

C7545 – General Conditions of Contract

Consultants for Engineering Projects

August 2021

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1 Definitions / Interpretations

1.1 Definitions

Unless the contrary intention applies:

"Confidential Information" means any information provided to the Consultant or of which the Consultant becomes aware, which is confidential to the Principal, whether for the purpose of providing the Consultant Services or otherwise and includes, without limitation, information concerning or relating to past, present or contemplated activities, internal or external business operations or other information whatsoever of the Principal or which may either directly or indirectly be relevant to the Principal's business and includes any compilation of otherwise public information that is in a form not in the public domain.

"BIM" means Building Information Model.

"Consultant" means the person contracted to carry out the Consultant Services as stated in Item 2.1A of the *Offer for the Consultant Services – Non-Price Component (C7586)*.

"Consultant's Delegate" means the position / person delegated by the Consultant to manage the Consultant Services as stated in Item 2.1B of the *Offer for the Consultant Services – Non-Price Component (C7586)*.

"Consultant's Office(s)" means the offices that are approved for the Consultant Services to be carried out as stated in Item 1.7 of the *Offer for Consultant Service – Non-Price Component (C7586)*.

"Consultant Services" means the services to be supplied by the Consultant as set out in the Contract Documents.

"Contract" means the agreement between the Principal and the Consultant.

"Contract Amount" is the amount stated in the *Letter of Acceptance (C7599)*.

"Contract Documents" means the documents listed in the *Letter of Acceptance (C7599)*.

"Contract Material" means any material that exists at the beginning of the Contract and which is provided in connection with the Contract, and any material provided in connection with the Contract that is created, written or otherwise brought into existence by or on behalf of the Consultant in the course of performing the Contract.

"Date for Completion" means the date on which the Consultant Services are to be completed as stated in the *Letter of Acceptance (C7599)*, or the date subsequently determined according to the provisions of the Contract.

"Date of Completion" means the date when the Consultant Services are completed in accordance with the provisions of the Contract.

"Day" means a calendar day.

"Designer" means a person whose profession, trade or business involves them in:

- a) planning and design for infrastructure including variations and changes, or
- b) arranging for people under their control to plan or design infrastructure.

"Direction" includes agreement, approval, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

“Existing Work” means any literary, dramatic, musical or artistic work or any cinematographic film, sound recording, television or sound broadcast or any other work capable of being the subject of copyright or other Intellectual Property Rights, which is already in existence at the time that the Consultant Services commenced.

Ethical Supplier Mandate means the Queensland Government policy titled “Ethical Supplier Mandate” or any policy that replaces that policy.

Ethical Supplier Threshold means the Ethical Supplier Threshold described in paragraph 2.3 of the Queensland Procurement Policy.

“Fault” means:

- a) a defect, error, omission, or
- b) an amendment is necessary to the Contract Materials because they are inappropriate for their intended use with regard to the assumptions that the Consultant can be reasonably expected to make in accordance with sound engineering principles.

“Government Department or Instrumentality” means any governmental regulator, including Work Health Safety Queensland, the Queensland Building and Construction Commission, the Fair Work Commission and the Australian Building and Construction Commission.

“GST” means the goods and services tax imposed under the GST Acts. A reference to an amount of GST is reference to the GST liability in respect of the service in question.

“GST Acts” means *A New Tax System (Goods and Services Tax) Act 1999 (Commonwealth)*, associated legislation and any additional or substituted legislation providing for a value added tax, consumption tax, retail tax or other goods and services tax.

“Intellectual Property Rights” includes all copyright, designs, patents or other proprietary rights, or any rights to registration of such rights existing in Australia, or elsewhere or as protected by legislation from time to time whether created before, on or after the commencement of this Contract, but excludes Moral Rights.

“Legislative Requirement” includes:

- a) Acts, regulations, by-laws, orders, awards and proclamations of the Commonwealth, State or local government, applicable to the Consultant Services, and
- b) Certificates, licences, consents, permits, approvals and requirements of organisations having jurisdiction applicable to the Consultant Services.

“Manual” means Manual – Consultants for Engineering Projects (most current version).

“Materials” includes documents, equipment, information and data stored by any means.

“Moral Rights” has the meaning given to it in Clause 9.7(d) of the Contract.

“Notice of Dispute” means notice in writing from one party to the other party setting out details of the dispute or difference that the initiating party believes has arisen regarding the Consultant Services.

“Obligations of the Consultant” means the obligations expressed in this Contract to be performed by the Consultant or reasonably necessary to the performance by the Consultant of this Contract.

“Person” includes bodies corporate and unincorporated.

“**Personal Information**” means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

“**Prequalification Notice**” has the meaning given in Clause 2.17.3

“**Prequalification Systems**” has the meaning given in Clause 2.17.1.

“**Principal**” means the State of Queensland acting through the Department of Transport and Main Roads.

“**Principal’s Delegate**” means the position / person delegated by the Principal to represent the Principal’s interest in the Consultant Services as named in Item 3.2 of the *Invitation for Offer (C7585)*.

“**Project**” includes the design and construction activities enabling the commissioning of specific road transport infrastructure.

“**QBCC Act**” means the *Queensland Building and Construction Commission Act 1991* (Queensland).

“**QPP Compliance Unit**” means the Queensland Procurement Policy (QPP) Compliance Unit, Office of the Chief Advisor – Procurement, Department of Housing and Public Works.

“**Start Date**” means the date nominated in the *Letter of Acceptance (C7599 or equivalent)* when the Consultant shall commence the Consultant Services.

“**Supply**” has the meaning given in the GST Acts.

“**Tax Invoice**” means a Tax Invoice within the meaning of the GST Acts and which complies with the requirements of the GST Acts in all respects.

“**Team Member**” means any nominated personnel as stated in Item 4 of the *Offer for Consultant Services – Non-Price Component (C7586)*.

1.2 Interpretations

Headings and subheadings shall not form part of the Contract and shall not be used in the interpretation or construction of the Contract.

Where a word or expression is given a particular meaning, other parts of speech and grammatical forms of that word or expression have a corresponding meaning.

Words imparting a gender include each and every gender.

Prices, sums of money and payments under the Contract shall be in Australian currency.

All measurements of physical quantities shall be in legal metric units of measurement within the meaning of the *National Measurement Act 1960* (Commonwealth) as amended from time to time.

All Contract Documents and all communications between the parties to the Contract shall be in the English language.

2 Consultant responsibilities

2.1 Legislative Requirements

The Consultant shall observe and comply with all Legislative Requirements related or connected to the provision of the Consultant Services, including any necessary giving of notices or obtaining of consents in relation to the Consultant Services.

2.2 Performance

The Consultant shall perform the Consultant Services as described in the Contract Documents.

2.3 Consultant's obligations

The Consultant shall take reasonable actions to ensure that:

- a) it has the necessary skills, and experience to complete the Consultant Services in accordance with the Contract Documents
- b) its employees, sub-consultants and agents have the necessary skills and experience to perform those Obligations of the Consultant which are allotted to them by the Consultant
- c) it complies with the Ethical Supplier Threshold, and
- d) in accordance with the standard of care in Clause 2.6 to ensure that the subject matter of the Consultant Services or Contract Materials shall be free from defects and errors and appropriate for the intended use with regard to the assumptions that the Consultant can be reasonably expected to make in accordance with sound engineering principles.

2.4 Consultant's acknowledgements

The Consultant acknowledges that:

- a) the Principal may obtain information about the Consultant relevant to the Consultant's compliance with Clause 2.3c) that may be held by the QPP Compliance Unit or any Government Department or Instrumentality and take the information into account in assessing the Consultant's compliance with Clause 2.3c); and
- b) a failure to comply with the Principal's policies that apply to the work under the proposed contract or the Consultant's obligations under the proposed contract may result in the imposition of a demerit or sanction under the Ethical Supplier Mandate, in addition to any other remedies available to the Principal under this Contract.

2.5 Changing Team Members / Offices performing the work

The Consultant shall not vary the Team Members nominated to carry out the Consultant Services without the written approval of the Principal, which approval shall not be unreasonably withheld or delayed. The Consultant shall not allow persons other than the agreed Team Members to carry out the Consultant Services unless otherwise agreed in writing.

In addition, the Consultant's Office(s) as nominated in Item 1.7 of the *Offer for Consultant Services – Non-Price Component (C7586)* shall not be varied without the written approval of the Principal, such approval shall only be granted under exceptional circumstances.

2.6 Not an employment / agency agreement

The Consultant shall not represent itself and shall ensure that its employees, sub-consultants and agents do not represent themselves as being employees or agents of the Principal. It is the express intention of the parties that such relationships do not exist.

2.7 Skill, care and diligence

The Consultant shall exercise reasonable skill, care and diligence in performance of the Consultant Services.

2.8 Consultant identification of errors

The Consultant has a duty to use reasonable endeavours to identify any erroneous information supplied by the Principal and bring this to the attention of the Principal at the earliest opportunity. The Principal shall not be liable for any claims based on omissions or anomalies in the information supplied unless they have been brought to its attention as soon as practical after the Consultant discovers the error or omission.

2.9 Quality management

The Consultant shall carry out the Obligations of the Consultant in accordance with the provisions of its quality manuals and quality plans which are appropriate to the quality management requirements specified in the Contract Documents.

2.10 Reporting

The Consultant shall liaise with and report to the Principal as reasonably required by the Principal during the period of this Contract, and where required by the Principal, shall attend meetings and briefings with the Principal.

Reports to the Principal shall be in writing unless otherwise permitted by the Principal.

2.11 Accommodation, etcetera.

Unless specified or otherwise agreed in writing the Consultant shall provide at its own cost, suitable accommodation and equipment necessary to complete the Consultant Services.

2.12 Access to Consultant premises

The Consultant shall at all reasonable times give to the Principal, or to any other persons authorised in writing by the Principal, access to premises occupied by the Consultant where the Consultant Services are being undertaken and shall permit those persons to inspect the performance of the Consultant Services and anything brought into existence in association with the Contract.

2.13 Safety directions by Principal

Where the Consultant uses the Principal's premises or facilities, it shall comply with all reasonable directions and procedures relating to security and to workplace health and safety, which are in effect at those premises or in regard to those facilities, as notified by the Principal.

2.14 Safety directions by Consultant

Where the Principal uses the Consultant's premises or facilities, it shall comply with all reasonable directions and procedures relating to security and to workplace health and safety, which are in effect at those premises or in regard to those facilities, as notified by the Consultant.

2.15 Faults in Contract Materials

If it is necessary to subsequently amend the Contract Materials due to Fault, then the Consultant shall rectify the relevant Contract Materials and shall be responsible for that part of the cost, including Principal's costs, of rectifying the Contract Materials which may reasonably be attributed to the Consultant, its employees and agents.

As soon as possible after discovery of the Fault, where there do not appear to be any construction rectification cost implications, the party that identified the Fault will notify the other party of the fault.

2.16 Rectification of works

For the purpose of Clause 2.15, the word "works" means construction works that have flowed from design works.

Where construction of works results from the Contract Materials, and a Fault is subsequently discovered after construction, the following will apply:

- a) As soon as possible after discovery of the Fault, the party that identified the Fault will notify the other party
- b) Following notification in (a) above, except in cases of urgency, the Principal shall provide the Consultant an opportunity to respond to the existence of the Fault and, where agreement is reached, the Consultant shall prepare or be involved in the preparation of details of the rectification work to be performed, so that the Consultant has the opportunity to minimise the costs and delays resulting from rectification works. Such response by the Consultant shall be within three business days of receipt of the notice in (a) above
- c) Where agreement is not reached within five business days of the notice in (a) above or where urgency precludes the opportunity for Consultant response, the Principal shall carry out the rectification work and the costs shall become a debt due and owing to the Principal by the Consultant, and
- d) To the degree to which the Consultant, its employees and agents were responsible for the Fault, the Consultant will be responsible for the reasonable cost of rectification works including costs of delays associated with the rectification works.

2.17 Prequalification System

2.17.1 Acknowledgement

The Consultant acknowledges that the Principal maintains various prequalification and registration systems (**Prequalification Systems**), which are designed to (besides other things) minimise the contractual risks associated with constructing infrastructure, reduce the risk of injury to persons or damage to property, ensure value for money in the expenditure of public funds and to promote best practice in the construction industry.

2.17.2 General obligation

If the Consultant was required to demonstrate registration under one or more Prequalification System at the time of tendering for the Consultant Services, the Consultant shall maintain such registration during the term of the Contract.

If the Consultant fails to comply strictly with this clause, such failure will be a substantial breach of the Contract.

2.17.3 Loss of registration status

Notwithstanding anything else in the Contract, if the Consultant fails to comply strictly with Clause 2.17.2, the Principal shall be entitled to (in its absolute discretion and without first issuing a show cause notice), by notice in writing to the Consultant (**Prequalification Notice**):

- a) take out of the hands of the Consultant the whole of the Consultant Services remaining to be completed, or
- b) terminate the Contract.

Where the Principal exercises a right under this Clause, the Principal may itself or by others complete the Consultant Services under the Contract not completed at the date the Consultant Services are taken out of the hands of the Consultant or the date the Contract is terminated.

2.17.4 Compensation

All money which has been paid to the Consultant up to:

- a) the date the Consultant Services are taken out of the hands of the Consultant, or
- b) the date the Contract is terminated,

under Clause 2.17, together with any pro rata amount which is payable to the Consultant for the supply of the Consultant Services performed up to the relevant date, shall be in full satisfaction of all fees, expenses and claims by the Consultant under the Contract. The Principal is not otherwise liable to the Consultant for any cost, loss, expense or damage incurred by the Consultant under or in connection the Contract arising from or in connection with the issuing of the Prequalification Notice.

3 Principal's responsibilities

3.1 Payment

The Principal shall pay the Consultant the Contract Amount as modified by variations or other adjustments described in the Contract Documents.

3.2 Team Member removal

The Principal may give written notice to the Consultant to remove Team Members from the work associated with the Consultant Services. In exercising this right, the Principal must act reasonably. The Consultant shall promptly comply with such notice, which may also require replacement with personnel acceptable to the Principal.

3.3 Information

The Principal is not obliged to furnish any information, materials, documents or instructions earlier than the Principal should reasonably have anticipated at the date of the *Letter of Acceptance (C7599)*.

3.4 Principal caused loss

The Consultant is not liable, despite any other provisions of the Contract, for any loss or liability to the extent that any act or omission of the Principal, its employees or agents contributed to any damage suffered.

This provision is in addition to and does not derogate from any right or defence that the Consultant may have under common law or legislation.

4 Contract Documents

4.1 Number of copies

The Principal is only required to supply one (1) copy of the Contract Documents to the Consultant.

4.2 Mutuality of documents

The several documents forming the Contract are to be taken as mutually explanatory of each other.

4.3 Ambiguities

If either party discovers any ambiguity in any document prepared for the purpose of performing the Consultant Services, that party shall, as soon as possible after such discovery, notify the other party in writing of the ambiguity. In the event of an ambiguity being discovered, the Principal shall direct the Consultant as to the interpretation to be followed by the Consultant in carrying out the Consultant Services.

4.4 Direction regarding ambiguities

If a direction under Clause 4.3 causes the Consultant to incur more or less cost than the Consultant could reasonably have anticipated at the time of tendering, the difference shall be valued under Clause 6.4.1.

4.5 Document hierarchy

The following order of priority shall be used in resolving ambiguities in the Contract Documents pursuant to Clause 4.3:

- a) *Letter of Acceptance (C7599)*, or equivalent
- b) Post-tender correspondence
- c) *Notices to Offerors (includes notices to invitees) (C7555)*
- d) Functional Specification (Prequalified Consultants only / Brief)
- e) *Invitation for Offer (C7585)*
- f) *Supplementary Conditions of Contract (C7554)* (Prequalified Consultants only)
- g) *General Conditions of Contract (C7545)*
- h) *Offer for Consultant Service – Non-Price Component (C7586)*
- i) *Offer for Consultant Service – Price Component (C7587)*
- j) Other Contract Documents.

5 Commencement, progress and other time issues

5.1 Commencement and completion

The Consultant shall commence the Consultant Services within seven days of the Start Date and shall proceed with due expedition and without delay and complete the Consultant Services by the Date for Completion.

5.2 Program

For this clause, a 'program' is a statement in writing showing the dates by which, or the times within which, the various stages or parts of the Consultant Services are to be executed or completed.

A program does not affect rights or obligations in Clause 5.

The Consultant shall submit to the Principal a contract program within two weeks of the Start Date for approval by the Principal.

The Consultant shall not, without reasonable cause, depart from:

- a) a program included in the Contract, or
- b) a program furnished to the Principal.

The submission of a contract program does not relieve the Consultant of any obligations under the Contract including the obligation to not, without reasonable cause, depart from an earlier program.

5.3 Access to Principal

Working hours for this Contract, where access to the Principal is involved, are between 9.30 AM and 4:00 PM, Monday to Friday, excluding public holidays, unless otherwise agreed in writing.

5.4 Consultant advice of delay

Within 14 days of it becoming evident to the Consultant that anything beyond its control, including:

- a) an act or omission of the Principal, the Principal's employees, consultants, other contractors or agents, and
- b) the supply of erroneous information by the Principal

may delay the Consultant, the Consultant shall notify the Principal in writing with details of the possible delay and the cause.

5.5 Principal advice of delay

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall notify the Consultant in writing of the extent of the likely delay as soon as the delay is identified.

5.6 Consultant claim for extension of time

If the Consultant is or will be delayed in reaching the Date for Completion by a cause described in Clause 5.4, gives the notice required by Clause 5.4 and within 14 days after the delay occurs the Consultant gives the Principal a written claim for an extension of time to the Date of Completion setting out the facts on which the claim is based, the Consultant is entitled to an extension of time to the Date for Completion.

5.7 Number of days claimed

With any claim for an extension of time to the Date for Completion, or as soon as practicable thereafter, the Consultant shall give the Principal written notice of the number of days extension claimed.

5.8 Principal grant of extension of time

Subject to Clauses 6.3.5 and 6.3.6 and 6.3.7, if the Consultant is entitled to an extension to the Date for Completion, the Principal shall, within 14 days after receipt of the notice of the number of days extension claimed, grant a reasonable extension of time. If within the 14 days the Principal does not grant the full extension of time claimed, the Principal shall, before the expiration of the 14 days, give the Consultant notice in writing of the reason.

Where an extension of time is granted following advice under Clause 5.5, and the delay is caused solely by the Principal, the Consultant may apply for a variation under Clause 6.3.6 as if the extension of time was the Principal's direction.

5.9 Principal initiated extension of time

Notwithstanding that the Consultant is not entitled to or has not claimed an extension of time the Principal may, in its sole and absolute discretion and without being under any obligation to do so, at any time and from time to time by notice in writing to the Consultant extend the Date for Completion for any reason.

6 Payments and certificates

6.1 General

6.1.1 Payment basis

Payment by the Principal to the Consultant will be on the following basis:

- a) The Consultant shall complete the Consultant Services at the Unit Rates and Lump Sums as set out in the fee schedules. No additional amounts are payable to complete the Consultant Services unless otherwise provided for in this Contract or the parties expressly agree in writing.
- b) For a Lump Sum only basis Contract, the Consultant shall invoice the Principal after the Consultant Services have been completed and accepted by the Principal, or at milestone events as may be specified in the Contract Documents, or as otherwise agreed in writing, and
- c) For a Contract that includes a Unit Rate, the Contract Amount is ascertained by multiplying the unit rates (offered by the Consultant and accepted by the Principal) by the appropriate measured or agreed quantities, totalling such products and adding any offered and accepted lump sums. The Consultant shall invoice the Principal monthly on the last Business Day of each month, and once on the Date of Completion. Such Tax Invoices shall contain full details of the Consultant's personnel involved and their hours charged for that period.

6.1.2 Travelling expenses, etcetera.

Unless set out in the Contract Documents or otherwise agreed in writing, the Consultant shall be responsible for all travelling expenses, costs of consumables and office expenses incurred in providing the Consultant Services.

Where any travelling expenses, costs of consumables and office expenses are agreed to be paid by the Principal, details of all relevant travelling expenses, costs of consumables and office expenses shall also be shown on the invoice. Such costs, where appropriate shall be payable to the Consultant at the specified rate or as agreed in writing between the Principal and the Consultant. No additional costs will be paid unless approved in advance by the Principal.

6.1.3 Payment for "if ordered" items

An Item marked "if ordered" included in Item 2.1 of the *Offer for Consultant Service – Price Component (C7587)* is not payable by the Principal except where the Principal gives a written instruction to the Consultant directing the Consultant to carry out services under that Item. The amount payable for that Item depends on whether the services are carried out by:

- a) the Consultant, in which case, the amount is the agreed lump sum or the amount determined by multiplying the agreed Unit Rate (in Item 2.1 of the *Offer for Consultant Service – Price Component (C7587)*) by the measured quantity for that Item, or
- b) a sub-consultant to the Consultant, in which case, the amount is the agreed lump sum or the amount determined by multiplying the agreed Unit Rate (in Item 2.1 of the *Offer for Consultant Service – Price Component (C7587)*) by the measured quantity for that Item plus the percentage for profit and attendance stated in Item 2.2A of the *Offer for Consultant Service – Non-Price Component (C7586)*.

6.2 Tax Invoices / General Services Tax (GST)

6.2.1 Preparation of / action on Tax Invoices

The following apply to Tax Invoices:

- a) The Consultant shall prepare each Tax Invoice, and following preliminary agreement with the Principal's Delegate on its content, forward it to the person / address nominated in Item 3.2 of the *Invitation for Offer (C7585)*.
- b) The Principal shall not consider any Tax Invoice from the Consultant where the Consultant's current Australian Business Number (ABN) has not been included and/or the Consultant is not registered for GST.
- c) If the Principal discovers that the Consultant does not have a valid ABN, the Principal will withhold from the Consultant all sums that the Principal is required to withhold under the GST Acts.
- d) Where the Consultant is registered for GST, payment is conditional on the Principal receiving from the Consultant, a Tax Invoice together with any additional required documentation. Any purported Tax Invoice that does not comply with relevant requirements will be returned to the Consultant, and
- e) The Principal may at any time, without the prior receipt of a Tax Invoice, make a progress payment to the Consultant.

6.2.2 Examination of Tax Invoices

The Principal shall, within 15 Business Days of receipt of the Consultant's Tax Invoice at the nominated place, either:

- a) provide the Consultant with a payment schedule which:
 - i. identifies the Tax Invoice to which it responds
 - ii. states the amount of the payment, if any, that the Principal proposes to make, and
 - iii. if the amount proposed to be paid is less than the amount stated in the Tax Invoice — states why the amount proposed to be paid is less, including the Principal's reasons for withholding any payment, in which case the Consultant must provide the Principal with a revised Tax Invoice for the reduced amount within three Business Days of receipt of the Principal's payment schedule, or
- b) pay the Tax Invoice amount at the place indicated in Item 2.2B of the *Offer for Consultant Service – Non-Price Component (C7586)* in which case, for the avoidance of doubt, the Principal is not required to provide the Consultant with a payment schedule.

In the event that the Principal disputes the whole or any part of the Tax Invoice, the Principal shall provide the written reasons required by paragraph (a) above and pay the Consultant within 20 Business Days of receipt of the Tax Invoice, that part of the amount that is not in dispute. The Principal is not obliged to pay any amount in dispute until the dispute has been resolved.

If a party fails to pay monies payable under the Contract by the due date for payment, that party shall, subject to the applicability of Section 67P of the *Queensland Building and Construction Commission Act 1991* (Queensland), pay the other party interest on the amount payable at the rate indicated in Item 1.9 of the *Invitation for Offer (C7585)* for each day that the amount is unpaid. The default rate shall correspond to an annual rate of 10%.

6.2.3 Tax Invoice requirements

As well as complying with statutory requirements, a Tax Invoice shall include:

- a) relevant order numbers supplied by the Principal
- b) the dates / periods of time to which the Tax Invoice applies
- c) details of Consultant Services completed that refer to the Tax Invoice, and
- d) any other information required by the Contract Documents.

6.3 Variations

6.3.1 Directions

The following apply to Directions under this Contract:

- a) If, pursuant to a provision of the Contract enabling the Principal to give Directions, the Principal gives a Direction, the Consultant shall comply with the Direction.
- b) Except where the Contract otherwise provides, a Direction may be given orally, but the Principal shall as soon as practicable after giving an oral Direction, confirm it in writing.
- c) If the Consultant, in writing, requests the Principal to confirm an oral Direction, the Consultant is not bound to comply with the Direction until the Principal confirms it in writing.
- d) Despite any provision of the Contract to the contrary no variation shall invalidate or amount to a repudiation of the Contract, and
- e) For the avoidance of doubt, the Principal shall be entitled to have any omitted work carried out by other consultants.

6.3.2 Variation definition

A variation to the Contract shall result from a Direction of the Principal that involves:

- a) an increase or decrease in the scope of the Consultant Services
- b) omission of any part or the balance of the Consultant Services
- c) a change in the quantity or quality of any part of the Consultant Services, or
- d) changes to Obligations of the Consultant.

6.3.3 Change in legislation

If a new Legislative Requirement or a change in a Legislative Requirement after the date of the Contract:

- a) necessitates a change to the Consultant Services
- b) has effect after the Start Date of the Contract, and
- c) could not reasonably have been anticipated at that date

then the extent to which the Consultant Services are changed by that Legislative Requirement is deemed to be a Variation pursuant to Clause 6.3.2.

6.3.4 Principal initiated variation

- a) Upon receipt of a notice in writing from the Principal advising the Consultant of a proposed variation, the Consultant shall advise the Principal whether the proposed variation can be reasonably implemented.
- b) If the Consultant considers that the proposed variation can be reasonably implemented, the Consultant shall advise the Principal of the effect which the Consultant anticipates that the proposed variation will have on the program and the Date for Completion and provide an estimate of the cost (including delay costs, if any) of the proposed variation.
- c) If the Consultant considers that the proposed variation cannot be reasonably implemented, the Consultant shall advise the Principal of the reasons for its conclusion as soon as reasonably possible.
- d) Where the Consultant advises that the proposed variation can be reasonably implemented, the parties shall meet and attempt to agree on the price and timing for the proposed variation.
- e) Where the Principal and the Consultant agree on a proposed variation, the Principal may direct the Consultant by delivery of a written variation order, to carry out the variation for the agreed price and according to the agreed timing.
- f) Where:
 - i. the Principal and the Consultant cannot agree upon the price and/or timing for a proposed variation, or
 - ii. the Consultant considers that the proposed variation within a certain time (acting reasonably) cannot be reasonably implemented

the Principal may direct the Consultant by delivery of a written variation order, to carry out the variation, which shall be valued under Clauses 6.4.1 and 6.4.2.

- g) Either party may refer any disputed matters arising from the above to the dispute procedures in Clause 11.

6.3.5 General rules for Principal initiated variations

- a) The Principal shall reimburse the Consultant for the reasonable costs of complying with the requirements of Clause 6.3.4, such costs, if not agreed in writing, to be valued under Clauses 6.4.1 and 6.4.2.
- b) The Consultant is bound only to execute a variation that is within the general scope of the Contract.
- c) The Consultant is not bound to execute a variation directed after the Date of Completion.

- d) The valuation of the proposed variation shall be completed and advised to the Consultant prior to the commencement by the Consultant of the execution of that variation, unless otherwise agreed in writing between the parties.
- e) Where a variation is ordered, the Principal may grant an extension of time to the Date for Completion in accordance with Clauses 5.6 and 5.8.

6.3.6 Consultant initiated variation – Principal Direction

- a) If the Consultant is of the opinion that the Principal has given a Direction, including any matter raised by way of discussion either directly, or via a meeting or minutes of a meeting that in the Consultant's opinion is a variation, even though it was not expressly identified as a variation by the Principal, then the Consultant shall, within 14 days (or other period approved in writing by the Principal) of receiving the Direction, notify the Principal of its opinion in writing. Matters raised by the Consultant after the time limits in this sub-Clause will be time barred.
- b) Within seven days of receiving such a notice under Clause 6.3.6(a), the Principal shall confirm in writing whether or not the Direction is a variation to the Contract. If the Principal confirms that the Direction is a variation to the Contract, it shall be valued in accordance with Clauses 6.4.1 and 6.4.2.
- c) If the Principal fails to respond within the time limits in Clause 6.3.6(b), then the Direction will be deemed to be a variation and the Principal shall, within a reasonable time, direct the Consultant, by delivery of a written variation order, to carry out the variation, which shall be valued under Clauses 6.4.1 and 6.4.2.
- d) If the Consultant does not agree with the above response from the Principal, the Consultant may, within 14 days of receiving the Principal's Direction, refer the matter for resolution in accordance with the dispute procedures in Clause 11.
- e) Where a variation is ordered, the Principal may grant an extension of time to the Date for Completion in accordance with Clauses 5.6 and 5.8.

6.3.7 Other Consultant initiated variations

- a) The Consultant may request the Principal to consider a proposed variation (other than arising from a Principal Direction) at any time.
- b) The Principal will consider such requests and determine whether the proposed variation is predominantly:
 - for the Consultant's convenience, or
 - for the benefit of the Principal.
- c) Where the Principal determines that the proposed variation is predominantly for the convenience of the Consultant, the Principal may approve such a variation in writing. Such approval may be conditional and the Consultant shall comply with such conditions if it implements the variation. The Principal is not obliged to approve a variation for the convenience of the Consultant.

- d) Unless the Principal otherwise directs in the notice approving a variation for the convenience of the Consultant, the Consultant is not entitled to:
- an extension of time to the Date for Completion, or
 - extra payment, in respect of the variation or anything arising out of the Variation which would not have arisen had the variation not been approved.
- e) Where the Principal determines that the proposed variation is predominantly for the benefit of the Principal, the Principal may direct the Consultant by delivery of a written variation order, to carry out the variation, which shall be valued under Clauses 6.4.1 and 6.4.2.

The Principal may grant an extension of time to the Date for Completion in accordance with Clauses 5.6 and 5.8.

6.4 Valuation of variations

6.4.1 Arriving at valuation

Where the Contract provides that valuation of a proposed variation or variation is to be made under Clauses 6.4.1 and 6.4.2, the Principal shall pay or allow the Consultant or the Consultant shall pay or allow the Principal as the case may require, an amount determined by the Principal as follows:

- a) If the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used.
- b) If Clause 6.4.1(a) does not apply, the rates or prices in Item 2.1 of the *Offer for Consultant Service – Price Component (C7587)* shall be used to the extent that it is reasonable to use them.
- c) To the extent that neither Clause 6.4.1(a) or 6.4.1(b) apply, reasonable rates or prices shall be used in any valuation made by the Principal.
- d) In determining the deduction to be made for work which is taken out of the Contract, the deduction shall include a reasonable amount for profit and overheads.
- e) If the valuation is of an increase or decrease in a fee or charge or is a new fee or charge to comply with statutory requirements the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit, and
- f) If the valuation relates to extra costs incurred by the Consultant for delay or disruption caused by an act or omission of the Principal, or the Principal's employees, contractors or agents (other than the Consultant), the valuation shall include a reasonable amount for profit and overheads. Otherwise, the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit.

6.4.2 Variation quotation

- a) The Principal may, to assist in determining its valuation under Clause 6.4.1, direct the Consultant to provide a detailed quotation for carrying out a variation, supported by evidence of the basis of its measured / estimated quantities, rates and lump sums.
- b) When the Principal directs the Consultant to support an estimate of cost or quotation with evidence of the basis of its measured / estimated quantities, rates and lump sums, the Principal shall allow the Consultant the reasonable cost of preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost.

7 Liabilities and indemnities

7.1 Consultant's indemnity

7.1.1 Indemnity

The Consultant releases and indemnifies the Principal and the Principal's employees and agents ("the indemnified") from and against all actions whatsoever which may be brought or made against the indemnified by any person, including the Consultant, arising, directly or indirectly from:

- a) Any breach of a duty owed in a professional capacity in connection with the performance of the Consultancy Services by the Consultant or its subcontractors, or any person for whose conduct the Consultant is liable.
- b) Any other negligent professional act, error or omission on the part of the Consultant, or any person for whose conduct the Consultant is liable, arising out of the performance (or attempted or purported performance or non-performance) of the Consultancy Services by the Consultant.
- c) Any contravention of any Legislative Requirement or any unlawful or negligent act or omission by the Consultant, or its subcontractors, or any person for whose conduct the Consultant is liable.
- d) Any unlawful or negligent act or omission of the visitors, invitees or licensees of the Consultant.
- e) Any death, personal injury, loss or damage suffered by the Principal or the Consultant (or any of its subcontractors, employees, agents, visitors, invitees or licensees) or any other person, arising from an unlawful or negligent act or omission of the Consultant in the course of the performance (or attempted or purported performance) of the Contract.
- f) Any loss of or damage to tangible property caused or contributed by the unlawful or negligent act or omission of the Consultant or its subcontractors or any person for whose conduct the Consultant is liable.
- g) Any failure to comply with the requirements of the Ethical Supplier Threshold, and
- h) Any breach of this Contract by the Consultant.

The indemnity in this Clause 7.1.1 shall not apply to:

- i. exclude any other right of the Principal to be indemnified by the Consultant, and
- ii. claims in respect of the Principal's right to have the Consultancy Services carried out.

7.1.2 Proportional reduction in liability

The Consultant's liability to indemnify the Principal under Clause 7.1.1 or otherwise shall be reduced, to the extent permissible by law, proportionally to the extent:

- a) Caused by a negligent or other wrongful act or omission of the Principal or its officers, employees, agents or other contractors of the Principal contributed to the loss, damage, death or injury, or
- b) Where an Excepted Risk (as defined in Clause 7.1.3) limit is reached or contributed to the loss, damage, death or personal injury.

7.1.3 Excepted risks

Excepted risks are:

- a) Claims arising from war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, nationalisation or requisition of property by or under the order of any government or public authority.
- b) Claims in excess of the cap on occupational liability permitted by the schemes approved under the *Professional Standards Act 2004* (Queensland).
- c) Any other risks specifically excepted in the Contract Documents, and
- d) Claims in excess of the amount of insurance listed in Item 1.10 of the *Invitation for Offer (C7585)* that is required to be effected and maintained by the Consultant or the Principal under Clause 8. The cap on the Consultant's liability to indemnify the Principal under this Clause 7.1.3(d) does not apply where the claim, arises, directly or indirectly from:
 - i. personal injury or death
 - ii. infringement of Intellectual Property Rights
 - iii. fines or penalties
 - iv. fraudulent, malicious or criminal conduct
 - v. wilful default, or
 - vi. conduct with reckless disregard for the consequences of such conduct.

8 Insurance

8.1 Consultant insurance of employees

The Consultant shall effect and maintain insurance to cover the Consultant against liability for claims arising from death of or injury to the Consultant's employees in carrying out the Obligations of the Consultant. Such insurance shall be in accordance with any relevant statute dealing with workers compensation or employer liability and shall include any liability imposed by statute and the common law. The Consultant shall take reasonable actions to ensure that any sub-consultants carrying out any part of the Consultant Services are similarly covered for such claims.

8.2 Consultant professional indemnity insurance

8.2.1 Consultant arranged insurance

The Consultant shall effect and maintain, for the duration of the Consultant Services, "claims made" professional indemnity insurance for claims by the Principal, its employees and agents and third parties retroactive to the Start Date:

- a) For the amount nominated in Item 1.10 of the *Invitation for Offer (C7585)*, or approved in writing by the Principal, and
- b) For a period until the later of:
 - i. seven years after the Date of Completion, or
 - ii. seven years after the date the Contract has expired or is terminated.

The insurance must include personal injury and property damage.

The insurance shall be from an insurer deemed suitable by the Principal.

8.2.2 Principal arranged insurance

The Principal shall effect and maintain for the duration of the Consultant Services professional indemnity insurance. The Principal must maintain the policy while ever the Consultant has an interest in relation to the works under the Contract and the Principal must pay all premiums. The Principal must maintain the policy for a period of ten years. The policy will be project specific and cover damages resulting from professional negligence of the Principal, Consultant and Designer. The policy must include the Principal, the Consultant and Designer as insured parties. The Consultant is responsible for payment of deductibles under the policy to the extent that the claim under the policy is not a direct consequence, without fault or omission on the part of the Consultant, of an Excepted Risk.

8.3 Public liability insurance

The Consultant shall effect and maintain, for the duration of the Consultant Services, annual public liability insurance for claims by third parties which may arise from death of or injury to any person or loss or damage to any property arising out of or incidental to any negligent act, error or omission by the Consultant in connection with carrying out the Consultant Services.

The amount to insure each occurrence is nominated in Item 1.10 of the *Invitation for Offer (C7585)*.

8.4 Sub-Consultant insurance

The Consultant shall ensure all other parties contracted by the Consultant to carry out the Consultant Services, have suitable professional indemnity and public liability insurance to satisfy the requirements of the Contract.

8.5 Cross liability and non-vitiation

To the extent permissible by law, where multiple insured parties are insured under a policy, a cross liability and non-vitiation clause shall be included in the policy.

8.6 Material change in risk

The Consultant must make full and accurate disclosure to insurers which includes all material changes in risk.

The Consultant must advise the Principal of any changes of and to insurance within seven days of when they occur.

8.7 Inspection and provision of insurance policies

8.7.1 Proof of insurance

Before the Consultant commences work and whenever requested in writing by the Principal, the Consultant liable to effect or maintain insurance (including professional indemnity insurance if Clause 8.2.1 applies) shall produce evidence to the satisfaction and approval of the Principal acting reasonably of the insurance effected and maintained. Where required in the Contract Documents, such evidence shall note the Principal's interest as co-insured.

The effecting of insurance shall not limit the liabilities or obligations of the Consultant under other provisions of the Contract.

The Consultant shall provide the Principal with evidence and details of insurance satisfying the requirements of Clause 8.3 before commencing the Consultant Services.

This evidence shall be by:

- a) providing an original or certified copy of the Consultant's workers' compensation, professional indemnity insurance and public liability insurance policies that meet the requirements set out in Clause 8.3 to the Principal, or
- b) providing certificates of currency for workers' compensation, professional indemnity insurance and public liability insurance held by the Consultant. For professional indemnity and public liability insurances, the certificates shall specify:
 - c) Name of the insured (and co-insured if relevant)
 - d) Policy number
 - e) Expiry date
 - f) Name of the insurer
 - g) Level of cover in the aggregate (exclusive of legal cost)
 - h) Policy excess
 - i) Summary of the cover provided
 - j) Jurisdictional and territorial limits, or
- c) including a completed *Statutory Declaration – Professional Indemnity Insurance and Public Liability Insurance (C7547)* declaring that the consultant's policy meets the requirements set out in Clauses 8.2 and 8.3.

8.7.2 Failure to produce proof of insurance

If, after being requested in writing by the Principal to do so, the Consultant fails to produce evidence of compliance with insurance obligations under Clause 8 to the satisfaction and approval of the Principal acting reasonably, the Principal may effect and maintain the insurance and pay the premiums. The amount paid shall be a debt due from the Consultant in default to the Principal. Where the defaulting party is the Consultant, the Principal may refuse payment until evidence of compliance with insurance obligations under Clause 8 is produced by the Consultant to the satisfaction and approval of the Principal. The rights given by Clause 8.5.2 are in addition to any other right.

9 Intellectual property

9.1 Definitions

For the purposes of this clause:

- a) 'existing Contract Material' means Contract Material in existence before the agreement between the Principal and the Consultant was made
- b) 'deliverable' means any document, data listing or other creation needed to be delivered to the Principal in order to complete the performance of the Consultant Services

- c) 'new Contract Material' means Contract Material forming part of or constituting a deliverable that is created, written or otherwise brought into existence by or on behalf of the Consultant in the course of performing the Consultant Services, and
- d) 'Moral Rights' means the right of integrity of authorship, the right of attribution of authorship, and the right not to have the authorship falsely attributed, more particularly as conferred by the *Copyright Act 1968* (Commonwealth), and rights of a similar nature anywhere in the world whether existing before, on or after the commencement of this Contract.

9.2 Contract material

If Item 1.12 of the *Invitation for Offer (C7585)* specifies copyright and other Intellectual Property Rights in new Contract Material will vest in one or both of the parties, those rights will vest in accordance with the *Invitation for Offer (C7585)*. If the *Invitation for Offer (C7585)* does not specify how those Intellectual Property Rights are to vest, then the Intellectual Property Rights which are not specified in the *Invitation for Offer (C7585)*, will vest in the Principal.

9.3 Licence of existing Contract Material to Principal

The Consultant grants, and must ensure that relevant third parties grant, to the Principal an irrevocable paid up non-exclusive licence to use, reproduce and adapt any existing Contract Material incorporated into a deliverable in any way the Principal thinks fit (and any further development of Contract Material included in the deliverable).

9.4 Licence of new Contract Material to Principal

If the Contract specifies copyright or other Intellectual Property Rights in certain new Contract Material is vested in the Consultant, the Consultant grants, and must ensure that relevant third parties (if any) grant, to the Principal an irrevocable paid up non-exclusive licence to use, reproduce and adapt that new Contract Material in any way the Principal thinks fit (and any further development of Contract Material included in the deliverable).

9.5 Assignment of Contract Material

Where Intellectual Property Rights in any new Contract Material is to vest in the Principal the Consultant must, prior to commencing work in relation to a deliverable, obtain from every person who is to create Contract Material which is to form part of or constitute the deliverable, and provide to the Principal, a written assignment from that person to the Principal of any Intellectual Property Rights which may vest in that person as a result of that person performing the work.

9.6 Moral Rights

If the Consultant is an individual, the individual consents to any act or omission done by the Principal in the exercise of the Intellectual Property Rights in the Contract Material granted under this Contract that might otherwise constitute an infringement of the individual's Moral Rights without limiting the individual consents to:

- a) The Principal determining in its entire discretion whether or not the individual being will be attributed as an author of the Contract Material comprised in a deliverable and if the individual will be attributed, that attribution will occur in a manner acceptable to the Principal.
- b) Any amendments deletion, destruction, alterations, relocation or selection of the Contract Material (or part thereof) at the discretion of the Principal, and
- c) The publication or communication of the Contract Material or any part there.

9.7 Indemnity

The Consultant releases and indemnifies the Principal from and against all actions which may be brought or made against the Principal by any person, including the Consultant, arising from any infringement or alleged infringement of any Intellectual Property Rights or Moral Rights in respect of the Contract Material.

10 Suspension, termination of the contract

10.1 Suspension

10.1.1 Suspension by Principal

The Principal may, at any time, require the Consultant to suspend the progress of the whole or part of the Consultant Services for such time as the Principal advises to the Consultant:

- a) by reasonable notice in writing from the Principal because of the changed nature, scope or timing of the Consultant Services to be provided, or
- b) by immediate notice in writing in the event that the Consultant or an employee or sub-consultant of the Consultant acts or omits to act in such a way as to, in the opinion of the Principal, require suspension of the Consultant Services.

10.1.2 Suspension by Consultant

For situations where the Principal has not complied with Clause 6.2.2, the Consultant may suspend the progress of the whole or part of the Consultant Services for such time as the Consultant advises the Principal by reasonable notice in writing because of the Principal's failure to respond in accordance with Clause 6.2.2.

For all other situations where the Consultant wishes to suspend the whole or part of the Consultant Services, the Consultant shall obtain the prior written approval of the Principal. The Principal may approve of the suspension and may impose conditions of approval.

10.1.3 Recommencement by Principal

As soon as the Principal becomes aware or is satisfied on reasonable grounds that the reason for any suspension under Clause 10.1.1 no longer exists, the Principal shall direct in writing the Consultant to recommence work on the whole or on the relevant part of the Consultant Services, which were suspended.

10.1.4 Recommencement by Consultant

If the Consultant Services are suspended pursuant to Clause 10.1.2, the Consultant may recommence the Consultant Services at any time after reasonable advance notice to the Principal.

10.1.5 Costs of suspension

Where the Principal directs the Consultant to suspend the Consultant Services under Clause 10.1.1(a) any reasonable costs incurred by the Consultant by reason of the suspension shall be valued under Clauses 6.4.1 and 6.4.2 and borne by the Principal.

Any cost incurred by the Consultant by reason of a suspension under Clauses 10.1.1(b) and 10.1.2 shall be borne by the Consultant but if the suspension is due to an act or omission of the Principal or an employee, consultant or agent of the Principal and the suspension causes the Consultant to incur more or less cost than otherwise would have been incurred but for the suspension, the difference shall be valued under Clauses 6.4.1 and 6.4.2. The amount payable under this clause will be adjusted so the Consultant is not liable to bear costs that arose due to the act or omission of the Principal or an employee, consultant or agent of the Principal.

10.1.6 Associated extension of time

Suspension does not affect the Date for Completion, but the cause of suspension may be a ground for an extension of time under Clauses 5.6 and 5.8.

10.2 Termination

10.2.1 Unforeseeable circumstances

The Principal may terminate the Contract in the event of:

- a) war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, martial law or confiscation by any order of the Australian Government, the Queensland State Government or duly constituted local or public authority in Queensland, or other Government action or inaction
- b) ionising radiations or contamination by radioactivity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, such radiations or contaminations not having resulted from the operations of the Consultant or its employees, agents or sub-consultants
- c) epidemics, storms, floods, fires, earthquakes, and labour disputes
- d) strikes, lockouts or other labour disputes caused or encouraged by the Consultant, or
- e) frustration.

10.2.2 Principal payments

In the event of a termination under Clauses 10.2.1 or 10.2.11, the Principal shall pay the Consultant:

- a) the cost of completed work based on an agreed percentage complete for lump sum items and actual time for schedule of rates items, and
- b) the reasonable costs of the Consultant in winding down its project management operations to compensate for the termination of this Contract.

10.2.3 Principal initiated termination

The Principal may commence action for termination of the Contract by:

- a) suspending payment under the Contract
- b) notifying the Consultant in writing accordingly, specifying the reason for the notice, and
- c) requiring the Consultant to show cause why the Contract should not be terminated within 14 days of the date when the notice is deemed to be served.

10.2.4 Basis for Principal action

Reasons for initiating such action under Clause 10.2.3 include:

- a) the Consultant fails to observe or perform a material Obligation of the Consultant or the work performed by the Consultant is otherwise unsatisfactory to the Principal (in the Principal's reasonable opinion)
- b) the Consultant fails to comply with a Direction of the Principal given in accordance with the provisions of the Contract
- c) the Consultant assigns any of its benefits or purports to assign, sub-let or otherwise divest itself of any of the Obligations of the Consultant without the written consent of the Principal
- d) the Consultant abandons or refuses to proceed with the supply of Consultant Services whether or not it has commenced work
- e) the Consultant is not able to reasonably satisfy the Principal that the Consultant will be able to complete the Consultant Services by the Date for Completion or reach previously agreed significant milestones
- f) the Consultant commits an act of bankruptcy, has a bankruptcy petition presented against it or is made bankrupt
- g) the Consultant advises the Principal or other creditors in writing that it is insolvent
- h) the Consultant enters into a Scheme of Arrangement or an arrangement with creditors under Part 10 of the *Bankruptcy Act 1966* (Commonwealth)
- i) the Consultant goes in to voluntary administration
- j) an application is made to a Court for the winding up of the Consultant, and not stayed within 14 days
- k) a winding up order is made in respect of the Consultant
- l) a receiver or a receiver / manager is appointed to carry on the business or any part of the business or assets of the Consultant, or
- m) execution is levied against the Consultant by any person.

10.2.5 Principal show cause / termination notice

If the Consultant fails within the period specified in the notice in Clause 10.2.3 to show cause to the reasonable satisfaction of the Principal as to why this Contract should not be terminated, the Principal may, without prejudice to any other rights, terminate this Contract forthwith by notice in writing to the Consultant.

10.2.6 Date of termination

If this Contract is terminated pursuant to Clause 10.2.5, termination is from the date that the notice of termination is served upon the Consultant. The termination notice shall be served as specified in Clause 11.4.5.

10.2.7 Termination payments

Upon termination of the Contract pursuant to Clause 10.2.5, all money which has been paid to the Consultant up to the date of termination, together with any pro rata amount which is payable to the Consultant for the supply of Consultant Services performed up to the date of termination shall be in full satisfaction of all fees, expenses and claims by the Consultant under this Contract.

10.2.8 Consultant initiated termination

Where the Principal fails to observe or perform any of its obligations under the Contract, the Consultant may issue to the Principal a notice to show cause why this Contract should not be terminated within 14 days of the date that the notice is deemed to have been served.

10.2.9 Consultant show cause / termination notices

If the Principal fails within the period specified in the notice in Clause 10.2.8 to show cause as to why the Contract should not be terminated, the Consultant may, without prejudice to any other rights, terminate this Contract forthwith by notice in writing to the Principal.

10.2.10 Frustration

If pursuant to Clause 10.2.1, or under the law governing the Contract, the Contract is frustrated, the Principal shall pay the Consultant:

- a) for work executed up to the date of frustration, the amount not then paid but which would have been payable if the Contract had not been frustrated
- b) costs reasonably incurred by the Consultant to that date in the expectation of carrying out the Consultant Services and not included in any prior payment by the Principal, and
- c) the reasonable cost of return to their place of recruitment of the Consultant's employees and sub-consultants engaged in carrying out the Consultant Services at the date of frustration.

10.2.11 Termination for convenience

In addition to any other right available to the Principal to terminate the Contract, the Principal may, at its absolute discretion and without cause, by written notice to the Consultant terminate the Contract for its sole convenience.

The Principal may itself or by others complete the work under the Contract not completed at the date of termination under this Clause.

Within 28 days after the issues of the notice of termination in accordance with this Clause the Principal must (subject to the Principal's rights under or in connection with the Contract including to withhold or set off payments and recover damages) pay the Consultant, as the Consultant's sole compensation and remedy in relation to the termination in accordance with Clause 10.2.2.

The Principal is not otherwise liable to the Consultant for any cost, loss, expense or damage incurred by the Consultant under or in connection with the termination of the Contract.

Within 28 days after the issue of the notice of termination, the Consultant shall deliver to the Principal's address nominated in the termination notice all Contract Materials created in relation to the Contract including any drawings, specifications and other information, samples, models, patterns and the like created in relation to the Contract. The Consultant may retain one copy subject to the provisions of Clause 12.9.1 for its professional record keeping requirements.

11 Dispute settlement

11.1 Dispute initiation

Any dispute between the parties shall be initiated by a Notice of Dispute from one of the persons nominated for First Stage Referral by the Principal in Item 1.11 of the *Invitation for Offer (C7585)* and by the Consultant in Item 2.3A of the *Offer for Consultant Service – Non-Price Component (C7586)*. Where the two persons nominated for First Stage Referral cannot resolve the matter to their mutual satisfaction within seven days of service of the Notice of Dispute, and then the matter shall be referred to the persons nominated for Second Stage Referral by the Principal in Item 1.11 of the *Invitation for Offer (C7585)* and by the Consultant in Item 2.3B of the *Offer for Consultant Service – Non-Price Component (C7586)*.

11.2 Second Stage Referral

Where the persons nominated for Second Stage Referral cannot resolve the matter in the Notice of Dispute within seven days of its receipt, they shall refer the matter for determination to a mutually acceptable Independent Expert.

11.3 Independent Expert

The Independent Expert shall give a decision within seven days of referral, the decision of the Independent Expert being binding on both parties unless either party is dissatisfied with the decision, and initiates action with the other party to refer the matter to arbitration or commences litigation within 14 days of receiving the decision.

11.4 Independent Expert procedures

The procedures to be used by the Independent Expert will follow the current version of *“The Institute of Arbitrators & Mediators Australia Expert Determination Rules”*.

11.5 Rapid adjudication

For disputes regarding payment claims only, the parties agree that such disputes may, at the option of either party, be subject to Part 4 of the *Building Industry Fairness (Security of Payment) Act 2017*.

12 General

12.1 Survival

The following clauses will survive termination or expiration of this Contract:

- Clause 2.3 (Consultant's Obligations)
- Clause 7 (Liabilities and Indemnities)
- Clause 8 (Insurance)
- Clause 9 (Intellectual Property)
- Clause 12.1 Survival
- Clause 12.4 (Applicable Law)
- Clause 12.9 (Confidential Information)
- Clause 12.11 (Right to Information)
- Clause 12.12 (Privacy Requirements)

- Clause 12.13 (Record Keeping Requirements), and
- Clause 13 (Non-conforming Building Products).

For the avoidance of doubt nothing in this clause prevents any other provisions of the Contract, as a matter of interpretation, also surviving the termination of the Contract.

12.2 Collusion

The Consultant warrants and represents to the Principal that:

- a) It had no knowledge of the Offered Fee of any other offeror for the Consultant Services at the time of submission of its offer.
- b) Except as disclosed in its offer, it has not entered into any contract, arrangement or understanding to pay or allow any money directly or indirectly to a trade or industry association (above the published standard membership fee) or to or on behalf of any other offeror in relation to this offer or any contract to be entered into consequent to that offer, nor paid or allowed any money on that account, nor will it pay or allow any money on that account.
- c) Except by prior agreement with the Principal, it has not paid or allowed or entered into any contract, arrangement or understanding to pay or allow any money directly or indirectly to or on behalf of any other offeror nor received any money or allowance from or on behalf of any other offeror in relation to its offer or this consequent contract, nor will it pay or allow or receive any such monies, and
- d) If, without the Principal's prior agreement, it receives or has received any money or allowance from or on behalf of any other offeror in relation to its offer, the other offeror's offer or this Contract, then without prejudice to any other right or remedy of the Principal, such money or allowance is deemed to be held by the Consultant on trust for the Principal and shall be paid to the Principal immediately.

12.3 Severability

If any provision of the Contract is illegal, void, invalid or unenforceable for any reason, all other provisions that are self-sustaining and capable of separate enforcement shall, to the maximum extent permitted by law, be and continue to be valid and enforceable.

12.4 Applicable law

The Contract is governed by and construed in accordance with the laws for the time being in force in the State of Queensland and the parties to the Contract agree to submit to the jurisdiction of the Courts of the State of Queensland.

12.5 Notices

12.5.1 Notices to be in writing

All notices under the Contract shall be in writing.

12.5.2 Address for service

Service of any notice on a party to the Contract shall be to the address of the party as shown in Items 1.1 and 3.2 of the *Invitation for Offer (C7585)* or as subsequently advised by a notice addressed to the other party.

12.5.3 Method of service

Notice may be served:

- a) by hand delivery to the Principal or Consultant where such notice is deemed to be served at the time that the document is handed over
- b) by prepaid post where notice is deemed to be served at the time at which such notice would normally arrive in the ordinary course of the mail, or
- c) by facsimile where notice is deemed to have been served on the day of transmission except where the person who received the transmission notifies the person who sent the transmission by 4:00 PM on the day following transmission that the copy received was not legible, in which case the later date of transmission is deemed to be the date of service of the notice.

12.5.4 Service of payment claims

Service of payment claims by the Consultant on the Principal shall be made by forwarding or serving such claims to the Principal's Delegate.

The Consultant shall ensure that within 24 hours after any notice (other than a payment claim or payment schedule) under the *Building Industry Fairness (Security of Payment) Act 2017* is given or received by the Consultant or any sub-consultants, a copy of that notice is given to the Principal's Delegate.

12.5.5 Hand delivery for termination

Where either party purports to terminate the Contract, notice shall be served by hand.

12.6 Assignment and subcontracting

12.6.1 Assignment

Neither party shall, without prior written consent of the other party and except on such reasonable terms and conditions as are determined in writing by that other party, assign the Contract, or any payment or any other right, benefit or interest under the Contract.

12.6.2 Subcontracting

The Consultant shall not subcontract the whole or any part of the Consultant Services without prior written consent of the Principal which consent shall not be unreasonably withheld and may be conditional on the Consultant obtaining from the sub-consultant the Intellectual Property Rights granted to or vested in the Principal in Clause 9 and appropriate insurance of employees, professional indemnity insurance and public liability insurance.

12.6.3 Consultant liability for assignees and sub-consultants

The written consent of the Principal to assign or subcontract will not discharge the Consultant from any liability in respect of the Contract and the Consultant is liable to the Principal for the acts and omissions of all sub-consultants and assignees and employees and agents of sub-consultants and assignees as if they were the acts and omissions of the Consultant.

12.7 Computer Software used to produce computer system outputs

Consultants shall use the Principal's Computer Software as nominated in Item 3.5 of the *Invitation for Offer (C7585)* in the electronic production of design, drawings and electronic models.

In addition, the Consultant is required to provide to the Principal with each work package or at a time otherwise agreed, the raw model, the design parameters that were used to generate the design model, including the input files, modifiers and macros that were applied to generate the various elements of the design model, horizontal and vertical alignment, pavement widths / depths, crossfall / superelevation, tapers, drains and batters. Where BIM has been specified in the contract, an Industry Foundation Class federated model must also be supplied to the Principal.

12.8 Performance reports

The Principal and Consultant shall together complete performance reports regarding the performance in the Consultant Services and delivery of the Contract Material. These reports will be used in the assessment of the Consultant's prequalification levels and will be taken into account in the award of future contracts by the Principal.

Performance reporting is to be conducted during two phases – Pre-construction and Post-construction.

The pre-construction reporting consists of two reports:

- *Initiation of Contract (Form C7561), and*
- *Preconstruction Evaluation (Form C7562), for both milestone and finalisation of service reporting.*

Post Construction is one form:

- *Post Construction (Form C7563), for use both during construction (to capture any issues) and after construction (to assess the constructability of the design).*

The Consultant shall participate in the performance reporting processes detailed in this Clause 12.8. Failure to do so will be taken into account by prequalification assessors and offer assessment panels.

12.9 Confidential information

12.9.1 Consultant undertaking

The Consultant hereby undertakes:

- a) to treat as confidential and not disclose (unless required by law), duplicate, use or permit the use of, at any time and in any way, the Confidential Information, other than for the purpose of providing the Consultant Services, and will protect fully the confidentiality of the Confidential Information
- b) to limit the disclosure of the Confidential Information to those of its officers, employees and subconsultants to whom such a disclosure is strictly necessary for the purpose of providing the Consultant Services, and
- c) not to use the name of the Principal for promotion of the Consultant's services, unless the Principal has first given its written consent, which consent will not be unreasonably withheld.

12.10 Return of materials

Unless otherwise instructed by the Principal, all Contract Materials and materials supplied by the Principal to the Consultant for use during the course of the Contract shall be returned to the Principal upon the earlier of termination or the Date of Completion. The Consultant may retain one copy subject to the provisions of Clause 12.9.1 for its professional record keeping requirements.

12.11 Right to information

12.11.1 Right to access

The *Right to Information Act 2009* provides members of the public with a legally enforceable right to access documents held by Queensland Government agencies.

12.11.2 Disclosure

The *Right to Information Act 2009* requires that documents be disclosed upon request, unless documents are exempt or on balance contrary to the public interest.

12.11.3 Third party disclosure

Information relating to this Contract is potentially subject to disclosure to third parties.

12.11.4 Sensitive material

If disclosure under the *Right to Information Act 2009*, and/or general disclosure of information provided by the Consultant in connection with this Contract, would be of substantial concern to the Consultant, because it would disclose trade secrets, information of commercial value, the purpose or results of research or other information of a confidential nature, this should be indicated by the Consultant. The Principal cannot guarantee that any information provided by the Consultant will be protected from disclosure under the *Right to Information Act 2009*.

12.11.5 Publication

Despite any other provision in this Contract, the Principal is entitled to publish on the Queensland Government QTender website:

<https://qtenders.hpw.qld.gov.au/qtenders/>

under “View Awarded Contracts” or any other means the following details:

- a) the name and address of the Consultant
- b) the description of the Consultant Services
- c) the commencement date of the Contract
- d) the Contract value, and
- e) procurement methods used.

12.12 Privacy requirements

12.12.1 Personal Information

If the Consultant collects or has access to Personal Information in order to provide the Consultant Services, the Consultant must:

- a) if the Principal is an “agency” within the meaning of the *Information Privacy Act 2009*, comply with Parts 1 and 3 of Chapter 2 of that Act in relation to the discharge of its obligations under this Contract, as if the Consultant was the Principal
- b) not use Personal Information other than for the purposes of the performance of the Consultant Services, unless required or authorised by law
- c) not disclose Personal Information without the consent of the Principal, unless required or authorised by law

- d) not transfer Personal Information outside of Australia without the consent of the Principal
- e) ensure that access to Personal Information is restricted to those of its employees and officers who require access in order to perform their duties
- f) ensure that its officers and employees do not access, use or disclose Personal Information other than in the performance of their duties
- g) ensure that its sub-consultants who have access to Personal Information comply with obligations the same as those imposed on the consultant under this Clause
- h) fully co-operate with the Principal to enable the Principal to respond to applications for access to, or amendment of a document containing an individual's Personal Information and to privacy complaints, and
- i) comply with such other privacy and security measures as the Principal reasonably advises the Consultant in writing from time to time.

12.12.2 Deed of privacy

On request by the Principal, the consultant must obtain from its employees, officers or sub-consultants engaged for the purposes of this Contract, an executed deed of privacy in a form acceptable to the Principal.

12.12.3 Breach of privacy

The Consultant must immediately notify the Principal on becoming aware of any breach of Clause 12.12.

12.12.4 Digital data licence agreement

On request by the Principal in relation to digital data (such as Digital Video Roads) requirements, the consultant must enter into a formal licence agreement with the department for the use of the data and software.

12.13 Record keeping requirements

The Consultant must provide the Principal with plans, drawings, specifications, documents, Contract Materials and Materials required under this Contract and the Manual at the times and the manner and form specified in the Contract and the Manual.

13 Non-conforming building products

- a) In this clause, the terms 'person in the chain of responsibility', 'building product', 'non-conforming building product' and 'intended use' each have the respective meanings given to those terms in the *QBCC Act*.
- b) The Consultant acknowledges that, to the extent that the Consultant is a person in the chain of responsibility, it has obligations under Part 6AA of the *QBCC Act* in relation to non-conforming building products and must:
 - i. comply with its obligations under the *QBCC Act*
 - ii. not include in the Consultant Services a building product that is a non-conforming building product for an intended use

- iii. notify the Principal as soon as practicable, but in any event within two days of becoming aware, or reasonably suspecting through the carrying out of its Consultant Services that a building product relevant to the Consultant Services is a non-conforming building product for an intended use, and
 - iv. must provide the Principal with copies of all notices (including warning statements) issued and received in relation to the Consultant Services pursuant to the *QBCC Act* within 48 hours of dispatch or receipt by the Consultant of the relevant notice.
- c) The Consultant indemnifies and shall keep indemnified the Principal against all loss, costs, liabilities, claims, damages or expense caused or contributed to any breach of its obligations under this Clause 13, or by any failure of the Consultant to comply with its obligations under the *QBCC Act* in relation to building products, and
- d) For the avoidance of doubt, the indemnity contained in Clause 13 survive the termination, cancellation, completion, expiration or otherwise merging of this Contract.

14 Entire agreement

- a) The Contract sets out all the parties' rights and obligations relating to the subject matter of the Contract, and it supersedes all previous agreements and understandings, whether verbal or in writing, in connection with the relevant subject matter.
- b) Subject to Clause 6.3, the rights and obligations of the parties under the Contract shall not be varied except by agreement in writing between the parties.

