Model Clauses: Offsite Construction

The Office of Projects Victoria (OPV) and Department of Treasury and Finance (DTF) have prepared a suite of model clauses to assist delivery agencies adopt offsite construction (OSC) where it is considered appropriate at a project level. The objective is to maximise the productivity, efficiency, commercial and legal benefits to the State while eliminating (or if elimination is not possible, minimising and mitigating) the risks to the State posed by OSC.

The model clauses are intended to supplement the Victorian Public Construction Contracts (VPCC), which comprise DTF Standard Form Contracts and approved Agency Specific Contracts. While the clauses are designed to work with the VPCC, modification and tailoring may be necessary to align with those specific Contracts at a project level.

The model clauses facilitate the consistent treatment by the State of key issues that arise in projects employing significant OSC elements. Use of these clauses will provide significant efficiency when integrating OSC provisions into the relevant Contracts. The clauses also document the State’s position on fundamental commercial principles for inclusion in bespoke contracts that are developed for High Value, High Risk projects incorporating OSC.

The model clauses are intended to be used in projects employing significant OSC elements where standard clauses are not suitable or commercially acceptable (e.g. typical unfixed plant and equipment clauses in a construction contract).

The suite comprises three sets of model clauses, each designed to accommodate a different delivery scenario:

1. Offsite Construction Model Clauses - Supply Model 1 & Supply Model 2 - Supply Contract
2. Offsite Construction Model Clauses - Supply Model 2 - Construction Contract
3. Offsite Construction Model Clauses - Subcontracting Model - Construction Contract

This set of model clauses applies to contracting approach **Subcontractor Model 2** (shown below).

| 1. Contracting Approach
 | 1. Base Contract / Party
 | 1. Model Clauses
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| Supply Model 1 and Supply Model 2 | Supply Contract / Supplier | Model Clauses as relevant for Supply Only/Supply and Design/Supply and Install/Supply, Design and Install (as relevant) are set out in: * Offsite Construction Model Clauses - Supply Model - Supply Contract
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| Supply Model 2 | Construction Contract/or | All Model Clauses are set out in: * Offsite Construction Model Clauses - Supply Model - Construction Contract
 |
| Subcontractor Model | Construction Contract/or | All Model Clauses set out in: * Offsite Construction Model Clauses - Subcontractor Model - Construction Contract
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The intention is that all of the Model Clauses will be included in the relevant Base Contract, other than where they are specified to be “Optional”, in which case the “Option” that is not applicable should be deleted. If a Model Clause is otherwise “not applicable”, rather than being deleted, it should be switched off in the “Particulars” or "Annexure Part A" as indicated in the Guidance Notes.

Model Clauses: Offsite Construction

**Contracting approach: Subcontractor Model with base construction** **contract/or**

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| **Guidance Note:** This document is intended for use when the State wishes to procure the supply and installation of offsite Components under a **Construction Contract using a Subcontractor Model**. This document is **not a standalone contract**. The clauses following are designed to be included in a base construction contract which must be DTF endorsed and approved under the Ministerial Directions (**Base Contract**). Agencies will need to consider whether to use selected or nominated subcontractor provisions in the Base Contract to limit or specify the manufacturer/s with which the Construction Contractor is required to enter into a subcontract to deliver the Components. Agencies may also need to add additional items to the "Particulars" or "Annexure Part A", as well as additional "Schedules" or "Annexures" in, the Base Contract. Guidance Notes are provided to assist with this exercise and to indicate when existing clauses in the Base Contract should be replaced, or new clauses inserted.Please note that certain terms within this document will be flagged with a "##". For example, the term "the Contract" appears as <##the Contract>. This formatting has been used in circumstances where the terminology or numbering in the clauses will need to be aligned with the relevant terminology or numbering in the Base Contract. The model clauses and the Base Contract will also need to be carefully checked, and conformed, to ensure that the model clauses align and integrate with the Base Contract.Also please note that, in the Contract Particulars and Schedules, items highlighted:* ***green*** are to be completed by the agency before going to tender; and
* ***yellow*** are to be completed by the agency using information provided by the tenderer in response to the RFT.

A Base Contract into which these clauses are integrated **must be legally reviewed** prior to issue for tender.  |

# Definitions

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| 1. **Guidance Note:** The following definitions should be inserted in alphabetical order in the "Definitions" section of your contract. Note that if your contract already includes a definition for the same term, this should be replaced with the definition in this list.
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**Acceptance** means, in respect of a Component:

* 1. the Component Part is free from Defects, other than minor Defects which:
		1. do not prevent the Component from being reasonably capable of being used for the purposes stated in or reasonably able to be inferred from <##the Contract>; and
		2. can be corrected without prejudicing the convenient use of the Component; and
	2. all tests required by <##the Contract> to be carried out and passed to achieve Acceptance have been carried out and passed;
	3. all documents and information required by <##the Contract> to be provided to the Principal to achieve Acceptance have been so provided, including all Engineering Certificates required in connection with the relevant Component Part and all Approvals as are necessary for the use of the Component Part;
	4. the Contractor has done everything identified in the Completion Schedule (or elsewhere in this Contract) as being required to be done before, or as a condition precedent to, Acceptance; and
	5. the Contactor has executed and provided the Principal or, if the Principal so directs, such other party as is notified by the Principal to the Contractor, with a Collateral Warranty.
1. **Acceptance Certificate** has the meaning given in clause 7.4(b)(i).
2. **Approval** means any licence, permit, registration, consent, assessment, approval, authorisation, determination, certificate, accreditation, clearance, permission or the like which is required by an Authority or under any Law to be issued, obtained, held or satisfied to perform the <##Contractor’s Activities or to occupy or use the Works.
3. **Asset Register** means a register of all Components and Component Parts that includes:
	1. an asset number for each Component and Component Part;
	2. where relevant, the date that Acceptance occurred for each Component and Component Part;
	3. the Date of Acceptance for each Component and Component Part; and
	4. the location of each Component and Component Part within the facility at which it is ultimately located.
4. **Authority** means any:
	1. government of the Commonwealth of Australia or any Australian State or Territory and their departments, authorities, ministers, statutory corporations and instrumentalities, and any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, in Australia; or
	2. person to the extent that it has legally enforceable jurisdiction over the whole or part of the Site or the Manufacturing Facility, the <##Contractor’s Activities> or the Works.
5. **Business Days** means a day in Melbourne that is not:
	1. a Saturday or Sunday; or
	2. a day that is wholly or partly observed as a public holiday throughout Victoria.
6. **Certificate as to Title** means a certificate provided by the Contractor (in the form set out in Schedule <insert>, or such other form as is acceptable to the Principal) pursuant to which the Contractor certifies that it has title to the items the subject of the certificate and to which is annexed a Clear PPSA Certificate.
7. **Claim** includes any claim, action, demand, suit or proceeding (including by way of contribution or indemnity), made in any way in connection with, <##the Contract>, the <##Contractor’s Activities> or the Works or otherwise at Law or in equity, including under any statute, in tort or for restitution.
8. **Clear PPSA Certificate** means a certificate generated by the Personal Property Securities Register (as a search result for the purposes of s174 of the PPS Act) which does not show the existence of any Security Interest.
9. **Collateral Warranty** means a warranty in the form of Schedule <##insert>.
10. **Component** means:
	1. each consolidated item which the Contractor must deliver to the Principal in accordance with <##the Contract> as identified in the Component Schedule and described more fully in the Component Brief, or, if <##the Contract> requires the Contractor to supply more than one Component:
		1. means each of the Components identified in the Component Schedule and described more fully in the Component Brief; and
		2. references in <##the Contract> to "Component " are taken to apply separately to each such Component; and
	2. if it is identified as a Component in the Component Schedule, the Prototype.
11. **Component Brief** means the section of the <##Delivery Requirements> named as such that sets out the requirements for the Components.
12. **Component Design** means:

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| 1. **Guidance Note:** Select one of Option A or Option B.
2. Select Option A where Option A has been selected in clause 6.3.
3. Select Option B where Option B has been selected in clause 6.3.
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1. **Option A**: those Design Deliverables that have been through the process set out in clause 6.2 and in respect of which the Contractor is entitled to commence performance of any part of the <##Contractor's Activities> to which such Design Deliverable submitted or resubmitted to the <##Principal's Representative> applies in accordance with clause 6.2(e).

**Option B:** those deliverables set out in the Component Brief.

1. **Component Part** means, in respect of a Component, each part of the relevant Component specified in the Component Schedule and includes a Component Part to which a Milestone Payment attaches as identified in the Milestone Schedule.
2. **Component Security** means an unconditional, irrevocable bank guarantee which is payable on demand and:
	1. is issued by a financial institution that is the holder of a current licence issued by the Australian Prudential Regulation Authority and has a credit rating of at least A- by Standard and Poor's (Australia) Pty Limited or A3 by Moody's Investors Service, Inc;
	2. specifies a location in Melbourne (or such other place as the Principal may approve) where demand can be given and payment made, without further confirmation from the issuer, on any Business Day;
	3. is governed by and is to be construed according to the Laws applying in Victoria; and
	4. is in the form and on the terms set out in Schedule <##insert> (or such other form and terms as the Principal may approve).

**<##Contract Sum>** has the meaning given in clause 9.1(b)(i).

1. **Contractor IP** means Intellectual Property Rights owned by or licensed to the Contractor (or a third party) which were:
	1. brought into existence prior to the <##Contract Date> for general use in the Contractor's (or third party's) Manufacturing processes; or
	2. developed by the Contractor (or a third party) completely independently of the <##Contractor’s Activities>,
2. but excludes:
	1. Intellectual Property Rights in or related to the Retained Temporary Works; and
	2. without limiting paragraph (c), the Manufacturing processes and documents (including shop drawings and fabrication drawings) that have been developed, or reviewed, commented on or approved by or on behalf of the Principal, in connection with the Retained Temporary Works, the Components, the <## Contractor’s Activities> or the Design Deliverables which form part of the Developed IP.
3. **Date for Acceptance** means, in respect of a Component Part, the date the identified as such in the Milestone Schedule.
4. **Date of Acceptance** means, in respect of a Component Part, the date notified in any Acceptance Certificate.
5. **Defect** means any:
	1. defect, deficiency, error, fault or omission, whether in design, quality, materials, workmanship, the <##Contractor's Activities>, the Retained Temporary Works or the Works (including any Component or Component Part);
	2. other aspect of the <##Contractor's Activities>, the Retained Temporary Works or the Works (including any Component or Component Part) which is not in accordance with the requirements of <##the Contract>; or
	3. physical damage resulting from any of the events of circumstances referred to in paragraph (a) or (b) of this definition.
6. **Design Development Payment** means so much of the <##Contract Sum> (as at the <##Contract Date>) as is specified in the Pricing Schedule, if any, to be payable in connection with the development of the design of the Components.
7. **Design Deliverables** means all design documentation (including drawings, designs, specifications, manuals, samples, models, calculations, patterns and the like) and other information (including electronic files) which is required by <##the Contract> to be created by the Contractor to perform the <##Contractor's Activities> (or any part), including to Manufacture or procure the Manufacture of the Components (or any Component Part).
8. **Design Management Plan** means a plan setting out how the Design Deliverables are to be produced and submitted for review. At a minimum, it must set out:
	1. the responsibilities, timing and processes of all design activities as between the Principal, the Contractor and any Project Participants;
	2. a schedule of proposed Design Deliverables to be produced by the Contractor and the packages in which these will be submitted to the <##Principal's Representative>;
	3. a program for the delivery of all Design Deliverables;
	4. any interface points with designs undertaken by other parties; and
	5. the means by which the Contractor will communicate with the Principal and any Project Participants.

**Developed IP** means all Intellectual Property Rights, trade secrets and know-how comprised in or related to:

* 1. the Retained Temporary Works;
	2. the Components;
	3. the <##Contractor’s Activities>; and
	4. the Design Deliverables,

but excludes Contractor IP.

1. **Engineering Certificate** means a certificate in the form of Schedule <##insert>, or such other form as is acceptable to the Principal.
2. **Final RTW Payment** means so much of the <##Contract Sum> (as at the <##Contract Date>) as is specified in Item <##13 replace with relevant reference to item in the Contract Particulars of your contract>, if any, as either payment by the Contractor in accordance with clause 5.4(b)(i), or payment by the Principal in accordance with clause 9.2(a)(iii).
3. **Fit for Purpose** means fit for its intended purposes, functions and uses as specified in, or reasonably inferred from, the <##Delivery Requirements> or any other parts of <##the Contract>.
4. **GST** has the meaning given in the GST Act.
5. **GST Act** means the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).
6. **Hold Point** means:
	1. each Milestone identified as such in the Milestone Schedule; and
	2. any other point in the Manufacture of a Component Part identified as such in the Component Brief.
7. **Initial RTW Payment** means so much of the <##Contract Sum> (as at the <##Contract Date>) as is specified in the Pricing Schedule, if any, to be payable in connection with the Manufacturing of the Retained Temporary Works, but excludes the Final RTW Payment.
8. **Intellectual Property Right** means any patent, registered design, trademark or name, copyright or other protected right, whether created or in existence before, on or after the date of the Contract and whether existing in Australia or otherwise.
9. **Loss** means any:
	1. loss, damage (including damages at common law or in equity), liability, debt, cost (including legal costs, deductibles or increased premiums), expense, fee, compensation, charge or other amount; or
	2. fine or penalty (to the extent not prohibited by Law),
10. whether direct, indirect, consequential, present, future, fixed, unascertained, actual or contingent.
11. **Manufacture** includes construction, manufacture and assembly.
12. **Manufacturing Facility** means the location at which any Component or Component Part is Manufactured and includes those locations identified in <##the Contract Particulars>.

**Manufacturing Problem** means a feature or requirement of a Component or Component Part as specified in the Component Designs that will result in:

* 1. the work methodologies that are necessary or required for Manufacturing of the Component or Component Part in accordance with the Component Designs not being feasible;
	2. Manufacturing of the Component or Component Part in accordance with the Component Designs not being feasible within the timeframes required by <##the Contract> or for the Contract Sum;
	3. the Component or Component Part as specified in the Component Design not being able to be Manufactured in a safe manner; or
	4. additional work to ensure that the relevant part of the Component or Component Part is suitable for its intended purpose.
1. **Milestone** means an event or stage in the performance of the <##Contractor's Activities> as described as such (if at all) in the Milestone Schedule.
2. **Milestone Date** means the date by which a Milestone must be achieved, as specified in the Milestone Schedule.
3. **Milestone Payment** means so much of the <##Contract Sum> (as at the <##Contract Date>) as is specified in the Pricing Schedule to be payable on:
	1. in respect of a Component Part, the achievement of Acceptance of a Component Part; and
	2. in respect of any Milestone, achievement of the Milestone.
4. **Milestone Schedule** means Schedule <##insert>.
5. **Moral Right** has the meaning given by the *Copyright Act 1968* (Cth) and if any work is used in any jurisdiction other than in Australia, any similar rights capable of protection under the laws of that jurisdiction.
6. **Other Works** means the Works, other than any Component or Component Part.
7. **Payment Claim** has the meaning given in clause 9.2(a).
8. **Payment Statement** has the meaning given in clause 9.4(a).

**PPS Act** means the *Personal Property Securities Act 2009* (Cth) and regulations made under that Act.

1. **Project Participants** has the meaning given in Item <##5 replace with relevant reference to item in the Contract Particulars of your contract>.
2. **Prototype** has the meaning identified in Item <##7 replace with relevant reference to item in the Contract Particulars of your contract> and described more fully in the Component Brief.
3. **Prototype Acceptance** has the meaning given in clause 7.2(f)
4. **Prototype Payment** means so much of the <##Contract Sum> (as at the <##Contract Date>) as is specified in the Pricing Schedule, if any, to be payable in connection with the Manufacturing of the Prototype.
5. **Quality Management Plan** means the Project Plan of that name described in clause 7.1, the requirements for which are specified in <##insert name and section of the contract document in which the requirements for the Quality Management Plan appear>.

**Relevant Personal Property** has the meaning given in clause 3.1(a)(iv).

1. **Retained Temporary Works** has the meaning identified in Item <##2 replace with relevant reference to item in the Contract Particulars of your contract> and described more fully in the Component Brief.
2. **RTW Manufacture** has the meaning given in clause 5.2(e).
3. **RTW Milestone** has the meaning given to that term in the Milestone Schedule.
4. **RTW Milestone Date** means the date set out in respect of the RTW Milestone in the Milestone Schedule.
5. **Security Interest** means a mortgage, charge, lien, pledge, security interest, title retention, preferential right, trust arrangement, encumbrance and contractual right of set off and includes a security interest within the meaning of the PPSA.
6. **Security of Payment Act** means the *Building and Construction Industry Security of Payment Act 2002* (Vic).
7. **Tax Invoice** has the meaning given to them in GST Act.
8. **Works** means all of the physical things which the Contractor must design (if and to the extent required by the Contract), construct and complete in accordance with the requirements of the Contract and includes the Components and the Component Parts.

# Component Security

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| 1. **Guidance Note:** This clause is intended to address the Security required as the Contractor will not be able to provide a Certificate of Title prior to payment as, in many cases, the Contractor will not yet have paid the supplier. This will operate as a "floating" unfixed plant and materials security with the idea being that it should be sized to the largest Payment Claim that the Principal is likely to receive in respect of Component Parts for which the Principal has not received a Certificate of Title with the Payment Claim. If there is a concern that the Contractor may "game this", the Principal might consider capping the amount that may be claimed re Component Parts in any Payment Claim and linking the required Security to this capped amount.
2. Note that the obligation to provide this Security is in addition to any obligation to provide performance security in connection with any other <##Contractor's Activities>.
3. This clause should be added as a new clause in the Base Contract, preferably immediately after any existing security clause.
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## Provision of Component Security

### The Contractor must, within 10 Business Days after the <##Contract Date>, provide security to the Principal in the form of the Component Security and in the amount set out in Item <##1 replace with relevant reference to item in the Contract Particulars of your contract>.

### To the extent permitted by law, where the Contractor has failed to provide the Component Security in accordance with clause 2.1(a), in addition to any other remedies available to the Principal (whether under <##the Contract> or otherwise), the Principal may deduct or withhold from any monies payable pursuant to a Payment Statement an amount equivalent to the Component Security, to be held as cash security.

### On receipt of the Component Security, the amount so deducted or withheld must be returned to the Contractor with the next Payment Statement due.

## No injunction

1. The Contractor must not at any time take any steps to enjoin or otherwise restrain:

### any issuer of the Component Security from paying the Principal pursuant to the Component Security;

### the Principal from taking any steps (such as making a demand) which may be a precondition to obtaining payment under the Component Security; or

### the Principal using the proceeds of any Component Security.

## Release

### Subject to any other rights or remedies of the Principal under the Contract or otherwise at law (including the right of set off in clause 9.8), the Principal must release the Component Security to the Contractor within ##10 Business Days after the Date of Acceptance in respect of the last Component Part to achieve Acceptance.

### The return of the Component Security will not operate so as to waive, prejudice, release or discharge any of the conditions of the Contract or any of the obligations imposed on the Contractor by <## the Contract>.

## Interest

1. The Principal:

### is not obliged to pay the Contractor interest on the Component Security or the proceeds of the Component Security if it is converted into cash; and

### does not hold the proceeds or money referred to in clause 2.4(a) on trust for the Contractor.

# PPS Act[[1]](#footnote-1)

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| 1. **Guidance Note:** If the Base Contract includes a clause in respect of the *Personal Property Securities Act* *2009* (Cth) that clause should be deleted and replaced with the following clause. If the Base Clause does not include a clause in respect of the *Personal Property Securities Act 2009* (Cth) this clause should be added as a new clause in the Base Contract, preferably immediately after any existing payment clause.
2. The PPS Register is an official register created under the PPS Act and administered by the Registrar of Personal Property Securities. It operates as a public noticeboard of security interests in personal property. The Registrar is appointed by the Attorney General's Department. The Registrar's office sits in a Commonwealth government department called the Australian Financial Security Authority (AFSA).
3. The PPS allows the agency to take an effective security interest in the Component or Component Parts upon payment for them, provided the clauses below are included in the Base Contract.
4. In broad terms, a security interest is an interest in personal property, which includes goods and contractual rights. Under these Model Clauses, the security interests with which an agency should primarily be concerned will arise when the agency pays for a Component and becomes entitled to ownership of that Component, Component Part or Retained Temporary Works.
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## Security Interests

1. The Contractor acknowledges and agrees that:

### the Principal may:

#### immediately upon title in Components and Component Parts passing to the Principal under clause 9.5(d);

#### immediately upon title in the Retained Temporary Works passing to the Principal under clause 5.3(a); and

#### at any other time if and to the extent that the Principal forms a belief on reasonable grounds that the Principal is, or will become, a secured party arising out of or in connection with <## the Contract>,

#### at the Contractor's expense, take all steps that the Principal considers advisable to:

#### perfect, protect, record, register, amend or remove the registration of, the Principal's Security Interest in any relevant personal property that is the subject of this Security Interest (**Relevant Personal Property**); and

#### better secure the Principal's position in respect of Relevant Personal Property under the PPS Act;

### it will do all things reasonably necessary to assist the Principal to take the steps described in clause 3.1(a);

### it irrevocably and unconditionally waives its right to receive any verification statement in respect of any financing statement or financing change statement relating to any Security Interests of the Principal in Relevant Personal Property;

### if, and only if, the Principal is or becomes a secured party in relation to Relevant Personal Property, and to the extent only that Chapter 4 of the PPS Act would otherwise apply to an enforcement of a Security Interest in Relevant Personal Property, the Contractor and the Principal agree that, pursuant to section 115 of the PPS Act, the following provisions of the PPS Act do not apply in relation to those Security Interests to the extent, if any, mentioned in section 115: section 117, section 118, section 120, subsection 121(4), section 125, section 129, section 130, subsection 132(3)(d), subsection 132(4), section 142, and section 143;

### subject to section 275(7) of the PPS Act, it will not disclose the contents of <##the Contract>; the amount or performance obligation secured by the Principal's Security Interest in Relevant Personal Property and the other information mentioned in section 275(1) of the PPS Act pursuant to section 275(4) of the PPS Act;

### it must immediately notify the Principal if it becomes aware of any person other than the Principal taking steps to register, or registering, a financing statement in relation to Relevant Personal Property; and

### it must arrange for the removal or cessation of any registration of any Security Interest that affects the priority of the Principal's interest in Relevant Personal Property.

1. For the purposes of this clause 3.1, "financing statement", "financing change statement", "personal property", "registration", "secured party" and "verification statement" each have the meaning given to those terms in the PPS Act.

## Indemnity

1. The Contractor must indemnify the Principal on demand from any Claims against, or Loss suffered or incurred by the Principal, arising out of or in connection with any breach by the Contractor of its obligations under clause 3.1.

# Intellectual Property Rights[[2]](#footnote-2)

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| 1. **Guidance Note:** A specific IP clause is required for Contracts employing Offsite Construction. Manufacturing processes in Offsite Construction procurement are often proprietary in nature, and Contractors frequently attempt to carve their proprietary manufacturing processes out from any licences granted to the Principal in respect of background IP (IP not created for the purposes of the Contract).
2. This clause replaces the existing clause titled "Intellectual Property Rights" in the Base Contract. Please delete that clause from the Base Contract and replace it with the following.
3. This clause provides for a broad licence in IP created for the purposes of the <##Contractor's Activities> and in the Contractor's background IP. This is typically sufficient if the Principal is simply seeking to use the IP in the future for government projects, If the Principal requires ownership of IP (e.g. if it intends to commercialise the IP or to share the IP with other parties other than in connection with a project of the Principal), this clause should be substituted with an IP ownership clause. Legal advice must be sought for that purpose.
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## Warranty and indemnity

1. The Contractor:

### warrants to the Principal that:

#### the Retained Temporary Works;

#### the Components;

#### the <##Contractor's Activities>;

#### the Design Deliverables;

#### any methods of working; and

#### the use or enjoyment by the Principal (or any nominee of the Principal) of any RTW, Components or any Design Deliverables,

#### will not infringe any Intellectual Property Rights; and

### indemnifies the Principal on demand against any Claim or Loss (including any third party Claim against the Principal) arising out of or in connection with any actual or alleged infringement of any Intellectual Property Right.

## Licence

### The Contractor grants to the Principal (or must procure that the Principal is granted, as the case may be) a perpetual, royalty-free, irrevocable, non-exclusive, transferable, worldwide licence (including the right to sub-licence) to exercise all or any of the Intellectual Property Rights in the Developed IP for all purposes in connection with the Retained Temporary Works, Components, <##Contractor's Activities> and Design Deliverables, including:

#### the use and enjoyment of the Retained Temporary Works, Components, <##Contractor's Activities> and Design Deliverables;

#### any installation, use, operation, support, repair, maintenance of, or additions, alterations or repairs to the Retained Temporary Works and Components; and

#### use in any way for any other project of the Principal.

### The Contractor grants to the Principal (or must procure that the Principal is granted, as the case may be) a licence in respect of the Intellectual Property Rights in the Contractor IP on the terms set out in clause 4.2(a), with the exception that clause 4.2(a)(iii) will not apply.

### All sub-paragraphs of this clause 4.2 are to be construed as separate and independent grounds on which the licence may be exercised, and without limiting each other or any other part of this clause.

## Moral Rights

### The Contractor:

#### must ensure that it does not infringe any moral right of any author of any work in carrying out the <##Contractor's Activities>;

#### must ensure that it obtains an irrevocable and unconditional:

##### written consent on the terms reasonably required by the Principal, for the benefit of the Principal and the Contractor, from the author of any work to be incorporated into the Components, or used during, or as part of the <##Contractor's Activities>, including any necessary consents from its employees, subcontractors and any consultants engaged by it, or the employees of its subcontractors and consultants, to doing or authorising the doing of an act or making or authorising the making of an omission (whether occurring before or after this consent is given), anywhere in the world which, but for the consent, infringes or may infringe that author's Moral Rights in the work; and

##### waiver on the terms reasonably required by the Principal, to the extent permitted by law, of any and all Moral Rights to which that author may be entitled anywhere in the world in relation to the work;

#### must not (and must not encourage or permit anyone else to) apply any duress to any person or make a statement to any person knowing that the statement is false or misleading in a material particular, or knowing that a matter or thing has been omitted from the statement without which the statement is false or misleading in a material particular, in procuring consents and waivers under this clause 4.3; and

#### indemnifies the Principal against any Claims against, or Loss suffered or incurred by, the Principal, arising out of, or in any way in connection with, any actual or alleged infringement of any author's Moral Rights arising out of or in any way in connection with the Retained Temporary Works, Components, <##Contractor's Activities> and Design Deliverables , or arising in the future out of or in connection with any change, distortion, destruction, alteration, relocation or destruction of the Retained Temporary Works or the Components.

### This clause 4.3 will survive the termination of the Contract and the completion of the <##Contractor's Activities>.

### Where used in this clause 4.3, the term "work" has the meanings given to it in section 189 of the *Copyright Act 1968* (Cth).

# Retained Temporary Works[[3]](#footnote-3)

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| 1. **Guidance Note:** The Retained Temporary Works refers to the moulds, complex jigs, bespoke templates, etc. used to Manufacture Components or Component Parts. In circumstances where the Principal intends to use the same Components or Component Parts on future projects, the Principal might consider retaining the Retained Temporary Works as well as the Components or Component Parts.
2. The following clause provides for the Principal to own the Retained Temporary Works upon payment of the Initial RTW Payment, with the Contractor being required to deliver the Retained Temporary Works to the Principal as a condition precedent to Acceptance of the last Component Part. Principal ownership of the Retained Temporary Works can result in efficiencies in terms of procurement timeframes and construction costs on future projects. The Principal will, however, need to factor in the cost of storing Retained Temporary Works and the likelihood of use on future projects when making the decision to seek ownership. The Contractor retains the risk of loss or damage to the Retained Temporary Works until the Date of Acceptance in respect of the last Component Part to achieve Acceptance (i.e. the Contractor will need to repair or replace the Retained Temporary Works if lost or damaged at no cost to the Principal).
3. The following clause also provides that the Principal may make an election within ##10 Business Days following the Date of Acceptance in respect of the last Component Part to achieve Acceptance to require the Contractor to purchase the Retained Temporary Works at a reduced price. This clause has been included to incentivise the Contractor to design, Manufacture and maintain the Retained Temporary Works to the requisite standard, or risk not receiving payment for the full value of the Retained Temporary Works.
4. It is contemplated that the following clause will be included in each Contract as a new clause, preferably inserted near other completion clauses. If it is not relevant to your procurement, please mark "not applicable" in the relevant Contract Particulars.
 |

## Application

1. This clause 5 applies unless otherwise stated in Item <##25 replace with relevant reference to item in the Contract Particulars of your contract>.

## RTW Manufacture

### The Contractor must:

#### Manufacture the Retained Temporary Works by the RTW Milestone Date; and

#### give the <##Principal's Representative>:

##### ##5 Business Days prior written notice of the date on which it anticipates achieving the RTW Milestone; and

##### written notice when it considers the RTW Milestone has been achieved.

### Within ##4 Business Days after receiving notice under clause 5.2(a)(ii)B, the <##Principal's Representative> may:

#### inspect the Retained Temporary Works (together with any nominee of the <##Principal's Representative>); and

#### give written notice to the Contractor, together with reasons, if the RTW Milestone has not been achieved.

### The Contractor must provide the <##Principal's Representative> (and any nominee) with access to, and (where applicable) a demonstration of, the Retained Temporary Works if the <##Principal's Representative> elects to conduct an inspection under clause 5.2(b)(i).

### On receipt of a notice under clause 5.2(b)(ii), the Contractor must promptly address such issues as are identified in the <##Principal's Representative>'s notice, whereupon clauses 5.2(a)(ii)B to this clause 5.2(d) (both inclusive) will reapply.

### The RTW Milestone will be taken to have been achieved when ##4 Business Days expire after the giving of a notice under clause 5.2(a)(ii)B without a notice under clause 5.2(b)(ii) having been given (**RTW Manufacture**).

### Compliance with clause 5.2(d) does not prejudice the Contractor's rights, under clause <##insert dispute resolution clause number>, to dispute a notice given under clause 5.2(b)(ii).

## Ownership and risk

### Ownership of, and unencumbered title in, the Retained Temporary Works passes to the Principal free of any Security Interest immediately upon payment of the Initial RTW Payment.

### The Contractor must:

#### do everything necessary to give effect to clause 5.3(a); and

#### without limiting its obligations under clause 3.1, at its expense, do all things reasonably necessary to assist the Principal to register a Security Interest in, and better secure the Principal's position in respect of, the Retained Temporary Works under the PPS Act.

### The Principal grants to the Contractor a non-exclusive, revocable licence to use the Retained Temporary Works for the sole purpose of the Contractor complying with its obligations under <##the Contract>.

### The Contractor:

#### bears the risk of loss of or damage to the Retained Temporary Works until the Date of Acceptance in respect of the last Component Part to achieve Acceptance, unless caused by a negligent act or omission of the Principal; and

#### must promptly rectify, at its own cost, any loss or damage to the Retained Temporary Works for which the Contractor bears the risk in accordance with clause 5.3(d)(i).

### Subject to clause 5.4, it is a condition precedent to the achievement of Acceptance in respect of the last Component Part to achieve Acceptance that:

#### the Contractor has delivered to the Principal (at a place nominated by the Principal, acting reasonably) the Retained Temporary Works; and

#### the Retained Temporary Works are free from Defects and in good condition and repair.

## Retained Temporary Works

### The Principal may, within ##10 Business Days after the Date of Acceptance in respect of the last Component Part to achieve Acceptance, advise the Contractor in writing that it requires the Contractor to purchase the Retained Temporary Works from the Principal.

### If a notice is given under clause 5.4(a):

#### the Principal will be entitled to retain or be paid the Final RTW Payment as payment by the Contractor for the purchase of the Retained Temporary Works;

#### the Principal will procure that ownership of, and unencumbered title in, the Retained Temporary Works passes to the Contractor free of any Security Interest upon receipt by the Principal of the Final RTW Payment;

#### the Contractor will retain responsibility for, and all risk of loss of or damage to, the Retained Temporary Works; and

#### the Contractor will not be entitled to make (and the Principal will not be liable upon) any Claim for the Final RTW Payment.

# Component Design

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| 1. **Guidance Note:** The design process is integral to successful Offsite Construction. There are many design related issues that must be considered when designing Components and Component Parts, not least of which being how to lift and transport the Component Parts from the manufacturing facility to the Delivery Point. The following clauses have been prepared to address these issues.
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## Contractor obligations

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| 1. **Guidance Note:** This clause should be added to the Base Contract where the Contractor is responsible for designing the Components or Component Parts. Ideally, this clause would be inserted below any existing design clause in the Base Contract and the design of the Component and Component Parts identified as an exclusion to the design obligations in the existing clause.
 |

### The Contractor must design, or develop and complete the design of, the Components, Component Parts and the Retained Temporary Works in accordance with the Component Brief and other requirements of <##the Contract> and, for this purpose, prepare all relevant Design Deliverables.

### In performing its obligations under clause 6.1(a), the Contractor must:

#### liaise with and proactively seek input from all Project Participants, including by providing Project Participants with drafts of Design Deliverables, convening meetings and addressing, in the Design Deliverables submitted in accordance with clause 6.2, such issues as may reasonably be raised by any of the Project Participants;

#### ensure that the Components and Retained Temporary Works can be readily and economically transported to the Site (meaning, without limitation, the loading, transportation, tie-down and unloading of the Components and Retained Temporary Works should not require the use of vehicles or items of equipment that are specialised, bespoke or not readily commercially available, and should not result in any Approvals being required to be obtained (unless otherwise agreed with the Principal));

#### for the purposes of clause 6.1(b)(ii), assess and take into account (without limitation) lifting, transport tie-down design, transportation loads and dimension capacities and transport routes;

#### incorporate in the Components such penetrations as are necessary or desirable to facilitate connection to all relevant utility services at the Site, and in a manner that is cost efficient and consistent with good design and construction practices;

#### ensure that the Components are designed having regard to and make all due allowance for:

##### installation staging and sequencing as between the Component Parts and Components and as between any one or more of the Component Parts or Components and any Other Works;

##### cumulative fabrication, installation and construction tolerances as between the Component Parts and Components and as between any one or more of the Component Parts or Components and any Other Works;

##### any requirements to inspect the Components (or any Component Parts) during the performance of construction works (including as required by any Quality Management Plan); and

##### safe access to all points of the Component Parts and Components to which access will be required (or that a competent Contractor should reasonably anticipate will or may be required) in connection with the installation or incorporation of the Component Parts and Components in construction works (including lifting points, tie-down points and utility service connections); and

#### ensure that the Components are interfaced and coordinated with the works or services being carried out by other Project Participants.

## Design Review

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| 1. **Guidance Note:** The design review process in this clause provides the Principal with an opportunity to review and reject Design Deliverables that do not comply with the requirements of the Contract.
2. This clause should be added to the Base Contract where the Contractor is responsible for designing the Components or Component Parts. This clause should be inserted below clause 6.1.
 |

### The Contractor must prepare and submit to the Principal for approval in accordance with clause <##insert cross reference to clause addressing approval of Project Plans> a Design Management Plan.

### The Contractor must submit the Design Deliverables that it prepares to the <##Principal's Representative> for review in a manner and at a rate which will give the <##Principal's Representative> a reasonable opportunity to review the Design Deliverables and otherwise in accordance with the approved Design Management Plan.

### The <##Principal's Representative> may, after the submission (or resubmission) of a Design Deliverable:

#### review the Design Deliverable; and

#### within *##*10 Business Days after its submission, reject the Design Deliverable (or any part) if it does not comply with the requirements of <##the Contract> and state the nature of the non-compliance.

### The Contractor must amend and resubmit to the <##Principal's Representative> any Design Deliverable that is rejected under section 6.2(c)(ii) within *##*10 Business Days after the date of such rejection, and this clause 6.2 will reapply.

### The Contractor must not commence performance of any part of the <##Contractor's Activities> to which any Design Deliverable submitted or resubmitted to the <##Principal's Representative> applies unless the <##Principal's Representative>:

#### has had the period referred to in section 6.2(c)(ii) to review the Design Deliverable; and

#### has not rejected the Design Deliverable.

### The Contractor must not amend any Design Deliverable that has:

#### been submitted to the <##Principal's Representative>; and

#### not been rejected under section 6.2(c)(ii),

* 1. unless the Contractor submits the proposed amendments to the <##Principal's Representative>, in which case this clause 6.2 will reapply.

### Neither the Principal nor the <##Principal's Representative> assumes or owes any duty of care or other responsibility to the Contractor to review, or in reviewing, a Design Deliverable submitted by the Contractor, including for errors, omissions or non-compliance with <##the Contract>.

### The Contractor will not be entitled to make (and the Principal will not be liable upon), any Claim arising out of or in any in connection with the <##Principal's Representative> not detecting and notifying the Contractor of any errors, omissions or non-compliance with the requirements of <##the Contract> in any Design Deliverable submitted.

### No review of, comment upon or rejection of, or failure to review or comment upon or reject, a Design Deliverable prepared or submitted by the Contractor, or any other direction by the <##Principal's Representative> in connection with the Design Deliverable, will:

#### constitute a direction to carry out a <##Variation>;

#### relieve the Contractor from or alter its liabilities or obligations, whether under <##the Contract> or otherwise according to any law; or

#### limit or otherwise affect the Principal's rights against the Contractor, whether under <##the Contract> or otherwise according to any law.

## Warranties

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| 1. **Guidance Note:** Select one of Option A or Option B.
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1. **OPTION A**

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| 1. **Guidance Note:** This clause should be added to the Base Contract where the Contractor is responsible for designing the Components or Component Parts. This clause should be inserted below clause 6.2. These warranties are in addition to any warranties the Contractor provides in respect of other designs or the Works more generally.
 |

1. Without limiting the Contractor's obligations under <##the Contract>, the Contractor warrants that:

### it has carefully checked, examined and analysed the Component Brief and is satisfied that the Component Brief is appropriate and suitable for the purposes of enabling the Contractor to perform its obligations under <##the Contract>, including the production of the Design Deliverables and the Manufacture of the Components and Component Parts so as to meet the requirements of the Component Brief and the remainder of the Contract;

### it has satisfied itself that there is nothing in the Component Brief that would prevent the Components and Component Parts from being Fit for Purpose;

### it will construct the Components and Component Parts in accordance with the approved Component Designs; and

### as at the Date of Acceptance, each Component and Component Part will:

#### be, and will remain, Fit for Purpose subject to being operated and maintained in a manner consistent with reasonable market operating and maintenance practices and applicable laws;

#### comply with all requirements of <##the Contract> and applicable laws.

1. **OPTION B**

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| 1. **Guidance Note:** This clause should be added to the Base Contract where the Contractor is not responsible for designing the Components or Component Parts. This clause should be as a new clause in the Base Contract, preferably this clause would be inserted together with other clauses addressing the design, Manufacturing and Acceptance of the Components and Component Parts. These warranties are in addition to any warranties the Contractor provides in respect of other designs or the Works more generally.
 |

1. Without limiting the Contractor's obligations under <##the Contract>, the Contractor warrants that:

### it has carefully checked, examined and analysed the Component Design and is satisfied that the Component Design is appropriate and suitable for the purposes of enabling the Contractor to perform its obligations under <##the Contract>;

### it will not make any claim against the Principal in any way in connection with a Manufacturing Problem; and

### it will Manufacture the Components and Component Parts in accordance with the approved Component Designs.

# Acceptance

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| 1. **Guidance Note:** This clause should be added as a new clause in the Base Contract. This clause would be inserted where other clauses addressing the design, Manufacturing and Acceptance of the Components and Component Parts are located.
 |

1.

## Quality Management Plan

### The Contractor must prepare and submit to the Principal for approval in accordance with clause <##insert cross reference to clause addressing approval of Project Plans> a Quality Management Plan.

### The Contractor must comply with any approved Quality Management Plan in the Manufacture of any Prototype, the Components and the Component Parts.

## Prototype Acceptance

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| 1. **Guidance Note:** This clause enables the Principal to see and sign off on the required quality of the Component or Component Parts.
 |

### If it is stated in Item <##6 replace with relevant reference to item in the Contract Particulars of your contract> that this clause 7.2 applies, then the Contractor must, by the date set out in Item <##8 replace with relevant reference to item in the Contract Particulars of your contract>, Manufacture and make available to the <##Principal's Representative> for inspection and demonstration, the Prototype.

### The <##Principal's Representative> may:

#### on reasonable prior notice to the Contractor, attend (together with any other persons nominated by the <##Principal's Representative>) an inspection (and where applicable, require a demonstration) of the Prototypes; and

#### within ##5 Business Days after an inspection (and where applicable, demonstration) under clause 7.2(b)(i), by written notice to the Contractor setting out the reasons for doing so, reject any Prototype if the Prototype does not comply with the requirements of <##the Contract>.

### The Contractor must provide the <##Principal's Representative> (together with any other persons nominated by the <##Principal's Representative>) with access to, and conduct demonstrations of, the Prototype when so requested under clause 7.2(b)(i).

### If a Prototype is rejected, the Contractor must make available for inspection, at its cost, a corrected or substituted Prototype which addresses the reasons identified in the <##Principal's Representative>'s notice under clause 7.2(b)(ii), whereupon clause 7.2(b) will reapply.

### Compliance with clause 7.2(d) does not prejudice the Contractor's rights, under clause <##insert dispute resolution clause number>, to dispute a notice given under clause 7.2(b)(ii).

### The Contractor must not commence the Manufacture of any Component to which a Prototype applies unless the <##Principal's Representative> has had ##5 Business Days to review, and has not rejected, the Prototype (**Prototype Acceptance**).

### The Contractor acknowledges and agrees that:

#### the <##Principal's Representative> does not assume or owe any duty of care to the Contractor to inspect any Prototype, or in inspecting, to identify any errors, omissions in the Prototype or any failure to comply with <##the Contract>; and

#### no review of, comments upon, consent to or rejection of, or failure to review or comment upon or consent to or reject, any Prototype or any other direction by the <##Principal's Representative> about, or any other act or omission by the <##Principal's Representative> in relation to, a Prototype will:

##### relieve the Contractor from, or alter or affect, the Contractor’s obligations under <##the Contract> or otherwise at law or in equity; or

##### prejudice the Principal's rights against the Contractor under <##the Contract> or otherwise at law or in equity.

### The Contractor must ensure a Prototype remains available for inspection at the Contractor's premises (or such other location as is agreed in writing by the <##Principal's Representative>) until the Date of Acceptance in respect of the last Component Part to which that Prototype applies.

### The Contractor represents and warrants to the Principal that as at the Date of Acceptance all Components and Component Parts will match the quality, finish, aesthetic and operational capability of the relevant Prototype which has achieved Prototype Acceptance.

## Component Part Manufacture and inspection

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| 1. **Guidance Note:** This clause sets out an inspection process in respect of the Manufacture of Components and Component Parts. You should identify any points in the Manufacture of the Components and Component Parts at which you require the right to inspect and, where these are Milestones, note this as such in the Milestone Schedule, or otherwise set this out in the Component Brief.
 |

### The Contractor must:

#### not progress the Manufacture of a Component or Component Part (as the case may be) beyond a relevant Hold Point until it has complied with the requirements of this clause 7.3; and

#### give the <##Principal's Representative> not less than ##5 Business Days prior written notice of the date on which, in respect of a Component or Component Part (as the case may be), a Hold Point will be reached.

### At each Hold Point the Contractor must provide the <##Principal's Representative> (together with any other persons nominated by the <##Principal's Representative>) with:

#### access to the Component or Component Part (as the case may be) so that it can be inspected; and

#### other documents and evidence (which must be in a form required by the <##Principal's Representative>) that demonstrate that the Contractor has complied with its obligations under <##the Contract> in relation to the Component or Component Part (as the case may be).

### The <##Principal's Representative> may, within ##6 Business Days after the last to occur of:

#### an inspection of a Component or Component Part (as the case may be); and

#### the Contractor complying with clauses 7.3(b)(i) and 7.3(b)(ii) in respect of that Component or Component Part (as the case may be),

* 1. notify the Contractor (acting reasonably) that a Component or Component Part (as the case may be) does not comply with <##the Contract>, together with reasons.

### The Contractor must:

#### promptly rectify any non-compliance notified under clause 7.3(c), whereupon the requirements of this clause 7.3 will reapply; and

#### comply with clause 7.3(d)(i) regardless of whether the Contractor disputes the Principal's notice under clause 7.3(c).

### Compliance with clause 7.3(d) does not prejudice the Contractor's rights, under clause <##insert dispute resolution clause number>, to dispute a notice given under clause 7.3(c).

## Acceptance

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| 1. **Guidance Note:** This clause applies where the Contractor is required to deliver any Component or Component Part to a location other than the Manufacturing Facility.
2. This clause sets out a process for signing off factory acceptance testing and inspections of all Components and Component Parts in the Manufacturing Facility before delivery to the Delivery Point. Note that if you do not give an Acceptance Certificate or a rejection notice within ##6 Business Days after receiving a notice under clause 7.4(a)(iii), then the relevant Component or Component Part is deemed accepted. This drafting has been included to allow the Principal to elect not to inspect and provide sign off on all Components and Component Parts (e.g. where the Principal has undertaken a thorough review of a number of Component Parts and is comfortable that these are being Manufactured to the requisite standard, and thereafter the Principal elects to only review a limited number of Component Parts) but will mean that you need to ensure that if you have any concerns a rejection certificate is provided with the requisite ##6 Business Days.
3. Where you do not require the Contractor to deliver any Component Part to a location other than the Manufacturing Facility, please mark "not applicable" in the relevant item in the Contract Particulars.
 |

### The Contractor must:

#### complete the Manufacture of each Component and Component Part in accordance with the relevant Design Deliverables and the requirements of <##the Contract>;

#### give the <##Principal's Representative> not less than ##10 Business Days written notice of the date on which the Contractor anticipates Acceptance of a Component or Component Part (as the case may be) will occur; and

#### when it considers that Acceptance of a Component or Component Part (as the case may be) has occurred in accordance with clause 7.4(a)(i):

##### give written notice to that effect to the <##Principal's Representative>; and

##### provide the <##Principal's Representative> (together with any other persons nominated by the <##Principal's Representative> with access to the Component or Component Part (as the case may be) within ##7 Business Days after giving a notice under clause 7.4(a)(iii)A so that it can be inspected.

### Within ##10 Business Days after receiving a notice under clause 7.4(a)(iii)A, the <##Principal's Representative> will give the Contractor, in respect of the relevant Component or Component Part (as the case may be) a notice:

#### certifying that Acceptance has been achieved in respect of the relevant Component or Component Part (as the case may be) (**Acceptance Certificate**); or

#### detailing reasons for not providing an Acceptance Certificate.

### If the <##Principal's Representative> does not give a notice under clause 7.4(b) within the period specified in that clause, the Component or Component Part (as the case may be) will be taken to have achieved Acceptance.

### The Contractor must:

#### promptly rectify any non-compliance notified under clause 7.4(b)(ii), whereupon the requirements of this clause 7.4 will reapply; and

#### comply with clause 7.4(d)(i) regardless of whether the Contractor disputes the Principal's notice under clause 7.4(b)(ii).

### Compliance with clause 7.4(d) does not prejudice the Contractor's rights, under clause <##insert dispute resolution clause number>, to dispute a notice given under clause 7.4(d)(i).

### The Contractor's obligations under this clause 7.4 will survive any termination of <##the Contract>.

### A notice under clause 7.4(b)(i) stating that the Component or Component Part (as the case may be) and associated <##Contractor's Activities> has achieved Acceptance will not:

#### constitute approval by the Principal of the Component or Component Part (as the case may be) and associated <##Contractor's Activities>;

#### be taken as an admission or evidence that the Component or Component Part (as the case may be) and associated <##Contractor's Activities> comply with <##the Contract>; or

#### prejudice any rights or powers of the Principal.

### Nothing in clause 7.4 prejudices any other right, power or remedy which the Principal or the <##Principal's Representative> may have under <##the Contract> or at Law arising out of the failure of the Contractor to provide materials, plant, equipment, other items or work in accordance with <##the Contract>.

### Neither the Principal nor the <##Principal's Representative> are obliged to give any notice or direction under this clause 7.4 to assist the Contractor.

## Not used

## Not used

## Collateral Warranty

### The Contractor must, as a condition precedent to the achievement of Acceptance in respect of a Component or Component Part (as the case may be), provide the Principal with a duly completed and executed Collateral Warranty in favour of either the Principal or, if the Principal so directs, such other party as is notified by the Principal to the Contractor.

### The Contractor acknowledges and agrees that any Collateral Warranty given in favour of the Principal under clause 7.7(a) may be assigned by the Principal to a third party.

### Nothing in this clause 7.7, nor any Collateral Warranty or assignment of rights as contemplated by this clause, will limit or affect any of the Contractor’s obligations or liabilities, or derogate from any rights which the Principal may have against the Contractor, in respect of the subject matter of the Collateral Warranty.

# Not used

# Payment

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| 1. **Guidance Note:** Typically, contracts require a Contractor to provide security to the full value of any amounts paid for plant and materials before they are delivered to the construction site. Given the size of the Offsite Construction market, and the likely value of any unfixed Component Parts at any point in time, Contractors are unlikely to agree to provide security to the full value of unfixed Component Parts. Accordingly, it is typical to make substantial payments for unfixed Component Parts to ensure adequate Contractor cashflow. The following provisions ensure that the Principal's interests in the unfixed Component Parts for which it has made payment is acknowledged and protected.
2. This clause is intended to replace the existing clause titled "Payment" in the Base Contract. Please delete that clause and replace it with the following clause which addresses payment for the Retained Temporary Works, any Prototype, the Component(s) and Component Parts, and any other amounts making up the "Contract Sum" in the Base Contract.
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## Payment obligation

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| 1. **Guidance Note:** The following clause contemplates that all payment types will be retained in each Contract. If a particular payment type is not relevant to your Contract, please mark "not applicable" in the relevant "Contract Particulars" or "Annexure Part A" of the Base Contract.
2. The payment type "Prototype Payment" should only be used where a Prototype is to be provided but is sacrificial, that is, it will NOT form part of the permanent Component(s). Alternatively, if a Prototype is to be permanent, the Component Schedule will need to reflect this (see the definition of “Component”). It will need to be characterised as a Milestone and a corresponding Milestone Payment ascribed to it.
 |

### Clauses 9.1(b)(i)A to 9.1(b)(i)F (inclusive) apply unless otherwise stated in Item <##10 replace with relevant reference to item in the Contract Particulars of your contract>.

### In consideration of the Contractor performing its obligations under <##the Contract> the Principal will, subject to clauses 5.4(b)(i) and 9.8 and any other right of set off which the Principal may have, pay the Contractor:

#### the sum of:

##### the Design Development Payment;

##### the Initial RTW Payment;

##### unless a notice is given under clause 5.4(a), the Final RTW Payment;

##### the Prototype Payment;

##### in respect of each Component Part or Milestone, the corresponding Milestone Payment; and

##### the amount specified in Item <##10 replace with relevant reference to item in the Contract Particulars of your contract> or, if no amount is so specified, the amount calculated in accordance with the Pricing Schedule (other than amounts referred to in clauses 9.1(b)(i)A to 9.1(b)(i)E (inclusive)),

##### subject to adjustment for <##Adjustment Events> (**Contract Sum**); and

#### any other amounts which are payable by the Principal to the Contractor under <##the Contract>.

## Payment Claims

### Subject to clause 9.3, the Contractor is entitled to submit claims to the <##Principal's Representative> for payment of:

#### the Design Development Payment, at the times specified in Item <##12 replace with relevant reference to item in the Contract Particulars of your contract>, in respect of the value of all Design Deliverables delivered in the previous month;

#### the Initial RTW Payment, within 10 Business Days of RTW Manufacture;

#### unless a notice is given under clause 5.4(a), the Final RTW Payment, following the expiration of ##10 Business Days after the Date of Acceptance in respect of the last Component Part to achieve Acceptance;

#### the Prototype Payment, within 10 Business Days of Prototype Acceptance;

#### each Milestone Payment, at the times specified in Item <##12 replace with relevant reference to item in the Contract Particulars of your contract>, in respect of the value of all Milestones achieved in the previous month; and

#### the <##Contract Sum> (other than amounts referred to in clauses 9.1(b)(i)A to 9.1(b)(i)E inclusive), monthly at the times specified in Item <##12 replace with relevant reference to item in the Contract Particulars of your contract>, in respect of the value of the <##Contractor's Activities> carried out in the previous month,

#### until termination of <##the Contract> (each a **Payment Claim**).

### A Payment Claim must:

#### be in a form acceptable to the <##Principal's Representative>;

#### include an updated Asset Register, current as at the date of submission of the Payment Claim;

#### include supporting documentation and any other information reasonably required by the <##Principal's Representative>; and

#### set out any other amounts then payable by the Principal to the Contractor.

## Conditions precedent to Payment Claims

1. For the purposes of determining when a time for submitting a Payment Claim and a ‘reference date’ arise under the Security of Payment Act, neither a time for submitting a Payment Claim nor a ‘reference date’ arise unless:

### in relation to the Design Development Payment:

#### the Contractor has provided to the Principal the relevant Design Deliverables in a manipulable format; and

#### the relevant Design Deliverables have been submitted to the <##Principal's Representative> for review in accordance with clause <##insert reference to document review clause> and the specified time for review has expired without the relevant Design Deliverables having been rejected;

### in relation to the Prototype Payment, the Prototype has achieved Prototype Acceptance;

### in relation to any Milestone Payment:

#### in respect of a Component Part, the <##Principal's Representative> has given notice under clause 7.4(b) that the relevant Component Part has achieved Acceptance; and

#### in respect of any other Milestone, the Milestone has been achieved; and

### the Contractor has provided the <##Principal's Representative> with:

#### any Component Security required pursuant to clause 2;

#### where the payment is for the Retained Temporary Works or a Component Part, evidence that the Retained Temporary Works and the Component Parts are insured and have been properly stored and protected (as applicable) and labelled the property of the Principal;

#### in relation the Initial RTW Payment, the Prototype Payment and any Milestone Payment:

##### a duly executed Certificate as to Title in relation to the Retained Temporary Works, the Prototype or the Component Parts the subject of the preceding Payment Claim; and

##### a Clear PPSA Certificate in relation to the Components the subject of the preceding Payment Claim which has been generated no more than 2 Business Days prior to the date of provision to the <##Principal's Representative>; and

#### a statutory declaration (together with any supporting evidence that may reasonably be required by the <##Principal's Representative>) in accordance with clause 9.9.

## Payment statements

### Within 10 Business Days after receipt of a Payment Claim, the <##Principal's Representative> will give the Contractor a payment statement which (**Payment Statement**):

#### identifies the Payment Claim to which it relates;

#### states the amount previously paid to the Contractor in accordance with <##the Contract>;

#### states the amount (if any) which the <##Principal's Representative> believes to be then payable by the Principal to the Contractor and which the Principal proposes to pay to the Contractor; and

#### if the amount in clause 9.4(a)(i) is less than the amount claimed in the Payment Claim, the reason for the difference (including, if the Principal has retained, deducted, withheld or set off any amount, the reason for so doing).

### If the Contractor does not submit a Payment Claim in accordance with clause 9.2, the <##Principal's Representative> may nevertheless issue a Payment Statement.

## Tax invoice and payment

### The Contractor must, within 2 Business Days after receipt of a Payment Statement, give the <##Principal's Representative> a Tax Invoice for the amount stated in the Payment Statement as then payable by the Principal to the Contractor.

### Subject to the provisions of <##the Contract>, within ##10 Business Days of receipt of a Payment Claim that complies with clauses 9.2 and 9.3, the Principal must pay the amount stated in the Payment Statement to the Contractor.

### If a Payment Statement indicates that an amount is due from the Contractor to the Principal, the Contractor must pay that amount to the Principal within ##5 Business Days after the issue by the <##Principal's Representative> of the Payment Statement.

### In respect of Components and Component Parts the subject of a Payment Statement, immediately upon:

#### the Principal making payment to the Contractor under clause 9.5(b) of the amount in the Payment Statement; or

#### if clause 9.3(d)(iii) applies, the last to occur of:

##### the Principal making payment to the Contractor under clause 9.5(b) of the amount in the Payment Statement; and

##### the Contractor complying with clause 9.3(d)(iii),

#### ownership of, and unencumbered title in, those Components and Component Parts passes to the Principal free of any Security Interest.

## No admission

### Payment is on account only and neither a Payment Statement nor a payment of moneys will be an admission or evidence that the Contractor has carried out its obligations in accordance with <##the Contract>.

### Failure by the <##Principal's Representative> to set out in a Payment Statement an amount which the Principal is entitled to retain, deduct, withhold or set off will not prejudice the Principal's right to subsequently exercise the right to retain, deduct, withhold or set off any amount.

### At any time and from time to time, the <##Principal's Representative> may by a further Payment Statement correct any error discovered in any Payment Statement.

## Interest

### If a party fails to pay an amount that is due and payable by that party to the other party within the time required under <##the Contract>, then the first mentioned party must pay interest on that amount:

#### on and from the date that is 10 Business Days after the payment due date until the date on which payment is made; and

#### calculated at the rate stated in Item <##14 replace with relevant reference to item in the Contract Particulars of your contract>.

### Subject to clause <##insert termination/default clause number>, the amount specified in clause 9.7(a) will be a party's sole entitlement in respect of the other party's failure to pay an amount by its due date.

## Set off

1. The Principal may:

### deduct from moneys otherwise due to the Contractor:

#### any debt or other moneys due from the Contractor to the Principal (including liquidated damages payable under clause <##insert clause number>); and

#### any claim to money which the Principal may have against the Contractor whether for damages or otherwise under the Contract or otherwise at law or in equity arising out of or in connection with the performance of the <##Contractor's Activities>; and

### without limiting clause 9.8(a) or the unconditional nature of the security held under <##clause 2><[##insert security clause number]>, deduct any debt, other moneys due or any claim to money referred to in clause 9.8(a)(i) or 9.8(a)(ii) from any the security held under clause <##clause 2><[##insert security clause number]>.

## Payment of workers and subcontractors

### The Contractor must with each Payment Claim under clause 9.2 provide the <##Principal's Representative> with:

#### a statutory declaration in the form set out at Schedule <##insert>, together with any supporting evidence which may be reasonably required by the <##Principal's Representative>, duly signed by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that, except to the extent disclosed in the statutory declaration (such disclosure to specify all relevant amounts, workers and subcontractors):

##### all workers who have at any time been employed by the Contractor in connection with the <##Contractor's Activities> have at the date of the Payment Claim been paid all moneys due and payable to them in respect of their employment in connection with the <##Contractor's Activities>; and

##### all subcontractors have been paid all moneys due and payable to them in respect of the<##Contractor's Activities>; and

#### documentary evidence that, except to the extent otherwise disclosed (such disclosure to specify all relevant amounts and workers), as at the date of the payment claim, all workers who have been employed by a subcontractor have been paid all moneys due and payable to them in respect of their employment in connection with the <##Contractor's Activities>.

### The Principal is entitled to withhold from any amount stated as then payable by the Contractor in a Payment Statement the amount disclosed as unpaid under clause 9.9.

## GST

### Subject to clause 9.10(b), where any supply arises out of or in connection with the Contract for which GST is not otherwise provided, the party making the supply (**Supplier**) will be entitled to increase the amount payable for the supply by the amount of any applicable GST.

### Where an amount is payable to the Supplier for a supply arising out of or in connection with the Contract which is based on the actual or reasonable costs incurred by the Supplier, the amount payable for the supply will be reduced by the amount of any input tax credits available to the Supplier (or a representative member on the Supplier's behalf) in respect of such costs before being increased for any applicable GST under clause 9.10(a).

### 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.

### If the amount paid to the Supplier in respect of the GST (whether because of an adjustment or otherwise) is:

#### more than the GST on the supply, then the Supplier must refund the excess to the recipient; or

#### less than the GST on the supply, then the recipient must pay the deficiency to the Supplier.

### Subject to clause <##insert definitions clause number>, in this clause 9.9 terms defined in GST Act have the meanings given to them in GST Act.

## Security of Payment Act

### The Contractor agrees with the Principal that:

#### a Payment Claim submitted to the <##Principal's Representative> under clause 9.2 which also purports to be (or is at law) a payment claim under the Security of Payment Act is received by the <##Principal's Representative> as agent for the Principal;

#### unless otherwise notified to the Contractor by the Principal in writing, the <##Principal's Representative> will give Payment Statements and carry out all other functions of the Principal under the relevant Security of Payment Act as the agent of the Principal;

#### to the extent permitted by and for the purposes of the Security of Payment Act, the “reference dates” are those of the dates prescribed in clause 9.2(a) on which the Contractor has satisfied the requirements of clause 9.3;

#### a reference to a “Payment Statement” is also a reference to a “payment schedule” for the purposes of the Security of Payment Act; and

#### the amount stated in a Payment Statement under clause 9.4 as then payable by the Principal to the Contractor is, to the extent permitted by and for the purposes of the Security of Payment Act, the amount of the "progress payment" (as defined in the Security of Payment Act) calculated in accordance with the terms of the Contract and which the Contractor is entitled to be paid under <##the Contract>.

### Failure by the <##Principal's Representative> to state in a Payment Statement issued under the Security of Payment Act or otherwise an amount which the Principal is entitled to retain, deduct, withhold or set off from the amount which would otherwise then be payable by the Principal to the Contractor will not prejudice:

#### the <##Principal's Representative>’s ability or power to state in a subsequent Payment Statement an amount which the Principal is entitled to retain, deduct, withhold or set off from the amount which would otherwise then be payable by the Principal to the Contractor; or

#### the Principal’s right to subsequently exercise its right to retain, deduct, withhold or set off any amount under the Contract or otherwise at law or in equity.

### The parties agree that clause <##insert dispute resolution clause number> is a method for resolving disputes for the purposes of section 10A(3)(d) of the Security of Payment Act.

### The Contractor irrevocably chooses the person specified in Item <##15 replace with relevant reference to item in the Contract Particulars of your contract> as, to the extent permitted by and for the purposes of the Security of Payment Act, the authorised nominating authority.

### The Contractor must give copies of any notice given by a subcontractor under the Security of Payment Act (including notice of a subcontractor's intention to suspend work under the Security of Payment Act but excluding any "payment claim" or "payment schedule") to the <##Principal's Representative> within 2 Business Days after receipt by the Contractor.

### The Principal may, if it becomes aware that a subcontractor is entitled to suspend work under the Security of Payment Act, pay the subcontractor moneys owing to the subcontractor and the amount so paid will be a debt due and payable by the Contractor to the Principal.

Contract Particulars

|  |
| --- |
| **Guidance Note:** The following additional items should be inserted by the Agency into the Particulars in your Contract and the clause references in the "Description" column updated to reflect the clause references in your Contract prior to issue for tender. |

| 1. Item No.
 | 1. Description
 | 1. Detail
 |
| --- | --- | --- |
| * 1.
 | Amount of Component Security:(Clause 2.1) |

|  |
| --- |
| 1. **Guidance Note:** As further detailed in clause 1, this will operate as a "floating" unfixed plant and materials security with the idea being that it should be sized to the largest Payment Claim that the Principal is likely to receive in respect of Component Parts for which the Principal has not received a Certificate of Title with the Payment Claim. For example, if 10 Component Parts, each valued at $10,000 are being procured, and it is likely that the largest the number of Components the Contractor will claim for in any one Payment Claim is 2, then the security should be valued at 2 x $10,000).
 |

$[insert] |
| * 1.
 | Does clause 5 apply?(Clause 5.1) |

|  |
| --- |
| **Guidance Note:** Refer to the Guidance Note at clause 5 for guidance as to whether this clause should apply and select yes or no below. |

Yes/No |
|  | Retained Temporary Works:(Clause 5.1) |

|  |
| --- |
| **Guidance Note:** This should set out a brief description of any Retained Temporary Works which are moulds, complex jigs, bespoke templates, etc. used to Manufacture Components or Component Parts. This should cross refer to the relevant sections of the Component Brief. |

 |
| * 1.
 | Not used |  |
| * 1.
 | Project Participants:(Clause 6.2) |

|  |
| --- |
| **Guidance Note:** Insert the names of any other Project Participants known at the time of entering into your contract. In all cases, you should include any future owners or users of the Components where these parties are known at the time of entering into your contract. |

 |
| * 1.
 | Does clause 7.2 apply?(Clause 7.2(a)) |

|  |
| --- |
| **Guidance Note:** Select yes if you require the Contractor to provide a Prototype. |

Yes/No |
| * 1.
 | Prototype:(Clause 7.2) |

|  |
| --- |
| **Guidance Note:** This should set out a brief description of any Prototype including whether the prototype needs to be connected to any services etc to operate. This should cross refer to the relevant sections of the Component Brief. |

 |
| * 1.
 | Date for completing Manufacture of the Prototype:(Clause 7.2(a)) |

|  |
| --- |
| **Guidance Note:** State "Not applicable" if clause 7.2 does not apply.Otherwise, insert the date for completing Manufacture of the Prototype before issue for tender. |

"Not applicable"/ [insert date] |
|  | Manufacturing Facility:(Clause 7.3) |

|  |
| --- |
| **Guidance Note:** Insert address(es) for Contractor's manufacturing facility(ies). |

[insert] |
| * 1.
 | Components of Contract Sum that do not apply:(Clause 9.1(a)) | 1. “Not applicable” / [Insert components of the Contract Sum that do not apply]

|  |
| --- |
| **Guidance Note:** Where all components of the Contract Sum apply, including “Not applicable”. Otherwise specify components of the Contract Sum that will not apply i.e. the Prototype Payment. |

 |
| * 1.
 | Other amounts forming part of the Contract Sum:(Clause9.1(b)(i)F) | 1. $[insert] excluding GST.

|  |
| --- |
| **Guidance Note:** Specify GST after Contract Sum agreed with preferred Contractor. |

 |
| * 1.
 | Time for submission of Payment Claims by the Contractor:Clause 9.2(a)(vi)) | 1. [insert] day of each month.
 |
| * 1.
 | Final RTW Payment:(Clause 1) |

|  |
| --- |
| **Guidance Note:** This is the final payment in respect of the Retained Temporary Works aimed at ensuring that the Principal holds back sufficient funds in connection with the RTW to ensure that the Contractor does not run the RTW into the ground in manufacturing the Components, such that the RTW retains no value for the Principal. Where the Principal requires the Contractor to purchase the Retained Temporary Works back from the Principal, this final payment will also be the amount due to the Principal as payment by the Contractor for the Returned Temporary Works. This amount would ordinarily be approximately 20% of the value of the Retained Temporary Works. |

[insert $]*(if nothing is stated, "not applicable")* |
| * 1.
 | Interest rate: (Clause 9.7(a)(ii)) |

|  |
| --- |
| 1. **Guidance Note:** the Fair Payments Act requires this be the Penalty interest Rate where the value of the goods or services does not exceed $3 million. Select the applicable option below.
 |

1. If the *Fair Payments Policy* DOES apply: Simple interest calculated on a daily basis at the rate for the time being fixed under Section 2 of the *Penalty Interest Rates Act 1983* (Vic)
2. If the *Fair Payments Policy* DOES NOT apply: [insert]%
3. *(if nothing stated, [insert]%)*
 |
| * 1.
 | Authorised nominating authorities:(Clause 9.11(d)) | 1. Adjudicate Today Pty Limited;2. Australian Solutions Centre Pty Ltd;3. Resolution Institute;4. Rialto Adjudications Pty Ltd;5. RICS Dispute Resolution Service; or6. such other entity authorised pursuant to the *Building and Construction Industry Security of Payment Act 2002* (Vic). |

Component Schedule

| 1. Component No.
 | Component / Component Part Title | Component / Component Part Description | 1. Additional Requirements for Acceptance
 |
| --- | --- | --- | --- |
|  |  |

|  |
| --- |
| **Guidance Note:** This needs to clear identify the relevant Component or Component Part (noting that a Component Part will be a part of a particular Component set out in this schedule and in respect of which a separate Milestone Payment will apply), including by reference to any relevant section of the Component Brief that further specifies the Component or Component Part.  |

 |  |
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|  |  |  |  |
|  | Guidance Note: Add additional rows as required |  |  |

Milestone Schedule

| 1. Milestone No.
 | Milestone Title | Milestone Description | 1. Hold Point
 | 1. Milestone Date
2. OR
3. Date for Acceptance
4. OR
5. RTW Milestone Date
 | Milestone Payment (excluding GST) |
| --- | --- | --- | --- | --- | --- |
|  |

|  |
| --- |
| **Guidance Note:** This should include all Components and Component Parts and any Returned Temporary Works together with any additional Milestones (e.g. delivery of Design Deliverables, completion of training). |

 |

|  |
| --- |
| **Guidance Note:** Where this includes Components and Component Parts, cross refer to the relevant description in the Component Schedule. |

 |

|  |
| --- |
| **Guidance Note:** State "yes" or "no" against each Milestone. State "no" against each Component and Component Part. |

 |  |

|  |
| --- |
| **Guidance Note:** This should include all Components and Component Parts and any Returned Temporary Works together with any additional Milestones (e.g. delivery of Design Deliverables, completion of training). |

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Delivery Requirements

|  |
| --- |
| **Guidance Note:** The Delivery Requirements must include a section with the title "Component Brief". This section must set out in detail: * the requirements in respect of the Components and Component Parts including any quality standards and functional requirements (e.g. maintainability, degree of adaptability or future proofing required) applying to the Components and Component Parts;
* a list of any Component Designs;
* any hold points applying in respect of any Components or Component Parts (these must be clearly set out and described as "Hold Points"); and
* if clause 5 applies, a section with the title "Returned Temporary Works" which set out in detail the requirements in respect of the Returned Temporary Works including, if relevant, any quality standards applying to the Returned Temporary Works;
* a section with the title " Prototype" which describes any specific requirements in respect of the Prototype.

The Delivery Requirements should also set out the scope of any Other Works. |

Statutory Declaration

|  |  |
| --- | --- |
| **To:** | [##Insert name] of [##insert address] (**Principal’s Representative**) |
| **From:** | [##insert name] (ACN [##insert ACN]) of [##insert address] (**Contractor**) |
| **Project:** | [[##Insert] project name] (**Project**) |
| **Contract:** | between the Principal and the Contractor dated [##insert] (**Contract**) |
| **Payment claim:** | made by the Contractor and dated [##insert date of Payment Claim] (**Payment Claim)** |
| **Period covered by this Payment Claim:** | from: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ to: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_(**Payment Claim Period**) |

I, [##insert name] of [##insert address], [##insert occupation], do solemnly and sincerely declare as follows:

1. I am an employee duly authorised to make this statutory declaration on behalf of the Contractor;

2. all workers who are, or who have at any time been employed by the Contractor in connection with the <##Contractor's Activities > have, for work done during the Payment Claim Period, been paid all moneys due and payable to them in respect of their employment in connection with the <##Contractor's Activities>, including any superannuation or redundancy payments (if applicable) and in accordance with any applicable award or industrial agreement;

3. subject to paragraph 4(d), all consultants, suppliers and subcontractors who are, or have been, engaged by the Contractor in connection with the Contract have been paid in full all moneys due and payable to them in respect of the <##Contractor's Activities> that have become payable to them under the terms of their agreement with the Contractor; and

4. as at the end of the Payment Claim Period:

|  |  |  |
| --- | --- | --- |
| (a) | the total amount payable by the Contractor to all subcontractors in respect of the <##Contractor's Activities> is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (b) | the amount paid by the Contractor to all subcontractors in respect of the <##Contractor's Activities> is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (c) | the amount claimed by all subcontractors in respect of the <##Contractor’s Activities> which is disputed by the Contractor as being due and payable is: | $\_\_\_\_\_\_\_\_\_\_\_\_\_ |
| (d) | the amount referred to in paragraph 4(c) of this statutory declaration is disputed, as at the date of this statutory declaration, on the following grounds:[##insert grounds for dispute] |  |

 **The Statutory Declaration Witness and the person making**

**this statutory declaration must sign or initial this page**

**Declarant: ……… Witness: ………**

**And I** acknowledge that this declaration is true and correct, and I make it in the belief that a person making a false declaration is liable to the penalties for perjury.

|  |  |  |  |
| --- | --- | --- | --- |
| Declared **at****this day of 20****Before me:** |  |  |  |
| **Signed** |
|  |  |  |  |
| ***Signature of person before whom the declaration is made*** |  |  | ***Name of Declarant*** |
|  |  |  |  |
| ***Name, qualification and contact address of person before whom the declaration is made*** |  |  |  |

Certificate as to Title

|  |  |
| --- | --- |
| To: | [##insert name] of [##insert address] (**Principal**) |
| Project: | [##insert project name] (**Project**) |
| Identification numbers: | [##insert] (**Identification Numbers**) |
| Contract: | between the Principal and the Contractor dated [##insert] (**Contract**) |
| Payment claim: | made by the Contractor and dated [##insert] (**Payment Claim)** |

1. This certificate is issued for the benefit of the Principal in relation to the <##insert “Retained Temporary Works” or “the Prototype” or “the Component Parts” as applicable> bearing the Identification Numbers referred to above (the **Components**).
2. I certify as follows:
	* + 1. I am a director of the Contractor;
			2. the Components bear the Identification Numbers in a permanent, indelible and conveniently visible manner;
			3. the Contractor has full legal, beneficial and unencumbered ownership of the Components and all plant and materials incorporated in the Components
			4. the Contractor has clear title to the Components (including all plant and materials incorporated in the Components);
			5. the Components (including all plant and materials incorporated in the Components) are not the subject of any Security Interest;
			6. the Contractor is able to immediately pass clear title to the Components (including all plant and materials incorporated in the Components) to the Principal; and
			7. the Components (including all plant and materials incorporated in the Components) are insured for their full replacement value (including the cost of fabrication) and that the interests of the Principal are noted in relation to that insurance.
3. I acknowledge that risk in the Components (including all plant and materials incorporated in the Components) remains with the Contractor until that risk passes to the Principal under the Contract.
4. I attach a Clear PPSA Certificate.

Unless otherwise indicated, terms defined in this certificate have the meanings given in the Contract.

Signed by the Contractor

Date:

|  |  |  |
| --- | --- | --- |
| **Director** of the Contractor | ……………………………………. | ……………………………………. |
|  | Signature of Director  | Signature of witness |
|  | Name of Director  | Name of witness |

Collateral Warranty

|  |
| --- |
| **Guidance Note:** Note the Beneficiary may be the Principal or, if required by the Principal, another party. |

 **Date**

**Parties** [##insert name] (ACN [##insert ACN]) of [##insert address] (**Beneficiary**)

[##insert name] (ACN [##insert ACN]) of [##insert address] (**Contractor**)

**Background**

A. The Contractor has entered into the Contract with the Principal for the performance of the Contractor’s Activities.

B. In return for the Principal allowing the Component to be used in the Contractor’s Activities, the Contractor agrees to give the warranties, indemnities and other promises in this deed.

C. The obligations created by this deed are in addition to the obligations of the Contractor to the Principal and do not affect any other rights or remedies available to the Principal against the Contractor.

**Operative provisions**

# Definitions

## Incorporated terms

1. In this deed, terms defined in <##the Contract> and not otherwise defined in clause 1.2 have the same meanings, unless the context otherwise requires.

## Defined terms

1. In this deed:
2. **Business Day** means a day that is not:
	1. a Saturday or Sunday; or
	2. a day that is wholly or partly observed as a public holiday throughout Victoria.
3. **Component** means the <##insert either “Component” or “Component Part”, as applicable> stated in the Schedule.
4. **Contract** means the Contract dated [##insert date] between the Principal and the Contractor in respect of the Contractor’s Activities.
5. **Contractor’s Activities** has the meaning given in the Contract.
6. **Defect** means any defect in the Component, including any failure to comply with this deed or with the Contract.
7. **Principal** means the person so named in the Schedule.
8. **Warranty Period** means the period stated in the Schedule.

# Warranty

### The Contractor warrants to the Beneficiary that:

#### alll work performed, and materials supplied, by the Contractor in connection with the Component will comply in all respects with the requirements of the Contract;

#### it has, and will maintain, the skill and experience to properly fulfil its obligations under this deed and the Contract.

### The Contractor agrees that the warranties set out in this deed extend to the acts defaults and neglects of any subcontractor, supplier, employee or agent of the Contractor as fully as if they were the acts defaults or neglects of the Contractor.

# Replacement or making good Component

### The Contractor must at its cost make good, to the reasonable satisfaction of the Beneficiary, the Component or any part which, within the Warranty Period, is found to not comply with the requirements referred to in clause 2(a) of this deed.

### The liability of the Contractor under this clause 3 is reduced to the extent that deterioration is caused by:

#### normal wear and tear; or

#### incorrect operational procedures or maintenance, in each case not attributable to the Contractor.

# Rectification of Defects

### The Beneficiary may at any time give the Contractor written notice of any Defect, which notice may specify the time within which the Contractor must rectify the Defect.

### The Contractor must rectify any Defect the subject of a notice given under clause 4(a):

#### to the satisfaction of the Beneficiary;

#### at the Contractor’s expense; and

#### within the time specified in the Beneficiary's notice or, if the Beneficiary does not specify a time, within a reasonable time from receipt of the Beneficiary's notice.

### If the Contractor fails to rectify any Defect in accordance with this deed, the Beneficiary may arrange for the Defect to be rectified at the Contractor’s expense and the Contractor indemnifies the Beneficiary against all costs, losses and damages suffered or incurred by the Beneficiary in so doing.

# Urgent action by Beneficiary

### The Beneficiary may take any urgent action necessary to protect the Contractor’s Activities, other property or people as a result of a breach of clause 2(a) of this deed.

### Where the Beneficiary takes action in accordance with clause 5(a), the Contractor:

#### agrees that the Beneficiary taking such action does not affect any obligation of the Contractor under this deed; and

#### indemnifies the Beneficiary against all costs, losses and damages suffered or incurred by the Beneficiary in taking that action.

# Beneficiary's rights

### The rights of the Beneficiary pursuant to:

### this deed are in addition to and do not derogate from any other rights which the Beneficiary may have; and

### any clause of this deed are cumulative and the rights arising under one clause do not derogate from rights arising under any other clause.

# Operation of deed

1. This deed comes into effect when executed by the Contractor and is effective whether or not executed by the Beneficiary.

# Assignment

1. The Beneficiary may assign its interest in this deed at any time without notice to the Contractor.

# Notices

## How notice to be given

1. Each communication (including each notice, consent, approval, request and demand) under or in connection with this deed must:

### be given to a party by hand delivery, courier service, prepaid express post or email;

### be delivered to the address or other details for the party set out in the Schedule (or as otherwise notified by that party to the other party from time to time under this clause 9); and

### must be in legible writing and in English.

## When notice taken to be received

1. Without limiting the ability of a party to prove that a notice has been given and received at an earlier time, each communication (including each notice, consent, approval, request and demand) under or in connection with this deed is taken to be given by the sender and received by the recipient:

### (in the case of delivery by hand or courier service) on delivery;

### (in the case of prepaid express post sent to an address in the same country) on the 6th Business Day after the date of posting;

### (in the case of prepaid express post sent to an address in another country) on the 10th Business Day after the date of posting;

### (in the case of email, whether or not containing attachments) the earlier of:

#### the time sent (as recorded on the device from which the sender sent the email) unless, within 4 hours of sending the email, the party sending the email receives an automated message that the email has not been delivered;

#### receipt by the sender of an automated message confirming delivery; and

#### the time of receipt as acknowledged by the recipient (either orally or in writing),

### provided that if the communication would otherwise be taken to be received on a day that is not a Business Day or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.

# No waiver

### Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this deed Contractby a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this deed.

### A waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.

### No waiver of a breach of a term of this deed operates as a waiver of another breach of that term or of a breach of any other term of this deed.

# Governing law and jurisdiction

### This deed is governed by and must be construed according to the law applying in Victoria.

### Each party irrevocably:

#### submits to the non‑exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this deed; and

#### waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 11(b)(i).

# Further acts

1. Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this deed.

# Counterparts and electronic signature

## Electronic signature

Each party warrants that immediately prior to entering into this deed, it has unconditionally consented to:

### the requirement for a signature under any law being met; and

### any other party to this deed executing it,

1. by any method of electronic signature that other party uses (at that other party's discretion), including signing on an electronic device or by digital signature.

## Counterparts

1. This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart.

## Electronic communication

1. Without limitation, the parties agree that this deed may be exchanged by hand, post, facsimile or any electronic method that evidences a party's execution of this deed, including by a party forwarding a copy of its executed counterpart by hand, post, facsimile or electronic means to the other party.

# Severability

1. If at any time a provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

### the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or

### the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this deed.

1.

|  |  |  |
| --- | --- | --- |
| **Item** | **Description** | **Details** |
|  | **Principal**(Clause 1) | [##Insert] |
|  | **Component**(Clause 1) | [##Insert] |
|  | **Warranty Period**(Clause 1) | [##Insert] |
|  | **Notices**(Clause 9) | **Beneficiary:**[##Insert]**Contractor:**[##Insert] |

**Executed** as a deed.

|  |
| --- |
| **Guidance Note:** Insert appropriate execution block. |

Component Security

|  |  |
| --- | --- |
| Deed poll made at |  on , 20  |
| In favour of: | [##insert] (**Principal**) |
| Given by: | [##insert] (**Financial Institution**) |

|  |  |
| --- | --- |
| Contractor | [##insert] |
| Project | [##insert]  |
| Contract  | [##insert] |
| Security Amount  | $[##insert] |

**This deed poll provides:**

1. At the request of the Contractor, and in consideration of the Principal accepting this undertaking from the Financial Institution in respect of the Contract, the Financial Institution unconditionally undertakes to pay on demand any sum or sums which may from time to time be demanded by the Principal to a maximum aggregate sum of the Security Amount.
2. The Financial Institution unconditionally agrees that, if notified in writing by the Principal (or someone authorised by the Principal) that the Principal requires the whole or part of the Security Amount, the Financial Institution will pay the Principal at once, without reference to the Contractor and notwithstanding any notice from the Contractor not to pay.
3. The Financial Institution may, at any time without being required to do so, pay to the Principal the Security Amount less any amounts previously paid under this undertaking, and the liability of the Financial Institution will then immediately end.
4. The liability of the Financial Institution under this undertaking must not be discharged or impaired by reason of any variation or variations (with or without the knowledge or consent of the Financial Institution) in any of the stipulations or provisions of the Contract or the Contractor's Activities or acts or things to be executed, performed and done under the Contract or by reason of any breach or breaches of the Contract by the Contractor or the Principal.
5. A demand under this undertaking may be made in Melbourne at [insert].
6. The undertaking continues until:
	* 1. the Principal notifies the Financial Institution in writing that the Security Amount is no longer required;
		2. this undertaking is returned to the Financial Institution; or
		3. the Financial Institution pays to the Principal the whole of the Security Amount.
7. This undertaking is governed by the laws of the State of Victoria.

**Executed** as a deed poll.

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed, sealed and delivered** for and on behalf of **[Insert name and ABN of Financial Institution]** by its attorney under a power of attorney dated [insert] in the presence of: |  |  |  |
|  |  |  |  |
| Signature of witness |  |  | Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney |
|  |  |  |  |
| Full name of witness |  |  | Full name of attorney |

Engineering Certificate

|  |  |
| --- | --- |
| **To:** | [##insert name] of [##insert address] (**Principal**) |
| **From:** | [##insert name] (ACN [##insert ACN]) of [##insert address] (**Engineer**) |
| **Project:** | [##insert project name] (**Project**) |
| **Contract:** | between the Principal and the Contractor dated [##insert] in relation to the Project (**Contract**) |

1. This certificate is issued for the benefit of the Principal in relation to the <##Component> <Component Part> provided by the Contractor and listed in the attached Schedule.
2. I certify as follows:
	* 1. I have undertaken an independent detailed inspection of the <##Component> <Component Part>;
		2. I am satisfied that the <##Component><Component Part> has been manufactured in accordance with the approved Component Design identified in the attached Schedule; and
		3. the <##Component><Component Part> is free from Defects, other than the following minor Defects:

[##List]

1. I have used the due skill, care and diligence of a professional engineer in my inspection of the <##Component><Component Part>.
2. Terms defined in the Contract have the same meaning in this certificate.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Signed for and on behalf of
[##insert name of Engineer]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Date

**Schedule**

|  |  |  |
| --- | --- | --- |
| **No** | **Item** | **Details** |
|  | <##Component><Component Part> | [##Insert] |
|  | Component Design | [##Insert] |

Pricing Schedule

|  |
| --- |
| **Guidance Note:** This will need to be inserted based the successful tender and final negotiated position. Note that the template issued for tendering purposes should make provision for those of the elements adopted from the Model Clauses that need to be addressed. Relevantly, the Model Clauses contemplate that:* if the Contract Sum is not an amount specified in the Contract Particulars, it is an amount able to be calculated in accordance with the Pricing Schedule; and
* each of the Design Development Payment, Milestone Payment, Prototype Payment and Initial RTW Payment will be specified in the Pricing Schedule.
 |

1. This clause applies to the contract under which the State will procure a party to design and Manufacture the components (i.e. in a Supply Model, this will apply to the Supply Contract, in a Subcontracting Model, this will apply to the Construction Contract). While the clauses are set out in the same document at present, these will be separated into different documents once the drafting of the relevant clauses has been agreed with DTF/OPV [↑](#footnote-ref-1)
2. This clause applies to the contract under which the State will procure a party to design and Manufacture the components (i.e. in a Supply Model, this will apply to the Supply Contract, in a Subcontracting Model, this will apply to the Construction Contract). While the clauses are set out in the same document at present, these will be separated into different documents once the drafting of the relevant clauses has been agreed with DTF/OPV [↑](#footnote-ref-2)
3. This clause applies to the contract under which the State will procure a party to design and Manufacture the components (i.e. in a Supply Model, this will apply to the Supply Contract, in a Subcontracting Model, this will apply to the Construction Contract). While the clauses are set out in the same document at present, these will be separated into different documents once the drafting of the relevant clauses has been agreed with DTF/OPV [↑](#footnote-ref-3)