



Minor Works Agreement (Design & Construct)

Contract No: [Number]
[Contract Name]

Contractor: [Name]
ABN: [Number]

Contract Sum: \$[Amount]

Date for Completion: [Date]

Table of Contents

	Page No
Schedule	5
Date	8
Parties	8
Background	8
Agreed Terms	8
1. Definitions and Interpretation	8
1.1 Definitions	8
1.2 Interpretation	11
1.3 Background	12
2. Execution of Contract Works	12
3. Access, Work Health and Safety	12
3.1 Access to Site and Contract Works	12
3.2 Work Health and Safety	13
3.3 Contractor responsible	13
3.4 Suspension of Contract Works	13
4. Materials and Work	14
5. Provisional Sums	14
6. Subcontracting and Assigning	14
7. Workforce	15
7.1 Control of employees	15
7.2 Industrial relations	15
8. Variations	15
8.1 Variations	15
8.2 No unauthorised variation	15
8.3 Execute Variations	16
8.4 Adjustment of Contract Sum	16
9. Time	16
9.1 Commencement of Contract Works	16
9.2 Completion of Contract Works	16
9.3 Claim for time extension	16
9.4 Extension of time	17
9.5 Conditions precedent	17
9.6 Extraordinary grant	17
9.7 No costs or damages	17
10. Completion of Contract Works	18
10.1 Inspection of Contract Works	18
10.2 Certificate of Completion	18
10.3 Completion of Contract Works	18
11. Defects Liability	18
11.1 Defects Liability Period	18
11.2 Remedy Defects	18
11.3 Carry out instructions	19
11.4 Council may rectify	19
11.5 Further Defects Liability Period	19
11.6 Access for remedial works	19
11.7 Deemed Variation	19
11.8 Final Certificate	19
12. Adjustment of Contract Sum	19
12.1 No adjustment unless authorised	19
12.2 Adjustment for Variations	20
13. Payment of Contract Sum	20
13.3 Effect of Payment	20

14.	Security	20
15.	Right of Council to Recover Money	20
16.	Risks, Indemnities and Insurances	21
	16.1 Contractor's risk.....	21
	16.2 Property damage.....	21
	16.3 Public risk.....	21
	16.4 Contractor's insurance.....	21
	16.5 Return to Work SA.....	22
	16.6 Inspection of insurance policies.....	22
17.	Force Majeure	22
18.	Termination by Council	23
19.	Termination by Contractor	24
20.	Confidential Information and Freedom of Information	24
21.	Dispute Resolution	25
	21.1 General.....	25
	21.2 Mediation.....	25
	21.3 Arbitration.....	26
	21.4 Performance.....	26
22.	Representatives	26
23.	Relationship	26
24.	Miscellaneous	26
	24.1 Special Conditions.....	26
	24.2 Business Days.....	26
	24.3 Alteration	27
	24.4 Approvals and consents	27
	24.5 Entire agreement.....	27
	24.6 Waiver	27
	24.7 Exercise of power.....	27
	24.8 Survival.....	27
	24.9 Further action	27
	24.10 Governing law	27
	24.11 Ombudsman.....	27
	24.12 Work Health and Safety.....	27
	24.13 ICAC.....	28
25.	Goods and Services Tax	28
	25.1 Consideration does not include GST.....	28
	25.2 Gross up of consideration.....	28
	25.3 Reimbursements	28
	25.4 Tax invoices	28
	25.5 Adjustments.....	28
26.	Security of Payment	29
27.	Notices	29
28.	Costs	30
29.	Design Responsibility	30
	29.1 Design	30
	29.2 Development Approval	30
	29.3 Professional Indemnity Insurance	30
30.	Intellectual Property	31
	Annexure A Contract Works	32
	Annexure B Special Conditions	33
31.	Work health and safety	33
32.	Notification of certain events to the council	33
33.	Fire Danger	34
34.	Environmental duty	34
35.	Certification of the work	34
36.	Motor vehicle insurance	34
37.	DDA requirements	35
38.	Aboriginal heritage	35
39.	Advance notice of work	35

40. **Site safety** 36
41. **Equipment** 36
42. **Storage locations**..... 36
43. **Nuisance**..... 36
44. **Connection to Utilities**..... 36
45. **Inputs from the Council**..... 36
46. **Collaboration**..... 36
47. **Site meetings** 37
48. **Child Protection** 37
Annexure C **Program** 38
Annexure D **Schedule of Rates**..... 39
EXECUTED as an agreement 40

Schedule

Item 1 Council	City of Onkaparinga ABN 97 047 258 128 Street Address: Noarlunga Office, Ramsay Place, Noarlunga Centre Postal Address: PO Box 1, Noarlunga Centre SA 5168 Fax: 08 83828744 Email: [Address] Phone: [Number] Mobile: [Number]
Item 2 Contractor	Name: [Name] ABN: [Number] Street Address: [Address] Postal Address: [Address] Email: [Address] Phone: [Number] Mobile: [Number]
Item 3 Contract Sum	[\$Amount] (exclusive of GST) <u>[\$Amount] (GST)</u> [\$Amount] (Total – including GST) being a fixed lump sum price and not subject to any rise and fall escalation or Schedule of Rates (refer Annexure D)
Item 4 Contract Works	As described generally in Annexure A
Item 5 Site	[Address]
Item 6 Date for Commencement	[Date]

Item 7 Date for Completion	As stated on front cover
Item 8 Defects Liability Period	Fifty-two (52) calendar weeks commencing on Completion of the Contract Works
Item 9 Security	Not Required or Form of Security: Bank Guarantee Security amount: Five (5)% of the Contract Sum, as adjusted from time to time, inclusive of GST
Item 10 Contractor's Representative	[Name]
Item 11 Working hours	7:00am to 7:00pm Monday to Saturday excluding Public Holidays
Item 12 Rates for valuation of Variations	[\$Amount] (All expressed exclusive of any GST)
Item 13 Provisional sums	[Description] [\$Amount]
Item 14 Payment of Contract Sum	<p>Lump Sum</p> <ol style="list-style-type: none"> 1. The Contractor may at monthly intervals (or as otherwise specified in this agreement), submit a written progress claim for an amount which comprises of: <ol style="list-style-type: none"> 1.1 the portion of the Lump Sum completed to that time; and 1.2 the portion of the total of any approved Variations completed to that time. 2. The Council must assess the claim and issue the Council's assessment to the Contractor within ten (10) business days of receipt and must particularise any discrepancy (if any) between the claimed amount and the assessed amount. 3. The Contractor will then give to the Council a tax invoice for the assessed amount less any previous payments made and any retention sum. 4. The Council must pay the invoiced amount (including payment for GST) within 30 days of the end of the month in which the invoice is received by Council. <p>or</p> <p>Schedule of Rates</p> <ol style="list-style-type: none"> 1. The Contractor may at monthly intervals (or as otherwise specified in this agreement), submit a written progress claim for an amount calculated by the quantity of work performed since the last claim multiplied by the scheduled rate/s

	<ol style="list-style-type: none"> 2. The Council must assess the claim and issue the Council's assessment to the Contractor within ten (10) business days of receipt and must particularise any discrepancy between the claimed amount and the assessed amount. 3. The Contractor will then give to the Council a tax invoice for the assessed amount 4. The Council must pay the invoiced amount (including payment for GST) within 30 days of the end of the month in which the invoice is received by Council. <p>Any difference arising between the parties in respect of the quantum of payments can be resolved in accordance with clause 13</p>
Item 15 Council's Representative	[Name]
Item 16 Confidential Sections	None
Item 17 Reimbursable Expenses	None

Date

[Insert Date]

Parties

City of Onkaparinga ABN 92 047 258 128 of Noarlunga Office, Ramsay Place, Noarlunga Centre (**Council**)

The person specified in Item 2 of the Schedule (**Contractor**)

Background

- A. Pursuant to a [insert process pursuant to which this agreement is to be executed – eg. Request for Tender, Request for Quote, etc], the Council sought Tenders from suitably qualified parties for the Contract Works.
- B. The Contractor submitted a [insert appropriate submission – eg. tender, quote, etc] for the Contract Works, and the Council accepted it.
- C. The Contractor agrees to perform the Contract Works on the terms in this agreement.

Agreed Terms

1. Definitions and Interpretation

1.1 Definitions

1.1.1 In this agreement:

- 1.1.1.1 **Agreement** means this agreement and includes the Schedule and the Annexures.
- 1.1.1.2 **Annexure** refers to an Annexure of this agreement.
- 1.1.1.3 **Authorisation** means any authorisation, agreement, approval, licence, permit, consent, qualification, accreditation, filing, registration, certificate, resolution, direction, declaration or exemption and any renewal and variation of them by or with a Governmental Agency.
- 1.1.1.4 **Business Day** means a day that is not a Saturday, Sunday or public holiday in the State of South Australia.
- 1.1.1.5 **Certificate of Completion** means the certificate of completion issued under clause 10.2.
- 1.1.1.6 **Clause** refers to a clause of this agreement.
- 1.1.1.7 **Completion, Completion of the Contract Works** and like expressions is the stage when the Contract Works are complete except for minor Defects and are fit for use and occupation by the Council for their intended use.

- 1.1.1.8 **Confidential Information** means any documentation or information of a confidential nature supplied by either of the parties to the other in connection with this agreement and includes all scientific, technical, manufacturing, performance, sales, financial, commercial, contractual or marketing information possessed by each party, but specifically excludes any documentation or information which has been previously published or otherwise disclosed to the general public or is required to be disclosed by Law.
- 1.1.1.9 **Confidential Sections** are those clauses, Schedules and/or Annexures specified in specified in Item 16 of the Schedule that are deemed to be confidential for the purposes of the FOI Act.
- 1.1.1.10 **Contract Sum** means the sum specified in Item 3 of the Schedule, as adjusted from time to time in accordance with this agreement.
- 1.1.1.11 **Contract Works** means the works specified in Item 4 of the Schedule and Annexure A, and any authorised Variation.
- 1.1.1.12 **Contractor's Design Obligations** means all tasks required of the Contractor to design and specify the Works including preparation of design documents.
- 1.1.1.13 **Contractor's Representative** means the person specified in Item 10 of the Schedule.
- 1.1.1.14 **Council** means the Council specified in Item 1 of the Schedule.
- 1.1.1.15 **Council's Project Requirements** means the Councils written requirements for the Works including a Preliminary Design (if any)
- 1.1.1.16 **Council's Representative** means the person specified in Item 15 of the Schedule.
- 1.1.1.17 **Date for Commencement** means the date specified in Item 6 of the Schedule.
- 1.1.1.18 **Date for Completion** means the date specified in Item 7 of the Schedule, as adjusted from time to time in accordance with this agreement.
- 1.1.1.19 **Defect** means any defect, error or omission in the Contract Works.
- 1.1.1.20 **Defects Liability Period** means the period specified in Item 8 of the Schedule.
- 1.1.1.21 **Defects Notice** means a written defects notice issued pursuant to clause 11.2.
- 1.1.1.22 **Design Documents** means the drawings, specifications and other information for the construction of the Works
- 1.1.1.23 **Final Certificate** means the final certificate issued pursuant to clause 11.8.
- 1.1.1.24 **FOI Act** means the *Freedom of Information Act 1991* (SA).
- 1.1.1.25 **Force Majeure Event** means an unforeseeable and unknown event occurring after the date of this agreement beyond the reasonable control of the parties which precludes a party from performing on time an obligation under this agreement. Such circumstances include:
- (a) acts of God, lightning strikes, earthquakes, floods, storms, explosions, fires and any natural disaster; and
 - (b) acts of war, acts of public enemies, terrorism, riots, civil commotion, malicious damage, sabotage and revolution;

- (c) a pandemic is declared by a Governmental Agency and measures are implemented by the Governmental Agency to address the pandemic; and/or
- (d) a suspension or termination of services or works is necessitated by legislative requirement or is ordered by a Governmental Agency;

but does **not** include any event or circumstance which the Contractor ought to have reasonably foreseen from or as a result of the Existing Conditions.

- 1.1.1.26 **Governmental Agency** means any government or any government, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, agency or entity including any self-regulatory organisation established under statute or any stock exchange.
- 1.1.1.27 **Latent Condition** means any physical condition on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by the Contractor prior to entering into this agreement if the Contractor had:
 - (a) examined all information made available in writing by the Council to the Contractor;
 - (b) examined all information relevant to the risks, contingencies and other circumstances affecting this agreement and obtainable by reasonable enquiries; and
 - (c) inspected the Site and its surroundings.
- 1.1.1.28 **Law** means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation.
- 1.1.1.29 **Non-completion Notice** means a written notice of non-completion of the Contract Works issued under clause 10.2.
- 1.1.1.30 **Notice** means a notice, demand, consent, approval or communication under this agreement.
- 1.1.1.31 **Preliminary Design** means any design documents provided (or referred to) in the Councils Project Requirements
- 1.1.1.32 **Program** means the program for the conduct of the Contract Works in Annexure C.
- 1.1.1.33 **Recipient** refers to a party who receives a supply pursuant to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 1.1.1.34 **Reimbursable Expenses** means the expenses specified in Item 17 of the Schedule.
- 1.1.1.35 **Reportable Incident** means any accident, injury, property or environmental damage or any potential breach of any Law that occurs during or as a result of this agreement.
- 1.1.1.36 **Schedule** refers to the Schedule of this agreement.
- 1.1.1.37 **Schedule of Rates** refers to the rates tabled in Annexure D
- 1.1.1.38 **Security** means the security in the amount and form specified in Item 9 of the Schedule.
- 1.1.1.39 **Site** means the site of the Contract Works specified in Item 5 of the Schedule.

- 1.1.1.40 **Special Conditions** mean the special conditions set out in Annexure B, if any.
- 1.1.1.41 **Supplier** refers to a party who makes any supply under the *A New Tax System (Goods and Services Tax) Act 1999 (Cth)*.
- 1.1.1.42 **Variation** means any change in the Contract Works as specified in this agreement, being:
 - (a) any increase of, decrease in, or omission from such works;
 - (b) any change in the character or quality of any such works; or
 - (c) any supply of additional works.

1.2 Interpretation

1.2.1 In this agreement, unless the context otherwise requires:

- 1.2.1.1 headings do not affect interpretation;
- 1.2.1.2 singular includes plural and plural includes singular;
- 1.2.1.3 words of one gender include any gender;
- 1.2.1.4 a reference to a party includes its executors, administrators, successors and permitted assigns;
- 1.2.1.5 a reference to a person includes a partnership, corporation, association, government body and any other entity;
- 1.2.1.6 a reference to the Contractor includes any person comprising the Contractor;
- 1.2.1.7 a reference to this agreement includes any schedules and annexures to this agreement;
- 1.2.1.8 an agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
- 1.2.1.9 an agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
- 1.2.1.10 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
- 1.2.1.11 a provision is not construed against a party only because that party drafted it;
- 1.2.1.12 an unenforceable provision or part of a provision may be severed, and the remainder of this agreement continues in force, unless this would materially change the intended effect of this agreement;
- 1.2.1.13 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
- 1.2.1.14 an expression defined in the Corporations Act 2001 (Cth) has the meaning given by that Act at the date of this agreement;
- 1.2.1.15 an expression defined in the A New Tax System (Goods and Services Tax) Act 1999 (Cth) has the meaning given by that Act at the date of this agreement.

1.3 Background

The Background forms part of this agreement and the parties agree that the Background is true and accurate.

2. Execution of Contract Works

2.1 In consideration for the payment of the Contract Sum, the Contractor must:

2.1.1 execute and complete the Contract Works in accordance with this agreement to Completion by no later than the Date for Completion and to the reasonable satisfaction of the Council, and perform its other obligations under this agreement;

2.1.2 supply at the Contractor's expense all facilities and services required at or about the Site for the execution of the Contract Works. Those facilities and services must comply with all Authorisations and the standards and other requirements of all applicable Laws and of any relevant Governmental Agency;

2.1.3 comply with reasonable directions of the Council in the execution of the Contract Works;

2.1.4 comply with all Laws and Authorisations affecting or applicable to the Contract Works or the execution of the Contract Works;

2.1.5 not interfere with or damage property on or adjacent to the Site;

2.1.6 repair all damage caused to property on or adjacent to the Site by the Contractor, its employees, agents or sub-contractors or their respective employees, and provide any necessary temporary protection;

2.1.7 pay all fees in respect of the execution of the Contract Works to any Governmental Agency, and procure any Authorisation required in respect of the execution of the Contract Works;

2.1.8 before Completion and during the Defects Liability Period and any operational maintenance period specified:

2.1.8.1 keep the Contract Works and the Site clean and tidy;

2.1.8.2 regularly remove from the Site all surplus materials;

2.1.8.3 clean up rubbish on a daily basis;

2.1.8.4 place all rubbish in a bin provided on-site or other areas as directed by the Council.

Failure to do so may result in the Council carrying out this work at the cost of the Contractor without notice;

2.2 unless otherwise agreed with the Council in writing, carry out the Contract Works only between the working hours set out in Item 11 of the Schedule.

3. Access, Work Health and Safety

3.1 Access to Site and Contract Works

3.1.1 The Council must within 14 days of agreement, give to the Contractor access to the site so the Contractor can commence and perform their design obligations.

- 3.1.2 The Council is not obliged to give the contractor access to the site required under clause 3.1.1 until the Contractor has provided evidence of Public Liability Insurance, Professional Indemnity Insurance, Insurance of Employees and Work Health & Safety requirements.
- 3.1.3 The Council must within 14 days of acceptance of the design documents, grant to the Contractor Possession of the Site (or part thereof) to enable the Contractor to undertake and complete the Contract Works.
- 3.1.4 The Council is not obliged to grant Possession of the Site required in clause 3.1.3, if the contractor at that time, fails to comply with their obligations under Contract in regard to Public Liability Insurance, Insurance of Employees and Work Health and Safety requirements.
- 3.1.5 The Contractor must allow the Council access to the Site and the Contract Works at all times.

3.2 **Work Health and Safety**

- 3.2.1 The Contractor must comply with the *Work Health and Safety Act 2012* (SA), any regulations made under it and the Council's Work Health and Safety Policy, including the implementation of safety requirements and a safe system of work.

3.3 **Contractor responsible**

- 3.3.1 Without limiting its other obligations under this agreement, the Contractor has complete responsibility and liability for health and safety on the Site. In this regard the Contractor must develop and implement appropriate rules, systems and procedures and generally monitor, manage and administer the operations of the Site and the Contract Works in a proper and professional manner and, without limiting this, the Contractor must take and enforce all necessary or desirable measures to ensure safety in respect of persons and property while performing its obligations under this agreement.
- 3.3.2 Without limiting clause 3.3.1, the Contractor must at its own cost:
 - 3.3.2.1 erect and at all times during the day and night maintain in or around the Site suitable signs warning the public of the execution of the Contract Works; and
 - 3.3.2.2 during all hours of darkness keep all machinery and other obstructions or traps created in the course of the Contract Works adequately illuminated for the protection of the public.

3.4 **Suspension of Contract Works**

- 3.4.1 If the Council considers that the suspension of the whole or part of the Contract Works is necessary because of a breach of this clause by the Contractor or for any other reason (with the Council acting reasonably in all things), the Council may direct the Contractor to suspend the progress of the whole or part of the Contract Works for such time as the Council thinks fit (acting reasonably in all things).
- 3.4.2 As soon as the Council becomes aware that the reason for suspension no longer exists, the Council must direct the Contractor to recommence work on the whole or relevant part of the Contract Works.
- 3.4.3 If caused (whether directly or indirectly) by any act or omission by the Contractor, the Contractor bears any cost incurred by it by reason of a suspension under this clause.
- 3.4.4 Suspension under this clause does not affect the Date for Completion, but the cause of the suspension may be a ground for time extension under clause 9.3.

4. **Materials and Work**

- 4.1 Unless otherwise specified in this agreement, the Contractor must supply at its own cost everything necessary for the proper completion of the work under this agreement and the proper performance of its obligations under this agreement.
- 4.2 Unless otherwise specified in this agreement, materials used in the Contract Works and the standard of workmanship must be suitable for their purpose and consistent with the nature and character of the Contract Works.
- 4.3 Unless otherwise specified in this agreement, materials to be incorporated in the Contract Works must be new and, where applicable, materials and workmanship must comply with the relevant standard of Standards Australia International Limited.
- 4.4 At any time before the issue of the Final Certificate, the Council may reject any material or work which does not comply with this agreement and may direct its removal, correction or replacement, whether it has been the subject of a payment or not. The Council must make any such rejection or give any such direction as soon as practicable after discovering the non-compliance.
- 4.5 If the removal, correction or replacement directed by the Council requires the removal of, or damage to, works or materials of other contractors, the Contractor must also remove, replace and/or reinstate those other works or materials.
- 4.6 If the Council directs the Contractor to correct or replace any material or work, the Contractor must commence the work of correction or replacement within seven days after the receipt by the Contractor of the direction (or such other period as the Council may reasonably determine) and must complete the work properly and to the satisfaction of the Council. If the Council directs the Contractor to remove from the Site any material which does not comply with this agreement, the Contractor must do so promptly.
- 4.7 The Contractor must bear the cost of all such removals, corrections, replacements and reinstatements.
- 4.8 If the Contractor fails to comply with this clause the Council may have the removal, correction or replacement carried out by other persons. The cost incurred by the Council in having the work so carried out is a debt due from the Contractor to the Council.

5. **Provisional Sums**

- 5.1 The Council need not pay any provisional sum specified in Item 13 of the Schedule unless the relevant work or item is performed or supplied by the Contractor at the direction of the Council. In that case, the Council must pay the provisional sum (subject to adjustment) to the Contractor as an addition to the Contract Sum in the same manner and at the same time as the Contract Sum.

6. **Subcontracting and Assigning**

- 6.1 The Contractor must not assign or subcontract this agreement or any right or obligation under it without the prior written consent of the Council, which may be granted or withheld in the Council's absolute discretion.
- 6.2 With any application for such consent, the Contractor must provide all information required by the Council, including evidence that the proposed assignee or subcontractor is capable of performing the Contract Works to be assigned or subcontracted.
- 6.3 Unless otherwise agreed in writing by the Council, no such assignment or subcontract relieves the Contractor from any liability under this agreement or at Law in respect of the performance or purported performance of this agreement and the Contractor is responsible for the acts and omissions of any assignee or subcontractor or any assignee's or subcontractor's employees and agents as if they were the acts or omissions of the Contractor.

- 6.4 For the purpose of this clause, if the Contractor is a company, an assignment of this agreement includes any change in the beneficial ownership of the share capital of the Contractor, or the resignation, death or appointment of any director of the company, which alters the effective control of the Contractor.

7. Workforce

7.1 Control of employees

- 7.1.1 The Contractor must employ and must ensure that its subcontractors employ only persons who are careful, skilled and experienced in their respective trades and callings.
- 7.1.2 The Council may object to and direct the Contractor to remove or have removed from the Site or from any activity connected with the Contract Works within such time as the Council directs any person employed by the Contractor or by any subcontractor who (in the Council's opinion) is incompetent or negligent in the performance of that person's duties or whose conduct is (in the Council's opinion) prejudicial to the competent, safe and timely execution of the Contract Works.
- 7.1.3 The Contractor must comply with such direction and any such person must not again be employed on the Site or on activities connected with the Contract Works without the prior approval of the Council.

7.2 Industrial relations

- 7.2.1 The Contractor is responsible for industrial relations with all workers engaged in and about the execution of the Contract Works.
- 7.2.2 The Contractor must keep the Council fully informed of any disputes with or demands by workers or their representatives and any other circumstances which could result in industrial action affecting the normal working of the Site or otherwise affecting the competent and timely execution of the Contract Works.
- 7.2.3 If the workers of the Contractor or the workers of any subcontractor of the Contractor take industrial action which affects the normal working of the Site or otherwise affects the competent and timely execution of the Contract Works and that industrial action is prohibited by Law, then the Contractor must at its own cost take all action necessary to seek urgent injunctive relief preventing such industrial action and must at all times keep the Council fully informed of the progress of such action.
- 7.2.4 If the Contractor fails to seek injunctive relief in accordance with this clause, or if the Contractor does not do so with all expedience, the Council may take such action, and the Contractor is liable to the Council for all costs incurred in so doing.

8. Variations

8.1 Variations

- 8.1.1 No Variation invalidates this agreement.

8.2 No unauthorised variation

- 8.2.1 The Contractor must not make any Variation of the Contract Works except:
- 8.2.1.1 a Variation instructed by the Council; and/or
- 8.2.1.2 a Variation requested by the Contractor, which has been approved by the Council.

8.3 **Execute Variations**

- 8.3.1 The Contractor must carry out as part of the Contract Works or omit from the Contract Works (as is required) any Variation instructed by the Council.

8.4 **Adjustment of Contract Sum**

- 8.4.1 For the purpose of any adjustment of the Contract Sum for a Variation:
- 8.4.1.1 if practicable, the value of a Variation must be agreed by the Contractor and the Council before the Contractor commences to execute the Variation;
 - 8.4.1.2 if the value of a Variation is not agreed by the Contractor and the Council, the value must be determined by the Council in accordance with the rates and the criteria set out in Item 12 of the Schedule;
 - 8.4.1.3 a Variation must be valued as soon as practicable, and the Contractor must promptly and diligently supply to the Council all information relevant to the valuation.

9. **Time**

9.1 **Commencement of Contract Works**

- 9.1.1 The Contractor must commence the execution of the Contract Works on or before the Date for Commencement and must execute the Contract Works with due diligence, and maintain a rate of progress appropriate to bring the Contract Works to Completion in accordance with this agreement.

9.2 **Completion of Contract Works**

- 9.2.1 The Contractor must bring the Contract Works to Completion on or before the Date for Completion.

9.3 **Claim for time extension**

- 9.3.1 The Contractor by written notice to the Council may claim a time extension if progress of the Contract Works is delayed or will be delayed by:
- 9.3.1.1 a breach of this agreement by the Council;
 - 9.3.1.2 construction and execution of a Variation unless made necessary by an act or omission of the Contractor;
 - 9.3.1.3 civil commotion, any combination of workmen on or off site, lockouts or similar actions undertaken by employers of labour provided such actions have not been caused or contributed to by an act or omission of the Contractor or a company related to the Contractor;
 - 9.3.1.4 a Latent Condition;
 - 9.3.1.5 a strike, ban or other industrial action affecting the progress of the Contract Works which is of general application throughout the relevant industry or industries; or
 - 9.3.1.6 inclement weather or its consequences affecting the Contract Works at the Site.
- 9.3.2 The Contractor may only claim a time extension made reasonably necessary by the delays caused by the factors specified in clause 9.3.1.

- 9.3.3 The claim must state with reasonable particularity the cause of delay, and an estimate (if practicable) of the extent or likely extent of the delay in bringing the Contract Works to Completion.
- 9.3.4 The claim must be made before or within seven days after the commencement of the delay, whether or not it is practicable to estimate the delay or its consequences.
- 9.3.5 The Contractor may provide to the Council any information the Contractor considers appropriate for any ongoing review by the Council of the time extension.
- 9.3.6 The Contractor must promptly provide to the Council all information requested by the Council for any ongoing review by the Council of the time extension.

9.4 **Extension of time**

- 9.4.1 If progress of the Contract Works is delayed by a cause beyond the control of the Contractor and listed in clause 9.3.1, and if Completion of the Contract Works is thereby delayed, the Contractor is entitled, subject to clauses 9.5 and 9.6, to a fair and reasonable extension of the time for bringing the Contract Works to completion, and the Date for Completion must be extended under clause 9.6.

9.5 **Conditions precedent**

- 9.5.1 The Contractor is entitled to a time extension only if:
 - 9.5.1.1 the Contractor claimed a time extension in strict compliance with clause 9.3;
 - 9.5.1.2 the Contractor took reasonable steps to minimise the delay in Completion of the Contract Works; and
 - 9.5.1.3 the delayed activities are critical to the Programme.
 - 9.5.1.4 Council's determination
- 9.5.2 The Council must determine what (if any) fair and reasonable extension of time for bringing the Contract Works to Completion should be allowed to the Contractor in respect of each claim, and must give written notice of every such determination to the Contractor, and the Date for Completion must be extended accordingly.

9.6 **Extraordinary grant**

- 9.6.1 With the Contractor's consent, before or after Completion, the Council may by written notice allow to the Contractor an extension of time for bringing the Contract Works to Completion, and the Date for Completion of the Contract Works must be extended accordingly.

9.7 **No costs or damages**

- 9.7.1 The Contractor accepts the risk of all costs, losses and expenses incurred because of a delay in progress or Completion of the Contract Works (including a delay caused by a Variation directed by the Council). The Contractor's sole remedy for such a delay is an extension of time approved by the Council under this clause. No costs or damages are payable by the Council in respect of such a delay.

10. Completion of Contract Works

10.1 Inspection of Contract Works

- 10.1.1 The Contractor must notify the Council in writing to arrange an inspection or inspections of the Contract Works when, or as soon as practicable after, they are brought to Completion. The Contractor must at that time provide to the Council all warranties, certificates, operating and maintenance manuals and other information necessary for the use, operation and maintenance of the Contract Works, including a copy of the 'as built' drawings, plans and specifications for the Contract Works.

10.2 Certificate of Completion

- 10.2.1 The Council must then inspect the Contract Works and:
- 10.2.1.1 if satisfied that the Contract Works have been brought to Completion, must give to the Contractor a Certificate of Completion of the Contract Works stating the date upon which the Contract Works were brought to Completion; or
- 10.2.1.2 if not so satisfied, must give to the Contractor a Non-completion Notice specifying the Defects which the Contractor must attend to before the Council will issue a Certificate of Completion of the Contract Works.
- 10.2.2 If the Council fails to give to the Contractor either a Certificate of Completion or a Non-completion Notice within 10 days after receipt of the written notice from the Contractor under clause 10.1, the Contractor may give the Council a further written notice requiring the Council to issue a Certificate of Completion or a Non-completion Notice within seven days after receipt of that further notice. If the Council fails to do so, the Council is deemed to give a Certificate of Completion of the Contract Works upon the expiration of seven days.
- 10.2.3 The Contractor may give the Council a notice under clause 10.1 more than once.

10.3 Completion of Contract Works

- 10.3.1 Unless the Contractor by written notice to the Council disputes the Certificate of Completion of the Contract Works within seven days after receipt of the Certificate, the Contract Works are deemed to have been brought to Completion on the date stated in the Certificate of Completion. The Certificate must not be otherwise disputed.

11. Defects Liability

11.1 Defects Liability Period

- 11.1.1 The Defects Liability Period for the Contract Works commences upon Completion of the Contract Works and continues until expiry of the period stated in Item 8 of the Schedule.

11.2 Remedy Defects

- 11.2.1 If before the expiry of the Defects Liability Period, in the Council's opinion a Defect is apparent or has been detected in the Contract Works, the Council may give written notice to the Contractor in the form of a Defects Notice requiring the Contractor to remedy that Defect. The Defects Notice must state:
- 11.2.1.1 the Defect which is required to be remedied; and
- 11.2.1.2 the date by which the Defect is to be remedied.

11.3 **Carry out instructions**

11.3.1 The Contractor must promptly and competently carry out instructions of the Council given in a Defects Notice, in strict accordance with that Defects Notice.

11.4 **Council may rectify**

11.4.1 If a Defect is not rectified within the time specified in the Defects Notice, the Council may rectify the Defect at the Contractor's cost, without prejudice to any other rights that the Council has against the Contractor in respect of that Defect. The costs incurred by the Council in so rectifying the Defect are a debt due from the Contractor to the Council.

11.5 **Further Defects Liability Period**

11.5.1 If the Contractor executes remedial work under this clause, the Council may by written notice to the Contractor fix a further Defects Liability Period in respect of the remedial work (being no longer than the initial Defects Liability Period) commencing upon the date of completion of the remedial work. This clause applies to that remedial work as if the further Defects Liability Period was the Defects Liability Period referred to in clause 11.1.

11.6 **Access for remedial works**

11.6.1 The Council must provide reasonable access to the Contract Works for the Contractor to execute remedial works at times reasonably convenient to the Council and occupiers of the Contract Works. The Contractor must execute remedial works in such manner as minimises inconvenience to the Council and occupiers of the Contract Works.

11.7 **Deemed Variation**

11.7.1 If it is established that a Defect identified as such by the Council is not a Defect or is a Defect in the design of the Contract Works as prepared by any consultant of the Council, the works carried out by the Contractor pursuant to an instruction under clause 11.2 are deemed a Variation.

11.8 **Final Certificate**

11.8.1 Upon the expiry of the Defects Liability Period, and when the Contractor has completed the Contract Works including all remedial works to the reasonable satisfaction of the Council and has provided to the Council all documents and other information required by the Council under this agreement, the Council must issue to the Contractor a Final Certificate stating the Council must pay to the Contractor in accordance with item 14 clause 3 of the schedule any remaining balance of the Contract Sum as adjusted under this agreement.

11.8.2 Issue of the Final Certificate and payment of the Contract Sum do not release or discharge any liability of the Contractor to the Council for any breach of this agreement (including any Defect) or for any other conduct in relation to the Contract Works or this agreement.

12. **Adjustment of Contract Sum**

12.1 **No adjustment unless authorised**

12.1.1 If the Contract Sum is a fixed lump sum, it is not subject to rise and fall, and includes allowance for all works incidentally or contingently necessary to execute and complete the Contract Works and for all the Contractor's risks and responsibilities. Without limiting this, it includes allowance for all the Contractor's costs of and incidental to any special payment or allowance made to or for the benefit of workers engaged upon execution of the Contract Works including any project or site allowance, any disability allowance, any redundancy payment or redundancy pay scheme, or any payment or contribution or allowance for or on account of superannuation or long service leave.

- 12.1.2 The Contract Sum will not be adjusted or varied except in accordance with provisions of this agreement providing expressly for an adjustment of the Contract Sum.

12.2 Adjustment for Variations

- 12.2.1 If the Council instructs a Variation, the Contract Sum is adjusted by adding or deducting (as the case requires) the value of the Variation as agreed between the Contractor and the Council. However, the Contract Sum must not be increased unless:

- 12.2.1.1 the Council has expressly stated in writing that the instruction is a Variation;
- 12.2.1.2 the Council has expressly stated in writing that the Contract Sum will be adjusted for the Variation; or
- 12.2.1.3 the works carried out are deemed a Variation under clause 11.7.

13. Payment of Contract Sum

- 13.1 Where the Contract Sum is a fixed lump sum, the Council must pay the Contract Sum in accordance with Item 14 of the Schedule.
- 13.2 Where the Contract Sum is determined by the Schedule of Rates in Annexure C, the Council must pay the Contract Sum at the time and in the manner specified in Annexure C.
- 13.3 **Effect of Payment**
- 13.3.1 A payment of all or part of the Contract Sum is not an acceptance of the Works or Services or a waiver of a right or action of the Council.

14. Security

- 14.1 If the Security is a bank guarantee, then the Contractor must provide the Security to the Council before the Date for Commencement as security for the due performance of the Contractor's obligations under this agreement.
- 14.2 If the Security is a retention sum, then the Council may deduct and retain an amount up to the Security amount from each payment by the Council to the Contractor under this agreement as security for the due performance of the Contractor's obligations under this agreement.
- 14.3 The Security (whether retention sum or bank guarantee) must be released to the Contractor as follows:
- 14.3.1 upon the issue of the Certificate of Completion, 50% of the Security (as adjusted under this agreement) must be released; and
- 14.3.2 upon the issue of the Final Certificate, any remaining Security (as adjusted under this agreement) must be released.

15. Right of Council to Recover Money

- 15.1 Without limiting the Council's other rights, the Council may deduct any debt due from the Contractor to the Council under this agreement from any money which is or becomes payable to the Contractor by the Council, including the Security. This clause does not affect the Council's right to recover from the Contractor the whole of the debt or any balance that remains owing after deduction.

16. Risks, Indemnities and Insurances

16.1 Contractor's risk

- 16.1.1 The Contract Works are at the Contractor's risk until the Contract Works are brought to Completion.
- 16.1.2 The Council's insurance does not cover material loss or damage to any property, plant or equipment or materials of the Contractor. The Contractor must take out appropriate insurance to cover these items.
- 16.1.3 Security for plant, equipment and unfixed materials on Site is the sole responsibility of the Contractor.

16.2 Property damage

- 16.2.1 The Contractor must indemnify the Council against any loss or liability (including the payment of excesses on insurance effected by the Council) incurred by the Council in respect of the loss or destruction of, or damage to, or interference with, any property of the Council or of any person, if and to the extent that it is caused or contributed to by the Contractor or its employees or agents or any subcontractor or any person supplying work or services in and about the execution of the Contract Works by the Contractor.

16.3 Public risk

- 16.3.1 The Contractor must indemnify the Council against any liability incurred by the Council in respect of personal injury to, or death of, any person arising out of, or in the course of, the execution of the Contract Works if and to the extent that it is caused or contributed to by the Contractor or its employees or agents or any subcontractor or any person supplying work or services in and about the execution of the Contract Works.

16.4 Contractor's insurance

- 16.4.1 The Contractor must effect and maintain at all material times during the currency of this agreement insurance in the joint names or otherwise for the benefit of the Council, the Contractor and all subcontractors and suppliers (**Insured**). The insurance must at all times cover liability to the public (including the Council) for at least \$20,000,000 in respect of personal injury to or death arising by accident to any person and in respect of any injury loss or damage arising by accident to any property real or personal including property (other than the Contract Works) belonging to the Council or in which the Council is interested and where the accident arises out of or is caused by the execution of the Contract Works.
- 16.4.2 The Contractor must keep the insurance current until the expiry of the Defects Liability Period.
- 16.4.3 The Contractor must ensure that each policy of insurance required by this clause contains provisions acceptable to the Council that:
 - 16.4.3.1 require the insurer to accept the term 'insured' as applying to each of the persons comprising the Insured as if a separate policy of insurance had been issued to each of them (subject always to the overall sum insured not being increased thereby); and
 - 16.4.3.2 require the insurer, whenever the insurer gives to the Contractor a notice of cancellation or any other notice under or in relation to the policy, at the same time to inform the Council in writing that the notice has been given to the Contractor; and
 - 16.4.3.3 provide that a notice of the occurrence of an event out of which the particular Insured giving the notice alleges that it has suffered or could suffer a loss or damage must be accepted by the insurer as a notice of the occurrence given by the Insured. If an event occurs which in the opinion of the Contractor may give rise to a claim involving

the Council or the Contractor under the policy of insurance effected by the Contractor it must notify the Council and must ensure that the Council is kept fully informed of subsequent action and developments concerning the claim.

16.5 Return to Work SA

- 16.5.1 Subject to clause 16.5.2, the Contractor must ensure that it is at all times registered as an employer under the *Return to Work Act 2014 (SA) (Act)* and that it pays all premiums due under it in respect of its employees engaged in and about the Contract Works. The Contractor must produce to the Council on execution of this agreement a current Certificate of Registration as an employer under the Act. The Contractor must ensure that all subcontractors engaged by it have at all times current Certificates of Registration as employers under the Act, and must produce them to the Council upon request in writing by the Council.
- 16.5.2 Notwithstanding clause 16.5.1, if the Contractor (or any sub-contractor) is unable to register as an employer under the Act, then the Contractor must instead adequately insure against accident, personal injury and disability. The Contractor must maintain such insurance at all times during the currency of this agreement (including the Defects Liability Period) and must produce evidence of:
- 16.5.2.1 the existence and adequacy of such insurance; and
 - 16.5.2.2 the Contractor's (and/or any sub-contractor's) inability to register as an employer under the Act.

16.6 Inspection of insurance policies

- 16.6.1 Whenever requested by the Council, the Contractor must produce evidence (to the satisfaction of the Council) of the insurances effected and maintained by the Contractor pursuant to this clause.
- 16.6.2 If the Contractor fails to do so, the Council may effect and maintain any such insurance and pay the premiums. The amount paid is a debt due from the Contractor to the Council.

17. Force Majeure

- 17.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this agreement:
- 17.1.1 neither party is liable for such delay or failure; and
 - 17.1.2 all obligations of a party under this agreement are suspended until the Force Majeure Event ceases to apply.
- 17.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this agreement must:
- 17.2.1 notify the other party as soon as possible giving:
 - 17.2.1.1 reasonably full particulars of the Force Majeure Event;
 - 17.2.1.2 the date of commencement of the Force Majeure Event and an estimate of the time required to enable it to resume full performance of its obligations; and
 - 17.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - 17.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;

- 17.2.3 resume performance as soon as possible after termination of the Force Majeure Event or after the Force Majeure Event abates to an extent which permits resumption of performance;
- 17.2.4 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
- 17.2.5 notify the other party when resumption of performance occurs.
- 17.3 If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this agreement by written notice to the Contractor (**Termination Date**).
- 17.4 In the event of the Council terminating this agreement pursuant to clause 17.3:
 - 17.4.1 the Council remains liable to pay the Contractor any unpaid progress claims already submitted; and
 - 17.4.2 within twenty (20) Business Days of the Termination Date the Contractor must give the Council a final progress claim:
 - 17.4.2.1 for Contract Works completed up to and including the Termination Date and not the subject of a prior progress claim; and
 - 17.4.2.2 for reasonable and substantiated direct costs or expenses (net of GST input tax credits) the Contractor incurred as the result of the Council terminating the agreement under clause 18.3 and not reasonably able of being put to alternate use.
 - 17.4.3 The Council will not otherwise be liable to the Contractor for any cost, loss, expense or damage incurred by the Contractor in connection with the exercise by the Council of its rights under clause 17.3 including, without limitation, any claim relating to loss of anticipated profits or unperformed Contract Works.

18. Termination by Council

- 18.1 If:
 - 18.1.1 the Contractor becomes an externally administered body corporate or an insolvent under administration;
 - 18.1.2 execution is levied against the Contractor or its assets for more than \$1,000 and execution is not stayed or satisfied within 14 days;
 - 18.1.3 the Contractor fails, or ceases, to hold an Authorisation required by Law for carrying out the Contract Works;
 - 18.1.4 any industrial action affects the execution or progress of the Contract Works or any industrial action which may affect the execution or progress of the Contract Works is threatened, except industrial action of a general application throughout the relevant industry or industries;
 - 18.1.5 the Contractor's engagement under any other agreement with the Council in respect of the Site or any adjacent site is terminated or if the Council lawfully excludes the Contractor from the Site or any adjacent site under any such agreement;
 - 18.1.6 the Contractor:
 - 18.1.6.1 fails to provide the Security;
 - 18.1.6.2 fails to proceed diligently and competently with the execution of the Contract Works;

18.1.6.3 commits a breach of this agreement; or

18.1.6.4 fails to comply with an instruction or direction of the Council; and

the Council gives written notice to the Contractor specifying the breach and requiring it to be remedied within seven days of receipt or any other reasonable period specified in the notice and stating the Council's intention to terminate the Contractor's engagement under this agreement if the breach is not remedied within that period, and the Contractor does not so remedy the breach within that period;

Without limiting its other rights, the Council may:

18.1.7 take over the whole or any part of the Contract Works remaining to be completed; and/or

18.1.8 terminate the Contractor's engagement under this agreement by written notice to the Contractor.

18.2 If the Council exercises these rights, insofar as is necessary, the Council may exclude from the Site the Contractor and any other person concerned in the performance of the Contract Works.

18.3 If the Council takes over the whole or any part of the Contract Works remaining to be completed, the Council may:

18.3.1 complete them or part of them;

18.3.2 let a contract for them or part of them; or

18.3.3 engage or employ any person other than the Contractor to carry out them or part of them.

18.4 After taking over the Contract Works or part of them, on Completion the Council must ascertain the cost of the works to the Council, comprising payments to the Contractor and all losses, costs, charges and expenses incurred by the Council in carrying out the Contract Works. The Council must certify that amount to the Contractor. A certificate signed by the Council stating the costs of the Contract Works to the Council is prima facie evidence of the matters stated in the certificate. If the amount certified is greater than the amount which would have been paid to the Contractor if the whole of the Contract Works had been completed by the Contractor pursuant to this agreement, the difference between the two amounts is a debt due from the Contractor to the Council.

18.5 Upon termination of the Contractor's engagement under this clause, the Contractor is liable to the Council for all losses, costs and expenses caused by the termination of the Contractor's engagement, as if this agreement had been repudiated by the Contractor and rescinded by the Council's acceptance of such repudiation.

19. Termination by Contractor

19.1 The Contractor may terminate this agreement by written notice to the Council if the Council breaches a material term of this agreement and fails to remedy the breach within a reasonable time after receiving written notice requiring it to do so.

19.2 Termination of this agreement under this clause does not affect any accrued rights or remedies of other party.

20. Confidential Information and Freedom of Information

20.1 Each party agrees that it will not use any Confidential Information of the other party or allow any Confidential Information of the other party to be used for any purpose, except for the purposes of and in the manner contemplated by this agreement, and agrees that it will:

- 20.1.1 keep confidential;
- 20.1.2 take reasonable steps to ensure that the party's officers and employees do not disclose to a third party;
- 20.1.3 maintain proper and secure custody of; and
- 20.1.4 not use or reproduce in any form;

any Confidential Information belonging to the other party. Any departure from a party's obligations pursuant to this clause may only be with the written consent of the other party or as required by law or the terms of this agreement.

- 20.2 The Consultant consents to any disclosures made as a result of the Council complying with its obligations under the FOI Act, subject to any legally required consultation.
- 20.3 Unauthorised disclosure of any Confidential Sections constitutes a breach of a party's obligations under this agreement.

21. **Dispute Resolution**

21.1 **General**

- 21.1.1 A party must not commence arbitration or court proceedings (except for urgent equitable or injunctive relief) in respect of a dispute under this agreement, unless it first attempts to resolve the dispute by negotiation and mediation under this clause.
- 21.1.2 A party claiming that a dispute has arisen under this agreement must give written notice to the other party specifying the nature and details of the dispute.
- 21.1.3 On receipt of that notice by the other party, the parties must negotiate in good faith to resolve the dispute.
- 21.1.4 If the parties are unable to resolve the dispute within 10 business days, they must promptly refer the dispute:
 - 21.1.4.1 in the case of the Council to the Chief Executive Officer; and
 - 21.1.4.2 in the case of the Consultant to the Consultant's Representative.
- 21.1.5 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute.

21.2 **Mediation**

- 21.2.1 If those persons are unable to resolve the dispute within 10 business days of referral, a party may refer the dispute for mediation under the mediation rules of the Law Society of South Australia Inc to:
 - 21.2.1.1 a mediator agreed by the parties; or
 - 21.2.1.2 if the parties are unable to agree a mediator within five business days, a mediator nominated by the President of the Law Society or the President's nominee.
- 21.2.2 The role of a mediator is to assist in negotiating a resolution of the dispute. A mediator may not make a decision that is binding on a party unless that party has agreed in writing.
- 21.2.3 Any information or documents disclosed by a party under this clause:
 - 21.2.3.1 must be kept confidential; and

21.2.3.2 may not be used except to attempt to resolve the dispute.

21.2.4 Each party must bear its own mediation costs. The parties must bear equally the costs of any mediator.

21.3 Arbitration

21.3.1 If the dispute is not resolved within 10 business days of appointment of the mediator, a party may refer the dispute to:

21.3.1.1 an arbitrator agreed by the parties; or

21.3.1.2 if the parties are unable to agree an arbitrator within five business days, an arbitrator nominated by the Chairperson of the South Australian Chapter of The Institute of Arbitrators and Mediators Australia or the Chairperson's nominee.

21.3.2 A referral to arbitration is a submission to arbitration within the meaning of the *Commercial Arbitration Act 2011* (SA).

21.3.3 The party serving the notice of arbitration must lodge with the arbitrator a security deposit for the cost of the arbitration proceedings.

21.3.4 The arbitrator may determine the amount of costs, how costs are to be apportioned and by whom they must be paid.

21.4 Performance

21.4.1 If possible, each party must perform its obligations under this agreement during negotiations, mediation and arbitration proceedings.

22. Representatives

22.1 The Council nominates the Council's Representative as its agent for the purpose of this agreement.

22.2 The Contractor nominates the Contractor's Representative as its agent for the purposes of this agreement.

22.3 Each party's representative has the authority to make or give instructions, approvals and decisions in respect of the Contract Works, unless a party notifies the other in writing of limits on the powers of its representative.

23. Relationship

23.1 This agreement does not create a relationship of employment, agency or partnership between the parties.

24. Miscellaneous

24.1 Special Conditions

24.1.1 If there is an inconsistency between a Special Condition set out in Annexure B and the rest of this agreement, the Special Condition governs to the extent of the inconsistency.

24.2 Business Days

24.2.1 Except for the commencement carrying out or completion of any works, if the day on which an act is to be done under this agreement is not a business day, that act may be done on the next business day.

24.3 **Alteration**

24.3.1 This agreement may be altered only in writing signed by all parties.

24.4 **Approvals and consents**

24.4.1 Unless otherwise provided, a party may in its discretion give (conditionally or unconditionally) or withhold any approval or consent under this agreement.

24.5 **Entire agreement**

24.5.1 This agreement:

24.5.1.1 constitutes the entire agreement between the parties about its subject matter;

24.5.1.2 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.

24.6 **Waiver**

24.6.1 A waiver of a provision of or right under this agreement must be in writing signed by the party giving the waiver and is effective only to the extent set out in the written waiver.

24.7 **Exercise of power**

24.7.1 The failure, delay, relaxation or indulgence by a party in exercising a power or right under this agreement is not a waiver of that power or right.

24.7.2 An exercise of a power or right under this agreement does not preclude a further exercise of it or the exercise of another right or power.

24.8 **Survival**

24.8.1 Each indemnity, obligation of confidence and other term capable of taking effect after the expiration or termination of this agreement, remains in force after the expiration or termination of this agreement.

24.9 **Further action**

24.9.1 Each party must do all things necessary to give full effect to this agreement and the transactions contemplated by this agreement.

24.10 **Governing law**

24.10.1 This agreement is governed by the law in South Australia.

24.10.2 The parties irrevocably submit to the exclusive jurisdiction of the courts in South Australia.

24.11 **Ombudsman**

24.11.1 The Contractor acknowledges that the *Ombudsman Act 1972 (SA)* empowers the Ombudsman to investigate matters in the public interest. The Contractor must ensure compliance with all obligations arising under that or any other Act.

24.12 **Work Health and Safety**

24.12.1 In complying with its obligations pursuant to this agreement, the Contractor agrees to:

24.12.1.1 comply with any environmental requirements of the Council communicated from time to time by the Council to the Contractor;

- 24.12.1.2 comply with all requirements of the *Work Health and Safety Act 2012* (SA) and any regulations made under it;
- 24.12.1.3 comply with any reasonable requests of the Council in relation to the Contractor's performance of its obligations pursuant to this agreement;
- 24.12.1.4 promptly notify the Council of any accident, injury, property or environmental damage or any potential breach of any law (reportable incident) that occurs during or as a result of this agreement. Within 24 hours of a reportable incident, the Contractor must provide a report to the Council's Representative giving details, including the result of investigations into its cause and recommendations or strategies for prevention in the future.

24.13 ICAC

- 24.13.1 The Contractor acknowledges and agrees that by entering into this agreement with the Council the Contractor will be considered to be a public officer for the purposes of the *Independent Commissioner Against Corruption Act, 2012* (SA) (**ICAC Act**) and is obliged to comply with the ICAC Act and the Directions and Guidelines issued pursuant to the ICAC Act.

25. Goods and Services Tax

25.1 Consideration does not include GST

- 25.1.1 Unless specifically described as 'GST inclusive', any payment or consideration under this agreement does not include GST.

25.2 Gross up of consideration

- 25.2.1 Where a supply by one party (**Supplier**) to another party (**Recipient**) under this agreement is subject to GST (other than a supply specifically described as 'GST inclusive'):
 - 25.2.1.1 the expressed consideration for that supply must be increased by, and the Recipient must pay to the Supplier, an amount equal to the GST payable by the Supplier in respect of that supply; and
 - 25.2.1.2 the Recipient must pay that additional amount at the same time and in the same manner as the expressed consideration.

25.3 Reimbursements

- 25.3.1 If a payment to a party under this agreement is a reimbursement or indemnification of an expense or other liability incurred or to be incurred by that party, then the amount of the payment must be reduced by the amount of any input tax credit to which that party is entitled for that expense or other liability, such reduction to be effected before any increase in accordance with the previous subclause.

25.4 Tax invoices

- 25.4.1 Notwithstanding any other provision of this agreement, the Recipient need not make any payment for a taxable supply made by the Supplier under this agreement until the Supplier has given the Recipient a tax invoice in respect of that taxable supply.

25.5 Adjustments

- 25.5.1 If an adjustment event has occurred in respect of a taxable supply made under this agreement, any party that becomes aware of the occurrence of that adjustment event must notify each other party to that taxable supply as soon as practicable, and all of those parties agree to take

whatever steps are necessary (including to issue an adjustment note), and to make whatever adjustments are required, to ensure that any GST or additional GST on that taxable supply, or any refund of GST (or part thereof), is paid no later than 28 days after the Supplier first becomes aware that the adjustment event has occurred.

26. Security of Payment

- 26.1 If the *Building and Construction Industry Security of Payment Act 2009* (SA) (**SP Act**) applies to this agreement:
- 26.1.1 the SP Act prevails to the extent of any inconsistency; and
 - 26.1.2 the parties agree to comply with the SP Act.
- 26.2 The Contractor must immediately give the Council, by handing to the Council's Representative, a copy of any notice or any written communication of any nature the Contractor receives or issues pursuant to the SP Act. This includes a copy of any notice(s) or written communication(s) of any nature that the Contractor receives from any other party in relation to the Contract Works, including from any subcontractor or subconsultant of the Contractor.
- 26.3 If the Council receives a copy of a notice or other written communication from a subcontractor or subconsultant of the Contractor indicating an intention to suspend or actually suspending any aspect of the Contract Works, the Council may, in its absolute discretion, pay the subcontractor or subconsultant the whole or part of the money the subcontractor or subconsultant states that it is owed by the Contractor and the amount of the payment made by the Council will be a debt due from the Contractor to the Council.
- 26.4 The Contractor indemnifies the Council against all liabilities, damages, losses, costs and expenses (including legal costs on a full indemnity basis) incurred by the Council arising from a suspension of the Contract Works pursuant to the SP Act.
- 26.5 If the Contractor suspends the whole or any part of the Contract Works pursuant to the SP Act, then to the extent permitted by law, the Contractor shall not be entitled to any extension of time for Completion of the Contract Works or any adjustment of the Contract Sum.

27. Notices

- 27.1 A Notice must be:
- 27.1.1 in writing, in English and signed by a person authorised by the sender; and
 - 27.1.2 hand delivered or sent by pre-paid post or facsimile or electronic communication to the recipient's address or facsimile number specified in the Schedule, as varied by any Notice given by the recipient to the sender.
- 27.2 A Notice is deemed to be received:
- 27.2.1 if hand delivered, on delivery;
 - 27.2.2 if sent by prepaid mail, two business days after posting (or seven business days after posting if posting to or from a place outside Australia);
 - 27.2.3 if sent by facsimile, at the time and on the day shown in the sender's transmission report, if it shows that the entire Notice was sent to the recipient's facsimile number last Notified by the recipient to the sender;

27.2.4 if sent by electronic communication, at the time deemed to be the time of receipt under the *Electronic Transactions Act 1999* (Cth) if the notice was being given under a law of the Commonwealth of Australia.

However if the Notice is deemed to be received on a day that is not a business day or after 5:00pm, the Notice is deemed to be received at 9:00am on the next business day.

27.3 If two or more people comprise a party, notice to one is effective Notice to all.

28. **Costs**

28.1 Each party must pay its own costs of preparing this agreement and any document required by it.

29. **Design Responsibility**

29.1 **Design**

29.1.1 The Contractor will:

29.1.1.1 prepare and be responsible for the design of the Works;

29.1.1.2 complete the design documents, in accordance with the Contract and all relevant legislative requirements; and

29.1.1.3 ensure that materials and standards of workmanship prescribed in drawings, trade specifications and other documents are fit for the purpose specified in the tender documents and are consistent with the nature and character of the Works and in accordance with the Contract.

29.1.2 The Contractor warrants to the Council that:

29.1.2.1 the Contractor will exercise the degree of skill, care and diligence expected of a competent design professional in carrying out the design and documentation of the Works; and

29.1.2.2 the design of the Works will comply with the Contract and will in all respects be fit for the purpose specified in the tender documents.

29.1.3 The Contractor will remain responsible for the design of the Works notwithstanding any approval or confirmation given under the *Development Act 1993* or any review or approval of the design undertaken by or on behalf of the Principal.

29.1.4 The Contractor acknowledges that the Principal is relying on the Contractor's skill and expertise in undertaking the design and construction of the Works.

29.2 **Development Approval**

29.2.1 The Contractor will be responsible for obtaining Development Approval as required under the *Development Act 1993*. For this purpose, the Contractor must pay all fees and submit to the Council all material necessary for obtaining such confirmation or approval.

29.3 **Professional Indemnity Insurance**

29.3.1 Before commencing the design work under the Contract, the Contractor must have professional indemnity insurance for not less than the amount of \$2,000,000

29.3.2 Professional indemnity insurance must be maintained for 6 years after the completion of the Contract.

29.3.3 The Contractor must produce evidence of insurance to Council upon request.

30. **Intellectual Property**

30.1 The Contractor grants to the Council an unconditional, irrevocable licence to use the Design Documents.

Annexure A Contract Works

For the purpose of this RFT document refer to separate document. The remainder of this page has been intentionally left blank.

Annexure B Special Conditions

31. Work health and safety

- 31.1 The Contractor acknowledges that the Council has adopted a Contractor management - WHS procedure detailing our requirements in the engagement and managing contractors in regard to Work Health & Safety. In accordance with this procedure the Contractor must ensure that it and any sub-contractors have systems in place to manage Work Health & Safety.
- 31.2 Where the work is deemed to be a 'Construction Project' the Council engages the Contractor as the 'Principal Contractor' (as defined in regulations 292 and 293 of the *Work Health and Safety Regulations 2012*). A construction project has only one Principal Contractor at any specific time.
- 31.3 The Contractor must not commence, nor allow any other person to commence work until such time as the contractor has:
- 31.3.1 been subject to a Contractor management – induction by the Council
 - 31.3.2 has complied with any requirements as stated in the *Work Health and Safety Regulations 2012*
- 31.4 The Council is not obliged to grant access to the site under clause 3.1 until the contractor has complied with the requirements of special conditions clause 29.3
- 31.5 Following induction the contractor must review and update any safety requirements or safe systems of work and provide a copy of any changes to the Council's Representative, upon request.
- 31.6 The contractor throughout the term of the agreement will review and update any safety requirements or safe systems of work and provide a copy of any changes to the Council's Representative, upon request.
- 31.7 In regard to the performance of work or services under this contract, the Contractor must notify the Council's Representative immediately upon the:
- 31.7.1 occurrence of any 'Notifiable Incident' (as defined in section 35 of the *Work Health & Safety Act 2012*);
 - 31.7.2 occurrence of any incident resulting in an injury that requires treatment other than first aid, to any person(s) as a result of performance of the work;
 - 31.7.3 issue of any Improvement Notice, Prohibition Notice or Enforceable Undertaking by an Inspector of the Regulator (as defined in the *Work Health & Safety Act 2012*);
 - 31.7.4 occurrence of any hazard or near miss that had the 'potential' to have high consequence (eg significant risk) regardless of the actual outcome.

32. Notification of certain events to the council

- 32.1 On the same day as occurs or, if that is not practicable, on the next working day, the Contractor shall report to the council:
- 32.1.1 an occurrence, which may result in an offence pursuant to Part 9 of the *Environmental Protection Act 1993*
 - 32.1.2 a material interruption to the carrying out of the work from any cause;

- 32.1.3 a material variation, suspension, revocation or expiry of insurance policy or a legislative requirement the Contract requires the Contractor or its sub-Contractor to hold.
- 32.1.4 an occurrence, which may result in a claim against any of the insurances required
- 32.1.5 Any incident involving access by a person with a disability as defined under the *Disability Discrimination Act 1992 (Commonwealth)*
- 32.1.6 the discovery or suspected discovery of an Aboriginal site or Aboriginal object or remains, including any direction issued by the Minister or an inspector under the *Aboriginal Heritage Act 1988*.

33. **Fire Danger**

- 33.1 The Contractor acknowledges that Council has adopted a Response to Declared Fire Danger Days procedure. In accordance with this procedure the Contractor must ensure that it and any sub-contractors have systems in place to undertake adequate risk assessments, preplanning and make appropriate decisions to protect themselves on days which are declared severe, extreme or catastrophic fire danger days
- 33.2 In the event of a severe, extreme or catastrophic fire danger day declaration, the Contractor must implement the system required by this clause.
- 33.3 Upon request, the Contractor must provide to Council, a copy of any risk assessments or plans prepared and implemented under this clause.

34. **Environmental duty**

- 34.1 If required by the council the contractor must develop and implement an Environmental Management Plan relevant to the work being performed.
- 34.2 Upon request, the contractor must provide to the Council, a copy of any plans prepared and implemented under special conditions clause 32.1

35. **Certification of the work**

- 35.1 Where the work or any part of the work is required to be certified under applicable legislation, then the Contractor must ensure that the work, or part of the work is certified, and a copy of the Certificate of Compliance is provided promptly to the Council.

36. **Motor vehicle insurance**

- 36.1 All motor vehicles used in the actual performance of the work must either be registered or exempt from registration under the Motor Vehicles Act 1959.
- 36.2 The Contractor must ensure that both it and any sub-contractors take out and maintain throughout the duration of the contract a motor vehicle policy of insurance covering accidental damage, fire and theft. The policy must be for a sum of not less than the full market value of the vehicle or vehicles.

- 36.3 Such insurance must be with an insurer authorised to carry on motor vehicle insurance business in Australia.
- 36.4 Upon request, the Contractor must provide to Council documentary evidence of the policy of insurance required under this clause.
- 36.5 Any damage arising as a result of the use of any unregistered vehicles (plant) is to be covered by either an extension of the Contractor's motor vehicle insurance policy or the liability endorsed onto the Contractor's public liability insurance policy.

37. **DDA requirements**

- 37.1 The Contractor must ensure that it and any sub-contractors comply with the provisions of the *Disability Discrimination Act 1992 (Commonwealth)* and associated policies, regulations or standards

38. **Aboriginal heritage**

- 38.1 The Contractor must ensure that it and any sub-contractors comply with the provisions of the *Aboriginal Heritage Act 1988* and associated policies, regulations or standards.
- 38.2 If the Contractor discovers or suspects they have discovered:
- 38.2.1 an Aboriginal site; or
 - 38.2.2 an Aboriginal object or remains;
- then the Contractor will cease all work and take any action required under clause 20 of the *Aboriginal Heritage Act 1988*, and will not recommence work until directed.
- 38.3 In addition to any action required under special conditions clause 36.2, the Contractor will also notify:
- 38.3.1 South Australian Police in the event of discovery any remains suspected as being human, whether aboriginal or not
 - 38.3.2 the Council.
- 38.4 The Contractor agrees to comply with any direction issued by:
- 38.4.1 the Council
 - 38.4.2 the Minister or
 - 38.4.3 an inspector under the *Aboriginal Heritage Act 1988*.

39. **Advance notice of work**

- 39.1 Before commencing to carry out any work on the site, the Contractor shall first give the maximum period of advance written notice of the work that is reasonably practicable in the circumstances (minimum 3 working days) to such of the following as may be relevant to the work:
- 39.1.1 the Council's representative
 - 39.1.2 occupiers of land adjoining or proximate to the site and whose access to land or utility services or travel may be impeded or prevented by the work and

- 39.1.3 suppliers of utilities and also government agencies and instrumentalities for matters within their concern

which notices inform of the date and time the work upon the site is anticipated to commence, the likely disruption (including the extent, times and dates) to traffic or to utilities, the date and time the work is anticipated to cease, and any other additional matters required by applicable law. The Contractor shall promptly give a fresh notification if after a notice is given any particulars of that notice change in a material way.

40. **Site safety**

- 40.1 The Contractor shall supply, erect, maintain and when no longer required remove from the site all barricades, guards, fencing, signs, lighting, temporary roadways and footpaths necessary for the protection of the Works, other property and for the safety and convenience of the public as required by Australian Standard AS 1742.3 2009 'Manual of uniform traffic control devices – Traffic control for works on roads'.

41. **Equipment**

- 41.1 The Contractor shall ensure that any equipment used by the Contractor or a subcontractor in carrying out the work is fit for the purpose for which used and used only in conformity with applicable law and in a safe manner.

42. **Storage locations**

- 42.1 Except as the Contract otherwise provides, delivery of materials for work, space to store materials and for locating sheds will be allowed only as arranged between the Contractor and the Council.

43. **Nuisance**

- 43.1 In performing work, the Contractor shall take all proper precautions to minimise noise, dust, mud, vibration and any other nuisance to the public and, in particular, to any residents near the site.

44. **Connection to Utilities**

- 44.1 Except where the Contract provides otherwise, the Council is not obliged to provide the Contractor with connection to any water, electricity, sewage or other services as may be upon the site.

45. **Inputs from the Council**

- 45.1 The Contract is exhaustive of the Council's obligations to provide to the Contractor or its subcontractor any information, goods, services or other assistance for the purposes of work

46. **Collaboration**

- 46.1 The Contractor shall collaborate fully with relevant government authorities, utility suppliers, and other persons lawfully employed upon the site.

47. **Site meetings**

- 47.1 As required by the Council, the Contractor shall arrange and attend at site meetings between the Council, Contractor and appropriate subcontractors (if any), and keep minutes of such meetings. Minutes shall be distributed to attendees as soon as practicable after each meeting.

48. **Child Protection**

- 48.1 City of Onkaparinga is committed to providing a child safe environment, as defined by the *Children's Protection Act 1993* at all times. A child safe environment is 'an environment, which is both child-safe and child-friendly, where children are valued and feel respected and encouraged to reach their full potential.'
- 48.2 The Contractor acknowledges that, if necessary, it has fulfilled its requirements under the *Children's Protection Act 1993* prior to the performance of the works or service.
- 48.3 Council reserves the right to request the Contractor to complete Council's standard 'Statutory Declaration as to Suitability of Character' at any time given Council's duties and responsibilities under legislation to act in the best interests of the community at large.
- 48.4 Council reserves the right to request the Contractor to provide a current police clearance or the relevant criminal history screening certificate under legislation for itself or any of the Contractors employees, Sub-contractors and Sub-contractor's employees or agents performing the works or service.
- 48.5 If Council makes a request to the Contractor under special conditions clauses 48.3 and/or 48.4, the Contractor must provide the requested documents to Council within 10 working days of such request. Failure to do so may result in this Contract being terminated.
- 48.6 The Council is not liable for any costs associated with the Contractor complying with its obligation under this special condition clause 48.

Annexure C Program

To be included in final draft following acceptance of tender. The remainder of this page has been intentionally left blank

Annexure D Schedule of Rates

To be inserted in final draft following acceptance of tender. The remainder of this page has been intentionally left blank.

EXECUTED as an agreement

[Insert standard signature block]