



Professional Services Agreement

Contract No: [Number]
[Contract Name]

Consultant: [Name]
ABN: [Number]

Fee: \$[Amount]

Termination Date: [Date]

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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 Phone: [Number] Mobile: [Number] Email: [Address]
Item 2 Consultant	Name: [Name] ABN: [Number] Street Address: [Address] Postal Address: [Address] Phone: [Number] Mobile: [Number] Email: [Address]
Item 3 Reimbursable Expenses	None
Item 4 Insurance requirements	Public liability insurance Company: [Name] Policy No: [Number] Expiry: [Date] Amount: \${Amount} for any one incident

	<p>Professional indemnity insurance</p> <p>Company: [Name] Policy No: [Number] Expiry: [Date] Amount: \${Amount}</p>
Item 5 Commencement Date	[Date]
Item 6 Termination Date	As stated on front cover
Item 7 Council's Representative	[Name/s] and any other person as may be advised by the Council in writing
Item 8 Consultant's Staff	[Name/s] and any other person as may be approved by the Council in writing
Item 9 Confidential Sections	None
Item 10 Consultant's Representative	[Name] and any other person as may be advised by the Consultant in writing

Date

[Insert Date]

Parties

City of Onkaparinga ABN 97 047 258 128 of Noarlunga Office, Ramsay Place, Noarlunga Centre SA 5168
(Council).

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

Background

- A. Pursuant to a [insert appropriate process, eg request for tender, request for quote, expression of interest etc] process, the Council sought submissions from suitably qualified parties for the Services.
- B. The Supplier submitted a [Insert appropriate submission, eg tender, quote etc] for the Services, and the Council accepted it.
- C. The Consultant agrees to perform the Services 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 includes** any authorisation, agreement, approval, licence, permit, consent, qualification, accreditation, registration, certificate, declaration or exemption and any renewal and variation of them by or with a Governmental Agency.

1.1.1.4 **Background Intellectual Property** means Intellectual Property Rights in the Deliverables which were not specifically created as part of the Services

(including the pre-existing Intellectual Property Rights of the Consultant and Intellectual Property Rights of third parties).

- 1.1.1.5 **Business Day** means a day that is not a Saturday, Sunday or public holiday in the State of South Australia.
- 1.1.1.6 **Clause** refers to a clause of this agreement.
- 1.1.1.7 **Commencement Date** means the date specified in Item 5 of the Schedule.
- 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 9 of the Schedule that are deemed to be confidential for the purposes of the FOI Act.
- 1.1.1.10 **Consultant's Representative** means the person specified in Item 10 of the Schedule.
- 1.1.1.11 **Consultant's Staff** means the people approved by the Council to perform the Services, being those persons specified in Item 8 of the Schedule.
- 1.1.1.12 **Council** means the Council specified in Item 1 of the Schedule.
- 1.1.1.13 **Council's Representative** means the person specified in Item 7 of the Schedule.
- 1.1.1.14 **Data** means information directly or indirectly relating to this agreement and/or the Services.
- 1.1.1.15 **Deliverables** means all documents, equipment, software, information and Data produced as part of the Services and supplied to the Council as part of the Services.
- 1.1.1.16 **Fee** means the fee payable by the Council for the Services, which is to be determined and reviewed in the manner set out in Annexure B.
- 1.1.1.17 **FOI Act** means *Freedom of Information Act 1991* (SA).
- 1.1.1.18 **Force Majeure Event** means an event 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 Consultant ought to have reasonably foreseen from or as a result of the Existing Conditions.

- 1.1.1.19 **Governmental Agency** means any government or any government, semi-governmental, administrative, fiscal or judicial body, commission, authority, tribunal, agency or entity including any self-regulatory organisation established under statute or any stock exchange.
- 1.1.1.20 **Intellectual Property Rights** includes property and rights in respect of or in connection with copyright (including future copyright and rights in the nature of or analogous to copyright), know-how, trade mark, service mark, design, inventions (including patents), business or company names, or other proprietary rights, or any rights to registration of such rights (including all renewals and extensions) whether created before or on or after the agreement.
- 1.1.1.21 **Law** means any statute, regulation, order, rule, subordinate legislation or other document enforceable under any statute, regulation, order, rule or subordinate legislation.
- 1.1.1.22 **Notice** means a notice, demand, consent, approval or communication under this agreement.
- 1.1.1.23 **Recipient** refers to a party who receives a supply pursuant to the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 1.1.1.24 **Reimbursable Expenses** means the expenses specified in Item 3 of the Schedule.
- 1.1.1.25 **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.
- 1.1.1.26 **Schedule** refers to the Schedule of this agreement.
- 1.1.1.27 **Services** means those services which the Consultant is to perform under this agreement, more specifically set out in Annexure A.

- 1.1.1.28 **Special Conditions** mean the special conditions set out in Annexure C, if any.
- 1.1.1.29 **Supplier** refers to a party who makes any supply under the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
- 1.1.1.30 **Term** means the period starting on the Commencement Date and finishing on the Termination Date.
- 1.1.1.31 **Termination Date** means the date specified in Item 6 of the Schedule, unless this agreement is terminated in accordance with this agreement.
- 1.1.1.32 **Variation** means any change to the Services including:
- (a) any increase of, or decrease in, the Services;
 - (b) any changes to the character, specifications, quality, scope and/or extent of the Services.

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 a reference to a party includes its executors, administrators, successors and permitted assigns;
 - 1.2.1.4 a reference to a person includes a partnership, corporation, association, government body and any other entity;
 - 1.2.1.5 a reference to this agreement includes any schedules and annexures to this agreement;
 - 1.2.1.6 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;
 - 1.2.1.7 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;
 - 1.2.1.8 a reference to legislation includes any amendment to it, any legislation substituted for it, and any subordinate legislation made under it;
 - 1.2.1.9 a provision is not construed against a party only because that party drafted it;

- 1.2.1.10 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;
- 1.2.1.11 the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
- 1.2.1.12 an expression defined in the Corporations Act 2001 (Cth) has the meaning given by that Act at the date of this agreement;
- 1.2.1.13 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. **Engagement of Consultant**

- 2.1 The Council engages the Consultant who accepts the engagement for the Term to perform the Services on the terms of this agreement.
- 2.2 The parties acknowledge that nothing in this agreement creates or infers a relationship between the parties of partnership or employer/employee.

3. **Basis of Engagement**

3.1 **Publicity and Changes**

- 3.1.1 The Consultant must not (without the prior written consent of the Council) advertise, promote or publish in any form, the fact that the Consultant is providing the Services to the Council.
- 3.1.2 The Consultant must immediately notify the Council in writing of:
 - 3.1.2.1 any change in the financial or technical capacity of the Consultant which a reasonable person would consider adversely impacts upon the Consultant's ability to provide the Services to the Council; and/or
 - 3.1.2.2 any change in the Consultant's ownership.

4. Invoicing and Payment

4.1 Payment of the Fee

3.1.1 The Council will pay to the Consultant the Fee for the supply of the Services.

4.2 Payment of Reimbursable Expenses

3,2,1 Subject to clause 3.3.3.4, the Council will pay to the Consultant the Reimbursable Expenses directly incurred by the Consultant in the supply of the Services.

4.3 Payment Terms

4.3.1 The Consultant will issue a tax invoice to the Council within seven days of the completion of the Services.

4.3.2 Payment of the Fee and any Reimbursable Expenses, if applicable, will be due within 30 days from the end of the month in which the Council receives a correctly rendered tax invoice from the Consultant.

4.3.3 A tax invoice is correctly rendered when it:

4.3.3.1 describes the Services provided and the period to which the Services relate;

4.3.3.2 displays the terms of payment of the Fee described in the invoice;

4.3.3.3 displays the Council's purchase order number (if relevant);

4.3.3.4 displays the terms of payment of the Reimbursable Expenses and attaches receipts for all the Reimbursable Expenses;

4.3.3.5 is addressed to the Council's address as specified in this agreement; and

4.3.3.6 set out in reasonable detail the manner and basis of the calculation of the Fee and Reimbursable Expenses, including the component of GST.

4.4 **Effect of payment**

- 4.4.1 A payment of all or part of the Fee is not an acceptance of the Services or a waiver of a right or action of the Council.

4.5 **Right of set off**

- 4.5.1 The Council may deduct from amounts otherwise payable to the Consultant any amount due from the Consultant to the Council.

5. **Standard and Scope of Services**

- 5.1 The Consultant represents and warrants to the Council that:

- 5.1.1 all actions and conditions required to be taken, fulfilled and done by it in order to enable it to enter into, exercise its rights and perform its obligations under this agreement have been done; and
- 5.1.2 all Authorisations required for its entry into, exercise of its rights under, and performance of its obligations under this agreement have been obtained.

- 5.2 The Consultant must provide the Council with the Services in the manner and at the times or within the timeframe specified in Annexure A.

- 5.3 The Consultant must:

- 5.3.1 perform the Services with all the skill, care and diligence to be expected from a qualified, competent and experienced provider of services similar to the Services;
- 5.3.2 devote such of its time and ability as is appropriate and reasonably necessary for the proper and timely performance of the Services;
- 5.3.3 comply with all Authorisations and all applicable Laws, accepted industry standards, specifications and procedures in the performance of the Services and its obligations under this agreement; and
- 5.3.4 comply with any reasonable requests of the Council, whether in relation to the manner of the performance of the Services or otherwise.

- 5.4 The Consultant must supply at its own expense all plant, equipment and facilities required for the performance of the Services and maintain them in a safe and good working condition.

- 5.5 The Consultant must keep the Council fully and regularly informed as to all matters affecting or relating to the Services and must provide to the Council any information reasonably requested by the Council to monitor the performance of the Consultant's obligations under this agreement.

- 5.6 The Consultant must promptly notify the Council of a Reportable Incident within 24 hours of the incident taking place. The Consultant must provide a report to the Council's Representative giving complete details, including results of investigations into its cause, and any recommendations or strategies for prevention in the future.

5.7 Times for the fulfilment of the Consultant's obligations under this agreement are essential terms of this agreement.

6. Variation to Services

6.1 General

6.1.1 Variations

No Variation invalidates this agreement.

6.1.2 No unauthorised variation

6.1.2.1 The Consultant must not, and is not authorised to, make any Variation of the Services except:

- (a) a Variation instructed by the Council; and/or
- (b) a Variation requested by the Consultant, which has been approved by the Council in writing.

6.1.2.2 Variations by the Consultant arising from, or related or attributable to the Existing Conditions which were, or ought to have been, reasonably foreseen as at the date of receipt of a Purchase Order from the Council are not permitted.

6.1.3 Execute Variations

The Consultant must provide as part of the Services or not provide as part of the Services (as is required) any Variation instructed by the Council.

6.1.4 Adjustment of Fee

For the purpose of any adjustment to the Fee for a Variation:

- 6.1.4.1 if practicable, the value of a Variation must be agreed by the Consultant and the Council before the Consultant commences to execute the Variation; or
- 6.1.4.2 if the value of the Variation is not agreed by the Consultant and the Council, the value must be determined by the Council by application of rates accepted by the Council.

A Variation must be valued as soon as practicable, and the Consultant must promptly and diligently supply to the Council all information relevant to the valuation.

6.2 Extension of Time

6.2.1 Extension

6.2.1.1 Subject always to clause 6.2.1.2, if performance of the Services is delayed by a cause beyond the control of the Consultant, the Consultant is entitled, subject to clauses 6.2.2 and 6.2.3, to a fair and reasonable extension of the time for performing the Services, and the time and date for which the Services are to be performed must be extended under clause 6.2.3.

6.2.1.2 For the avoidance of doubt, the Consultant is not entitled to an extension of time for any delays or disruptions arising from the Existing Conditions which were, or ought to have been, reasonably foreseen as at the date of receipt of a Purchase Order from the Council.

6.2.2 Conditions precedent

The Consultant is entitled to a time extension only if the Consultant took reasonable steps to minimise the delay in performance of the Services.

6.2.3 Council's determination

The Council must determine what (if any) fair and reasonable extension of time for performing the Services should be allowed to the Consultant in respect of each claim, and must give written notice of every such determination to the Consultant, and the date and time for performing the Services must be extended accordingly.

6.2.4 No costs or damages

The Consultant accepts the risk of all costs, losses and expenses incurred because of a delay in performance of the Services (including a delay caused by a Variation directed by the Council). The Consultant'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.

7. Consultant's Staff

7.1 The Consultant acknowledges that the Council enters into this agreement on the basis of the skills, reputation, qualifications, experience and knowledge of the Consultant's Staff and that the Services must be performed only by the Consultant's Staff.

7.2 The Consultant may request in writing that the Council approve further people as Consultant's Staff.

7.3 The Council may, in its absolute discretion, give (conditionally or unconditionally) or withhold such approval.

7.4 The Consultant is responsible for the performance of the Services by Consultant's Staff and will not be relieved of its obligations or liabilities under this agreement.

7.5 The Consultant is responsible for labour management and industrial relations in respect of the provision of the Services by the Consultant's Staff.

7.5.1 The Council does not bear or accept any additional costs as a result of the impact of any industrial dispute on the performance of the Services.

7.5.2 In the event of an industrial dispute, the Consultant must take all reasonable steps to ensure the continuation of the Services without adverse impact on the Council.

8. Insurance

8.1 During the Term, the Consultant must maintain all insurances required by Law and this agreement, including:

8.1.1 public liability insurance for the amount specified in Item 4 of the Schedule in respect of any one incident arising during or in consequence of the performance of the Services. The insurance policy must bear an endorsement from the insurer acknowledging the indemnities given by the Consultant under this agreement;

8.1.2 any other insurances specified in Item 4 of the Schedule.

8.2 The Consultant must produce evidence of those insurances to the Council upon request.

8.3 All insurance policies must bear an endorsement from the insurer that it will notify the Council if the policy is cancelled or altered or allowed to lapse.

8.4 The Consultant must not allow any act or omission which would make any policy of insurance void or unenforceable.

8.5 Where required by law the Consultant must register itself with Return to Work SA and maintain that registration and pay all levies pursuant to the *Return to Work Act 2014 (SA) (Act)* at all times during the Term. The Consultant must produce evidence of that registration to the Council upon request.

8.6 The Consultant must ensure that its subconsultants (so long as they have been approved by the Council) comply with this clause.

9. Ownership of Intellectual Property Rights and Deliverables

9.1 The Consultant warrants that the Deliverables will not infringe the Intellectual Property Rights of any person. The Consultant fully indemnifies the Council against any loss, costs, expenses, demands or liability, whether direct or indirect, arising out of a claim by a third party against the Council alleging that the Deliverables infringe any such Intellectual Property Rights.

9.2 The Consultant hereby assigns to the Council all future copyright and all other rights of a like nature in the Deliverables throughout all countries of the world to the intent that such rights will, upon their creation, vest in the Council.

9.3 Subject to clause 8.4, title to all Intellectual Property Rights in the Deliverables (other than copyright vesting in the Council under clause 8.2), will be assigned to the Council upon its creation.

- 9.4 The Consultant hereby grants the Council a perpetual, royalty-free, non-exclusive licence of Background Intellectual Property, with a right to grant sub-licences, to the extent necessary to use or reproduce in any way the Deliverables.
- 9.5 The Consultant must do all such things and execute all such forms and documents as are necessary to permit or facilitate the performance of the transactions contemplated by this clause 8.

10. **Indemnity and Exclusion of Liability**

- 10.1 The Consultant must indemnify the Council and its employees, officers and consultants against all claims, demands, expenses, loss or damage in respect of loss or damage to any property, or the death of or personal injury to any person, caused or contributed to by the Consultant, a breach by the Consultant of this agreement, a wilful unlawful or negligent act or omission of the Consultant, and any claim action or proceeding by a third party against the Council or its employees officers and consultants caused or contributed to by the Consultant.
- 10.2 This indemnity is reduced by the extent to which the Council contributes to the event giving rise to the claim for the indemnity.
- 10.3 The Consultant must perform the Services at its own risk in all things and releases the Council and its employees, officers, members and consultants from all claims, actions, proceedings, costs, expenses, losses, suffering, and liabilities incurred by the Consultant or its employees, agents, subcontractors and third parties which arise from the performance of the Services.

11. **Non-Performance by Consultant**

- 11.1 If the Consultant breaches a provision of this agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so, the Council may:
- 11.1.1 suspend any or all payment of the Fee until the breach is remedied; and/or
 - 11.1.2 remedy the breach itself whether by the use of the Council's employees or other consultants and deduct the cost of remediation from any Fee due to the Consultant; and/or
 - 11.1.3 terminate this agreement in accordance with clause 12.1; and/or
 - 11.1.4 pursue any other legal remedies available to the Council.

12. **Force Majeure**

- 12.1 If a Force Majeure Event causes delay or failure by a party to perform its obligations under this agreement:
- 12.1.1 neither party is liable for such delay or failure; and

- 12.1.2 all obligations of a party under this agreement are suspended until the Force Majeure Event ceases to apply.
- 12.2 A party which is, by reason of a Force Majeure Event, unable to perform any obligation or condition required by this agreement must:
 - 12.2.1 notify the other party as soon as possible giving:
 - 12.2.1.1 reasonably full particulars of the Force Majeure Event;
 - 12.2.1.2 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
 - 12.2.1.3 where possible, the means proposed to be adopted to remedy or abate the Force Majeure Event;
 - 12.2.2 use all reasonable diligence and employ all reasonable means to remedy or abate the Force Majeure Event as soon as possible;
 - 12.2.3 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;
 - 12.2.4 notify the other party when the Force Majeure Event terminates or abates to an extent which permits resumption of performance; and
 - 12.2.5 notify the other party when resumption of performance occurs.
- 12.3 If a delay or failure under this clause exceeds 60 days, the Council may immediately terminate this agreement by written notice to the Consultant (**Termination Date**).
- 12.4 In the event of the Council terminating this agreement pursuant to clause 12.3:
 - 12.4.1 the Council will be liable to pay the Consultant any unpaid Fees properly owing up to the Termination Date; and
 - 12.4.2 within twenty (20) Business Days of the Termination Date the Consultant must give the Council a final invoice:
 - 12.4.2.1 for Services provided up to and including the Termination Date and not the subject of any previous invoice; and
 - 12.4.2.2 for reasonable and substantiated direct costs or expenses (net of GST input tax credits) the Consultant incurred as the result of the Council terminating this agreement under clause 12.3 and not reasonably able of being put to alternate use.
 - 12.4.3 Without limiting the effect of clause 12.4, the Council will not be liable to compensate the Consultant for loss of potential profits or other consequential loss incurred by the Consultant arising from termination by the Council pursuant to clause 12.3.

13. Termination

13.1 Termination by Council

13.1.1 The Council may immediately terminate this agreement by giving notice to the Consultant if the Consultant:

13.1.1.1 ceases to carry on business or becomes otherwise unable to perform its obligations under this agreement; or

13.1.1.2 breaches a material or essential term of this agreement and fails to remedy the breach within a reasonable time after receiving notice requiring it to do so; or

13.1.1.3 becomes an externally administered body corporate or an insolvent under administration; or

13.1.1.4 becomes insolvent or bankrupt.

13.1.2 In such circumstances, the Council will be liable to the Consultant only in respect of the Fees properly owing up to the date of termination in respect of the Services (or part thereof) performed to that time. Without limiting the effect of this clause 12.1.2, the Council will not be liable to compensate the Consultant for loss of potential profits or other consequential loss incurred by the Consultant arising from termination by the Council pursuant to this clause.

13.2 Termination by Consultant

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

13.3 Accrued rights and remedies

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

14. Confidential Information and Freedom of Information

14.1 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:

14.1.1 keep confidential;

14.1.2 take reasonable steps to ensure that the party's officers and employees do not disclose to a third party;

14.1.3 maintain proper and secure custody of; and

14.1.4 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.

14.2 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.

14.3 Unauthorised disclosure of any Confidential Sections constitutes a breach of a party's obligations under this agreement.

15. **Dispute Resolution**

15.1 **General**

15.1.1 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.

15.1.2 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.

15.1.3 On receipt of that notice by the other party, the parties must negotiate in good faith to resolve the dispute.

15.1.4 If the parties are unable to resolve the dispute within 10 business days, they must promptly refer the dispute:

15.1.4.1 in the case of the Council to the Chief Executive Officer; and

15.1.4.2 in the case of the Consultant to the Consultant's Representative.

15.1.5 Those persons must meet to resolve the dispute and must be authorised to resolve the dispute.

15.2 **Mediation**

15.2.1 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:

15.2.1.1 a mediator agreed by the parties; or

15.2.1.2 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.

15.2.2 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.

15.2.3 Any information or documents disclosed by a party under this clause:

15.2.3.1 must be kept confidential; and

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

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

15.3 **Arbitration**

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

15.3.1.1 an arbitrator agreed by the parties; or

15.3.1.2 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.

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

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

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

15.4 **Performance**

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

16. **Subcontracting and Assigning**

16.1 The Consultant 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.

16.2 With any application for such consent, the Consultant must provide all information required by the Council, including evidence that the proposed assignee or subcontractor is capable of performing the Services to be assigned or subcontracted.

- 16.3 Unless otherwise agreed in writing by the Council, no such assignment or subcontract relieves the Consultant from any liability under this agreement or at Law in respect of the performance or purported performance of this agreement and the Consultant 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 Consultant.
- 16.4 For the purpose of this clause, if the Consultant is a company, an assignment of this agreement includes any change in the beneficial ownership of the share capital of the Consultant, or the resignation, death or appointment of any director of the company, which alters the effective control of the Consultant.

17. **Miscellaneous**

17.1 **Special Conditions**

- 17.1.1 If there is an inconsistency between a Special Condition set out in Annexure C and the rest of this agreement, the Special Condition prevails to the extent of the inconsistency.

17.2 **Alteration**

- 17.2.1 This agreement may be altered only in writing signed by each party.

17.3 **Entire agreement**

- 17.3.1 This agreement:
- 17.3.2 constitutes the entire agreement between the parties about its subject matter; and
- 17.3.3 supersedes any prior understanding, agreement, condition, warranty, indemnity or representation about its subject matter.

17.4 **Waiver**

- 17.4.1 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.

17.5 **Exercise of power**

- 17.5.1 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.
- 17.5.2 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.

17.6 **Survival**

17.6.1 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.

17.7 **Further action**

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

17.8 **Governing law**

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

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

17.9 **Ombudsman**

17.9.1 The Consultant acknowledges that the *Ombudsman Act 1972 (SA)* empowers the Ombudsman to investigate matters in the public interest. The Consultant must ensure compliance with all obligations arising under that Act and all applicable Laws.

17.10 **Work Health and Safety**

17.10.1 In complying with its obligations pursuant to this agreement, the Consultant agrees to:

17.10.1.1 comply with any environmental requirements of the Council communicated from time to time by the Council to the Consultant;

17.10.1.2 comply with all requirements of the *Work Health and Safety Act 2012 (SA)* and any regulations made under it;

17.10.1.3 comply with any reasonable requests of the Council in relation to the Consultant's performance of its obligations pursuant to this agreement; and

17.10.1.4 promptly notify the Council of any accident, injury, property or environmental damage of 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 Consultant must provide a report to the Council's Representative giving complete details, including the results of investigations into its cause and recommendations or strategies for prevention in the future.

17.11 **Return to Work SA**

17.11.1 Subject to clause 17.11.2, the Consultant 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 monthly levies due under it in respect of its employees engaged in and about the

Contract Works. The Consultant must produce to the Council on execution of this agreement a current Certificate of Registration as an employer under the Act. The Consultant 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.

17.11.2 Notwithstanding clause 17.11.1, if the Consultant (or any sub-contractor) is unable to register as an employer under the Act, then the Consultant must instead adequately insure against accident, personal injury and disability. The Consultant must maintain such insurance at all times during the currency of this agreement (including the Defects Liability Period) and must produce evidence of:

17.11.2.1 the existence and adequacy of such insurance; and

17.11.2.2 the Consultant's (and/or any sub-contractor's) inability to register as an employer under the Act.

17.12 **ICAC**

17.12.1 The Consultant acknowledges and agrees that by entering into this agreement with the Council the Consultant 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.

18. **Goods and Services Tax**

18.1 **Consideration does not include GST**

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

18.2 **Gross up of consideration**

18.2.1 Where a supply by a Supplier to a Recipient under this agreement is subject to GST (other than a supply specifically described as 'GST inclusive'):

18.2.2 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

18.2.3 the Recipient must pay that additional amount at the same time and in the same manner as the expressed consideration.

18.3 **Reimbursements**

18.3.1 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.

18.4 Tax invoices

18.4.1 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.

18.5 Adjustments

18.5.1 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.

19. Notices

19.1 A Notice must be:

19.1.1 in writing, in English and signed by a person authorised by the sender; and

19.1.2 hand delivered or sent by prepaid 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.

19.2 A Notice is deemed to be received:

19.2.1 if hand delivered, on delivery;

19.2.2 if sent by prepaid post, two business days after posting (or seven business days after posting if posting to or from a place outside Australia);

19.2.3 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;

19.2.4 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.

19.3 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.

20. **Costs**

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

Annexure A Services

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

Annexure B Fee

To be included post tender. The remainder of this page has been intentionally left blank.

Annexure C Special Conditions

21 Work health and safety

- 21.1 The Consultant 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 Consultant must ensure that it and any sub-contractors have systems in place to manage Work Health & Safety.
- 21.2 The Consultant must not commence nor allow any other person to commence service until such time as the consultant has:
 - 21.2.1 been subject to a Contractor management – induction by the Council if required
 - 21.2.2 has complied with any requirements as stated in the *Work Health and Safety Regulations 2012*
- 21.3 Following induction the consultant 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.
- 21.4 The consultant 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.
- 21.5 In regard to the performance of work or service under this contract, the Consultant must notify the Council's Representative immediately upon the:
 - 21.5.1 occurrence of any 'Notifiable Incident' (as defined in section 35 of the Work Health & Safety Act 2012).
 - 21.5.2 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
 - 21.5.3 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).
 - 21.5.4 occurrence of any hazard or near miss that had the 'potential' to have high consequence (eg significant risk) regardless of the actual outcome.

22 Notification of certain events to the council

- 22.1 On the same day as occurs or, if that is not practicable, on the next working day, the Consultant shall report to the council:
 - 22.1.1 a material interruption to the carrying out of the service from any cause;

- 22.1.2 a material variation, suspension, revocation or expiry of insurance policy or a legislative requirement the Contract requires the Consultant or its sub-contractor to hold
- 22.1.3 an occurrence, which may result in a claim against any of the insurances required as a result of performance of the service
- 22.1.4 if the Consultant or sub-contractor is admitted to or becomes a member of a scheme approved under the Professional Standards Act 2004

23 **Fire Danger**

- 23.1 The Consultant acknowledges that the council has adopted a Response to Declared Fire Danger Days procedure. In accordance with this procedure the Consultant 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
- 23.2 In the event of a severe, extreme or catastrophic fire danger day declaration, the Consultant must implement the system required by special conditions clause 3.1
- 23.3 Upon request, the Consultant must provide to Council, a copy of any risk assessments or plans prepared and implemented under special conditions clause 3.2

24 **Environmental duty**

- 24.1 If required by the council the consultant must prepare and implement an Environmental Management Plan relevant to the work being performed.
- 24.2 Upon request, the contractor must provide to the Council, a copy of any plans prepared and implemented under special conditions clause 4.1

25 **Inputs from the Council**

- 25.1 The Contract is exhaustive of the Council's obligations to provide to the Consultant or its subcontractors any information, goods, services or other assistance for the purposes of service.

26 **Child Protection**

- 26.1 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.'

- 26.2 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.
- 26.3 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.
- 26.4 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.
- 26.5 If Council makes a request to the Contractor under special conditions clauses 6.3 and/or 6.4, 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.
- 26.6 The Council is not liable for any costs associated with the Contractor complying with its obligation under this special condition clause 6.

EXECUTED as an agreement

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