notice has been given under clause 17.1 is previously settled, either party may, not less than seven (7) days after the notice of dispute or difference was given, give notice to refer the dispute or difference to litigation.

17.4 Work to continue

If it be reasonably possible, work under the Contract must continue during legal proceedings, and no payment due or payable by Council, that is not in dispute, must be withheld on account of the legal proceedings, unless so authorised by the Contractor or by this Contract.

18 SECURITY OF PAYMENT ACT

18.1 Copies of Communications

The Contractor shall ensure that a copy of any written communication it delivers or arranges to deliver to Council of whatever nature in relation to the *Security of Payment Act* (including, without limitation, a payment claim under the *Security of Payment Act*), is provided to the Supervisor at the same time.

18.2 Suspension under the *Security of Payment Act*

18.2.1 Notice of intention to suspend

The Contractor shall first give the Supervisor, as Council's nominee for this purpose, at least two Business Days' notice of its intention to suspend the Services under the *Security of Payment Act*.

18.2.2 Suspension of work under the Contract by a sub-contractor under the *Security of Payment Act*

If the Contractor becomes aware that a sub-contractor is entitled to suspend work pursuant to the *Security of Payment Act*, the Contractor shall promptly and without delay give to the Supervisor a copy of any written communication that the Contractor receives from the sub-contractor pursuant to the *Security of Payment Act*.

If a sub-contractor under its sub-contract for work under the Contract suspends the whole or part of its sub-contract work pursuant to the *Security of Payment Act*:

- (a) the suspension shall not of itself affect any date for completion of the Services or part of the Services under the Contract;
- (b) Council shall not be liable for any costs, expenses, losses or other liability, including delay or disruption costs whatsoever suffered or incurred by the Contractor as a result of a suspension pursuant to this sub-clause; and
- (c) the circumstances of such suspension is a breach of this Contract to which clause 12.1 applies.

18.2.3 Contractor's Further Indemnity

Except for a payment default by Council, the Contractor indemnifies and shall keep indemnified Council against all damage, expense (including legal costs and Council's administrative costs), loss (including consequential and economic loss) or liability of any nature suffered or incurred by Council arising out of:

- (a) a wrongful suspension by the Contractor, or a suspension pursuant to the *Security of Payment Act* by a sub-contractor of work under the Contract; or
- (b) a failure by the Contractor to comply with clause 18.

The amount of such sum shall be determined by the Supervisor and shall then be a debt due by the Contractor to Council.