SUBCONTRACTOR DEED OF COVENANT

[FOR USE WITH ECI HC-1 (2022) ONLY]

*[Note: Where the subcontract is a design consultancy, please use the "Consultant Deed of Covenant" in the Schedule of Collateral Documents instead of this Deed]*

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

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

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

 ***[INSERT NAME, ABN AND ADDRESS OF SUBCONTRACTOR]* ("Subcontractor")**

Recitals

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

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

C. The Contract and the Subcontract require the Contractor and the Subcontractor to enter into this Deed.

**This Deed provides**

1. Interpretation
	1. Definitions

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

"**Attorney**" means any attorney and agent appointed under clause 8.

"**Event of Termination**" means that:

* + 1. the Commonwealth has issued a notice under clause 2.10(a)(ii) of the Contract;
		2. an event has occurred which under clause 14 of the Contract entitles the Commonwealth to terminate the Contract (subject to the issue of all notices required by that clause); or
		3. the Commonwealth has given notice to the Contractor under clause 14.7 of the Contract terminating the Contract.

"**Nominee**" means the person, firm or corporation (if any) nominated by the Commonwealth under clause 6.2(b).

"**Security**" means any unconditional undertaking issued by a financial institution and provided by the Subcontractor to the Contractor under the Subcontract as replaced or reduced from time to time.

* 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 Contract or the Subcontract, this Deed prevails unless the parties expressly agree otherwise.

1. Subcontractor's construction covenants

The Subcontractor undertakes to the Commonwealth to complete the design (if any) and construction of the Subcontract Works:

* + 1. in a thorough and tradesmanlike manner;
		2. with materials of merchantable quality and which are fit for their purpose;
		3. with proper skill and care;
		4. so that they are fit for the purposes as set out in, or reasonably to be inferred from, the Subcontract; and
		5. in accordance with the Subcontract.

Where there is any inconsistency or ambiguity between the requirements of paragraphs (a) to (d) and paragraph (e), whichever is the higher standard will apply to the extent of the inconsistency or ambiguity.

1. General covenants and acknowledgements

Notwithstanding any provision of the Contract or the Subcontract, each of the Contractor and the Subcontractor acknowledges and agrees for the benefit of the Commonwealth that:

* + 1. they will duly and punctually perform their respective obligations under the Contract and the Subcontract;
		2. they will notify the Commonwealth of any dispute or difference between the Contractor and the Subcontractor;
		3. the Subcontractor will notify the Commonwealth of a default by the Contractor under the Subcontract and the Subcontractor will give 30 days' prior written notice ("**Termination Notice**") to the Commonwealth of its intention to terminate the Subcontract;
		4. the Subcontractor will not terminate the Subcontract if before the expiry of the Termination Notice, the Commonwealth has:
			1. in the case of a payment default, paid all moneys required to remedy the default; or
			2. in the case of any other default, undertaken to remedy it within a reasonable time after the Termination Notice's expiry having regard to the nature and extent of the default or, where the default is incapable of being remedied, to compensate the Subcontractor for the default for an agreed amount or, in the absence of agreement, for an amount determined by arbitration;
		5. the arbitration clause of the Subcontract will apply to any arbitration under paragraph (d)(ii) as if all references in that clause to the Contractor were references to the Commonwealth;
		6. they will not without the prior written consent of the Commonwealth amend, rescind, grant or accept any waiver or discharge of the Subcontract, or otherwise alter the obligation under the Subcontract whether by the doctrine of estoppel or (without limitation) pursuant to any other principle of law; and
		7. the Commonwealth owes no obligation to the Subcontractor unless it otherwise agrees in accordance with this Deed.
1. Insurances
	* 1. Notwithstanding anything else, the Subcontractor will:
			1. take out all insurances as are required under the Subcontract; and
			2. otherwise comply with all of its obligations in relation to insurance in the Subcontract.
		2. The Contractor and the Subcontractor must ensure that it does not do or omit to do anything or does not permit anything to be done or omitted to be done whereby any insurance policy may be prejudiced.
		3. If any default is made by the Subcontractor in effecting or maintaining such insurance policy or if any such insurance policy becomes void or voidable, the Commonwealth may (but is not obliged to) effect or maintain that insurance policy at the cost of the Subcontractor or, failing it, the Contractor.
		4. The Contractor and the Subcontractor will do all things necessary and provide all documents, evidence and information necessary to enable the Commonwealth to collect or recover any moneys due or to become due in respect of any insurance policy at the cost of the Subcontractor or, failing it, the Contractor.
		5. Without prejudice to the above requirements, neither the Contractor nor the Subcontractor will cause or take any steps to bring about the cancellation, lapse, material change, reduction or any rescinding of any such insurance policy unless it has first obtained the written consent of the Commonwealth after giving 60 days prior written notice to the Commonwealth.
		6. The Contractor and the Subcontractor will immediately notify the Commonwealth of any cancellation, lapse, material change, reduction, or any rescinding of any such insurance policy, and of the occurrence of any event giving rise to any claim under any such insurance policy in respect of the Subcontract Works.
2. Security
	* 1. The Contractor and the Subcontractor will ensure that any Security will:
			1. contain a provision permitting assignment by way of security of the Contractor's rights and benefit of the Security to the Commonwealth without the necessity for consent from the Subcontractor or the issuer of the Security; and
			2. be in terms approved by the Commonwealth.
		2. The Contractor will deposit each Security with the Commonwealth. The Commonwealth will not be obliged to release the Security to the Contractor unless:
			1. the Contractor makes a request in writing for its return and proves to the reasonable satisfaction of the Commonwealth that the Subcontractor is in default under the Subcontract; or
			2. the Contractor is obliged to return it to the Subcontractor by the terms of the Subcontract.
3. Enforcement
	1. Request for Information

The Commonwealth may at any time after an Event of Termination has occurred give a notice in writing to the Subcontractor ("**Request**") requesting it to advise of any claims outstanding between the Contractor and the Subcontractor. The Subcontractor will within 7 days of the Request give the Commonwealth a written notice ("**Advice**") advising:

* + 1. the sum claimed against the Contractor and then outstanding pursuant to the terms of the Subcontract;
		2. the sum claimed against the Contractor as a result of breaches of the Subcontract by the Contractor; and
		3. the sum claimed pursuant to any other principle of law (including any claim in negligence).

The Advice must specifically identify the legal basis of the claims and the amounts claimed on that basis.

* 1. Notice of intention to complete

The Commonwealth may after receipt of the Advice give written notice ("**Notice**") to the Subcontractor stating:

* + 1. the intention of the Commonwealth to require the Subcontractor to complete construction of the Subcontract Works; and
		2. the name of the person, firm or corporation (if any) which is to be a party to the new contract referred to in clause 6.3(b).
	1. Continued performance of Subcontractor's obligations

As from the date of receipt by the Subcontractor of a Notice:

* + 1. the Contractor and the Subcontractor will be deemed to have terminated the Subcontract;
		2. the Commonwealth or the Nominee (as the case may be) and the Subcontractor will be deemed to have entered into a new contract on the same terms and conditions as the Subcontract, save and except that:
			1. the Commonwealth or the Nominee (as the case may be) will be named therein in lieu of the Contractor;
			2. subject to subparagraph (iii), the rights, obligations and liabilities of the Commonwealth or the Nominee (as the case may be) and the Subcontractor will be as if the Commonwealth or the Nominee (as the case may be) had executed the Subcontract in lieu of the Contractor; and
			3. the liability (if any) of the Commonwealth or the Nominee (as the case may be) to the Subcontractor in respect of any fact, matter or thing arising before the date of the Request will not exceed the amount referred to in the Advice given to the Commonwealth and if the Subcontractor has not given an Advice to the Commonwealth, the Subcontractor will have no right to make a claim against the Commonwealth or the Nominee (as the case may be) in respect of any fact, matter or thing arising before the date of the Request to the extent permitted by law; and
		3. the Subcontractor will indemnify the Commonwealth against all claims, costs, expenses, losses or damages suffered or incurred by the Commonwealth arising out of or incidental to any work which may have been performed by the Subcontractor under the Subcontract with the Contractor prior to its termination.
1. Payment for unfixed goods
	1. Request for payment

Where the Subcontractor requests the Contractor to make payments in advance for the provision of materials, plant and equipment which are intended for incorporation into the Works but which at the time of the request have not yet been incorporated into the Works, the Contractor must give notice in writing to the Contract Administrator.

* 1. Security

Following receipt of a notice in accordance with clause 7.1, if the Contract Administrator agrees to include the value of such materials, plant and equipment in a payment statement under the Contract, it may require the Subcontractor to provide to the Commonwealth security in the form of an unconditional undertaking in the form set out in the Schedule of Collateral Documents and given by a financial institution approved in writing by the Commonwealth under which that financial institution undertakes to pay to the Commonwealth on demand a sum equal to the value of the materials, plant and equipment for which payment in advance is being requested.

* 1. Payment for unfixed materials, plant and equipment

Subject to the provision of security in accordance with clause 7.2, the Contract Administrator must incorporate into a payment statement under the Contract an amount equal to 90% of the value (as determined by the Contract Administrator) of the materials, plant and equipment for which payment in advance is being made, subject to the following conditions:

* + 1. the Contract Administrator is satisfied that the materials, plant or equipment have not been prematurely delivered to the Site or to the place of storage and have been stored and protected in a location and manner that is appropriate and adequate having regard to their nature;
		2. the materials, plant or equipment have been inspected by the Contract Administrator and found to be satisfactory subject to any further tests and inspections that the Contract Administrator may require to be carried out upon building in, fixing or installation of the materials, plant or equipment;
		3. the materials, plant or equipment have been insured by the Subcontractor in the name of the Commonwealth;
		4. all relevant shipping and insurance documents together with any test results and inspection certificates which may be required by the Contract in relation to the materials, plant and equipment have been received by the Contract Administrator and are in a form which is satisfactory to the Contract Administrator;
		5. the materials, plant or equipment are properly labelled as the property of the Commonwealth;
		6. the Subcontractor has executed a certificate of ownership in the form set out in Appendix 1 in respect of materials, plant and equipment stored off-site or in the form set out in Appendix 2 in respect of materials, plant and equipment on the Site and has supplied the original of that certificate to the Contract Administrator;
		7. in the case of materials, plant and equipment stored off-Site the Commonwealth may at any time demand that the materials, plant or equipment be delivered to the Site or any other place that it may from time to time require and may at any time, during normal working hours, gain access to the place of storage for the purpose of collecting the materials, plant or equipment;
		8. the inclusion of such materials, plant and equipment in a payment statement under the Contract or the payment of that payment statement will not be taken as evidence against or as an admission by the Contract Administrator or the Commonwealth that the materials, plant or equipment are in accordance with the requirements of the Contract or the Subcontract but will be taken to be a payment on account only;
		9. the amount of the payments pursuant to this clause must not at any time exceed the amount of the security lodged with the Commonwealth under clause 7.2; and
		10. no payment will be made by the Commonwealth for storage costs or double handling.
	1. Reduction of security

The amount of the security provided by the Subcontractor under clause 7.2 will be progressively reduced upon incorporation into the Works of the materials, plant and equipment in respect of which the payments in advance have been made. The security will be reduced by such amount as is agreed upon between the Commonwealth and the Subcontractor, and failing agreement in this regard, as determined by the Contract Administrator.

* 1. Liability of the Contractor

The Contractor acknowledges and agrees that nothing in this clause 7 will in any way diminish, reduce or relieve the Contractor from any of its liabilities or obligations under the Contract and (without limitation) the Contractor will be and remain responsible for the work of the Subcontractor.

1. Power of attorney
	* 1. All things which the Contractor is obliged to do under or in connection with the Subcontract or this Deed may be done (at the cost of the Contractor) by any Attorney at any time after a Notice has been issued, in the name of the Contractor or the Commonwealth or the Attorney.
		2. The Contractor irrevocably and for value appoints the Contract Administrator as its agent and attorney for the purposes set out in paragraph (a). Without limiting the generality of the powers of the Attorney, the Attorney may at any time and at the cost of the Contractor:
			1. do anything necessary or as the Attorney considers expedient for enforcing, complying with or implementing the Subcontract or this Deed;
			2. execute, perform or enforce any document or agreement to which the Contractor is a party or is required to be a party pursuant to or as a consequence of this Deed, the Contract or the Subcontract;
			3. subject to the prior termination of the Subcontract, enter into on behalf of the Contractor any agreement for the construction or completion of construction of the Subcontract Works with any person; or
			4. novate the Subcontract in favour of any person on such terms and conditions as may be required by the Commonwealth.
2. 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 prepaid express post or sent by email to the relevant address or email address:
			1. stated in Item 5 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;

* + 1. 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
		2. 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 9 of the Deed" in the subject field of the email.
	1. Deemed Receipt

A notice given or served in accordance with clause 9.1 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. 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. Stamp duty

The Contractor must pay all stamp and other duties (together with any fines or penalties for late payment) on or in connection with the execution, delivery and performance of this Deed and the transactions contemplated by this Deed which may be payable in any State or Territory of Australia and whether assessable against itself or any other person.

1. Moratorium legislation

Unless application is mandatory by law, any present or future law will not apply to this Deed so as to abrogate or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to the Commonwealth.

1. Severance

Any provision of this Deed which is prohibited or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Deed or affecting the validity or enforceability of such provision in any other jurisdiction.

1. Assignment

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

1. Further Assurances

The Contractor and the Subcontractor undertake upon request by the Commonwealth to execute all documents and do all things necessary to vest in the Commonwealth or its Nominee (as the case may be) the Subcontract 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 laws applicable to the Contract.

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. Set‑off

Without limiting the Commonwealth's rights under the Contract, all moneys which the Commonwealth may pay or incur and for which the Contractor is liable under the terms of the Contract or in respect of which it is under this Deed liable to make reimbursement to or indemnify the Commonwealth, may be deducted by the Commonwealth from all moneys due, becoming due or to become due from it to the Contractor under the Contract or may be recovered by the presentation of any unconditional undertaking which may have been provided by the Contractor under the Contract or may be recovered from the Contractor by action at law or otherwise.

1. Attorneys

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

Schedule

|  |  |  |
| --- | --- | --- |
| Item 1(Recital A) | Contract: | Early Contractor Involvement Head Contract for ***[INSERT]*** dated ***[INSERT]*** |
| Item 2(Recital A) | Works: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 3(Recital B) | Subcontract: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 4(Recital B) | Subcontract Works: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 5(Clause 9.1(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 SUBCONTRACTOR]*

Appendix 1

Certificate of ownership for off‑site goods

|  |  |
| --- | --- |
| **Date:** | ..................................................................................………… |
| **Works:** | ..................................................................................………… |
| **Contractor:** | ..................................................................................………… |
| **Subcontractor:** | ..................................................................................………… |

This is to certify that the off‑site materials, plant and equipment ("**goods**") described in this certificate will become the property of the Commonwealth of Australia ("**Commonwealth**") upon payment by the Commonwealth to the Contractor in respect of the Works of the sum of $................

 The goods are stored and will remain stored until delivery to the Site at:

 The value of the goods including delivery to the Site at the date shown on this certificate is:

 $

 The anticipated delivery date to the Site is:

 Sum for which the goods will be insured (to include an allowance for inflation for the period of storage off‑site) is:

 Description of identification attached to the goods:

 Description of goods (a complete detailed description is required, including technical specifications, model or serial numbers, quantity and, where several items are included, a detailed inventory with values of each item indicated):

$

*[INSERT APPROPRIATE SIGNING BLOCK FOR SUBCONTRACTOR]*

Appendix 2

Certificate of ownership for on‑site goods

|  |  |
| --- | --- |
| **Date:** | ..................................................................................………… |
| **The Works:** | ..................................................................................………… |
| **Contractor:** | ..................................................................................………… |
| **Subcontractor:** | ..................................................................................………… |

This is to certify that the on‑site materials, plant or equipment ("**goods**") described in this certificate will become the property of the Commonwealth of Australia ("**Commonwealth**") upon payment by the Commonwealth to the Contractor in respect of the Works of the sum of $..............

 The value of the goods including delivery to the Site at the date shown on this certificate is:

 $

 Description of identification attached to the goods:

 Description of goods (a complete detailed description is required, including technical specifications, model or serial numbers, quantity and, where several items are included, a detailed inventory with values of each item indicated):

$

*[INSERT APPROPRIATE SIGNING BLOCK FOR SUBCONTRACTOR]*