Consultant Deed of Covenant

**[FOR USE WITH ECI HEAD CONTRACT ONLY]**

***[Note: Where the subcontract is a construction subcontract, please use the "Subcontractor 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 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 Contractor and the Consultant have entered into the subcontract described in Item 3 of the Schedule ("**Services** **Subcontract**") 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 Subcontract require the Contractor and the Consultant to enter into this Deed.

**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 and the following term has the following meaning, unless the context otherwise requires.

**"Attorney"** means any attorney and agent appointed under clause 7.

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

1. Novation

If the Commonwealth gives a notice under clause 14.5(a)(ii)of the Works Contract requiring novation of the Services Subcontract in accordance with this clause 2 and (where applicable) of the name of the person, firm or corporation (if any) which is to be a party to the new contract referred to in paragraph (b) (**"Nominee"**) then:

* + 1. the Services Subcontract is immediately terminated on and from the date of the notice;
    2. the Commonwealth or the Nominee (as the case may be) and the Consultant will be deemed to have immediately on and from the date of the notice entered into a new contract on the same terms and conditions as the Services Subcontract, subject to the following:
       1. the Commonwealth or the Nominee (as the case may be) will be named in the new contract in lieu of the Contractor; and
       2. the rights, obligations and liabilities of the Commonwealth or the Nominee (as the case may be) and the Consultant will be as if the Commonwealth or the Nominee (as the case may be) had executed the Services Subcontract in lieu of the Contractor; and
    3. the Consultant 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 failure by the Consultant to perform its obligations under the Services Subcontract with the Contractor prior to its termination.

1. Duty of care

The Consultant:

* + 1. warrants to the Commonwealth that it will exercise the standard of skill, care and diligence in the performance of the Services that would be expected of an expert professional provider of the Services;
    2. must:
       1. ensure that the Design Documentation (as defined in the Services Subcontract) complies with the requirements of the Services Subcontract; and
       2. use its best endeavours to ensure that the Design Documentation will be fit for its intended purpose;
    3. must ensure that the Services are provided economically and in accordance with any budgetary requirements of the Contractor notified to the Consultant; and
    4. must exercise the utmost good faith in the best interests of the Contractor and keep the Contractor fully and regularly informed about all matters affecting or relating to the Services and the Subcontract Services (as defined in the Services Subcontract)or otherwise.

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 Subcontract.

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 Commonwealth or its Nominee (as the case may be) the Services 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 law applicable to the Works Contract.

1. Power of Attorney
   * 1. All things which the Contractor is obliged to do under or in connection with the Services 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 Services 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 Works Contract or the Services Subcontract;
        3. subject to the prior termination of the Services Subcontract, enter into on behalf of the Contractor any agreement for the carrying out of the Services with any person; or
        4. novate the Services 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 8 of the Deed" in the subject field of the email.
  1. Deemed Receipt

A notice given or served in accordance with clause 8.1 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 executing this Deed states that they have no notice of the 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 Subcontract: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 4 (Recital B) | Services: | ***[INSERT BRIEF DESCRIPTION]*** |
| Item 5 (Clause 8.1(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]***