



WALGA

## Member Contract Conditions (Services)

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**Version 2 (July 2023)**

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## 1 Definitions

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The meanings of the terms used in the Contract are set out below.

| <b>Term</b>                     | <b>Meaning</b>   |
|---------------------------------|--|
| <b>Approval</b>                 | each approval, certificate, licence, authority, waiver, exemption, registration, consent, permit or authorisation required to perform the Services in accordance with all applicable Laws.   |
| <b>Approved Subcontractor</b>   | a subcontractor listed as an "Approved Subcontractor" in the Procurement Form (if any).  |
| <b>Business Day</b>             | a day that is not a Saturday, Sunday, a public holiday in the place where the Principal has its head office, or 27, 28, 29, 30 or 31 December.   |
| <b>Claim</b>                    | a claim, demand, action or proceeding of any nature, whether actual or threatened, arising out of, or in connection with, the Contract or otherwise arising in any way whatsoever.   |
| <b>Confidential Information</b> | <p>the terms of the Contract and in respect of a party, all information in connection with the party's business, operations, finances or customers regardless of its form which is disclosed to, or acquired by, the other party directly or indirectly (whether before or after the date of the Contract) and which:</p> <ol style="list-style-type: none"> <li>1 is, by its nature, confidential; or</li> <li>2 is treated or designated as confidential by the party or the receiving party knows, or ought to know, is confidential,</li> </ol> <p>but does not include information which:</p> <ol style="list-style-type: none"> <li>3 is or becomes public knowledge other than by a breach of the Contract; or</li> <li>4 has been independently developed by the receiving party or is in the possession of the receiving party without restrictions on disclosure.</li> </ol> |
| <b>Contract</b>                 | <p>the agreement formed between the parties regarding the performance of the Services by:</p> <ol style="list-style-type: none"> <li>1 with respect to the Services, either: <ul style="list-style-type: none"> <li>– the relevant Procurement Form; or</li> <li>– the details in VendorPanel; and</li> </ul> </li> <li>2 the Services Contract Conditions,</li> </ol> <p>with the documents forming part of the Contract prevailing in the order of precedence set out in this definition.</p>  |

| <b>Term</b>                     | <b>Meaning</b>   |
|---------------------------------|--|
| <b>Contractor</b>               | the party defined as the “Contractor” in the Procurement Form.   |
| <b>Contractor IP</b>            | any Intellectual Property of the Contractor (or Intellectual Property licensed to the Contractor by a third party) which: <ol style="list-style-type: none"> <li>1 is in existence before the date of the Contract or comes into existence after the date of the Contract other than in connection with the Contract or the provision of the Services; and</li> <li>2 the Contractor makes available, contributes, brings to or uses in connection with the Contract.</li> </ol> |
| <b>Contractor’s Obligations</b> | all of the Contractor’s obligations under the Contract.  |
| <b>Contractor’s Personnel</b>   | the Contractor’s officers, employees, agents and subcontractors and their respective employees and agents.   |
| <b>Date for Completion</b>      | the date specified as the “Date for Completion” in the Procurement Form.   |
| <b>Date of Completion</b>       | the date on which the Services Requirements have been met.   |
| <b>Defect</b>                   | any defect, error, damage, deficiency, fault or inadequacy in the design, performance, workmanship, quality or makeup of the Services.   |
| <b>Dispute</b>                  | a difference, dispute or issue arising at any time between the parties arising out of, or in connection with, the Contract.  |
| <b>Dispute Notice</b>           | a notice in respect of a Dispute given under clause 21(b).   |
| <b>End Date</b>                 | the date specified as the “End Date” in the Procurement Form.  |
| <b>Excluded Loss</b>            | loss of production, loss of revenue, loss of profit or anticipated profit, loss of business reputation, business interruptions of any nature and loss of opportunities.  |
| <b>Fee</b>                      | the fee or rates set out in the Procurement Form.  |
| <b>Government Agency</b>        | any government or governmental, local governmental, semi-governmental, judicial, quasi-judicial or administrative entity, agency, department,  |

| <b>Term</b>                  | <b>Meaning</b>  |
|------------------------------|---|
|                              | commission, authority or Minister in Western Australia or the Commonwealth of Australia.  |
| <b>GST</b>                   | has the meaning given in section 195-1 of the GST Act.  |
| <b>GST Act</b>               | <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other act, ordinance, regulation, public binding ruling or subordinate legislation relating to the imposition of GST.   |
| <b>Incident</b>              | any occurrence or event that has resulted in, or has the potential to result in, adverse consequences to people, property, the environment, reputation or production or a combination of these, including: <ol style="list-style-type: none"> <li>1 deviations from the Principal's health, safety and environmental Policies and Guidelines; and</li> <li>2 non-compliances with relevant health, safety and environmental Laws and Approvals and any public complaint regarding the Contractor and relating to its performance of the Services.</li> </ol>  |
| <b>Insolvency Event</b>      | in respect of the Contractor: <ol style="list-style-type: none"> <li>1 the appointment of an administrator, a liquidator, a provisional liquidator or a controller (including any receiver or receiver and manager);</li> <li>2 any compromise, arrangement, merger, amalgamation, reconstruction, winding up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors (including a deed of company arrangement), insolvency, bankruptcy; or</li> <li>3 any similar procedure or situation which involves a moratorium or the suspension of the payment of any debts or, where applicable, changes in the constitution of any partnership or person, or death.</li> </ol> |
| <b>Insurances</b>            | the insurances which the Contractor is required to obtain under the Panel Agreement.  |
| <b>Intellectual Property</b> | all intellectual and industrial property rights, including trademarks, copyright (including future copyright), Moral Rights, inventions, patents, designs, circuits and other eligible layouts, database rights, and other intellectual property rights as defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation dated 14 July 1967 (as amended from time to time), including any application or right to apply for registration of any of these rights.   |

| <b>Term</b>                     | <b>Meaning</b>  |
|---------------------------------|---|
| <b>Laws</b>                     | any act, ordinance, regulation, subordinate legislation, by-law, award of the State, Territory or Commonwealth (as applicable) in which the Contractor's Obligations are being carried out.   |
| <b>Loss</b>                     | any liability, cost, expense, loss, personal injury (including illness), death or damage, amounts payable on a Claim (whether or not the Claim is successful), suit, charge, diminution in value, action, statutory or equitable compensation, demand, legal costs and disbursements. |
| <b>Maximum Liability Amount</b> | by reference to each party:<br><ol style="list-style-type: none"> <li>1 the amount in the Procurement Form; or</li> <li>2 where no amount is provided in the Procurement Form, an amount equal to the Fee.</li> </ol>   |
| <b>Moral Rights</b>             | has the meaning given in the <i>Copyright Act 1968</i> (Cth).   |
| <b>Non-Acceptance Notice</b>    | is defined in clause 6(d).  |
| <b>Panel Agreement</b>          | the agreement between WALGA and the Contractor, regarding the panel pursuant to which the Contractor is providing the Services to the Principal.  |
| <b>Party Details</b>            | the details of each party set out in the Procurement Form.  |
| <b>Policies and Guidelines</b>  | all of the policies and guidelines of the Principal made available to the Contractor, as amended from time to time.   |
| <b>Principal</b>                | the party defined as the "Principal" in the Procurement Form, being an entity within the definition of "Member" (as that term is defined in the Panel Agreement).   |
| <b>Principal Data</b>           | information and materials of the Principal in respect of which the Contractor has custody or control for the purpose of providing the Services or which are accessed, transmitted or stored using the Contractor's information systems or equipment under the Contract.               |
| <b>Principal IP</b>             | any Intellectual Property of the Principal (or licensed to the Principal by a third party) which the Principal makes available, contributes, brings to or uses in connection with the Contract.   |

| Term                                | Meaning   |
|-------------------------------------|---|
| <b>Professional Contractor</b>      | a contractor with skill and experience in, and the expertise and resources necessary to complete, the performance of services the same as, or similar to, the Services.   |
| <b>Project IP</b>                   | is defined in clause 12(b).   |
| <b>Procurement Form</b>             | as appropriate: <ol style="list-style-type: none"> <li>1 the form of that title, order or requisition issued by the Principal to the Contractor from time to time, which provides for the specifics, execution and creation of the Contract for the provision of the Services; or</li> <li>2 where a Contract is to be created in VendorPanel, the specifics contained on that system, by reference to the Services, necessary for a Contract to be created.</li> </ol>                             |
| <b>Security of Payment Act</b>      | the <i>Building and Construction Industry (Security of Payment) Act 2021</i> (WA).  |
| <b>Services</b>                     | any services set out in the Procurement Form, including the delivery of any goods and performance of services ancillary to the Services.  |
| <b>Services Contract Conditions</b> | this document called 'Member Contract Conditions for Services'.   |
| <b>Services Requirements</b>        | that: <ol style="list-style-type: none"> <li>1 the Services meet the requirements of the Contract (including those set out in the Specifications); and</li> <li>2 those tests which are required by the Contract to be carried out and passed in respect of the Services have been carried out and passed (or, where no such tests are set out in the Contract, any tests which are commonly required for services of the same nature as the Services have been carried out and passed).</li> </ol> |
| <b>Site</b>                         | any premises which the Principal owns or which is in the care, control and management of the Principal including any land on which the Principal's property is situated on and which the Contractor or the Contractor's Personnel needs to access in connection with the Contract.  |
| <b>Site Requirements</b>            | any requirements, including safety requirements, that the Contractor must comply with when on the Site, as may be notified by the Principal to the Contractor from time to time.  |



| <b>Term</b>                      | <b>Meaning</b>  |
|----------------------------------|---|
| <b>Specifications</b>            | the specifications and requirements describing the Services to be supplied under the Contract, as set out in the Procurement Form.  |
| <b>Start Date</b>                | the date specified as the “Start Date” in the Procurement Form.   |
| <b>Sustainability Objectives</b> | has the meaning given in clause 9.  |
| <b>Tax</b>                       | any income, land, indirect and other taxes, levies, imposts, deductions, charges, duties, compulsory loans and withholdings, including financial institutions duty, debits tax or other taxes whether incurred by, payable by return or passed on to another person and includes any interest, penalties, charges, fees, fines or other amounts imposed in respect of any of the above, but does not include GST. |
| <b>Tax Invoice</b>               | any document or record treated by the Commissioner of Taxation as a tax invoice or as a document entitling a recipient to an input tax credit.  |
| <b>Term</b>                      | the period of time from the Start Date to the End Date.   |
| <b>Variation</b>                 | an increase, decrease, addition, omission, substitution or other change to any part of the Services to be performed under the Contract.   |
| <b>Variation Notice</b>          | a notice issued by the Principal under clause 17(b) directing the Contractor to carry out a Variation requested under clause 17(a).   |
| <b>Variation Quotation</b>       | a quotation from the Contractor which sets out the Contractor’s additional costs or savings and the effect on the Services Date for Completion for performing a Variation requested under clause 17(a).   |
| <b>VendorPanel</b>               | WALGA’s online quotation, compliance and contract management system, as updated from time to time, which includes the system formerly branded as “eQuotes”.   |
| <b>WALGA</b>                     | the Western Australian Local Government Association (ABN 28 126 945 127) of 170 Railway Parade, West Leederville, in the State of Western Australia.  |

| Term                                       | Meaning  |
|--|--|
| <b>Work Health and Safety Requirements</b> | <p>the requirements set out in the Contract relating to work health and safety, and any of the following related to work health and safety or dangerous goods:</p> <ol style="list-style-type: none"> <li>1 Laws;</li> <li>2 the National Standard for Construction Work, codes of practice, Australian Standards and compliance codes;</li> <li>3 directions, notices and the like issued by any Government Agency or in accordance with any Laws;</li> <li>4 any such matters of which the Contractor has been informed by the Principal, orally or in writing; and</li> <li>5 any relevant Policies and Guidelines,</li> </ol> <p>and, for clarity, includes the <i>Work Health and Safety Act 2020 (WA)</i> and the <i>Work Health and Safety (General) Regulations 2022 (WA)</i>.</p> |

## 2 Interpretation

In the Contract, unless the context suggests otherwise:

- (a) headings and bold type are for convenience only and do not affect the interpretation of the Contract;
- (b) the singular includes the plural and the plural includes the singular;
- (c) other parts of speech and grammatical forms of a word or phrase defined in the Contract have a corresponding meaning;
- (d) an expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual;
- (e) a reference to a clause, party, schedule or attachment is a reference to a clause of, and a party, schedule or attachment to, the Contract;
- (f) a reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them;
- (g) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (h) a reference to a party to a document includes that party's successors and permitted assignees;
- (i) a promise on the part of 2 or more persons binds them jointly and severally;
- (j) no provision of the Contract will be construed adversely to a party because that party was responsible for the preparation of the Contract or that provision;
- (k) specifying anything after the words 'include' or 'for example' or similar expressions does not limit what else is included;

- (l) a reference to 'consent', 'approved' or 'approval' will be deemed to mean 'consent to in writing', 'approved in writing' or 'approval in writing';
- (m) a reference to a 'day', 'month', 'quarter' or 'year' is a reference to a calendar day, a calendar month, a calendar quarter or a calendar year;
- (n) Part 1F of the *Civil Liability Act 2002* (WA) does not apply to the Contract; and
- (o) to the extent of any inconsistency between the provisions of the documents forming the Contract, the Contractor must give the Principal notice of that inconsistency, and the Principal will direct the Contractor as to the interpretation and construction to be followed.

### 3 Term

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- (a) The Contract commences on the Start Date and ends on the End Date, unless terminated under clause 19.
- (b) Subject to clause 19(a), the Contract continues in full force and effect notwithstanding the termination or expiry of the Panel Agreement.

### 4 Performance of Services

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- (a) The Contractor must perform the Services in accordance with clause 6 and otherwise in accordance with the Contract.
- (b) The Contractor must ensure that it and the Contractor's Personnel, in performing the Contractor's Obligations under the Contract:
  - (1) have all of the necessary skills and training and hold all of the required qualifications and licences to perform the Services in accordance with all applicable Laws and industry standards;
  - (2) obtain any Approvals required for the performance of the Services, including any approvals set out in the Specifications;
  - (3) comply with all applicable Laws, Work Health and Safety Requirements, the Policies and Guidelines and any reasonable directions given by the Principal;
  - (4) do not interfere with the Principal's activities or the activities of any other person at the Site;
  - (5) carry out the Contractor's Obligations in a safe manner in a way which does not prejudice safe working practices, safety and care of property or continuity of work;
  - (6) provide all such information and assistance as the Principal reasonably requires; and
  - (7) at their own expense, supply all plant, equipment and resources required for the performance of the Services, except for any items of plant and equipment to be provided by the Principal as set out in the Specifications.

## 5 Quality of Services

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The Contractor must ensure that:

- (a) the Services match the description of the Services set out in the Procurement Form and comply with the requirements in the Contract;
- (b) the Services are performed with the professional skill, care and diligence expected of a skilled and experienced Professional Contractor;
- (c) any goods, materials, supplies, equipment or other items the Contractor uses or supplies as part of the Services are new and of merchantable quality and are free from Defects in design, materials and workmanship; and
- (d) the Services are fit for the purpose stated in the Contract (including the Specifications), or the purpose which could reasonably be inferred by a Professional Contractor performing the Services.

## 6 Performance and Acceptance of Services

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- (a) The Contractor must perform and complete the Services in accordance with any timing requirements in the Specifications and otherwise complete the Services by the Services Date for Completion.
- (b) The Contractor must allow the Principal or a representative of the Principal, at all reasonable times, to inspect, examine, review and witness tests of the Services, or the performance of the Services and to carry out site inspections at the Contractor's premises.
- (c) The Contractor must, where it is required to perform (or re-perform) any Services under the Contract, give notice to the Principal when, in its opinion, the Services are complete and meet the Services Requirements.
- (d) If the Principal determines that the Services do not meet the Services Requirements, the Principal may issue a notice to the Contractor within 20 Business Days of receiving a notice from the Contractor under clause 6(c) stating the reasons why the Services do not meet the Services Requirements (**Non-Acceptance Notice**).
- (e) If the Contractor receives a Non-Acceptance Notice, the Contractor must, at its cost, re-perform the Services, or that part of the Services that do not meet the Services Requirements, until the Services Requirements are met. The Principal has no liability to pay for Services that are subject to a Non-Acceptance Notice.
- (f) Acceptance of the Services by the Principal does not constitute approval of the Services or prejudice any Claim the Principal may have in connection with the Services.

## 7 Assignment and Subcontracting

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### 7.1 Assignment

- (a) The Principal may, without the Contractor's consent, assign or novate the Contract or assign any other right, benefit or interest under the Contract to any

person or entity who is solvent and able to make the payments required by the Contract, and able to comply with the Principal's other obligations.

- (b) The Contractor must not assign or novate the Contract or assign any other right, benefit or interest under the Contract to any person or entity without the prior consent of the Principal.

## 7.2 Subcontracting

- (a) Unless otherwise provided for in the Panel Agreement, the Contractor must not, without the prior written approval of the Principal, subcontract any part or all of the performance of the Services.
- (b) Approved Subcontractors are taken to have the approval of the Principal for the purposes of clause 7.2(a).
- (c) The Principal may request further information regarding a subcontractor and the particulars of the Services to be subcontracted in order to approve (or otherwise) a subcontractor under clause 7.2(a).
- (d) Approval to subcontract does not relieve the Contractor from any liability or obligation under the Contract, and the Contractor is absolutely liable:
  - (1) to the Principal for the acts and omissions of any subcontractor, its personnel and the Contractor's Personnel as if they were acts or omissions of the Contractor;
  - (2) for undertaking the appropriate due diligence to ensure that the subcontractor is able to perform the Services that it has been subcontracted in accordance with this clause 7.2; and
  - (3) for the direct payment of all subcontractors,notwithstanding the Principal's approval (or otherwise) of any subcontractor (including Approved Subcontractors).

## 8 Working on the Site

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- (a) This clause 8 applies to the extent the Contractor or any of the Contractor's Personnel are required to be on, or near the vicinity of, the Site for the purposes of the Contract.
- (b) Without limiting any other obligation under the Contract, the Contractor agrees to comply, and to ensure that the Contractor's Personnel comply, with:
  - (1) all Site Requirements;
  - (2) the Principal's health, safety and environmental Policies and Guidelines applicable from time to time;
  - (3) all relevant Work Health and Safety Requirements, environmental Laws and Approvals;
  - (4) all reasonable instructions from a representative of the Principal; and
  - (5) the health, safety and environmental conditions in this clause 8.
- (c) The Contractor must work co-operatively with other contractors working at the Site, and must use best endeavours to avoid any conflict between the Contractor's activities and the activities of other contractors.

- (d) Where required, each of the Contractor's Personnel must attend all appropriate and relevant induction courses required by the Principal to enter the Site.
- (e) The Contractor must ensure that the Contractor's Personnel entering the Site:
  - (1) maintain the Site in a safe, secure, clean and orderly manner having regard to the condition of the Site immediately before such entry; and
  - (2) do not interfere with the activities of the Principal or any other person while on the Site.
- (f) The Contractor must notify the Principal as soon as possible of any Incident.
- (g) If the Contractor or any of the Contractor's Personnel fail to comply with any obligation under this clause 8, then the Principal may in its discretion deny that person access to the Site or require that person to leave the Site immediately.
- (h) The Principal is not liable to the Contractor for any Loss or Claim arising from the removal of any person under clause 8(g).
- (i) Nothing in this clause 8 affects any obligation or duty imposed on the Contractor or the Contractor's Personnel to secure and have proper regard to the health and safety of any of the Contractor's Personnel.

## 9 Sustainable procurement

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- (a) The Contractor acknowledges that the Principal supports ethical and environmentally, socially and economically sustainable procurement practices (**Sustainability Objectives**).
- (b) The Contractor agrees to:
  - (1) use reasonable endeavours to conduct its business and supply the Services in a manner which seeks to support and is consistent with the Sustainability Objectives;
  - (2) provide the Principal with any reasonably requested information relating to the measures adopted by the Contractor in pursuit of the Sustainability Objectives; and
  - (3) undertake reasonable due diligence and monitoring of its supply chain on an ongoing basis to ensure that the Services are supplied from sustainable sources and free from modern slavery.
- (c) The Contractor acknowledges that a rating system may be implemented by WALGA or the Principal to assess the Contractor's performance in relation to the Sustainability Objectives, and in considering whether to engage the Contractor or another supplier.
- (d) The Principal may request from time to time, and the Contractor must provide within the timeframe stipulated in such request:
  - (1) evidence of the Contractor's compliance with the Sustainability Objectives and this clause 9; and
  - (2) any other information reasonably requested by the Principal in connection to this clause 9.
- (e) The Contractor must allow the Principal (or its nominee) prompt access to the Contractor's records in connection with this clause 9, and to otherwise audit the Contractor's compliance with this clause 9 and the Sustainability Objectives.

## 10 Records and Reporting

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- (a) The Contractor must keep and maintain accurate and reasonably detailed books and records in connection with the performance of the Contractor's Obligations.
- (b) Within a reasonable time of the Principal's request, the Contractor will permit the Principal to audit and examine any books and records necessary for the verification of compliance with the Contractor's Obligations.
- (c) From time to time, the Principal may request that the Contractor provide a report setting out in detail such information about:
  - (1) the Services; or
  - (2) any other obligations of the Contractor under the Contract,and the Contractor must provide the report to the Principal within 10 Business Days of that request, unless another reasonable timeframe is stipulated in the Principal's request.

## 11 Confidentiality, Publicity and Data Security

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### 11.1 Confidential Information

- (a) Each party must:
  - (1) keep confidential, and not use or disclose, any of the other party's Confidential Information, except:
    - (A) to the extent necessary for the performance of its obligations under the Contract;
    - (B) that a party may disclose to its legal advisers or auditors who are under a duty of confidence;
    - (C) that a party may disclose if required by Law (including any order of a court of competent jurisdiction), the rules of any stock exchange or statutory duty; and
    - (D) that the Principal may (where applicable) disclose to the Minister responsible for administering the *Local Government Act 1995* (WA) or that Minister's department; and
  - (2) immediately provide notice to the other party if it becomes aware of any loss or unauthorised use, access, copying or disclosure of any of the other party's Confidential Information.
- (b) The Contractor must return to the Principal, or destroy or delete as the Principal directs, all original documents and copies (including in electronic form) in the Contractor's possession, custody or control which comprise, contain, reproduce, are based on, utilise or relate to the Confidential Information of the Principal, at the earliest of the following:
  - (1) immediately on demand by the Principal; or
  - (2) on the termination or expiry of the Contract.
- (c) The Contractor acknowledges that the Principal may be subject to the *Freedom of Information Act 1992* (WA) and that the Contract or documents relating to the

Contract may become the subject of an application under that Act and access to them may need to be given to a third party in accordance with that Act. The Principal has no liability to the Contractor whatsoever for giving access to a document in accordance with the *Freedom of Information Act 1992* (WA).

## 11.2 Publicity and reputation

The Contractor must not:

- (a) make any public announcement or issue any media release relating to the Contract or the performance of the Services or exploit the fact that it has entered into the Contract, without the prior written approval of the Principal, which may be withheld at the Principal's discretion or given subject to any conditions; and
- (b) commit any act or omission that damages or adversely affects, or has the potential to damage or adversely affect, the Principal's reputation, trademark or brand.

## 11.3 Data Security

The Contractor must:

- (a) do all things that a Professional Contractor would do to ensure that all Principal Data is protected at all times from unauthorised access or use by a third party and from misuse, damage or destruction by any person;
- (b) provide protective measures for the Principal Data that are no less vigorous than accepted industry standards and commensurate with the consequences and probability of unauthorised access to, or use, misuse or loss of, the Principal Data; and
- (c) either return to the Principal or destroy any Principal Data immediately following the termination or expiry of the Contract, provided that the Contractor may retain one copy of any Principal Data solely for the purposes of its own records or if required by Law.

## 12 Intellectual Property

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- (a) Subject to clause 12(c), the Contractor IP remains vested in the Contractor and the Principal IP remains vested in the Principal.
- (b) The Principal will own all Intellectual Property that the Contractor creates in the performance of the Services (**Project IP**).
- (c) The Contractor grants to the Principal a non-exclusive, perpetual, royalty-free, irrevocable, transferable licence (with the right to assign and sub-license) to use the Contractor IP to the extent necessary to use the Project IP.



## 13 Indemnity and limits of liability

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### 13.1 Indemnity

- (a) The Contractor indemnifies the Principal from and against any Claim or Loss, however caused, brought against, suffered or incurred by the Principal arising out of or in connection with the provision of the Services, the Contractor's breach of the Contract, or the negligence of the Contractor or the Contractor's Personnel, in respect of:
- (1) damage to, or loss or destruction of, any property (including damage to the environment);
  - (2) injury to, or death or disease of, any person;
  - (3) reputational damage to the Principal;
  - (4) any breach of Law; or
  - (5) any breach of a party or third party's Intellectual Property.
- (b) The indemnity in clause 13.1(a) will be reduced to the extent that the Loss is caused, or contributed to, by the Principal's negligence or breach of the Contract.

### 13.2 Limits of liability

- (a) To the extent permitted by Law, but subject to clause 13.2(c), each party will have no liability to the other party arising under or in connection with the Contract (howsoever arising, including negligence) for Excluded Loss.
- (b) Subject to clause 13.2(c), the Contractor's liability to the Principal, and the Principal's liability to the Contractor, in respect of Loss arising out of or in connection with the Contract, in the aggregate for all Claims, is limited to the Maximum Liability Amount.
- (c) The Contractor's liability in respect of the following is not limited by clause 13.2(a) or 13.2(b), and is not counted towards the limit under clause 13.2(b):
- (1) personal injury and death, including third party Claims in connection with personal injury or death;
  - (2) damage to, or loss or destruction of, any property;
  - (3) breach of any Laws, confidence or privacy;
  - (4) the infringement of any Intellectual Property of a party or third party;
  - (5) any amount agreed as the Fee under the Contract; and
  - (6) to the extent that the Contractor recovers proceeds under insurances required by the Contract in respect of the liability, or would have recovered insurance proceeds if it had complied with the Contract, complied with the insurance policy, and taken all reasonable steps to do so.
- (d) When determining the insurance proceeds that would have been recovered for the purposes of clause 13.2(c)(6), the exclusions and limits of liability under clauses 13.2(a) and 13.2(b) will not be taken into account.
- (e) A party's liability in respect of the following is not limited by clauses 13.2(a) or 13.2(b), and is not counted towards the limit under clause 13.2(b):

- (1) fraud, deliberate default, wilful misconduct; or
  - (2) any act or omission done or not done with a reckless disregard for the consequences by the party or any other party for whom the party is responsible.
- (f) Liability to which a limit under clause 13.2(b) applies is counted towards the limit when discharged by a party.

## 14 Fee and invoicing

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### 14.1 Payment of the Fee

- (a) The Principal must pay the Fee to the Contractor for the Services in accordance with this clause 14.
- (b) The Fee is inclusive of all costs and expenses including packaging, freight, delivery, insurance, the cost of any miscellaneous services, compliance with the Contract and Taxes and no additional amounts will be payable by the Principal, subject to:
  - (1) clause 17;
  - (2) any cost and expense being included or excluded from being paid under the Contract in accordance with the terms of the Panel Agreement; and
  - (3) any amounts payable as set out in the Procurement Form.

### 14.2 Payment claims

- (a) Subject to clause 14.2(b), on or promptly after the Date of Completion of the Services, the Contractor may submit to the Principal a written payment claim for the amount due to the Contractor.
- (b) If set out in the Procurement Form, the Contractor may submit a payment claim to the Principal at the end of each month, or any other period agreed by the Principal in writing, for any Services performed during that or previous months provided those Services have not already been included in a Tax Invoice issued to the Principal.
- (c) Each payment claim must:
  - (1) set out the total amount claimed and an itemised breakdown of that amount;
  - (2) include details and supporting information reasonably required to assess whether the amounts claimed are payable in accordance with the Contract; and
  - (3) otherwise be in the form and include the information reasonably required by the Principal.
- (d) The Contractor must provide any further information and assistance reasonably requested by the Principal for the purposes of assessing a payment claim.

### **14.3 Payment schedule**

- (a) Within 10 Business Days of receipt of the payment claim under clause 14.2, the Principal must assess the payment claim and issue a payment schedule to the Contractor.
- (b) The payment schedule must identify the payment claim to which it relates (if any) and set out:
  - (1) the amount claimed which is payable to the Contractor;
  - (2) the reasons for any difference (including, if applicable, the reasons for withholding or setting off any amount); and
  - (3) any other amounts that are payable to the Contractor in accordance with the Contract (including any relevant additional amounts for authorised Variations under clause 17).
- (c) The Principal may, at any time, issue a payment schedule correcting any error discovered in a previous payment schedule.

### **14.4 Tax invoice**

- (a) Within 2 Business Days of the Principal issuing a payment schedule to the Contractor, the Contractor must provide the Principal with a Tax Invoice for the amount specified in the payment schedule.
- (b) A Tax Invoice must include:
  - (1) the Procurement Form number;
  - (2) a description of the Services performed;
  - (3) the amount being claimed for the Services;
  - (4) the amount of any applicable GST; and
  - (5) any further information reasonably requested by the Principal.
- (c) Tax Invoices must be submitted to the details provided by the Principal in writing, as updated from time to time.
- (d) The Contractor warrants that it is registered for GST purposes in Australia and, if requested by the Principal, must provide to the Principal sufficient evidence to substantiate that the Contractor is registered for GST purposes.

### **14.5 Payment**

Subject to clause 14.7, the Principal must pay the amount stated as due to the Contractor in a payment schedule within 8 Business Days after the provision by the Contractor of a Tax Invoice in compliance with clause 14.4.

### **14.6 Payment not approval**

Payment under this clause 14 will not be taken as proof or admission that all, or any part of, the Services have been performed to the satisfaction of the Principal, but will be taken to be payment on account only.

### **14.7 Principal's right of set-off**

The Contractor agrees that the Principal may:

- (a) deduct from amounts due to the Contractor any money due or which may become due from the Contractor to the Principal under, or in connection with, the Contract; and
- (b) withhold payment of any amounts payable under the Contract pending resolution of any Dispute.

## 15 GST

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- (a) Words or expressions used in this clause 15 which are defined in the GST Act have the same meaning as in the GST Act.
- (b) Unless otherwise stated, all amounts payable or the value of other consideration provided in respect of the supplies made under the Contract are exclusive of GST and where the value of any supply is to be calculated with reference to a monetary turnover figure, the GST exclusive value of the monetary turnover will be used in calculating the value of the supply.
- (c) If a party (**supplier**) makes a taxable supply under or in connection with the Contract:
  - (1) the consideration otherwise payable or to be provided for that supply is increased by, and the party paying or providing the consideration (**recipient**) must also pay to the supplier, an amount equal to the GST payable by the supplier on that supply;
  - (2) subject to the supplier complying with clause 15(c)(3), the recipient must pay the GST amount in Australian dollars, at the same time and in the same manner as it must pay or provide the consideration for that supply; and
  - (3) the supplier must issue a valid Tax Invoice or adjustment note to the recipient of the supply at or before the time of payment of the GST inclusive consideration or at such other time as the parties agree.
- (d) Where an amount is payable to a party as a reimbursement, indemnification or similar payment calculated by reference to a Loss or any other amount incurred by that party, then such amount must be reduced by any part of that Loss or other amount which is attributable to GST for which that party, or the representative member of any GST group of which that party is a member, is entitled to an input tax credit.

## 16 Insurance

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- (a) The Contractor acknowledges and agrees that:
  - (1) it is obliged under the Panel Agreement to take out and maintain Insurances, which, as a minimum, Insurances will apply in respect of contracts with WALGA members (including the Principal) for the procurement of goods, services and works under the Panel Agreement;
  - (2) due to the nature of the Services, the Procurement Form may require that levels of insurances greater than those required under clause 16(a)(1) be provided by the Contractor; and

- (3) in circumstances where the Procurement Form requires higher levels of insurance, the Contractor must ensure that it has insurances sufficient to meet such requirements.
- (b) The parties acknowledge and agree that the relevant provisions of the Panel Agreement are repeated and apply in the Contract, as modified for the application to the provision of the Services under the Contract.
- (c) Subject to clause 7.2, if the Contractor subcontracts any part of the Services, the Contractor must ensure that each subcontractor effects and maintains all of the insurances required under the Panel Agreement, as appropriate for the Services being performed by that subcontractor, before the subcontractor commences providing any part of the Services.
- (d) In addition to the Principal's rights under clause 19(a)(2), if the Contractor fails to comply with any of its obligations under this clause 16, the Principal may, immediately suspend the Contract in accordance with clause 18(a)(4) or refuse payment of any amount due to the Contractor until evidence of the Insurances required by this clause 16 is produced to the Principal.
- (e) The Insurances contemplated by this clause 16 are primary and not secondary to the indemnities referred to in the Contract.

## 17 Variations

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- (a) If at any time the Principal notifies the Contractor that it requires a Variation, the Contractor must promptly provide a Variation Quotation.
- (b) If the Principal accepts a Variation Quotation, the Principal will issue a Variation Notice to the Contractor and:
  - (1) the Contractor must then carry out the Variation;
  - (2) the Fee will be adjusted by the amount set out in the relevant Variation Quotation; and
  - (3) the Date for Completion will be adjusted as set out in the Variation Quotation.
- (c) The Contractor will not be entitled, in any circumstances, to an adjustment to the Fee or any extension of time except as set out in a Variation Notice.

## 18 Suspension by Principal

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- (a) The Principal may, by written notice to the Contractor, suspend the performance of all or part of the Services if:
  - (1) the Contractor breaches a provision of the Contract and fails to comply with a written notice issued by the Principal within 10 Business Days of receiving such notice;
  - (2) the Principal reasonably believes that the Contractor, or the Contractor's Personnel, is not complying or will not comply with clause 8;

- (3) the Principal reasonably believes that the Contractor, or any Contractor's Personnel, is endangering or will endanger any person, property or the environment; or
  - (4) the Contractor has failed to ensure insurance is effected and maintained in accordance with clause 16, or to provide evidence of insurance in accordance with clause 16.
- (b) The Principal's written notice must state the Principal's reasons for the suspension.
  - (c) The Contractor must recommence any Services suspended under this clause 18 as soon as practicable after receiving written notice from the Principal directing the Contractor to recommence the Services. The Contractor must notify the Principal in writing before recommencing the suspended Services.
  - (d) Subject to clause 18(e), the Contractor is not entitled to make any Claim against the Principal arising out of, or in connection with, a suspension under this clause 18.
  - (e) If the Principal suspends the Services for a reason other than the reasons identified in clause 18(a), the Contractor will be paid the standby rates approved by the Principal (acting reasonably).

## 19 Termination

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- (a) The Principal may terminate the Contract by notice to the Contractor:
  - (1) at any time and in its discretion by giving the Contractor not less than 20 Business Days' notice;
  - (2) if the Contractor commits a breach of the Contract and fails to remedy that default within 10 Business Days of the Principal giving notice of the breach;
  - (3) immediately if an Insolvency Event occurs; or
  - (4) immediately if the Principal becomes aware that WALGA has suspended or terminated the Panel Agreement, in accordance with the terms of the Panel Agreement.
- (b) The Contractor may terminate the Contract by notice to the Principal if the Principal does not comply with its obligations under clause 14.5 and fails to remedy that default within 15 Business Days of notice of that default from the Contractor.
- (c) On termination of the Contract, the Contractor must:
  - (1) immediately cease performance of the Contractor's Obligations;
  - (2) ensure that accurate notes are made of the Services performed up to the date of termination and delivered to the Principal; and
  - (3) promptly comply with its obligations under clause 11.1(b) and deliver to the Principal all employee lists, working papers, correspondence, documents and other property belonging to the Principal that may be in the Contractor's possession or under its control.
- (d) If the Contract is terminated under clause 19(a) or 19(b):

- (1) the Principal must pay the Contractor that part of the Fee for any Contractor's Obligations performed prior to termination that have not already been paid by the Principal; and
  - (2) the Contractor is not entitled to, and the Principal is not liable for, any additional parts of the Fee whatsoever.
- (e) Subject to clause 19(d), termination of the Contract, however it may occur, does not prejudice any Claim that either party may have against the other under the Contract on termination.

## 20 Security of Payment Act

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- (a) This clause 20 only applies to the extent that the Services constitute 'construction work' carried out within Western Australia or involves the supply of 'related goods and services' (both as defined in the Security of Payment Act).
- (b) Nothing in the Contract will affect, restrict or limit the Contractor's right to:
  - (1) make an adjudication application pursuant to section 28 of the Security of Payment Act; and
  - (2) suspend the Services under section 62 of the Security of Payment Act.
- (c) Notwithstanding anything else in the Contract, the Contractor must:
  - (1) promptly give the Principal a copy of any notice the Contractor receives from a subcontractor; and
  - (2) ensure that each subcontractor promptly gives the Principal a copy of any notice that the subcontractor receives from another party (including the Contractor), under any of sections 28, 30, 57 or 62 of the Security of Payment Act.
- (d) If the Principal becomes aware that a subcontractor is entitled to suspend services (which forms part of the Services) under section 62 of the Security of Payment Act, the Principal may (at its discretion) pay the subcontractor such money that is or may be owing to the subcontractor in respect of services forming part of the Services, and any amount paid by the Principal is recoverable from the Contractor as a debt due to the Principal. The Principal:
  - (1) must notify the Contractor prior to making payment pursuant to this clause 20(d); and
  - (2) will not make a payment pursuant to this clause 20(d) where the Contractor demonstrates to the Principal that it has reasonable grounds to have withheld payment to the subcontractor.
- (e) The Contractor indemnifies, and holds harmless, the Principal against all Loss of any nature suffered or incurred by the Principal arising out of:
  - (1) a suspension by a subcontractor of services (which forms part of the Services) under section 62 of the Security of Payment Act;
  - (2) a subcontractor exercising a statutory lien, under section 64 of the Security of Payment Act, over unfixed plant or materials supplied by the subcontractor for use in carrying out services forming part of the Services; and

- (3) a failure by the Contractor to comply with its obligations under clause 20(c).
- (f) For the purposes of this clause 20, a reference to a subcontractor refers to any party engaged by the Contractor, any of its subcontractors or any other party to carry out services which forms part of the Services.

## 21 Dispute Resolution

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- (a) Neither party may commence any action, bring any proceedings or seek any relief or remedy in a court, except interlocutory or equitable relief from a court in respect of a Dispute, until they have complied with the dispute resolution process in accordance with this clause 21.
- (b) If any Dispute arises between the parties in relation to the Contract, either party may give notice of the Dispute to the other party (**Dispute Notice**).
- (c) A Dispute Notice must specify the:
  - (1) alleged facts on which the Dispute is based;
  - (2) legal basis on which the Dispute is made, including any issues of law relevant to the Dispute (if any); and
  - (3) relief that is claimed.
- (d) Within 3 Business Days of a party receiving a Dispute Notice, the parties must arrange for a senior representative from the Principal and a senior representative from the Contractor to meet to attempt to resolve the Dispute.
- (e) If a Dispute is not resolved within 3 Business Days of the parties' senior representatives meeting to attempt to resolve the Dispute in accordance with clause 21(d), the parties may escalate the Dispute to WALGA, for WALGA to assist the parties in the resolution of the Dispute.
- (f) If a Dispute is not resolved within 20 Business Days of the party receiving a Dispute Notice, either party who has given a Dispute Notice under clause 21(b) and complied with this clause 21 may end the dispute resolution process and commence court proceedings in relation to the Dispute.
- (g) If a Dispute exists, each party must continue to comply with its obligations under the Contract, except with respect to any aspect that is in dispute.

## 22 Notices

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### 22.1 How and where notices may be sent

- (a) Subject to clause 22.1(b), a notice must be in writing and:
  - (1) delivered by hand or sent by post, to the address of the party set out in the Party Details or otherwise notified; or
  - (2) sent by email, as an attachment to an email, to the email address of the party set out in the Party Details or otherwise notified.
- (b) A notice under clause 19 may only be delivered by hand or sent by post.



## 22.2 When notices are taken to have been delivered and received

A notice is effective:

- (a) if delivered by hand, on the date it is delivered to the recipient;
- (b) if sent by post:
  - (1) within Australia to an Australian address, on the third Business Day following the postage date; or
  - (2) from a place within Australia to an address outside of Australia, or from a place outside Australia to an address within Australia, on the eighth Business Day following the postage date; or
- (c) if sent by email, on the earlier of:
  - (1) an email delivery confirmation report being received by the sender; or
  - (2) 4 hours after the email was sent unless the sender receives notification from its or the recipient's email server that the email is undeliverable, was not delivered or the recipient is out of the office,provided that where any notice is sent by email and is received after 4:00pm (recipient's time) or on a day other than a Business Day (recipient's time), then the notice will be deemed as being received at 9:00am on the next Business Day (recipient's time).

## 23 General

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### 23.1 Governing law and jurisdiction

The Contract is governed by the law in force in Western Australia and each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Western Australia.

### 23.2 Entire agreement and reliance

- (a) The Contract states all the express terms of the agreement between the parties in respect of its subject matter. It supersedes all prior representations, discussions, negotiations, understandings and agreements in respect of its subject matter.
- (b) Neither party has relied on any statement by the other party not expressly included in the Contract.

### 23.3 Waiver

No party to the Contract may rely on the words or conduct of any other party (including any delay in exercising a right) as a waiver of any right unless the waiver is in writing and signed by the party granting the waiver. In this clause 23.3, "waiver" includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

### 23.4 Relationship of the parties

- (a) The Contractor acknowledges and agrees that:

- (1) it is an independent contractor and not an agent of the Principal;
  - (2) the Contract is entered into in accordance with the terms of the Panel Agreement;
  - (3) the Contract is entered into between the Principal and the Contractor, and WALGA is not a party to the Contract; and
  - (4) the Contractor has no authority to bind the Principal, or WALGA, by contract or otherwise.
- (b) In carrying out their respective obligations under the Contract, each party is acting independently of the other party. Nothing in the Contract creates a partnership, trust or agency between the parties or imposes any fiduciary duties on either party in relation to the other, unless expressly stated.
- (c) In the event that the Contractor assigns or novates any right, benefit or interest under the Panel Agreement in accordance with the terms of the Panel Agreement, the Contractor must provide the Principal with such reasonable assistance as may be necessary to assign or novate (as applicable) the Contractor's rights, benefit or interest under the Contract to the assignee or novatee (as applicable).

### **23.5 Amendment**

An amendment of any term of the Contract must be in writing and signed by both parties.

### **23.6 Invalidity and enforceability**

- (a) Any provision of the Contract which is invalid or unenforceable will not affect the remaining provisions of the Contract which remain in full force and effect.
- (b) If any provision of the Contract is found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question will apply with such modification as may be necessary to make it valid.

### **23.7 Executing the Contract**

- (a) Each party must do all things and execute all documents necessary to give full effect to its obligations under the Contract and the transactions contemplated by it.
- (b) The Contractor represents and warrants that it:
- (1) has full power and authority to enter into and perform its obligations under the Contract; and
  - (2) has taken all necessary action to authorise the execution, delivery and performance of the Contract.
- (c) The Contract may be executed in any number of counterparts and all counterparts, taken together, constitute one instrument. A party may execute the Contract by signing any counterpart.

### **23.8 Rights under the Contract**

- (a) Unless the Contract provides otherwise:
- (1) a party may exercise a right, power or remedy in any way at its discretion; and

- (2) the rights, powers and remedies provided by the Contract are in addition to any rights, powers and remedies provided at Law.
- (b) Nothing in the Contract:
  - (1) gives a party authority to bind any other party in any way; or
  - (2) imposes any fiduciary duties on a party in relation to any other party.
- (c) The Principal is not required to engage the Contractor exclusively to perform the Services.

### **23.9 Survival**

Clauses 1, 2, 11, 12, 13, 19(e) and 23, and any other obligations which are expressed to or, by their nature, survive expiry or termination of the Contract, will survive termination or expiry of the Contract, and are enforceable at any time at Law.