



Government
of South Australia

Department for Infrastructure and Transport

Guidelines:

PREFERRED SUPPLY ARRANGEMENT BITUMINOUS WORKS

(PSA No. 20C096)

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1 INTRODUCTION

1.1 Guidelines

Companies wishing to be part of Contract No. 20C096, – *Preferred Supply Arrangement Bituminous Works* (PSABW) are invited by the Department for Infrastructure and Transport (the Department) to submit an Application in accordance with these Guidelines (the Application).

To be eligible, Applicants must be able to demonstrate the appropriate technical prequalification, skills, management systems and experience appertaining to performing Bituminous Works for the Commissioner of Highways (the Principal).

The submission must contain all information requested in the Application otherwise the Application will not be accepted.

A company may submit an Application at any time whilst the PSABW is open.

Approval of an Application does not represent a guarantee of work and no representations made by the Principal guarantee the amount of work over the term.

Any future services sought under the PSABW will be in accordance with the Terms and Conditions (refer Attachment 1 of the Application) which will require the execution of Contract No. 20C096, Preferred Supply Arrangement - Bituminous Works Letter of Award should a member of the PSABW be awarded work.

The Principal may amend or add to the information in these Guidelines or the Application at any time.

1.2 Accuracy of Guidelines

The Principal makes no promise or representation that any factual information supplied in or in connection with your participation in the PSABW or Guidelines are accurate.

Information is provided in good faith and the Principal will not be liable for any omission from these Guidelines.

1.3 Your Use of Guidelines

Without the express prior written consent of the Principal, you must not re-produce, re-advertise and/or in any way use the contents of these Guidelines either in whole or in part, other than for the purpose of preparing and lodging an Application.

1.4 Procurement Process does not create a Contract

Your Application is at your sole risk.

Nothing in these Guidelines, or your Application must be construed as creating any binding contract or other legal relationship (express or implied) between you and the Principal.

An Applicant's participation in the PSABW process is non-exclusive.

Nothing in these Guidelines shall prevent or prohibit or be construed as preventing or prohibiting the Principal from seeking services or materials from any other company, whether prequalified for the PSABW or otherwise, if the Principal so wishes.

2 YOUR APPLICATION TO THE PSABW

2.1 Format of Application

Your Application must:

- a) be in English;
- b) be endorsed by an appropriately authorised officer;
- c) observe word limits where specified as the Principal reserves the right to disregard any part(s) of your Application that exceed any specified word limit;
- d) be concise and only provide what is sufficient to present a complete and effective response; and
- e) be in the format included in Appendix 1 of these Guidelines.

The Principal may disregard any content in an Application that is illegible.

2.2 Application Categories

The PSABW is open to all companies who are presently accredited on the Department's Bituminous Technical Prequalification Scheme, refer:

https://www.dit.sa.gov.au/contractor_documents/prequalification

The Applicant's accreditation will be aligned to the present category and bituminous prequalification as follows:

<u>Category 1 <\$550 000 (GST inclusive)</u>	<u>Category 2 >\$550 000 (GST inclusive)</u>
Simple Technical Prequalification Scheme categories A1, S1 and C1	Complex Technical Prequalification Scheme categories A2, S2, and C2.

The PSABW will be split into Category 1 and 2 and the relevant scheme categories.

2.3 Application

You may only submit an Application if you hold an unrestricted Bituminous Technical Prequalification.

Your Application must include the following completed schedules included in the Application form (refer Appendix 1):

1. Supplier Information;
2. Financial Viability;
3. Insurances;
4. Compliance;
5. Application Requirements;
6. Statement of Intent for Targeted Industry Participation Plan (TIPP) and agreement of the TIPP template (Category 2 only); and
7. Registration on Tenders SA

Please note, as part of the Application you are agreeing to the PSABW Terms and Conditions as provided in Attachment 1 of the Application. No further negotiation will be entered into during any stage of the PSABW unless the Principal alters the Terms and Conditions for a specific

Work Order. Any successful Job will be awarded by a Letter of Award signed by both parties. No contractual relationship exists until the Letter of Award is executed by the last party. No site access will be granted until the Letter of Award is fully executed.

You are responsible for the cost of preparing and submitting your Application (s) and all other costs arising from your participation in the PSABW.

Your Application must be submitted on Tenders SA and submitted by the closing date specified on the Application front page.

2.4 Validity

By lodging an Application you agree that the Application will remain open for acceptance by the Principal for 120 days from the Application closing date.

2.5 Timeframes

The PSABW is for a term up to 30 months with the option of two (12) month extension terms subject to the Principal's discretion. The 30 month term is due to expire on 13 November 2024.

The period of notice to extend shall be six (6) months prior to the expiry of the then current term.

2.6 Principal's Use of Your Application Materials

Upon lodgement, your Application will become the property of the Principal.

Intellectual Property owned by you or any third parties forming part of the Application will not pass to the Principal with the physical property comprising the Application materials. However, you acknowledge and agree that you have the authority to grant to the Principal an irrevocable, royalty free licence to use, reproduce and circulate any copyright material contained in the Application to the extent necessary to conduct the evaluation and in the preparation of any resultant contract.

3 CONSORTIA AND SUB-CONTRACTING FOR THE APPLICATION

3.1 Consortia

If you are a member of a consortium then your Application must stipulate which part(s) of these Guidelines that each entity comprising the consortium would provide and how the entities would relate with each other to ensure full provision of the Guidelines. All consortium members that are not natural persons are to provide details relating to their legal nature and any relevant corporate structure.

The Principal will treat you as the preferred contact person for any consortium Application.

3.2 Sub-contracting

If your Application relies on a sub-contracting arrangement, then you must stipulate in your Application the tasks that the proposed sub-contractor(s) would undertake. You remain legally responsible for meeting the PSABW Guidelines in all respects both during the Application Process and during any resultant Contractual relationship with the Principal.

4 APPLICATION PROCUREMENT PROCESS CONDUCT

4.1 Your Conduct

You must:

- a) ensure all communications are undertaken via the contact person;
- b) declare any actual or potential conflict of interest;
- c) not employ or engage the services of any person who has a duty to the Principal as an adviser, consultant or employee (or former adviser, consultant or employee);
- d) not apply any incentive to, or otherwise attempt to influence, any employee of the Principal or any member of an evaluation team at any time;
- e) not engage in any collusive or anti-competitive conduct with any Supplier or Applicant under these Guidelines;
- f) comply with all laws in force in South Australia applicable to this PSABW;
- g) disclose whether you are acting as agent, nominee or jointly with another person(s) and disclose the identity of the other person(s); and
- h) not issue any news releases or responses to media enquiries and questions regarding these guidelines without the Principal's written approval.

If you act contrary to the expectations outlined above, the Principal reserves the right (regardless of any subsequent dealings) to exclude your Application from further consideration.

4.2 Principal Conduct

The Principal will:

- a) preserve the confidentiality of any information marked as confidential (subject to conditions concerning confidentiality); and
- b) give all Applicants under the PSABW the opportunity to compete fairly.

4.3 Confidentiality

You must identify any aspect of your Application that you consider should be kept confidential including reasons. The Principal is not obliged to treat information as confidential and in the absence of any agreement to do so, you acknowledge that the Principal has the right to publicly disclose the information.

Any condition in your Application that seeks to prohibit or restrict the Principal's right to disclose will not be accepted.

Notwithstanding any undertaking regarding confidentiality, by submitting an Application, you agree that the Principal may forward information relating to you or your Application to the Australian Competition and Consumer Commission (ACCC) if the Principal reasonably suspects, or is notified by the ACCC that it reasonably suspects, that there is cartel conduct or unlawful collusion in relation to your participation in the PSABW (whether or not the suspicion relates to your Application).

Information supplied by or on behalf of the Principal is confidential to the Principal and you are obliged to maintain its confidentiality. You may disclose confidential information to any person that has a need to know the information for the purposes of submitting your Application.

5 APPLICATION EVALUATION PROCESS

5.1 Evaluation

You must meet all the mandatory and non-price criteria evaluation for qualification to be a member in the PSABW, as shown respectively in tables 5.1 and 5.2 (Evaluation Criteria):

Table 5.1 – Mandatory criteria assessment for qualification to the PSABW.

Mandatory Criteria	Category 1 <\$550 000 GST incl.	Category 2 >\$550 000 GST incl.
Certificate of Currency for Public/Product liability insurance to \$20 million & Workers Compensation Insurance Certificate (RTWSA).	Mandatory	Mandatory
Industry Advocate Statement of Intent completed as part of the returnable schedules.	Mandatory	Mandatory
Acceptance of the Industry Advocate's TIPP for the PSABW, including Aboriginal Engagement Plan.	Not required	Mandatory
Currently approved on The Department's technical Bituminous Works Prequalification Scheme Category and product type.	Mandatory	Mandatory
Australian Government National Code of Practice 2016 for any works containing Federal Government funding streams (not required for Cat. 1, if 100% funded from State Government).	Preferred	Mandatory
Australian Government Building and Construction Work Health and Safety (WHS) Accreditation Scheme for category 2 members only.	Not Required	Mandatory
Builders Licensing requirements to perform Bituminous works in accordance with the requirements of the Department of Consumer and Business Services of SA. The minimum license category endorsement of 'Paving' with preference given to 'Civil Construction', has been deemed minimum requirement.	Mandatory	Mandatory
Provision of company signed acceptance of the PSABW contract and related documents.	Mandatory	Mandatory
Australian Government Workplace Relations Management Plan (WRMP)	Not Required	Mandatory

Table 5.2 – Non-Price Criteria assessment for qualification to the PSABW.

Non Price Criteria - Description	Category 1 Weighting <\$550 000 GST incl.	Category 2 Weighting >\$550 000 GST incl.
Demonstrated company knowledge, expertise, experience, and track record, particularly for Bituminous Works for The Department or other Road Authorities. Provided for each category they are requesting accreditation for under the PSABW.	20%	20%
Demonstration of how their company will continually report and meet the reporting functions for projects awarded under the PSABW. These scores will be determined from responses received from their signed "Application Form" to be submitted with each Contractors returnable schedules.	20%	20%
Management systems and plans <u>or</u> third party ISO accredited systems (ISO preferred) including ISO45001:2018 (Safety), ISO 9001:2015 (Quality) and Environmental ISO 14001:2015 (Environmental).	40%	30%
Experience, ability and accessibility of the key nominated personnel to perform Bituminous works.	20%	30%
Total	100%	100%

In evaluating Applications the Principal will consider:

- a) the Evaluation Criteria;
- b) compliance with applicable Government Policies; and
- c) any other information that the Principal considers relevant.

Where mandatory criteria are specified and your Application does not comply with these criteria the Principal may choose not to further evaluate your Application.

The Principal may in its absolute discretion (but is not obliged to):

- a) take into account any relevant consideration when evaluating Applications;
- b) invite any person or entity to lodge an Application;
- c) allow a member under the PSABW to change its Application;
- d) consider, decline to consider, or accept (at the Principal's sole discretion) an Application lodged other than in accordance with these guidelines;
- e) seek further information from you regarding your Application including but not limited to requests for additional information or presentations by, or interviews with you or your key personnel;

- f) seek and evaluate relevant financial viability data concerning any member under the PSABW's business and related entities including seeking any assistance from third party providers;
- g) suspend or terminate this PSABW process;
- h) make enquiries of any person or entity to obtain information about any member under the PSABW and its Application (including but not limited to the referees); and
- i) visit facilities operated by any member under the PSABW, proposed subcontractors of any member under the PSABW and/or by their customers in order to assess their capabilities and performance (at a mutually convenient time).

5.2 Negotiation

The Principal may choose to:

- a) enter into negotiations with you or any Applicant under the PSABW (including parallel negotiations with more than one member under the PSABW) in order to vary its Application on grounds of capability/capacity, technical issues, cost, effectiveness, to finalise agreement on the terms of the contract, or any other matters;
- b) re-evaluate Applications generally after any negotiation;
- c) suspend, discontinue or terminate at any time negotiations with you or any member under the PSABW or any other person or organisation;
- d) negotiate with you or any member under the PSABW for the provision of any part of the Guidelines and negotiate with any other member under the PSABW with respect to the same or other parts of the Guidelines and to enter into one or more contracts for part or parts of the Guidelines;
- e) negotiate at any time with any organisation that is not a member under the PSABW and enter into a contract in relation to the Guidelines or any part of the Guidelines with that organisation on such terms as the Principal, at its absolute discretion, considers appropriate; and
- f) seek best and final Applications from all or some of the member under the PSABW. Irrespective of the Principal's right to negotiate and/or seek a best and final Application, you are bound by your Application, and if selected, you must be willing to enter into a contract on the basis of your Application.

5.3 Financial Checks

A financial viability assessment is required to be undertaken for all Applicants prior to the establishment of the PSABW and an assessment will be undertaken as a minimum, once per calendar year thereafter in accordance with the Department's Procedure PR236 Financial Assessment of Companies.

Should the financial viability assessment show the Applicant is not financially capable of undertaking work in its selected category, the Principal may reduce the Applicants categories or not accept the Application.

5.4 Acceptance to the PSABW

You will be notified in writing of your acceptance onto the PSABW and your company name will appear on the PSABW register published on the Principal's website.

5.5 Review of Ongoing Compliance

At any time the Principal may request you to provide evidence of your ongoing compliance to the requirements under which your Application on the PSABW was granted.

Within 7 days of such request you shall provide the required information.

Your failure to provide all the required information within 7 days will result in you being removed from the PSABW (at the sole discretion of the Principal).

5.6 Performance

Revocation of Applicant Status

An Applicant will be removed from the PSABW (at the Principal's discretion), if the Applicant:

- a. Does not respond to a Work Order Request in any 12 month period having been issued at least three requests in that 12 month period; or
- b. Achieves a Red Contractor Overall Status for three (3) consecutive months;
- c. Fails to demonstrate their ability to meet the minimum assessment requirements for their appointed service categories due to staff changes. You are required to notify the Principal of any staff changes; or
- d. Fails to maintain the Bituminous Technical Prequalification under which the member was granted acceptance on the PSABW.
- e. Fails a financial check in accordance with Clause 5.3 of these Guidelines.

Performance Review

You will not be offered work under the PSABW (at the Principal's discretion) if you demonstrate poor performance, including but not limited to:

- a. Three Yellow Contractor Overall Status ratings within a 12 month period; or
- b. One Red Contractor Overall Status ratings within a 12 month period.

The Principal may, in its absolute discretion, consider your performance against Key Performance Indicators in previous agreements with the Principal when allocating Services or Materials to you.

The Principal may, in its absolute discretion and without limiting this clause 5.6, consider your current workload and availability to perform the Bituminous Works to the nominated completion date when allocating Services or Materials to you.

6 HOW TO WIN WORK

6.1 General

Upon establishment of the PSABW the secondary procurement process will seek responses to Work Order Requests from the PSABW members.

A Job will be identified and released in a Work Order Request to a PSABW member based on their category and bituminous accreditation (e.g. asphalt, spray seal or thin shape correction). In accordance with Section 2.2 above, packages will be released based on the following:

- for services low/medium risk and/or routine with an estimated Contract value up to \$550 000 (GST inclusive) a Work Order Request will be released to Category 1 members for the intended bituminous type;
- for services considered medium/high risk and/or complex with an estimated Contract value up to \$550 000 (GST inclusive) the Work Order Request will be released to PSABW Category 2 members for the intended bituminous type;
- for all services with an estimated Contract value of greater than \$550 000 (GST inclusive) a Work Order Request will be released to Category 2 members for the intended bituminous type; and
- for services which include a small portion (<10% by value) of granular rehabilitation, only members from the bituminous Category 2 shall be considered if they attain a R2 road prequalification rating, or directly engage an R2 company as a sub-contractor to perform the granular works.

At the Principal's sole discretion a Job may be requested as an individual project or a bundle of multiple projects. Locations will be both metro and rural covering the State of South Australia. Work may be required across a range of environments, some of which may require specific conditions of entry such as rail corridors, traditional owned lands (e.g. APY Lands) and active construction sites. You will be obligated to comply with all site entry pre requisites.

6.2 Work Order Request

For each Job under the PSABW, the Principal will release a Work Order Request which may include, but will not be limited to:

- Contact details, submission details and closing time and date;
- Tender Form;
- Annexure to the Terms and Conditions;
- Scope of work;
- Contract specific specification requirements;
- Pricing schedules;
- Working Time;
- Project specific tendering requirements; and
- IPP requirements.

An example of a Work Order (incorporating a Work Order Request) is included in Appendix 2.

A Job requested under a Work Order Request is based on the unamended PSABW Terms and Conditions agreed by you in the Application stage. No negotiation or changes to the Terms and Conditions requested by the PSABW member will be accepted by the Principal during any subsequent stages will be considered.

The number of members for each Work Order Request will be selected at the Principal’s sole discretion.

6.3 Work Order Pricing

If requested, each member will provide a Work Order Offer within the time specified in the Work Order Request.

All Work Order Offers shall be sent directly into the Principal’s dedicated PSABW email address (as stated on the Work Order Request). Only the secure email shall be used for submission, otherwise the submission shall be deemed as “non-compliant” and set aside from further evaluation.

The Work Order Offer will be in the format provided in the Principal’s Work Order Request and shall not include any other documents or schedules not requested in the Work Order Request. Additional documents or schedules provided with a Work Order Offer will not be considered and may lead to the Work Order Offer being non-conforming and set aside from further evaluation.

Late submissions will not be considered.

6.4 Work Order Offer Evaluation

The Work Order Offer will be evaluated using the Adjusted Comparative Pricing method.

The evaluation weightings for the PSABW are as follows:

- x (price): 80%
- y (non-price): 20%

For the first 6 months of the PSABW operation, the member’s initial non-price score attained for the Application, as per Section 5.2, will be used by the Principal as the 20% non-price score for Work Order Offer evaluation.

Following the first 6 months of operation, and a minimum of every 6 months thereafter, the Principal will review the performance of each member, their adherence to the KPI’s and evaluate their performance in accordance with [CO505](#) ‘Performance Rating – Bituminous Works’.

Following this evaluation the non-price criteria will be ranked with the following criteria.

Non-Price Criteria (y)	Weighted Score (20%)
Methodology	10%
Technical Capacity & Performance	25%
Quality Systems	25%
Occupational Health & Safety	40%
Total	100%

6.5 Award

Upon completion of the Work Order Offer evaluation, if a Job is to be awarded by the Principal, a Letter of Award substantially in the form included in Appendix 3 will be issued to the preferred member. Nothing provided by the Principal prior to this Letter of Award will constitute an acceptance by the Principal of a Work Order Offer or give rise to a contractual obligation.

This Letter of Award will comprise the formal instrument of agreement between the Principal and the member for the Job.

The preferred member shall sign and return the Letter of Award to the Principal's Representative and upon execution by both parties will form a contractual relationship between the parties to undertake the Job for that Work Order only.

6.6 Performance Evaluation

The Principal's Representative will provide performance evaluation feedback to the PSABW member in accordance with the Key Performance Indicators for each Work Order. A further performance review will be undertaken every 6 months thereafter.

The results will be taken into consideration when allocating future Work Orders Requests in accordance with Section 6.4 of these Guidelines.

The Principal's Representative may evaluate and review member performance and quality of work at any stage during the course of the PSABW.

7 GOVERNMENT POLICIES

South Australian Government policies apply to all South Australian Government purchasing and related activities.

7.1 Employment of Ex-Government Employees

Unless an exemption has been granted by the Treasurer, the Principal will not accept the services of any former public sector employee, either directly or through a third party, for a period that corresponds with the number of weeks of a targeted voluntary separation package received from the South Australian Government, where such engagement may breach the conditions under which the separation package was paid to the former public sector employee.

7.2 Disclosure of Government Contracts

If a Contract is entered into, the Principal may disclose that contract and/or information in relation to it in either printed or electronic form and either generally to the public or to a particular person as a result of a specific request.

**APPENDIX 1 – APPLICATION FORM INCLUDING TERMS
AND CONDITIONS**

DATED

DAY OF

PREFERRED SUPPLY ARRANGEMENT - BITUMINOUS WORKS

BETWEEN

COMMISSIONER OF HIGHWAYS

("Principal")

-AND-

THE PARTY NAMED IN THE WORK ORDER

("Contractor")

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SCHEDULE 1 GENERAL SPECIFICATION

SCHEDULE 2 RISE AND FALL

SCHEDULE 3 LETTER OF AWARD TEMPLATE

SCHEDULE 4 KEY PERFORMANCE INDICATORS

SCHEDULE 5 CONTRACT MANAGEMENT FRAMEWORK

SCHEDULE 6 NOT USED

AGREEMENT dated _____ day of _____

PARTIES:

COMMISSIONER OF HIGHWAYS a body corporate established under the *Highways Act 1926* (SA) of Level 9, 83 Pirie Street, Adelaide South Australia 5000 (**Principal**)

AND

THE PARTY NAMED IN THE WORK ORDER (**Contractor**)

BACKGROUND:

- A. The Principal has established a Preferred Supply Arrangement - Bituminous Works (PSABW).
- B. The Contractor is prequalified under the existing Technical Prequalification Scheme for Bituminous Works at https://dpti.sa.gov.au/contractor_documents/prequalification
- C. The Contractor has agreed to provide the Services and Materials to the Principal (and the Materials to the Principal's Nominated Contractors), as and when requested, in accordance with the terms and conditions set out in this Agreement.
- D. The Principal has undertaken a secondary procurement process and as a result of this process has selected the Contractor to supply the Services and Materials.
- E. The Contractor has been notified by Letter of Award of their success in the secondary procurement process as detailed in the 'Preferred Supply Arrangement – Bituminous Works Guidelines'.

IT IS AGREED:

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

In this document, unless the context otherwise requires, the following words have the following meanings:

1.1.1 Act of Prevention means any one of:

- (a) an act, omission or default of the Principal; or
- (b) an act or omission of a contractor engaged by the Principal in connection with the Services,

(other than to the extent that the act, omission or default arises out of or in connection with any failure of the Contractor to comply with its obligations under the Agreement).

- 1.1.2 **Agreement** means this Agreement (including its annexure parts) and a Letter of Award and Work Order issued under this Agreement.
- 1.1.3 **Business Day** means any day that is not a Saturday, Sunday or a public holiday in Adelaide
- 1.1.4 **Cartel Conduct** means conduct by two or more parties who are competitors (or would be but for the conduct) which enter into a contract, arrangement or understanding that involves price fixing, output restrictions, allocating customers, suppliers or territories, or bid-rigging, as defined in section 44ZZRD of the *Competition and Consumer Act 2010*.
- 1.1.5 **Claim** means any claim or action which the Contractor may make or bring against the Principal:
- (a) under, arising out of, or in connection with, the Work Order Request, any negotiations had or representations made prior to entering this Agreement;
 - (b) arising out of, or in connection with, the Services, the Materials or the Sites; or
 - (c) otherwise at law or in equity including:
 - (i) by statute;
 - (ii) in tort for negligence or otherwise, including negligent misrepresentation; or
 - (iii) for restitution for unjust enrichment,
- in respect of any fact, matter or thing under, arising out of or in connection with the Services, Materials, Sites or the Agreement.
- 1.1.6 **Complete or Completion** means the Services for the Job are finished, with no omissions and no Defects and the Site which the Services relate to is capable for use for its intended purpose and is free from any omissions or Defects.
- This includes, without limitation (to the extent applicable to the Services) the supply to the Principal of:
- (a) all manuals, certificates, authorisations, approvals and consents from statutory authorities and service providers;
 - (b) those certificates required for the occupation, use and maintenance of the Services; and
 - (c) all other documents, testing, training and other requirements specified in the Agreement,
- in relation to the Services.
- 1.1.7 **Completion Date** means that date for the Job as specified in Schedule 1 Item 14 of the Work Order, adjusted for any extension of time granted under the terms of this Agreement.
- 1.1.8 **Confidential Information** means information disclosed by or on behalf of a party to this Agreement that is:
- (a) by its nature confidential or by the circumstances in which it is disclosed is confidential; or
 - (b) designated by the disclosing party as confidential or identified in terms connoting its confidentiality,
- and includes Confidential Information pertaining to the Principal or the Crown, but does not include:

- (c) this Agreement; or
 - (d) information which is or becomes public knowledge other than by a breach of this Agreement.
- 1.1.9 **Conflict of Interest** means any interest or duty which conflicts or potentially conflicts with the obligations, liabilities or rights of either party as written in this Agreement.
- 1.1.10 **Contractor's Representative** means the person appointed by the Contractor pursuant to clause 8.
- 1.1.11 **Crown** means the Crown in right of the State of South Australia, and includes all of its agencies and instrumentalities.
- 1.1.12 **Declaration in Relation to Unlawful Collusion** means a declaration in relation to unlawful collusion submitted by the Contractor to the Principal in the procurement process preceding this Agreement
- 1.1.13 **Defect** means any defect, shrinkage, fault or omission in any Services or Materials, including any aspect of the Services, Materials or a Site which is not in accordance with the requirements of this Agreement.
- 1.1.14 **Defects Liability Period** means:
- (a) a period of 18 months; or
 - (b) such other period nominated in Schedule 1 of the Work Order, provided that such period is not greater than 3 years,
- commencing upon the date of Completion of the Job.
- 1.1.15 **Delivery Date** means the date and time specified in the Work Order for delivery of the Materials.
- 1.1.16 **Delivery Point** means the location(s) specified in the Work Order where the Materials will be delivered.
- 1.1.17 **Design** means Design of the Services, whether carried out by the Contractor or the Principal, but not including working drawings or shop drawings, which are taken not to constitute design work; Designed, the Design, and other derivatives of Design have a corresponding meaning.
- 1.1.18 **Direction** or **Direct** or **Directed** includes any agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement which is lawful and which the Principal may, in its absolute discretion make, give or issue from time to time.
- 1.1.19 **Event of Force Majeure** means any of the following events:
- (a) war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, act of terrorism or military or usurped power or martial law or confiscation by order of any Government or public authority or industrial dispute;
 - (b) ionising radiation or contamination by radioactivity from any nuclear fuel or any nuclear waste from the combustion of nuclear fuel not caused by the Contractor; and
 - (c) natural disasters such as catastrophic fire or major flood; or
 - (d) state-wide industrial dispute.
- 1.1.20 **Executive Negotiators** means those persons nominated in Item 9 of Schedule 1 of the Work Order, or such other person nominated by the relevant party by written notice to the other party.

- 1.1.21 **Expiry Date** means the date equivalent to the expiration of the Defects Liability Period specified in Item 10 of Schedule 1 of the Work Order.
- 1.1.22 **General Specification** means the document set out at Schedule 1.
- 1.1.23 **GST** means the tax imposed by the GST Law
- 1.1.24 **GST Law** has the meaning attributed in the A New Tax System (Goods and Services Tax) Act 1999 (Cth).
- 1.1.25 **GST Rate** has the meaning attributed in the GST Law.
- 1.1.26 **Insolvency Event** means:
- (a) an administrator is appointed to the Contractor;
 - (b) the Contractor resolves to be wound up;
 - (c) a court order is made that the Contractor be wound up (for insolvency or otherwise);
 - (d) the Contractor ceases business;
 - (e) a receiver or manager is appointed to the Contractor;
 - (f) a liquidator or provisional liquidator of the Contractor is appointed;
 - (g) the Contractor enters into an arrangement with its creditors; or
 - (h) the Contractor is unable to pay its debts when they are due.
- 1.1.27 **Job** means the whole of the Services to be executed on a Site under the Work Order (including the provision of Materials as part of the Services), including variations permitted under this Agreement, which by this Agreement is to be handed over to the Principal.
- 1.1.28 **Key Performance Indicators** or **KPIs** means the key performance indicators set out in Schedule 4.
- 1.1.29 **Latent Condition** has the meaning given to it in clause 6.6.1.
- 1.1.30 **Legislative Requirements** means:
- (a) acts, ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and State or Territory in which the obligations under the Agreement are being carried out;
 - (b) all Australian Standards, policies, plans, manuals, guidelines, instructions, codes of practice and other governmental (whether Commonwealth, State or local) requirements (including of Authorities) which are, or may become applicable to the Services or Materials (including, without limitation, as set out in the Specifications); and
 - (c) fees and charges payable in connection with the above.
- 1.1.31 **Letter of Award** means a Letter of Award in the form set out in Schedule 3, accepted by the Principal under clause 5.1.3 which sets out the terms and conditions that apply to the Contractor's delivery of the Services and Materials.
- 1.1.32 **Materials** means the materials priced in Schedule 2 of the Work Order.
- 1.1.33 **National Construction Code** means the National Construction Code produced and maintained by the Australian Building Codes Board, as in force from time to time.
- 1.1.34 **Negotiators** has the meaning given to it in clause 31.2.1.

- 1.1.35 **Personnel** in respect of a party, means its employees, agents, contractors, consultants and in respect of the Contractor includes any other person engaged to perform the Contractor's obligations under this Agreement.
- 1.1.36 **Prices** means the rates, prices and amounts set out in the Work Order.
- 1.1.37 **Principal's Nominated Contractors** means those contractors (not including the Contractor), as nominated in writing by the Principal to the Contractor, engaged by or to be engaged by the Principal to undertake services the same as or similar to the Services.
- 1.1.38 **Principal's Representative** means the person stated in Item 8 of Schedule 1 of the Work Order or such other person from time to time as notified by the Principal to the Contractor.
- 1.1.39 **PSABW** means the Department for Infrastructure and Transport's (The Department's) 'Preferred Supply Arrangement - Bituminous Works';
- 1.1.40 **Qualifying Cause of Delay** means each of the following events if and to the extent it causes a critical path delay to the Services achieving Completion:
- (a) an Act of Prevention;
 - (b) an Event of Force Majeure;
 - (c) approved Variations;
 - (d) a Latent Condition;
 - (e) a direction by a municipal, public or statutory authority but not where the direction arose from the failure of the Contractor to comply with a Legislative Requirement or the Agreement or any other act or omission of the Contractor (including its subcontractors).
- 1.1.41 **Rectify** means to repair or replace the defective part of the Services so that they meet the Specification and are fit for their intended purpose.
- 1.1.42 **Reports** means the reports required under clause 16.
- 1.1.43 **Representative** means the Principal's Representative and Contractor's Representative, as the context dictates.
- 1.1.44 **Services** means the services described in the Specification (including the Design and provision of any Materials as part of the Services).
- 1.1.45 **Site** means the lands and other places to be made available and any other lands and places made available to the Contractor by the Principal for the purpose of this Agreement and identified in the Work Order.
- 1.1.46 **Specifications** means the General Specification and the Technical Specification.
- 1.1.47 **Tax Invoice** has the meaning attributed in the GST Law.
- 1.1.48 **Taxable Supply** has the meaning attributed in the GST Law.
- 1.1.49 **Technical Specification** means the Principal's specification of standards and requirements for the performance of the Services and/or delivery of the Materials as set out in Schedule 1, as amended from time to time, and for the purposes of the Technical Specification:
- (a) a reference to the "Contract" is to this Agreement;
 - (b) a reference to the "work under the Contract" is to the provision of Services and Materials under a Work Order;
 - (c) a reference to the "General Conditions of Contract" is to the terms and conditions in this document;

- (d) a reference to “Practical Completion” is to “Completion”; and
- (e) A reference to “Date of Practical Completion” means the date of Completion under this Agreement;

The parts of the Technical Specification that are considered relevant to the Services and Materials required under a Work Order will be annexed to that Work Order including the relevant Master Specification parts and Contract Scope.

- 1.1.50 **Term** has the meaning given to it in clause 3.1.
- 1.1.51 **Variation** means a variation to the Services procured under a Work Order by adding to, changing or deleting part of the Services.
- 1.1.52 **Warranty Period** means the warranty period for the Materials set out in Item 11 of Schedule 1 of the Work Order.
- 1.1.53 **WHS Act** means *Work Health and Safety Act 2012 (SA)*.
- 1.1.54 **WHS Law** means all workplace, health and safety related laws, codes of practice, other compliance codes, directions on safety or notices issued by any relevant authority and standards where any obligations of the Contractor are being carried out, and includes the WHS Act, the WHS Regulations and any codes of practice in force under the WHS Act.
- 1.1.55 **WHS Management Plan** means the Contractor’s overarching plan to manage work health and safety in carrying out its obligations under this Agreement, as provided to the Principal prior to entering into this Agreement and forming part of the Work Order.
- 1.1.56 **WHS Regulations** means *Work Health and Safety Regulations 2012 (SA)*.
- 1.1.57 **Work Order** means a Work Order Offer issued by the Contractor and accepted by the Principal.
- 1.1.58 **Work Order Offer** means a Contractor’s response to a Work Order Request.
- 1.1.59 **Work Order Request** means a request for a Job issued by the Principal.

1.2 Interpretation

In this Agreement, unless a contrary intention is evident:

- 1.2.1 A reference to this Agreement is a reference to this Agreement as amended, varied, novated or substituted from time to time;
- 1.2.2 A reference to any legislation or to any provision of any legislation includes:
 - (a) all legislation, regulations, proclamations, ordinances, by-laws and instruments issued under that legislation or provision; and
 - (b) any modification, consolidation, amendment, re-enactment or substitution of that legislation or provision;
- 1.2.3 A word importing:
 - (a) the singular includes the plural;
 - (b) the plural includes the singular; and
 - (c) a gender includes every other gender;
- 1.2.4 Words denoting individuals include corporations, unincorporated associations, partnerships, trusts and joint ventures;
- 1.2.5 A reference to a party includes that party’s administrators, successors and permitted assigns;

- 1.2.6 If any act pursuant to this Agreement would otherwise be required to be done on a day which is not a Business Day then that act may be done on the next Business Day;
- 1.2.7 Where a word or phrase is given a defined meaning, any other part of speech or grammatical form in respect of that word or phrase has a corresponding meaning;
- 1.2.8 A reference to two or more persons is a reference to those persons jointly and severally;
- 1.2.9 A reference to a clause or schedule is a reference to a clause of, or a schedule to, this Agreement;
- 1.2.10 A reference to a clause number includes a reference to all of its subclauses;
- 1.2.11 A reference to dollars is to Australian dollars;
- 1.2.12 Where general words are associated with specific words which define a class, the general words are not limited by reference to that class;
- 1.2.13 The clause headings are for convenience only and they do not form part of this Agreement;
- 1.2.14 The word "or" is not exclusive;
- 1.2.15 A reference to the "Contract" is to this Agreement; and
- 1.2.16 In resolving inconsistencies in this Agreement and subject to clause 5.1.5, this Agreement will be construed by reference to the following order of priority:
 - (a) these terms and conditions;
 - (b) the Schedules;
 - (c) any annexures or attachments.

2. **AGREEMENT**

- 2.1 This Agreement:
 - 2.1.1 sets out pre-agreed terms and conditions critical to the delivery of Services and Materials by the Contractor; and
 - 2.1.2 contemplates that the Principal and Contractor will enter into one or more separate contracts for the supply of Services and Materials.
- 2.2 The following documents only and their attachments, if any, together constitute the agreement between the Principal and the Contractor:
 - (a) this Agreement;
 - (b) Letter of Award; and
 - (c) Work Order.

3. **TERM**

- 3.1 The Term of this Agreement commences on the date the Letter of Award is executed by the last of the parties and expires on the Expiry Date unless:
 - 3.1.1 the Principal exercises its right to extend the Expiry Date pursuant to clause 3.2;
 - or

- 3.1.2 either party exercises its right to terminate this Agreement, however that right arises.
- 3.2 The Principal may extend the Term for the period specified in Schedule 1 of the Work Order by giving written notice to the Contractor within the period specified in Schedule 1 of the Work Order.

4. **ACKNOWLEDGEMENTS**

The Contractor acknowledges and agrees that nothing in this Agreement shall prevent or prohibit or be construed as preventing or prohibiting the Principal from seeking services or materials from any other contractor, whether prequalified for the PSABW or otherwise, if the Principal so wishes.

5. **PURCHASE OF SERVICES AND MATERIALS**

5.1 **Purchasing Process**

The Principal may purchase the Services and Materials under this Agreement by issuing a Letter of Award.

General

- 5.1.1 A Letter of Award must be in writing, be approved by the Principal, and be in the form and contain the information contemplated by the template set out in Schedule 3.
- 5.1.2 The Principal has issued a Letter of Award to the Contractor for the purchase of either or both Services and Materials.

Letter of Award

- 5.1.3 The Letter of Award takes effect on execution of the Letter of Award by the last of the parties.
- 5.1.4 The Contractor must provide the Services and Materials ordered by the Principal under a Letter of Award in accordance with the terms of this Agreement and, subject to clause 5.1.5, the Letter of Award.
- 5.1.5 The several documents forming the Agreement are to be taken as mutually explanatory of one another. The following order of precedence (in descending order of precedence) shall apply to resolve any ambiguity or discrepancy, to the extent necessary to resolve the ambiguity or discrepancy:
- (a) the terms of a Work Order and any terms and conditions that may be included with a Work Order;
 - (b) the terms of a Letter of Award and any terms and conditions that may be included with a Letter of Award;
 - (c) this Agreement.

5.2 **Cancellation of Letter of Award**

- 5.2.1 Notwithstanding any other provision of this Agreement and without prejudice to any of the Principal's other rights, the Principal may:
- (a) by giving written notice to the Contractor, cancel a Letter of Award or any part of a Letter of Award at any time; and
 - (b) either itself or by a third party thereafter carry out the relevant Services or obtain the relevant Materials.

- 5.2.2 Subject to clauses 5.2.3 and 5.2.4, the Contractor will have no Claim (insofar as is permitted by law) against the Principal arising out of or in connection with any notice under this clause 5.2, the cancellation of a Letter of Award or the carrying out of the relevant Services or supply of Materials by the Principal or a third party.
- 5.2.3 Where the Principal cancels a Letter of Award or part of a Letter of Award, the Principal must pay:
- (a) for any Services performed, or Materials supplied under and in accordance with the Letter of Award prior to cancellation; and
 - (b) all reasonable direct costs incurred by the Contractor as a result of the cancellation,
- provided the Contractor has taken all reasonable steps to avoid or mitigate such costs and amounts to the satisfaction of the Principal, less any other amounts owing by the Contractor to the Principal.
- 5.2.4 Notwithstanding clause 5.2.3, the Contractor is not entitled to any amount under clause 5.2.3 where the cancellation of the Letter of Award arises from or in connection with any failure of the Contractor to comply with its obligations under the Agreement or from any other act or omission of the Contractor or any of its subcontractors.
- 5.2.5 The Contractor must ensure that all subcontracts can be terminated for convenience on terms (including in relation to termination payment) which are consistent with this Agreement.

6. SERVICES

6.1 General

The Contractor must provide the Services purchased by the Principal in accordance with the terms and conditions of this Agreement and any Letter of Award.

6.2 Standards

The Contractor must provide the Services:

- 6.2.1 in accordance with the Specification;
- 6.2.2 in a proper, competent and professional manner;
- 6.2.3 with due care, skill and diligence;
- 6.2.4 by any applicable Completion Date, and otherwise in a timely and expeditious way;
- 6.2.5 in a way that will prevent injury to or death of persons or damage to property;
- 6.2.6 to the appropriate professional and legal standards;
- 6.2.7 in accordance with the best practices current in the Contractor's industry; and
- 6.2.8 strictly in accordance with:
 - (a) all Legislative Requirements; and
 - (b) any policies and directions given to the Contractor by the Principal from time to time.

6.3 Security practices and procedures

The Principal may inform the Contractor of any security practices and procedures implemented by the Principal from time to time. The Contractor must comply with those procedures at all times.

6.4 Site

- 6.4.1 Prior to the commencement date indicated in the Work Order the Principal must give the Contractor sufficient access to the Site to commence, and continue the Services.
- 6.4.2 If required by the Principal (by written notice to the Contractor), the Contractor must permit persons engaged by the Principal ("Principal's contractors") to have access to the Site, to deliver and store materials on the Site and to carry out work on the Site, and must take all reasonable measures to cooperate with them and coordinate the Contractor's work with their work.

6.5 Principal supplied information

The Contractor:

- 6.5.1 acknowledges that the Principal does not warrant, guarantee or make any representation about the currency, accuracy or adequacy of any documents, information or data included in this Agreement or made available to the Contractor, whether before or after the Agreement Date, in relation to:
- (a) the Sites;
 - (b) the Services or Materials;
 - (c) the Legislative Requirements; or
- whether by the Principal, the Principal's Personnel, or any other government party (**Information**);
- 6.5.2 must not rely on the Information and must review and check that Information and satisfy itself about the currency, accuracy and adequacy of that Information;
- 6.5.3 must notify the Principal promptly if any Information is insufficient, inaccurate or unclear; and
- 6.5.4 will not have any Claim (insofar as is permitted by law) against the Principal arising out of or in connection with the Information.

6.6 Latent Conditions

- 6.6.1 If the Contractor finds conditions on site (**Latent Conditions**) (but excluding weather conditions and physical conditions which are a consequence of weather conditions) that:
- (a) were not disclosed in any information available to the Contractor at the time the Letter of Award becomes effective;
 - (b) were not and could not reasonably have been anticipated by the Contractor at the time the Letter of Award becomes effective; and
 - (c) will make it necessary to undertake more services (**Latent Conditions Services**) to complete the Services than would have been necessary had the Latent Condition not existed;
- and the Contractor satisfies the Principal as such, the Latent Conditions Services and the associated costs will be treated as a Variation, provided that the Contractor complies with the provisions of this clause.
- 6.6.2 Immediately on finding Latent Conditions, the Contractor must:
- (a) take any action immediately required to protect the safety of persons and to avoid immediate damage to the Services;
 - (b) not proceed with any Latent Conditions Services; and

- (c) immediately notify the Principal of the Latent Conditions, the nature of anticipated Latent Conditions Services, and the extent of any action taken in accordance with this clause.
- 6.6.3 On receiving notice under this clause from the Contractor, the Principal must
 - (a) issue a Variation that addresses the Latent Condition, (which may include changing the design, or deleting part of the services, or authorising additional services); or
 - (b) notify the Contractor that the Principal disputes that there is a Latent Condition (whether on the basis that the conditions found were or could reasonably have been anticipated, or will not make additional services necessary) and instruct the Contractor whether the services notified by the Contractor as Latent Conditions Services are required to be carried out.
- 6.6.4 If the existence of a Latent Condition is disputed:
 - (a) the Contractor must proceed with the Services, including any work instructed by the Principal under the preceding sub-clause, and excluding any work which the Principal instructs is not required to be carried out;
 - (b) the parties must undertake the dispute resolution procedure under this Agreement in an endeavour to resolve the dispute; and
 - (c) the Contractor remains entitled to payment for the costs of any work that is ultimately determined to be Latent Conditions Services, either by agreement of the parties or by the determination of a court or the determination of any third party the parties may agree to appoint to make a final and binding determination on the matter.
- 6.7 **Care of the Services and reinstatement of damage**
 - 6.7.1 From the time the Contractor is given access to the Site until the Contractor vacates the Site following Completion, the Contractor is responsible for the care of the Site, the Services, and all equipment and materials (including the Materials) on the Site.
 - 6.7.2 The Contractor must at its cost rectify and reinstate any loss or damage to the Site, the Services, and equipment and materials (including the Materials) on the Site, except to the extent such damage is caused by the Principal or is beyond the reasonable control of the Contractor.
- 6.8 **Commencement and completion**
 - 6.8.1 The Contractor must commence the Services required under a Work Order immediately upon being given possession of the relevant Site or on such later date as specified in the Work Order.
 - 6.8.2 The Contractor must ensure the Job is Complete by the Completion Date in the Work Order.
 - 6.8.3 When, in the Contractor's view, the Job is Complete, the Contractor must give the Principal written notice of the fact (**Notice of Claimed Completion**).
 - 6.8.4 The Principal may respond to a Notice of Claimed Completion by:
 - (a) a notice setting out work that remains to be done in order to achieve Completion (**Notice of outstanding work**); or
 - (b) a notice acknowledging Completion (**Notice acknowledging Completion**).
 - 6.8.5 The Principal may issue a Notice acknowledging Completion without having received a Notice of Claimed Completion.

- 6.8.6 For the purposes of determining any matter, date or period of time that depends on the date of Completion of the Job, the date is taken to be:
- (a) if the Contractor has issued a Notice of Claimed Completion and the Principal has not within 15 Business Days responded with a Notice of outstanding work, the date of the Notice of Claimed Completion;
 - (b) a date determined by the Principal without there having been any prior issue of a Notice of Claimed Completion, the date of the Notice acknowledging Completion;
 - (c) if the Principal issues a Notice of outstanding work and the Contractor asserts that the Job is nevertheless Complete, the date when the Job is actually Complete according to any agreement eventually reached by the parties, or according to the determination of a court or the determination of any third party the parties may agree to appoint to make a final and binding determination on the matter.

6.9 Delay

6.9.1 If the Contractor demonstrates to the satisfaction of the Principal that the Contractor has or will be unavoidably delayed in Completion of the Job by a Qualifying Cause of Delay, the Contractor is entitled to have the Completion Date varied by a period equal to the actual critical path delay to the Services achieving Completion as determined by the Principal.

6.9.2 Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a Qualifying Cause of Delay, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for achieving Completion.

6.10 Delay Costs

6.10.1 Subject to clauses 6.10.2, where:

- (a) the Contractor has been granted an extension of time for achieving Completion under clause 6.9;
- (b) the cause of the delay is an Act of Prevention; and
- (c) the Contractor has demonstrated that it has taken all reasonable steps to avoid or mitigate any costs arising out of the delay, and provided any substantiating material requested by the Principal

the Principal shall pay the Contractor the extra reasonable, direct, necessary and unavoidable costs incurred by the Contractor as a result of the delay.

6.10.2 Nothing in this clause obliges the Principal to pay extra costs for a delay which:

- (a) have already been included in the value of a Variation or any other payment under this Agreement;
- (b) results from a direction by a municipal, public or statutory authority issued under the *Emergency Management Act 2004* (SA) in respect of COVID-19;.

6.11 Defects liability

6.11.1 The Contractor must Rectify any Defect that becomes apparent in the Services during the performance of the Services and during the Defects Liability Period.

6.11.2 The Principal must notify the Contractor of any defect that becomes apparent in the Services (including any defect in the Materials) during the Defects Liability Period.

6.11.3 If the Contractor fails to Rectify a Defect in accordance with this clause, the Principal may (without being obliged to, and without prejudice to any other rights that the Principal may have against the Contractor in respect of the Defect and associated loss and damage):

- (a) Rectify the Defect or engage another contractor to Rectify the Defect;
- (b) claim from the Contractor as a debt the cost of Rectifying the defect;
- (c) claim from the Contractor as a debt an amount that reflects the diminution in value or usefulness of the Services as a result of the Defect.

None of the above options are to be taken to be mutually exclusive. For the avoidance of doubt, amounts due by the Contractor to the Principal under this clause may under clause 27.3, at the Principal's discretion, be set off against monies owed to the Contractor.

6.11.4 The Contractor will:

- (a) have no entitlement to payment for any Services (including Materials) which require Rectification in respect of a Defect; and
- (b) be entitled to payment for Services (including Materials) which it Rectifies under clause 6.11.1, subject to deduction for any costs, losses and damages incurred by the Principal arising out of or in connection with the failure to perform.

6.11.5 The Contractor must carry out the Rectification required under this clause 6.11:

- (a) at times and in a manner that causes as little inconvenience to the Principal and occupiers and users of the Sites as is reasonably possible; and
- (b) at its own cost, including by any costs associated with labour, preliminaries, attendance, supervision, on and off site overheads, goods, materials, plant and equipment and all other tasks and things which are required to enable the Contractor to undertake the Rectification, and will not be entitled to make a Claim against the Principal for any such work.

6.11.6 Any work carried out under this clause by the Contractor during the Defects Liability Period, shall be subject to an additional Defects Liability Period of equal duration to the original defects liability period, being 12 months, but commencing on the date of completion of those works.

6.11.7 The Contractor, to the extent permitted by law, indemnifies and undertakes to keep indemnified, the Principal and the Crown, from and against any costs, losses, damages, expenses (including legal expenses), liabilities or other outgoings of whatever kind suffered or incurred by the Principal or the Crown, arising out of, or in respect of, any Defect or the work associated with Rectifying the Defect.

6.12 Contractor Documents

The Contractor acknowledges and agrees that:

6.12.1 the Principal does not assume or owe any duty of care to the Contractor to review and comment on, direct any amendments to, or approve, any documents provided to the Principal by the Contractor; and

6.12.2 no review and comment on, consent to or rejection of, or failure to review or comment upon or consent to or reject any documents provided by the Contractor or any other Direction by the Principal in connection with, or any other act or omission by the Principal in relation to, the documents provided by the Contractor will:

- (a) relieve the Contractor from, or alter or affect, the Contractor's liabilities or responsibilities; or
- (b) prejudice the Principal's rights against the Contractor, whether under this Agreement or otherwise.

6.13 Variation to Services

6.13.1 Notice of Variation by the Principal

The Principal may give the Contractor:

- (a) a written document entitled "Variation Proposal" giving notice of a proposed Variation and requiring the Contractor to provide the details referred to in clause 6.13.2; or
- (b) whether or not the Principal has previously issued a Variation Proposal - a written document titled "Variation Notice" directing the Contractor to carry out the Services in accordance with a Variation.

6.13.2 Notice of Variation by Contractor

If the Contractor receives a Variation Proposal under clause 6.13.1(a), then the Contractor must:

- (a) give the Principal a notice in writing within 10 days of receiving the Variation Proposal and before commencing the Variation, setting out details of the proposed Variation and the adjustment (if any) which the Contractor considers should be made under clause 6.13.5 to the amounts payable under the Agreement; and
- (b) continue to perform the Services in accordance with the Agreement and all directions of the Principal.

6.13.3 Variation Notice

- (a) The Contractor must not commence Services the subject of a Variation Proposal, prior to receiving a Variation Notice from the Principal directing the Contractor to carry out those Services.
- (b) Where the Principal issues a Variation Notice, the Price payable under the Letter of Award will be adjusted in accordance with clause 6.13.5.

6.13.4 Bar

Notwithstanding that the Contractor is obliged to perform the Services the subject of a Variation, the Contractor will not be entitled to, and the Principal will not be liable for or upon, any Claim (insofar as is permitted by law) arising out of or in connection with the Variation unless the Principal has issued a Variation Notice under clause 6.13.1(b).

6.13.5 Adjustment for Variations

- (a) Subject to clauses 6.13.4 and 6.13.6(b), the amount payable under the Letter of Award, will be adjusted (whether upwards or downwards) on account of a Variation from the date stated in the Variation Notice issued under clause 6.13.1(b) by:
 - (i) an amount agreed between the Principal and the Contractor including, where the Principal states in the Variation Notice that it agrees with the adjustment notified by the Contractor under clause 6.13.2, that amount; or
 - (ii) failing agreement, a reasonable amount determined by the Principal having regard to the rates and prices in the Letter of Award and other

provisions of the Agreement (if any) applicable to the calculation of that amount.

6.13.6 Omissions

The Principal may direct a Variation deleting any part of the Services, in which case:

- (a) the Principal may thereafter either perform the omitted services itself or employ or engage another person to perform the omitted services;
- (b) the relevant rates, prices and amounts payable under the Letter of Award will be deemed to be deleted but otherwise the rates, prices and amounts payable under the Letter of Award will not be subject to adjustment; and
- (c) the Principal will not be liable upon any Claim (insofar as is permitted by law) by the Contractor arising out of or in connection with the direction.

6.14 Making Good and Keeping Clean

The Contractor must:

- 6.14.1 in performing the Services, keep the areas of the Sites in which the Services are being performed clean and tidy and regularly remove rubbish and surplus or salvaged materials;
- 6.14.2 take all protective measures necessary to guard against any damage to any property of the Principal or any other user or occupier of a Site; and
- 6.14.3 at its cost make good all damage to any property, except to the extent caused by the Principal or a cause beyond the reasonable control of the Contractor.

6.15 Inspections, Testing and Non-Complying Services

6.15.1 The Principal may at any time inspect the Services or the Sites, to verify compliance with the Agreement.

6.15.2 The Contractor acknowledges that:

- (a) the Principal does not owe the Contractor any obligation to:
 - (i) inspect the Services or the Sites; or
 - (ii) review the Services for errors, omissions or compliance with the requirements of this Agreement if it does so inspect; and
- (b) no inspection or review of the Services or the Sites or failure to do so by the Principal will in any way lessen or otherwise affect the Contractor's obligations or the Principal's rights against the Contractor, whether under this Agreement or otherwise according to law.

6.15.3 The Contractor must:

- (a) at all reasonable times enable inspection of the Services or the Sites by the Principal and its Personnel; and
- (b) provide every reasonable facility to the Principal necessary for the supervision, examination and testing of any work or materials (including the Materials) for the Agreement at any place where work is being or is to be carried out or materials (including the Materials) are being prepared.

6.15.4 If an inspection is carried out and it reveals any Defect then clause 6.11 applies.

7. MATERIALS

7.1 General

The Contractor must provide the Materials purchased by the Principal in accordance with the terms and conditions of this Agreement.

7.2 Standards

The Contractor must:

- 7.2.1 use new materials unless otherwise specified;
- 7.2.2 provide the Materials in accordance with the requirements set out in the Specification; and
- 7.2.3 sell the Materials without encumbrance.
- 7.2.4 ensure the Materials are free from defects in materials, manufacture and workmanship;
- 7.2.5 conform to any applicable Australian Standards or other standards nominated in the Specifications;
- 7.2.6 are of merchantable quality;
- 7.2.7 are fit for their intended purpose, as specified by the Principal in the relevant Work Order; and
- 7.2.8 are manufactured and supplied without infringing any person's intellectual property rights.

7.3 Supply of Services and Materials

If the Principal purchases Services and Materials from the Contractor for a Job:

- 7.3.1 the Contractor is responsible for obtaining and delivering the Materials as necessary to ensure it Completes the Services in accordance with the requirements (including timing) set out in clause 6 of this Agreement;
- 7.3.2 the Contractor is not entitled to payment for Materials not incorporated in the Services;
- 7.3.3 any Defect to the Materials must be dealt with in accordance with clause 6.15.

7.4 Supply of Materials only

If the Principal purchases Materials only from the Contractor for a Job:

- 7.4.1 the Contractor must:
 - (a) deliver the Materials to the Delivery Point on or before the Delivery Date;
 - (b) comply with the Principal's reasonable directions and delivery instructions; and
 - (c) provide test evidence for the Materials if required;
- 7.4.2 the Materials are deemed to be accepted either:
 - (a) on delivery, if the Principal notifies the Contractor that it accepts the Materials; or
 - (b) if no notice is issued by the Principal, then 5 Business Days after delivery of the Materials to the Delivery Point subject to any prior notice of rejection from the Principal.
- 7.4.3 acceptance of the Materials does not relieve the Contractor of any of its obligations under this Agreement.

- 7.4.4 the Contractor bears the risk in the Materials until delivery to the Delivery Point;
- 7.4.5 title in the Materials will pass to the Principal upon the Principal's acceptance of the Materials;
- 7.4.6 if prior to or during the Warranty Period the Materials are defective then the Principal may in its absolute discretion (without being obliged to, and without prejudice to any other rights that the Principal may have against the Contractor in respect of the defective materials and associated loss and damage) require that the Contractor at its expense:
- (a) replace the Materials within 10 Business Days of notification by the Principal (or such other time as is agreed); or
 - (b) refund the Price paid for the Materials.

For the avoidance of doubt, amounts due by the Contractor to the Principal under this clause may under clause 27.3, at the Principal's discretion, be set off against monies owed to the Contractor.

7.5 Inspection and testing of Materials

- 7.5.1 The Principal may inspect and test the Materials to determine whether they comply with the Specifications.
- 7.5.2 The Contractor acknowledges that:
- (a) the Principal does not owe the Contractor any obligation to:
 - (i) inspect the Materials; or
 - (ii) ensure the Materials comply with the Specifications; and
 - (b) no inspection or review of the Materials or failure to do so by the Principal will in any way lessen or otherwise affect the Contractor's obligations or the Principal's rights against the Contractor, whether under this Agreement or otherwise according to law.
- 7.5.3 If an inspection is carried out and it reveals any defect then clause 7.4.6 applies.

8. CONTRACT ADMINISTRATION

- 8.1 For the purpose of administering this Agreement, each party appoints as its Representative the person designated in Schedule 1 of the Work Order.
- 8.2 The Contractor's Representative and the Principal's Representative each has authority to:
- 8.2.1 exercise all of the powers and functions of his or her party under this Agreement, other than the power to amend this Agreement;
 - 8.2.2 bind his or her party in relation to any matter arising out of or in connection with this Agreement; and
 - 8.2.3 delegate that authority.
- 8.3 A notice served on a Representative is taken to be notice to that Representative's party.
- 8.4 The Contractor must comply with all reasonable Directions given by the Principal's Representative.
- 8.5 Either party may by fourteen (14) days written notice to the other change its Representative.

9. MEETINGS

The Contractor must:

- 9.1 comply with any meeting requirements set out in the Specifications and Schedule 5; and
- 9.2 attend all meetings requested by the Principal. The Principal must, as far as practicable, give reasonable notice of all such meetings to the Contractor.

10. PERSONNEL

- 10.1 The Contractor must ensure that the Contractor's Personnel are competent and professional with qualifications and experience appropriate to the tasks they will perform under this Agreement.
- 10.2 If the Principal gives the Contractor notice in writing requiring any one or more of the Contractor's Personnel to be withdrawn from providing the Services or Materials, the Contractor must immediately comply with the notice and provide replacements acceptable to the Principal. If the Contractor fails to comply with that notice then the Principal may terminate this Agreement immediately by written notice to the Contractor.
- 10.3 The Principal reserves the right to refuse entry to any of the Principal's premises or the Site to any of the Contractor's Personnel.

11. GENERAL WARRANTIES

The Contractor warrants that:

- 11.1 it examined all information relevant to the risks, contingencies and other circumstances which could affect its provision of the Services and Materials and which the Principal has made available or which the Contractor could otherwise have obtained by making reasonable enquiries before entering this Agreement;
- 11.2 it has done everything possible to inform itself fully as to the physical conditions and other requirements of the Sites, or any other condition or characteristic of the Sites affecting or which may affect its performance of the Agreement;
- 11.3 it informed itself completely of the nature of the work and materials necessary for the execution of the Services and supply of Materials before entering this Agreement;
- 11.4 it will continue to obtain and examine all information and advice and otherwise inform itself of all matters referred to in this clause.

12. ENVIRONMENT

The Contractor:

- 12.1 must comply with all Legislative Requirements for the protection of the environment;
- 12.2 must comply with all reasonable environmental policy requirements provided by the Principal, and any environmental requirements set out in the Specification;
- 12.3 must demonstrate to the Principal whenever required that all requirements of the Agreement for protection of the environment have been met;
- 12.4 must deal with and dispose of hazardous materials in accordance with all Legislative Requirements;
- 12.5 must not pollute, contaminate or otherwise damage the environment;

- 12.6 is responsible for and must at its own cost make good any pollution, contamination or damage to the environment to the extent caused by:
- 12.6.1 the performance of the Services or provision of Materials, whether or not it has complied with the requirements of this Agreement for the protection of the environment; or
 - 12.6.2 a failure to perform the Services or provide the Materials in accordance with this Agreement;
- 12.7 immediately notify the Principal of:
- 12.7.1 any non-compliance with the requirements of this clause;
 - 12.7.2 a breach of any Legislative Requirement relating to the environment or any other incident which could have an adverse effect on the environment or any person at a Site;
 - 12.7.3 the receipt of any notice, order or communication received from any relevant Authority in connection with the environment at any Site; and
 - 12.7.4 its recommendation for fully addressing (both retroactively and proactively) the issue under clauses 12.7.1 to 12.7.3;
- 12.8 take all such steps as the Principal may require to address any issue notified under the preceding subclause or otherwise identified by the Principal; and
- 12.9 ensure that all subcontractors comply with the requirements of this clause and prepare site environment plans to the reasonable satisfaction of the Contractor.

13. **WORK HEALTH AND SAFETY**

- 13.1 The Contractor must ensure the work health and safety of its Personnel and the public in carrying out its obligations under this Agreement.
- 13.2 The Contractor must comply with the WHS Law at all times, regardless of whether the Principal issues a Direction in that regard or not.
- 13.3 The Contractor must implement all necessary systems, comply with such systems and will take all necessary actions in relation to satisfying its safety obligations under the WHS Act and under this Agreement.
- 13.4 The Contractor must review and update the WHS Management Plan so that it remains at all times compliant with WHS Law.
- 13.5 The Contractor must comply with the requirements of a “person with management or control of fixtures, fittings or plant at a workplace” (as that term is defined in the WHS Act) under the WHS Law.
- 13.6 If and to the extent any Services are a construction project, the Contractor must perform the duties of:
- 13.6.1 a principal contractor, as specified in the WHS Regulations; and
 - 13.6.2 a person with management or control of a workplace, as specified in the WHS Act and the WHS Regulations,
- and for the purpose of such work the Contractor:
- 13.6.3 is engaged as principal contractor for the construction project in accordance with regulation 293 of the WHS Regulations;
 - 13.6.4 is authorised to have management and control of the workplace as necessary to enable it to discharge the duties of a principal contractor and of a person having management or control of a workplace.

- 13.7 If requested by the Principal, the Contractor must:
- 13.7.1 provide evidence satisfactory to the Principal of its capacity to comply with the WHS Law;
 - 13.7.2 provide evidence that its Personnel have received appropriate training in and are aware of their legal obligations and responsibilities in relation to WHS Law; and
 - 13.7.3 provide the Contractor's WorkCover Registration Number.
- 13.8 The Contractor must permit the Principal to carry out any inspections the Principal deems necessary to ensure that the Contractor is complying with the work health and safety practices referred to in this Agreement.
- 13.9 If all or part of the work under this Agreement is to be provided on the premises of the Principal and under the direction of the Principal, the Contractor must comply with the Principal's workplace health and safety policies, procedures and instructions. If the Contractor becomes aware of any potentially hazardous situation on the premises of the Principal, the Contractor must immediately bring it to the Principal's attention.
- 13.10 The Contractor must comply with any additional requirements regarding the preparation and implementation of workplace health and safety systems and plans as detailed in the Specifications.
- 13.11 Without limiting the Contractor's obligations in this clause, the Contractor must, so far as is reasonably practicable:
- 13.11.1 manage risks associated with the carrying out of the construction projects; and
 - 13.11.2 ensure that all workplaces are secured from unauthorised access, and in doing so, have regard to all relevant matters including risks to health and safety arising from unauthorised access to the workplace, the likelihood of unauthorised access occurring and to the extent that unauthorised access to the workplace cannot be prevented, how to isolate hazards within the workplace.
- 13.12 Without limiting the obligations in this clause, the Contractor must:
- 13.12.1 cooperate with the Principal to enable the Principal to comply with its obligations under the WHS Law applicable or relevant to this Agreement;
 - 13.12.2 immediately upon becoming aware of or observing a risk or hazard to health and safety on about or in the vicinity of a Site (whether to the public or otherwise) inform the Principal in writing of the risk and provide advice to the Principal as to how to mitigate, cure or remove the risk or hazard; and
 - 13.12.3 supply all plant necessary to ensure the carrying out of the Services in a manner that is safe and without risks to health and ensure that all plant supplied by it is, and is maintained, in a condition that is safe and without risks to any person.
- 13.13 If the Contractor fails to comply with any of its duties referred to in this clause, the Principal may do either or both of the following:
- 13.13.1 Direct the Contractor to suspend the work as a result of the Contractor's failure, until such time as the Contractor satisfies the Principal that failure has been resolved (for the avoidance of doubt, the costs incurred by the Contractor by reason of a suspension under this clause shall be borne by the Contractor); and
 - 13.13.2 have the Contractor's obligations carried out by the Principal or by others and the cost incurred by the Principal in having those obligations carried out will be a debt due from the Contractor to the Principal.
- 13.14 The Contractor must, to the extent permitted by law, indemnify and hold harmless the Principal and the Crown against any loss which the Principal or Crown may suffer arising out of, or in connection with, non-compliance or breach by the Contractor or any

subcontractor of any requirement of this clause including any loss suffered by the Principal in taking steps to ensure compliance by it or the Contractor or any subcontractor with the WHS Law, where the Contractor or subcontractor has failed to take those steps or equivalent steps under this clause.

- 13.15 Without limiting the Contractor's reporting or other obligations elsewhere under this document, the Contractor must promptly provide the Principal with a copy of:
- 13.15.1 the current WHS Management Plan and any Site specific work health and safety plan, including any revisions that are made under regulation 311 of the WHS Regulations;
 - 13.15.2 the site induction process;
 - 13.15.3 any safe work method statements which have been obtained under regulation 312 of the WHS Regulations;
 - 13.15.4 the Contractor's records in relation to the steps the Contractor has taken to comply with the WHS Law;
 - 13.15.5 any other registers, records and documents,
- that the Service Provider prepares, keeps or obtains in connection with its obligations under the WHS Law, including (if applicable) as a principal contractor.
- 13.16 Nothing in this clause or elsewhere in this document in any way limits or excludes the obligations the Service Provider has under the WHS Regulation, including (if applicable) as a principal contractor.
- 13.17 Nothing in this clause requires the Principal to monitor the Contractor's compliance with this clause and the WHS Law. Any monitoring or review by the Principal is solely for the benefit of the Principal and no monitoring, review or approval (or failure to do those actions) by the Principal will relieve the Contractor from its obligations under this clause and/or the WHS Law.
- 13.18 In this clause:
- 13.18.1 the terms **principal contractor** and **construction project** have the same meanings given to those terms under the WHS Regulation; and
 - 13.18.2 the term **workplace** has the meaning given to that term under the WHS Act.

14. **SUBCONTRACTING**

- 14.1 The Principal has approved the Contractor engaging the sub-contractors listed in Item 12 of Schedule 1 of the Work Order (**Pre-approved Subcontractors**) to perform those tasks set out against each Pre-approved Subcontractor.
- 14.2 Except to the extent approved under the preceding subclause, the Contractor must not engage any sub-contractor without approval of the Principal.
- 14.3 The Contractor must apply to the Principal in writing for approval to appoint a sub-contractor and the application must include details of the name of the proposed sub-contractor and the tasks that the Contractor proposes that it performs.
- 14.4 The Principal may request other information about the proposed sub-contractor.
- 14.5 If the Principal grants its approval then the approval may be given on such conditions as the Principal reasonably considers appropriate.
- 14.6 The Contractor remains responsible for obligations performed by its subcontractors to the same extent as if such obligations were performed by the Contractor.
- 14.7 The Contractor must include in every subcontract:

- 14.7.1 details of the Contractor's obligations in connection with this Agreement which are to be carried out by the subcontractor;
- 14.7.2 consent for the subcontract to be novated to the Principal or its nominee, if required by the Principal if the Principal terminates this Agreement;
- 14.7.3 the right for the Principal to contact the subcontractor directly to satisfy itself that payment is occurring in accordance with the conditions of the subcontract;
- 14.7.4 a written provision requiring the Contractor to pay the subcontractor within 15 days after the subcontractor has issued an invoice in accordance with the subcontract; and
- 14.7.5 requirements consistent with the provisions of the following clauses of this Agreement:
 - (a) clause 12 – Environment;
 - (b) clause 13 – Work Health and Safety;
 - (c) clause 14 – Subcontracting;
 - (d) clause 20 – Confidential Information;
 - (e) clause 21 – Price and Payment;
 - (f) clauses 23 – Insurance;
 - (g) clause 27.6 – SA Government Codes of Practices;
 - (h) clause 32.4 – Governing Law; and
 - (i) clause 32.12 – Publicity.

15. **KEY PERFORMANCE INDICATORS**

- 15.1 Key Performance Indicators are selected performance levels chosen to reflect aspects of the Agreement of particular importance to the Principal.
- 15.2 The measuring of Key Performance Indicators will commence on the date of the execution of this Agreement.
- 15.3 The Contractor must achieve the Key Performance Indicators in its performance of obligations under this Agreement, and comply with its further obligations as set out in Schedule 4.

16. **REPORTS**

The Contractor must provide written reports to the Principal, including:

- 16.1 the reports as stipulated in the Specifications and Schedule 5; and
- 16.2 on request by the Principal, reports providing such information as the Principal requests on the performance this Agreement at intervals reasonably required by the Principal.

17. **RECORDS**

The Contractor must, until the expiration of 12 months following the expiry or earlier termination of this Agreement, maintain up-to-date records:

- 17.1 sufficient to establish whether or not it has provided the Services and Materials, including without limitation, copies of the Work Order and each Report;

- 17.2 sufficient to establish whether it has complied with the requirements of all Legislative Requirements in any way affecting or applicable to the Services or Materials;
- 17.3 sufficient to establish whether or not it has otherwise complied with this Agreement;
- 17.4 in a form that will enable the Principal to carry out fast and efficient inspections of the records; and
- 17.5 in accordance with any specific requirements set out in the Specifications.

18. **AUDIT**

- 18.1 The Contractor must, on reasonable notice (unless otherwise stated in the Specifications), permit the Principal and its nominees to have access to the Contractor's premises for the purpose of conducting an audit of the performance by the Contractor of its obligations under this Agreement and for the purposes of this clause, the Contractor must:
 - 18.1.1 permit the Principal and its Personnel access to all records and information including, but not limited to, computer data bases and other computerised information systems reasonably required by the Principal to enable it to evaluate the performance of the Contractor's obligations;
 - 18.1.2 if required by the Principal, allocate people to assist the Principal in auditing and interpreting the information; and
 - 18.1.3 do all other things reasonably necessary to assist the Principal in its enquiries.
- 18.2 Despite any other provision of this Agreement, in the event that the audit reveals that the Contractor has not complied with this Agreement, the Contractor must bear all reasonable costs associated with the audit carried out in accordance with this clause.

19. **CONFLICTS OF INTEREST**

- 19.1 The Contractor warrants to the Principal that neither it, nor any of its Personnel, have a Conflict of Interest under this Agreement.
- 19.2 If the Contractor becomes aware that it or any of its Personnel do have or will have a Conflict of Interest, then the Contractor shall immediately inform the Principal, in writing, with full details of that Conflict of Interest.
- 19.3 The Contractor shall comply with all reasonable directions of the Principal requiring it to resolve or otherwise deal with any Conflict of Interest.
- 19.4 The provision of this clause will operate without prejudice to any other rights which the Principal may have arising out, or in respect of, the existence of any Conflict of Interest or potential Conflict of Interest.

20. **CONFIDENTIAL INFORMATION**

- 20.1 Subject to this clause 20, neither party may disclose any Confidential Information of the other party except as genuinely and necessarily required for the purpose of this Agreement.
- 20.2 Neither party may disclose any Confidential Information of the other party except:
 - 20.2.1 to an employee or agent of that party, on a "need to know" and confidential basis;
 - 20.2.2 as required by law or a court order; or
 - 20.2.3 in accordance with any Parliamentary or constitutional convention;

20.2.4 to the Australian Competition and Consumer Commission (**ACCC**) if the party reasonably suspects, or is notified by the ACCC that it reasonably suspects, that there is Cartel Conduct or unlawful collusion in connection with the supply of Services or Materials under this Agreement; or

20.2.5 for the purposes of prosecuting or defending proceedings.

20.3 The Parties may mutually agree to disclose Confidential Information.

21. PRICE AND PAYMENT

21.1 The Prices apply to the provision of the Services and Materials, except to the extent otherwise provided in this Agreement.

21.2 Subject to clause 22, the Prices include all taxes, duties or government charges imposed or levied in Australia or overseas in connection with this Agreement.

21.3 The Prices include all costs of compliance with the Contractor's obligations under this Agreement, including all labour, preliminaries, attendance, supervision, on and off site overheads, goods, materials, spare parts, plant, equipment and consumables.

21.4 No other costs or expenses are payable by the Principal. The Contractor is not entitled to any additional payment for the correction of Defects or re-supply of any non-complying Service or Materials, including during the Term and the Defects Liability Period.

21.5 If stated in Schedule 1 of the Work Order Item 5, the Prices (and the rates and/or lump sums it includes) will be adjusted for rise or fall in costs, on the terms set out in Schedule 2 (Costs Adjustment Formula).

21.6 The Contractor is entitled to invoice the Principal, on a monthly basis, for payment:

21.6.1 only for Services correctly rendered and Materials correctly provided in accordance with this Agreement and the Letter of Award;

21.6.2 if the Contractor is providing Services and Materials for a Job, subject to clause 7.3.2, when the Contractor is entitled to a payment instalment under the Letter of Award;

21.6.3 if the Contractor is providing Materials only for a Job, on acceptance of the Materials by the Principal in accordance with clause 7.4.

21.7 The Principal does not have to pay a Contractor's invoice unless the invoice is properly rendered. An invoice is properly rendered if it:

21.7.1 is issued in respect of Services and Materials for which the Contractor is entitled to invoice under this Agreement;

21.7.2 reflects the correct price for the Services and Materials under this Agreement;

21.7.3 is supported by any evidence required by this Agreement or a Work Order;

21.7.4 is submitted together with a Statutory Declaration in the form contained on the Department for Infrastructure and Transport's website addressing the accuracy of the invoice;

21.7.5 is a valid Tax Invoice within the meaning of the GST Law; and

21.7.6 complies with any other requirements stipulated by the Principal.

21.8 If the Principal does not dispute the amount of a properly rendered invoice within 14 days of receiving it (**Undisputed Invoice**), the Principal must pay that amount within 15 days of receiving it.

21.9 If the Principal disputes the amount of an invoice:

- 21.9.1 the Principal must notify the Contractor of the dispute, and of any amount that is undisputed within 15 days of receiving the invoice;
- 21.9.2 the Contractor must issue a properly rendered invoice for the undisputed amount (**Re-issued Invoice**);
- 21.9.3 the Principal must pay the undisputed amount (if any) and any applicable GST to the Contractor within 15 days after receiving the Re-issued Invoice and without prejudice to either party's rights with respect to the disputed portion of the invoice; and
- 21.9.4 the Parties must seek to resolve the dispute in accordance with the dispute resolution procedure set out in clause 31.

21.10 **Financial Undertaking**

- 21.10.1 The Contractor must arrange for a bank or financial institution acceptable to the Principal, and with a branch in Adelaide, to give the Principal an undertaking in the form of an unconditional and irrevocable financial undertaking for the amount specified in Schedule 1 of the Work Order (**Financial Undertaking**).
- 21.10.2 All charges incurred in obtaining and maintaining the Financial Undertaking must be borne by the Contractor.
- 21.10.3 The Contractor must advise the Principal (as soon as practicable and in any event within 5 Business Days), if at any time during the Term, the Financial Undertaking required by this clause ceases to have effect for any reason.
- 21.10.4 Subject to its rights to have recourse to the Financial Undertaking, the Principal must release the balance of the Financial Undertaking then held within the later of:
 - (a) 3 months after the expiration of the Agreement; or
 - (b) 14 days after the expiry of the last to expire Defects Liability Period or Warranty Period (whichever is applicable), provided all Defects then known have been remedied and otherwise when all Defects then known are remedied.
- 21.10.5 If the Contractor commits any breach of this Agreement or the Principal is otherwise entitled to terminate this Agreement, then the Principal is entitled to exercise its rights in relation to the Financial Undertaking and require payment under the Financial Undertaking to the extent it considers necessary to rectify the relevant breach and to cover any liability of the Contractor to the Principal in respect of that breach.
- 21.10.6 The Contractor agrees that if at any time a demand for payment is made against the Financial Undertaking by the Principal, the Contractor must, if requested to do so by the Principal, provide additional security for a further sum to ensure that the Financial Undertaking is maintained at the level set out in Schedule 1 of the Work Order and in the form required under this Agreement.
- 21.10.7 The Principal's entitlement to exercise its rights in relation to the Financial Undertaking is not subject to any impediment by reason of the fact that the parties are engaged in a dispute resolution procedure.
- 21.10.8 The provision of a Financial Undertaking for the Principal in accordance with this clause is a condition precedent to this Agreement, and the parties have no rights or obligations under this Agreement unless that condition has been either satisfied, or waived by the Principal, within 1 month of the execution of this Agreement or such later date as determined by the Principal. Immediately on satisfaction of this condition precedent, the Agreement comes into full force and effect and binds the parties.

21.10.9 This condition precedent is for the sole benefit of the Principal.

21.11 Work Order Final Payment Claim

21.11.1 Within 28 days after either the expiration of all Defects Liability Periods for a Job (including any separate Defects Liability Period which arises under clause 6.11.6), or where the Contractor has provided Materials only the applicable Warranty Period, whichever is relevant, the Contractor must give the Principal:

- (a) an invoice which complies with this clause and which must include all amounts which the Contractor claims from the Principal on account of all amounts payable under the Letter of Award; and
- (b) notice of any other amounts which the Contractor claims from the Principal under this Agreement,

in respect of any fact, matter or thing arising out of, or in any way in connection with, the Letter of Award or the Job, Services or Materials procured under the Letter of Award, which occurred before the expiration of the Defects Liability Period (or Warranty Period).

21.11.2 After the date for submitting the invoice and notice under clause 21.11.1 has passed, the Contractor releases the Principal from any Claim in respect of any fact, matter or thing arising out of, or in any way in connection with, the Letter of Award, or the Job, Services or Materials procured under the Letter of Award, which occurred before the expiration of the Defects Liability Period (or Warranty Period) except for any Claim included in an invoice or notice under clause 21.11.1 which is given to the Principal within the time required by, and in accordance with the terms of, clause 21.11.1.

21.12 The payment of moneys (including amounts set out in Undisputed Invoices) by the Principal is to be taken to be payment on account only and any such payment is not to be taken as evidence against or an admission by the Principal:

21.12.1 of the value of any services or materials, or items of services or materials; or

21.12.2 of any services having been performed or materials delivered in accordance with the Agreement.

21.13 Security of Payments Act (South Australia)

21.13.1 In this clause 21.13:

- (a) “**SOP Act**” means the Building and Construction Industry Security of Payment Act 2009 (SA);
- (b) “**Subcontractor**” means any party engaged by or on behalf of:
 - (i) the Contractor; or
 - (ii) a contractor of the Contractor (including at any subcontract level), to carry out work which forms part of the works or related goods and services;
- (c) Any other term which is not expressly defined in this Contract will, unless the context otherwise requires, have the meaning given to it in the SOP Act.

21.13.2 The *Contractor* must:

- (a) notwithstanding any other provision of the Contract, serve a copy of any notice or application under the SOP Act on the Principal by hand delivery at the address for the Principal stated in the Contract, or such other address as may be notified by the Principal to the Contractor from time to time;

- (b) when the Contractor becomes aware of any claim or lien made, including when a Subcontractor is entitled to suspend work pursuant to the SOP Act, within 24 hours after any notice is given or received, give the Principal a copy of any written communication of whatever nature in relation to the SOP Act which the Contractor receives from such Subcontractor, and the Contractor acknowledges that this obligation represents a fundamental term of the Contract, a breach of which is a breach of the Contract by the Contractor; and
 - (c) ensure that any subcontract or any arrangement that the Contractor has with a Subcontractor contains terms equivalent to the terms of this clause 59A, so as to enable the Contractor to comply with its obligations under this clause 59A.
- 21.13.3 A payment claim for the purposes of the SOP Act is a Payment Claim pursuant to clause 58.
- 21.13.4 The date prescribed in clause 58 as the time at which the Contractor may deliver payment claims is, for the purpose of the SOP Act, the reference date.
- 21.13.5 Failure by the Principal to set out in a Payment Schedule an amount which the Principal is entitled to retain, deduct, withhold or set-off (whether under the Contract or otherwise) from the amount which would otherwise be payable to the Contractor by the Principal will not prejudice the Principal's right to subsequently exercise that right to retain, deduct, withhold or set-off any amount.
- 21.13.6 Payment of moneys for which the Principal has become liable to pay the Contractor by reason of the SOP Act shall not be evidence of the value of the works or related goods and services, an admission of liability or evidence that the works or related goods and services has been executed satisfactorily, but shall be payment on account only.
- 21.13.7 If the Contractor suspends the whole or part of the carrying out of the works pursuant to the SOP Act:
 - (a) the suspension shall not affect the Completion Date; and
 - (b) except to the extent that section 28(3) of the SOP Act applies, the Principal shall not be liable for any costs, expenses, damages, losses or other liability including delay or disruption costs whatsoever suffered or incurred by the Contractor as a result of the suspension.
- 21.13.8 If the Principal becomes aware that a Subcontractor is or is likely to become entitled to:
 - (a) suspend work or the supply of related goods and services (forming part of the works or related goods and services) under section 28 of the SOP Act; or
 - (b) exercise a statutory lien under section 11(3) of the SOP Act over any unfixated plant and materials supplied by the Subcontractor for use in connection with the carrying out of work forming part of the works or related goods and services,

the Principal may at its absolute discretion, pay the Subcontractor such money that is or may be owing under the SOP Act to the Subcontractor in respect of the work forming part of the works or the supply of goods or services related to the works. Any such amount paid by the Principal is recoverable from the Contractor as a debt due and payable to the Principal on demand and the Principal may set off that amount from money otherwise payable to the Contractor.

- 21.13.9 The Contractor must indemnify the Principal from and against any claim, demand, action, suit or proceeding and all damages, losses (including financial losses), expenses or costs (including legal costs on a full indemnity basis) suffered or incurred by the Principal arising out of and in connection with:
- (a) a suspension by a Subcontractor of work (which forms part of the works or related goods and services) under the SOP Act;
 - (b) a Subcontractor exercising a statutory lien under the SOP Act over unfixed plant and materials supplied by the Subcontractor for use in connection with the carrying out of work forming part of the works or related goods and services;
 - (c) a failure by the Contractor to comply with any of its obligations under clause 59A.1;
 - (d) a failure by the Contractor to pay any Subcontractor; or
 - (e) the Principal exercising its rights under clause 59A.8.

22. GST

22.1 The Contractor represents that:

22.1.1 it is registered under the *A New Tax System (Australian Business Number) Act 1999* (Cth), and that the ACN shown in Item 2 Schedule 1 of the Work Order is the Contractor's ACN; and

22.1.2 it is registered under the GST Law.

22.2 If the Prices in a Work Order are expressed as being GST exclusive and the supply for which payment is claimed is a Taxable Supply then, in addition to any amount payable by the Principal by reference to the price (the **base consideration**), the Principal must pay to the Contractor, an additional amount of consideration (**GST consideration**) for the Taxable Supply calculated by multiplying the GST Rate by the base consideration. The GST consideration is payable at the same time and subject to the same conditions as the base consideration.

23. INSURANCE

Contractor obligations

- 23.1 The Contractor must effect and maintain all insurance policies set out in Schedule 1 of the Work Order for not less than the amounts specified.
- 23.2 The insurance policies set out in Schedule 1 of the Work Order must be with insurers satisfactory to the Principal.
- 23.3 The policies referred to in Schedule 1 of the Work Order must be in the name of the Contractor and must cover the Contractor and all subcontractors for their respective rights, interests and liabilities.
- 23.4 Before supplying Services under this Agreement, the Contractor must provide the Principal with insurance certificates of currency for the insurances required under this clause. At any time during the Term, the Principal may require the Contractor to provide proof that the policies of insurance have been effective and maintained.
- 23.5 The Principal, in specifying levels of insurance in this Agreement accepts no liability for the completeness of their listing, the adequacy of the sum insured, limit of liability, scope

of coverage, conditions or exclusions of those insurances in respect to how they may or may not respond to any loss, damage or liability.

- 23.6 The Contractor acknowledges and agrees that it is the Contractor's responsibility to assess and consider the risks and scope of insurances required under this Agreement.

24. NOTIFICATION OF CLAIMS

24.1 Notice of Potential Claims

The Contractor must:

- 24.1.1 as soon as possible inform the Principal in writing of any occurrence that may give rise to a claim under an insurance policy required by the Agreement;
- 24.1.2 keep the Principal informed of all significant developments concerning the claim (including any claim for contribution from the Principal by the Contractor or its insurer); and
- 24.1.3 ensure that its subcontractors similarly inform the Contractor and the Principal in respect of occurrences which may give rise to claims by them.

24.2 Notice of Actual Claims

If the Contractor wishes to make a Claim, it must give the Principal the following 2 notices:

- 24.2.1 within 10 Business Days of the first occurrence of the events on which the Claim is based, written notice:
- (a) that it proposes to make the Claim; and
 - (b) of the events upon which the Claim will be based; and
- 24.2.2 within 28 days of giving the notice under clause 24.2.1 written notice setting out:
- (a) detailed particulars of the events on which the Claim is based;
 - (b) the legal basis for the Claim;
 - (c) the facts relied upon in support of the Claim; and
 - (d) details of the quantification of the amount claimed.

24.3 Continuing Events

If the events upon which the Claim is based or the consequences of the events are continuing, the Contractor must continue to give the detailed particulars required under clause 24.2.2 every 28 days after the first date particulars are provided until the events or the consequences have ceased.

24.4 Bar to Claim

The Principal will not be liable upon any Claim (insofar as is permitted by law), unless the Contractor has strictly complied with clauses 24.2 and 24.3.

24.5 Excluded Claims

Clauses 24.2 and 24.3 will not apply to:

- 24.5.1 any invoice by the Contractor for the Prices payable for Services or Materials under clauses 21.5 or 21.10;
- 24.5.2 any invoice for a variation made pursuant to clause 6.13.

25. INDEMNITY

- 25.1 Without limiting any other indemnity under this Agreement, the Contractor indemnifies, and undertakes to keep indemnified, the Principal and the Crown, from and against any costs, losses, damages, expenses (including legal expenses), liabilities or other outgoings of whatever kind suffered or incurred by the Principal or the Crown, including in connection with:
- 25.1.1 loss of, or damage to, any real or personal property of any person; and
 - 25.1.2 personal injury (which includes illness) or death of any person, arising out of or in respect of:
 - 25.1.3 any negligence, wrongful act or omission or breach of duty by the Contractor or any of its Personnel; or
 - 25.1.4 any breach by the Contractor of any of the provisions of this Agreement.
- 25.2 Any indemnity provided in this clause 25 or anywhere else in this Agreement shall be reduced proportionally to the extent that the costs, losses, expenses and damages were caused or contributed to by those indemnified.

26. DEFAULT AND TERMINATION

26.1 Notice of Breach

If the Contractor commits a breach of this Agreement (**Default**) the Principal may give the Contractor a written notice (**Default Notice**) requiring the Contractor to remedy the Default.

26.2 Contents of Notice

The Default Notice must state:

- 26.2.1 that it is a Default Notice;
- 26.2.2 the alleged Default; and
- 26.2.3 that Contractor must:
 - (a) if in the opinion of the Principal the Default is capable of being remedied within 14 days of the date of the notice (or such shorter period as the Principal may require having regard to the urgency of the need to remedy the breach), remedy the Default within that period;
 - (b) if the Default is incapable of being remedied at all immediately mitigate any adverse effect of the Default on the Principal and the Crown to the satisfaction of the Principal.

26.3 Termination

- 26.3.1 The Principal may terminate this Agreement immediately upon giving notice in writing to the Contractor if the Contractor:
- (a) fails to remedy a Default in accordance with clause 26.2.3(a) within the required timeframe;
 - (b) commits a Default which is incapable of being remedied, despite the Contractor's compliance with the requirements set out in clause 26.2.3(b);
 - (c) suffers or, in the reasonable opinion of the Principal, is in jeopardy of becoming subject to any form of Insolvency Event;
 - (d) has a Conflict of Interest;

- (e) has submitted a Declaration in Relation to Unlawful Collusion which is found to be false in any particular; or
 - (f) has failed to comply with the insurance obligations in clause 23.
 - 26.3.2 The Principal may terminate this Agreement for convenience upon 28 days written notice.
 - 26.3.3 Any termination of this Agreement by the Principal is without prejudice to any rights, remedies or actions the Principal may have against the Contractor which may have arisen prior to the date of termination.
 - 26.3.4 If the Principal terminates this Agreement it will pay the Contractor for that part of the Services authorised by the Principal and delivered by the Contractor to the Principal's satisfaction prior to the Contractor receiving the Principal's notice.
- 26.4 Survival**
- The following provisions of this Agreement will survive any expiry or termination of the Agreement:
- 26.4.1 clauses 4, 6.5, 6.7, 6.11, 6.11.7, 6.13.4, 6.14, 7.4.6, 11, 12, 13, 14, 17, 18, 20, 21.11, 21.12, 23, 24, 25, 26.4, 27.3, 31 and 32; and
 - 26.4.2 any provision which relates to or is in connection with:
 - (a) the Contractor's warranties;
 - (b) the Principal's rights to set-off and to recover money;
 - (c) defects liability;
 - (d) confidentiality;
 - (e) any indemnity, or security given under this Agreement;
 - (f) any release of the Principal from any Claim;
 - (g) any Claims or notices that are barred; or
 - (h) any right arising on expiry or termination,or any provision which is otherwise expressly or by implication from its nature is intended to survive expiry or termination.

27. LEGISLATIVE REQUIREMENTS, CODES AND QUALITY ASSURANCE

27.1 Legislative Requirements

The Contractor must:

27.1.1 unless otherwise specified, comply with all applicable Legislative Requirements;

27.1.2 without limiting the preceding subclause:

- (a) apply for and obtain all licences, approvals, authorisations and consents necessary to carry out the Services and provide the Materials;
- (b) give all notices and pay all fees and other amounts which it is required to pay in respect of the carrying out of its Agreement obligations; and
- (c) perform the Services and provide the Materials so that they comply with the Specifications, all relevant Australian Standards, the Building Code of Australia (insofar as it applies) and any other standards which the Principal instructs the Contractor to comply with.

24.2 Quality Management

Without limiting the Contractor's obligations under this Agreement, the Contractor must comply with the quality management requirements set out in the Specifications.

27.2 Rail Safety

27.2.1 The Contractor must:

- (a) notify the Principal, in the form of network access application, at least 14 days before the date it intends to commence carrying out any activity within a rail corridor;
- (b) not perform any activities under this Agreement within a rail corridor without receiving from the Principal an approved network access application;
- (c) not perform any activities under this Agreement within a rail corridor without the supervision of a Principal Supplied Track Protector;
- (d) comply with any directions of the Principal Supplied Track Protector in relation to activities carried out within or around the rail corridor;
- (e) carry out its activities under this Agreement in a manner consistent with the Rail Safety Law;
- (f) undertake at its cost all rail safety awareness training, assessment and certification required to carry out its activities under this Agreement, and promptly provide evidence of this to the Principal on request;
- (g) cooperate with the Principal to enable the Principal to comply with its obligations under the Rail Safety Law;
- (h) not do anything or fail to do anything which could prejudice the Principal's accreditation under the Rail Safety Law;

27.2.2 For the purposes of this clause:

- (a) a **Principal Supplied Track Protector** means a person supplied by the Principal, at the Principal's cost, to supervise the operations of the Contractor within the rail corridor;
- (b) **Rail Safety Law** means all rail safety related laws, codes of practice, other compliance codes, directions on safety or notices issued by any relevant authority and standards where the Contractor's activities under this Agreement are being performed and includes the *Rail Safety National Law (South Australia) Act 2012* and any regulations made thereunder; and
- (c) References to the **Principal** includes the Rail Commissioner.

27.3 Building Code 2016

27.3.1 If required by Item 3 Schedule 1 of the Work Order, the Contractor must comply with the requirements of the Commonwealth Building Code 2016 and Schedule 6 (Compliance with Building Code 2016) applies.

27.4 Australian Government Agreement

27.4.1 This clause 27.4 applies if identified as applicable in the Item 4 Schedule 1 of Work Order.

27.4.2 For the purpose of this clause 27.4, the following definitions shall apply:

- (a) 'Agreement' means the agreement between the Commonwealth of Australia and State of South Australia that will be entered for the provision of funds for the Project;

- (b) 'OHS Accreditation Scheme' means the Australian Government Building and Construction OHS accreditation scheme established by the Fair Work (Building Industry) Act 2012;
- (c) 'Project' means the Job.

27.4.3 The Contractor acknowledges that the State will enter into an Agreement.

27.4.4 The Contractor agrees to cooperate in all respects during the life of the Contract to enable the State to perform its obligations under the Agreement and without limitation, the Contractor will:

- (a) preserve the confidentiality of the Commonwealth Funding Agreement;
- (b) not do anything or permit anything to be done (whether by act or omission) which may cause or contribute towards a breach of the Agreement by the State or otherwise prejudice the Agreement;
- (c) provide any information requested by the Commonwealth pursuant to the Agreement.

27.4.5 In the event that the Commonwealth either:

- (a) terminates the Agreement; or
- (b) otherwise withdraws funding for the Project,

then the Principal has the right to terminate this Agreement with no liability to the Principal, except that the Principal will pay the Contractor for services rendered prior to such termination.

27.5 **Australian Government Building and Construction OHS Accreditation Scheme**

27.5.1 If required in Item 4 Schedule 1 of the Work Order, and subject to the exclusions specified in the Fair Work (Building Industry - Accreditation Scheme) Regulations 2005, the Contractor must maintain accreditation under the Australian Government Building and Construction OHS Accreditation Scheme (the Scheme) established by the Fair Work (Building Industry) Act 2012 (FWBI Act) while building work (as defined in section 5 of the FWBI Act) is carried out.

27.5.2 The Contractor must comply with all conditions of Scheme accreditation and the National Construction Code performance requirements in relation to building materials.

27.6 **SA Government Codes of Practice**

27.6.1 Subject to the express provisions of the Contract, the parties must comply with the relevant provisions of the codes of practice listed in the Work Order.

27.7 **Construction Training Fund Levy**

27.7.1 If the Principal authorises the Contractor to commence the Services, the Contractor must:

- (a) comply with the *Construction Industry Training Fund Act 1993* (SA) and must pay to the Construction Industry Training Board the levy imposed under the Act in respect of this project;
- (b) produce to the Principal documentary evidence of payment of the levy, before commencing the Services.

27.7.2 If the Contractor fails to provide the documentary evidence required under clause 27.7.1(b) before commencing the Services, then notwithstanding any other provision of this Agreement, the Principal may withhold payment of moneys due to the Contractor until the documentary evidence is received by the Principal.

28. SET OFF

Any claim the Principal may have against the Contractor may be set off against monies owed to the Contractor under this Agreement.

29. INDUSTRY PARTICIPATION POLICY

29.1 The Contractor must implement the Contractor's Industry Participation Plan as submitted as part of its Work Order Offer and accepted by the Principal, which is attached to the Work Order.

Industry Participation Reports

29.2 The Contractor must provide an Industry Participation Report (IPP Report) to the IPA in respect of each Industry Participation Reporting Period within two weeks of the end of each period, in the format set out in the IPP (Tailored) Plan Implementation Report template which is attached to the Agreement, including all the information indicated in that template.

29.3 The Industry Participation Reporting Period is:

29.3.1 the period between the date of the Letter of Award and the date six (6) months after the date of the Letter of Award;

29.3.2 each subsequent six (6) month period during the term of the Agreement;

29.3.3 the date of Completion.

Industry Participation Meetings

29.4 The Contractor must attend any meeting scheduled by the Industry Participation Advocate during the term of the Agreement to review how the Contractor's Industry Participation Plan is being implemented and advanced, and for this purpose, the Contractor must provide all information reasonably requested by the IPA. The IPA must give the Contractor not less than ten (10) Business Days' notice of any such meeting.

Failure to Comply

29.5 The Contractor's failure to comply, in whole or in part, with the commitments contained within the Contractor's Industry Participation Plan may be a factor taken into account in the award of future contracts for the Government of South Australia.

General

29.6 In this clause, 'Industry Participation Advocate' or 'IPA' means the person who from time to time has been appointed to the position of Industry Participation Advocate within the Office of the Industry Advocate, situated within the Department of the Premier and Cabinet, or his/her successor.

30. RESPECTFUL BEHAVIOURS

30.1 The Contractor acknowledges the Principal's zero tolerance towards men's violence against women in the workplace and the broader community.

30.2 The Contractor agrees that, in performing its obligations under this Agreement, the Contractor's Personnel will at all times:

30.2.1 act in a manner that is non-threatening, courteous and respectful; and

30.2.2 comply with any instructions, policies, procedures or guidelines issued by the Principal regarding acceptable workplace behaviour.

30.3 If the Principal believes that the Contractor's Personnel are failing to comply with the behavioural standards specified in this clause, then the Principal may in its absolute discretion:

30.3.1 prohibit access by the relevant Contractor's Personnel to the Principal's premises; and

30.3.2 direct the Contractor to withdraw the relevant Contractor's Personnel from performing its obligations under this Agreement.

31. DISPUTE RESOLUTION

31.1 Except in a case of genuine urgency where a party seeks immediate interlocutory relief or other interim remedy, neither party may take legal proceedings in respect of any dispute in relation to this Agreement without attempting resolution in accordance with this clause.

31.2 Disputes must be addressed as follows:

31.2.1 Each party must submit the dispute to one of its senior officers who has not previously been involved in the dispute (**Negotiators**) within 10 Business Days of the dispute arising.

31.2.2 The Negotiators must meet as soon as practicable to resolve the dispute.

31.2.3 If the Negotiators cannot resolve the dispute within 15 Business Days of its reference to them, each Negotiator must prepare a written summary of his or her attempts to resolve the dispute and immediately refer that summary to that party's applicable Executive Negotiator.

31.2.4 The Executive Negotiators must meet as soon as practicable to resolve the dispute, but in any case within 15 Business Days of its reference to them. Each party must authorise and inform its Executive Negotiator sufficiently so that he or she can undertake that meeting without detailed reference to another person.

31.2.5 If the Executive Negotiators cannot resolve the dispute within a further 15 Business Days of its reference to them, either party may commence legal proceedings without further notice.

31.3 Notwithstanding the existence of a dispute each party must continue to perform its obligations under this Agreement.

32. GENERAL

32.1 Proportionate Liability

To the extent permitted by law, the operation of Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA)*, and any equivalent statutory provision, is excluded in relation to all rights, obligations and liabilities in connection with the Agreement whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.

32.2 Notices

32.2.1 A **notice** means a consent, approval or other communication required to be in writing under this Agreement.

32.2.2 A notice must be in writing and signed by or on behalf of the sender, addressed to the recipient and:

(a) delivered to the recipient's address; or

(b) sent by pre-paid mail to the recipient's address;

- (c) transmitted by facsimile to the recipient's address; or
 - (d) transmitted by electronic mail to the recipient's address.
- 32.2.3 A notice given to a person in accordance with this clause is treated as having been given and received:
- (a) on the day of delivery if delivered before 5.00 pm on a Business Day, otherwise on the next Business Day; or
 - (b) if sent by pre-paid mail, on the third Business Day after posting;
 - (c) if transmitted by facsimile and a correct and complete transmission report is received on the day of transmission: on that day if the report states that transmission was completed before 5.00 pm on a Business Day, otherwise on the next Business Day;
 - (d) if transmitted by electronic mail:
 - (i) when the relevant email appears in the sender's sent log with properties disclosing an appropriate routing; and
 - (ii) the sender does not receive a message from the system operator to the effect that the relevant email was undeliverable,provided that if the result is that the notice would be taken to be received before 5.00pm on a Business Day, it is taken to be received on that day, otherwise on the next Business Day.

32.2.4 The contact details of a person are those set out below that person's name in Item 8 Schedule 1 of the Work Order.

32.2.5 A person may from time to time notify its other contact details by written notice to the other party.

32.3 **Compliance with Laws**

The Contractor must comply with the laws in force in the State in which it is performing its obligations under this Agreement. The Contractor undertakes to comply with all South Australian Government policies of which the Principal informs the Contractor which relate to the performance of the Contractor's obligations under this Agreement.

32.4 **Governing Law**

32.4.1 This Agreement is governed by the laws in the State of South Australia.

32.4.2 The courts of the State of South Australia have exclusive jurisdiction in connection with this Agreement.

32.5 **Relationship Between the Parties**

32.5.1 The parties acknowledge and agree that nothing in this Agreement:

- (a) constitutes a partnership or joint venture of any kind between the parties; or
- (b) constitutes any relationship of employer and employee or principal and agent between the Principal and the Contractor or between the Principal and any employees, agents, sub-contractors, members or volunteers of the Contractor.

32.5.2 No party has any authority to bind the other party in any manner whatever except with the express approval by notice in writing of the other party.

32.6 **No Waivers by the Principal**

32.6.1 The Principal waives a right under this Agreement only by written notice to that effect.

32.6.2 Nothing else done or omitted to be done by the Principal in relation to the Principal's rights under the Agreement will have the effect of a waiver.

32.7 Entire Agreement

This Agreement constitutes the entire agreement between the parties in respect of the matters dealt with in this Agreement and supersedes all prior agreements, understandings and negotiations in respect of the matters dealt with in this Agreement.

32.8 No assignment

The Contractor must not assign or encumber any of its rights under this Agreement without the prior written approval of the Principal.

32.9 Modification

No addition to or modification of any provision of this Agreement will be binding upon the parties unless made by written instrument signed by the parties.

32.10 Auditor-General

Nothing in this Agreement derogates from the powers of the Auditor-General under the *Public Finance and Audit Act 1987 (SA)*.

32.11 Disclosure of Government Contracts

The Contractor acknowledges that the Principal may disclose this Agreement either generally to the public, or to a particular person as a result of a specific request. Nothing in this clause derogates from the Contractor's obligations under any other provision of this Agreement or the provisions of the *Freedom of Information Act 1991 (SA)*.

32.12 Publicity

The Contractor must not make any public announcement or media release in respect of any aspect of this Agreement or the Services without the prior written approval by the Principal.

32.13 Severance

32.13.1 Each word, phrase, sentence, paragraph and clause of this Agreement is severable.

32.13.2 Severance of any part of this Agreement will not affect any other part of this Agreement.

32.14 Counterparts

This Agreement may be executed in any number of counterparts each of which is taken to be an original. All of those counterparts taken together constitute one instrument. An executed counterpart may be delivered by email.

32.15 Acting Ethically

The Contractor must conduct itself in a manner that does not invite, directly or indirectly, the Principal's officers, employees or agents or any public sector employee (as defined in the *Public Sector Act 2009 (SA)*) to behave unethically, to prefer private interests over the Principal's interests or to otherwise contravene the Code of Ethics for the South Australian Public Sector.

SCHEDULE 1

GENERAL SPECIFICATION

Schedule 1.1 – Master Specification Parts

Schedule 1.2 - Contract Scope

SCHEDULE 2**RISE AND FALL****COST ADJUSTMENT FORMULA****1 General**

The Principal will pay or deduct an amount for rise and fall on the bituminous binder, polymer modified binder and cutter used in this Agreement. Adjustment of payment for rise and fall will not be paid for any other part of the work or supply of materials under this Agreement.

This amount will be determined by the following formula:

$$\text{Amount} = \text{EV}_{\text{bit}} \times A_{\text{bit}} + \text{EV}_{\text{PMB}} \times A_{\text{PMB}} + \text{EV}_{\text{cut}} \times A_{\text{cut}}$$

where:

EV_{bit} =	Effective Value for C170/C320 Bituminous Binder;
A_{bit} =	Cost Adjustment Factor for C170/C320 Bituminous Binder;
EV_{PMB} =	Effective Value for Polymer Modified Binder;
A_{PMB} =	Cost Adjustment Factor for Polymer Modified Binder;
EV_{cut} =	Effective Value for Bituminous Cutter;
A_{cut} =	Cost Adjustment Factor for Bituminous Cutter;

Where the Cost Adjustment Factor is positive, the amount calculated for rise and fall shall be added to the value of the payment to be made in respect of the progress certificate or the final certificate.

Where the Cost Adjustment Factor is negative, the amount calculated for rise and fall shall be subtracted from the value of the payment to be made in respect of the progress certificate or the final certificate.

2 Calculation of The Effective Value

The Effective Value is the value of C170/C320 bituminous binder, Polymer Modified Bitumen and Cutter (as applicable) incorporated into the work included in the progress certificate or the final certificate, less the Effective Value in respect of previous progress payments, disregarding any increase or decrease under this Clause.

3 Calculation of the Cost Adjustment Factors

The Cost Adjustment Factor will be determined by the following formulae:

$$A_{\text{bit}} = \left(\frac{B_n - B_o}{B_o} \right)$$

$$A_{\text{PMB}} = \left(\frac{\text{PMB}_n - \text{PMB}_o}{\text{PMB}_o} \right)$$

$$A_{\text{cut}} = \left(\frac{C_n - C_o}{C_o} \right)$$

where:

Bn = Current Bitumen Index Number, which shall be the Published List Selling Price for C170/C320 bitumen from the bitumen supplier for the work, applicable at the date that the work subject of the certificate was carried out.

Bo = Base Bitumen Index Number, which shall be the Published List Selling Price for C170/C320 bitumen from the bitumen supplier for the work, applicable at the date of Work Order Offer.

PMBn = Current Polymer Modified Bitumen Index Number, which shall be the Published List Selling Prices for polymer modified bitumen from the bitumen supplier for the work under the Agreement, applicable at the date that the work subject of the certificate was carried out.

PMBo = Base Polymer Modified Bitumen Index Number, which shall be the Published List Selling Prices for polymer modified bitumen from the bitumen supplier for the work under the Agreement, applicable at the date of Work Order Offer.

Cn = Current Cutter Index Number, which shall be the Published List Selling Prices for the cutter from the supplier for the work under the Agreement, applicable at the date that the work subject of the certificate was carried out.

Co = Base Cutter Index Number, which shall be the Published List Selling Prices for the cutter from the supplier for the work under the Agreement, applicable at the date of Work Order Offer.

Where the Contractor sources bituminous products from more than one supplier, the appropriate Index Number from each supplier shall be used to calculate rise and fall for that proportion of the bituminous product supplied by that supplier.

The base index numbers shall be as listed in Schedule 7 of the Work Order "Published List Selling Prices of Bituminous Products".

4 Cost Adjustment on Work Completed After the Date for Practical Completion

Where a payment is made to the Contractor in respect of any work under the Agreement executed subsequent to the Date for Practical Completion then an amount for rise and fall for any such work will be calculated using Bn, PMBn and Cn applicable at the Date for Practical Completion.

Bitumen

The bitumen required to fulfil any Work Order will be supplied to the Principal at the list price provided by Viva Energy to the Contractor (**C170 bitumen price**) without any mark up or margin.

The Contractor must:

- a. specify in the Work Order the published price for bitumen at that time, the indicative amount required, and therefore an indicative amount payable for the bitumen; and
- b. confirm in its invoice the published price of the bitumen at the time of purchase per tonne and in total.

PAYMENT

The Contractor is entitled to issue an invoice to claim payment on a monthly basis and only for Services correctly rendered and Materials correctly provided in accordance with this Agreement and the Work Order.

INVOICING REQUIREMENTS

Invoices must include the details set out in the Progress Claim Template issued by the Principal to the Contractor. Each invoice must be supported by sufficient evidence as requested by the Principal to demonstrate the Contractor's entitlement to payment in accordance with this Agreement and such other information as reasonably requested by and to the satisfaction of the Principal.

SCHEDULE 3

LETTER OF AWARD TEMPLATE

SCHEDULE 4**KEY PERFORMANCE INDICATORS****1. GENERAL**

- 1.1 The Contractor must comply with each of the Key Performance Indicators during the term of this Agreement.
- 1.2 The Key Performance Indicators are as set out in the table in clause 3 of this Schedule.
- 1.3 The frequency of assessment applied to each KPI is as set out in the table in clause 3 of this Schedule.
- 1.4 The KPI measurement processes are considered fundamental to the delivery of a service which meets and/or exceeds the Principal's requirements under this Contract.
- 1.5 The KPI's are categorised into the following tiers as detailed below:
- 1.5.1 Tier 1 – Safety, Quality, and Service Delivery;
- 1.5.2 Tier 2 – Industry Participation and Community Impact; and
- 1.5.3 Tier 3 – Invoicing.
- 1.6 KPIs are to be measured and reported according to the reporting periods as defined in the following table:

KPI Measurement and Reporting Periods per KPI Tier Category

Tier	Reporting Period
Tier 1	Monthly Monthly KPIs are measured for the month commencing from the date of contract execution, and each subsequent month thereafter
Tier 2	Quarterly Quarterly KPIs are measured for the first whole quarter following the date of contract execution, and each quarter thereafter.
Tier 3	Quarterly Quarterly KPIs are measured for the first whole quarter following the date of contract execution, and each quarter thereafter.

2. NON-PERFORMANCE

- 2.1 In the event that the Contractor fails to achieve a KPI based on two consecutive measurement periods, the Principal at its discretion may not issue further works until the failure has been rectified to the Principals satisfaction.

- 2.2 The Contractor may, at any time, submit to the Principal details and evidence that the NCR rectification has been implemented and has been effective.
- 2.3 If the collated data for each individual KPI is not provided within 10 business days after the end of month to which the report applies, it constitutes a KPI failure.

3. KPI TABLE

The KPIs are as follows:

Tier	Area	KPI	Target	Measurement Methodology /Threshold Levels	Frequency
1	Adherence to Construction Program schedule	Achievement of each individual work site completion date set out in each Work Order, or such adjusted dates as agreed between the parties as a result of a delay arising from a cause outside of the Contractor's control.	100% of individual work site completion dates within Work Order achieved on time.	Collate monthly data that identifies any individual work site completion dates that are greater than 2 weeks overdue. If any completion date is more than 2 weeks overdue it constitutes a KPI Failure.	Monthly
1	Safety	Tool Box/ safety talks conducted at the beginning of every shift.	100% Compliance	Contractor must provide a written assurance that safety tool box talks are conducted as specified, with evidence to substantiate the assurance to the Principal's satisfaction. If the target is not achieved it constitutes a KPI Failure.	Monthly
		Site safety maintained in line with the Principal's work, health and safety (WHS) policies and minimum safety expectations	100% Compliance to principle WHS policies and minimum safety expectations.	Timely monthly reporting of level of compliance with the WHS plan, in accordance with the overarching Principal's WHS Policy and minimum safety expectations. If the target is not achieved it constitutes a KPI Failure.	
		Hazards identified and rectifications made. First Aid Injury (FAI)	All hazard controls implemented The total number of FAI injuries is reported to the Principal with a suitable remediation plan to support future prevention	Data presented in a monthly report that supports the number of hazards, first aid injuries and near misses identified though the period with remediation plans to support prevention in the future. If the report does not contain the required information (as per the Target) or a suitable	

Tier	Area	KPI	Target	Measurement Methodology /Threshold Levels	Frequency
		Near misses	Number of near misses reported to the Principal	remediation plan, it constitutes a KPI Failure.	
		Notifiable Health and Safety Incident (NHSI)	<p>Zero NHSIs</p> <p>For any incidents provide a safety incident report (in at least a preliminary form if investigations are ongoing at the time the report is required) including rates of injury and hours lost.</p> <p>Notification of any NHSI must be immediate to The Department.</p>	Monthly report containing the details of any incidents, the incident reports provided and the notification issued to The Department. If the monthly report does not contain the required information (as per the Target) it constitutes a KPI Failure.	
		Positive safety moment	>1 positive safety moment	Monthly report containing the required amount of positive safety moments (as per Target). If the monthly report is submitted greater than 10 Business Days after the end of the month to which the report applies, or does not contain the required number of safety initiatives, it constitutes a KPI Failure.	
1	Conformance to Specification	Works are delivered in accordance with the required specification, unless otherwise agreed in writing between the parties.	All non-conformances reported within 3 days of becoming aware.	Non-conformance reports submitted to the Principal within 3 business days	Monthly

Tier	Area	KPI	Target	Measurement Methodology /Threshold Levels	Frequency
2	Labour utilisation (IPP) / Reporting	Measured performance of TIPP rating provided upon initial issue of work order, then against final reported values at the completion of the work order.	Accuracy of Work Order Offer score upon completion of the work order.	Performance less than commitments in the TIPP will be audited by the OIA.	Quarterly (for quarters during which the six monthly IPP Report is due as per clause 29)
3	Invoice accuracy	Invoices are accurate and do not require correction or cancellation. Invoices are to be submitted with all supporting documentation, including correct statutory declarations, lot packages and non-conformance reports.	No repeat errors on invoices Quantities in lot data match SOR. No Variations claimed which haven't been approved. rise and fall correct.	No repeat error on the invoices requiring reconciliation by the Principal. No invoices which do not have all substantiation.	Quarterly

4. KPI REPORTING

- 4.1 The Contractor must submit KPI reports to the Principal in accordance with Schedule 4 in the format as agreed between the parties.
- 4.2 The Contractor must provide the Principal an initial draft template of a KPI report within 10 Business Days of the execution of this Agreement, seeking the endorsement of the Principal as to the format and structure of the KPI report. For the purposes of clause 4.1 of this Schedule, the agreed form of KPI report shall be the form submitted and accepted by Principal, or in the absence of agreement such other form as reasonably determined by the Principal.
- 4.3 The "Contractual KPI reporting" required under Schedule 4 must include the following information:
 - 4.3.1 Details of the Contractor's performance against each KPI, and whether such performance constitutes achievement or failure of the KPI;
 - 4.3.2 Areas of service issues or failures that have contributed to the Contractor's level of performance and immediate actions taken to minimise the impact to customers in the event of a service failure;
 - 4.3.3 Areas where issues have been resolved;
 - 4.3.4 Planned actions to prevent further occurrences of similar problems—both from the Contractor and the organisation;
 - 4.3.5 Additional actions discussed;
 - 4.3.6 Value-added services provided;

- 4.3.7 Continuous improvement activities undertaken by the Contractor;
 - 4.3.8 Other information about significant events affecting the Contractor; and
 - 4.3.9 Such other information as required by the table set out in clause 3 of this Schedule.
- 4.4 If the Contractor is not obliged to provide, and has not provided, any Services or Materials during the relevant reporting period, then the Contractor's report in respect to items 4.3.1 and 4.3.2 of this Schedule may simply state "no activity".

5. KPI SCORING

- 5.1 Within the time specified in Schedule 4, the Contractor will provide the Principal with the required KPI reports described in clause 4 of this Schedule.
- 5.2 The Principal will review the KPI reports submitted by the Contractor and undertake an assessment to determine the overall status in accordance with this clause (**Overall Status**)
- 5.3 The Principal will assess the Overall Status by way of scoring each KPI based on the information presented within the KPI reports and such other information available to the Principal, and determine an Overall Status score of either Green, Amber or Red.
- 5.4 The Contractor's Overall Status for each month is determined as follows:
- 5.4.1 the Contractor's Overall Status will be Red if either or both of the following apply:
 - (a) if the Contractor has previously failed a tier 1 KPI, and the remedial obligations for that KPI have not been closed prior to the next KPI report being provided; or
 - (b) in the most recent monthly KPI measurements, the Contractor failed a tier 1 KPI;
 - 5.4.2 the Contractor's Overall Status will be Amber if:
 - (a) in the most recent KPI measurements, the Contractor has not failed a tier 1 KPI; and
 - (b) any one or more of the following apply:
 - (i) if the Contractor has previously failed a tier 1 KPI, then in respect to that KPI:
 - (1) the remedial obligations have been closed prior to the next KPI report being provided; and
 - (2) since failing that tier 1 KPI, the Contractor has not had a complete quarter without failing one or more KPIs; or
 - (ii) if the Contractor has previously failed a tier 2 KPI or consecutive tier 3 KPIs, then in respect to that KPI, either:
 - (1) the remedial obligations for that KPI have not been closed within the next KPI reporting period; or
 - (2) both of the following apply:
 - (A) the remedial obligations have been closed within the next KPI reporting period; and
 - (B) since the failure, the Contractor has not had a complete quarter without failing one or more KPIs;

- (iii) in the most recent KPI measurements, the Contractor failed a tier 2 or 3 KPI;
- 5.4.3 the Contractor's Overall Status will be Green if the criteria for Red and Amber are not satisfied.
- 5.5 The Contractor's Overall Status may be considered by the Principal in its choice of contractor when issuing Work Requests.
- 5.6 No Work Requests may not be submitted to Contractor's with a Red Overall Status or Contractors with outstanding remediation obligations that have not been closed in within the next KPI reporting period.
- 5.7 Individual KPI scores are determined as follows:
 - 5.7.1 if the KPI is tier 1, and the Contractor fails to achieve it, the KPI score for that individual KPI is Red;
 - 5.7.2 if the KPI is tier 2 or 3, and the Contractor fails to achieve it, the KPI score for that individual KPI is Amber;
 - 5.7.3 if the Contractor achieves any individual KPI, the KPI score for that individual KPI is Green.

SCHEDULE 5**CONTRACT MANAGEMENT FRAMEWORK**

This Schedule sets out a contract management framework for this Agreement.

The Contractor must:

- Attend the meetings set out in this Schedule; and
- Provide reports to facilitate the discussions during the relevant meetings, including works schedules, project pipelines, key performance indicator (KPI) performance, invoicing and issue escalation.

Table 1 - Contract Meetings Summary (Operational and Management Meetings)

Activity	Contract Kick-off	Project Meetings	Operational meetings	Management Team Meetings
Required Frequency (select)	Post Contract execution	N/A (may be performed as required)	Monthly	3 monthly
Location	As agreed between the parties	The Department relevant location	The Department relevant location	Rotate between The Department office and Contractor's office

Table 2 - Contract Management Reports

Title	Required Frequency (select)	Review at Operational Meeting	Review at Management Meeting	Due date for report
Operational Meeting Agenda/Presentation	Monthly	detail	N/A	5 days prior to meeting
Operational Meeting Minutes	Per meeting	detail (at proceeding meeting)	N/A	5 days post the meeting
Management Meeting Agenda/Presentation	Quarterly	N/A	detail	5 days prior to meeting
Management Meeting Minutes	Per meeting	N/A	detail (at proceeding meeting)	5 days post the meeting
Contractual KPI reporting	Monthly	detail	summary	By the 5 th Business Day of month for prior month

Table 3 - Operational Meeting Structure

Attendees	The Department	For the Contractor
Roles	Contract Representative	Account Manager / Contract Representative
	Technical Representative / Project Manager	Technical Representative / Project Manager
	Contract Sponsor (if required)	Senior Manager (if required)
	EHS Representative (if required)	EHS Representative (if required)

The objective of the Operational Meeting is to undertake an operational review of the Contractor's performance in order to ensure the work is being completed in compliance with the Agreement and that operational issues are being addressed and resolved as and when they arise. Primary areas of focus include the technical and operational performance of the Contractor.

The meeting will be used to review the following key areas:

- Work, Health and Safety (WHS);
- Contract Management and Operational Delivery (including KPIs);
- People and Communications; and
- Any Other Business as detailed in the agenda.

Table 4 - Management Meeting Structure

Attendees	The Department	For the Contractor
Roles	Contract Representative	Account Manager / Contract Representative
	Contract Sponsor	Senior Manager
	Technical Representative / Project Manager (if required)	Technical Representative / Project Manager (if required)
	EHS Representative (if required)	EHS Representative (if required)

The objective of the Management Meeting is to undertake a management review of the Contractor's performance to ensure there is an appropriate focus on compliance with WHS performance, KPIs, management reports, contractual issues, and to address issues escalated from the Operational Meeting. It will also be a forum for a discussion on future strategies and the Contractor's continuous improvement initiatives.

The meeting will be used to review the following key areas:

- Work, Health and Safety (WHS);
- Contractor Performance (including KPIs, summary review only);
- People and Communications;
- Innovation and Business Improvement; and
- Any Other Business as detailed in the agenda.

SCHEDULE 6

NOT USED