Consultant Deed of NOVATION

**[FOR USE WITH ECI HC-1 (2022) WHERE SPECIAL CONDITION 21 APPLIES ONLY]**

**Deed** **made at** ………… **on** ………………………., 20……

**Parties Commonwealth of Australia ("Commonwealth")**

***[INSERT NAME, ABN AND ADDRESS OF CONTRACTOR]* ("Contractor")**

***[INSERT NAME, ABN AND ADDRESS OF CONSULTANT]* ("Consultant")**

**Recitals**

A. The Commonwealth has engaged the Contractor under the contract described in Item 1 of the Schedule ("**Works** **Contract**") to effect certain works, brief particulars of which are set out in Item 2 of the Schedule ("**Works**").

B. The Commonwealth and the Consultant have entered into the contract described in Item 3 of the Schedule ("**Services** **Contract**") to effect certain design work, brief particulars of which are set out in Item 4 of the Schedule ("**Services**"), which work forms part of the Contractor's obligations under the Works Contract.

C. The Works Contract and the Services Contract require the Contractor and the Consultant to enter into this Deed for the purpose of effecting a novation of the Services Contract from the Commonwealth to the Contractor.

**This Deed provides**

1. Interpretation
   1. Definitions

In this Deed, terms defined in the Works Contract and not otherwise defined in this Deed have the same meanings, unless the context otherwise requires.

* 1. General

In this Deed, unless the context otherwise indicates:

* + 1. words in the singular include the plural and vice versa;
    2. references to a person include an individual, firm, corporation or unincorporated body;
    3. headings are for convenience only and do not affect the interpretation of this Deed;
    4. references to any legislation or to any section or provision of any legislation include any:
       1. statutory modification or re‑enactment of, or any statutory provision substituted for, that legislation, section or provision; and
       2. ordinances, by-laws, regulations and other statutory instruments issued under that legislation, section or provision;
    5. the words "including" and "includes", and any variants of those words, will be read as if followed by the words "without limitation";
    6. references to any document (including this Deed) include any amendment to or substitute for such document; and
    7. references to any party to or in this Deed or any other document include its successors or permitted assigns.
  1. This Deed Prevails

To the extent of any inconsistency between this Deed, the Works Contract or the Services Contract, this Deed prevails unless the parties expressly agree otherwise.

1. Novation

In accordance with clause ***[21.1]*** of the Special Conditionsof the Works Contract and clause 2.12 of the Services Contract:

* + 1. the Commonwealth and the Consultant mutually agree:
       1. to terminate the Services Contract and (subject to subparagraph (ii)) to release each other from all obligations and liabilities under the Services Contract; and
       2. that the amount set out in Item 5 of the Schedule is payable by the Commonwealth to the Consultant in full and final settlement of all claims under the Services Contract prior to the termination under subparagraph (i); and
    2. the Contractor and the Consultant will be deemed to have entered into a new contract on the same terms and conditions as the Services Contract, subject to the following:
       1. the Contractor will be named in the new contract in lieu of the Commonwealth;
       2. the rights, obligations and liabilities of the Contractor and the Consultant will be as if the Contractor had executed the Services Contract in lieu of the Commonwealth;
       3. the amount set out in Item 6 of the Schedule is the balance payable by the Contractor to the Consultant for the Services under the new contract; and
       4. the Consultant will indemnify the Contractor against all claims, costs, expenses, losses or damages suffered or incurred by the Contractor arising out of or incidental to any failure by the Consultant to perform its obligations under the Services Contract with the Commonwealth prior to its termination.

1. Assignment

Except as expressly contemplated by this Deed, neither the Contractor nor the Consultant may assign or transfer any of its rights or obligations under this Deed or the Services Contract.

1. Further assurances

The Contractor and the Consultant undertake upon request by the Commonwealth to execute all documents and do all things necessary to vest in the Contractor the Services Contract or otherwise to give effect to the terms of this Deed.

1. Governing law and jurisdiction

This Deed will be governed by and construed in accordance with the law applicable to the Works Contract.

1. Notices
   1. Address for Service

Any notice to be given or served under or arising out of a provision of this Deed must:

* + 1. be in writing;
    2. be delivered by hand, sent by express prepaid post or sent by email to the relevant address or email address:
       1. stated in Item 7 of the Schedule; or
       2. last notified in writing to the party giving or serving the notice, for the party to whom or upon which the notice is to be given or served;
    3. be signed by the party giving or serving the notice or (on the party's behalf) by the solicitor for or attorney, director, secretary or authorised agent of the party giving or serving the notice; and
    4. in the case of notices sent by email:
       1. be in Portable Document Format (pdf) and appended as an attachment to the email; and
       2. include the words "This is a notice under clause 6 of the Deed" in the subject field of the email.
  1. Deemed Receipt

A notice given or served in accordance with clause 6.1 is taken to be received by the party to whom or upon whom the notice is given or served in the case of:

* + 1. delivery by hand, on delivery;
    2. prepaid express post sent to an address in the same country, on the fifth day after the date of posting;
    3. prepaid express post sent to an address in another country, on the seventh day after the date of posting; and
    4. email, the earlier of:
       1. delivery to the email address to which it was sent; or
       2. one hour after the email enters the server of the email address to which it was sent, provided that no delivery or transmission error is received by the sender within one hour of the time of sending shown on the "sent" email.

1. Counterparts

This Deed may be executed in any number of counterparts and all of such counterparts taken together will be deemed to constitute one and the same instrument.

1. Waivers, remedies cumulative
   1. No waiver

No failure to exercise and no delay in exercising, on the part of the Commonwealth, any right or remedy under this Deed will operate as a waiver, nor will any single or partial exercise of any right or remedy preclude any other or further exercise, of that or any other right or remedy.

* 1. Remedies cumulative

The rights and remedies provided in this Deed are cumulative and are not exclusive of any rights or remedies provided by law or any other such right or remedy.

1. Attorneys

Each of the attorneys (if any) executing this Deed states that they have no notice of revocation of their power of attorney.

Schedule

|  |  |  |
| --- | --- | --- |
| Item 1 (Recital A) | Works Contract: | Early Contractor Involvement Head Contract for ***[INSERT]*** dated ***[INSERT]*** |
| Item 2 (Recital A) | Works: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 3 (Recital B) | Services Contract: | Design Services Contract for ***[INSERT]*** dated ***[INSERT]*** |
| Item 4 (Recital B) | Services: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 5 (Clause 2(a)(ii)) | Amount payable: | ***[INSERT AMOUNT]*** |
| Item 6 (Clause 2(b)(iii)) | Balance payable: | ***[INSERT AMOUNT]*** |
| Item 7 (Clause 6.1(b)(i)) | Notices: | ***[INSERT ADDRESS & email address FOR EACH PARTY]*** |

**Executed** as a Deed.

|  |  |  |  |
| --- | --- | --- | --- |
| **Signed sealed and delivered** for and on behalf of **the Commonwealth of Australia** in the presence of: |  |  |  |
|  |
| Signature of Witness |  |  | Signature of Authorised Officer |
| Name of Witness in full |  |  | Name and Position of Authorised Officer |
|  |

***[INSERT APPROPRIATE SIGNING BLOCKS FOR CONTRACTOR AND CONSULTANT]***