

## CITY OF SWAN GENERAL CONDITIONS OF CONTRACT FOR THE PROVISION OF WORKS AND SERVICES

(Part 3 of Request Document)

### 3.1 Governing Law

The Contract is governed by the Laws of Western Australia and all parties submit to the jurisdiction of the Courts of Western Australia to resolve any dispute.

### 3.2 Definitions

In these Conditions:

**business day** means a day that is not a Saturday, Sunday or public holiday in Western Australia.

**Certificate of Practical Completion** means a lawfully authorised certificate issued by the Superintendent to the Principal and Contractor certifying:

- (a) that, save for Defect Liability Works, the Works are complete; and
- (b) the quantum of monies held by the Principal as the Retention Sum as at the Date of Practical Completion.

**Clean Up** means clearing away and removing from the Site all of the Contractor's plant, equipment, surplus materials, rubbish and temporary works, leaving the Site and Works in a clean and tidy condition to the satisfaction of the Superintendent.

**Contract** means all the documents which constitute the parties' written agreement.

**Contract Sum** means:

- (a) where payment is to be made for a fixed amount, then that amount exclusive of GST;
- (b) where payment is to be made of a Bill of Quantities or Schedule of Rates basis, the amount determined by having regard to (as is applicable):
  - (i) the quantities of goods and materials supplied by the Contractor to the Principal;
  - (ii) the price of each good and material;
  - (iii) the services supplied by the Contractor to the Principal; and
  - (iv) GST; or

- (c) if the Contract expressly provides for the Contractor being paid in part by a fixed amount and in part in accordance with any Bill of Quantities or Schedule of Rates, then the aggregate of (a) and (b).

**Contractor** means the party to the Contract who is not the Principal.

**Contractor Failure** means any or all of the events referred to in Clause 3.17(a).

**Contractor's Representative** means a competent person employed and appointed by the Contractor to be its representative for the Contract and Works.

**Date for Practical Completion** means the date stated in the Contract as being the Date for Practical Completion.

**Defects Liability Period** means the period commencing on the Date of Practical Completion and ending 52 weeks thereafter.

**Defects Liability Works** means the work that the Contractor must perform to:

- (a) rectify any and all defects and complete omissions in the Works;
- (b) comply with any and all directions issued by the Superintendent; and
- (c) Clean Up in respect of (a) and (b).

**Final Certificate** means a lawfully authorised certificate issued by the Superintendent to the Principal and Contractor certifying:

- (a) that the Contractor has completed the Works; and
- (b) the quantum of monies held by the Principal as the Retention Sum (if any) as at the date that the Final Certificate was issued.

**GST** means goods and services tax as is applicable pursuant to *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Laws** means all relevant Acts, Regulations, by-laws, orders, proclamations, the common law and equity.

**parties** means both of the Principal and Contractor.

**party** means each of the Principal and Contractor.

**Principal** means the City of Swan.

**Retention Sum** means the security granted by the Contractor to the Principal:

- (a) for an amount equal to 5% of the Contract Sum; and

- (b) which shall be withheld from the Contractor by the Principal progressively at a rate of:
- 5% x (the amount referred to in Clause 3.12(c)(ii) less the amount referred to in Clause 3.12(c)(iii)).

**Safety Management Plan** means the Contractor's written plan to establish and maintain an effective health and safety management system.

**Site** means the place described in the Contract as the Site.

**Superintendent** means the person appointed by the Principal, in writing, to be the Superintendent of the Contract and the Works.

**Superintendent's Certificate** means a certificate issued by the Superintendent pursuant to Clause 3.12(c).

**tax invoice** has the same meaning as in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

**Variation** means that work that is the subject of:

- (a) a written direction issued by the Superintendent in accordance with Clause 3.14(b)(i); or
- (b) a lawful, written agreement of the parties to vary the Works made in accordance with Clauses 3.14(b)(ii) and 3.14(d).

**Works** means the whole of the work, services, goods, materials, products and things to be carried out, performed, supplied and installed by the Contractor pursuant to the Contract, compliance with all directions issued by the Superintendent, all Variations, Clean Up and Defect Liability Works.

### 3.3 No Rise and Fall Adjustment

The Contract Sum is not subject to rise and fall adjustment.

### 3.4 Notices

- (a) Any notice given under the terms of the Contract must be in writing, signed by the issuing part or Superintendent (as is applicable) and sent by pre-paid post or email to or left at the recipient's address recorded in the Contract.
- (b) A notice is deemed to have been received by a party:
- (i) if sent by pre-paid post, upon the expiration of 3 business days after the date on which it was sent; or
- (ii) if sent by email:
- a. prior to 5.00pm on a business day, on that business day; or

- b. if not prior to 5.00pm on a business day, the next business day; or
- (iii) if left at an appropriate place at the party's address:
  - a. prior to 5.00pm on a business day, on that business day; or
  - b. if not prior to 5.00pm on a business day, the next business day.
- (c) A notice sent by email is deemed to have been signed by the sender if it expressly records that it is sent by the sender.

### **3.5 Legal Compliance**

- (a) The Contractor must, at its expense, comply with all applicable Laws.
- (b) The Contractor must indemnify the Principal and Superintendent to the extent that either or both of them suffer or incur expense, cost, damage, loss, liability or penalty by reason of the Contractor's failure to comply with Clause 3.5(a).

### **3.6 Assignment and Subcontracting**

- (a) Neither party may assign its rights or obligations under the Contract.
- (b) The Contractor must not subcontract any part of the Works without the Principal's prior written consent.

### **3.7 Contractor's Provision of All Things Necessary to Perform and Protect the Works**

- (a) The Contractor must, at its own expense, comply with all directions issued by the Superintendent.
- (b) During the period, from starting the Works to the Date of Practical Completion, alternatively the Contract's termination, the Contractor must protect the Works (**Protection Period**).
- (c) The Contractor:
  - (i) is solely liable to the Principal for any damage suffered during the Protection Period; and
  - (ii) must, if any of the Works are lost or damaged during the Protection Period from any cause whatsoever, indemnify the Principal for the replacement or repair (at the Principal's election) of the Works.
- (d) The indemnity referred to in Clause 3.7(c) shall be reduced proportionately to the extent that the damage to or loss of the Works is directly caused by the Principal's or the Superintendent's negligence.

**3.8 Time for Commencement and Completion**

- (a) The Contractor must start the Works on the Site within 14 days of being given access to the Site. The time of 14 days may be extended at the discretion of the Principal.
- (b) Before starting the Works, the Contractor must give the Superintendent 3 business days' notice in writing.
- (c) The Contractor must complete the Works (save for Defect Liability Works) by the Date for Practical Completion.
- (d) The Contractor must complete all Defect Liability Works:
  - (i) as promptly as possible;
  - (ii) at a rate of progress satisfactory to the Superintendent; and
  - (iii) prior to the expiration of the Defects Liability Period.
- (e) Time is of the essence.

**3.9 Materials**

- (a) All materials and things used in and incorporated into the Works by the Contractor must be fit for their purpose and, unless expressly specified otherwise by the Contract, be new.
- (b) The Superintendent may reject any material or Works which is not in accordance with the Contract. The Superintendent may direct the Contractor to replace, correct or remove the material or Works and the cost of complying with that direction will be borne by the Contractor.

**3.10 Contractor's Representative**

- (a) The Works shall be supervised, whenever it is necessary (which is to be determined by the Superintendent), by the Contractor's Representative.
- (b) Any order given by the Superintendent to the Contractor's Representative shall be deemed to be an order given to the Contractor.

**3.11 Cleaning Up**

- (a) The Contractor must, at its own expense, at all times keep the Site clean and free of hazards.
- (b) The Contractor must not obstruct access to and from the Site.

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**3.12 Payment and Retention Sum**

- (a) Unless otherwise provided, the Contractor shall be entitled at intervals of not more frequent than one month, to issue to the Superintendent a progress claim recording:
  - (i) an itemised description of the Works that the Contractor asserts it has performed with sufficient details so as to allow the Superintendent to determine whether or not payment for such Works is due;
  - (ii) the progress of the Works that are the subject of the progress claim – expressed as a percentage;
  - (iii) the value of the Works performed by the Contractor in the period to which the progress claim relates;
  - (iv) any setoff that the Contractor asserts the Principal is entitled to apply pursuant to Clause 3.12(o);
  - (v) that portion of any payment purportedly owed by the Principal to the Contractor that is to be withheld as the Retention Sum (or any portion of it); and
  - (vi) GST purportedly payable by the Principal to the Contractor.
- (b) To the extent that the Works include the Contractor's purchase or supply of any:
  - (i) goods, materials, products or things, the Contractor is not entitled to any payment for such goods, materials, products or things until they are at the Site and permanently incorporated into the Works; or
  - (ii) plant, equipment or tools, the Contractor must not claim for and is not entitled to any payment for the same.
- (c) Within 21 days of the Superintendent receiving the Contractor's progress claim, the Superintendent must inspect the Works that are subject of the progress claim and provide to the Principal and Contractor, the Superintendent's Certificate recording the Superintendent's assessment of:
  - (i) the progress of each item that is the subject of the progress claim – expressed as a percentage;
  - (ii) the value of the Works performed by the Contractor in the period to which the progress claim relates;
  - (iii) any setoff that the Principal is entitled to make by reason of Clause 3.12(o);
  - (iv) that portion of any payment owed by the Principal to the Contractor that is to be withheld as the Retention Sum; and
  - (v) the GST payable by the Principal to the Contractor.

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- (d) The Superintendent must act fairly, reasonably and lawfully when assessing the Contractor's progress claim and issuing the Superintendent's Certificate.
  - (e) Upon receiving the Superintendent's Certificate, the Contractor:
    - (i) may issue to the Principal a tax invoice that accurately accords with the Superintendent's Certificate; but
    - (ii) must not issue to the Principal a tax invoice that seeks payment in excess of the Superintendent's Certificate.
  - (f) Within 14 days of the Principal receiving the Contractor's invoice that accords with the Superintendent's Certificate, the Principal must pay to the Contractor that amount that the Superintendent has certified is owed by the Principal to the Contractor exclusive of the Retention Sum.
  - (g) Subject to Clauses 3.12(j), 3.12(k), 3.12(l) and 3.17(c)(v), the Principal may withhold from the Contractor the Retention Sum or any portion of it.
  - (h) The Principal may have recourse to and apply any and all monies held by it as the Retention Sum to pay or discharge any indemnity or liability that the Contractor has to the Principal by reason of the terms of the Contract, a breach of the Contract or breach of any Laws.
  - (i) If prior to the issue of a Certificate of Practical Completion, the Principal has recourse to any or all of the Retention Sum (**Recourse Event**), then:
    - (i) within 14 days of the Recourse Event, the Contractor must pay to the Principal such an amount that would reinstate the quantum of the Retention Sum to its value immediately prior to the Recourse Event (**Reinstatement Amount**); and
    - (ii) the Reinstatement Amount is deemed to be part of the Retention Sum.
  - (j) Upon the Superintendent issuing to the Contractor and Principal a Certificate of Practical Completion, the Contractor may issue to the Principal a tax invoice for an amount equal to 50% of the monies certified by the Superintendent as being held by the Principal as the Retention Sum as at the Date of Practical Completion.
  - (k) Within 35 days of the Principal receiving the Contractor's lawfully issued and accurate tax invoice referred to in Clause 3.12(j), the Principal must pay to the Contractor, 50% of the monies certified by the Superintendent as being held by the Principal as the Retention Sum as at the Date of Practical Completion.
  - (l) The Principal is not liable to pay to the Contractor any remaining portion of the Retention Sum (if any) until 35 days after:
    - (i) the Superintendent has issued to the Contractor and Principal a Final Certificate; and

- (ii) the Contractor has issued to the Principal a tax invoice for an amount equal to the monies certified by the Superintendent in the Final Certificate as being held by the Principal as the remainder of the Retention Sum.
- (m) The Contractor is not entitled to interest earned or accrued on any monies held as the Retention Sum.
- (n) The:
  - (i) Superintendent's assessment of any progress claim; and
  - (ii) Principal's payment of any tax invoice (whether it be in respect of a progress claim or for any or all of the Retention Sum);

is provisional only and does not constitute the Principal's or Superintendent's approval or acceptance of any Works.
- (o) The Principal may setoff from any monies owed by it to the Contractor pursuant to the Contract any amount owed by the Contractor to the Principal by reason of Clause 3.5(b), 3.7(c), 3.12(i), 3.15(d), 3.17(c)(iii) and/or 3.17(c)(iv).
- (p) All payments made pursuant to the Contract are to be in Australian Dollars.

### **3.13 Defects Liability Period**

During the Defects Liability Period, the Contractor must perform the Defects Liability Works.

### **3.14 Variation**

- (a) The Contractor must not vary the Works other than in accordance with Clause 3.14.
- (b) If, at any time during the term of the Contract, the Principal or Superintendent determines that the form, quality or quantity of the Works ought to be varied, the Superintendent may, in writing:
  - (i) direct the Contractor to decrease or omit any part of the Works; and
  - (ii) ask the Contractor to increase or change the character or quality of any of the Works.
- (c) If the Superintendent directs the Contractor to decrease or omit any part of the Works, the Contract Sum must be decreased in an amount equal to the value of the decreased or omitted Works, having regard to the Contract.
- (d) If the Superintendent asks the Contractor to increase or change the character or quality of the Works, then prior to the Contractor commencing any such works, the parties must, in writing, agree:



- (i) the price for the Variation Work; and
- (ii) if and insofar as the Variation Work will result in an extension of the Date for Practical Completion.

### 3.15 Intellectual Property

- (a) The Contractor warrants that each and every design, document, working method and material that it prepares, creates, employs, applies, uses or disseminates to perform the Works or in relation to the Contract does not and will not infringe any copyright, patent, registered design, trademark or other intellectual property right of any person.
- (b) All copyright and property in each and every design, document, working method and material (whether in draft, revision or final) prepared or created by either or both of the Principal or Contractor for the purpose of the Contract, vests in the Principal.
- (c) The Principal grants to the Contractor a non-exclusive licence to use the designs, documents, working methods and materials referred to in Clause 3.15(b) for the sole purpose of completing the Works.
- (d) The Contractor must indemnify the Principal to the extent that the Principal suffers or incurs expense, cost, damage, loss or liability by reason of the Contractor's breach of warranty expressed in Clause 3.15(a).

### 3.16 Confidentiality

- (a) The Contractor must treat as and keep confidential all information that is (**confidential information**):
  - (i) disclosed or made known to the Contractor by the Principal or its agents; and
  - (ii) not information that is available to the general public in Western Australia.
- (b) The Contractor must not use, disclose or authorise the use or disclosure of any confidential information to any person without the prior written consent of the Principal.

### 3.17 Contractor's Default

- (a) If the Contractor:
  - (i) fails to commence the Works within the period specified by the Contract;
  - (ii) fails to carry out the Works at a rate of progress satisfactory to the Superintendent;
  - (iii) fails to comply with Clause 3.9 or 3.12(i);

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- (iv) neglects or omits to carry out, perform or satisfy any direction issued by the Superintendent;
  - (v) fails to provide to the Principal copies of the insurance contracts that the Contractor is obliged to effect and maintain in accordance with the Contract;
  - (vi) is issued with an improvement or prohibition notice by any regulatory authority, including but not limited to WorkSafe or Department of Mines and Petroleum; or
  - (vii) intimates that it is unwilling or unable to perform the Works;

and the Contractor Failure persists for 7 days after the Principal has, in writing, notified the Contractor of:

- a. the Contractor Failure; and
- b. the Principal's intention to terminate the Contract if the Contractor does not immediately remedy the Contractor Failure;

then the Principal may, without prejudice to any other rights that the Principal has or may have pursuant to any Laws, terminate the Contract by written notice.

(b) If the Contractor:

- (i) causes or contributes to the death of any person whilst at the Site; or
- (ii) becomes bankrupt or externally administered in accordance with Chapter 5 of the *Corporations Act 2001* (Cth) (as is applicable);

then the Principal may, by giving the Contractor written notice, immediately terminate the Contract.

(c) If the Principal terminates the Contract pursuant to Clause 3.17(a) or 3.17(b), then:

- (i) the Principal's liability to the Contractor arising from or in any way connected to the Contract and Works is limited to that portion of the Contract Sum that is payable for the entire Works that have been completed and are free of defects;
- (ii) the Principal's liability to the Contractor arising from or in any way connected to any Variations is limited to that portion of the agreed price for the Variations that is payable for the Variations that have been completed and are free of defects;
- (iii) the Contractor must indemnify the Principal for any and all expense, cost, damage, loss or liability that the Principal suffers or incurs by reason of the Contractor not having completed the Works for the Contract Sum and Variations for the agreed price;
- (iv) without limiting the rights of the Principal, the Principal may:

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- a. have recourse to and apply any and all of the monies held by the Principal as the Retention Sum to pay or discharge any indemnity or liability owed by the Contractor to the Principal pursuant to the Contract; and
  - b. recover from the Contractor any loss, expenses or damage suffered or incurred by the Principal by reason of the Contractor not having completed the entire Works for the Contract Sum or Variations for their agreed price; and
- (v) if, after the application of Clause 3.17(c)(iv), the Principal holds any of the Retention Sum (**Retained Amount**), within 14 days of the Principal receiving the Contractor's tax invoice for the Retained Amount, the Principal must pay the Retained Amount to the Contractor.

### 3.18 Principal's Default

If the Principal fails to make a payment that is by reason of Clause 3.12(f), 3.12(k) or 3.12(l), due and payable to the Contractor and that failure persists for 7 days after the Contractor has, in writing, notified the Principal of:

- (a) the Principal's failure; and
- (b) the Contractor's intention to terminate the Contract if the Principal does not immediately remedy the Principal's failure;

then the Contractor may, without prejudice to any other rights that the Contractor has or may have pursuant to any Laws, terminate the Contract by written notice.

### 3.19 Resolution of Disputes

All disputes whether raised during the Works or after the completion of the Works must, unless the parties agree otherwise in writing, be referred to a mediator, who shall be appointed either by:

- (a) the written agreement of the parties; or if agreement cannot be reached
- (b) the Resolution Institute.

### 3.20 Document Retention

The Contractor must, at its own cost, for 7 years following the completion or termination of the Contract, keep and maintain in good condition all documents and records that the Contractor prepared, created or received that relate to the Contract or Works and, within 7 days of receiving the Principal's written request, permit the Principal to inspect and copy those documents and records.

**3.21 Entire Agreement**

The Contract constitutes the entire agreement between the parties regarding the Works. It supersedes any and all previous arrangements, correspondence, quotes, purchase orders, tenders, representations, proposals, understandings and communications between the parties.

**3.22 Severability**

If any provision or part of the Contract becomes void or unenforceable, then that provision or part will be severed from the Contract and the rest of the Contract will remain in full force and effect.

**3.23 Amendment and Waiver**

- (a) No term of the Contract or right or obligation of a party arising from or under the Contract is amended, waived, discharged or released without the parties' prior written agreement signed by them.
- (b) A party's waiver of a right arising from or under the Contract does not prejudice that party's rights in respect of any subsequent breach of the Contract.

**3.24 Joint and Several Obligations and Liabilities**

If the Contractor is a partnership or comprised of two or more entities, then each of the partners or entities comprising the Contractor shall be bound to the Contract jointly and severally.

**3.25 Survival**

The following Clauses survive the expiry or termination of the Contract 3.1, 3.7(c), 3.7(d), 3.12(g), 3.12(h), 3.12(l), 3.12(m), 3.12(o), 3.12(p), 3.15, 3.16, 3.17(c) and 3.19 to 3.25.