

## **CDI GROUP PTY LTD**

ABN 92 056 787 734

## **CDI (WA) PTY LTD**

ABN 14 132 387 038

## **CDI PROPERTY SERVICES PTY LTD**

ABN 35 605 645 476

## **BALLARDONG CDI CONTRACTING PTY LTD**

ABN 18 661 913 622

# General Conditions of Subcontract for Works

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## General Conditions of Subcontract

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### 1. Definitions and interpretation

#### 1.1 Definitions

In this Subcontract, unless the context otherwise requires:

**‘Acceleration Direction’** is defined in clause 7.6(b).

**‘Anti-Corruption Laws’** means Laws relating to anti-bribery or anti-corruption, including:

- (a) the *US Foreign Corrupt Practices Act 1977*;
- (b) the *UK Bribery Act 2010*; and
- (c) the *Australian Criminal Code Amendment (Bribery of Foreign Public Officials Act) 1999*.

**‘Approved Subcontractor’** means the subcontractors approved by CDI as specified in item 1 of the Schedule of Subcontract Information or as otherwise approved by CDI in writing.

**‘Australian Standard’** means any applicable standard published by Standards Australia and any other standard or specification which applies by Law.

**‘Authority’** is any body which has a right to impose a requirement or whose consent is required with respect to the Project, the Head Contract Works or the Works.

**‘Background Intellectual Property’** means the Subcontractor and Subcontractor Personnel’s Intellectual Property Rights which:

- (a) are in existence at the Effective Date and any improvements or modifications thereto; or
- (b) come into existence after the Effective Date otherwise than in connection with this Subcontract.

**‘Bank’** means a bank of good repute and financial standing, that is approved by CDI, which approval will not be unreasonably withheld or delayed and which has a credit rating of A under the Standard & Poor’s Long-Term Issuer Credit Ratings.

**‘Buildability Problem’** means any ambiguities, inadequacies, inconsistencies, incompleteness or lack of co-ordination or integration of, between or in any documents which make up the Scope of Work, the Specification and the Drawings which:

- (a) cause a problem, difficulty or complexity relating to:
  - (i) the means, methods or techniques by which Work under the Subcontract is to be performed; or
  - (ii) the co-ordination or integration of the Work under the Subcontract; or

- (b) without limiting paragraph (a), a Relevant Contractor, including having done what the Subcontractor warrants that it did in preparing its tender for the Work under the Subcontract, would reasonably have foreseen as involving additional work to ensure that the part of the Works to which the ambiguities, inadequacies, inconsistencies, incompleteness or lack of co-ordination or integration relates, would be suitable for its intended purpose and otherwise compliant with this Subcontract.

**‘Business Day’** means a day on which trading banks are open for business in Perth, Western Australia.

**‘Certificate of Substantial Completion’** is a certificate issued to CDI under clause 7.7.

**‘CDI’** means the party defined as ‘CDI’ in the Formal Instrument of Agreement.

**‘CDI Material’** means any Material provided by CDI to the Subcontractor for the purposes of this Subcontract, or which is copied or derived from Material so provided.

**‘CDI's Drug and Alcohol Policy’** means CDI's drug and alcohol policy, as provided to the Subcontractor.

**‘CDI's Construction Programme’** means the programme relating to the Work under the Subcontract, as referred to in Schedule 15 and provided by CDI to the Subcontractor.

**‘CDI's HSEQ Plan’** means CDI's Health, Safety, Environment and Quality Plan, as provided to the Subcontractor.

**‘CDI's Quality Inspection Checklist’** means CDI's quality inspection checklist, as provided to the Subcontractor.

**‘CDI's Related Works Contractors’** means other contractors engaged by CDI to perform other works on or in the vicinity of the Site or the Works.

**‘CDI's Representative’** is the person named as such in item 2 of the Schedule of Subcontract Information.

**‘CDI's Requirements’** means the set of CDI's (and, where applicable, the Principal's) requirements, standards, specifications, policies and procedures contained in the Scope of Work (all as amended from time to time).

**‘Certificate of Substantial Completion’** means the certificate issued under clause 7.7(b)(i) certifying that Substantial Completion has been achieved.

**‘Claim’** includes any claim for payment of money (including damages) or for an extension of time at Law or in equity including in contract, in tort (including for negligence), under statute or in restitution whether by the Subcontractor against the Indemnified Parties or by CDI against the Subcontractor.

**‘Conflict of Interest’** means a conflict of interest which will or might reasonably be considered to have a material adverse effect on the ability of the Subcontractor or the Subcontractor Personnel to carry out the obligations under this Subcontract, whether that conflict of interest is perceived or actual.

**‘Consequential Loss’** means any loss of income, loss of revenue, loss of profit (actual or

anticipated), loss of financial opportunity, loss of business or loss of business opportunity or loss of goodwill, whether present or future, fixed or unascertained, actual or contingent.

**‘Date for Substantial Completion’** is the date by which the Subcontractor must achieve Substantial Completion, being the date stated in item 3 the Schedule of Subcontract Information, as adjusted (if applicable) under this Subcontract.

**‘Date of Substantial Completion’** is the date certified in a Certificate of Substantial Completion.

**‘Defect’** means any material or workmanship not in accordance with this Subcontract, any defect in or arising from the Works or any other aspect of the Works not in accordance with this Subcontract, including any failure to meet any performance warranty or guarantee.

**‘Defects Correction Period’** means the period stated in item 4 of the Schedule of Subcontract Information.

**‘Design Material’** means where Special Condition 1 applies, all documents, information, Drawings and plans necessary for the Works to be completed by the Subcontractor in accordance with the Subcontract.

**‘Design Review Date’** means, where Special Condition 1 applies, the date stipulated in the Schedule of Subcontract Information.

**‘Documentation’** includes software (including source code and object code versions) manuals, drawings, diagrams, graphs, charts, projections, specifications (including the Specification), estimates, records, concepts, documents, accounts, plans, formulae, designs, methods, techniques, processes, supplier lists, price lists, customer lists, market research information, correspondence, letters and papers of every description including all copies of and extracts from the same.

**‘Drawings’** means the drawings contained in Schedule 8.

**‘Effective Date’** means the date set out in item 5 of the Schedule of Subcontract Information or, if not set out in the Schedule of Subcontract Information, the date the Subcontract is signed by CDI.

**‘Encumbrances’** means any restrictions, conditions, covenants, liens, charges, mortgages, security interests, claims or encumbrances of any nature.

**‘ERS System’** means the evaluated receipt settlement system by which CDI automatically creates a Recipient Created Tax Invoice at the time that a Payment Schedule is issued by CDI in respect of a Payment Claim using the Subcontractor's Payment Claim Number as the invoice number and then making payment to the Subcontractor against the ERS System invoice based on the payment terms.

**‘Excepted Risk’** means each risk specified in item 6 of the Schedule of Subcontract Information.

**‘Existing Plant’** is the existing plant, if any, located at the Site as at the Effective Date, including the plant referred to in the Schedule of Subcontract Information.

**‘Force Majeure Event’** is any event or circumstance (or combination of events and circumstances) which occurs in Australia and:

- (a) is beyond the control of the party affected by that event or circumstance or both;
- (b) causes delay in, or prevention of, the performance by the affected party of any of its obligations under this Subcontract; and
- (c) cannot be prevented, overcome or remedied by the exercise by the affected party of a standard of care and diligence consistent with that of a prudent and competent construction contractor,

which:

- (d) affects the execution of the Work under the Subcontract at the Site; and
- (e) lasts for more than seven consecutive

days, but does not include:

- (f) other industrial-related disputes including strikes, lockouts, industrial difficulties, labour difficulties, work bans, blockades or picketing; or
- (g) wet or otherwise inclement weather.

**‘Formal Instrument of Agreement’** means the formal instrument of agreement, which forms part of the Subcontract and which is executed by CDI and the Subcontractor in relation to the Works.

**‘General Conditions of Subcontract’** means these general conditions of subcontract and **‘General Condition’** means a clause of these General Conditions of Subcontract.

**‘Good Industry Practice’** means, in respect of the Subcontractor, performance:

- (a) as would ordinarily be expected of a Relevant Contractor;
- (b) in a manner which is:
  - (i) efficient, professional and cost effective;
  - (ii) safe to the environment; and
  - (iii) in accordance with all applicable Laws;
- (c) by trained, knowledgeable and experienced personnel using high quality, safe and appropriate equipment, tools and procedures, and adopting the highest industry standards;
- (d) with an adequate number of skilled personnel, materials, resources and supplies in order to perform the Work under the Subcontract in accordance with this Subcontract; and
- (e) using new and high quality fixtures, fittings, finishes, plant and materials, which are free from defects and appropriate for the Works and the environment in which they are intended to be used,

and where this definition results in conflicting standards, the highest standard applies.



**‘Goods’** means any materials, supplies, machinery, equipment, fuel and other things used by the Subcontractor in performing the Work under the Subcontract and which are to be incorporated in the Works, or are to be consumed in executing the Work under the Subcontract.

**‘GST’** means the tax payable on taxable supplies under the GST Legislation.

**‘GST Legislation’** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any related Act imposing such tax or legislation that is enacted to validate, recapture or recoup such tax, and includes any subordinated legislation in respect of those Acts.

**‘Head Contract’** means the contract between CDI and the Principal specified in item 7 of the Schedule of Subcontract Information.

**‘Head Contract Works’** means the works to be performed by CDI under the Head Contract.

**‘High-Risk Construction Work’** includes:

- (a) any work defined as high risk in the 19 categories stated in the National Standard for Construction Work [NOHSC:1016 (2005)];
- (b) any work that exposes employees to any potential hazard and or risk that may cause serious incident, notifiable event, damage or harm and is required to be controlled through safe working methods; and
- (c) any works that by legislation requires licenses, permits, qualifications and/or certification.

**‘Head Contract Works’** means the works to be carried out by CDI pursuant to the Head Contract.

**‘Indemnified Parties’** means the Principal, CDI and each of their directors, officers, employees, contractors, consultants, subcontractors (other than the Subcontractor and the Subcontractor Personnel) and agents and related entities (as defined in section 9 of the *Corporations Act 2001* (Cth)).

**‘Insolvency Event’** means any one of the following:

- (a) the relevant party becomes, is declared to be, is taken under any applicable law (including the *Corporations Act 2001* (Cth)) to be, admits to or informs the other party in writing or its creditors generally that it is insolvent, an insolvent under administration, bankrupt, unable to pay its debts or is unable to proceed with the Subcontract for financial reasons;
- (b) execution is levied against the relevant party by a creditor;
- (c) a garnishee order, mareva injunction or similar order, attachment, distress or other process is made, levied or issued against or in relation to any asset of the relevant party and the effect of the same is that the relevant party is no longer able to perform its obligations under the Subcontract;
- (d) where the relevant party is an individual person or a partnership including an individual person, the relevant party:
  - (i) commits an act of bankruptcy;

- (ii) has a bankruptcy petition presented against him or her or presents his or her own petition;
- (iii) is made bankrupt; or
- (iv) applies for, agrees to, enters into, calls a meeting for the consideration of, executes or is the subject of an order or declaration in respect of:
  - A. a moratorium of any debts; or
  - B. a personal insolvency agreement or any other assignment, composition or arrangement (formal or informal) with creditors,  
  
by which his or her assets are subjected conditionally or unconditionally to the control of a creditor or trustee;
- (e) where the relevant party is a corporation, any one of the following:
  - (i) notice is given of a meeting of creditors with a view to the corporation entering into a deed of company arrangement;
  - (ii) a liquidator or provisional liquidator is appointed in respect of a corporation;
  - (iii) the corporation entering a deed of company arrangement with creditors;
  - (iv) a controller, restructuring practitioner, administrator, receiver, receiver and manager, provisional liquidator or liquidator (each as defined in section 9 of the *Corporations Act 2001* (Cth)) is appointed to the corporation;
  - (v) an application is made to a court for the winding up of the corporation and not stayed within 14 days;
  - (vi) any application (not withdrawn or dismissed within 7 days) is made to a court for an order, an order is made, a meeting is convened or a resolution is passed, for the purpose of proposing or implementing a scheme of arrangement other than with the prior approval of the Commonwealth under a solvent scheme of arrangement pursuant to Part 5.1 of the *Corporations Act 2001* (Cth);
  - (vii) a winding up order or deregistration order is made in respect of the corporation;
  - (viii) the corporation resolves by special resolution that it be wound up voluntarily (other than for a members' voluntary winding-up);
  - (ix) as a result of the operation of section 459F(1) of the *Corporations Act 2001* (Cth), the corporation is taken to have failed to comply with a statutory demand (as defined in the

*Corporations Act 2001 (Cth)*); or

- (x) a mortgagee of any property of the corporation takes possession of that property;
- (f) the Commissioner of Taxation issues a notice to any creditor of a person under the *Taxation Administration Act 1953 (Cth)* requiring that creditor to pay any money owing to that person to the Commissioner in respect of any tax or other amount required to be paid by that person to the Commissioner (whether or not due and payable) or the Commissioner advises that creditor that it intends to issue such a notice; or
- (g) anything analogous to anything referred to in paragraphs (a) to (f), or which has a substantially similar effect, occurs with respect to a person or corporation under any law of any jurisdiction.

**‘Intellectual Property’** means property over which Intellectual Property Rights exist.

**‘Intellectual Property Rights’** means all copyright and analogous rights, all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, confidential information (including trade secrets), know-how, circuit layouts and all other rights throughout the world resulting from intellectual activity in the industrial, scientific or artistic fields.

**‘JSEA’** means the Subcontractor's Job Safety Environmental Analysis, as approved by CDI.

**‘Latent Conditions’** means any ground conditions at the Site (excluding ground conditions resulting from inclement weather wherever occurring and excluding services and sub-surface services) which differ materially from those which should have been anticipated by a Relevant Contractor if it had done those things which the Subcontractor is deemed to have done under clause 4.7.

**‘Law’** means:

- (a) Commonwealth, any State and local government legislation including regulations and by-laws;
- (b) common law;
- (c) Authority requirements and consents (including conditions in respect of those consents); and
- (d) guidelines of Authorities with which the Subcontractor is legally required to comply.

**‘Licences’** means the licences, permits, consents, approvals, determinations and permissions which are required from an Authority or under relevant Laws, and any conditions or requirements under any of them, to perform the Works or otherwise perform this Subcontract.

**‘Material’** includes Documentation, equipment, models, software, goods, information, design concepts, audio, video, printed matter and data stored by any means.

**‘Moral Right’** has the meaning given to it in the *Copyright Act 1968* (Cth) and, if any work is used in any jurisdiction other than Australia, any similar rights capable of protection under the laws of that jurisdiction.

**‘Payment Schedule’** has the meaning given to it under clause 9.7(a).

**‘Practical Completion’** means practical completion of CDI’s works under the Head Contract.

**‘Principal’** means the principal to the Head Contract specified in item 8 of the Schedule of Subcontract Information.

**‘Principal’s Related Works Contractors’** means other contractors engaged by the Principal to perform other works on or in the vicinity of the Site or the Works.

**‘Privacy Laws’** means all laws relating to the privacy, confidentiality or use of any information about individuals, including the *Privacy Act 1988* (Cth).

**‘Payment Claim’** has the meaning provided to it under clause 9.4.

**‘Project’** is the project identified in item 9 of the Schedule of Subcontract Information.

**‘Project Intellectual Property Rights’** means all Intellectual Property Rights (present or future) created, discovered or coming into existence as a result of, for the purpose of, or in connection with the provision of the Works, the Project or this Subcontract including all Intellectual Property Rights developed by the Subcontractor in performing the Work and all Intellectual Property Rights in the Design Material.

**‘Provisional Sum Items’** are the items of work forming part of the Work under the Subcontract which are set out in the Schedule of Provisional Sum Items.

**‘Recipient Created Tax Invoice’** has the meaning given to it under clause 9.7(g).

**‘Related Bodies Corporate’** has the meaning given to it in section 50 of the *Corporations Act 2001* (Cth).

**‘Related Works’** means the works to be carried out by CDI’s Related Works Contractors and/or the Principal’s Related Works Contractors on or in the vicinity of the Site or the Works.

**‘Relevant Contractor’** means a prudent, professional, qualified, licensed, competent and experienced contractor that is experienced in performing works the same and/or similar to the Work under the Subcontract.

**‘Schedule’** means a schedule to the Subcontract.

**‘Schedule of Amenities, Facilities and Services’** is Schedule 12.

**‘Schedule of CDI Supplied Materials and Equipment’** is Schedule 13.

**‘Schedule of Documents Forming this Subcontract’** is Schedule 2.

**‘Schedule of Subcontract Information’** is Schedule 1.

**‘Schedule of Health and Safety Requirements’** is Schedule 5.

**‘Schedule of Insurance Information’** is Schedule 11.

**‘Schedule of Minimum Warranty Requirements’** is Schedule 15.

**‘Schedule of Subcontract Price’** is Schedule 9.

**‘Schedule of Provisional Sum Items’** is Schedule 14.

**‘Schedule of Special Conditions’** is Schedule 3.

**‘Schedule of Subcontract Documents’** is Schedule 16.

**‘Schedule of Trade Conditions’** is Schedule 10.

**‘Scope of Work’** means the scope of work set out in Schedule 6.

**‘Security’** means the security required by this Subcontract and provided by the Subcontractor in accordance with this Subcontract.

**‘Site’** is the land, water and other places on, under, in or through which the Works are to be constructed, and any other lands and places provided by CDI for working space or any other purpose as may be specifically designated in this Subcontract as forming part of the Site, as identified in item 10 of the Schedule of Subcontract Information.

**‘SOPA’** means the *Building and Construction Industry (Security of Payment) Act 2021* (WA) as amended and includes all regulations issued in relation to that Act.

**‘Special Condition’** is a special condition contained in the Schedule of Special Conditions (if any).

**‘Specification’** means the specification set out in Schedule 7.

**‘Subcontract’** means the contractual relationship between the parties constituted by the clauses, schedules and documents referred to in the Schedule of Documents Forming this Subcontract or otherwise set out or referred to in the parts of this Subcontract referenced in the Schedule of Documents Forming this Subcontract.

**‘Subcontract Documents’** means the documents referred to in the Schedule of Subcontract Documents.

**‘Subcontract Material’** means all Material which is:

- (a) prepared, or required to be prepared, by or on behalf of the Subcontractor under this Subcontract;
- (b) delivered, or required to be delivered, by or on behalf of the Subcontractor to CDI under this Subcontract;
- (c) incorporated into Material described in paragraphs (a) or (b) above; or

(d) where Special Condition 1 applies, the Design Material,  
any one singly and any combination.

**‘Subcontract Price’** is:

- (a) the amount stated in item 11 of the Schedule of Subcontract Information and as more particularly described in the Schedule of Subcontract Price;
- (b) inclusive of all Taxes (excluding any applicable GST); and
- (c) adjusted (if applicable) in accordance with this Subcontract.

**‘Subcontractor’** means the party named in item 12 of the Schedule of Subcontract Information.

**‘Subcontractor Personnel’** means any and all personnel engaged by the Subcontractor, including its directors, officers, employees, agents, consultants, invitees, contractors, subcontractors and any director, officer, employee, agent, consultant, contractor or invitee of any subcontractor, in performing the Subcontractor's obligations under this Subcontract.

**‘Subcontractor's Representative’** is the person named as such in item 13 of the Schedule of Subcontract Information.

**‘SWMS’** means the Subcontractor's Safe Work Method Statement, as approved by CDI.

**‘Substantial Completion’** is the stage in the execution of the Work under the Subcontract when:

- (a) the Works are complete except for minor omissions and minor Defects:
  - (i) which do not prevent the Works from being reasonably capable of being used for the intended purpose of the Works;
  - (ii) in relation to which CDI's Representative determines that the Subcontractor has reasonable grounds for not promptly rectifying them; and
  - (iii) rectification of which will not prejudice the safe and convenient use of the Works;
- (b) all commissioning and testing required by this Subcontract or CDI's Representative to be carried out and passed has been carried out and passed;
- (c) all information required under this Subcontract including approvals of all Authorities which are required for the use, operation and maintenance of the Works have been obtained and supplied to CDI's Representative;
- (d) the Works comply with all applicable Laws; and
- (e) the Subcontractor has done everything which this Subcontract requires it to do as a condition precedent to Substantial Completion, including those things

described in item 14 of the Schedule of Subcontract Information and the Scope of Work.

**'Tax Invoice'** has the meaning given to it in the GST Legislation.

**'Taxes':**

(a) includes all taxes, fees, levies, duties and charges imposed or assessed in respect of the Subcontract or the Work under the Subcontract by all local, state or national government authorities including income tax (including withholding for prescribed payments or group tax), payroll tax, statutory superannuation contributions and workers' compensation payments and contributions, sales tax, customs duty, excise tax, and stamp duty;

but

(b) does not include GST.

**'Unconditional Banker's Undertaking'** means an unconditional banker's undertaking in the form approved by CDI.

**'Work under the Subcontract'** means the whole of the work which the Subcontractor is required by the Subcontract to execute to comply with all of its contractual obligations, including temporary works, variations provided for by the Subcontract and remedial or rectification work and the provision of materials.

**'Works'** means the works as described in item 15 of the Schedule of Subcontract Information, Scope of Work, Specification, Drawings and elsewhere in the Subcontract to be carried out and completed by the Subcontractor in accordance with the Subcontract (including variations provided for by the Subcontract) which is to be handed over to CDI.

## 1.2 Interpretation

In this Subcontract (and unless expressly stated otherwise or the context indicates a contrary intention):

- (a) headings are inserted for convenience only and do not affect the interpretation of this Subcontract,
- (b) if the day on which any act, matter or thing is to be done under this Subcontract is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (c) unless stated otherwise, a reference in this Subcontract to dollars or \$ means Australian dollars and all amounts payable under this Subcontract are payable in Australian dollars;
- (d) a reference in this Subcontract to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (e) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or Authority;

- (f) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (g) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other gender;
- (h) a reference to the word "include" or "including" is to be construed without limitation;
- (i) the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (j) a reference to two or more clauses is inclusive of those referenced clauses;
- (k) a reference to a party, clause or a schedule is a reference to a party, clause or schedule of or to this Subcontract, unless expressly stated otherwise;
- (l) a reference to a clause is a reference to a clause in the General Conditions of Subcontract, unless expressly stated otherwise;
- (m) a reference to time is a reference to the time in Perth, Western Australia;
- (n) all information and documentation prepared or delivered by the parties must be in English;
- (o) each provision will be interpreted without disadvantage to the party that drafted or proposed that provision;
- (p) a reference to any legislation means a reference to that legislation as amended, substituted, consolidated, re-enacted or replaced; and
- (q) in addition to any of CDI's other rights at law:
  - (i) whenever a right or benefit is conferred on, or granted to, a third party under this Subcontract, CDI holds the right or benefit on trust for that third party; and
  - (ii) the Subcontractor acknowledges the existence of such trusts and consents to CDI exercising or otherwise enforcing such rights or benefits on behalf of those third parties.

### **1.3 Ambiguous and inconsistent terms**

- (a) Subject to the order of precedence of documents set out in Schedule 2, if CDI's Representative reasonably considers or the Subcontractor reasonably considers (in which case it must notify CDI's Representative promptly in writing) that:
  - (i) there is a conflict, ambiguity, inconsistency or discrepancy in or between any of the clauses or schedules of this Subcontract or any of the documents referred to in it; or



- (ii) any drawing, specification or other document provided by CDI contains an error, omission or discrepancy; or conflicts with an applicable Australian Standard, code or other legislative requirement,

CDI's Representative must direct the interpretation which the parties must follow within a reasonable period of time.

- (b) CDI's Representative, in giving a direction in accordance with clause 1.3(a), is not required to determine whether or not there is an ambiguity or inconsistency.
- (c) The Subcontractor will not be entitled to make any Claim (insofar as is permitted by Law) arising out of or in connection with any conflict, ambiguity, discrepancy or inconsistency referred to in, or a direction of CDI's Representative under, this clause 1.3.

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## **2. Personnel and Subcontract administration**

### **2.1 CDI's Representative**

- (a) CDI's Representative:
  - (i) will give directions and carry out all of the other functions of CDI's Representative under the Subcontract as the agent of CDI (and not as an independent certifier, assessor or valuer); and
  - (ii) is under no obligation to give consideration or reasonable consideration to the exercise of any right, power, discretion or other function under this Subcontract, unless expressly stated to the contrary.
- (b) Something done by CDI or CDI's Representative is deemed to be reasonable if they act in:
  - (i) accordance with a related direction from the Principal; or
  - (ii) a manner to ensure CDI is not in breach of, and is complying with, the Head Contract.

### **2.2 Compliance with directions**

The Subcontractor must comply with reasonable and valid directions given by CDI's Representative. If the Subcontractor fails to comply with a valid direction by CDI's Representative (either within the relevant time period stated in that direction or, where no time period is stated, within a reasonable time), or otherwise refuses to comply, then CDI may hold the Subcontractor in breach of the Subcontract and either:

- (a) issue a breach notice under clause 12.1(a); or
- (b) carry out, or have a third party carry out, the work the subject of the direction, in which case the cost incurred by CDI will be a debt due and payable from the Subcontractor to CDI.

### **2.3 Early warning**

- (a) The Subcontractor must give prior written notice to CDI's Representative if a failure by CDI's Representative to exercise any function under the Subcontract by a particular time could cause delay to the Work under the Subcontract.
- (b) Any notice to be issued under clause 2.3(a) must be given within a reasonable period before the function is required to be exercised, to the extent possible.

### **2.4 Subcontractor's Representative**

The Subcontractor warrants that the Subcontractor's Representative at all times has or will have authority to act on behalf of the Subcontractor in respect of this Subcontract.

### **2.5 Subcontractor Personnel**

- (a) The Subcontractor must:
  - (i) provide experienced and skilled Subcontractor Personnel to execute the Work under the Subcontract in accordance with its obligations under this Subcontract;
  - (ii) ensure that the Subcontractor Personnel are accredited and/or licensed to carry out the Work under the Subcontract in accordance with any relevant Laws and requirements; and
  - (iii) ensure that the Work under the Subcontract is executed under the supervision of appropriately qualified and experienced personnel.
- (b) CDI's Representative may by notice in writing instruct the Subcontractor to remove any Subcontractor Personnel from the Site or from any activity connected with the Work under the Subcontract, who (in the reasonable opinion of CDI's Representative) is guilty of misconduct or actions that are or may be unsafe or is incompetent or negligent or otherwise where CDI is directed by the Principal to remove them. The Subcontractor must ensure that this person is not again involved in the Work.
- (c) The Subcontractor must indemnify, and hereby indemnifies, CDI against all Claims, liens and loss, liability, damages and expenses in regard to wages due and payable to the Subcontractor Personnel and all other Claims arising from its Subcontractor Personnel in connection with the Works or Work under the Subcontract.

### **2.6 Comments, review, representation or approval by CDI or CDI's Representative**

- (a) CDI's Representative does not owe any duty to the Subcontractor in discharging any of the functions of CDI's Representative under the Subcontract.
- (b) No comment, review, representation or approval by CDI or CDI's Representative in respect of the Subcontractor's obligations under this Subcontract (including comments on, or review or approval of, any Material),

or any other direction of CDI's Representative, will lessen or otherwise affect the Subcontractor's obligations under this Subcontract.

## 2.7 Industrial relations

- (a) The Subcontractor is responsible for all employee and industrial relations risks arising in respect of the Subcontractor Personnel and must:
  - (i) comply with all applicable industrial awards and agreements and all industrial relations policies and plans incorporated in the Subcontract;
  - (ii) manage all aspects of industrial and employee relations in connection with the Works, so as to ensure that there is no disruption to the Works, the Related Works being performed by others, the Principal's operations or the Project (“**Project Activities**”);
  - (iii) keep CDI fully and promptly informed of any industrial or employee relations issues which affect or are likely to affect any of the Project Activities;
  - (iv) consult with CDI before taking any action in respect of any employee or industrial relations issue which may adversely affect any of the Project Activities and consider and give effect to CDI's requirements to the extent possible; and
  - (v) prior to commencing the Works, submit such information and documentation concerning the industrial relations and employment arrangements relating to the Subcontractor Personnel as CDI may reasonably require.
- (b) The Subcontractor must ensure that the Subcontractor Personnel comply with the requirements of clause 2.7(a).
- (c) The Subcontractor acknowledges and agrees that:
  - (i) without limitation to any other term of this Subcontract, the Subcontract Price, the Date for Substantial Completion and any programme submitted by the Subcontractor to CDI include adequate allowances to fully compensate the Subcontractor for all risks (including loss and delays) associated with all employee and industrial relations (including any issues relating to safety) both on and off Site in connection with the Works, including:
    - A. changes to work practices including any reduction in working hours per week on the Site;
    - B. the introduction of new, or changes, amendments or variations to existing, State or Federal industrial awards;
    - C. increases in labour costs, employment related insurance premiums, superannuation, bonuses, site allowances,

penalties, project specific site agreements, disability allowances, travel allowances, entitlements, and the like;

- D. increases in wages, allowances, penalties, entitlements, payments, bonuses and other like items contained in contracts of employment (both express and implied), industrial awards (both State and Federal), State and Federal certified agreements (both registered and unregistered) or any other registered or unregistered industrial agreement binding on the Subcontractor or applicable to the Site;
  - E. any industrial action or dispute;
  - F. any claims by Subcontractor Personnel, including proceedings in any court, tribunal or commission; and
  - G. the Subcontractor's obligations under this clause 2.7;
- (ii) the events contemplated in clause 2.7(c)(i) will not entitle the Subcontractor to a variation to this Subcontract and it will not be entitled to make any Claim against CDI (howsoever arising) for any loss or delay incurred or suffered by the Subcontractor in connection with the matters contemplated in clause 2.7(c)(i).

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### **3. Subcontractor's fundamental obligations**

#### **3.1 General**

The Subcontractor must:

- (a) execute the Work under the Subcontract in accordance with the requirements of this Subcontract and Good Industry Practice and, unless otherwise stated, at its cost;
- (b) at all times comply with CDI's Requirements, if any, including the Schedule of Trade Conditions and the requirements set out in the documents listed in the Schedule of Subcontract Documents;
- (c) comply with all applicable Laws relating to the performance of this Subcontract, including Laws relating to modern slavery and anti-bribery and corruption;
- (d) obtain and maintain all Licences required by the Subcontractor to perform this Subcontract and must ensure that all Subcontractor Personnel obtain and maintain all Licences that they require to assist with the performance of this Subcontract; and
- (e) ensure that the Works, if they form part of the Head Contract Works, comply with the requirements of the Head Contract (to the extent specified in this Subcontract).

### **3.2 Safety requirements**

The Subcontractor must:

- (a) within seven days of the Effective Date and in any event prior to attendance on Site, prepare and submit to CDI's Representative a JSEA and SWMS for approval by CDI;
- (b) comply with, and ensure that all persons (including the Subcontractor Personnel), for whom it is responsible or over whom it is capable of exercising control while upon the Site, at all times comply with:
  - (i) CDI's HSEQ Plan;
  - (ii) CDI's Drug and Alcohol Policy;
  - (iii) CDI's Requirements (if any), including the Schedule of Health and Safety Requirements;
  - (iv) the approved JSEA and SWMS; and
  - (v) any direction (whether written or oral) of CDI's Representative given in connection with this clause 3.2; and
- (c) submit the JSEA to CDI's Representative for review as and when required by CDI's Representative; and
- (d) maintain appropriate safety precautions and programs so as to prevent injury to persons or damage to property on, about or adjacent to the Site.

### **3.3 Protection of people and property**

- (a) The Subcontractor must take all reasonable measures necessary to protect people and property (including all unfixed goods, materials, hardware, equipment, plant and tools and all items listed in the Schedule of CDI Supplied Materials and Equipment) on or adjacent to the Site.
- (b) Without limiting clause 11 (Indemnities), if any Subcontractor Personnel damage property on or adjacent to the Site or in relation to the Works, the Subcontractor must promptly make good the damage and pay any compensation which the Law requires the Subcontractor to pay.
- (c) If the Subcontractor fails to comply with an obligation under clause 3.2 or this clause 3.3 when required by those clauses or otherwise as required by CDI's Representative (acting reasonably), CDI may perform or have performed the obligation on the Subcontractor's behalf and the cost incurred will be a debt due from the Subcontractor to CDI.

### **3.4 Incident Reporting**

The Subcontractor must report to CDI's Representative, immediately upon becoming aware, any accident or any incident which had or has the potential to give rise to any:

- (a) property damage; or
- (b) any of the following on or adjacent to the Principal's property or the Site which

involves:

- (i) death;
- (ii) loss of work for more than one day;
- (iii) medical attention including normal first aid; or
- (iv) near misses.

### **3.5 Environmental obligations**

- (a) The Subcontractor must:
  - (i) execute the Work under the Subcontract in a manner so as to avoid pollution or contamination of the Site and the areas and waterways adjacent to the Site; and
  - (ii) ensure that each of the Subcontractor Personnel also comply with the requirements under clause 3.5(a)(i).
- (b) The Subcontractor is responsible for, and must make good, any and all environmental harm, pollution and contamination caused by the execution of the Work under the Subcontract (including pollution and/or contamination of or outside the Site), including by Subcontractor Personnel.
- (c) The Subcontractor must:
  - (i) clean up any and all pollution and contamination caused during the execution of the Work under the Subcontract; and
  - (ii) comply with all reasonable directions of CDI's Representative and any Authority regarding cleaning up pollution or contamination.
- (d) The Subcontractor must indemnify CDI against any and all:
  - (i) liability to, and claims by, a third parties; and
  - (ii) costs, losses and damages suffered or incurred by CDI,

to the extent caused or contributed to by a failure by the Subcontractor or Subcontractor Personnel to comply with the requirements of this clause 3.5 or environmental harm caused or contributed to by the execution of the Work under the Subcontract by the Subcontractor or Subcontractor Personnel.

### **3.6 Privacy**

The Subcontractor must, in relation to all things relating to or arising out of the Head Contract, the Subcontract or the Project (any one singly and any combination), comply with all applicable Privacy Laws and provide all reasonable assistance to enable CDI to comply with all applicable Privacy Laws.

### **3.7 Prior Work**

All works and activities performed prior to the Effective Date in respect of the Work

under the Subcontract will be deemed to have been performed under, and will be subject to, this Subcontract. Payment in respect of those prior works and activities will be made upon payment of the relevant part of the Subcontract Price relating to them, whether before or after the Effective Date.

### **3.8 Title and risk**

- (a) Ownership, title and risk in the Works (including plant and materials) transfers to CDI free of any and all Encumbrances on the earlier of:
  - (i) incorporation of the relevant items into the Works; and
  - (ii) payment by CDI for the plant and materials or Works (as applicable).
- (b) Without limiting the Subcontractor's warranties, the Subcontractor must indemnify Indemnified Parties from and against any and all Claims and loss, liability, costs and expenses they may suffer or incur to the extent caused or contributed to by the Subcontractor or any Subcontractor Personnel having any Encumbrance or any other third party interest in:
  - (i) the Site, which exists or may occur at any time; or
  - (ii) the Works (including plant and materials), which exists or occurs on or after the transfer of title under clause 3.8(a).

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## **4. Site**

### **4.1 Access**

Subject to clauses 4.2 and 4.5, CDI will procure Site access for the Subcontractor on or before the expiry of the period of the notice given by the Subcontractor in accordance with clause 4.2(a), give the Subcontractor non-exclusive access to the Site sufficient to enable it to carry out its obligations under the Subcontract.

### **4.2 Subcontractor's Site obligations**

The Subcontractor must:

- (a) within the period set out in item 16 of the Schedule of Subcontract Information, give notice in writing to CDI that it requires access to the Site;
- (b) satisfy CDI that all insurances which the Subcontractor must effect under clause 12 have been effected; and
- (c) submit to CDI's Representative any plans or JSEA required pursuant to clause 3 for approval by CDI,

before the Subcontractor will be entitled to obtain access to the Site in accordance with clause 4.1. CDI will not be liable for, and the Subcontractor will not be entitled to make, any Claim arising from insufficient Site access being provided or Site access being provided late to the extent caused by the Subcontractor's failure to comply with this clause 4.2.

### **4.3 Induction training**

The Subcontractor:

- (a) must ensure that all Subcontractor Personnel undergo induction training required for the Project and the Site, before entering the Site, which induction training must be requested by the Subcontractor and will be arranged by CDI at a time convenient to CDI;
- (b) must ensure that all Subcontractor Personnel must bring with them to Site at the time of the relevant induction training a current white card, the JSEA, the SWMS and all Materials and Documentation relevant to the individual's role in the Project or the Works; and
- (c) acknowledges that it:
  - (i) has made a sufficient allowance in its Subcontract Price for, and assumes the risk of any delays arising out of or in connection with, the induction training required under clause 4.3(a); and
  - (ii) will not be entitled to make any Claim (insofar as is permitted by Law) arising out of or in connection with that induction training.

### **4.4 Control of access to Site and Site condition**

- (a) The Subcontractor must:
  - (i) if CDI provides the Subcontractor with secure access to the Site, ensure that it and all Subcontractor Personnel maintain such secure access;
  - (ii) keep the Site and any Goods and Subcontract Materials delivered to and/or installed on Site in a clean and tidy condition at all times;
  - (iii) ensure that a booking is made with CDI's Representative regarding any Goods or Subcontract Material to be delivered to or installed on the Site and that such Goods and Subcontract Material are delivered strictly in accordance with such booking; and
  - (iv) use best endeavours to ensure that any Goods and Subcontract materials delivered to or installed on the Site are checked by CDI's Representative and noted on CDI's Quality Inspection Checklist.
- (b) Unless expressly stated otherwise in the Subcontract, the Subcontractor accepts responsibility for and assumes the risk of all loss, delay and disruption arising in connection with the conditions present at the Site, including:
  - (i) having to dispose of, or otherwise deal with any contamination or pollution and remediating the Site or its immediate surrounds to the extent they are in any way affected by any contamination or pollution; and
  - (ii) the location and adequacy of existing services, infrastructure and utilities.



#### **4.5 Access for CDI and others**

- (a) The Subcontractor must ensure that at all times CDI and CDI's employees, consultants and agents have access to any part of the Site for any purpose.
- (b) The Subcontractor acknowledges that CDI may engage CDI's Related Works Contractors, and the Principal may engage the Principal's Related Works Contractors, to perform the Related Works and the Subcontractor must:
  - (i) permit CDI's Related Works Contractors and the Principal's Related Works Contractors to carry out Related Works;
  - (ii) consult, liaise and fully co-operate with CDI's Related Works Contractors and the Principal's Related Works Contractors;
  - (iii) co-ordinate the Subcontractor's activities in carrying out Work under the Subcontract with the Related Works and ensure that the Works are fully integrated with the Related Works as required by this Subcontract;
  - (iv) use its best endeavours to facilitate the execution of the Related Works;
  - (v) plan, program and perform the execution of Work under the Subcontract so as to minimise any interference with, disruption, hindrance or delay to, performance of the Related Works;
  - (vi) at all times refrain from carrying out any operation on-Site in a manner which is likely to cause damage or inconvenience to the execution of the Related Works; and
  - (vii) provide CDI's Representative, CDI's Related Works Contractors and the Principal's Related Works Contractors with all information in regard to the Work under the Subcontract as is reasonably necessary to ensure compliance with its obligations under this clause 4.5.
- (c) Except as provided in this clause 4.5(c), the Subcontractor will not be entitled to any addition or increase to the Subcontract Price or an extension of time under clause 7.3 for complying with its obligations under clause 4.5(b). To the extent that any Related Works or CDI's Related Works Contractors or Principal's Related Works Contractors cause any delay to the Subcontractor that could not reasonably have been foreseen, then the Subcontractor will be entitled to claim in accordance with the terms of the Subcontract for additional costs incurred and an extension of time to the Date for Substantial Completion.
- (d) In the event of any dispute or conflict between CDI and the Subcontractor with respect to right of way or priority of access in or around the Site, CDI will at all times have priority but it will use its best endeavours to ensure that the Subcontractor is not impeded in the performance of Work under the Subcontract.

- (e) The Subcontractor must perform Work under the Subcontract in such a manner as to ensure that no blockage or closure without CDI's consent or direction is caused upon any track, road, path or other access point either by the Subcontractor's vehicles or equipment or by any excavation work and must organise all transport required by the Work under the Subcontract in such a manner as to ensure that as little inconvenience as reasonably possible is caused to CDI, its consultants, CDI's Related Works Contractors, the Principal and the Principal's Related Works Contractors, their respective employees or the public.
- (f) CDI's Representative may from time to time direct a designated area of the Site as a prohibited area. The Subcontractor and its Subcontractor Personnel must not enter the prohibited area.
- (g) The Subcontractor must coordinate all interface works associated with Work under the Subcontract with relevant Authorities where necessary.

#### **4.6 Subcontractor's investigation**

The Subcontractor warrants that it has, and will be deemed to have, done everything that would be expected of a prudent, competent and experienced contractor, including:

- (a) assessing the risks which it is assuming under the Subcontract;
- (b) ensuring that the Subcontract Price contains allowances to protect it against those risks eventuating;
- (c) visiting and carrying out its own examinations, tests and inspections of the Site and its surroundings and the environment;
- (d) fully informing itself as to:
  - (i) the nature and character of the Site and the conditions at or around the Site which may affect the Works;
  - (ii) the measures required to protect the Works; and
  - (iii) the suitability of facilities, roads, infrastructure, utilities, transport, traffic, parking and repair facilities at the Site or otherwise required for the Works and all other matters affecting access to, from and within the Site.

#### **4.7 CDI information**

Without limiting clause 4.6, to the extent that CDI has made available to the Subcontractor, before the Effective Date, certain information, data and Documentation which were obtained by CDI for the purposes of the Works or the Work under the Subcontract from investigations carried out as to the conditions on, in, under or in the vicinity of the Site:

- (a) CDI does not warrant, guarantee or make any representation about the accuracy or adequacy of any such information, data and documents made available to the Subcontractor;
- (b) the Subcontractor acknowledges that, unless otherwise specified in the

Subcontract, such information, data and documents do not form part of the Subcontract and that clause 4.8 applies to the information, data and documents; and

- (c) to the extent permitted by Law, CDI will not be liable upon any Claim by the Subcontractor arising out of, or in any way in connection with, the information, data and documents.

#### **4.8 Subcontractor's warranty**

The Subcontractor:

- (a) warrants that, except as otherwise expressly provided in the Subcontract, it did not in any way rely upon:
  - (i) any information, data, representation, statement or Documentation made or provided to the Subcontractor by CDI or anyone on behalf of CDI; or
  - (ii) the accuracy or adequacy of any such information, data, representation, statement or document,for the purposes of entering into the Subcontract;
- (b) warrants that, except as otherwise expressly provided in the Subcontract, it enters into the Subcontract based on its own investigations, interpretations, deductions, information and determinations; and
- (c) acknowledges that it is aware that CDI has entered into the Subcontract relying upon the warranties in clauses 4.6, 4.8(a) and 4.8(b).

#### **4.9 Physical conditions**

Subject to clause 7.3, the Subcontractor:

- (a) is responsible for, and assumes the risk of, all delays, all increased costs and any and all losses and damages arising out of or in connection with the physical conditions and characteristics of the Site and its surrounding areas; and
- (b) will not be entitled to make any Claim in respect of the matters referred to in clause 4.9(a).

#### **4.10 Operation of Existing Plant**

The Subcontractor must use best endeavors to ensure:

- (a) that any interruption to the operation of the Existing Plant caused by the interconnection of the Works to the Existing Plant is minimised;
- (b) that (other than as contemplated in clause 4.10(a)) the Existing Plant and its continued operation are not affected in any way by the execution of the Work under the Subcontract; and
- (c) without limiting clause 4.10(a) and 4.10(b), that the Works will fully, effectively and efficiently interface with the Existing Plant.

#### **4.11 CDI's provided amenities, facilities and services**

- (a) Subject to clause 4.11(b), CDI must provide the amenities, facilities and services described in the Schedule of Amenities, Facilities and Services for use by the Subcontractor in executing the Work under the Subcontract.
- (b) Where the Schedule of Amenities, Facilities and Services states that the Subcontractor must pay for the use of specific amenities, facilities and services, the Subcontractor must do so.
- (c) The Subcontractor must comply with CDI's Representative's reasonable directions when using the amenities, facilities and services referred to in clause 4.11(a).
- (d) The Subcontractor has no entitlement to make any Claim (insofar as is permitted by Law) arising out of or in connection with CDI's failure to provide, or any delay or disruption in providing, the amenities, facilities and services referred to in clause 4.11(a), except to the extent (if any) that it has an entitlement to delay or disruption costs under clause 7.2(b) or an extension of time under clause 7.3.

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### **5. Documentation**

#### **5.1 Overcoming Buildability Problems**

- (a) The Subcontractor must give notice to CDI's Representative in writing of any and all Buildability Problems that the Subcontractor or any Subcontractor Personnel identifies, promptly upon becoming aware of the relevant Buildability Problem.
- (b) CDI's Representative may give the Subcontractor a direction as to how to overcome a Buildability Problem, including relevant design details showing any changes to the Scope of Work, the Specification and the Drawings or materials to be used to complete the Works.
- (c) Where such a change referred to in clause 5.1(b) is of a nature consistent with the intent generally found in the Scope of Work, the Specification and the Drawings or is otherwise consistent with that which a prudent, competent and experienced contractor acting reasonably would expect to find in work of a similar nature to the Works, the Subcontractor will, to the extent permitted by Law, have no Claim against CDI arising out of or in any way in connection with:
  - (i) the Buildability Problem;
  - (ii) CDI's Representative's direction; or
  - (iii) any work arising out of or in any way in connection with CDI's Representative's direction.

#### **5.2 Ownership of, and Intellectual Property Rights in, Subcontract Material**

- (a) The Subcontractor hereby assigns to CDI (or CDI's nominee, at CDI's absolute

discretion) all Project Intellectual Property Rights (including future copyright) in all Subcontract Material upon the creation of that Subcontract Material or, to the extent that any Project Intellectual Property Rights are not created until after the time of the creation of the Subcontract Material, upon the later creation of the Project Intellectual Property Rights in that Subcontract Material.

- (b) The Subcontractor must, if required by CDI, do all further things necessary to assign or license the relevant Intellectual Property Rights in the Subcontract Material to CDI to ensure that CDI (or CDI's nominee, at CDI's absolute discretion) receives the rights and benefit of those Intellectual Property Rights as required by this Subcontract.
- (c) CDI hereby grants to the Subcontractor a revocable, non-exclusive, non-transferable (except to the extent of sub-licensing to the Subcontractor Personnel as required) licence to use Subcontract Material and CDI Material to the extent required to design, construct and rectify the Works.
- (d) The Subcontractor hereby grants to CDI an irrevocable, non-exclusive licence to utilise the Background Intellectual Property for the purpose of constructing, maintaining or expanding the Works. This irrevocable licence will survive the termination of the Subcontract.
- (e) The Subcontractor warrants that:
  - (i) the Subcontractor is able to assign or license the relevant Intellectual Property Rights in Subcontract Material as described in this clause 5.2;
  - (ii) use by CDI, or by another person at the direction or with the permission of CDI, of the Subcontract Material in accordance with the Subcontract will not infringe the Intellectual Property Rights of any third party or breach any Laws; and
  - (iii) neither CDI, nor any other person acting at the direction or with the permission of CDI, is liable to pay any third party any licence or other fee in respect of the use of the Subcontract Material.

The Subcontractor must indemnify CDI against any and all costs, expenses, losses, damages and liability incurred and/or suffered by any and all Indemnified Parties to the extent caused or contributed to by any actual or alleged infringement of any Intellectual Property Rights in or in relation to Subcontract Material or otherwise caused or contributed to by the Subcontractor or any Subcontractor Personnel.

### **5.3 Security of Material**

The Subcontractor must protect, keep safe and secure all documents, notes, reports, memoranda, materials, software, disks and all other media, articles and things provided by CDI to the Subcontractor, including all Subcontract Material and CDI Material.

### **5.4 Limited Reproduction of Material**

The Subcontractor must ensure that:

- (a) CDI Material;

- (b) Subcontract Material; and
- (c) anything else recording, containing, setting out, or making reference to the Subcontract, the Works or the Work under the Subcontract,

is used, copied, supplied or reproduced only to the extent necessary for the purposes of executing the Work under the Subcontract, unless the Subcontractor has obtained the prior written approval of CDI to use it for any other purpose.

## **5.5 Return of Material**

- (a) Subject to clause 5.7(b), the Subcontractor must, within seven days after the Date of Substantial Completion (or such other period directed by CDI's Representative), provide or return (as the context permits) to CDI:
  - (i) all CDI Material;
  - (ii) all Subcontract Material; and
  - (iii) anything recording, containing, setting out, or making reference to the Works, the Project or the Work under the Subcontract, except as otherwise specified in a direction of CDI's Representative.
- (b) The Subcontractor may keep one set of the Material referred to in clause 5.5(a) for its records.

## **5.6 Moral Rights**

To the extent permitted by Law, the Subcontractor must, at its own expense, obtain or procure all consents or waivers from any person who has Moral Rights in any Design Material or in any part of the Works designed by the Subcontractor to the extent necessary to ensure that CDI may do or authorise any acts or omissions consistent with the ownership, licences and Intellectual Property Rights granted by clause 5.2 without infringing any Moral Rights.

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# **6. Construction obligations**

## **6.1 Workmanship**

The Subcontractor must:

- (a) use good quality, new and undamaged materials for the Works which are of merchantable quality and fit for their intended purpose; and
- (b) use workmanship:
  - (i) expected from a Relevant Contractor; and
  - (ii) which is fit for purpose; and
- (c) subject to the express provisions of the Subcontract, comply with relevant Australian Standards when executing the Work under the Subcontract.

The Subcontractor acknowledges that for the purpose of this clause 6.1, the 'purpose' means the purpose of CDI as contained in (or otherwise reasonably inferable from) the Subcontract.

## **6.2 Qualitative non-performance**

If, at any time during the carrying out of the Work under the Subcontract or (other than in the case of clause 6.2(b)) prior to the expiration of the Defects Correction Period, CDI's Representative considers there to be a Defect (acting reasonably), CDI's Representative may direct the Subcontractor:

- (a) to rectify the Defect, and specify the time within which this must occur (such time must be reasonable), and any such rectification will be at the Subcontractor's own cost;
- (b) to carry out a variation to the Work under the Subcontract to overcome the Defect, or any part of it, and specifying the time within which this must be carried out (such time must be reasonable); or
- (c) that CDI accepts the work or any part of it, despite the Defect,

any one singly and any combination. If CDI accepts defective work under clause 6.2(c), CDI's Representative will assess the cost of rectifying the defective work so accepted and the cost of rectifying the defective work as assessed by CDI's Representative (acting reasonably) will be deducted from the Subcontract Price.

## **6.3 Rectification of Defects**

If a direction is given under clause 6.2(a) or 6.2(b), the Subcontractor must rectify the Defect:

- (a) within the time specified in the direction; and
- (b) if after Practical Completion, at times and in a manner which cause as little inconvenience to the occupants of the Works, the Principal, the Principal's Related Works Contractors and CDI's Related Works Contractors, as is reasonably possible.

## **6.4 Rectification by others**

- (a) CDI may have the rectification work referred to in clause 6.2(a) carried out by others at the Subcontractor's cost if:
  - (i) CDI's Representative has directed the Subcontractor to rectify a part of the Work under the Subcontract in accordance with clause 6.2(a); and
  - (ii) the Subcontractor has failed to rectify that work within the time specified in the direction.
- (b) All costs and expenses suffered or incurred by CDI (or both) under this clause 6.4 will be a debt due and payable by the Subcontractor to CDI within seven calendar days following a demand by CDI to that effect.

## **6.5 Cost**

Where a direction is given under:

- (a) clause 6.2(b), CDI's Representative will determine:
  - (i) the value of the variation to the Work under the Subcontract in accordance with clause 8.2; and
  - (ii) the cost of rectifying the Defect (or the relevant part);and the Subcontract Price will be adjusted by the difference between the valuations under clause 6.5(a) as follows:
  - (iii) if the value under clause 6.5(a)(i) is greater than the cost under clause 6.5(a)(ii), the Subcontract Price will be increased by the difference between those amounts; or
  - (iv) if the cost under clause 7.5(a)(ii) is greater than the value under clause 7.5(a)(i), the Subcontract Price will be decreased by the difference between those amounts; and
- (b) clause 6.2(c) prior to the expiration of the Defects Correction Period, the amount determined by CDI's Representative (acting reasonably) which represents the cost of correcting the Defect (or the relevant part) will be a debt due and payable by the Subcontractor to CDI within seven calendar days following a demand by CDI to that effect.

## **6.6 Preservation of rights**

Neither CDI's rights, nor the Subcontractor's liability, whether under the Subcontract or otherwise according to Law in respect of Defects, whether before or after the expiration of the Defects Correction Period, will be affected or limited by:

- (a) the rights conferred upon CDI or CDI's Representative by clauses 6.1 to 6.5 or any other provision of the Subcontract;
- (b) the failure by CDI or CDI's Representative to exercise any such rights; or
- (c) any direction of CDI's Representative under clause 6.2.

## **6.7 Obligations after Substantial Completion**

Without limiting clauses 6.1 to 6.6, after Substantial Completion, the Subcontractor must promptly complete all outstanding items of work required to be completed to comply with this Subcontract.

## **6.8 Subcontracting**

- (a) Apart from any Approved Subcontractors, the Subcontractor may not enter into subcontracts for the vicarious performance of any part of its obligations under the Subcontract without first obtaining the prior written approval of CDI's Representative. CDI may (acting reasonably) impose conditions on giving its approval.
- (b) The Subcontractor must ensure that each contract that it enters into with a



subcontractor or supplier contains terms and conditions that are consistent with this Subcontract and will ensure that the Subcontractor is able to comply with the terms of this Subcontract.

- (c) The Subcontractor's obligations under the Subcontract are not lessened or otherwise affected by subcontracting the performance of those obligations to Approved Subcontractors.
- (d) The Subcontractor must procure from its subcontractors and suppliers the collateral warranties described in the Schedule of Minimum Warranty Requirements, upon demand by CDI and in the form approved by CDI (acting reasonably). Those warranties do not limit any right which CDI may have against the Subcontractor under this Subcontract or at Law in respect of the subject matter of those warranties.
- (e) The Subcontractor must ensure that all contracts with subcontractors and suppliers contain a provision which requires the relevant subcontractor or supplier (as applicable) to novate the contract to CDI, the Principal or a nominee upon CDI's request and as directed by CDI (acting reasonably). The form of deed of novation must be approved by CDI (acting reasonably).

## **6.9 CDI's supplied materials and equipment**

- (a) CDI must supply the materials and equipment listed in the Schedule of CDI's Supplied Materials and Equipment for use by the Subcontractor in the execution of the Work under the Subcontract.
- (b) The Subcontractor:
  - (i) must take possession of, and the risk in, the materials and equipment referred to in clause 6.9(a) in accordance with the procedures:
    - A. directed by CDI's Representative; and
    - B. to the extent (if any) set out in the Schedule of CDI's Supplied Materials and Equipment; and
  - (ii) will be responsible for any loss of or damage to the materials and equipment referred to in clause 6.9(a) following delivery of the materials and equipment to the Subcontractor, and must indemnify CDI against any and all costs, expenses, loss, damages and liability incurred and/or suffered by any of the Indemnified Parties (any one singly and any combination) arising out of or in connection with such loss or damage, to the extent caused or contributed to by the Subcontractor or any of the Subcontractor Personnel.
- (c) The Subcontractor must promptly return to CDI the materials and equipment referred to in clause 6.9(a) which it no longer requires for execution of the Work under the Subcontract.

## **6.10 Provisional Sum Items**

- (a) The allowances shown in the Schedule of Provisional Sum Items, and which have been included in the Subcontract Price, are for Provisional Sum Items

the scope of which is not fully defined at the Effective Date.

- (b) CDI's Representative may, in its absolute discretion, direct the Subcontractor whether or not to carry out the Provisional Sum Items as part of the Work under the Subcontract.
- (c) If CDI's Representative gives the direction in clause 6.10(b), CDI must provide the Subcontractor with the scope of work for a Provisional Sum Item by the relevant date indicated in the Schedule of Provisional Sum Items.
- (d) The Subcontractor must, in consultation with and subject to the directions of CDI's Representative, promptly prepare and deliver to CDI a quote for that Provisional Sum Item by the relevant date in the Schedule of Provisional Sum Items.
- (e) If CDI's Representative accepts the Subcontractor's quote for a Provisional Sum Item referred to in clause 6.10(d) by notice in writing, then:
  - (i) the Subcontractor must execute that Provisional Sum Item as part of the Work under the Subcontract; and
  - (ii) the Subcontract Price will be adjusted by the difference between the quote approved by CDI's Representative and the relevant allowance in the Schedule of Provisional Sum Items.
- (f) If CDI's Representative does not approve a quote for a Provisional Sum Item, then:
  - (i) CDI may have the Provisional Sum Item executed by a third party;
  - (ii) the Subcontract Price will be reduced by the relevant allowance in the Schedule of Provisional Sum Items; and
  - (iii) the Subcontractor will have no Claim against CDI arising out of or in connection with the Provisional Sum Item.

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## **7. Time**

### **7.1 Completion of the Works**

The Subcontractor must:

- (a) diligently execute and progress the Work under the Subcontract in an orderly manner, expeditiously and without delay; and
- (b) bring the Works to Substantial Completion by the Date for Substantial Completion; and
- (c) comply with CDI's Construction Programme (and provide updates to CDI's Construction Programme when reasonably requested by CDI).

### **7.2 Risk of delay and disruption and resultant increased costs**

- (a) The Subcontractor accepts the risk of all increased costs resulting from delay

or disruption in the execution of the Work under the Subcontract and the performance of its other obligations under the Subcontract, and accepts that it will have no entitlement to make any Claim for any costs, losses, damages or liability incurred or suffered by the Subcontractor arising out of or in any way in connection with such delay or disruption (including for damages for breach of contract), with the exception of a Claim under clause 7.2(b).

- (b) The Subcontractor is entitled to the actual, direct and unavoidable on-Site costs it can establish, to the reasonable satisfaction of CDI's Representative, it has reasonably incurred as a result of a delay caused by:
- (i) a breach by CDI of the Subcontract;
  - (ii) a variation to the Work under the Subcontract directed under clause 8.1;
  - (iii) the suspension of the execution of the Work under the Subcontract pursuant to a written direction given under clause 7.9(a), unless that direction was given as a result of a breach by the Subcontractor of its obligations under the Subcontract or otherwise the acts or omissions of the Subcontractor or any of the Subcontractor Personnel; or
  - (iv) any other event or circumstance stated in item 17 of the Schedule of Subcontract Information,

for which the Subcontractor has been granted an extension of time to the Date for Substantial Completion under the Subcontract.

### **7.3 Extensions of time**

If the Subcontractor considers that it may be entitled to an extension of time:

- (a) the Subcontractor:
- (i) must give written notice to CDI's Representative, as soon as practicable and in any event within the time period specified in item 18 of the Schedule of Subcontract Information after becoming aware of the fact of or likelihood of delay to the Date for Substantial Completion; and
  - (ii) provide with that notice details of the cause of the delay and how Substantial Completion is likely to be delayed;
- (b) the Subcontractor must give CDI's Representative, within the time period specified in item 19 of the Schedule of Subcontract Information, following the date on which the Subcontractor is required to give notice under clause 7.3(a)(i):
- (i) a written claim for extension of time specifying the number of days claimed;
  - (ii) details of why the cause of the delay actually caused the delay, including a statement of the facts and the provisions of the Subcontract on which the claim is based;

(iii) detailed evidence in satisfaction of the requirements of clause 7.3(c);  
and

(iv) all other information reasonably required by CDI's Representative,

and, to the extent that the circumstances causing the delay continue for more than 7 calendar days, the Subcontractor must provide an updated claim every 7 calendar days.

(c) If the Subcontractor satisfies CDI's Representative (acting reasonably) in its claim under clause 7.3(b) that:

(i) Substantial Completion has been or will actually be delayed prior to the Date for Substantial Completion, in a manner which will prevent the Subcontractor from achieving Substantial Completion by the Date for Substantial Completion, unless the Date for Substantial Completion is extended;

(ii) the Subcontractor has taken all reasonable steps to preclude the occurrence or minimise the extent and consequences of the delay;

(iii) the cause of the delay is one of the following:

A. breach by CDI of the Subcontract or any other act or omission of CDI or CDI's Representative, other than an act or omission authorised by the Subcontract (except as expressly provided for in clauses 8.3(c)(iii)B and 7.3(c)(iii)D);

B. a variation to the Work under the Subcontract directed under clause 8.1 or 6.2(b);

C. a Force Majeure Event;

D. the suspension of the execution of the Work under the Subcontract pursuant to a written direction given under clause 7.9(a), unless that direction was given as a result of a breach by the Subcontractor of its obligations under the Subcontract or any other act or omission of the Subcontractor or any of the Subcontractor Personnel;

E. a suspension of the Works pursuant to section 62 of the SOPA; or

F. any other event or circumstance stated in item 20 of the Schedule of Subcontract Information; and

(iv) the cause of the delay does not arise out of or is not in any way connected with:

A. an act or omission of the Subcontractor or the Subcontractor Personnel; or

B. any other event, fact, matter or circumstance not referred to in clause 7.3(c)(iii), and

- C. CDI's Representative has not given an Acceleration Direction under clause 7.6(b)(i),

then the Subcontractor will be entitled to an extension of time to the Date for Substantial Completion, except to the extent of the period of delay being concurrently caused by a circumstance referred to in subclause (iii) above and a circumstance which is not referred to in subclause (iii) above. If the Subcontractor fails to issue CDI with a notice in accordance with clause 7.3(a) or a written claim for an extension of time in accordance with clause 7.3(b), the Subcontractor will be barred from making the relevant Claim.

#### **7.4 Determination of extension of time Claims**

- (a) CDI's Representative:
- (i) must, within a reasonable period of receiving a Claim under clause 7.3(b), give the Subcontractor written notice of the extension of time which is granted (if any) and the new Date for Substantial Completion; or
  - (ii) if within 28 days of the Subcontractor making a Claim for an extension of time to the Date for Substantial Completion no written notice pursuant to clause 7.4(a)(i) is provided by CDI's Representative, the Subcontractor's Claim will be deemed to be rejected.
- (b) CDI's Representative may, in CDI's Representative's absolute discretion, extend the Date for Substantial Completion at any time by giving notice to the Subcontractor nominating a new Date for Substantial Completion regardless of whether:
- (i) the Subcontractor has claimed or is entitled to an extension of time under the Subcontract; or
  - (ii) CDI's Representative has previously rejected or is deemed to have rejected any Claim.
- (c) Without limiting clause 7.4(b), CDI's Representative may, pursuant to that clause, extend the Date for Substantial Completion to account for any delay caused by an act of prevention of CDI, so as to ensure that CDI's rights under clause 7.5 for late Substantial Completion are not affected.

#### **7.5 Late Substantial Completion**

If the Subcontractor fails to bring the Works to Substantial Completion by the Date for Substantial Completion:

- (a) the Subcontractor is indebted to CDI for; and
- (b) CDI may deduct from payments due to the Subcontractor,

liquidated damages at the rate specified in item 21 of the Schedule of Subcontract Information, for every day after the Date for Substantial Completion up to and also counting the Date of Substantial Completion or the date of earlier termination of the

Subcontract (in addition to and without limiting any other remedy available to CDI, including the right to claim common law damages for any other Claims, losses, liabilities, costs or expenses suffered). The Subcontractor's liability to pay liquidated damages will be capped at the amount specified in item 21 of the Schedule of Subcontract Information (if any). If no liquidated damages are specified in item 21 of the Schedule of Subcontract Information, CDI will be entitled to its actual general damages. Where the liquidated damages payable by the Subcontractor are found or otherwise determined by a Court to be unenforceable, CDI will be entitled to its actual general damages in connection with delay.

## 7.6 Acceleration of the Works

- (a) CDI's Representative may (acting reasonably) direct the Subcontractor to:
- (i) accelerate the progress of any one or more activities comprising the Work under the Subcontract, or the Work under the Subcontract as a whole, so as to bring the Works to Substantial Completion by the Date for Substantial Completion or a brought forward Date for Substantial Completion (which is before the then current Date for Substantial Completion); or
  - (ii) if the Subcontractor gives CDI's Representative a Claim under clause 7.3(b) to accelerate the Work under the Subcontract by taking those measures which are necessary to overcome or minimise the extent and effects of some or all of the delay including, if required, in order to achieve Substantial Completion by the relevant Date for Substantial Completion.
- (b) A direction given under clause 7.6(a) may be effected:
- (i) only by a written form expressly identified as an '**Acceleration Direction**' signed by CDI's Representative and forwarded to the Subcontractor;
  - (ii) in the case of a direction under clause 7.6(a)(i) requiring the Date for Substantial Completion to be brought forward, only if:
    - A. CDI's Representative has first given the Subcontractor 14 days written notice of the proposed acceleration; and
    - B. the Subcontractor has not objected in writing to the acceleration within that period of 14 days, which objection may only be made on the basis that it would not be physically possible for the Subcontractor to comply with the proposed acceleration, regardless of the resources applied by the Subcontractor; and
  - (iii) in the case of clause 7.6(a)(ii) regardless of whether or not the cause of delay for which the Subcontractor has given its Claim under clause 7.3(b) otherwise entitles the Subcontractor to an extension of time.
- (c) The Subcontractor must execute the Work under the Subcontract in accordance with all CDI's Representative's reasonable directions given in accordance with clauses 7.6(a) and 7.6(b).

- (d) If:
- (i) CDI's Representative gives an Acceleration Direction; and
  - (ii) the Subcontractor complies with the Acceleration Direction,
- then:
- (iii) subject to clauses 7.6(d)(iv) and 7.6(e), the Subcontractor will only be entitled to payment of the additional direct costs incurred as a result of complying with the Acceleration Direction if the Subcontractor's Claim for the additional direct costs clearly demonstrates:
    - A. the costs that were incurred were reasonable; and
    - B. the costs which would otherwise have been incurred are substantiated by reference to the Subcontractor's estimates for the work included in its tendered price or rates; and
  - (iv) subject to clause 7.6(g), the Subcontractor will not be entitled to make any Claim against CDI, arising out of, or in any way in connection with, the cause of delay (in the case of an Acceleration Direction under clause 7.6(a)(ii)) and the Acceleration Direction other than for the amount which is payable by CDI under this clause 7.6(d).
- (e) CDI's Representative and the Subcontractor's Representative must attempt to agree on a fixed amount to which the Subcontractor will be entitled on account of additional direct costs under clause 7.6(d)(iii) as a result of complying with the Acceleration Direction. If CDI's Representative and the Subcontractor's Representative fail to reach agreement as to the amount to which the Subcontractor is entitled under clause 7.6(d)(iii) then such dispute will be resolved under clause 14.
- (f) CDI's right to compensation (whether by way of liquidated damages or otherwise) under clause 7.5 for failure by the Subcontractor to achieve Substantial Completion by the Date for Substantial Completion will be measured from the adjusted Date for Substantial Completion if CDI's Representative gives the Subcontractor an Acceleration Direction in accordance with clauses 7.6(a) and 7.6(b).
- (g) If CDI's Representative gives the Subcontractor an Acceleration Direction under clause 7.6(a)(ii) and it only applies to part of the delay, the Subcontractor's entitlement to any extension of time which it otherwise would have had will only be reduced to the extent to which the Acceleration Direction requires the Subcontractor to accelerate to overcome the delay.

## **7.7 Substantial Completion**

- (a) When the Subcontractor is of the opinion that Substantial Completion has been reached, the Subcontractor must request in writing that the CDI Representative inspect and certify that the Works have achieved Substantial Completion.
- (b) Within the time period listed in item 22 of the Schedule of Subcontract

Information after receiving the written request under clause 7.7(a), CDI will either:

- (i) certify that Substantial Completion of the Works has been achieved, or
  - (ii) give notice to the Subcontractor identifying which part of the Works that have not satisfied the requirements for Substantial Completion.
- (c) The Subcontractor must remedy the items stated in CDI's notice under clause 7.7(b)(ii) within the time and in the manner prescribed. Once complete, the Subcontractor must issue a new written request to CDI under clause 7.7(a).
- (d) Upon the issue of a Certificate of Substantial Completion, the Subcontractor must hand over the Works to CDI.
- (e) The Subcontractor must, no later than the number of days specified in item 23 of the Schedule of Subcontract Information after the Date of Substantial Completion, correct all items that remain outstanding as listed in the Certificate of Substantial Completion, failing which:
- (i) CDI may complete any or all of those items that remain uncorrected either itself or by engaging others; and
  - (ii) the cost incurred by CDI will be a debt due and payable by the Subcontractor to CDI.
- (f) A Certificate of Substantial Completion will not:
- (i) constitute approval by CDI of performance of the Work under the Subcontract or the Works;
  - (ii) be taken as an admission or evidence that the Work under the Subcontract or the Works comply with this Subcontract; or
  - (iii) prejudice any rights or powers of CDI.
- (g) The Principal may, by CDI giving prior written notice to the Subcontractor, occupy and use any part of the Works even though Substantial Completion has not been achieved.
- (h) Such occupation and use by the Principal will not limit or affect the Subcontractor's rights and obligations under this Subcontract, including the obligation to achieve Substantial Completion by the Date for Substantial Completion.

## **7.8 Force Majeure**

- (a) If a Force Majeure Event occurs and the Subcontractor is affected so that it is unable wholly or in part to carry out its obligations under the Subcontract (other than an obligation to pay money), the Subcontractor must give to CDI written notice (including full particulars) of that event within the time period specified in item 24 of the Schedule of Subcontract Information following the



occurrence of the event.

- (b) The obligations of the Subcontractor will be suspended to the extent that they are affected by the Force Majeure Event, but only for so long as the Force Majeure Event continues.
- (c) If the Subcontractor is affected by a Force Majeure Event it must:
  - (i) use reasonable endeavours to mitigate the effect of the Force Majeure Event as quickly as practicable; and
  - (ii) inform CDI in writing (on a weekly basis) of the steps taken by it to mitigate the effect of that Force Majeure Event and the impacts of those steps.

## **7.9 Suspension**

- (a) CDI may at any time give a written direction to the Subcontractor to suspend the execution of all or any part of the Work under the Subcontract and the Subcontractor must, upon receipt of that direction, immediately suspend the execution of that part of the Work under the Subcontract.
- (b) Subject to clause 7.9(d), CDI will determine (acting reasonably) whether to pay the Subcontractor compensation for the suspension of all or any part of the Work under the Subcontract subject to a direction given under clause 7.9(a), which compensation will be limited to the Subcontractor's direct on Site stand-down costs and direct demobilisation costs as determined by the CDI Representative.
- (c) CDI may at any time give a written direction to the Subcontractor to resume the execution of the Work under the Subcontract which has been suspended and:
  - (i) the Subcontractor must resume execution of the Work under the Subcontract which has been suspended as soon as possible; and
  - (ii) in the event that the suspension will cause an actual delay to the Subcontractor achieving Substantial Completion by the Date for Substantial Completion, CDI must extend the Date for Substantial Completion.
- (d) If CDI gives a direction under clause 7.9(a) as a result of a breach by the Subcontractor of its obligations under the Subcontract, or an act or omission of the Subcontractor or any of the Subcontractor Personnel, the Subcontractor is not entitled to:
  - (i) any compensation under clause 7.9(b);
  - (ii) an extension of the Date for Substantial Completion under clause 7.9(c); or
  - (iii) make any other Claim.

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## 8. Variations to the Work under the Subcontract

### 8.1 Variations

- (a) The Subcontractor acknowledges and agrees that:
  - (i) CDI's Representative may at any time (acting reasonably) direct the Subcontractor to vary the Work under the Subcontract;
  - (ii) the variation may include increases in or additions to, reductions in or omissions from, or variations in the character or the quality of the Work under the Subcontract; and
  - (iii) if the variation requires the omission of Work under the Subcontract, CDI may carry out the omitted Work under the Subcontract itself or have the omitted Work under the Subcontract carried out by others or not at all, as it sees fit.
  
- (b) If the Subcontractor receives a direction under clause 8.1(a), it must:
  - (i) perform its obligations under the Subcontract in accordance with the varied Work under the Subcontract to the extent the parties have agreed the consequences of that variation or otherwise CDI has made a determination of the consequences under clause 8.2; and
  - (ii) submit a proposal (“**Variation Proposal**”) to CDI within 3 Business Days of receipt of the direction or within such other period agreed by the parties, setting out:
    - A. any amendments to this Subcontract, including to the Scope of Work, which may be required as a result of the proposed variation, together with a detailed explanation as to why the amendments are necessary;
    - B. if applicable, details of any delay to performance of the Works which would result from the proposed variation, including the effect on the Date for Substantial Completion, and the other details required by this Subcontract in respect of an extension of time claim;
    - C. if applicable, any adjustment to the Subcontract Price which would result from the proposed variation valued in accordance with the rates, prices and principles in this Subcontract;
    - D. a full breakdown of, and all supporting information to substantiate, a Subcontract Price adjustment on an open book basis and calculated on the basis of applicable rates or prices in this Subcontract or where an applicable rate or price is not specified in this Subcontract, the Subcontractor may propose a rate or price, but any such proposal will not limit or in any way affect CDI's rights under clause 23.5; and

- E. any other relevant matters that might assist CDI and the Principal to make a decision regarding whether to proceed with the proposed variation; and
- (c) accompanied by a full breakdown of, and all supporting information to substantiate, the adjustment on an open book basis; and calculated on the basis of applicable rates or prices in the Pricing Schedule or where an applicable rate or price is not specified in the Pricing Schedule, the Contractor may propose a rate or price for adjustment to the Contract Sum, but any such proposal will not limit or in any way affect, the Principal's rights under clause 8.2.

## **8.2 Valuation**

If the parties are unable to agree to an adjustment of the Subcontract Price within the time period specified in item 25 of the Schedule of Subcontract Information following the date of a direction given under clause 8.1(a) or clause 6.2(b), CDI's Representative must (acting reasonably):

- (a) determine such adjustment on the cost of the work and materials to be added, reduced or omitted as a result of the variation to the Work under the Subcontract; and
- (b) value the cost of the work and materials referred to in clause 8.2(a) on the basis of:
  - (i) if the Schedule of Prices prescribes rates and prices to be applied in determining the value, those rates and prices; or
  - (ii) if clause 8.2(b)(i) does not apply, reasonable rates and prices.

## **8.3 Unacknowledged variations**

- (a) If the Subcontractor considers that a CDI direction constitutes a variation (but it does not purport to be a variation), the Subcontractor must before acting in accordance with the direction:
  - (i) immediately notify CDI accordingly; and
  - (ii) within 3 Business Days of the date of the direction, provide CDI with a fully substantiated Variation Proposal under clause 8.1(b)(ii).
- (b) If the Subcontractor fails to comply with clause 8.3(a):
  - (i) CDI will not be liable upon any Claim by the Subcontractor; and
  - (ii) the Subcontractor will be absolutely barred from making any Claim against CDI,

in connection with the direction which the Subcontractor considers constitutes a variation.

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## **9. Payment**

### **9.1 CDI's payment obligations**

Subject to clause 9.12 and any other right to set-off which CDI may have, CDI must pay the Subcontractor the Subcontract Price in accordance with the Subcontract.

### **9.2 Form of Payment**

CDI will make payment to the Subcontractor by EFT to the Subcontractor's nominated account as specified in the Schedule of Subcontract Information.

### **9.3 Payment Claims**

If CDI is to pay the Subcontractor:

- (a) one amount (“**contract sum**”) for the performance by the Subcontractor of all of its Work under the Subcontract, the Subcontractor may claim the proportion of the contract sum that is equal to the proportion that the work performed (since the previous payment claim) bears to the total Work under the Subcontract to be performed by the Subcontractor; and/or
- (b) in accordance with rates or amounts specified in the Subcontract, the Subcontractor may claim the value of the Work under the Subcontract performed, calculated by reference to those rates or amounts.

### **9.4 Time for and format of Payment Claims**

- (a) Unless otherwise agreed and subject to clause 9.9, the Subcontractor must give CDI's Representative one claim per month for payment on account of the Subcontract Price and any other amounts payable by CDI to the Subcontractor under the Subcontract (“**Payment Claim**”) (which will be deemed to be a payment claim for the purposes of the SOPA):
  - (i) on or after the day of each month specified in item 26 of the Schedule of Subcontract Information and the time required by clause 9.10 where relevant; and
  - (ii) in the format approved in writing by CDI's Representative (acting reasonably), which must as a minimum:
    - A. set out the amount of the Subcontract Price and the other amounts that the Subcontractor asserts are payable to the Subcontractor in accordance with the Subcontract;
    - B. detail the relevant period of the Work under the Subcontract for the Payment Claim;
    - C. describe in detail the part of the Work under the Subcontract performed during the relevant period for the Payment Claim;
    - D. set out amounts paid previously under the Subcontract;

- E. refer to the Subcontract number in the Schedule of Subcontract Information;
  - F. provide an individual Payment Claim Number for CDI to quote with remittance of payment;
  - G. state that it is made under the '*Building and Construction Industry (Security of Payment) Act 2021 (WA)*' and set out any and all other information required by that Act and its associated regulations;
  - H. include a certificate or statutory declaration (as directed by and, in the form reasonably requested by, CDI's Representative) stating that all wages and other charges have been paid and that no monies are due or owing by the Subcontractor to the Subcontractor Personnel other than any Subcontractor Personnel disclosed in the certificate or declaration (including reasons);
  - I. include any other information as reasonably directed by CDI's Representative.
- (b) Any Payment Claim issued prior to the relevant date referred to in clause 9.4(a)(i) will be deemed to have been issued and dated on the relevant date referred to in that clause.
  - (c) In the event that the Subcontractor issues a Payment Claim after the end of the month in which the Payment Claim was intended to be submitted (i.e. after the month in which the earliest date for submission of the Payment Claim as referred to clause 9.4(a)(i) arises), CDI will be entitled to (and may elect) treat the Payment Claim as having been submitted in the subsequent month and in which case it will be deemed to have been issued and dated as required by clause 9.4(a)(i) in that subsequent month.
  - (d) Notwithstanding anything in this clause, the Subcontractor must not, and is not entitled to, submit a Payment Claim more than 6 months after the Work to which the Payment Claim relates was last carried out.

## **9.5 Subcontractor warranty**

By making a Payment Claim, the Subcontractor warrants to CDI that:

- (a) the Subcontractor has completed the work which is the subject of the Payment Claim;
- (b) to the knowledge of the Subcontractor, there are no Defects in the work which is the subject of the Payment Claim;
- (c) any remuneration and other amounts payable by the Subcontractor to any of its Subcontractor Personnel by Law or under an industrial instrument and otherwise in respect of the Work under the Subcontract have been paid;
- (d) the Approved Subcontractors have been paid all amounts due and payable to them for work performed or material supplied by them in respect of the work

which was the subject of the Payment Claim; and

- (e) the Subcontractor has complied with all of the obligations imposed on the Subcontractor by any subcontract in relation to the Work under the Subcontract.

## **9.6 Incomplete Payment Claims**

- (a) If any Payment Claim (including any Payment Claim submitted under clause 9.6(b)) does not contain the information required under clause 9.4(a)(ii), CDI's Representative may:
  - (i) complete the missing details and assess the Payment Claim in accordance with clause 9.7; or
  - (ii) return the incomplete Payment Claim to the Subcontractor and notify the Subcontractor that clause 9.6(b) applies.
- (b) Where CDI's Representative returns an incomplete Payment Claim to the Subcontractor, the Subcontractor must submit a Payment Claim that complies with clause 9.4(a)(ii) within the time notified by CDI's Representative or, where no time is notified, within 48 hours.

## **9.7 Response to Payment Claim**

- (a) Within 15 Business Days after the date of a Payment Claim made under clause 9.4, CDI's Representative will give the Subcontractor on behalf of CDI a written payment schedule ("**Payment Schedule**") which states:
  - (i) the Payment Claim to which it relates;
  - (ii) the amount payable to the Subcontractor by CDI (including in respect of any relevant milestones achieved by the Subcontractor that are the subject of the Payment Claim);
  - (iii) any other amounts that are payable to the Subcontractor in accordance with this Subcontract;
  - (iv) any and all amounts payable by the Subcontractor to CDI, including the amount of delay liquidated damages; and
  - (v) any and all amounts that CDI is entitled to retain, deduct, withhold or set-off.
- (b) CDI's Representative may when issuing a further Payment Schedule correct any error discovered in any previous Payment Schedule or modify any previous Payment Schedule issued by it.
- (c) If the Subcontractor fails to make a Payment Claim in accordance with the Subcontract, CDI's Representative may nevertheless issue a Payment Schedule under clause 9.7(a).
- (d) The Payment Schedule will also include any reasons (including under this Subcontract or otherwise) for any part of an amount claimed by the Subcontractor in a Payment Claim that CDI has determined to not be payable, including by way

of any retention, deduction, withholding or setting-off.

- (e) If within the time prescribed in clause 9.7(a) a Payment Schedule is not given, then CDI will pay the amount claimed in the Payment Claim.
- (f) Failure by CDI's Representative to set out in a Payment Schedule an amount which CDI is entitled to retain, deduct, withhold or set off from the amount which would otherwise be payable to the Subcontractor by CDI will not prejudice CDI's right to exercise its right to retain, deduct, withhold or set off any amount under the Subcontract.
- (g) The parties agree that in accordance with its ERS System CDI will issue a recipient created tax invoice ("**Recipient Created Tax Invoice**"), as that term is used in the GST Legislation, on behalf of the Subcontractor in relation to the Works together with each Payment Schedule and that the Subcontractor will not issue a Tax Invoice in relation to the Works.

## **9.8 Payment**

- (a) Subject to clauses 9.7(e), 9.9, 9.13, 10.2 and 10.4, within the number of days specified in item 27 of the Schedule of Subcontract Information after the date of a Payment Claim or Final Payment Claim is issued (as applicable), CDI must pay to the Subcontractor (or, where Special Condition 3 applies, through the Project Bank Account) or the Subcontractor must pay to CDI, as the case may be, the amount shown in the Payment Schedule as due to the Subcontractor or to CDI as the case may be.
- (b) A payment made pursuant to the Subcontract:
  - (i) is on account only and will not prejudice the right of either party to dispute whether the paid amount is the amount properly due and payable;
  - (ii) will not be evidence of the value of the Work under the Subcontract;
  - (iii) will not be evidence that the Work under the Subcontract has been executed satisfactorily; and
  - (iv) will not be an admission of liability on the part of CDI.

## **9.9 Conditions precedent to Payment Claims**

Notwithstanding anything else in this Subcontract, the Subcontractor is not entitled to submit a Payment Claim under clause 9.3 unless the Subcontractor has:

- (a) effected the insurance required by clause 10 and (if requested) provided evidence of this to CDI's Representative;
- (b) finalised and received approval for any and all plans, JSEA or SWMS required pursuant to clause 3;
- (c) where clause 9.14 applies, complied with the requirements of clause 9.14 in respect of unfixed goods or materials;
- (d) provided the Unconditional Banker's Undertaking if required by this

Subcontract; and

- (e) satisfied the other conditions precedent to submitting a Payment Claim set out in item 28 of the Schedule of Subcontract Information.

## 9.10 Final Payment Claim

- (a) Within 28 days after the expiry of the last Defects Correction Period (or, where there is not Defects Correction Period then by the date that is 6 calendar months after completion of all Work under the Subcontract), the Subcontractor must deliver to CDI's Representative a final payment claim under clause 9.3 titled "**Final Payment Claim**" which will be deemed to be a final payment claim for the purposes of the SOPA.
- (b) The Subcontractor must include in the Final Payment Claim:
  - (i) a statement that it is made under the '*Building and Construction Industry (Security of Payment) Act 2021 (WA)*' and set out any and all other information required by that Act and its associated regulations;
  - (ii) a complete statement of accounts, including any variations to the Subcontract or the Work under the Subcontract;
  - (iii) all money that the Subcontractor considers to be due from CDI arising out of or in connection with the Work under the Subcontract, the Subcontract or any alleged breach of Subcontract;
  - (iv) confirmation that all Drawings, Documentation, approvals of all Authorities and deliverables as required by the Subcontract have been lodged with CDI's Representative;
  - (v) a certificate or statutory declaration (as directed by and, in the form reasonably requested by, CDI's Representative) stating that all wages and other charges have been paid and that no monies are due or owing by the Subcontractor to any Subcontractor Personnel other than any Subcontractor Personnel disclosed in the certificate or declaration (including reasons); and
  - (vi) any and all information reasonably directed by CDI's Representative.
- (c) The Subcontractor must provide with the Final Payment Claim details of how the amount claimed ("**Amount Claimed**") is calculated including:
  - (i) separate identification of each Claim and the amount of each Claim which is part of the Amount Claimed;
  - (ii) which clause, if any, of the Subcontract the Subcontractor relies upon to support an entitlement to each Claim;
  - (iii) if based on breach of Subcontract, what obligation, if any, CDI has breached and which the Subcontractor relies upon to support an entitlement to each Claim; and



- (iv) a description of the other acts, defaults and omissions that the Subcontractor relies upon to support any entitlement to a Claim.

After expiration of the relevant period in clause 9.10(a), all Claims which the Subcontractor could have made against CDI but which have not been made are barred.

#### **9.11 Interest on overdue payments**

- (a) If any money due to either party remains unpaid after the date on which the money should have been paid, then the party responsible for the payment must, following a written request by the other party for payment of interest, pay to the other party simple interest on the unpaid amount at the rate of 6% per annum from the date on which the amount is due until payment.
- (b) To the extent permitted by Law, this will be the Subcontractor's sole entitlement to interest including damages for loss or use of, or the cost of borrowing, money.

#### **9.12 Set off**

CDI may set off or deduct from any payments due to the Subcontractor any debt or other moneys due from the Subcontractor to CDI (including any related CDI entity) or any Claim to money which CDI makes against the Subcontractor, whether for damages (including liquidated damages) or otherwise, whether under the Subcontract or on any other account whatsoever.

#### **9.13 CDI's payment of subcontractors**

- (a) If the Subcontractor owes any subcontractor of the Subcontractor money in connection with the Work under the Subcontract, and:
  - (i) that money has been outstanding under the relevant subcontract for more than 14 days; and
  - (ii) the Subcontractor cannot satisfy CDI's Representative that there is a valid reason for that outstanding money not having been paid,

CDI may pay the subcontractor the outstanding amount, and the outstanding amount so paid will be a debt due and immediately payable from the Subcontractor to CDI.

- (b) No debt by CDI will be taken to have accrued in favour of the Subcontractor in respect of any payment by CDI of an outstanding amount in accordance with clause 9.13(a).
- (c) CDI is entitled to withhold from any payment which would otherwise be due to the Subcontractor under the Subcontract any amount owing to a subcontractor by the Subcontractor under clause 9.13(a).

#### **9.14 Unfixed goods and materials**

Notwithstanding any other provision of the Subcontract but to the extent permitted by Law, the Subcontractor must not include any amount on account of unfixed goods or

materials in a Payment Claim or any other Claim unless a Special Condition expressly provides in which case the terms of that Special Condition will apply.

## 9.15 GST

- (a) Each party acknowledges that it is registered for GST and agrees that it will immediately notify the other party if it ceases to be so registered.
- (b) As soon as a party receives notice or becomes aware the other party is not registered for GST or has otherwise failed to satisfy the requirements of any applicable tax ruling on Recipient Created Tax Invoices, the GST registered party may withhold any payment due to the other party under the Subcontract until the other party becomes GST registered or complies with the requirements of any applicable tax ruling on Recipient Created Tax Invoices (as the case may be).
- (c) Subject to clause 9.15(d), where any supply occurs under or in connection with the Subcontract or the Works the consideration for which is not expressed to be GST- inclusive, the party making the supply (“**Supplier**”) will be entitled to increase the amount payable for the supply by the amount of any applicable GST.
- (d) If, under the Subcontract, the amount of a payment to, or reimbursement of, the Subcontractor by CDI is calculated by reference to the Subcontractor's costs, and the Subcontractor (or the representative member of any GST group of which the Subcontractor is a member) is entitled to claim an input tax credit in respect of some or all of those costs, the amount is to be calculated by reference to the costs reduced by the amount of that entitlement. If the recovery from CDI is consideration for a taxable supply (as defined in the GST Legislation), CDI will pay, in addition to that consideration, any GST arising in respect of that consideration.
- (e) As a condition precedent to any amount on account of GST being due from the recipient to the Supplier in respect of a taxable supply, the Supplier must provide a Tax Invoice to the recipient in respect of that supply.
- (f) If the amount paid by the recipient to the Supplier in respect of GST (whether because of an Adjustment or otherwise):
  - (i) is more than the GST on the taxable supply, then the Supplier must refund the excess to the Recipient; or
  - (ii) is less than the GST on the taxable supply, then the recipient must pay the deficiency to the Supplier.
- (g) For the purposes of this clause, “**GST group**”, “**input tax credits**”, “**recipient**”, “**representative member**”, “**supply**” and “**taxable supply**” have the meanings given to them in the GST Legislation.

## 9.16 Taxes

- (a) The Subcontractor is and remains liable for payment of any and all Taxes. If any Tax is imposed, the Subcontractor must pay the full amount to the relevant authority and indemnifies CDI against any failure to do so. If any exemptions, reductions, allowances, rebates or other privileges in relation to Taxes may be available to the Subcontractor or CDI, the Subcontractor must adjust any

payments due to reflect any such savings or refunds (including interest awarded) to the maximum allowable extent.

- (b) CDI may deduct from the whole or part of payments due to the Subcontractor any Taxes which CDI is required to withhold or deduct by any Taxing Authority in respect of the Work under the Subcontract.

## **9.17 Allowance in the Subcontract Price**

- (a) The Subcontractor acknowledges and agrees that the Subcontract Price (as varied in accordance with this Subcontract) is the Subcontractor's sole entitlement to payment in respect of the Works, and is not subject to adjustment for rise and fall of costs, including any changes in the costs of labour, plant, equipment, materials, taxation, excises, duties, fees or charges, except as otherwise expressly stated in this Subcontract.
- (b) The Subcontractor acknowledges and agrees that:
  - (i) the Subcontract Price is not conditional upon the Subcontractor having exclusive possession or control of the Site, or that portion of the Site on which the Works will be performed;
  - (ii) CDI, the Principal and their employees, agents, consultants, contractors and other subcontractors will be entitled at all times to use and occupy any part of the Site during performance by the Subcontractor of the Works; and
  - (iii) the Subcontractor is required to use its best endeavours to ensure that it does not cause any damage to, or interference with, the property or work of those parties.
- (c) The Subcontractor warrants that it has made due allowance in the Subcontract Price for all costs necessary to:
  - (i) progress and complete the Works in accordance with the terms of the Subcontract, including the times and by the latest date(s) prescribed by CDI in CDI's Construction Programme;
  - (ii) carry out the Works in accordance with each of the drawings, specifications and other documents incorporated into this Subcontract; and
  - (iii) liaise with and co-ordinate the performance of the Works with such other parties as will be on Site at the same time as the Subcontractor.

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## **10. Security**

### **10.1 Delivery of Unconditional Banker's Undertakings**

- (a) If item 29 of the Schedule of Subcontract Information specifies that the Subcontractor is to provide security in respect of the performance of its obligations under the Subcontract by way of Unconditional Banker's Undertakings, then the Subcontractor must, within 7 days of the Effective Date, provide two Unconditional Banker's Undertakings in a form approved by CDI in writing and in the amounts specified in item 29 of the Schedule of Subcontract Information.
- (b) If, at any time, an Unconditional Banker's Undertaking provided by the Subcontractor is set to expire before the date until which that security is required under this Subcontract, the Subcontractor must, not less than 20 Business Days before that security is set to expire, notify CDI in writing and either:
  - (i) procure an extension of the security's expiry as necessary; or
  - (ii) provide a replacement Unconditional Banker's Undertaking in the same form and satisfying the same requirements as the one that it is replacing.
- (c) If the issuer of the Unconditional Banker's Undertaking ceases to have the rating required by item 29 of the Schedule of Subcontract Information or ceases to be the holder of a current licence issued by the Australian Prudential Regulation Authority, the Subcontractor must promptly, and in any case no later than 10 Business Days after the relevant rating downgrading or loss of licence (as the case may be) has occurred, procure the provision of a replacement security to CDI in the same form and satisfying the same requirements as the one that it is replacing.
- (d) Without limiting the unconditional nature of the security, and in addition to and without limiting CDI's right to draw on the security, if the Subcontractor fails to replace security in accordance with this clause 10.1, CDI may demand (and the Subcontractor must pay on demand) the full face value of the relevant security that is to be replaced and hold and use that amount as cash in accordance with this clause 10.

### **10.2 Retention Moneys**

If item 29 of the Schedule of Subcontract Information specifies that the Subcontractor is to provide security by way of retention moneys, then:

- (a) CDI will be entitled to deduct from the amount payable to the Subcontractor pursuant to any Payment Schedule a portion of that amount equal to the percentage specified in item 29 of the Schedule of Subcontract Information by way of retention moneys until the limit (being an amount or maximum percentage of the Subcontract Price as specified in item 29 of the Schedule of Subcontract Information) is reached.
- (b) CDI will pay any retention moneys received into a trust account with a Bank, which must be established by CDI within 10 Business Days of the Effective

Date. The trust account will be a deposit or transaction account of the Bank and the name and description of the account will include the words 'trust account' and CDI's records will reflect the same. CDI will maintain and operate the trust account in accordance with the SOPA.

- (c) CDI is entitled to use a previously established trust account for the purposes of complying with this clause 10.2.
- (d) As soon as practicable after the trust account has been established or nominated, CDI will inform the Subcontractor in writing of the following particulars of the trust account (and notify the Subcontractor in writing if any of these particulars change):
  - (i) the name of the Bank with which the trust account has been established;
  - (ii) the name of the trust account;
  - (iii) the BSB and account number for the trust account; and
  - (iv) any other particulars prescribed by the relevant SOPA regulations.
- (e) Any retention moneys provided by the Subcontractor will be held on trust by CDI until it is used, disbursed, or returned in accordance with clause 10.4.
- (f) If CDI uses the retention moneys and it is subsequently determined, in accordance with this Subcontract, that the subcontractor has no liability to CDI for the relevant loss in respect of which CDI called upon the retention monies, or the relevant loss is less than the retention moneys used by CDI, then:
  - (i) CDI will repay the relevant amount of the retention moneys used by CDI that is in excess of CDI's determined loss (if any); and
  - (ii) the Subcontractor will not be entitled to make any Claim against CDI, other than in accordance with clause 10.2(f)(ii).
- (g) CDI may close the trust account:
  - (i) after the retention moneys are no longer retained under this Subcontract; or
  - (ii) the retention moneys are transferred to another trust account established for the same purposes.

CDI will give the Subcontract written notice of any closure of the trust account as soon as practicable after the closure.

### **10.3 Recourse to Security**

CDI may have recourse to the Security provided for by this clause 10 in the event that the Subcontractor fails to comply with its obligations under the Subcontract (including in respect of any and all sums due from the Subcontractor to CDI that are not paid when due) and otherwise, in respect of retention monies, as permitted by the SOPA. CDI

agrees to provide the Subcontractor with not less than 5 Business Days' prior written notice before CDI makes a demand on any Security (whether it be retention moneys or an Unconditional Banker's Undertaking) under this Subcontract, which notice must:

- (a) be given in writing;
- (b) identify the Subcontract and the provisions of the Subcontract that CDI relies on to have recourse to the Security; and
- (c) describe the circumstances that entitle CDI to have recourse to the Security.

## **10.4 Return of Security**

- (a) Subject to clauses 10.4(b) and 10.4(c), CDI must return 50% of the Unconditional Banker's Undertakings or the retention moneys, as the case may be, to the Subcontractor within thirty (30) days of the issue of the Certificate of Substantial Completion, and the balance of the Unconditional Banker's Undertaking or retention moneys within thirty (30) days of the expiration of the last of the Defects Correction Periods.
- (b) If at the time for the return of the Unconditional Banker's Undertaking or retention moneys under clause 10.4(a) CDI has a bona fide Claim against the Subcontractor, CDI may retain an amount of the Unconditional Banker's Undertaking or retention moneys as the case may be or the whole, sufficient to cover the Claim.
- (c) If the Subcontract is terminated by CDI for any reason, CDI will be entitled to retain the Unconditional Banker's Undertakings or retention moneys (or both) until all matters in dispute between CDI and the Subcontractor are resolved by agreement or binding determination, decision or award. This clause 10.4 will survive the termination of the Subcontract.
- (d) The proceeds of the exercise or presentation of Security by CDI in respect of the Subcontractor's performance of its obligations under the Subcontract will not be held in trust and may be used or disbursed by CDI at its discretion.

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## **11. Indemnities**

### **11.1 Indemnity by Subcontractor**

Insofar as this clause applies to property, it applies to property other than Work under the Subcontract.

The Subcontractor must indemnify, and keep indemnified, the Indemnified Parties against any and all:

- (a) loss of, and damage to, property of the Indemnified Parties; and
- (b) Claims in respect of personal injury or death, or loss of, or damage to, any other property,

arising out of or as a consequence of the carrying out of Work under the Subcontract to the extent caused or contributed to (or both) by the Subcontractor or any Subcontractor Personnel (any one singly and any combination), but the indemnity will be reduced

proportionally to the extent that the act or omission of one or more of the Indemnified Parties has contributed to the injury, death, loss or damage.

The Subcontractor must indemnify, and keep indemnified, the Indemnified Parties against and any all liabilities arising from any breach of the Subcontract by the Subcontractor which results in one or more Claims being made against CDI by the Principal under the Head Contract or one or more Claims being made against CDI or its Related Bodies Corporate under any other contracts to which CDI or any of its Related Bodies Corporate is a party in relation to these Works (any one singly and any combination). This indemnity will be reduced proportionally to the extent that an act or omission of CDI or the relevant Related Body Corporate contributes to the Claim.

This clause will not apply to:

- (a) the extent that the Subcontractor's liability is limited by another provision of the Subcontract;
- (b) exclude any right of the Indemnified Parties to be indemnified by the Subcontractor;
- (c) things for the care of which the Subcontractor is responsible under clause 12.1; and
- (d) Claims in respect of the right of CDI to have Work under the Subcontract carried out.

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## **12. Risk of loss or damage and insurance**

### **12.1 Care of Work under the Subcontract**

Except as provided in clause 12.2, the Subcontractor must be responsible for the care of:

- (a) the whole of Work under the Subcontract from and including the date of commencement of Work under the Subcontract to 4:00pm on the Date of Substantial Completion, at which time the responsibility for the care of the Works (except to the extent provided in clause 12.1(b)) will pass to CDI; and
- (b) outstanding work and items to be removed from the Site by the Subcontractor after 4:00pm on the Date of Substantial Completion until completion of any outstanding work including remedying any and all Defects.

### **12.2 Reinstatement**

If loss or damage, other than to the extent caused by an Excepted Risk, occurs to Work under the Subcontract during the period of the Subcontractor's care, the Subcontractor must, at its cost, rectify such loss or damage.

### **12.3 Insurance policies**

Unless stated otherwise in the Schedule of Insurance Information, the Subcontractor must at its own expense procure and maintain the following insurances with reputable insurers and on policy forms reasonably acceptable to CDI:

### *Workers' Compensation Insurance*

- (a) workers' compensation insurance (including occupational disease where required by Law) and employer's indemnity insurance with a sum insured of not less than the sum stipulated in Schedule 10 (Schedule of Insurance Information), for the duration of the Works and Work under the Subcontract);
- (b) the workers' compensation insurance must with the relevant Laws and cover all claims and liabilities under any statute and at common law (where applicable) for the death of or injury to:
  - (i) any person employed by the Subcontractor or any of its subcontractors in connection with the Subcontract; and
  - (ii) any person who is a worker of the Subcontractor or any of its subcontractors in connection with the Subcontract and who may be deemed under statute to be a worker of CDI or the Principal;
- (c) where permitted by Law, the workers' compensation insurance must:
  - (i) be extended to indemnify CDI and the Principal for statutory liability under the *Workers' Compensation and Injury Management Act 1981* (WA) (as amended) or any equivalent legislation, and liability at Common Law; and
  - (ii) be further extended to include a waiver of subrogation favouring CDI and the Principal for statutory liability under the *Workers' Compensation and Injury Management Act 1981* (WA) (as amended) or equivalent legislation, and liability at Common Law;

### *Motor Vehicle Insurance*

- (d) motor vehicle insurance covering all mechanically propelled vehicles that are registered, or capable of being registered, for road use and are at any time used in connection with the Subcontract which provides cover not less than the sum stipulated in the Schedule of Insurance Information, including:
  - (i) insurance that is compulsory under applicable laws governing the use of motor vehicles and liability for personal injury or death; and
  - (ii) liability insurance for third party property damage with a sum insured of not less than the sum stipulated in the Schedule of Insurance Information in respect of a single occurrence and in the aggregate for all occurrences during the period of insurance;
- (e) the motor vehicle insurance must:
  - (i) be extended to indemnify CDI for its liability arising from the operation of motor vehicles, plant and/or equipment, and also include a waiver of subrogation in favour of CDI; and
  - (ii) include a cross-liability extension stating that the policy must operate as if there was a separate policy covering each insured and



further include a provision stating that a failure by any insured to comply with the policy terms and conditions will not prejudice the rights and entitlements of any other insured under the policy;

*General Public and Products Liability Insurance*

- (f) general public and products liability insurance covering liability to any person for death, bodily injury, loss of or damage to property and consequential loss in connection with the activities of the Subcontractor pursuant to the Subcontract, but all in all events not less than the sums stipulated in the Schedule of Insurance Information in respect of a single occurrence and in the aggregate for all occurrences during the period of insurance (being the duration of the Works and Work under the Subcontract);
- (g) the general public and products liability insurance must, unless prohibited by law:
  - (i) include a principal's indemnity extension in favour of the Principal and CDI with respect to the liability incurred as a result of the acts or omissions of the Subcontractor;
  - (ii) be endorsed by the insurer to act as primary cover to (and therefore not as excess of or secondary cover to) any other insurance or indemnities provided by the Subcontractor under this Subcontract;
  - (iii) include a cross liability endorsement that:
    - A. the insurance policy and endorsements, except limits of liability, must operate in the same manner as if there were a separate policy of insurance covering each party insured;
    - B. a failure by any insured party to observe and fulfil the terms and conditions of the policy must not prejudice the rights of any other insured party;
  - (iv) include an obligation on insurer to waive its rights of subrogation against the Principal and CDI; and
  - (v) include worker to worker liability – to ensure that the Principal, CDI and the Subcontractor are covered for any cross-indemnity liabilities in respect of claims by workers, not being their respective employees, injured during services.

*Professional Indemnity Insurance*

- (h) where the Subcontractor is performing or providing any professional advice or services, including design, design and supervision obligations and project management services under the Subcontract, professional indemnity insurance covering those obligations, with a sum insured of not less than the sums stipulated in the Schedule of Insurance Information in respect of a single claim and in the aggregate for all occurrences during the period of insurance (being from the Execution Date to 7 years after the completion of all the Works and

Work under the Subcontract);

- (i) the professional indemnity insurance must not contain provisions which preclude CDI's ability to recover for breach of professional duty up to the limit of the insurance;

*Construction Risks Insurance*

- (j) construction risks insurance covering (for full replacement value) all Works and any part thereof (including Goods supplied by CDI) to the extent it involves the fabrication, manufacture, construction, erection, alteration or repairing of any plant or equipment that will subsequently be permanently incorporated into the Works;
- (k) the construction risks insurance must allow for demolition, removal of debris, professional fees and extra cost of working/reinstatement and cover the period of the performance of the Works and Work under the Subcontract until the end of the final Defects Correction Period; and

*Other insurance*

- (l) any and all other insurance stated in the Schedule of Insurance Information.

## **12.4 Endorsements**

In addition to those requirements outlined in clause 12.3, the Subcontractor must ensure that, except for any contract of professional indemnity insurance, where prohibited by Law or to the extent that the Indemnified Parties do not have a relevant insurable interest, each contract of insurance referred to in clause 12.3 is endorsed:

- (a) to name the Indemnified Parties, other than contractors who are not related entities (as defined in section 9 of the *Corporations Act 2001* (Cth)) of CDI, as persons to whom the benefit of the contract of insurance extends, only to the extent of their respective interests and liabilities arising out of or in connection with the Subcontract;
- (b) where reasonably possible, with a waiver of subrogation clause in which the insurer agrees not to be subrogated to the rights of any insured or person to whom the benefit of the contract of insurance extends, against any other party so named;
- (c) with a cross-liabilities clause in which the insurer agrees that the policy applies as if a separate policy was issued to each named insured (with the exception of limits of liability); and
- (d) where reasonably possible, with a severability and non-imputation stipulation, so that a breach of any term of the policy or of the duty of disclosure by one insured will not disentitle other named insureds or noted interest beneficiaries to coverage.

## **12.5 CDI's insurance to be excess**

The Subcontractor must do all things reasonable and necessary to enable CDI to ensure that its own insurances operate in excess of any insurance taken out by the Subcontractor, in accordance with clause 12.3, and are not called into contribution with it.

## **12.6 Subcontractors**

The Subcontractor must ensure that its subcontractors procure and maintain the contracts of insurance mentioned in clause 12.3 and that those contracts of insurance are endorsed in accordance with clause 12.3.

## **12.7 Insurances and liability**

To avoid any doubt, no provision in this clause 12 will limit the Subcontractor's liability under clause 11.

## **12.8 Currency of insurance**

- (a) The Subcontractor must, at the commencement of the Subcontract and otherwise when requested by CDI to do so from time to time, promptly satisfy CDI that each contract of insurance it is required to procure under this clause 12 is current.
- (b) Notwithstanding anything to the contrary in the Subcontract, CDI:
  - (i) has the right to refuse the Subcontractor (and any Subcontractor Personnel) entry to CDI's premises; and
  - (ii) is not obliged to pay, and may withhold payment of (without any interest accruing), any amount owed by it to the Subcontractor under the Subcontract,

unless and until the Subcontractor has at the Effective Date (or promptly thereafter) satisfied CDI pursuant to this clause that the required insurance is in place and current.

## **12.9 Failure to procure or maintain insurance**

If the Subcontractor fails to procure and maintain insurance policies in accordance with the Subcontract CDI may, but is not obliged to:

- (a) procure and maintain any such insurance and deduct the cost of doing so from any payments to be made to the Subcontractor by CDI (under the Subcontract or any other contract); or
- (b) refuse to make any further payments due from time to time to the Subcontractor (under the Subcontract or any other contract) until the insurance policies and receipt for the payment of premiums are made available for inspection by CDI.

## **12.10 General obligations in relation to insurance**

- (a) Whenever a claim is made under any of the policies of insurance referred to in clause 12.3, the Subcontractor is liable for any excess or deductible payable as a consequence.
- (b) Whenever a claim is made under any construction risks insurance policy maintained by CDI, the Subcontractor is liable for any excess or deductible payable as a consequence to the extent that the Subcontractor is responsible for

the act or failure to act which gave rise to that claim.

- (c) The Subcontractor must inform CDI's Representative in writing immediately it becomes aware of any actual, threatened or likely claims under any of the insurances referred to in clause 12.3.
- (d) The Subcontractor must not do or omit to do, or permit or suffer to be done any act or omission whereby any of the insurances referred to in clause 12.3 may be vitiated, rendered void or voidable, or whereby the rate of premium of any of the insurances is liable to be increased.
- (e) The parties expressly agree and acknowledge that the requirements of this clause 12 are fundamental requirements of the Subcontract.

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## **13. Default and termination**

### **13.1 CDI's remedy notice**

- (a) If CDI considers that the Subcontractor is in breach of any term or warranty under the Subcontract, CDI may give the Subcontractor a notice:
  - (i) specifying the alleged breach;
  - (ii) specifying the time and date (acting reasonably) by which the Subcontractor must rectify the breach; and
  - (iii) stating whether CDI requires the Subcontractor to prepare a cure plan (and, if so, a reasonable time period for submitting that cure plan) detailing the actions the Subcontractor will take to remedy the breach (if the breach is capable of remedy) or steps it will take to mitigate or overcome the effects of the breach (if the breach is not capable of remedy).
- (b) The Subcontractor must comply with the notice issued under clause 13.1(a).

### **13.2 Termination following breach**

If the Subcontractor fails to comply with a notice given under clause 13.1(a) and/or fails to comply with the cure plan (if any), CDI may:

- (a) if any such failure is subsisting 10 Business Days after the notice has been given, suspend payments of the Subcontract Price to the Subcontractor (to the extent permitted by law) until the date on which the Subcontractor has complied with all of the requirements referred to in this clause 13.2 (as applicable); and/or
- (b) terminate the Subcontract, with immediate effect, by written notice to the Subcontractor.

### **13.3 Termination for CDI's failure to pay**

- (a) If CDI fails to pay an amount when due under this Subcontract, the Subcontractor may give CDI a notice:

- (i) specifying the alleged breach; and
  - (ii) specifying that the payment must be made within 20 Business Days of receipt of the notice.
- (b) CDI must pay the outstanding amount by the date specified in clause 13.3(a)(ii) otherwise the Subcontractor will be entitled to terminate the Subcontract.

#### **13.4 Termination for insolvency**

- (a) If an Insolvency Event occurs to the Subcontractor, CDI may terminate the Subcontract (to the extent permitted by Law), with immediate effect, by written notice to the Subcontractor.
- (b) If an Insolvency Event occurs to CDI, the Subcontractor may request that CDI shows reasonable cause as to why the Subcontractor should not terminate the Subcontract. CDI must respond to that request within the time period notified by the Subcontractor (which must be reasonable). If CDI fails to show reasonable cause then the Subcontractor may terminate the Subcontract (to the extent permitted by Law) upon giving written notice to CDI.

#### **13.5 Termination for convenience**

- (a) Notwithstanding any other provision of the Subcontract:
  - (i) CDI may at its sole discretion and for any reason terminate the Subcontract upon giving 5 Business Days' written notice to the Subcontractor or at a future date specified in the notice; and
  - (ii) the Subcontractor must cease the execution of the Work under the Subcontract immediately upon receiving that notice or upon any later date specified in that notice.
- (b) The Subcontractor is not entitled to make any Claim in relation to the period after the date specified in the notice issued under clause 13.5(a).

#### **13.6 Consequences of Termination**

In the event of termination of the Subcontract by CDI for any reason:

- (a) the Subcontract must:
  - (i) mitigate the cost of termination;
  - (ii) stop work, including not placing further orders or entering into any further contracts in respect of this Subcontract;
  - (iii) take such action as CDI reasonably directs to protect property (including the Works and all plant and materials and the items listed in the Schedule of CDI Supplied Materials and Equipment) in the possession of the Subcontractor in which CDI or the Principal has or may acquire an interest;

- (iv) deliver all items and plant and equipment (including the items listed in the Schedule of CDI Supplied Materials and Equipment) to the Site or other location nominated by CDI, including items in the course of manufacture or to be imported, to the extent paid for by CDI;
  - (v) remove all other plant and equipment of the Subcontractor and the Subcontract Personnel from the Site and leave the Site in a clean and tidy condition;
  - (vi) assign or novate to CDI, the Principal or a nominee all rights and benefits under contracts associated with this Subcontract, as directed by CDI;
  - (vii) transfer to CDI, the Principal or a nominee, all licences, consents and approvals which may be required for use of the plant and materials or otherwise the Works, or to the extent non-transferable, either:
    - A. ensure that the Principal is the beneficiary; or
    - B. make new applications for them for and on behalf of the Principal, as directed by CDI;
  - (viii) hand over the Subcontract Material (complete or not) to CDI;
  - (ix) cease using all items, plant, equipment and Intellectual Property belonging to CDI or the Principal; and
  - (x) as soon as possible, but no later than 5 Business Days after termination, return, erase or destroy (as directed by CDI) all copies of the Principal's and CDI's Intellectual Property and confidential information in the possession or control of the Subcontractor or the Subcontract Personnel;
- (b) CDI is not liable to pay any damages, compensation or reimbursement for any work performed or expense incurred by the Subcontractor after the date of termination nor any cost, charge or expense, Consequential Loss or loss of profit or other economic loss of any kind arising from or consequential upon such termination;
- (c) the remaining Works may be performed by another person;
- (d) to the extent permitted by Law, the Subcontractor will waive any and all Claims for loss, liability, costs, expenses or damages (any one singly and any combination) including Consequential Loss on account of termination; and
- (e) any rights of the parties which may have accrued before the date of termination will not be affected;
- (f) the rights and obligations of the parties under any clause of this Subcontract which expressly, or by implication from their nature, are intended to continue after termination will continue; and

- (g) the availability to CDI of any other remedies or rights which CDI may have against the Subcontractor with respect to the performance or non-performance of this Subcontract up to the effective date of termination or in connection with any breach of this Subcontract by the Subcontractor or at law will not be affected.

### **13.7 Preservation of other rights**

If the Subcontractor is in breach of a term or warranty of the Subcontract nothing in this clause 13 will prejudice the right of CDI to recover damages or exercise any other right it may have under the Subcontract or at Law or in equity.

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## **14. Dispute resolution**

### **14.1 Negotiation**

- (a) The Subcontractor acknowledges and agrees that all of the time bars in this Subcontract are essential provisions of this Subcontract, and necessary to ensure that CDI does not incur liability or loss under the Head Contract.
- (b) This clause 14.1 is subject to clause 14.2.
- (c) If any difference, dispute or question (a “**dispute**”) arises between CDI and the Subcontractor in respect of or in connection with this Subcontract, then a party must give notice to the other party in writing (“**Dispute Notice**”) adequately identifying and providing details of the dispute.
- (d) CDI and the Subcontractor must meet within fourteen (14) days after receipt of the Dispute Notice with a view to resolving the dispute. At any such meeting, each party must be represented by a person having authority to agree to a resolution of the dispute.
- (e) If that meeting does not result in a resolution of the dispute, CDI and the Subcontractor will within a further fourteen (14) days appoint an independent mediator to attend another meeting of the parties to facilitate a resolution to the dispute. If the parties cannot agree upon a mediator within fourteen (14) days, either party may request the President, for the time being of the Master Builders Association of Western Australia, to nominate a suitable person to act as mediator at the meeting. Save for any claim of conflict, the parties agree to be bound by the President’s nomination. In either case, the costs of the mediator will be borne and paid equally by the parties.
- (f) If mediation under clause 14.1(e) does not result in a resolution of the dispute, either party will then be able to commence legal proceedings in any Court of appropriate jurisdiction. It will be a condition precedent to the commencement of legal proceedings that the steps in clauses 14.1(c) to 14.1(e) are strictly adhered to by the party seeking to litigate a matter.
- (g) Nothing in this clause 14 operates to prevent either party to a dispute seeking urgent injunctive or declaratory relief in a court of competent jurisdiction.
- (h) For the avoidance of doubt, the existence or prospect of a dispute (whether

under this clause 14 or otherwise) over any matter in respect of, or in connection with, this Subcontract, does not relieve the Subcontractor of its obligation to perform the Subcontract, including as varied.

## **14.2 Related Disputes**

Where a dispute arises (whether in fact or law or fact and law) which touches or concerns issues raised in dispute between CDI and another subcontractor or CDI and the Principal or both (a “**Related Dispute**”), CDI may, at its option and to the extent permitted by Law, require and the Subcontractor consents to:

- (a) the dispute and the Related Dispute being determined together (which may include determining the dispute in accordance with the process for determining the Related Dispute);
- (b) the joining of the Subcontractor to the Related Dispute;
- (c) the dispute and the Related Dispute being heard at the same time or immediately before or after the other; or
- (d) the proceedings with respect to the dispute under this clause 14 being stayed until the determination of the Related Dispute,

any one singly and any combination.

## **14.3 Dispute resolution not to delay performance**

Notwithstanding the existence of a dispute between the parties and subject to section 62 of the SOPA:

- (a) the Subcontractor must proceed without delay to continue to execute the Work under the Subcontract; and
- (b) both parties must perform their other obligations under the Subcontract.

## **14.4 Impact of SOPA**

- (a) An application for adjudication under Part 3 of the SOPA will not be considered a notice of dispute under clause 14.1(b).
- (b) If a Dispute Notice is given under clause 14.1(b) and the dispute is, or subsequently becomes, the subject of an adjudication application under Part 3 of the SOPA, the operation of this clause 14 will be stayed in relation to that dispute until such time as the application is dismissed or determined under the SOPA.
- (c) If a determination is made pursuant to Part 3 of the SOPA, or the application is dismissed, this clause 14 will have no application in relation to the dispute the subject of that determination or dismissal and either party may commence litigation relating to the dispute.



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## **15. Confidentiality**

- (a) The Subcontractor must not, and must ensure that the Subcontractor Personnel do not, without the prior written approval of CDI:
  - (i) use confidential information obtained from, or on behalf of, or in relation to CDI, other than as necessary for the performance of the Work under the Subcontract; or
  - (ii) disclose such confidential information,  
except to the extent required by Law.
- (b) The Subcontractor must, within seven days of a written direction by CDI's Representative to do so, return or destroy all confidential information in the Subcontractor's possession, custody or control.
- (c) The Subcontractor must not make media announcements or releases (including sharing information or photographs on social media) in relation to CDI, the Principal, the Project, the Subcontract or the Work under the Subcontract, without CDI's prior written approval (including as to the form, content and manner of the announcement or release).
- (d) The Subcontractor must not publish, display or otherwise release any advertisement, information or promotional material regarding the Project, the Subcontract or the Work under the Subcontract (including its appointment under the Subcontract) or referring to CDI or the Principal, without CDI's prior written approval.

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## **16. Notification of Claims**

### **16.1 Notices of Claims**

If the Subcontractor wishes to make a Claim against CDI, other than a Claim for an extension of time under clause 7.3 or a Payment Claim under clause 9.3, in respect of any fact, matter or thing arising out of or in connection with the Work under the Subcontract or the Subcontract, it must give CDI's Representative the following two notices:

- (a) within the relevant time period specified in item 30 of the Schedule of Subcontract Information of the occurrence of the events on which the Claim is based, written notice:
  - (i) that it proposed to make the Claim; and
  - (ii) of the events upon which the Claim will be based; and
- (b) within the relevant time period specified in item 30 of the Schedule of Subcontract Information of giving the notice under clause 16.1(a), written notice setting out:
  - (i) detailed particulars of the events on which the Claim is based;
  - (ii) the legal basis for the Claim;

- (iii) the facts relied upon in support of the Claim; and
- (iv) details of the quantification of the amount claimed.

## **16.2 Continuing events**

If the events upon which the Claim under clause 16.1 is based or the consequences of the events are continuing, the Subcontractor must, until the events or the consequences of those events have ceased, continue to give the detailed particulars required under clause 16.1(b) at the intervals specified in item 30 of the Schedule of Subcontract Information after the first detailed particulars are required.

## **16.3 Failure to comply with Notice provisions**

To the extent permissible at Law, CDI will not be liable upon any Claim by the Subcontractor in respect of any fact, matter or thing arising out of or in connection with the Work under the Subcontract, whether under the Subcontract or (insofar as is permitted by Law) any other principle of Law, unless the Subcontractor has complied with clauses 16.1 and 16.2 and will, in any event, be entitled to claim any damages arising from the Subcontractor as a result of their failure to comply with this clause 16.

## **16.4 Other provisions unaffected**

Nothing in clauses 16.1 to 16.3 will limit the operation or effect of any other provision of the Subcontract which requires the Subcontractor to give notice to CDI's Representative in order to preserve an entitlement to make a Claim against CDI.

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## **17. Dayworks**

- (a) If CDI directs the Subcontractor in writing to perform dayworks by notice in writing prior to commencement of the dayworks, and which notice must specifically identify this clause 17, the Subcontractor will be entitled to claim for the approved dayworks at the rate(s) per hour specified in item 31 of the Schedule of Subcontract Information.
- (b) For the avoidance of doubt, the Subcontractor will only be entitled to payment for dayworks directed and performed in accordance with clause 17(a).

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## **18. Trustee Provisions**

- (a) If the Subcontractor is named in this Subcontract as a trustee of a trust ("**Trust**"), it represents and warrants in favour of CDI on the Effective Date and every day during this Subcontract that:
  - (i) it enters into this Subcontract as trustee of the Trust and in its own right;
  - (ii) it has full power and authority under the relevant trust deed ("**Trust Deed**") in respect of the Trust to enter into and perform its obligations under this Subcontract;

- (iii) the Trust was validly created and is in existence and no steps have been taken to wind-up the Trust;
- (iv) the Subcontractor is validly appointed as the sole trustee of the Trust;
- (v) it has unrestricted right of indemnity out of the Trust's assets and is indemnified under the Trust Deed in respect of its obligations and liabilities incurred in respect of this Subcontract and that indemnity is only limited by the extent of the property of the Trust;
- (vi) the Trust property is sufficient to satisfy the Subcontractor's right of indemnity in relation to its obligations under this Subcontract in full, and all other obligations in respect of which the Subcontractor has a right to be indemnified out of Trust property and the Subcontractor has not released or disposed of its equitable lien over the assets of the Trust;
- (vii) no part of the Trust's assets have been re-settled or set aside;
- (viii) there has been no capital distribution from, and no beneficiary has been allowed to use or occupy, the Trust's assets;
- (ix) it has not blended or mixed the Trust's assets; and
- (x) it is not in default of any provision of the Trust Deed;
- (xi) the execution, delivery and performance by it of this Subcontract does not and will not violate any encumbrance or document which is binding upon it or on any property of the Trust or on any of its assets or the constituent documents of the Trust;
- (xii) it is not a trustee of any trust or settlement other than the Trust;
- (xiii) the entry into and performance by it of its obligations under this Subcontract is in the Trust's commercial interests and is for the benefit of the beneficiaries of the Trust;
- (xiv) the Subcontractor and its directors have complied with their obligations in connection with the Trust;
- (xv) it has provided to CDI, prior to the Effective Date, a copy of the Trust Deed, together with the other constituent documents of the Trust, all variations to the Trust Deed and material notices the Subcontractor has received in respect of the Trust and sufficient information in respect of the financial position of the Trust to allow CDI to make an informed assessment of the financial covenant strength of the Subcontractor;
- (xvi) it is not in default under the constituent documents of the Trust;
- (xvii) no beneficiary under the Trust is presently entitled to the distribution of any of the capital of the Trust;

- (xviii) no resolution has been passed or direction been given by the beneficiaries for the winding up or termination of the Trust or distribution of the property of the Trust; and
  - (xix) no resolution has been passed or direction or notice been given removing the Subcontractor as trustee of the Trust.
- (b) The Subcontractor must not do any of the following:
- (i) default under the Trust Deed or any other constituent documents of the Trust;
  - (ii) allow its right of indemnity or subrogation to be restricted and must on demand from CDI exercise its rights of indemnity and subrogation against the Trust's assets;
  - (iii) otherwise than in the ordinary course of business:
    - A. allow the compromise of any Claim relating to the Trust's assets;
    - B. part with possession of any of the Trust's assets;
  - (iv) allow any capital distribution under the trust, exercise any power of determination, revocation, appropriation or advancement, or permit any settlement, setting aside, abandonment or transfer to other trusts of funds of the Trust except the distribution of Trust income in terms of the Trust Deed or so as not to infringe the law against perpetuities or relating to accumulation;
  - (v) retire or resign as trustee of the Trust, permit the appointment of another trustee or allow the Trust Deed to be varied;
  - (vi) blend or mix the Trust's assets.
- (c) The Subcontractor acknowledges and agrees that this Subcontract will bind it both personally and in its capacity as trustee.
- (d) The Subcontractor must:
- (i) provide to CDI, promptly after receipt, a copy of all variations to the Trust Deed and all material notices the Subcontractor receives in respect of the Trust;
  - (ii) promptly provide written notice to CDI of any material distribution of the capital of the Trust or diminution of the Trusts assets; and
  - (iii) promptly provide written notice to CDI of any limitations or restrictions to the Subcontractor's indemnity under the Trust Deed created after the Effective Date.

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## **19. General**

### **19.1 Law of the Subcontract**

- (a) The Subcontract is governed by the Law in force in the State nominated in item 32 of the Schedule of Subcontract Information.
- (b) The parties submit to the non-exclusive jurisdiction of the courts of the State nominated in item 32 of the Schedule of Subcontract Information and all courts authorised to hear appeals from those courts.

### **19.2 Nature of the relationship**

- (a) Nothing in the Subcontract constitutes a joint venture, agency, partnership or other fiduciary relationship between CDI and the Subcontractor.
- (b) At all times when performing its obligations under the Subcontract, the Subcontractor is deemed to be an independent contractor and not an employee or agent of CDI.

### **19.3 Variation and waivers in writing**

- (a) The Subcontract may only be varied in writing and signed by both CDI and the Subcontractor.
- (b) CDI's failure to take advantage of any default or breach of the terms and conditions to be observed by the Subcontractor under the Subcontract will not be construed as a waiver of that term or condition.
- (c) No consent or waiver expressed or implied by CDI or on behalf of CDI to or in respect of any particular breach of any of the terms and conditions to be observed by the Subcontractor under the Subcontract will be construed as a consent or waiver to or of any other breach of the same or any other of the terms and conditions to be observed by the Subcontractor under the Subcontract.
- (d) The parties may only give their consent, or waive their rights, in respect of the Subcontract, expressly in writing.

### **19.4 Compliance with Law**

The Subcontractor must, and it is its sole responsibility to:

- (a) comply with Law in performing its obligations under the Subcontract (including for the protection of the environment and making good any damage to the environment caused by its Work under the Subcontract);
- (b) obtain all required approvals from all Authorities and give CDI copies of all relevant documents issued by Authorities; and
- (c) obtain any other information which it may need in order for it to comply with any Law.

## **19.5 Severability**

Any provision in the Subcontract which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable, and is otherwise capable of being severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions of the Subcontract or the validity or unenforceability of that provision in any other jurisdiction.

## **19.6 Entire agreement**

To the extent permitted by Law, in relation to its subject matter, this Subcontract:

- (a) embodies the entire understanding of the parties, and constitutes the entire terms agreed by the parties; and
- (b) supersedes any prior written or other agreement of the parties.

## **19.7 Joint and several obligations**

If the Subcontractor comprises two or more persons, the liability of each of those persons under this Subcontract is joint and several.

## **19.8 Separable Portions**

If the Works are identified as containing separable portions:

- (a) the Subcontractor must complete the Works within the completion dates, and in accordance with CDI's Construction Programme and fortnightly work schedules, which apply to each separable portion;
- (b) the interpretations of:
  - (i) Works;
  - (ii) Work under the Subcontract;
  - (iii) Substantial Completion;
  - (iv) Date for Substantial Completion;
  - (v) Date of Substantial Completion;
  - (vi) Defects Correction Period; and
  - (vii) the performance security requirements,

will apply separately to each separable portion and references to the Works and the Work under the Subcontract will mean so much of the Works or the Work under the Subcontract as is comprised in, or associated with, the relevant separable portion; and

- (c) the interpretations of clauses in this Subcontract in relation to time (including extensions of time and delay damages) will apply separately to each separable portion.

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## **20. Personal Property Securities Act**

### **20.1 Definitions**

For the purposes of this clause 20:

**PPS Act** means the *Personal Property Securities Act 2009* (Cth);

**PPS Law** means the PPS Act and any regulations made at any time under the PPS Act, as amended from time to time;

**PPS Property** means all property over which, under the PPS Law, the Subcontractor is legally capable of granting a Security Interest;

**PPSA Register** has the meaning in the PPS Act;

**Security Interest** has the meaning given to it in the PPS Law; and

**security interest** means a mortgage, charge, lien, pledge, security interest, title retention, preferential right, trust arrangement, encumbrance, contractual right of set off, any security arrangement in favour of any person or security arrangement which is deemed to be a security interest for the purposes of the PPS Act.

### **20.2 Enforcement of liquid assets**

Sections 120 and 121(4) of the PPS Act do not apply to this Subcontract or the transactions contemplated under this Subcontract.

### **20.3 Requests for information**

- (a) Neither party may disclose information of the kind referred to section 275(1) of the PPS Act and this clause constitutes a confidentiality agreement within the meaning of the PPS Law.
- (b) The Subcontractor waives any right it may have, or but for this clause 21.3 may have had, under section 275(7)(c) of the PPS Act to authorise the disclosure of information of the kind referred to in section 275(1) of the PPS Act.

### **20.4 Application of PPS Law**

- (a) If:
  - (i) a PPS Law applies, or will at a future date apply, to this Subcontract or any of the documents listed in Schedule 2 or any of the transactions contemplated by them; or
  - (ii) CDI's Representative determines (acting reasonably) that a PPS Law applies, or will at a future date apply, to this Subcontract or any of the documents referred to in the Formal Instrument of Agreement or any of the transactions contemplated by them; and
  - (iii) in the reasonable opinion of CDI's Representative, the PPS Law:
    - A. adversely affects or would adversely affect CDI's

security position or the rights or obligations of CDI under or in connection with this Subcontract or any of the documents referred to in the Formal Instrument of Agreement or any of the transactions contemplated by them; or

- B. enables or would enable CDI's security position to be improved without adversely affecting the Subcontractor in a material respect,

CDI's Representative may give notice to the Subcontractor requiring the Subcontractor to do anything (including amending the Formal Instrument of Agreement or any document referred to in the Schedule of Documents Forming this Subcontract or executing a new Formal Instrument of Agreement or any of the documents referred to in the Schedule of Documents Forming this Subcontract) that in CDI's Representative's reasonable opinion is necessary to ensure that, to the maximum possible extent, CDI's security position, and its rights and obligations, are not adversely affected as contemplated by clause 20.4(a)(iii)A (or that any such adverse effect is overcome), or that the CDI's security position is improved as contemplated by clause 20.4(a)(iii)B.

- (b) The Subcontractor must comply with the requirements of a notice given by CDI's Representative under clause 20.4(a) within the time stipulated in the notice.
- (c) The Subcontractor is permitted to grant a Security Interest over its PPS Property except to the extent expressly prohibited by, or only in accordance with, the Formal Instrument of Agreement or documents referred to in the Schedule of Documents Forming this Subcontract.

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## **21. Integrity and compliance**

### **21.1 Conflicts of Interest**

The Subcontractor must, and must ensure the Subcontractor Personnel in connection with this Subcontract, declare any potential, perceived or actual Conflict of Interest, prior to entering into any agreements with CDI or the Principal, and in any event, as soon as any such Conflict of Interest comes to the attention of the Subcontractor or relevant Subcontractor Personnel.

### **21.2 Modern Slavery**

The Subcontractor must (and must ensure that each of its Subcontractor Personnel and, to the extent practicable, its other suppliers and business partners):

- (a) comply with all applicable laws, statutes and regulations in force pertaining to modern slavery (which is deemed to include forced labour, human trafficking and child labour) and take appropriate steps to meet international standards around modern slavery where these set a higher standard than domestic law;



- (b) take reasonable steps to ensure it has in place adequate procedures and policies to prevent and address involvement in modern slavery, including through its subcontractors (and to the extent practicable, its other suppliers and business partners);
- (c) on request by CDI, provide a copy of any modern slavery statement it is required to prepare under relevant modern slavery reporting legislation;
- (d) grant to CDI, or any third party nominated by CDI, the ability to audit the Subcontractor and the Subcontractor Personnel as applicable in relation to the obligations under this clause; and
- (e) promptly notify CDI (upon becoming aware) of any actual or suspected modern slavery arising in respect of the Subcontractor, the Subcontractor Personnel or their subcontractors, suppliers or business partners.

### 21.3 Anti-bribery and corruption

- (a) The Subcontractor must not, and must ensure that the Subcontractor Personnel, do not:
  - (i) violate any Anti-Corruption Laws;
  - (ii) pay or accept any commissions or fees, or make or accept any payments or rebates to or from any employee or officer of the Principal or its Related Bodies Corporate, or favour any of those persons with gifts or entertainment of unusual or substantial value, or enter into any business arrangements with any of those persons, that would result in a detriment to CDI or the Principal or is contrary to fair dealing;
  - (iii) provide or offer to provide a benefit or anything of value (which is not legitimately due) to a public official (including a foreign public official) in order to retain or obtain a business advantage; and
  - (iv) provide bribes (in any form) or facilitation payments to anyone in the course of performing the Subcontract, or when representing CDI or the Principal.
- (b) The Subcontractor must, and must ensure that its Personnel and any other persons acting for or on the Subcontractor's behalf, immediately report to CDI any conduct of the kind referred to in clause 21.3(a).

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## 22. Notices

- (a) A communication under or in relation to this Subcontract (**Communication**) must be in writing and delivered to the relevant address details in the Schedule of Subcontract Information or as otherwise notified from one party to the other.
- (b) A Communication is taken to be received by the addressee:
  - (i) if sent by email, at the time the email becomes capable of being retrieved by the recipient's email system unless:

- A. the result is that the Communication would be taken to be given or made at a time which is outside normal business hours at the local time in the place of receipt of the email or on a non-Business Day, in which case that Communication is taken to be received at 9.00 am on the next Business Day; or
    - B. a later time is specified in the Communication; or
  - (ii) if delivered by hand to the recipient's physical address, on the day of delivery provided it is a Business Day or, if not, then the next Business Day; or
  - (iii) if delivered by mail, 3 Business Days after posting.
- (c) A party may, from time to time, notify the other party of any change to its details for receiving Communications.
- (d) The Subcontractor must ensure that, with respect to any Communications:
- (i) its firewall or mail server (as applicable):
    - A. allows messages of up to 15 megabytes to be received;
    - B. does not trap any messages in the spam filter that have been sent from the Principal; and
    - C. if requested by the sender, sends a receipt notification to the sender upon receipt of a message; and
  - (ii) its system automatically sends a notification message to the sender when a message cannot, or will not, be delivered to the recipient.
- (e) Where the Subcontractor comprises more than one person:
- (i) a Communication delivered to one of those persons will be deemed to have been delivered to all of them;
  - (ii) a Communication delivered by one of those persons will be deemed to have been delivered by all of them.
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