

Subcontract Agreement

[Insert TVG Group party name]
[insert ACN/ABN]

[Insert Subcontractor name]
[insert ACN/ABN if company (otherwise delete)]

Formal Instrument of Agreement

Date This agreement is made on [INSERT]

Parties

[INSERT TVG Group party name] of [INSERT] (ABN [INSERT]) (the “**Contractor**”); and
[INSERT] of [INSERT] (ABN [INSERT]) (the “**Subcontractor**”).

1. Background

- A The Contractor has agreed to engage the Subcontractor to perform the Subcontract Works, and the Subcontractor has agreed to perform the Subcontract Works, upon the terms and conditions contained in this agreement.
- B Except to the extent expressly made the responsibility of the Contractor under the Subcontract, the Subcontractor accepts all risks and costs (whether ascertainable at the date this agreement was made or not) arising out of or in connection with the performance and completion of the Subcontract Works and shall not be entitled to make any claim and the Contractor shall have no liability to the Subcontractor in respect of any such matter, except to the extent expressly made the responsibility of the Contractor under the Subcontract.

2. Subcontract documents

(a) The Subcontract comprises the following documents:

- (i) This Formal Instrument of Agreement;
- (ii) Schedule 1 – Subcontract Particulars;
- (iii) Schedule 2 – Special Conditions
- (iv) Subcontract General Conditions;
- (v) Schedule 3 – Subcontract Works;
- (vi) Schedule 4 – Documents included as part of the Subcontract;
- (vii) Schedule 5 – Deed of Release;
- (viii) Schedule 6 – Non-Subcontract Documents; and

are to be to be interpreted in the order of precedence set out above.

(b) The documents listed in Schedule 6 – Non-Subcontract Documents, do not form part of the Subcontract and the Subcontractor acknowledges and accepts that these documents were provided solely for the convenience of the Subcontractor and that the Contractor does not warrant, guarantee or make any representation about the accuracy, quality, completeness or adequacy of the them, shall not be liable for errors or misleading statements within them, or have any duty of care in connection with the information identified in them.

3. Entire agreement

- (a) This agreement constitutes the entire agreement between the parties in relation to its subject matter. All prior discussions, undertakings, agreements, representations, warranties and indemnities in relation to that subject matter are replaced by this agreement and have no further effect.
- (b) Unless included in Schedule 4, the Subcontractor's tender (including any of the Subcontractor's standard commercial terms) do not form part of the Subcontract.

4. Prior Works

- (a) The terms of the Subcontract shall apply to any work performed by the Subcontractor in connection with the Subcontract Works even if it was performed prior to the date of this agreement.
- (b) Any payment made by the Contractor to the Subcontractor in connection with the Subcontract Works prior to the date of this agreement will be treated as a payment under the Subcontract and will be in part discharge of the Contractor's obligation to pay the Subcontract Sum.

5. Attorney

Each person who executes this agreement on behalf of a party under a power of attorney warrants that he or she has no notice of the revocation of that power or of any fact or circumstance that might affect his or her authority to execute this agreement under that power.

6. Counterparts

This agreement may be executed in any number of counterparts and all counterparts taken together will constitute one document

EXECUTED as an agreement

Signed for [Insert TVG Group party name and ABN])
)
By its authorised representative)
)
)

Signature

Date

Print Name

Position

EXECUTED by [Insert Subcontractor Name] ACN [Insert ACN])
)
)

accordance with section 127 of the)
Corporations Act 2001 (Cth):)

Signature of Director

Signature of Director/Secretary

Name of Director

Name of Director/Secretary

EXECUTED by **[Insert Subcontractor**)
Name] ACN **[Insert ACN]** in)
accordance with section 127 of the)
Corporations Act 2001 (Cth):)
)

Signature of Sole Director/Secretary

Name of Sole Director/Secretary

SIGNED by **[Insert name of sole**)
trader Subcontractor]:)
)
)
)

Signature of Witness

Signature of **[insert name]**

Name of Witness

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Schedule 1 Subcontract Particulars

Item		
1	Contractor's Representative: (Clause 1)	[Insert]
2	Date for Completion: (Clause 1)	[Insert]
3	Defects Liability Period: (Clauses 1 and 28.2)	[Insert] weeks
4	Extension of Time Notice Period: (Clauses 1 and 25.3(a)(ii))	[Insert] days
5	Subcontract Sum: (Clause 1)	\$(Insert) (excluding GST)
6	Working Hours and Working Days: (Clauses 1 and 23)	[Insert]
7	Security: (Clause 4.1 and 4.2(a))	[Insert] % of the Subcontract Sum
8	Professional indemnity is required: (Clause 15.1(c))	[Yes / No]
9	Professional indemnity insurance – amount: (Clause 15.1(c))	\$(Insert)
10	Professional indemnity insurance – period: (Clause 15.2(a))	[Insert] years
11	A specific warranty form or deed required: (Clause 22.2)	[Yes / No]
12	Liquidated damages: (Clause 27.1 and 27.3)	\$(Insert) per day

13	Time for payment claims: (Clause 30.1(a))	on the 20 th day of each month, except for December which shall be on the 15 th day.
14	Period for payment by the Contractor: (Clause 30.4(a))	within 60 days of the end of the month in which the payment claim was made or could have been made were no payment claim is made.
15	Contractor's address and email for notices: (Clause 38.1(a)(ii)(A))	[Insert address] [Insert email]
16	Subcontractor's address and email for notices: (Clause 38.1(a)(ii)(B))	[Insert address] [Insert email]
17	Governing law: (Clause 39.1)	[Insert]
18	Building Code 2016 – special condition SC1. applies to this Subcontract (Schedule 2 Special Conditions)	[Applies / Does not apply]

Schedule 2 Special Conditions

This special condition SC1 applies only if stated in Schedule 1 Subcontract Particulars as applying.

SC1. Building Code 2016.

- (a) The Contractor complies with the Building Code 2016 (**'Building Code'**).
- (b) The Subcontractor must comply with (and must ensure that its Lower Tier Subcontractor comply with) the Building Code. Compliance shall not relieve the Subcontractor from responsibility to perform the Subcontract, or from any liability for any defects.
- (c) Where a change in the Subcontract is proposed and that change would affect compliance with the Building Code, the Subcontractor shall immediately notify the Contractor's Representative, and if requested submit a report specifying the extent to which the Subcontractor's compliance will be affected.
- (d) If requested by the Contractor's Representative, the Subcontractor must provide the Contractor's Representative with evidence, satisfactory to the Contractor, of compliance by the Subcontractor with this clause.
- (e) The Subcontractor shall not be entitled to any claim, including a claim for adjustment of the Subcontract Sum or the Date for Completion in complying with this clause.
- (f) The Subcontractor shall permit the Commonwealth and those authorised by the Commonwealth, including a person occupying a position in the Australian Building and Construction Commission (ABCC), full access to the premises and records of the Subcontractor and any Lower Tier Subcontractor to:
 - (i) inspect any work, material, machinery, appliance, article or facility;
 - (ii) inspect and copy any record relevant to the project and works governed by this Subcontract; and
 - (iii) interview any person as is necessary to monitor compliance with the Building Code.
- (g) The Subcontractor undertakes that it and any Lower Tier Subcontractors will agree to a request from the Commonwealth, including a person occupying a position in the Australian Building and Construction Commission, to produce a specified document within a specified period, in person, by fax or by post.

Subcontract General Conditions

1. Definitions and Interpretation

1.1 Definitions

In this agreement, unless the contrary intention appears, the following words have the following meanings:

Term:	Definition:
Background Subcontractor IP	means all Intellectual Property Rights owned by, or licensed to, the Subcontractor that arise, or have arisen, independently of the Subcontract.
Business Day	has the same definition as that of a 'Business Day' in the Security of Payment Act.
Certificate of Completion	means the certificate issued in accordance with clause 26.1.
Change in Control	in relation to a Subcontractor, a person who has Control of the Subcontractor as at the date stated on the Formal Instrument of Agreement as the date the agreement was made, ceasing to have such Control, or a person not having Control of the Subcontractor as at the date stated on the Formal Instrument of Agreement as the date the agreement was made, acquiring Control.
Completion	means the stage when: <ul style="list-style-type: none">(a) the Subcontract Works are fully complete and contain no known defects;(b) any tests which are required by this Subcontract to be carried out and passed have been carried out and passed;(c) all necessary approvals required under applicable Legislative Requirements have been issued and supplied to the Contractor's Representative;(d) all warranties, certificates, documents or other information required under the Subcontract which, in the opinion of the Contractor's Representative are for the use, operation and maintenance of the Subcontract Works have been supplied to the Contractor; and(e) all rubbish, surplus material and plant and equipment have been removed from the Site as to leave the Site in a clean and tidy condition, except for those items which the

Contractor's Representatives consents in writing to remain on the Site.

Confidential Information	means all information relating to the business, technology, financial or other affairs of a party that is by its nature confidential and: (a) is designated by that party as confidential; or (b) the other party knows or ought to know is confidential.
Contract Material	means any Intellectual Property Rights developed by the Subcontractor for the purpose of performing the Subcontract Works.
Contractor's Representative	means the person identified in Schedule 1 or any replacement notified to the Subcontractor in writing from time to time.
Control	means the ability, directly or indirectly, to direct the management and decisions of an entity, whether through ownership of shares, voting rights, rights to appoint directors, by contract or by any other means.
Date for Completion	means the date specified in Schedule 1, or if an extension of time is granted by the Contractor's Representative or any alternate dispute resolution process or litigation the revised date.
Date of Completion	means the date certified by the Contractor's Representative as the date which the Subcontract Works reach Completion.
Deed of Release	means the deed of release in the form prescribed in Schedule 5.
Defects Liability Period	means the period stated in Schedule 1.
Dispute	means that there must be both a claim and a rejection of it.
Extension of Time Notice Period	means the period specified in Schedule 1.
Final Certificate	means the certificate issued in accordance with clause 26.2 certifying.
Force Majeure	means an event or circumstance not within the control of the party claiming Force Majeure, and which by the exercise of reasonable care, that party is not able to overcome provided that the event or circumstance is limited to: (a) acts of terrorism, war, invasion, act of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection or military or usurped power, martial law or confiscation by order of any government or public authority;

- (b) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel not caused by the Subcontractor of its Lower Tier Subcontractors or either's employees or agents;
- (c) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;
- (d) earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity; and
- (e) strikes or industrial disputes at a national level, which affect an essential portion of the Subcontract Works.

Governmental Authority

means any Federal, State or local government (including any local council), and any agency, department, directorate or instrumentality thereof, including any independent regulator deriving power from statute, within Australia or elsewhere.

GST

means the tax payable on taxable supplies under the GST Law.

GST Law

means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related law imposing such tax.

Independent QS

means a quantity surveyor nominated by the president of the state or territory of the Site of the Australian Institute of Quantity Surveyors.

Insolvency Event

means any of the following events:

- (a) a party ceases to carry on business or is deregistered;
- (b) a party informs the other party in writing or creditors generally that the party is insolvent or is financially unable to proceed with the Subcontract;
- (c) a party is unable to pay its debts when they fall due for payment, including bankruptcy, voluntary administration, liquidation and receivership;
- (d) a party disposes of the whole or part of its assets, operations or business other than in the ordinary course of business;
- (e) any step is taken by a mortgagee to take possession or dispose of the whole or part of a party's assets, operations or business;
- (f) any step is taken to enter into any arrangement between a party and its creditors;

- (g) any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, an administrator or other like person to the whole or part of a party's assets, operations or business
- (h) a party is an individual person or a partnership including an individual person, and if that person:
 - (i) dies;
 - (ii) commits an act of bankruptcy; has a bankruptcy petition presented against him or her or presents his or her own petition; or is made bankrupt;
 - (iii) makes a proposal for a scheme of arrangement or a composition; or
 - (iv) has a deed of assignment or deed of arrangement made, accepts a composition, is required to present a debtor's petition, or has a sequestration Order made, under Part X of the Bankruptcy Act 1966 (Cth);
- (i) in relation to a party being a corporation:
 - (i) notice is given of a meeting of creditors with a view to the corporation entering a deed of company arrangement;
 - (ii) the party enters a deed of company arrangement with creditors;
 - (iii) a controller or administrator is appointed;
 - (iv) an application is made to a court for the winding up of the party and not stayed within 14 days;
 - (v) a winding up order is made in respect of the party;
 - (vi) it resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up); or
 - (vii) a mortgagee of any property of the party takes possession of that property, or
- (j) any other event or circumstance which has an analogous effect to any of the events listed above.

**Intellectual
Property Rights**

means any and all intellectual property rights granted by law or equity from time to time, including copyright and related rights, designs, patents, trademarks, trade names and service marks, obligations of confidentiality and rights to use and protect the confidentiality of confidential information, know-

how, moral rights, business names, domain names, rights in get-up and trade dress, goodwill and the right to sue for passing off, rights to inventions, and all other rights in intangible property including rights of present and future intangible property and all similar rights in any part of the world including any rights to claim priority and, where those rights are obtained or enhanced by registration, any registration, renewal or extension of those rights and applications and rights to apply for and be granted those registrations, renewals or extensions.

Ipso Facto Laws	means <i>Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017</i> (Cth).
Legislative Requirements	means: <ul style="list-style-type: none">(a) acts, ordinances, regulations, by-laws, orders, awards and proclamations of the Commonwealth and the State or Territory in which the Subcontract Works or any part thereof is being carried out;(b) certificates, licences, consents, permits, approvals and requirements of any Governmental Authority and other organisations having jurisdiction in connection with carrying out the Subcontract Works;(c) the Building Code of Australia and any applicable Australian standards; and(d) fees and charges payable in connection with the foregoing.
Lower Tier Subcontractor	means any supplier, contractor or consultant appointed by the Subcontractor.
Modern Slavery Offence	means an event defined as modern slavery in the <i>Modern Slavery Act 2018</i> .
Moral Right Owner	means any person who has a moral right (within the meaning given by pt IX of the <i>Copyright Act 1968</i> (Cth)) in relation to any artistic work, building, structure, plan, instruction, design, sketch, document, model or other work or service, made, created, provided or procured as part of the performance of the Subcontract Works.
Personnel	Means any employee, director, officer, agent, contractor, consultant or representative employed or engaged by the Subcontractor or a related entity of the Subcontractor.
Proportionate Liability Legislation	means Part 4 of the <i>Civil Liability Act 2002</i> (NSW) (and any equivalent statutory provisions in any other state or territory).
Security of Payment Act	means the applicable security of payment legislation.

Site	means the land and places made available to the Subcontractor by the Contractor for performance of the Subcontract Works.
Subcontract	means this agreement between the Contractor and the Subcontractor.
Subcontract Sum	means the sum specified in, or calculated in accordance with, Schedule 1, but excludes any additions or deductions which may be required to be made under the Subcontract.
Subcontract Works	means the whole of the work described in Schedule 3 which is to be executed in accordance with the Subcontract, including all other work reasonably required and not specifically mentioned which is necessary to carry out the work, variations, remedial work, provision of construction plant, equipment and temporary works and all other work provided for by this Subcontract.
WH&S Legislation	means all legislation and regulations governing or relevant to workplace health and safety in the relevant State or Territory for the performance of the Subcontract Works.
Working Hours and Working Days	means the approved working hours and working days for performance of the Subcontract Works as identified in Schedule 1.

1.2 Interpretation

In this agreement, headings are for ease of reference only and do not affect the interpretation of this agreement and, unless the context otherwise requires:

- (a) a reference to days means calendar days;
- (b) the singular includes the plural and vice versa;
- (c) another grammatical form of a defined word or expression has a corresponding meaning;
- (d) a reference to a clause, paragraph or schedule is to a clause or paragraph of or schedule to this agreement and a reference to this agreement includes any schedule or annexure;
- (e) a reference to a document or instrument, includes the document or instrument as novated, altered, supplemented or replaced from time to time;
- (f) a reference to a party to this agreement, and a reference to a party to a document includes the party's executors, administrators, successors and permitted assigns and substitutes;
- (g) a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;

- (h) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
- (i) the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions; and
- (j) a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this agreement or any part of it.

2. Key Obligations

- (a) The Subcontractor shall carry out and complete the Subcontract Works in accordance with the Subcontract and any directions authorised by the Subcontract.
- (b) In consideration for the proper performance of the Subcontract Works, the Contractor agrees to pay the Subcontractor the Subcontract Sum adjusted by any additions or deductions made pursuant to the Subcontract.

3. Subcontractor Warranties

3.1 Warranties

The Subcontractor warrants that:

- (a) at all times it, its Personnel, and its Lower Tier Subcontractors shall be suitably qualified, experienced and licensed to perform the Subcontract Works;
- (b) it will execute and complete the Subcontract Works:
 - (i) in a proper and workmanlike manner with reasonable care and skill;
 - (ii) in accordance with all Legislative Requirements; and
 - (iii) in a timely manner so that the Subcontract Works reach Completion by the Date for Completion;
- (c) it has made proper allowance for all matters which might impact on the Subcontractor's ability to complete the Subcontract Works by the Date for Completion; and
- (d) the Subcontract Sum includes proper allowance for all the Subcontractor's obligations and responsibilities under the Subcontract.

3.2 Acknowledgements

The Subcontractor acknowledges that the Contractor has relied on the warranties provided in this clause 3 in entering this Subcontract.

4. Security

4.1 Provision of security

- (a) The Subcontractor shall provide security to the Contractor in the amount specified in Schedule 1.
- (b) The security is for the purpose of ensuring the due and proper performance by the Subcontractor of its obligations under the Subcontract and to allocate risk between the parties pending resolution of any Dispute.

4.2 Form and lodgement

- (a) Unless otherwise agreed by the Contractor, security must be in the form of an unconditional undertaking by an Australian bank and in a form approved by the Contractor (which shall not be unreasonably withheld). The security must be lodged prior to the commencement of the Subcontract Works.
- (b) At the election of the Subcontractor, in lieu of security, or until the Subcontractor provides the required security:
 - (i) the Contractor's Representative is entitled to include retention money as a reason for the scheduled amount being less than the claimed amount on any payment schedule; and
 - (ii) the Contractor is entitled to retain retention money at the time of making payment,

of not more than the amount specified for security in Schedule 1.
- (c) Should the Subcontractor provide security after the Contractor has retained retention money the Contractor must release the value of retention money held equal to the security provided in the next payment.
- (d) The Contractor shall own any interest earned on retention money.

4.3 Access to security and retention money

The Contractor shall have recourse to retention moneys, security or both and may convert into money security that does not consist of money where:

- (a) the Contractor claims to be entitled to exercise a right under the Subcontract in respect of the retention moneys, security or both;
- (b) the Contractor claims to be entitled to the payment of monies or an indemnity by the Subcontractor under, arising out of, or in connection with the Subcontract;
- (c) the Contractor is made aware of the failure of the Subcontractor to pay all moneys due and payable to a secondary subcontractor;
- (d) if the Subcontract includes a limit on the Subcontractor's liability under Clause 27 and the Contractor's Representative determines that the current liability exceeds the limit; or

- (e) otherwise as permitted under the Subcontract.

4.4 Release

- (a) Subject to the Contractor's right to have recourse to security and/or retention money, upon the later of:
 - (i) the issue of the Certificate of Completion;
 - (ii) the rectification of all defects and omissions in the Subcontract Works notified to the Subcontractor at or prior to the date of issue of the Certificate of Substantial Completion; and
 - (iii) the completion of work taken out of the hands of the Subcontractor and the Contractor's Representative has determined the costs incurred by the Contractor in completing the work pursuant to clause 34.2;

the Contractor's entitlement to security and retention moneys shall be reduced to 50 percent thereof, and the Contractor shall release security and retention moneys in excess of the entitlement within 10 Business Days of the applicable date.

- (b) Subject to the Contractor's right to have recourse to security and/or retention money, and provided the Subcontractor has complied with all of its obligations under the Subcontract, the balance of the security and/or retention money retained by the Contractor will be released or paid to the Subcontractor within 10 Business Days after the later of:
 - (i) the receipt of the Deed of Release; or
 - (ii) if the Subcontractor has notified the Contractor of a dispute pursuant to clause 26.2(b), the Dispute has been resolved or concluded.

5. Subcontract documents

5.1 Discrepancies

The documents forming the Subcontract are to be interpreted in the order of precedence as set out in the Formal Instrument of Agreement and figured dimensions shall prevail over scaled dimensions.

If either party discovers any inconsistency, ambiguity or discrepancy in any document prepared for the purpose of executing the subcontract works, that party shall notify the Contractor's Representative of the inconsistency, ambiguity or discrepancy who will direct the Subcontractor as to the interpretation to be followed.

The Subcontractor is not entitled to any claim arising out of any inconsistency, ambiguity or discrepancy or any direction of the Contractor's Representative under this clause 5.1.

5.2 Documents supplied by the Subcontractor

If the Subcontractor submits documents to the Contractor, then:

- (a) neither the Contractor, the Contractor's Representative or the Contractor's client shall be bound to check those documents for errors, omissions, inconsistencies, ambiguities, discrepancies or compliance with the Subcontract; and
- (b) any acknowledgement or approval shall not prejudice the Subcontractor's obligations.

6. Confidential Information

6.1 Subcontractor must keep information confidential

The Subcontractor must ensure it keeps secret and confidential and does not make available, communicate or disclose to any third party without the prior written consent of the Contractor, any Confidential Information supplied or made available by the Contractor or brought into existence by the Subcontractor in or for the purpose of the Subcontract.

6.2 Permitted disclosure

The Subcontractor may disclose Confidential Information where and to the extent that:

- (a) the Contractor gives its prior written consent to disclosure;
- (b) the information is required by law or by a Governmental Authority;
- (c) the information enters the public domain other than because of a breach of the Subcontract by the Subcontractor, its Personnel or any Lower Tier Subcontractor;
- (d) it is necessary to disclose to the Subcontractor's Personnel or any Lower Tier Subcontractor to allow them to perform their duties under the Subcontract, provided that the Subcontractor ensures that such Personnel or Lower Tier Subcontractor complies with the provisions of this clause 6 in respect of such information; or
- (e) the disclosure is made to a professional adviser of the Subcontractor, provided that the Subcontractor ensures that such adviser complies with the provisions of this clause 6.

7. Assignment and subcontracting

7.1 Assignment

The Subcontractor must not assign this Subcontract or any payment or any other right or benefit or interest in this Subcontract without the prior written approval of the Contractor, which approval may be given or withheld in the Contractor's absolute discretion.

7.2 Subcontracting

- (a) The Subcontractor must not subcontract the whole or substantially the whole of the Subcontract Work without the prior written approval of the

Contractor, which approval may be given or withheld in the Contractor's absolute discretion.

- (b) Approval to subcontract does not relieve the Subcontractor from any liability or obligation under this Subcontract. The Subcontractor will be liable to the Contractor for the acts, defaults and omissions of the Lower Tier Subcontractor (including its employees and agents) as if they were those of the Subcontractor.

8. Personnel

8.1 Personnel

All Personnel supplied by the Subcontractor to perform the Subcontract Works will always be considered employees of the Subcontractor.

8.2 Responsibilities of Subcontractor

The Subcontractor acknowledges that it has sole responsibility for the payment of:

- (a) remuneration and entitlements, superannuation, workers' compensation, payroll tax and all other imposts or levies imposed by law, and any payment on termination of services, payable to, or in relation to, its Personnel; and
- (b) any costs associated with requiring its Personnel to work at the Site, including relevant costs for travel, accommodation, meals, fuel and any other incidental costs.

9. Intellectual Property Rights

9.1 Warranty

The Subcontractor warrants that any design, materials, documents and methods of working provided by the Subcontractor will not infringe any Intellectual Property Right.

9.2 Contract Material

The Subcontractor assigns to the Contractor all Intellectual Property Rights in the Contract Material on creation, and must execute such documents and do all other things reasonably required by the Contractor in order to give effect to the assignment of the Contract Material in accordance with clause .

9.3 Use

The Subcontractor must:

- (a) use the Contract Material only for the purpose of carrying out its obligations under the Subcontract; and
- (b) use all reasonable efforts to safeguard the Contract Material.

9.4 Background Subcontractor IP

The Subcontractor grants the Contractor a perpetual, irrevocable, non-exclusive, world-wide, royalty-free licence (including the right to sublicense) to use, communicate, exploit and create derivative works from all Background Subcontractor IP incorporated in the Contract Material for the purpose of exercising its rights in relation to the Contract Material or otherwise receiving the benefit of the Subcontract Works.

10. Moral rights

- (a) The Subcontractor must ensure that any Moral Right Owner acknowledges and agrees that the Contractor, the Contractor's client and any other beneficiary of the work or service that is the subject of the applicable moral right, may use, adapt, change, modify, vary, alter, amend, relocate, demolish or destroy the whole or any part of such work or service without objection by the Moral Right Owner and without identifying the Moral Right Owner.
- (b) The Subcontractor must provide all reasonable assistance requested by the Contractor in relation to any communication between the Contractor, the Contractor's client or other beneficiary and a Moral Right Owner, in relation to the matters mentioned in clause 10(a).
- (c) If required by the Contractor, the Subcontractor must procure a written release from each Moral Right Owner in a form acceptable to the Contractor.

11. Legislative Requirements

- (a) The Subcontractor must ensure that the Subcontract Works complies with all Legislative Requirements.
- (b) The Subcontractor must and satisfy all Legislative Requirements in connection with the Subcontractor's performance of the Subcontract Works, except those that have been satisfied by the Contractor or the Contractor's client, or the parties agree in writing are to be satisfied by the Contractor.
- (c) If the Subcontractor finds that a Legislative Requirement is at variance with the Subcontract, it must promptly notify the Contractor's Representative.

11A Modern Slavery

- (a) The Subcontractor warrants that at the date stated on the Formal Instrument of Agreement as the date the agreement the Subcontractor has no knowledge of any Modern Slavery Offence occurring within the Subcontractor's organisation or supply chain.
- (b) The Subcontractor:
 - (i) will continue to take reasonable steps to identify the risk of, and prevent the occurrence of, Modern Slavery Offences within the Subcontractor's organisation or supply chains; and
 - (ii) for any services or goods procured from, or subcontracted or outsourced to, third parties, the Subcontractor has taken all reasonable steps to confirm that such third party is not engaging in

Modern Slavery Offences including by ensuring all such supply agreements contain similar provisions to this clause.

12. Proportionate liability

- (a) To the extent permitted by law, the operation of the Proportionate Liability Legislation is excluded in relation to all and any rights, obligations and liabilities under this Subcontract, whether such rights, obligations or liabilities are sought to be enforced by a claim in contract, tort or otherwise.
- (b) Without limiting the above paragraph, the rights, obligations and liabilities of the parties under this Subcontract with respect to proportionate liability are as specified in this Subcontract and not otherwise, whether such rights, obligations and liabilities are sought to be enforced by a claim in contract, tort or otherwise.
- (c) To the extent permitted by law the Subcontractor must not seek to apply the provisions of the Proportionate Liability Legislation in relation to any claim by the Contractor against the Subcontractor (whether in contract, tort or otherwise).
- (d) The Subcontractor must ensure that all policies of insurance covering third party liability which the Subcontractor is required by this Subcontract to effect or maintain:
 - (i) cover the Subcontractor for potential liability to the Contractor assumed by reason of the exclusion of the Proportionate Liability Legislation; and
 - (ii) do not exclude any potential liability the Subcontractor may have to the Contractor under or by reason of this Subcontract.

13. Workplace Health and Safety

13.1 General

The Subcontractor must, in carrying out its obligations under the Subcontract, comply, and use reasonable endeavours to ensure that all Lower Tier Subcontractors comply, with all relevant Legislative Requirements in respect of occupational health and safety.

13.2 Subcontractor Obligations

The Subcontractor must:

- (a) comply with all Site safety procedures and required standards of safety as may be advised by the Contractor from time to time;
- (b) in carrying out the Subcontract Works, eliminate risks to health and safety so far as is reasonably practicable and if it is not reasonably practicable to eliminate risks to health and safety, reduce those risks as far as is reasonably practicable;

- (c) immediately notify the Contractor of any accident, injury or breach of any WH&S Legislation relating to occupational health and safety that occurs in connection with or arising out of the Subcontract Works;
- (d) ensure all persons carrying out the Subcontract Works have undertaken all necessary industry and Site induction requirements;
- (e) ensure that any equipment, materials and procedures used in the performance of the Subcontract Works conform with WH&S Legislation;
- (f) supply and procure the use of personal safety equipment by all persons carrying out the Subcontract Works; and
- (g) ensure that a competent person always supervises the safe and proper performance of the Subcontract Works.

If the Subcontractor fails to comply with any such safety requirement and any cost or loss incurred by the Contractor shall be a debt due and payable from the Subcontractor to the Contractor.

14. Protection of people and property and care of the Subcontract Works

14.1 General

The Subcontractor must:

- (a) provide all things and take all measures necessary to protect the Subcontract Works, all people and other property against loss, injury and damage;
- (b) establish, maintain and comply with emergency safety and security procedures applicable to the performance of the Subcontract Works;
- (c) avoid unnecessary interference with the passage of people and vehicles to, around and in the vicinity of the Site; and
- (d) prevent nuisance and unreasonable noise and disturbance.

14.2 Urgent Action

- (a) If urgent action is required to protect the Subcontract Works, other property or people and the Subcontractor fails to take the required action, the Contractor may take the required action and any cost incurred by the Contractor shall be a debt due and payable from the Subcontractor to the Contractor.
- (b) If time permits, the Contractor's Representative shall give the Subcontractor prior written notice of the Contractor's intention to take required action pursuant to this clause.

14.3 Care of the Subcontract Works

- (a) The Subcontractor shall be responsible for care of the whole of the Subcontract Works until the Date of Completion, including any unfixed items,

items provided by the Contractor for inclusion by the Subcontractor into the Subcontract Works, the Subcontractor's temporary works, plant and equipment, and items brought on to the site by Lower Tier Subcontractors.

- (b) If any loss or damage occurs to anything while the Subcontractor is responsible for its care, the Subcontractor must at its own cost rectify such loss or damage.
- (c) If the Subcontractor fails to comply with any obligation under this clause the Contractor may (in addition to the Contractor's other rights and remedies) have the obligation performed by others and any cost incurred by the Contractor shall be a debt due and payable from the Subcontractor to the Contractor.

15. Insurance

15.1 Subcontractor to take out insurance

Prior to commencing any of the Subcontract Works, the Subcontractor must, at its own cost, effect and maintain with a reputable insurer, suitable policies in respect of the following insurances:

- (a) works insurance with a liability limit of not less than twice the Subcontract Sum covering at least the Subcontract Works and things in storage off Site and in transit to the Site;
- (b) public liability insurance written on an occurrence basis with a limit of liability not less than \$10,000,000 for each and every claim, covering at least legal liability for:
 - (i) death of, or bodily injury (including disease or illness) to any person; and
 - (ii) loss of, or damage to, property,

arising from or in connection with the performance of the Subcontractor's obligations under the Subcontract;
- (c) if required in Schedule 1, professional indemnity insurance for not less than the amount specified in Schedule 1 for each and every claim;
- (d) workers compensation insurance appropriate to its activities in the form and amount required by law; or
- (e) if workers compensation cover cannot legally be obtained, the Subcontractor must insure under a personal accident policy of insurance to cover personal accidents and related liability for death and permanent disability and temporary disablement for an amount not less than \$500,000;
- (f) motor vehicle insurance for any vehicle used by the Subcontractor or any other person with a limit not less than \$10,000,000 for each and every claim; and
- (g) insurance relating to the property of the Subcontractor, which is used or proposed to be used, or for which the Subcontractor is responsible, in

connection with the Subcontract Work for not less than their replacement value.

15.2 Insurance Requirements

The Subcontractor must:

- (a) ensure that the insurances required under clauses 15.1(a), 15.1(b), 15.1(d) or 15.1(e) (as applicable), 15.1(f) and 15.1(g) are maintained until expiry of the Defects Liability Period, and that any insurance required under clause 15.1(c) is maintained for the period required in Schedule 1 following the issue of a final certificate under Contractor's contract with its client;
- (b) note the Contractor as an interested party on the insurance required under clause 15.1(b);
- (c) upon the Contractor's request, provide the Contractor with certificates of currency with respect to the insurances; and
- (d) ensure that any Lower Tier Subcontractors appointed to perform any of the Subcontractor's obligations under the Subcontract effect and maintain the insurances referred to in:
 - (i) clauses 15.1(b), 15.1(d) or 15.1(e), 15.1(f) and 15.1(g); and
 - (ii) if the Subcontractor is required to maintain and effect professional indemnity, professional indemnity insurance for not less than \$1,000,000 for each and every claim maintained for the period of 7 years following the issue of a final certificate under Contractor's contract with its client.

15.3 Insurance excess

- (a) The Subcontractor shall bear the cost of any excess payable in respect of a claim under a policy of insurance which the Subcontractor is required to obtain under the Subcontract.
- (b) If the Contractor, or the Contractor's client, makes a claim under a policy of insurance maintained by either of them due to any act, omission, negligence or default of the Subcontractor, its Personnel or any Lower Tier Subcontractor, the Subcontractor shall be liable for any deductible payable under the policy and any legal costs in respect of the claim, and the amount shall be a debt due and payable by the Subcontractor to the Contractor.

16. Directions by Representatives

16.1 Directions

- (a) The Contractor's Representative will give directions and carry out all its other functions under the Subcontract as agent of the Contractor. The Subcontractor must comply with any instruction or other direction given by the Contractor's Representative.
- (b) If the Subcontractor considers that a direction may give rise to a claim, it must, as a condition precedent to any entitlement, give the Contractor's

Representative notice of that claim within five (5) days of the direction and in any event before commencing any work the subject of the direction. The notice must set out the general nature of the potential claim and the Subcontractor's reasonable estimate of the claim. On receipt of the advice the Contractor's Representative may confirm or revoke the direction. If the direction is confirmed the Subcontractor's entitlement will be determined in accordance with the Subcontract.

16.2 Oral Directions

The Contractor's Representative may give a direction to the Subcontractor orally but must, if requested by the Subcontractor in writing, confirm the direction in writing as soon as reasonably practicable.

16.3 Subcontractor's Representative

The Subcontractor shall superintend the Subcontract Works either personally or by a competent representative. Matters within the knowledge of the Subcontractor's representative (including directions received) shall be deemed to be within the Subcontractors knowledge.

16.4 Subcontractor's Personnel and Lower Tier Subcontractors

- (a) The Contractor's Representative may direct the Subcontractor to immediately remove from the Site any Personnel or person employed by a Lower Tier Subcontractor who in the reasonable opinion of the Contractor:
 - (i) is incompetent or negligent in the performance of their duties;
 - (ii) breaches any Site rules notified by the Contractor; or
 - (iii) disobeys any reasonable directions that the Contractor may give.
- (b) If the Contractor directs the removal of any Personnel in accordance with clause 16.4(a), this will not be grounds for the Subcontractor to make any claim for costs or extension of time.

17. Site

17.1 General

- (a) Unless otherwise provided, the Subcontractor must carry out the Subcontract Works at the Site or at such other location as the Contractor may reasonably require.
- (b) The Subcontractor is not entitled to sole possession of any part of the Site and acknowledges that the Contractor and others will be carrying out work on the Site concurrently.
- (c) The Subcontractor must not, and must ensure that its Personnel and Lower Tier Subcontractors do not, cause any nuisance or disruption to the Contractor or any other work or activity being carried out at the Site.
- (d) The Subcontractor must always maintain the Site in a clean and tidy state to the satisfaction of the Contractor.

- (e) Any costs incurred by the Contractor in removing from the Site the Subcontractor's rubbish, surplus material, plant or equipment shall be a debt due and payable by the Subcontractor to the Contractor.

17.2 Site conditions

The Subcontractor:

- (a) warrants that it has inspected and investigated the Site and has satisfied itself as to the suitability and adequacy of the Site for the purpose of the performance of the Subcontract Works;
- (b) acknowledges that the Contractor makes no representations and gives no warranties as to the adequacy or suitability of the Site for the performance of the Subcontract Works;
- (c) is responsible for and assumes the risk of dealing with any conditions found upon, above or below the surface of the Site or its surroundings in order to properly perform the Subcontract Works in accordance with the requirements of the Subcontract; and
- (d) releases the Contractor from any liability whatsoever with respect to the physical conditions or characteristics of the Site.

17.3 Access

- (a) By entering the Subcontract, the Subcontractor is deemed to have satisfied itself of the suitability and availability of all access routes to the Site.
- (b) The Subcontractor is responsible for and assumes the risk for arranging any access to, or for the use of, any adjoining site or property which the Subcontractor may require for the purpose of performing the Subcontract Works.

17.4 Setting out the Subcontract Works

Unless otherwise agree in writing by the parties, the Subcontractor shall set out the Subcontract Works in accordance with the Subcontract.

17.5 Site services and facilities

Unless otherwise agreed in writing by the parties, the Subcontractor shall provide all services and facilities necessary for the execution and completion of the Subcontract Works.

17.6 Damage to the Site or other property

- (a) If the Subcontractor, its Personnel or Lower Tier Subcontractors cause damage to any property including the Site, any property on or adjacent to the Site or any public utilities or services, the Subcontractor must:
 - (i) immediately notify the Contractor of the damage; and
 - (ii) promptly arrange to make good the damage at its own cost, including the payment of compensation sought by any party or service provider.

- (b) If the Subcontractor fails to comply with any obligation under this clause the Contractor may (in addition to the Contractor's other rights and remedies) perform the obligation, or have the obligation performed by others, and any cost incurred by the Contractor shall be a debt due and payable from the Subcontractor to the Contractor.

18. Quality assurance

The Subcontractor shall:

- (a) if requirements are stated in the Subcontract, plan, establish and maintain a quality system which conforms with those requirements; or
- (b) if requirements are not stated plan, establish and maintain a quality system appropriate to the Subcontract Works, the minimum being an inspection and test plan.

19. Materials, labour and plant and equipment

19.1 Supply of

Unless otherwise agreed in writing by the parties, the Subcontractor must, at its own cost, supply everything necessary for, or which may be reasonably inferred to be necessary for, carrying out the performance of the Subcontract Works.

19.2 Quality of materials

All materials must be of a kind suitable for the proper purpose of the Subcontract Works, of good quality and free from defects.

19.3 Warranty

The Subcontractor warrants that all materials supplied by it under the Subcontract at all times will be free from liens, claims and other encumbrances whatsoever and the Subcontractor will hold the Contractor free and harmless against any and all claims by persons furnishing labour, equipment, services and materials in connection with the performance of the Subcontract.

20. Inspection

20.1 Right to inspect

The Contractor reserves the right to inspect and monitor the Subcontractor's performance of the Subcontract Works at any time on the Site, including any part of the Subcontractor's materials intended for inclusion in the Subcontract Works.

20.2 Access to Subcontractor's premises

The Subcontractor must give the Contractor access at all reasonable times to the Subcontractor's own premises and any other location where materials to be used in the Subcontract Works are located or where processes related to the performance of the Subcontract Works are being performed for the purpose of inspecting and monitoring the Subcontractor's compliance with the Subcontract.

20.3 Inspected Subcontract Works

Any inspection by the Contractor (or the Contractor's client) will not be deemed to be an acceptance of the Subcontract Works and will not prejudice the Subcontractor's obligations or the Contractor's rights under the Subcontract.

21. Testing

21.1 Testing

- (a) The Subcontractor must carry out all testing required by the Subcontract at its own cost.
- (b) The Subcontractor must provide any assistance and samples and make accessible for testing such parts of the Subcontract Works as may be required.
- (c) In addition to the tests required by the Subcontract, the Contractor may direct that any materials or work provided under this Subcontract be tested at any time. The Contractor shall pay the reasonable costs of additional tests except where:
 - (i) the test shows material or work not in accordance with the Subcontract; or
 - (ii) the test relates to materials or work that has been rectified.

22. Warranties

22.1 Subcontractor's warranties

Where the Subcontract requires, the Subcontractor must provide, or procure from its relevant Lower Tier Subcontractor warranties stated in the Subcontract.

22.2 Form of warranty

When Schedule 1 states that a specific warranty form or deed is required, the Subcontractor must complete, execute and provide the specific warranty form or deed.

23. Working Hours and Working Days

The Subcontractor shall not be entitled to any claim where:

- (a) the nature of the Subcontract Works requires the Subcontractor to work outside Working Hours or Working Days; or
- (b) the Subcontractor must work outside the Working Hours or Working Days due to the Subcontractor failing to achieve the progress of the Subcontract Works required by the Contractor.

24. Suspension of Subcontract Work

24.1 Notice to suspend work

The Contractor may, at its sole discretion, by written direction to the Subcontractor suspend the progress of the Subcontract Works (or any part of the Subcontract Works) for such time as the Contractor decides. Upon receipt of such written notice, the Subcontractor must immediately suspend the performance of the Subcontract Works in accordance with the written notice.

24.2 Notice to recommence work

Following a suspension of the Subcontract Work, the Contractor may, at its sole discretion, issue a written notice to the Subcontractor to recommence the whole or relevant part of the Subcontract Work. Upon receipt of such notice, the Subcontractor must promptly recommence performance of the Subcontract Work in accordance with the Subcontract.

24.3 Termination

If a suspension persists for a period in excess of ninety days, the Subcontractor and Contractor must confer in good faith in order to agree to the future obligations of the parties under the Subcontract. If the parties are unable to reach agreement as to such future obligations the Subcontract shall continue unamended.

25. Time

25.1 Progress

The Subcontractor must perform the Subcontract Works:

- (a) in order to bring the Subcontract Works to Completion by the Date for Completion; and
- (b) so as not to inhibit the progress of the Contractor.

25.2 Notice of Delay

If the Subcontractor becomes aware of anything which might reasonably cause delay to the Subcontract Works, it must immediately notify the Contractor's Representative in writing detailing the cause of the delay and estimated period of delay.

25.3 Extension of Time

- (a) The Subcontractor will be entitled to an extension of time to the Date for Completion if:
 - (i) the Subcontractor is or will be delayed in achieving Completion by the Date for Completion by a cause described in the clause 25.3(b) and the delay was not caused or contributed to by any act or omission of the Subcontractor; and
 - (ii) within the Extension of Time Notice Period after the event which caused or will cause the delay first occurs the Subcontractor

provides the Contractor's Representative with a written claim detailing the nature of the delay, any evidence to support the claim for an extension of time and the number of days extension claimed; and

- (iii) the Subcontractor has taken all reasonable steps to minimise or avoid the delay.
- (b) The causes are:
- (i) breach of the Subcontract by the Contractor;
 - (ii) any act or omission by the Contractor, the Contractor's Representative or any of their officers, employees or agents, but not including an act or omission that the Contractor or the Contractor's Representative is entitled to do or omit to do under the Contract;
 - (iii) a variation, other than a variation directed due to defective materials or work;
 - (iv) suspension pursuant to a notice under clause 24.1, except where the Contract Representative's decision to direct the suspension was due to or contributed to by an act or omission of the Subcontractor;
 - (v) suspension under the Security of Payment Act or clause 34.3; and
 - (vi) Force Majeure.
- (c) Within 35 days of receiving a claim from the Subcontractor for an extension of time, the Contractor's Representative shall issue to the Subcontractor a written notice evidencing its assessment of the claim.
- (d) Notwithstanding that the Subcontractor is not entitled to, or has not claimed an extension of time in accordance with this clause 25.3, the Contractor's Representative may in its absolute discretion at any time prior to the expiry of the last Defects Liability Period issue an extension of time. The Subcontractor agrees that the Contractor's Representative is under no obligation to exercise this discretion for the benefit of the Subcontractor.

25.4 Extension of time sole remedy for delay and disruption

- (a) For the avoidance of doubt, the Subcontractor accepts the risk of and assumes responsibility for all increased costs, losses and damages however incurred or sustained in the execution of the Subcontract Works resulting directly or indirectly from any delay or disruption which occurs or arises in connection with the Subcontract Works.
- (b) The Subcontractor acknowledges and agrees that an extension of time granted by the Contractor under clause 25.3 will be the Subcontractor's sole remedy in respect of any delay or disruption to the Subcontract Works.
- (c) The Subcontractor will not be entitled to any increase or adjustment to the Subcontract Sum or to any other monetary amount, compensation or

damages (including damages for breach of contract), losses, costs, or expenses suffered or incurred directly or indirectly by the Subcontractor or its Lower Tier Subcontractors in respect of any delay or disruption to the Subcontract Works.

26. Completion

26.1 Certificate of Completion

When the Contractor's Representative is of the opinion that Completion has been achieved it shall issue a Certificate of Completion certifying the date that Completion was achieved.

26.2 Final Certificate

- (a) Within 15 days after the later of:
 - (i) the expiry of the period in clause 28.3(a)
 - (ii) the rectification of any Subcontract Works that was not in accordance with the Subcontract by the Subcontractor, the Contractor or others pursuant to clause 28;
 - (iii) the certification by the Contractor's Representative of any money owed by the Subcontractor to the Contractor pursuant to clause 34.2;
 - (iv) if the Contractor has notified the Subcontractor of a Dispute under clause 35.2, the Dispute has been resolved or concluded;

the Contractor will issue, a Final Certificate in respect of the Subcontract Works which will certify the final amount (if any) payable by the Contractor to the Subcontractor, or by the Subcontractor to the Contractor, under the Subcontract or otherwise in respect of the Subcontract Works.

- (b) If the Subcontractor does not agree with all or any part of the Final Certificate it must within 15 Business Days of the date of receipt of the Final Certificate notify the Contractor that it does not agree by giving the Contractor a written notice of dispute in accordance with clause 35.2. After the expiry of the 15 Business Day period the Subcontractor is barred from disputing the Final Certificate and from making any further claim against the Contractor.
- (c) If the Subcontractor does not intend to dispute the Final Certificate it must provide the Contractor's Representative with an executed Deed of Release which shall be a condition precedent to the Contractor's obligation to release the balance of any security and/or retention money pursuant to clause 4.4.

26.3 Consequence of issue of Final Certificate

The issue of a Final Certificate in accordance with this clause 26.2 is evidence that the Subcontract Works have been completed satisfactorily, except in relation to:

- (a) fraud, dishonesty or fraudulent concealment relating to the Subcontract Works;
- (b) any defect, omission, deficiency or other fault in the Subcontract Works not apparent to the Contractor at Completion or during the Defects Liability Period,

and will not limit or affect any claim which the Contractor has or might otherwise have against the Subcontractor in relation to the Subcontract Works.

27. Liquidated damages

27.1 Payment of liquidated damages

If Completion of the Subcontract Work is for any reason not achieved by the Date for Completion, the Subcontractor will be indebted to the Contractor for liquidated damages at the rate in Schedule 1 for every day from the Date for Completion to, and including, the earlier of the Date of Completion or the date of termination of the Subcontract.

27.2 Deduction

- (a) The Contractor may recover liquidated damages progressively, even though Completion has not been achieved, and the Contractor's Representative may include liquidated damages in any payment schedule.
- (b) The Contractor may deduct liquidated damage from any monies which may then be due or become due and payable to the Subcontractor, including any security and retention monies. If those monies are insufficient to satisfy the Contractor's entitlement to liquidated damages, any outstanding balance may be recovered by the Contractor as a debt due and payable to the Contractor by the Subcontractor.

27.3 Acknowledgement

The parties acknowledge and agrees that the rate of liquidated damages in Schedule 1 are either:

- (a) a fair and reasonable pre-estimate of the anticipated or actual loss and damage that will be suffered by the Contractor; or
- (b) have been accepted by the parties for commercial reasons.

28. Defects

28.1 Subcontractor's Warranty

The Subcontractor warrants that it will provide the Subcontract Work free of any defects, faults or omissions and that it will, at its own cost, promptly rectify any defects, faults or omissions in the Subcontract Work.

28.2 Defects Liability Period

The Defects Liability Period shall commence on the Date of Completion at 4:00 pm.

28.3 Rectification of the Subcontract Works

- (a) If, at any time the Contractor or the Contractor's Representative considers that any or all of the Subcontract Work is not in accordance with the Subcontract, the Contractor's Representative shall notify the Subcontractor and, unless directed otherwise by the Contractor's Representative, the Subcontractor must carry out all work necessary so that the Subcontract Work is in accordance with the Subcontract. If the Contractor's Representative directs that a separate Defects Liability Period shall apply to the rectified work, it shall commence at 4:00 pm on the date that the work is in accordance with the Subcontract.
- (b) If after being given notice the Subcontractor fails to make the Subcontract Works accord with the Subcontract within the period of time deemed necessary by the Contractor's Representative, the Contractor may carry out, or engage others to carry out, all work necessary so that the Subcontract Work is in accordance with the Subcontract and the Contractor's Representative shall certify the cost incurred as due and payable by the Subcontractor to the Contractor.
- (c) The Subcontractor is and remains liable for all the Contractor's costs, losses or damages resulting from the Subcontractor Works not being in accordance with the requirements of the Subcontract, including any resulting from:
 - (i) the failure of the Subcontractor to carry out all work necessary;
 - (ii) the Contractor having to carry out, or engage others to carry out necessary work; and
 - (iii) the Contractor or its subcontractors having to undertake work on adjoining or other work due to the Subcontract Work not being in accord with the Subcontract.
- (d) The Contractor, at its absolute and unfettered discretion, may accept Subcontract Work not in accordance with the Subcontract the effect of which shall be a deemed variation with the cost being determined by the Contractor's Representative.

29. Variations

29.1 Directions to vary the Subcontract Works

- (a) The Contractor or the Contractor's Representative may at any time direct the Subcontractor in writing by a notice entitled '**Variation Order**' to perform a variation and the Subcontractor shall be bound to undertake such variation. The Subcontractor must not vary the Subcontract works other than pursuant to a Variation Order and has no claim against the Contractor if it does.
- (b) If the Variation Order is to decrease or omit any part of the Subcontract Works:
 - (i) the Contractor's Representative shall be entitled to bring forward the Date for Completion; and

- (ii) the Contractor may carry out, or have others carry out, the decreased or omitted Subcontract Work.

29.2 Proposed Variations

- (a) If requested by the Contractor or the Contractor's Representative, the Subcontractor shall provide the following regarding a proposed variation:
 - (i) a detailed quotation; and
 - (ii) advice on whether the proposed variation will affect any of the Subcontractor's obligations under the Subcontract, including being able to reach Completion by the Date for Completion and the provisions of any warranties.
- (b) The Subcontractor is not entitled to any costs of complying with this clause 29.2.

29.3 Pricing a variation

- (a) The Contractor's Representative and the Subcontractor shall first attempt to agree upon the price (and any effect on any other of the Subcontractor's obligations under the Subcontract) for a variation.
- (b) If agreement cannot be made, or the Subcontractor fails to comply with its obligations in clause 29.2(a), the Contractor's Representative shall determine the price (and any effect on any other of the Subcontractor's obligations under the Subcontract) for a variation.

29.4 Dayworks

- (a) At its sole discretion the Contractor's Representative may direct that work the subject of a variation be carried out on a dayworks basis.
- (b) If directed to carry out dayworks, the Subcontractor, as a precondition to any entitlement to payment, each day must record all resources used in carrying out the work the subject of the variation and provide a copy to the Contractor's Representative.
- (c) The Subcontractor's entitlement to payment for dayworks is limited to:
 - (i) the all-inclusive hourly rate agreed with, or determined by the Contractor's Representative; and
 - (ii) the actual cost of any plant, materials and equipment approved by the Contractor's Representative to be used or provided, plus 10% of the actual costs.

30. Payment

30.1 Payment Claims

- (a) At the times for payment claims stated in Schedule 1 the Subcontractor shall submit to the Contractor's Representative the Subcontractor's claim

for payment for work completed to that time plus any other amounts then due arising out of or in connection with the Subcontract.

- (b) Each payment claim must:
 - (i) comply with any Legislative Requirements;
 - (ii) be supported by such documentation as reasonably required by the Contractor's Representative to allow it to properly assess the payment claim;
 - (iii) be accompanied with a statement by a representative of the Subcontractor who knows the facts that all Personnel and Lower Tier Subcontractors who have undertaken Subcontract Works have been paid all monies due at the date of the statement;
 - (iv) if the project is in New South Wales, be accompanied with a completed 'Subcontractor's Statement' (available at www.sira.nsw.gov.au or www.revenue.nsw.gov.au); and
 - (v) be accompanied with any warranties then required by clause 22.

30.2 Assessment of a payment claim

- (a) Within the period allowed under the applicable Security of Payment Act after receipt of a payment claim from the Subcontractor, the Contractor's Representative may issue a payment schedule stating the payment due from the Contractor to the Subcontractor or vice versa. If the payment due is different to the amount claimed by the Subcontractor, the Contractor's Representative may set out the reasons for the difference and (if it is less because payment is to be withheld) the reasons for withholding payment.
- (b) The Contractor's Representative is entitled to include in any payment schedule the value of previous payments, any retention moneys which the Contractor is entitled to retain, any amount included in the payment claim which the Subcontractor is not entitled to include in a payment claim, if any Subcontract Work is defective the estimated cost of rectifying the defect, and any deductions for debts due, due and payable, or claims that the Contractor is entitled to set off.
- (c) The Contractor may at any time issue a payment schedule to the Subcontractor, notwithstanding that a payment claim has not been submitted by the Subcontractor.

30.3 Tax Invoice

- (a) If the Contractor is entitled to issue a Recipient Created Tax Invoice (RCTI), it shall do so for the amount shown on the applicable payment schedule and the Final Certificate.
- (b) If the Contractor is not entitled to issue a Recipient Created Tax Invoice (RCTI), the Subcontractor must provide a tax invoice to the Contractor, complying with any GST Law, for the amount shown on the applicable payment schedule and the Final Certificate.

30.4 Payment

- (a) Subject to the provisions of the Subcontract, the Contractor must pay to the Subcontractor within the period stated in Schedule 1.
- (b) The Subcontractor must pay the Contractor within 10 Business Days of receipt of a payment schedule from the Contractor's Representative.
- (c) Unless agreed in writing by the parties, the Contractor shall not be obliged to pay for any item of unfixed plant or materials which is not incorporated in the project.
- (d) Any payment of monies by the Contractor is on account only and does not constitute an admission of liability or evidence that the Subcontract Works have been carried out satisfactorily by the Subcontractor.

30.5 Set-off

The Contractor may deduct from moneys otherwise due to the Subcontractor:

- (a) any debt or other money due or due and payable from the Subcontractor to the Contractor; and
- (b) any claim to money which the Contractor may have against the Subcontractor whether for damages (liquidated or unliquidated) or otherwise,

whether under the Subcontract or any other agreement between the parties or otherwise at law, and if those moneys are insufficient to discharge the debt or other money due or due and payable or claim, the Contractor may, subject to clause 4, have recourse to retention moneys and, if they are insufficient, then to security under the Subcontract.

30.6 Bill of Quantities

- (a) Where a bill of quantities or schedule of rates is provided by the Contractor, all quantities in the bill of quantities or schedule of rates will be estimated quantities only.
- (b) The Contractor provides no warranty or guarantee as to the descriptions, completeness or quantities stated in any bill of quantities or schedule of rates.
- (c) Unless otherwise agreed in writing between the parties, the Subcontractor assumes the risk on any bill of quantities or schedule of rates and releases the Contractor from any liability whatsoever with respect to them.

30.7 Interest

Interest at the rate set by the Attorney General under section 2 of the *Penalty Interest Rate Act (Vic) 1983* shall be due and payable on overdue money.

30.8 Direct payment of Lower Tier Subcontractors

At the written request of the Subcontractor the Contract may (but is under no obligation to do so) make payments directly to any Secondary Tier Subcontractor

for work undertaken as part of the Subcontract Works out of moneys payable to the Subcontractor. It is a condition precedent to any payment by the Contractor that the Contractor, Subcontractor and Lower Tier Subcontractor shall enter a deed for direct payment which confirms the arrangement. All reasonable costs of the Contractor in preparing and executing a deed, and administering any payment, shall be a debt due by the Subcontractor to the Contractor.

31. Security of Payment Act

31.1 General

- (a) A payment schedule issued by the Contractor's Representative is a payment schedule for the purposes of the Security of Payment Act.
- (b) (**Victoria only**) The Contractor and the Subcontractor agree that clause 35 is a method for resolving disputes for the purposes of section 10A(3)(d) of the Security of Payment Act.

31.2 Notices

The Subcontractor must promptly and without delay give the Contractor a copy of any notice the Subcontractor receives from a Lower Tier Subcontractor under the Security of Payment Act regarding non-payment, suspension, or adjudication.

31.3 Suspension of work by a Lower Tier Subcontractor

If the Contractor becomes aware that a Lower Tier Subcontractor is entitled to suspend work under the Security of Payment Act, the Contractor may (at its absolute discretion) pay the Lower Tier Subcontractor such money that is, or may be, owing to the Lower Tier Subcontractor for work forming part of the Subcontract Works, and any amount paid by the Contractor is recoverable from the Subcontractor as a debt due and payable to the Contractor.

32. GST

32.1 Interpretation

In this clause 32, a word or expression defined in the GST Law has the meaning given to it in that law.

32.2 Amounts payable

All amounts payable under the Subcontract are expressed exclusive of GST.

32.3 GST

- (a) Each Party acknowledges and agrees that:
 - (i) at the time of entering into the Subcontract, it is registered for GST;
 - (ii) it will promptly provide written evidence of its GST registration if requested by the other party; and
 - (iii) it will promptly notify the other party in writing if it ceases to be registered for GST.

- (b) In respect of payments to be calculated under or in connection with the Subcontract:
 - (i) when calculating the amount payable or other consideration to be provided for a supply, the amounts used in the calculation will exclude any GST component; and
 - (ii) if the Subcontract Sum is increased or reduced by an amount calculated by reference to a loss, cost or expense incurred by a party, then the amount will be reduced by any input tax credit to which that party is entitled in respect of that loss, cost or expense.
- (c) For each supply made by a party (supplier) under or in connection with the Subcontract on which GST is imposed:
 - (i) the consideration payable or to be provided for that supply will be increased by, and the recipient of the supply (Recipient) must also pay to the supplier, an amount equal to the GST exclusive consideration multiplied by the prevailing rate of GST; and
 - (ii) the amount by which the GST exclusive consideration is increased must be paid to the supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable or to be provided,
 - (iii) subject to a valid tax invoice being provided in respect of the GST exclusive consideration.

33. Taxation

- (a) Unless otherwise expressly provided in this Subcontract, the Subcontractor must pay all taxes due in connection with the Subcontract.
- (b) The Subcontractor acknowledges and agrees that it will be liable for and has made adequate allowance in the Subcontract Sum for:
 - (i) all taxes other than GST;
 - (ii) all costs relating to currency exchange rate variations;
 - (iii) all duties including, stamp duty, customs duty and import duty; and
 - (iv) all costs relating to the imposition of any new taxes, duties or the like, or a change in any of them.

34. Default, termination and Insolvency Events

34.1 By the Subcontractor

If:

- (a) the Subcontractor suffers an Insolvency Event;
- (b) the Subcontractor commits a material breach of any of its obligations under the Subcontract, which breach is not cured within seven (7) days following

receipt of written notice from the Contractor, or by its nature cannot be cured;

- (c) the Subcontractor assigns the Subcontract or any payment or any other right or benefit or interest in the Subcontract without the prior written approval of the Contractor;
- (d) in the reasonable opinion of the Contractor's Representative the Subcontractor's delays in performing the Subcontract Work will inhibit the progress of the Contractor to the extent that there is a real risk that the Contractor will be delayed in completing its work by the date required by the Contractor's client;
- (e) the Subcontract includes a limit on the Subcontractor's liability under Clause 27 and the Contractor's Representative determines that the current liability exceeds the limit; or
- (f) there is, in the Contractor's reasonable opinion, a Change in Control or ownership of the Subcontractor, without the Contractor's prior written consent, such consent not to be unreasonably withheld,

the Contractor may by written notice to the Subcontractor:

- (g) take out of hands of the Subcontractor the whole or part of the work remaining, complete that work, and take possession of any of the Subcontractor's plant or other things required to complete the Subcontract Works; or
- (h) (provided that the Contractor is not prohibited from doing so under the Ipso Facto Laws) terminate the Subcontract.

34.2 Procedure if work is taken out of hands

When work is taken out of hands of the Subcontractor, the Contractor shall (either itself or through others) carry out and complete the work and provided that the Contractor is not prohibited from doing so under the Ipso Facto Laws suspend all payments (including any payments due) to the Subcontractor until the Contractor's Representative has determined the cost incurred by the Contractor in carrying out and completing the work which shall be a debt due and payable by the Subcontractor to the Contractor.

34.3 By the Contractor

- (a) If the Contractor fails to make payment of an amount included in a payment schedule within 20 Business Days of the due date for payment; or suffers an Insolvency Event, the Subcontractor may give the Contractor a written notice to show cause.
- (b) The Subcontractor's notice must state:
 - (i) that it is a notice under this clause; and
 - (ii) that payment has not been made, or that the Subcontractor has reasonable evidence that the Contractor has suffered an Insolvency Event; and

- (iii) that the Contractor is required to show cause why the Subcontractor should not exercise its rights under this clause; and
 - (iv) the date, time (which must not be less than ten (10) Business Days after the date of the notice) and place by which the Contractor must show cause.
- (c) If the Contractor does not show reasonable cause by the date, time and place required by a notice issued under this clause; the Supplier may:
- (i) suspend the Subcontractor Works until the payment is made; or
 - (ii) (provided that the Subcontractor is not prohibited from doing so under the Ipso Facto Laws) terminate the Subcontract.

34.4 Termination for Convenience

- (a) The Contractor may, at its absolute discretion, and without being obliged to give any reasons, terminate this Subcontract at any time by giving written notice of termination to the Subcontractor.
- (b) Notwithstanding any other clause in this Subcontract, if the Subcontract is terminated in accordance with this clause 34.4, the Contractor's total liability to pay the Subcontractor is limited to:
 - (i) the value of the Subcontract Work completed in accordance with the Subcontract up until the date of termination;
 - (ii) the direct cost to the Subcontractor of any plant, equipment or materials ordered for the Subcontract conditional upon the Subcontractor delivering them to the Site or a place advised by the Contractor; and
 - (iii) an amount for profit on work still to be undertaken equal to one per cent (1%) of the balance of the then approved Subcontract Sum after taking into consideration the value and cost of clauses 34.4(b)(i) and 34.4(b)(ii);
 - (iv) less any amounts already paid to the Subcontractor, and any amount the Contractor is or may be entitled to deduct or setoff.
- (c) The Contractor is entitled to engage others to perform the whole or any part of the works remaining following termination under this clause.

34.5 Consequence of termination

- (a) Termination of the Subcontract will not relieve the parties of their respective obligations or deprive them of any rights which are intended, expressly or by implication, to survive termination.
- (b) Upon receipt of termination notice, the Subcontractor must cease all Subcontract Work to the extent specified in the notice and take all such other action as may be necessary or as the Contractor may direct for the transfer, protection or preservation of property and contract rights which are related to the termination.

- (c) The Subcontractor must use its best endeavours to minimise the cost of termination of the Subcontract.

35. Disputes

35.1 Court proceedings

Nothing in this clause 35 prevents either party from seeking urgent injunctive or other interim relief from a court, or from continuing existing court proceedings.

35.2 Dispute resolution

- (a) If a Dispute arises, a party may give the other party a written notice of dispute which must adequately identify and provide details of the Dispute.
- (b) Within 15 Business Days of receipt of the notice the parties must meet and use genuine efforts to resolve the dispute or agree on an alternate dispute resolution method.
- (c) If, within 20 Business Days of receipt of the notice the parties are unable to resolve the Dispute, or agree on an alternate dispute resolution method, the Dispute shall be referred as follows:
 - (i) where the Dispute is purely in respect of the value, or the method of valuing, an Independent QS in accordance with clause 35.3 with the valuation certificate being final and binding and not subject to appeal; and
 - (ii) for all others, expert determination in accordance with clause 35.4 with the determination being final and binding and not subject to appeal.

35.3 Independent QS

The Independent QS shall use methods it deems appropriate to value the Dispute and issue a written valuation certificate.

35.4 Expert determination

If the parties cannot agree on an expert within 20 Business Days of the Dispute being referred, the chairperson of the state or territory of the Site of Resolution Institute shall nominate the expert. The Resolution Institute's Expert Determination Rules shall apply.

35.5 Costs

Each party must bear its own costs of complying with this clause 35, and split the costs of any Independent QS or expert.

36. Liability and Indemnities

36.1 Excluded loss

To the maximum extent permitted by law, the Contractor will not be liable to the Subcontractor for any indirect or consequential loss, economic, incidental or special

loss or for any loss of production or production stoppage, loss of profit or anticipated profit, loss of revenue or other form of consideration, loss of savings or anticipated savings, loss of use, loss of data, loss of contract or repudiation of contract, loss of goodwill or reputation or loss of business opportunity, business interruption, holding over or overhead loss, loss of future business or for any punitive or exemplary damages.

36.2 Subcontractor Indemnity

- (a) The Subcontractor must indemnify the Contractor, its officers, employees and agents from and against all costs (including reasonable legal fees), losses, claims, damages and liabilities arising from or in connection with:
- (i) the personal injury, illness or death of any person;
 - (ii) any loss of or damage to any property of any person, including the Site or the Subcontract Works;
 - (iii) any acts, defaults or omissions of a Lower Tier Subcontractor (including their employees and agents);
 - (iv) any failure to comply with clause 6, 9 or 10;
 - (v) the Contractor not being able to fully recover because of the operation of provisions of Proportionate Liability Legislation;
 - (vi) the Subcontractor Works not being in accordance with the requirements of the Subcontract;
 - (vii) suspension by a Lower Tier Subcontractor under the Security of Payment Act; payment by the Contractor of a Lower Tier Subcontractor pursuant to clause 31.3; and any payment of a Lower Tier Subcontractor by the Contractor of an adjudicated amount identified on an adjudication certificate issued by an authorised nominating authority,
- arising out of or in connection with the Subcontract, but the indemnity will be proportionately reduced to the extent that a negligent act or omission of the Contractor directly contributes to the injury, death, loss or damage.
- (b) Each indemnity of the Subcontractor is a continuing obligation, separate and independent from the other obligations of the Subcontractor (including any obligation to pay liquidated damages) and survives the termination or expiration of this Subcontract.
- (c) It is not necessary for the Contractor to incur expense or to make any payment before enforcing a right of indemnity conferred by the Subcontract.
- (d) The Subcontractor shall pay on demand any amount it is obliged to pay to the Contractor under any indemnity in this Subcontract.

37. Relationship of the parties

The parties acknowledge and agree that:

- (a) each party enters into the Subcontract as an independent contractor, acting on its own behalf, not as agent or trustee for any other person;
- (b) the Subcontract does not give rise to any relationship of principal and agent, trustee and beneficiary or employer and employee; and
- (c) neither party has authority to act as agent for the other or to bind the other, except as expressly agreed in writing.

38. Notices

38.1 Service and notices

- (a) A notice, demand, consent, approval or communication under this agreement (**Notice**) must be:
 - (i) in writing, in English and signed by a person duly authorised by the sender; and
 - (ii) marked for the attention of the person, and hand delivered or sent by prepaid post or email to:
 - (A) for a Notice to the Contractor, the address specified in Item 1 of Schedule 1; or
 - (B) for a Notice to the Subcontractor, the address identified in Item 2 of Schedule 1,as varied by any Notice given by the recipient to the sender.
- (b) Communications by email need not be marked for the attention in the way required by clause 38.1(a)(ii). However, the email must state the first and last name of the sender. Communications sent by email are taken to be signed by the named sender.

38.2 Effective on receipt

A Notice given in accordance with clause 38.1 takes effect when taken to be received (or at a later time specified in it), and is taken to be received:

- (a) if hand delivered, on delivery;
- (b) if sent by prepaid post, six Business Days after the date of posting (or ten Business Days after the date of posting if posted to or from a place outside Australia); or
- (c) if sent by email, at the time the email was sent unless the sender receives an automated message that the email has not been delivered,

but if receipt is not on a Business Day or is after 5.00pm on a Business Day (in the time zone of the addressee), the Notice is taken to be received at 9.00am on the next Business Day.

39. General

39.1 Governing law and jurisdiction

This agreement will be governed by and construed in accordance with the laws in force in the governing jurisdiction stated in Schedule 1 and each party submits to the non-exclusive jurisdiction of the courts of that jurisdiction.

39.2 Amendment

This agreement may not be amended or varied unless the amendment or variation is in writing signed by all parties.

39.3 Waiver

- (a) Waiver of any power or right under this agreement by the Contractor must be in writing signed by the parties and is effective only to the extent set out in that written waiver.
- (b) The failure of the Contractor at any time to require full or partial performance of any provision of the Subcontract will not affect in any way the full right of the Contractor to require that performance of that provision subsequently.
- (c) The waiver by any Party of a breach of a provision of the Subcontract will not be deemed a waiver of all or part of that provision or of any provision or of the right of that party to avail itself of its rights subsequently.

39.4 Survival

Provisions of the Subcontract which by their nature, are intended to survive, survive termination or expiry of the Subcontract.

39.5 Severance

- (a) The parties agree that a construction of this Subcontract that results in all provisions being enforceable is to be preferred to a construction that does not so result.
- (b) If, despite the application of this clause, a provision of this Subcontract is illegal or unenforceable:
 - (i) if the provision would not be illegal or unenforceable if a word or words were omitted, that word or words are severed; and
 - (ii) in any other case, the whole provision is severed,and the remainder of this Subcontract continues in force.

39.6 Rights, remedies additional

Any rights and remedies that a person may have under this agreement are in addition to and do not replace or limit any other rights or remedies that the person may have.

Schedule 3 Subcontract Works

[Insert description of Subcontract Works]

Schedule 4 Documents included in the Subcontract

[Insert the drawings, specifications, schedule and other documents that are to form part of the Subcontract]

Schedule 5 Deed of Release

SUBCONTRACTOR: [INSERT]

PROJECT NAME/ ADDRESS: [INSERT]

SUBCONTRACT: [INSERT DESCRIPTION] (**Subcontract**)

The Subcontractor agrees that the total monies payable by the Contractor under or in any way arising out of the Subcontract is as follows:

Original Subcontract Sum

Adjustment – additions

Adjustment – deductions

Final adjusted Subcontract Sum

Progress payments paid to date (excluding GST)

Balance due (excluding GST)

Including retention – if applicable

1. Capitalised terms used in this Deed of Release have the meaning given in the Subcontract.
2. The Subcontractor agrees that, to the extent permitted by law, the total of the monies now due or that may in the future become due arising out of or in any way connected with the Subcontract or the Subcontract Works or any other works executed by the Subcontractor or any of its Personnel or Lower Tier Subcontractors is [INSERT FINAL PAYMENT AMOUNT] (**Final Payment**).
3. The Subcontractor acknowledges, to the extent permitted by law, payment by the Contractor to the Subcontractor of the final payment and release by the Contractor of the security is acceptance by the Subcontractor of full and final payment to the Subcontractor of all amounts due and payable now or in the future in connection with the Subcontract and the Subcontract Works or any other works executed by the Subcontractor, its Personnel or Lower Tier Subcontractors. Except that, in the event the Contractor is entitled to retain liquidated damages under the Subcontract but has not at the date of the deed exercised this right, the Contractor reserves its rights to liquidated damages.
4. In consideration of the promises contained in this deed and the payment by the Contractor of the final payment and the return or release of security to the Subcontractor, to the extent permitted by law, the Subcontractor waives, releases and forever discharges the Contractor from any and all claims, actions, proceedings or demands which the Subcontractor has now or might have against the Contractor in the future whether arising under or in connection with the Subcontract or in any way connected with the execution of the Subcontract Works or for the work performed or materials supplied at the Site.
5. The Subcontractor acknowledges that this deed may be pleaded as a complete and unconditional bar to any proceedings of whatever nature sought to be instituted, filed or maintained against the Contractor by the Subcontractor after the date of this deed of release.

Executed as a deed poll by [INSERT] in accordance with section 127 of the *Corporations Act 2001* (Cth):

Signature of Director

Signature of Director/Secretary

Name of Director

Name of Director/Secretary

Schedule 6 Non-Subcontract documents

[Insert the drawings, specifications, schedule and other documents that are not to form part of the Subcontract.]

Non-Subcontract Documents, do not form part of the Subcontract and were provided solely for the convenience of the Subcontractor and that the Contractor does not warrant, guarantee or make any representation about the accuracy, quality, completeness or adequacy of the them, shall not be liable for errors or misleading statements within them, or have any duty of care in connection with the information identified in them.]

(Refer Clause 2(b) of the Formal Instrument of Agreement)