Contract Number: 24120142-DOW-AGT-CV-0014

# Subcontract

**between**

## DOWNER UTILITIES AUSTRALIA PTY LTD

**ABN 65 075 194 857**

## AND

[redacted]

**ABN** [redacted]

# (Bango Wind Farm – Project Number: 37750008 for Package CVC003Z – BNWF2-20 Access Tracks, Hardstands and Excavation)



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# Subcontract

## Instrument of Agreement

## Parties

Downer Utilities Australia Pty Ltd (ABN 65 075 194 857) of Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113 (**Downer**)

AND

[redacted] (ABN [redacted]) of [redacted]

**(Subcontractor)**

## Background

A. Downer has been engaged by the Principal to carry out certain work under a Head Contract in connection with the Project.

B. For the purposes of satisfying its obligations under the Head Contract, Downer wishes to engage the Subcontractor to carry out the Work.

C. The Subcontractor has represented to Downer that it has the financial capacity, skill, experience, personnel, material and capability to carry out the Work in accordance with this Subcontract.

D. The parties have agreed that the Work will be carried out by the Subcontractor in accordance with the terms and conditions of this Subcontract.

## Agreement

1. This agreement is comprised of:
   (a) this Instrument of Agreement;
   (b) the attached General conditions of Subcontract including all Schedules; and
   (c) the documents and information identified in Item 16 of the Subcontract Details,

   (**Subcontract Documents**).
2. The Subcontractor shall perform the Work in accordance with the Subcontract.
3. In consideration of the Subcontractor performing the Work in accordance with the Subcontract and complying with its obligations under the Subcontract, Downer agrees to pay the Subcontract Sum to the Subcontractor in accordance with the terms of the Subcontract.

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**Executed** for and on behalf of **Downer** by its duly authorised representative:

.....
Signature

.....
Print Name/position

.....
Witness

.....
Print Name

……..
Date

**Executed** for and on behalf the **Subcontractor,** pursuant to s127 of the *Corporations Act 2001* (Cth)

.....
Director/Secretary

.....
Director

……..
Date



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## General Conditions of Subcontract

### 1 Definitions and interpretation

### 1.1 Definitions

In this Subcontract:

**Approval** means any authorisation, assessment, accreditation, determination, registration, clearance, permit, licence, consent, certificate or other approval obtained or required or applying in connection with anything required or permitted to be done by the Subcontractor under this Subcontract;

**Australian Standards** means any Australian Standard (including as may be amended or replaced from time to time) issued by Standards Australia applying directly or indirectly to the Work;

**Building Code** means the *Code for the Tendering and Performance of Building Work 2016* (Cth) in force pursuant to the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth), as varied or replaced from time to time (including to the extent applicable the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* (Cth)), and includes the *Building Code 2013 - Supporting Guidelines*, as varied or replaced from time to time (and **National Code** has a corresponding meaning);

**Bank Guarantee** means an unconditional undertaking without expiry in a form and from a financial institution approved by Downer;

**Business Day** means a day which is not a Saturday, Sunday or public holiday in the State or Territory in which the Work is carried out;

**Claim** means any claim, entitlement, action, suit, cause of action, cost, expense, demand, liability, whether by way of indemnity, under contract, in equity, under statute, in tort or otherwise and any other liability of any nature including a claim for an adjustment to the Subcontract Sum and a claim for an Extension of Time;

**Collateral** has the meaning given in the PPSA;

**Compensable Cause** means a breach by Downer of this Subcontract;

**Confidential Information** includes any thing or document which Downer provides to the Subcontractor and any matter concerned with, or arising out of, this Subcontract, the Project or Downer which is disclosed to or learnt by the Subcontractor;

**Consequential Loss** means loss of use, opportunity, profit, anticipated profit, revenue, business or business opportunities and damage to goodwill, reputation or share price;

**Convention on Contracts for the International Sale of Goods** means the *United Nations Conventions on Contracts for the International Sale of Goods,* signed 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988);

**Date for Practical Completion** means the date stated in Item 2 of the Subcontract Details, as adjusted in accordance with this Subcontract but where an Extension of Time is allowed in any arbitration, litigation or expert determination binding on the Parties, it means the date resulting therefrom;

**Date of Practical Completion** is the date evidenced in a certificate of Practical Completion issued pursuant to clause 23.2 as being the date on which the Work reached Practical Completion or where another date is determined in any arbitration, litigation or expert determination binding on the Parties as the date on which Practical Completion was reached, that other date;

**Defect** means any:

(a) error, deficiency, omission, non-conformity, fault, failure malfunction, irregularity or defect (including shrinkage, expansion, fading or settlement) in the Work or any Deliverable; and

(b) aspect of the Work or any Deliverable that is not in accordance with the requirements of this Subcontract;

**Defects Liability Period** means, subject to clause 19.2, the period specified in Item 30;

**Delay Costs** means the costs descr bed in clause 21.6(a);

**Deliverable** means documents, designs, drawings, specifications, reports and other information produced or provided (or required to be produced or provided) by or on behalf of the Subcontractor in the performance of the Work and, where clause 5 applies, includes the Design Documents;

**Design Documents** means the drawings, specifications and other information, samples, models, patterns and the like required by the Subcontract and created or to be created by the Subcontractor pursuant to clause 5 and includes any preliminary design and specifications prepared by or on behalf of the Principal or Downer which are to be reviewed, developed, warranted, amended and/or completed by the Subcontractor pursuant to clause 5;

**Design Life** means, if the Work includes an item or asset identified in this Subcontract with a design life specified, that period commencing from the Date of Practical Completion;

**Direction** includes agreement, approval, assessment, authorisation, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement;

**Downer's Representative** means the person identified as such in Item 1 of the Subcontract Details as may be replaced from time to time by Downer;

**Extension of Time** means an extension of the Date for Practical Completion;

**Final Certificate** means the certificate issued under clause 22.4(b);

**Final Payment Claim** means the Final Payment Claim referred to in clause 22.4(a);

**Financing Change Statement** has the meaning given to it in the PPSA; **Financing Statement** has the meaning given to it in the PPSA;

**GST Act** means *A New Tax System (Goods and Services Tax) Act 1999* (Cth);

**Head Contract** means the contract between Downer and the Principal as identified in Item 3, under which Downer has agreed to carry out certain work in relation to the Work;

**Head Contract Requirements** means:

(a) any requirements imposed on Downer under or in connection with the Head Contract; and

(b) Downer's obligations under or in connection with the Head Contract,

which are communicated by Downer to the Subcontractor from time to time (whether before or after the execution of this Subcontract) or which can be reasonably inferred from this Subcontract and the Project Information;

**Head Contract Program** means a program for the performance of the work the subject of the Head Contract as may be provided by Downer pursuant to clause 20;

**Head Contract Works** means the works to be performed pursuant to the Head Contract;

**Insolvency Event** means any one or more of the following circumstances:

(a) the Subcontractor informs Downer in writing or creditors generally that it is or may become insolvent, unable to pay its debts when due and payable or financially unable to proceed with this Subcontract;

(b) execution is levied against the Subcontractor by a creditor which is not satisfied, set aside or withdrawn within 14 days after execution is so levied;

(c) the Subcontractor suspends payment of its debts;

(d) the Subcontractor, being an individual person or a partnership including an individual person: commits an act of bankruptcy; has a bankruptcy petition presented against him or her or presents his or her own petition; is made bankrupt; makes a proposal for a scheme of arrangement or a composition; has a deed of assignment or deed of arrangement made or accepts a composition; is required to present a debtor's petition; or has a sequestration order made under Part X of the *Bankruptcy Act 1966* (Cth);

(e) the Subcontractor, being a corporation: enters into a deed of company arrangement, scheme of



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arrangement or composition with creditors; has (voluntarily or otherwise) a receiver, receiver and manager, controller or administrator, liquidator or provisional liquidator appointed to it; has a winding up order made against it or an application for a winding up order against it made to the court and not stayed within 14 days; resolves by special resolution that it be wound up voluntarily or placed under official management; or has any of its property taken possession of by a mortgagee; or

(f) something having a substantially similar effect to any of (a) or (e) happens under the law of any jurisdiction in relation to the Subcontractor which Downer reasonably believes may prejudice the Subcontractor's ability to carry out and complete the Work or to pass title in Work to Downer;

**Intellectual Property Rights** means all present and future rights conferred by statute, common law or equity in or in relation to copyright, trademarks, designs, patents, inventions and other results of intellectual activity in any field whether or not registrable, registered or patentable;

**Intended Purpose** means the purpose or purposes for which the Work is intended, including any purpose(s) which is described in, or may be reasonably inferred from, this Subcontract or the Project Information and any purpose notified by Downer to the Subcontractor (whether before or after the execution of this Subcontract);

**Item** means an Item in the Subcontract Details;

**Legal Requirements** means any Australian legislation, statute, ordinance, rules, regulation, subordinate legislation or by-law, Australian Standards, and includes any licenses, permits and consents necessary for the Subcontractor to carry out and complete the Work, those principles of common law and equity established by decisions of courts and all fees and charges payable in connection with the foregoing;

**OHS Rules** has the meaning as set out in the State and Territory Specific Schedules;

**Moral Right** means the rights conferred on authors of works by Part IX of the *Copyright Act 1968* (Cth) and all present and future rights of integrity of authorship, rights of attribution of authorship, rights not to have authorship falsely attributed, rights to alter or delete all or part of the work, rights to use work or an adaption of the work and rights of a similar nature conferred by statute anywhere in the world;

**Party** means a party to this Subcontract;

**PPSA** means the *Personal Property Securities Act 2009* (Cth);

**PPS Register** means the Personal Property Securities Register established under the PPSA;

**Practical Completion** is the stage in the carrying out and completion of the Work when:

(a) the Work is complete except for minor Defects:

(i) which do not prevent the Work from being reasonably capable of being used for the Intended Purpose;

(ii) which Downer determines the Subcontractor has reasonable grounds for not promptly rectifying; and

(iii) the rectification of which will not prejudice the convenient use of the Work;

(b) those tests which are required by this Subcontract to be carried out and passed before the Work reaches Practical Completion have been carried out and passed;

(c) the Subcontractor has made good the Site and its surrounds and rectified any damage caused by it or those for whom it is respons ble to the satisfaction of Downer;

(d) documents and other information required under this Subcontract which, in Downer's opinion, are essential for the use, operation and maintenance of the Work, have been supplied;

(e) the Subcontractor has provided to Downer all warranties from Secondary Subcontractors required by the Subcontract; and

(f) any other matter which this Subcontract states to be a requirement for Practical Completion is satisfied by the Subcontractor to Downer's reasonable satisfaction;

**Principal** means the person or persons that have engaged Downer under the Head Contract specified in Item 5 of the Subcontract Details and includes the Superintendent;

**Probity Event** means any event or thing which occurs before or after the date of this Subcontract which:

(a) has a material adverse effect on, or on the perception of, the character, integrity or honesty of a Relevant Person;

(b) relates to a Relevant Person and has or may have a material adverse effect on the public interest, or public confidence, in the Work; or

(c) involves a material failure of a Relevant Person or Secondary Subcontractor to achieve or maintain:

(i) reasonable standards of ethical behaviour;

(ii) the avoidance of conflicts of interest which will have a material adverse effect on the ability of the Relevant Person or Secondary Subcontractor (as applicable) to carry out and observe its obligations in connection with the Work; or

(iii) other standards of conduct that would otherwise be expected of a party involved in a project of the same nature and type as the Work;

**Project** means the Project to which the Head Contract relates;

**Project Information** means any and all documents, information or materials provided by or on behalf of Downer to the Subcontractor either before or after the execution of this Subcontract;

**Project Objectives** means the outcomes, objectives, purposes and requirements in relation to the Project communicated by Downer to the Subcontractor or any outcomes, objectives, purposes or requirements that may be reasonably inferred from this Subcontract or the Project Information;

**Qualifying Cause of Delay** means:

(a) a breach of this Subcontract by Downer;

(b) an act or omission of Downer other than an act or omission that is expressly or impliedly permitted under this Subcontract;

(c) subject to clause 14, the issue of a Variation Notice by Downer in accordance with clause 14.1(a);

(d) subject to clause 20.4(d), suspension directed by Downer pursuant to clause 20.4(a); or

(e) suspension by the Subcontractor in accordance with clause 27.9(b),

except to the extent caused or contributed to by any act or omission of the Subcontractor (including any Relevant Person);

**Related Company** means a 'related body corporate' within the meaning given to that term in section 50 of the *Corporations Act 2001* (Cth);

**Relevant Person** means any officer, employee, consultant, Secondary Subcontractor or agent of the Subcontractor;

**Secondary Subcontractor** means any of the Subcontractor's consultants, contractors, suppliers, service providers and any other person engaged by or on behalf of the Subcontractor in connection with the Work;

**Security Agreement** has the meaning given to it in the PPSA;

**Security Interest** has the meaning given to it in the PPSA;

**Security of Payment Act** means the relevant state or territory specific security of payment legislation and regulations applicable to the state or territory where the Work is being



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performed including as set out in the State and Territory Specific Schedules;

**Schedule of Rates** means any schedule included in the Subcontract which, in respect of any section or item of work to be carried out, shows the rate or respective rates of payment for the execution of that work and which may also include lump sums, provisional sums, other sums, quantities and prices;

**Special Conditions** means the special conditions set out in Part C of the Subcontract Details;

**Standards** means any codes, specifications, policies, requirements and standards (as amended or replaced), or any other policy, guideline, procedure, standard or requirement with which the Subcontractor must comply by virtue of a Legal Requirement or as directed by Downer in connection with the Work or which are otherwise applicable to the Work;

**Site** means the lands and other places to be made available to the Subcontractor for the purposes of this Subcontract, including as described in Item 4, and includes any improvements and structures (including the Works) located on those lands and other places;

**State and Territory Specific Schedules** means the Schedules to this Subcontract setting out provisions that apply with respect to specific States and Territories;

**Subcontract** means this agreement between Downer and the Subcontractor constituted by the Subcontract Documents;

**Subcontract Details** means the document described as such which is attached to these General Conditions of Subcontract;

**Subcontract Documents** has the meaning identified in the Instrument of Agreement which forms part of this Subcontract;

**Subcontract Sum** means:

(a) where there is a lump sum specified in Item 7, that lump sum including any provisional sums but excluding any additions or deductions which may be required to be made under the Subcontract; or

(b) where there are applicable rates included in this Subcontract, the sum ascertained by multiplying those rates by the quantity of Work properly performed in accordance with this Subcontract; or

(c) where there are both applicable rates and a lump sum(s), the aggregate of the sums referred to in paragraph (a) and (b),

as adjusted under this Subcontract;

**Subcontractor's Design Obligations** means each of the obligations of the Subcontractor pursuant to clause 5;

**Subcontractor's Representative** means the person identified as such in Item 8 of the Subcontract Details or a nominated replacement whose appointment has been approved by Downer;

**Superintendent** means the person stated in Item 6 and is the Superintendent or the Principal's representative or other person from time to time appointed in writing by the Principal to be the Superintendent or the Principal's Representative under the Head Contract and notified as such in writing to the Subcontractor by Downer and, so far as concerns the functions exercisable under the Head Contract by a Superintendent's representative or the Principal's representative delegate, includes each of those persons;

**Tax** means any present or future tax, royalty, levy, impost, deduction, assessment, charge, excise, fee, withholding or duty of any nature imposed, assessed, charged, levied or collected by any government agency or other body authorised by Legal Requirements;

**Tax Invoice** has the meaning given to that expression under the GST Act;

**Variation** means:

(a) additional work;

(b) a change in the character or quality of the Work;

(c) an increase or decrease in the scope of the Work (including the omission of any part of the Work); or

(d) a change to the levels, lines, positions or dimensions of any part of the Work;

**Variation Notice** has the meaning in clause 14.1(a);

**Verification Statement** has the same meaning as in the PPSA; and

**Work** means the work described generally in the Subcontract and more particularly identified in Item 9 and all work and activities that are necessary or incidental to that work including, where applicable, the performance of the Subcontractor's Design Obligations.

**1.2 Interpretation**

(a) Reference to:

(i) one gender includes the others;

(ii) the singular includes the plural and the plural includes the singular;

(iii) a person includes a body corporate;

(iv) a Party includes the Party's executors, administrators, successors and permitted assigns;

(v) a thing includes the whole and each part of it separately;

(vi) a statute, regulation, code or other law or a provision of any of them includes:

(A) any amendment or replacement of it; and

(B) another regulation or other statutory instrument made under it, or made under it as amended or replaced; and

(vii) dollars means Australian dollars unless otherwise stated.

(b) Words such as "includes", "including" and "for example" are not words of limitation and are to be construed as though followed by the words "without limitation".

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

(d) Headings and any table of contents or index are for convenience only and do not form part of this Subcontract or affect its interpretation.

(e) A provision of this Subcontract must not be construed to the disadvantage of a Party merely because that Party was responsible for the preparation of the Subcontract or the inclusion of the provision in this Subcontract.

(f) Any terms referred to in this Subcontract that are also defined terms in the Head Contract, have the same meaning in this Subcontract as the meaning given to them in the Head Contract, unless the context otherwise requires.

(g) Unless this Subcontract expressly provides otherwise, the Subcontractor must perform all of its obligations under this Subcontract at its own cost and expense.

(h) If an act must be done on a specified day which is not a Business Day, it must be done instead on the next Business Day.

(i) Unless otherwise provided, prices are in the currency in Item 13 and payments shall be made at the place in Item 14.

**1.3 Parties**

(a) If a Party consists of more than 1 person, this Subcontract binds each of them separately and any 2 or more of them jointly.

(b) An obligation, representation or warranty in favour of more than 1 person is for the benefit of them separately and jointly.

**1.4 State and Territory Specific Conditions**

(a) To the extent that any Work is performed in New South Wales, the conditions set out in Schedule 6 apply.



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(b) To the extent that any Work is performed in Victoria, the conditions set out in Schedule 7 apply.

(c) To the extent that any Work is performed in Queensland, the conditions set out in Schedule 8 apply.

(d) To the extent that any Work is performed in Western Australia, the conditions set out in Schedule 9 apply.

(e) To the extent that any Work is performed in Northern Territory, the conditions set out in Schedule 10 apply.

(f) To the extent that any Work is performed in Tasmania, the conditions set out in Schedule 11 apply.

(g) To the extent that any Work is performed in South Australia, the conditions set out in Schedule 12 apply.

(h) To the extent that any Work is performed in the Australian Capital Territory, the conditions set out in Schedule 13 apply.

**1.5 Commonwealth Building Code**

If Item 44 states that Schedule 14 applies, the Subcontractor must at all times comply with the provisions set out in Schedule 14 (otherwise, Schedule 14 will not apply to this Subcontract).

**2 The Work**

**2.1 Performance of the Work**

(a) The Subcontractor must carry out and complete the Work in a good, proper and workmanlike manner to the satisfaction of Downer and in accordance with the highest standards of the respective trades using industry best practices and otherwise in accordance with the requirements of this Subcontract.

(b) Downer may, at any time, and without prejudice to any other right available to Downer, reject any work or materials which do not comply with this Subcontract. The Subcontractor must rectify or replace any rejected work or materials at its own cost in accordance with the Directions of Downer (including any time period directed by Downer), failing which Downer may rectify or replace such work or materials or have such work or materials rectified or replaced by others, the costs of which will be a debt due from the Subcontractor to Downer.

(c) The Subcontractor must comply with:

(i) all Directions of Downer;

(ii) Downer's requirements in relation to occupational health, safety and the environment as set out in the Subcontract and as directed by Downer from time to time; and

(iii) all Legal Requirements applicable to the Subcontract or the Work.

**2.2 The Head Contract**

(a) The Subcontractor must do all things necessary to enable performance by Downer of the Head Contract Requirements and so as to ensure that Downer is not, by act or omission, in breach of any Head Contract Requirements.

(b) The Subcontractor acknowledges and agrees that:

(i) it obtains no rights or benefits under the Head Contract; and

(ii) the Work to be performed by the Subcontractor for the Subcontract Sum includes anything reasonably required of the Subcontractor by Downer to enable Downer to comply with the Head Contract Requirements.

(c) Without limiting the Subcontractor's obligations under clauses 2.2(a) and 2.2(b), the Subcontractor must co-operate and co-ordinate performance of the Work with Downer and others carrying out work on or about the Site so as to enable Downer to complete its work under the Head Contract in accordance with the Head Contract Requirements.

(d) The Subcontractor acknowledges and agrees that the Subcontract Sum includes an allowance to fully compensate the Subcontractor for all obligations, risks and contingencies which are associated with the Subcontractor's compliance with this clause 2.2 and the requirements pursuant to this clause 2.2 shall not constitute a Qualifying Cause of Delay (or an act, default or omission by Downer or Downer's Representative) for the purposes of clause 21.1.

**2.3 Quantities**

Quantities in a Schedule of Rates are estimated quantities and are not guaranteed by Downer. No limits of accuracy shall apply. The Subcontractor shall have no Claim by reason of the actual quantity of an item or section required to carry out the Work being greater or less than the quantity shown in the Schedule of Rates.

**2.4 Legal Requirements**

In the performance of the Work, the Subcontractor must:

(a) comply with its obligations and reasonably foreseeable potential obligations under the OHS Rules and Downer's occupational health and safety policies and procedures as amended from time to time;

(b) do all that is required to ensure the health and safety of workers and others;

(c) conform with, and ensure that the Work conforms with, all applicable industry requirements, best practices and Standards;

(d) ensure all Work, materials, tools, equipment and personal protective equipment is compliant with the relevant Australian Standards;

(e) ensure it does not breach the *Fair Work Act 2009* (Cth) or other relevant industrial legislation, awards or enterprise agreements;

(f) obtain and keep in full force and effect all Approvals necessary for the lawful performance, supply and use of the Work; and

(g) provide to Downer, upon request, any data and information that is or may be required by Downer, the Principal or any third party to comply with the *National Greenhouse and Energy Reporting Act 2007* (Cth) to the extent that such data and information relates to the Work or this Subcontract.

**3 Commencement**

**3.1 Access to Site**

(a) Subject to clause 3.2, not later than the date stated in Item 10, Downer must give the Subcontractor reasonable access to the Site to enable the Subcontractor to commence carrying out the Work. Any delay in giving the Subcontractor access to the Site is not a breach of contract, but may entitle the Subcontractor to claim an Extension of Time under and subject to clause 21.

(b) Unless Downer's Representative directs otherwise, the Subcontractor must only access the Site during the hours and on the days provided for in accordance with Item 15.

(c) Notwithstanding this clause 3, if the Subcontractor has not complied with clauses 8 and 9.2, the Subcontractor has no entitlement to (and Downer may refuse to give the Subcontractor) access to the Site until the Subcontractor complies with the requirements of those clauses.

(d) Except to the extent otherwise expressly stated in this Subcontract, the Subcontractor acknowledges and agrees that it is solely responsible for and has made sufficient provision for any constraints on access to and from the Site and all cranage, scaffolding, haulage and handling that may be required for the performance of the Work.

(e) The Subcontractor must:

(i) provide to Downer, evidence of its safety management system that will be implemented to manage the Work pursuant to this Subcontract;



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(ii) ensure that its workers (and all of its Secondary Subcontractors' workers) are inducted to the Site prior to the workers commencing work at the Site; and

(iii) ensure that its workers (and all of its Secondary Subcontractors' workers) possess the appropriate licence, qualification and competency for the work being undertaken.

**3.2 Other works on the Site**

(a) The Subcontractor acknowledges and agrees that it is not entitled to exclusive possession of the Site and that Downer and others will be carrying out work on or about the Site at the same time as the Subcontractor is carrying out the Work.

(b) The Subcontractor must co-ordinate its Work with the work and activities being carried out by others on the Site and has no entitlement to make any Claim against Downer in any way relating to the carrying out of work by others.

(c) Downer is not obliged to give the Subcontractor access to the Site under this clause 3 which is greater than Downer's rights under the Head Contract.

**4 Subcontractor warranties and acknowledgements**

**4.1 General Warranties**

The Subcontractor represents and warrants, in addition to and without limiting any other warranty given by the Subcontractor under this Subcontract:

(a) that it has thoroughly examined all the Subcontract Documents, the Project Information and all other information or documentation made available to it by Downer before entering into this Subcontract, including relevant extracts of the Head Contract and Head Contract Requirements and obtained all other information necessary to carry out and complete the Work;

(b) that it is and will at all times be suitably qualified and experienced;

(c) that it has entered into this Subcontract without relying on any representation by Downer, the Principal or any person purporting to represent Downer or the Principal except to the extent that such representation forms part of and is expressly stated in this Subcontract;

(d) that it has thoroughly inspected the Site and its adjacent surroundings, including any prior work, existing structures or materials and physical conditions (whether naturally occurring or in consequence of human activity) on, in, over or under the Site and its surroundings;

(e) that it will carry out and complete the Work so that, when complete, it is free from Defects and is fit for the Intended Purpose and is capable of remaining fit for the Intended Purpose (if maintained in accordance with good industry practice);

(f) that all materials supplied by it will be suitable for the purpose for which they are used and that, unless otherwise stated in this Subcontract, those materials will be new;

(g) that the Work will be completed within the time stipulated in this Subcontract;

(h) that the Work will comply with all the requirements of or to be inferred from, this Subcontract including, the Legal Requirements, Australian Standards and the requirements of all authorities having jurisdiction over the Work and will meet or exceed the Project Objectives;

(i) that it has determined the nature and extent of the Work and assessed the amount of temporary works, materials, labour, plant and equipment necessary to complete the Work in accordance with its obligations under this Subcontract and made all necessary allowances in the Subcontract Sum, including allowance for the supply of all items not expressly mentioned in this Subcontract but which are necessary for the satisfactory completion of the Work;

(j) that it has considered its obligations under this Subcontract and that both the Subcontract Sum and Date for Practical Completion are reasonable and each contain all necessary allowances taking into account the risk, responsibilities and costs allocated to the Subcontractor, whether expressly or otherwise;

(k) that it has made proper allowance for all matters which might impact on its ability to complete the Work or to complete the Work within any particular time, cost or quality constraints subject to the express provisions of this Subcontract;

(l) that it has obtained, or will be able to obtain, all necessary consents, permits or authorisations (other than those which Downer is required to obtain in accordance with this Subcontract) necessary for it to carry out the Work in accordance with the requirements of this Subcontract;

(m) that all registrations, permits, licences, qualifications and other requirements of its trade are in full force and effect at all times;

(n) that it is a GST registered entity;

(o) that it shall comply with all Legal Requirements applicable to the Work and the performance of the Work; and

(p) that is will carry out and complete the Work so that, when complete, each asset or item to which a Design Life applies will be free from Defects and fit for the purposes for which it is intended (without any major maintenance or refurbishment works) for its Design Life.

The Subcontractor's warranties remain unaffected notwithstanding:

(q) that design work (including preliminary design) has been carried out by or on behalf of Downer and included in Downer's Project Objectives;

(r) that the Subcontractor has entered into an assignment of any prior contract between Downer and a consultant of Downer;

(s) any receipt or review of, or comment or Direction on, the Design Documents or any aspect of the Work by Downer; or

(t) any Variation.

**4.2 Deliverables**

The Subcontractor must (and warrants that it will) ensure that all Deliverables:

(a) comply in all respects with this Subcontract;

(b) are fit for the purposes for which they are intended (or any purpose which may be reasonably inferred from the Subcontract or the Project Information);

(c) comply with all applicable Legal Requirements and Australian Standards;

(d) do not infringe any Intellectual Property Rights of any person;

(e) comply in all respects with the Head Contract Requirements; and

(f) satisfy or exceed the Project Objectives.

**4.3 Taxes and Employees Benefits**

(a) The Subcontractor acknowledges that it has sole liability in relation to:

(i) wages, salaries, allowances, incentive payments, bonuses, sick leave, long service leave, annual leave, personal leave, termination or redundancy payments and any other employment related liabilities; and

(ii) all group tax, payroll tax, PAYE, superannuation, workers compensation and other taxes, levies, deductions, charges, penalties, duties or withholdings,



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in respect of the Subcontractor's personnel.

(b) The Subcontractor further acknowledges that neither the Subcontractor nor any of the Subcontractor's personnel have, pursuant to this Subcontract or otherwise, any entitlement from Downer in relation to any form of employment benefit. The Subcontractor will not communicate or otherwise represent to its personnel that any of the Subcontractor's personnel have any entitlement from Downer in relation to any form of employment related benefit.

(c) The Subcontractor indemnifies Downer from and against any liability for the Indemnified Taxes, together with any other amount determined by Downer to be reasonably necessary to compensate Downer for an income tax liability, or reduction in income tax losses available to be carried forward or available income tax credits or rebates, to ensure that the after tax position of Downer is the same (or substantially the same) as it would have been had Downer never been liable for any Indemnified Taxes.

(d) If Downer is, becomes or reasonably forms the view that it may be or become, liable for the payment of any Indemnified Taxes, Downer may deduct the amount of its liability or prospective liability for the Indemnified Taxes from any amount due by Downer to the Subcontractor, whether under this Subcontract or otherwise.

(e) The indemnity under this clause is for the benefit of Downer. The Subcontractor agrees that presumptions applied in the construction of indemnities do not apply to this clause and that it bears the onus of proving that it has no liability or a lesser liability to indemnify Downer than claimed. In defending any liability under this clause, the Subcontractor is not permitted to raise any proposition which denies liability on grounds that to enforce the indemnity would be contrary to public policy or a similar defence.

(f) In this clause, **Indemnified Taxes** means any taxes, excluding GST, arising out of or in relation to this Subcontract or the performance of or payment for the Work or any other transaction contemplated by this Subcontract including Pay As You Go, withholding tax, superannuation guarantee charge, fringe benefits tax, workers' compensation insurance premiums and payroll tax, together with all costs, interest or penalties payable by reference to those taxes.

## 5 Design

Except to the extent that Item 17 excludes the respons bility of the Subcontractor for design and without limiting any other obligation of the Subcontractor under this Subcontract, the Parties acknowledge and agree that:

(a) the Subcontractor must prepare the Design Documents including by correcting and completing any incorrect or incomplete Design Documents existing as at the date of this Subcontract and otherwise carry out and complete the design of the Work in compliance with this Subcontract;

(b) the Subcontractor must submit its proposed Design Documents to Downer for review and comment at the times specified in the Subcontract or, if no time is specified, then by the earlier of:

(i) the date that enables Downer to comply with, any design review process contained in the Head Contract Requirements; or

(ii) 21 days prior to the Subcontractor's proposed commencement of construction (including procurement, manufacture and fabrication of any part of the Work the subject of the Design Documents);

(c) Downer may (but is not obliged to):

(i) review any Design Documents prepared and submitted by the Subcontractor; and

(ii) consult with and take into account any views or requirements of the Principal in connection with the Design Documents; and

(d) within the period prescr bed by this Subcontract (or if no period is specified, within 21 days of their receipt), Downer may reject or require amendments to the Design Documents if, in its opinion, the Design Documents do not comply with the requirements of this Subcontract or the Principal;

(e) if Downer issues any Direction in connection with Design Documents pursuant to clause 5(d), the Subcontractor must submit amended Design Documents to Downer in which case, the process in clauses 5(b), 5(c) and 5(d) shall apply to the amended Design Documents;

(f) the Subcontractor must not commence construction of the part of the Work to which any Design Documents which it has submitted to Downer applies, unless Downer has had the period prescribed by clause 5(b) to review the Design Documents and has not rejected or required amendments to the Design Documents;

(g) no preliminary design issued by or on behalf of Downer and no review of, comments upon, rejection of, failure to review or comment upon or reject, any Design Documents prepared by the Subcontractor or any other Direction by Downer shall:

(i) cause Downer to assume or owe any duty of care to the Subcontractor in respect of errors or omissions in the Design Documents or the Subcontractor's compliance with this Subcontract;

(ii) relieve the Subcontractor from, or alter or affect, the Subcontractor's warranties, liabilities or respons bilities whether under the Subcontract or otherwise according to law; or

(iii) prejudice Downer's rights against the Subcontractor whether under the Subcontract or otherwise according to law;

(h) without limiting any other warranty of the Subcontractor under the Subcontract, the Subcontractor warrants to Downer that the Subcontractor:

(i) at all times shall be suitably qualified and experienced, and shall exercise due skill, care and diligence in the carrying out and completion of the Subcontractor's design responsibilities under this Subcontract;

(ii) has examined the Subcontract and any preliminary design therein is suitable, appropriate and adequate for the Intended Purpose;

(iii) understands that any preliminary design may be incomplete and may require further work before it can be used by a competent contractor to carry out the Work to a stage of Practical Completion and wholly accepts liability for the adequacy of all Design Documents whether prepared by or on behalf of the Principal, Downer or the Subcontractor;

(iv) understands that the process referred to in this clause 5 will require the iterative submission and review of Design Documents and the carrying out of design development by the Subcontractor, in respect of which process the Subcontractor has allowed a sufficient amount in the Subcontract Sum and sufficient period of time in calculating the Date for Practical Completion;

(v) in carrying out the Subcontractor's design obligations, shall ensure that all the Design Documents:

(A) have been subjected to coordination, resolution of any error, omission,



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ambiguity, conflict, lack of clarity or deficiency in the design;

(B) do not depart from the layout, purposes, design intent, Standards, style, appearance and dimensions shown in or reasonably inferred from this Subcontract without the express written Approval of Downer:

(C) comply with the Legal Requirements and the requirements of this Subcontract; and

(D) are consistent with and meet the requirements of the Project Objectives; and

(i) shall carry out and complete the Work in accordance with the Design Documents prepared by the Subcontractor in accordance with this clause 5 so that the Work, when completed, shall:

(i) be fit for the Intended Purpose;

(ii) be free from design errors and Defects;

(iii) be compliant with the Head Contract Requirements;

(iv) meet or exceed the Project Objectives; and

(v) be compliant with any further purposes or requirements set out in 0.

**6 Subcontract Documents**

**6.1 Discrepancies**

(a) The several documents forming this Subcontract shall be taken as mutually explanatory of one another. Should the Subcontractor encounter any discrepancies, contradictions, omissions, ambiguity, errors, faults or inconsistencies in or between the Subcontract Documents the Subcontractor must promptly notify Downer's Representative in writing.

(b) The Subcontractor must comply with any Direction of Downer's Representative as to the interpretation to be adopted in resolving the discrepancy, contradiction, omission, ambiguity, error, fault or inconsistency and shall have no Claim in connection therewith.

**6.2 Evidence of Subcontract**

The Subcontractor is not entitled to payment under or in connection with this Subcontract and Downer is not obliged to make any payment to the Subcontractor until this Subcontract is executed by the Subcontractor and an original executed copy returned to Downer.

**6.3 Supply of documents by the Subcontractor**

The Subcontractor must, at least 14 Business Days before and as a precondition to Practical Completion, give Downer all warranties, guarantees, operating manuals, maintenance manuals and "as built" drawings applicable to the Work in accordance with this Subcontract or the Head Contract Requirements.

**6.4 Supply of documents by Downer**

(a) Unless this Subcontract expressly provides otherwise, Project Information of any nature provided by or on behalf of Downer to the Subcontractor at any time (other than the Subcontract Documents) is furnished to the Subcontractor solely for its convenience only and are not guaranteed to be complete, accurate, consistent or fit for any purpose (including the Intended Purpose). Downer has no liability whatsoever to the Subcontractor, whether in tort (including negligence), contract, statute or otherwise (except to the extent that such liability cannot be excluded) concerning or in any way connected with any interpretations, deductions, inferences drawn or conclusions made by the Subcontractor in relation to such information or documents or any errors, omissions, representations or misrepresentations contained in the same.

(b) The Subcontractor warrants that it has:

(i) examined carefully and acquired actual knowledge of the content of the Project Information and the Subcontract Documents and any other information made available by or on behalf of Downer to the Subcontractor;

(ii) examined all information obtainable by the making of reasonable enquiries in relation to the Work;

(iii) satisfied itself that the Subcontract Sum covers the cost of complying with all of its obligations under this Subcontract; and

(iv) checked and considered the Design Documents and any document from which the drawings are derived and satisfied itself that they are suitable for the Intended Purpose.

**7 Administration and personnel**

**7.1 Downer's Representative**

Downer's Representative:

(a) has authority to exercise and discharge any of Downer's powers and duties under this Subcontract unless and until Downer notifies otherwise; and

(b) may from time to time and at any time by notice in writing to the Subcontractor appoint delegates to exercise any functions of Downer's Representative.

**7.2 Compliance with Directions**

(a) The Subcontractor must:

(i) comply with any Direction given by Downer or Downer's Representative (or any authorised delegates); and

(ii) communicate with Downer's Representative in relation to any matters within Downer's Representative's authority.

(b) If the Subcontractor is dissatisfied with or disputes any Direction of Downer or Downer's Representative (or any authorised delegates), without limiting any other obligation of the Subcontractor under this Subcontract including with respect to the giving of notices, the Subcontractor shall within five Business Days after the Direction is given, notify Downer in writing identifying the Direction and giving particulars of the Subcontractor's dissatisfaction or dispute. If the Subcontractor fails to do so, the Subcontractor shall have no Claim arising out of or in connection with the Direction.

**7.3 Subcontractor's Representative**

The Subcontractor must ensure that:

(a) the Subcontractor's Representative is present on Site whenever Work is being undertaken and in any event during normal working hours;

(b) the Subcontractor's Representative has the full authority of the Subcontractor to receive instructions from and notices given by Downer's Representative in respect of all matters relating to this Subcontract or the Work;

(c) the Subcontractor's Representative attends all Site meetings as requested by Downer's Representative;

(d) subject to events beyond the Subcontractor's control, the key personnel specified in Item 28 are engaged in the execution of the Work and, if it becomes necessary for the Subcontractor to change any of the key personnel, the Subcontractor shall provide to Downer with detailed curricula vitae of at least two persons with training, qualifications, expertise and experience which is at least comparable to that of the personnel proposed to be replaced as proposed replacements for Approval by Downer. The Subcontractor shall not change the key personnel without the written consent of Downer; and

(e) the Subcontractor's Representative is replaced by an alternative Subcontractor's Representative upon receipt by the Subcontractor of a written notice by



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Downer's Representative requesting the replacement under clause 15.3 of this Subcontract.

**7.4 Subcontractor's Responsibilities**

(a) Downer, Downer's Representative and any delegates do not owe or assume any duty in contract or otherwise:

(i) to advise the Subcontractor, to supervise or control the Subcontractor's operations, methods of working or temporary works, to detect, prevent or remedy the Subcontractor's defaults or to ensure the proper performance of any of the Subcontractor's obligations or to exercise any authority or discretion for the benefit of the Subcontractor; and

(ii) in relation to any Approval, monitoring, inspection, review or attendance carried out or in relation to any information, permission, comment or recommendation to the Subcontractor.

(b) Any Approval, monitoring, inspection, review, or any attendance at any test or the giving of any information or permission or the making of any comment or recommendation by Downer or Downer's Representatives shall not constitute waiver of any breach or acceptance of any work, materials or goods, or in any way affect the Subcontractor's obligations and sole responsibility to ensure that the Work is in accordance with this Subcontract.

**7.5 Engagement of Illegal Workers prohibited**

(a) The Subcontractor must ensure that each person engaged by the Subcontractor would not, in doing the work for which they are engaged, be an Illegal Worker.

(b) The Subcontractor must remove, or cause to be removed, any Illegal Worker from any involvement in carrying out the Work.

(c) For the avoidance of doubt, compliance with the Subcontractor's obligations under this clause will not form the basis of, and will not give rise to any entitlement for the Subcontractor to make, any Claim.

(d) When requested in writing, the Subcontractor will provide evidence within 14 days that it has taken all reasonable steps to ensure that it has complied with, and is complying with, its obligations under this clause.

(e) In this clause:

(i) **Illegal Worker** means a person who is an Unlawful Non-Citizen who is working without a visa or a Non-Citizen who is performing work in breach of a Visa Work Condition;

(ii) **Non-Citizen** has the same meaning as under the *Migration Act* 1958;

(iii) **Unlawful Non-Citizen** has the same meaning as under the *Migration Act* 1958; and

(iv) **Visa Work Condition** means a condition (as set out in Schedule 8 of the *Migration Regulations* 1994) attached to a visa restricting the work that the Non-Citizen may do in Australia.

**8 Security**

**8.1 Bank Guarantees**

Unless Item 18 provides that retention monies are to be deducted in lieu of the provision of Bank Guarantees:

(a) within seven days after the date of this Subcontract, the Subcontractor must provide to Downer two Bank Guarantees each for the amount stated in Item 19 as security for the performance of the Subcontractor's obligations under the Subcontract; and

(b) the Subcontractor has no entitlement to payment under or in connection with this Subcontract and Downer is not obliged to make any payment to the Subcontractor until the Bank Guarantees are so provided.

**8.2 Retention Monies**

(a) If Item 18 provides that retention monies are to be deducted in lieu of the provision of Bank Guarantees then Downer is entitled to retain 10% of each progress payment until the amount retained equals the percentage of the Subcontract Sum set out in Item 20 and such retention monies shall be security for the performance of the Subcontractor's obligations under this Subcontract.

(b) Downer does not hold retention monies on trust for the Subcontractor and is not required to act in a fiduciary capacity with respect to retention monies held.

(c) The right to any interest accruing on retention monies vests in Downer.

**8.3 Recourse to security**

(a) Downer may have recourse to security and may convert into money any security that does not consist of money where Downer reasonably considers that monies are or will become due and payable from the Subcontractor to Downer, where Downer has a right of set off under this Subcontract or otherwise where Downer has an express right under this Subcontract.

(b) Where, with the prior written consent of Downer, the Subcontractor:

(i) has provided security by way of an approved unconditional undertaking;

(ii) the unconditional undertaking contains an expiry date; and

(iii) on the date which is three calendar months before the expiry date the Subcontractor is not yet entitled to the release of the security,

the Subcontractor shall provide a replacement undertaking with an identical undertaking except that the date of expiry shall be one year later than the expiry date of the previous undertaking.

(c) The replacement undertaking must be received by Downer not less than two calendar months before the expiry date of the original undertaking. If a replacement undertaking is not received by Downer by the time specified, Downer shall be entitled without notice to the Subcontractor to have recourse to the undertaking and convert it to money and the Subcontractor undertakes that it will not take any steps whether by itself or through any other person, to prevent Downer in any way from so converting the security.

**8.4 Reduction of security**

Subject to Downer's rights under this Subcontract (including clauses 8.7 and 22.8), provided that the Subcontractor has given Downer an executed Deed of Release in the form set out in Schedule 3, and subject to the exercise of any right of recourse that Downer may have to security, Downer must reduce by the percentage stated in Item 21 of the amount then held by Downer as a Bank Guarantee or as retention monies on the later of 42 days after the Date of Practical Completion for the whole of the Work and the date on which all Defects identified at Practical Completion have been rectified.

**8.5 Release of security**

Subject to clause 8.7 and Downer's right to exercise a right of recourse that Downer may have to security, Downer will release the balance of the amount then held as a Bank Guarantee or as retention monies under clause 8.2 on the later of 42 days after:

(a) the date on which the Subcontractor gives Downer an executed Deed of Final Release in the form set out in Schedule 4;

(b) the issue of the Final Certificate under clause 22.4; and

(c) the date on which all Defects identified during the Defects Liability Period have been rectified.

**8.6 Parent company guarantee**



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(a) In this clause 8.6, the terms "corporation" and "subsidiary" have the meanings defined in the *Corporations Act 2001* (Cth).

(b) If the Subcontractor is a corporation that is related to or is a subsidiary of another corporation as defined in the *Corporations Act 2001* (Cth), the Subcontractor must, if requested by Downer, give Downer within 14 days of that request, a deed of guarantee and indemnity in a form acceptable to Downer and duly executed by the Subcontractor and the other corporation for the performance of the obligations and the discharge of the liabilities of the Subcontractor under this Subcontract.

(c) If a deed of guarantee and indemnity is requested by Downer, the provision of such deed by the Subcontractor is a precondition to any entitlement to payment in connection with this Subcontract.

**8.7 Effect of claims**

(a) Despite any other provision of this Subcontract, where, at the time for the return of any security to the Subcontractor by Downer, Downer has claims against the Subcontractor that have not been finally resolved, Downer may retain such portion of the security held as Downer considers reasonably appropriate up to the limit of the value of those claims.

(b) Promptly upon the final and binding resolution of claims referred to in clause 8.7(a) and satisfaction of any entitlement to payment resulting therefrom, and subject to the other terms of this Subcontract, Downer shall return to the Subcontractor the balance of any security then held.

**9 Indemnity, liability and insurance**

**9.1 Indemnity**

(a) The Subcontractor is liable for and indemnifies and shall keep indemnified Downer (to the maximum extent permitted by law) against:

(i) all cost, loss, damage and expense (including legal fees on an indemnity basis) suffered by Downer and any of its employees or agents;

(ii) loss of or damage to Downer's or the Principal's property including existing property in or upon which the Work is being carried out;

(iii) claims in respect of personal injury or death or loss of, or damage to, any other property, arising out of or as a consequence of the carrying out of the Work;

(iv) any breach by the Subcontractor of the OHS Rules or any penalty or enforceable undertaking imposed for breach of any Legal Requirements; and

(v) all liabilities incurred by Downer as a consequence of any liability Downer has or may have to the Principal or another third party in relation to, arising out of or in connection with the Head Contract, the work under the Head Contract or work under a separate subcontract,

arising directly or indirectly as a result of or in connection with the performance of the Subcontractor's obligations under this Subcontract, any breach of this Subcontract by or any negligence of the Subcontractor, its employees, Secondary Subcontractors or agents. However, the Subcontractor's liability to indemnify Downer, its employees or agents is reduced proportionally to the extent that the act or omission of Downer, its employees or agents caused or contributed to the cost, loss, damage, expense or liability.

(b) The Subcontractor's liability under clause 9.1(a) is in addition to its liability under clause 23.3 to the extent that payments made under clause 23.3 are not sufficient to or do not compensate Downer for its actual cost, loss, damage and expense suffered and liabilities incurred under clause 9.1(a).

**9.2 Insurance required by Subcontractor**

(a) The Subcontractor must, as a precondition to any entitlement to payment in connection with this Subcontract, provide to Downer certificates of currency in respect of and have in place the insurance policies stated in Item 22, Item 23, Item 24, Item 25 and Item 26 in the amounts and for the periods stated in those items and upon terms and with an insurer approved by Downer.

(b) The Subcontractor must ensure that its Secondary Subcontractors are similarly insured or covered by the insurance required under this clause 9.2 for the relevant work to be performed by those Secondary Subcontractors.

(c) Without limiting the rest of this clause 9.2, all policies must require the insurer to notify Downer in writing at the same time it gives a notice of cancellation or any other notice concerning the policy to the Subcontractor.

(d) If the Subcontractor is required to have in place a public liability insurance policy under clause 9.2(a), such policy must:

(i) note the interest of Downer;

(ii) provide that Downer is protected by a "Principals" indemnity extension covering Downer's vicarious liability for the acts or omissions of other "Named Insureds" under such policy; and

(iii) include a cross liability clause in which the insurer agrees that the policy applies as if a separate policy was issued to Downer and each "Named Insured" (with the exception of limits of liability).

(e) If the Subcontractor is required to have in place a contract works insurance policy under clause 9.2(a), such policy must:

(i) identify Downer as a named insured;

(ii) provide that Downer is protected by a "Principals" indemnity extension covering Downer's vicarious liability for the acts or omissions of other "Named Insureds" under such policy; and

(iii) include a cross liability clause in which the insurer agrees that the policy applies as if a separate policy was issued to Downer and each "Named Insured" (with the exception of limits of liability).

(f) Before commencing any work and whenever requested by Downer's Representative, the Subcontractor must promptly provide to Downer's Representative copies of insurance policies required by this clause 9.2 together with certificates of currency.

(g) If the Subcontractor is required to have in place a professional indemnity policy of insurance pursuant to clause 9.2(a), it must ensure that such policy extends coverage to contractual liabilities assumed by the Subcontractor.

**9.3 Insurance of the Subcontractor's Plant and Equipment**

(a) Before commencing work the Subcontractor shall effect and maintain for the duration of the Subcontract an insurance policy covering loss or damage to:

(i) any construction plant, for their full replacement value at the time loss or damage occurs; and

(ii) valuable documents (including drawings, drafts, reports, calculations and data) relating to or prepared for the purposes of the Work.

(b) The insurance shall name Downer as an additional insured and shall include a cross liability clause which contains a waiver of subrogation rights against Downer.



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**9.4 Insurance required by Downer**

(a) Downer will be responsible for causing the insurances set out in Item 27 to be taken out.

(b) Downer must promptly when requested by the Subcontractor provide to the Subcontractor copies of certificates of currency in respect of insurance policies required by this clause 9.3.

(c) The Subcontractor must satisfy itself that the insurance to be taken out by Downer under this clause 9.3 is satisfactory for its stated purpose and effect any other or additional insurance which a reasonable and competent subcontractor would effect.

(d) The Subcontractor must comply with the terms of the insurance policies to be taken out by Downer under this clause 9.3 and is responsible for all excesses payable on any insurance claim under such insurance unless the relevant claim does not relate in any way to the Work.

**9.5 Failure to provide evidence of insurance**

If the Subcontractor fails to provide to Downer copies of insurance policies together with certificates of currency in accordance with the requirements of this Subcontract, Downer may (without being obliged to do so) effect and maintain such insurance and the cost incurred is a debt due by the Subcontractor to Downer.

**9.6 Notice of claims or likely claims**

The Subcontractor must as soon as practicable inform Downer's Representative in writing of any occurrence which it ought reasonably expect may give rise to a claim under an insurance policy required by this Subcontract. The Subcontractor must give all information and assistance requested by Downer's Representative in respect of any such claim or possible claim.

**9.7 Effect of insurances**

The effecting or failure to effect insurance by either the Subcontractor or Downer does not in any way limit or reduce any of the Subcontractor's obligations or liabilities under this Subcontract or at law.

**9.8 Limitation of Liability**

(a) Subject to clause 9.8(b), and except to the extent that liability cannot be limited or excluded, the total aggregate liability of the Subcontractor to Downer under this Subcontract is limited to the amount equal to 200% of the Subcontract Sum (as adjusted in accordance with this Subcontract).

(b) Clause 9.8(a) does not apply to:

(i) the Subcontractor's obligation and liability to carry out and complete the Work in accordance with the Subcontract;

(ii) the Subcontractor's liability as a consequence of, or to rectify, a Defect;

(iii) reduce or otherwise affect the Subcontractor's liability to pay liquidated damages under this Subcontract or any other damages for delay;

(iv) the Subcontractor's liability to indemnify Downer pursuant to any provision in this Subcontract;

(v) the Subcontractor's liability in relation to any Claim made by a third party (including the Principal) against Downer or the Subcontractor;

(vi) any event or Claim for which the Subcontractor is required to have insurance in accordance with this Subcontract; or

(vii) any liability in respect of which the Subcontractor is indemnified under a policy of insurance required to be effected pursuant to the requirements of this Subcontract or in respect of which the Subcontractor would have been indemnified by a policy of insurance required to be effected pursuant to the requirements of this Subcontract if the Subcontractor had:

(A) diligently pursued a claim under that policy of insurance;

(B) complied with the terms and conditions of that policy of insurance; or

(C) complied with its insurance obligations under this Subcontract.

**9.9 Consequential Loss**

(a) Subject to clause 9.9(b), neither Party will be liable to the other Party for any Consequential Loss arising out of or in connection with this Subcontract.

(b) Clause 9.9(a) does not apply to the Subcontractor's liability in respect of:

(i) liquidated damages under this Subcontract or any other damages for delay;

(ii) the Subcontractor's liability as a consequence of, or to rectify, a Defect;

(iii) the Subcontractor's liability to indemnify Downer pursuant to any provision in this Subcontract;

(iv) any Claim made by a third party (including the Principal) against Downer or the Subcontractor;

(v) any event or Claim for which the Subcontractor is required to have insurance in accordance with this Subcontract; or

(vi) any liability in respect of which the Subcontractor is indemnified under a policy of insurance required to be effected pursuant to the requirements of this Subcontract or in respect of which the Subcontractor would have been indemnified by a policy of insurance required to be effected pursuant to the requirements of this Subcontract if the Subcontractor had:

(A) diligently pursued a claim under that policy of insurance;

(B) complied with the terms and conditions of that policy of insurance; or

(C) complied with its insurance obligations under this Subcontract.

**10 Assignment and subcontracting**

**10.1 Assignment**

(a) The Subcontractor must not assign this Subcontract or any right, benefit or interest under this Subcontract without the prior written consent of Downer. If such consent is given, it may be given in whole, in part or subject to whatever conditions Downer requires.

(b) Downer may assign or novate this Subcontract or any right, benefit or interest under this Subcontract and the Subcontractor must promptly, upon request by Downer, execute a Deed of Novation in the form of Schedule 15 such deed being between Downer, the Subcontractor and Downer's nominee.

**10.2 Subcontracting**

(a) The Subcontractor shall not without Downer's prior written Approval (which shall not be unreasonably withheld):

(i) subcontract or allow a Secondary Subcontractor to subcontract any Work described in Item 39; or

(ii) allow a Secondary Subcontractor to assign a secondary subcontract or any payment or any other right, benefit or interest thereunder.

(b) Downer may impose any conditions it considers appropriate when giving its Approval under clause 10.2(a).

(c) The Subcontractor must ensure that Secondary Subcontractors are paid in accordance with the terms



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of their subcontracts. If a Secondary Subcontractor has become entitled to suspend work under a subcontract (whether under this Subcontract, applicable law (including statute) or otherwise) because of a failure by the Subcontractor to pay moneys to the Secondary Subcontractor, the Subcontractor irrevocably agrees that Downer or the Principal may pay to the Secondary Subcontractor the amount owing to or claimed by the Secondary Subcontractor in connection with that work, and any amount so paid by Downer or the Principal will be a debt due and immediately payable by the Subcontractor to Downer.

(d) The Subcontractor must ensure that its Secondary Subcontractors comply with all relevant requirements of this Subcontract.

(e) The Subcontractor is fully responsible for performing the Work and for ensuring compliance with the requirements of this Subcontract and will not be relieved of that responsibility because of any:

(i) involvement by Downer in the performance of the Subcontractor's obligations under this Subcontract; or

(ii) subcontracting of the whole or part of its obligations under this Subcontract.

(f) The Subcontractor must give to Downer and the Principal access to (or copies of, upon request) any proposed or executed subcontract (regardless of whether the Subcontractor or the Principal is a party to that subcontract) and all plans, specifications and drawings relating to that subcontract.

(g) The Subcontractor must:

(i) as a condition precedent to the achievement of Practical Completion provide to Downer warranties in favour of Downer and the Principal in a form reasonably required by Downer; and

(ii) ensure that Downer and the Principal have the benefit of all warranties given by all Secondary Subcontractors in relation to Work performed by them and any materials provided by them which are used in the provision of or form part of the Work.

(h) Without limiting the foregoing, the Subcontractor must include in each subcontract with a Secondary Subcontractor:

(i) details of the Subcontractor's obligations in connection with the Subcontract which are to be carried out by the Secondary Subcontractor;

(ii) consent to a novation to Downer or its nominee at the Direction of Downer and in this regard:

(A) the Subcontractor must, at the Direction of Downer, execute such documents as Downer may reasonably require to give effect to such novation and procure that the Secondary Subcontractor do likewise; and

(B) Downer may at any time make payments and may deduct, withhold or set-off any amounts to be paid under such novated contracts from amounts otherwise payable to the Subcontractor; and

(iii) when possible, a right of termination for convenience.

(i) Downer may require at any time that it, its nominee or the Principal may conduct probity or criminal investigations to report on the character, integrity or honesty of the Subcontractor, its officers and employees or any other Relevant Person. The Subcontractor must do all things necessary to enable the investigation to be conducted. The Subcontractor must give Downer notice immediately upon becoming aware that a Probity Event has occurred.

**10.3 Intention to suspend**

(a) The Subcontractor must promptly give to Downer's Representative a copy of any notice of intention to suspend work that the Subcontractor receives from any of its Secondary Subcontractors under the Security of Payment Act or otherwise if that work forms part of the Work.

(b) If Downer receives a copy of a notice of intention to suspend work or a Secondary Subcontractor otherwise suspends or threatens to suspend work, Downer may, in its absolute discretion, pay the Secondary Subcontractor the whole or any part of the money that it states that it is owed by the Subcontractor for its work and the amount of the payment made by Downer is a debt due from the Subcontractor to Downer.

(c) Payment by Downer of any amount under clause 10.3(b) does not relieve the Subcontractor of any of its obligations or liabilities under this Subcontract.

(d) The Subcontractor indemnifies Downer against any liability, damage, loss, cost or expense (including legal costs on a full indemnity basis) incurred by Downer arising from:

(i) a suspension by any of its Secondary Subcontractors under the Security of Payment Act or pursuant to a right under the relevant subcontract, if the relevant work forms part of the Work; and

(ii) any failure of the Subcontractor to notify Downer under clause 10.3(a);

(e) The Subcontractor's liability under clause 10.3 is in addition to the Subcontractor's liability under clause 23.3 to the extent that payment made under that clause is not sufficient to or does not compensate Downer for the damage, loss, cost and expense referred to in clause 10.3.

**11 Legal Requirements**

**11.1 Compliance**

(a) The Subcontractor shall satisfy all Legal Requirements except those in Item 40 or directed by Downer to be satisfied by or on behalf of Downer.

(b) The Subcontractor, upon finding that a Legal Requirement is at variance with the Subcontract or the Project Objectives, shall promptly give Downer written notice thereof.

**11.2 Change in Legal Requirements**

Subject to clause 22.9, if a Legal Requirement:

(a) necessitates a change:

(i) to the Work; or

(ii) in a fee or charge or payment of a new fee or charge;

(b) comes into effect after the date of execution of the Subcontract but could not reasonably then have been anticipated by a competent and diligent subcontractor performing work similar to that of the Subcontractor; and

(c) causes the Subcontractor to incur more or less cost than otherwise would have been incurred,

the difference shall be assessed by Downer and added or deducted from the Subcontract Sum which shall constitute the Subcontractor's sole remedy in respect of a change in Legal Requirements.

**12 Site conditions**

**12.1 Notification and risk**

(a) No information and data made available or provided by or on behalf of Downer to the Subcontractor in relation to the Site, or its surrounds, shall form part of the Subcontract. Downer does not warrant, guarantee or make any representation with respect to the



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completeness, accuracy or adequacy of such information or data. Such information and data is furnished only for the convenience of the Subcontractor and the Subcontractor warrants that it has made and shall rely upon its own enquiries, investigations and assessments. The use of or reliance on any of the information and data is solely at the Subcontractor's own risk. Downer shall not be liable to the Subcontractor whether in contract or otherwise in connection with any fact, matter or thing arising out of or in any way connected with the information or data made available or provided to the Subcontractor as to the Site or subsurface conditions.

(b) If the Subcontractor becomes aware of any physical condition on, over or under the Site or its adjacent surroundings that may result in the Subcontractor being delayed in completing the Work, the Subcontractor must immediately notify Downer's Representative in writing.

(c) After it receives a written notification under clause 12.1(b) Downer's Representative may, in its absolute discretion, issue a Direction pertaining to the condition and the Subcontractor must comply with the Direction.

(d) The Subcontractor wholly assumes the risk associated with, and has no entitlement to make a Claim in relation to, the Site and its surroundings, including:

(i) any delay to or prolongation of the performance of the Work; and

(ii) any cost, loss or expense caused by or arising out of any conditions on, in, over or under the Site or its surroundings (whether naturally occurring or in consequence of human activity), including any structures, materials, physical conditions or any contamination.

(e) The Subcontractor warrants that it has taken into account in agreeing the Subcontract Sum and the Date for Practical Completion all risks associated with the Site as set out in this clause 12.1. The Subcontractor has no entitlement to make any Claim against Downer in any way relating to the risks associated with the Site or its surroundings, including the risks identified in this clause 12.1.

### 12.2 Archaeological or other finds

Any things of value or archaeological or special interest found on or under the Site are, as between the parties, the property of Downer. If such an item is found, the Subcontractor must immediately notify Downer's Representative in writing and must comply with all Directions of Downer's Representative pertaining to the item.

## 13 Construction

### 13.1 Subcontractor's obligations

(a) The Subcontractor must diligently and continuously perform its obligations under this Subcontract and carry out the construction of the Work in accordance with this Subcontract.

(b) In addition to any other rights of Downer under this Subcontract or at law, Downer may perform or have others perform any obligation of the Subcontractor under this Subcontract which the Subcontractor has failed to perform despite notice in writing from Downer requiring such performance. Downer may recover the costs and expenses of it or others performing the obligation as a debt due and immediately payable to Downer by the Subcontractor.

### 13.2 Setting out

The Subcontractor must set out the Work in accordance with this Subcontract. The Subcontractor must, if it considers information is necessary to enable it to set out the Work, promptly notify Downer's Representative in writing. If the Subcontractor discovers an error in the position, level, dimensions or alignment in any part of the Work, the Subcontractor must immediately notify Downer's Representative in writing and unless otherwise directed by Downer's Representative, the Subcontractor must rectify the error at its own risk, including cost and time risk and has no Claim in connection therewith.

### 13.3 Construction method

(a) The Subcontractor must, within 10 Business Days of the date of this Subcontract, provide a complete and competently prepared construction method statement for the Work including particulars of the mode and place of manufacture, the source of supply, performance capabilities and any other information in respect of any materials, plant or equipment to be supplied by the Subcontractor or used in connection with the Work.

(b) The Subcontractor must not bring onto the Site any plant or equipment to which it does not have title unless the supply or hire agreement for the plant or equipment contains a provision that:

(i) requires the supplier or hirer (as the case may be), to immediately notify Downer of any failure of the Subcontractor to pay any monies in accordance with the supply or hire agreement; and

(ii) gives Downer the option (but does not require it) to remedy that default within a period of an additional seven days.

(c) If requested by Downer, the Subcontractor must provide Downer's Representative with copies of all supply or hire agreements for all plant or equipment that it brings onto the Site.

### 13.4 Quality

(a) The Subcontractor warrants to Downer that it will use:

(i) materials which are new, suitable, undamaged, free from Defects and which strictly comply with the Australian Standards and the requirements of this Subcontract; and

(ii) all due care and skill and proper workmanship expected of an expert contractor carrying out work and services similar to the Work.

(b) The Subcontractor must do all things necessary to comply with any quality assurance system notified by Downer's Representative or must, if requested by Downer's Representative, implement its own quality assurance system approved by Downer's Representative.

(c) The Subcontractor acknowledges and agrees that any quality assurance system implemented by it may require performance of the following:

(i) inspection and checklisting of work on completion;

(ii) identification and rectification of Defects;

(iii) provision of records on request;

(iv) reporting of non-conformance;

(v) provision of samples and prototypes; and

(vi) provision of access to the Subcontractor's systems and records by Downer's Representative and any persons authorised by Downer's Representative for the purpose of inspection and audit.

### 13.5 Protection of work and materials

(a) The Subcontractor is, until Practical Completion, respons ble for and must protect from damage or loss the Work and other things and materials brought on to the Site by or for the Subcontractor. If any damage or loss occurs, the Subcontractor must at its own cost promptly make good the damage or loss and fully and sufficiently reinstate and replace the things, damages or loss.

(b) If the Subcontractor fails to make good the damage or loss after Downer's Representative has given the Subcontractor notice that it intends to have that work carried out by others if the Subcontractor does not carry out the work within the period specified by Downer's Representative, on expiry of that period



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Downer's Representative may have that work carried out by others and any cost incurred is a debt due and immediately payable from the Subcontractor to Downer.

(c) Despite any other provision of this Subcontract, the Subcontractor accepts as full payment for any reinstatement or replacement of the Work that is the subject of an insurance claim, the amount of insurance proceeds recovered by Downer or the Subcontractor in respect of that reinstatement or replacement.

(d) In respect of any materials supplied by Downer to the Subcontractor for incorporation in the Work, the Subcontractor shall examine and satisfy itself and be deemed to have examined and satisfied itself that each item is free from Defects and fit for the Intended Purpose, at the time that each is made available to the Subcontractor.

(e) Risk in any Downer-issued items shall pass to the Subcontractor upon them being made available to the Subcontractor. The Subcontractor shall keep safe and maintain all such items in good order and condition. All Downer-issued items shall remain the property of Downer and any surplus shall be returned to Downer, disposed of, or otherwise dealt with as directed by Downer. Waste of Downer-issued items as a result of bad workmanship, negligence or any other default of the Subcontractor shall be made good at the Subcontractor's cost.

**13.6 Urgent protection**

If urgent action is necessary to protect the Work, other property or people and the Subcontractor fails to take the action, Downer may take necessary action to protect the Work. If the action taken by Downer was, in the opinion of Downer's Representative, action which the Subcontractor should have taken at the Subcontractor's cost, the cost incurred by Downer is a debt due from the Subcontractor to Downer.

**13.7 Testing**

(a) At any time before the issue of the Final Certificate, Downer's Representative may direct that any part of the work or materials comprising the Work be tested. If the Direction requires the Subcontractor to perform the testing, Downer's Representative may observe and must be promptly provided with the results of any test performed.

(b) The reasonable and actual costs of and incidental to testing are to be added to the Subcontract Sum unless such testing:

(i) reveals work or materials not in accordance with this Subcontract;

(ii) is consequent upon a failure of the Subcontractor to comply with this Subcontract; or

(iii) was required to be performed by the Subcontractor or has otherwise been included in the Subcontract Sum as part of the work to be undertaken by the Subcontractor under any other provision of this Subcontract.

(c) Costs in respect of this clause 13.7 that are not to be borne by Downer shall be borne by the Subcontractor and, in the case of costs incurred by Downer of or incidental to such testing, certified by Downer as moneys due and immediately payable from the Subcontractor to Downer.

**13.8 Defects**

(a) If Downer discovers any Defect, Downer may direct the Subcontractor to do any one or more of the following (including times for commencement and completion):

(i) remove material from the Site;

(ii) demolish the Work; or

(iii) reconstruct, replace or correct the Work.

(b) The Subcontractor must comply with the Direction at its own cost. If the Subcontractor fails to comply with Downer's Direction, Downer may perform the relevant work or arrange for a third party to perform the relevant work, the cost of which will be a debt due from the Subcontractor to Downer (or the reasonably estimated cost of such work where the cost has not been incurred).

(c) Instead of a Direction under clause 13.8(a), Downer or the Principal may elect to accept the Defect and reduce the Subcontract Sum by an amount equal to the decrease in value to the Work (including increased future costs, loss of income, loss of value or reduction in asset life) as a result of the Defect.

(d) Downer may give a Direction under this clause at any time prior to the expiry of the Defects Liability Period.

**14 Variations**

**14.1 Variations**

(a) Downer's Representative may direct the performance of a Variation by notice in writing to the Subcontractor, such notice being expressly identified as a 'variation notice' (**Variation Notice**). The Subcontractor must execute any Variation directed by Downer's Representative in a Variation Notice.

(b) If:

(i) Downer's Representative issues a Direction which is not a Variation Notice, but requires or may cause the Subcontractor to carry out work that is a Variation; or

(ii) the Subcontractor is otherwise required to carry out any Work that constitutes a Variation (without having received a Variation Notice),

the Subcontractor must, before it commences carrying out such Work and in any event no later than five days after receipt of the relevant Direction or upon becoming aware of the requirement to carry out Work that constitutes a Variation (as applicable), provide to Downer a written claim identifying the Variation and setting out an estimate of the cost, delay and any other impact of the Variation, including any proposed adjustment to the Subcontract Sum.

(c) To the extent permitted by law, the Subcontractor will have no Claim in respect of any Work that constitutes a Variation unless:

(i) it has received a Variation Notice from Downer which complies with clause 14.1(a) in respect of that Work; and

(ii) to the extent clause 14.1(b) applies, the Subcontractor has complied strictly with clause 14.1(b) in respect of that Work.

(d) A Direction under clause 14.1(a) may involve the omission of any part or parts of the Work and the Subcontractor acknowledges and agrees that Downer may itself, or engage others to, carry out that part of parts so omitted at any time. The Subcontractor further acknowledges that any one or more omissions will not constitute a basis to allege that Downer has repudiated the Subcontract notwithstanding the extent or timing of the omission.

(e) Where Downer omits Work, the Subcontractor will not be entitled to any compensation in respect of that Work (including for loss of profit or any costs incurred by reason of the omission).

**14.2 Quotation for Variations**

(a) If Downer's Representative requests the Subcontractor to provide a quotation for a proposed Variation the Subcontractor must provide a detailed quotation for the work, supported by measurements and other evidence of cost, accompanied by details of any Extension of Time the Subcontractor seeks, within five days of the request by Downer's Representative.

(b) In response to any quotation provided by the Subcontractor to Downer's Representative under clause 14.2(a) Downer's Representative may:



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(i) require the Subcontractor to execute the Variation on the terms of the quotation;

(ii) decline to proceed with the Variation; or

(iii) reject the quotation and require the Subcontractor to carry out the Variation, in which case the Variation must be valued by Downer's Representative in accordance with clause 14.3 and any Extension of Time must be assessed by Downer's Representative in accordance with clause 21.

**14.3 Valuation of Variations**

(a) Subject to this clause 14.3 and the terms of this Subcontract, Downer shall ensure that the value of any Variation is added to or deducted from the Subcontract Sum (as applicable). If the Parties do not agree the value of a Variation, Downer's Representative will determine a reasonable value for the Variation and in doing so may have regard to:

(i) applicable rates and prices included in this Subcontract; and

(ii) any increase or decrease in the costs that have been or will be incurred by the Subcontractor as a direct result of the Variation.

(b) Despite clause 14.3(a), if a Direction to carry out a Variation under this Subcontract is the result of a Direction to Downer under the Head Contract, without limiting any other provision of the Subcontract and to the extent permitted by law, the Subcontractor is not entitled to be paid for that Variation any amount which is greater than the amount to which Downer is entitled to be paid for that Variation under the Head Contract.

(c) Where a Variation relates to a variation under the Head Contract and the Variation has been valued under the Head Contract otherwise than by agreement between Downer and the Principal, the Subcontractor shall not be allowed any greater value for the Variation than the relevant value which has been determined or assessed under the Head Contract.

(d) The Subcontractor shall not be entitled to any payment for a Variation unless it has performed the work the subject of the Variation and until a specific price for the Variation has been finally determined by agreement in writing between the Parties, pursuant to the terms of this Subcontract or pursuant to a dispute resolution process prescribed by this Subcontract.

**15 Conduct on and in the vicinity of the Site**

**15.1 Protection of people and property**

(a) In the performance of the Work the Subcontractor must take all measures and provide all things reasonably necessary to protect the environment, people and property.

(b) Without limiting the generality of the foregoing, the Subcontractor must:

(i) take all necessary action, to the satisfaction of Downer, to minimise vibration, shock and noise arising from construction activities for the Work;

(ii) ensure that all construction facilities erected on the Site by the Subcontractor are designed and operated to minimise any nuisance arising from dust caused by construction activities;

(iii) take all proper precautions to minimise the impact of discharge of water into waterways on and in the vicinity of the Work and the Site;

(iv) take all precautions necessary to prevent the discharge into waterways of any oils or similar materials or of any foaming or non-biodegradable detergents and the Subcontractor acknowledges and agrees that all plant and equipment maintenance shall be carried out on a paved area, the drainage from which shall be provided with approved soil separation traps before discharge into any waterway. The Subcontractor shall be solely responsible for regular removal of deleterious matter from such traps and its disposal by approved methods; and

(v) ensure that the whole of the Subcontract Works and all operations related to them are carried out in a manner which will minimise inconvenience and nuisance to occupants of adjacent buildings, the public, Downer and to other subcontractors and workers.

**15.2 Access to other Properties**

(a) The Subcontractor acknowledges that it has been made aware of, and will comply with, any agreement made between the Principal and/or Downer and the owners of the land adjacent to and proximate to the Site and all matters included therein (including but not limited to restrictions on hours of work).

(b) Except for permissions and arrangements that Downer informs the Subcontractor have already been obtained or made, the Subcontractor must, at its own cost, and expense:

(i) obtain any necessary or appropriate permission to work upon, up to, in, over, under or make use of any adjoining or neighbouring site or property; and

(ii) make all arrangements for any access to work upon, up to, in, over, under or to make use of any adjoining or neighbouring site or property,

which the nature of the Work requires or which it may otherwise require for any purpose of the Subcontract or the Work.

(c) The Subcontractor accepts liability for and agrees to indemnify and keep indemnified and hold harmless Downer and the Principal in respect of any cost, expense, loss or damage arising out of or in connection with the Work being carried out upon, up to, in, over, under or by making use of any adjoining, adjacent or surrounding sites or properties or contrary to the terms of any agreement referred to in clause 15.2(a).

**15.3 Removal of persons from Site**

Downer's Representative may direct the Subcontractor to remove from the Site any person whom Downer's Representative considers to be disruptive, incompetent, negligent or guilty of misconduct. The written Approval of Downer's Representative must be obtained by the Subcontractor before the Subcontractor subsequently employs the person on Site or has the person involved in activities in any way connected with the Work.

**16 Intellectual Property Rights**

**16.1 Intellectual Property Rights granted to the Subcontractor**

(a) The term "author" in this clause 16.1 is to be interpreted as bearing the same meaning as under the *Copyright Act 1968* (Cth).

(b) The Subcontractor agrees that all present and future copyright and other Intellectual Property Rights of the Subcontractor in all Design Documents, drawings, reports, specifications, calculations, documents and other material provided or prepared by the Subcontractor, its employees, Secondary Subcontractors or agents in connection with the Work (the **Materials**) vests in Downer.

(c) The Subcontractor must ensure that no person will make any claim under Part IX of the *Copyright Act 1968* (Cth) arising out of or connected with the Materials.

(d) The Subcontractor must ensure that, and warrants that, it has obtained from all authors and holders of the Moral Rights in the Deliverables and the Work, consent to the following specific acts or omissions by



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Downer and the Principal and their successors, assigns and sub-licensees:

(i) reproducing, publishing, adapting or communicating the Deliverables and the Subcontractor's other documents to the public without attr buting their authorship or otherwise identifying the author of the relevant Deliverables and other documents; and

(ii) subjecting the Deliverables and any other relevant documents to derogatory treatment, including material distortion, mutilation or material alteration or the doing of anything else to the Deliverables and documents, including adapting, reproducing, publishing, communicating to the public, adding, deleting, editing or modifying the text, format or structure of the Deliverables and documents, in such a way as may prejudice the honour and reputation of the author.

(e) If requested by Downer's Representative, the Subcontractor must obtain a written consent substantially in the form of Schedule 5 that operates for the benefit of Downer, its assignees, licensees or anyone authorised by Downer, from each author of the Materials to the fullest extent validly permitted by Part IX of the *Copyright Act 1968* (Cth), genuinely consenting to the doing of any acts or omissions that would, except for the giving of the consent, constitute a breach of the author's rights under Part IX of the *Copyright Act 1968* (Cth), prior to that author commencing work on any Materials.

(f) The Subcontractor must deliver to Downer's Representative any consents obtained by the Subcontractor under this clause 16.1 within seven days of a request being made to that effect by Downer's Representative.

**16.2 Use of the Subcontract Documents**

Downer licences the Subcontractor and any Secondary Subcontractors approved under this Subcontract to use the Materials and the Subcontract Documents for the purpose of executing the Work.

**16.3 Irrevocable Licence**

Where the Subcontractor cannot pass title in Intellectual Property Rights to Downer in accordance with clause 16.1, the Subcontractor grants to Downer (and warrants that it has all rights and title to enable it to grant to Downer) a perpetual, irrevocable, transferable, worldwide, royalty-free licence of all such Intellectual Property Rights for Downer to use the Deliverables and all aspects of the Work for all purposes so as to comply with all of its obligations under the Head Contract (including the right to sub-licence and to transfer relevant Intellectual Property Rights to the Principal or other third parties).

**17 Reports and Approvals**

**17.1 Reports and records**

Downer's Representative may at any time direct the Subcontractor to submit a report or provide records to Downer's Representative containing such information as is reasonably requested by Downer's Representative for the purpose of monitoring the Subcontractor's compliance with this Subcontract or auditing the state of the Subcontractor's finances but nothing in this clause shall oblige the Subcontractor to provide any document that is the subject of legal professional privilege. The Direction may specify that compliance with the Direction is a precondition to the entitlement of the Subcontractor to issue a progress claim or further progress claim pursuant to clause 22. If the Direction provides that compliance with the Direction is a precondition to the issuing of a progress claim or further progress claim, then it is hereby agreed to constitute such a precondition.

**17.2 Approvals**

Except for those Approvals listed in Item 29, the Subcontractor must obtain (and pay all charges and costs associated with those Approvals) and comply with all Approvals required for the performance and completion of the Work, and must ensure that all such Approvals remain in full force and effect at all times. The Subcontractor must promptly provide to Downer's Representative copies of all Approvals obtained by the Subcontractor.

**18 Cleaning Up**

(a) The Subcontractor must keep the Site and the Work clean and tidy and must regularly remove rubbish from the Site and at the times directed to do so by Downer's Representative.

(b) Prior to Practical Completion (and as a precondition to Practical Completion), the Subcontractor must remove any temporary works, plant and equipment unless directed otherwise by Downer's Representative.

**19 Defects Liability Period**

**19.1 Rectification**

(a) Without limiting any other obligations of the Subcontractor under this Subcontract or at law, the Subcontractor must promptly rectify any Defect that is found to exist in the Work at the Date of Practical Completion or at any time during the Defects Liability Period.

(b) The Subcontractor must, when directed by Downer's Representative to do so, rectify any Defect in the Work at its sole risk and expense. The Direction may, without limitation, require the Subcontractor to remove material from the Site, demolish work, reconstruct, replace or correct the material or Work. Downer's Representative may direct the times within which the Subcontractor must commence and complete rectification of a Defect. The Subcontractor must notify Downer's Representative when rectification of a Defect has been completed.

**19.2 Downer's Representative may fix further Defects Liability Period**

Downer's Representative may extend the Defects Liability Period in respect of work to be rectified under clause 19.1 for a period specified by Downer's Representative but which must not exceed the length of the initial Defects Liability Period.

**19.3 Defects rectified by others**

If the Subcontractor fails to rectify any Defect in accordance with clause 19.1 or in accordance with a Direction given under clause 19.1, Downer may rectify the Defect itself or have the Defect rectified by others (including the Principal), and Downer may:

(a) certify and recover all actual or anticipated costs of so doing as a debt due and immediately payable from the Subcontractor to Downer provided that Downer accounts to the Subcontractor for any amount by which the anticipated costs exceed the actual costs; or

(b) accept the Defect and recover its assessment of any consequent reduction in value of the Work or claim upon Downer by the Principal as a debt due from the Subcontractor to Downer.

**20 Time**

**20.1 Practical Completion**

The Subcontractor must carry out the Work with due expedition and without delay and so as to achieve Practical Completion by the Date for Practical Completion.

**20.2 Subcontractor's program**

(a) The Subcontractor must supply to Downer's Representative at least seven days before the commencement of any work, a program for the performance of the Work compliant with clause 20.3 and Downer may, from time to time, direct the Subcontractor to give to Downer an updated program within the time and in the form directed by Downer, which program must:

(i) conform with the programming requirements of Downer including those in clause 20.3;



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(ii) be consistent with any Head Contract Program, as provided from time to time by Downer to the Subcontractor; and

(iii) be approved by Downer.

(b) The Subcontractor shall not, without reasonable cause, depart from a program approved by Downer.

(c) An approved program may be used by Downer in its absolute discretion to monitor the progress of the Work by the Subcontractor and assess claims for Extensions of Time but no program, approved program or Head Contract Program shall form part of the Subcontract and any departure from or amendment of a program, approved program or Head Contract Program shall not entitle the Subcontractor to any Claim, including a Claim for an Extension of Time. The Subcontractor's entitlement to an Extension of Time shall only arise in accordance with clause 21.

(d) Without limiting any other obligation of the Subcontractor under this Subcontract, the Subcontractor must:

(i) not, without reasonable cause, depart from the current Head Contract Program insofar as it identifies or is dependent upon the Work; and

(ii) immediately notify Downer in writing if its performance of the Work will depart from that identified in the Head Contract Program or delay the performance of activities identified in the Head Contract Program current at the time of departure, which are dependent upon performance of the Work.

(e) The Subcontractor shall not be entitled to any Claim arising from its obligations pursuant to this clause 20.2

**20.3 Contents of the program**

Each program provided by the Subcontractor under clause 20.2 must include:

(a) the date of commencement and the Date for Practical Completion;

(b) the sequence and timing of each component of the Work, including a critical path network analysis in the form of a time scaled bar chart;

(c) the dates when the Subcontractor is required to provide any information or materials in connection with the Work; and

(d) all other information reasonably required by Downer's Representative,

and must be provided to Downer in its native format with all logic links exposed and capable of being interrogated.

**20.4 Suspension**

(a) Downer's Representative may at any time and for any reason suspend the whole or any part of the Work by written notice to the Subcontractor. If Downer's Representative does so, the Subcontractor must not recommence work on the whole or on the relevant part of the Work until Downer's Representative directs the Subcontractor to do so in writing.

(b) If Downer Directs the Subcontractor to suspend the Work or any part of the Work, then at the time of issuing such Direction or at any subsequent time, Downer may also instruct the Subcontractor to:

(i) reduce the resources, including staff, allocated to the performance of the Work; and/or

(ii) demobilise all resources from the performance of the Work,

within the time nominated by Downer (provided that such time is not less than two days after the Direction is issued).

(c) The Subcontractor must resume the performance of the suspended Work as soon as practicable after being Directed by Downer and in any event not later than five days after receiving a written instruction to do so from Downer.

(d) The Subcontract Sum will be adjusted by Downer to include the reasonable costs actually incurred by the Subcontractor directly as a result of the suspension, except where the suspension is occasioned by an act or omission of the Subcontractor, in which case the Subcontractor will not be entitled to any adjustment of the Subcontract Sum or any Extension of Time to the Date for Practical Completion in connection with the suspension. The adjustment of the Subcontract Sum pursuant to this clause 20.4(d) and any Extension of Time to which the Subcontractor is entitled pursuant to clause 21 shall be the Subcontractor's sole remedy in connection with any suspension of the Work pursuant to this clause 20.4.

**20.5 Milestones**

If any milestone and corresponding milestone date are referred to in this Subcontract or any program approved by Downer pursuant to clause 20.2, the Subcontractor must bring that portion of the Work which comprises the milestone to the stage of completion by the relevant milestone date specified.

**20.6 Corrective Action**

(a) Without limiting any other right of Downer or obligation of the Subcontractor under this Subcontract, the Subcontractor agrees that:

(i) if at any time the progress of Work has fallen behind that shown in a program approved by Downer or is otherwise not in accordance with this Subcontract, the Subcontractor shall at its own cost take the necessary corrective action to ensure that progress is maintained in accordance with this Subcontract. Subject to permissible working hours, such corrective action may include the working of overtime and additional shifts, the application of more resources to carry out Work and the adjustment and rescheduling of activities. Downer may from time to time direct the Subcontractor to provide details of the corrective action it plans to take under this clause 20.6 and the Subcontractor must provide such details in writing within five Business Days of the Direction; and

(ii) if the Subcontractor fails to take corrective action in accordance with clause 20.6, Downer may direct the Subcontractor as to the corrective action it is to take and the Subcontractor shall comply with such Direction at its own cost and risk.

(b) The Subcontractor shall have no Claim in connection with, or as a consequence of, complying with its obligations under this clause 20.6.

**20.7 Proposal to accelerate**

Downer may at any time prior to the Date for Practical Completion by written notice request the Subcontractor to provide a proposal to accelerate the performance of the Work so as to expedite the achievement of Practical Completion. Within three days of such a request, the Subcontractor shall provide a written proposal to Downer which contains the following details:

(a) the measures which the Subcontractor considers necessary to accelerate the performance of the Work so as to expedite the achievement of Practical Completion; and

(b) the additional payment required by the Subcontractor to achieve the acceleration of the performance of the Work so as to expedite the achievement of Practical Completion.

Notwithstanding that, if Downer finds the Subcontractor's acceleration proposal to be unacceptable, whether in terms of the measures proposed or the additional payment required or otherwise, Downer may nevertheless give the Subcontractor a Direction to accelerate which expressly states that it is an acceleration Direction given under this clause and which contains the following:



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(i) the general measures which Downer requires the Subcontractor to take to accelerate the performance of the Work so as to expedite the achievement of Practical Completion;

(ii) the time by which the Subcontractor shall commence to implement the acceleration Direction; and

(iii) the reasonable revised (earlier) Date for Practical Completion.

(c) The Subcontractor shall comply with the acceleration Direction and Downer shall assess and certify the additional costs payable to the Subcontractor reasonably and necessarily arising from compliance with the acceleration Direction as an amount payable by Downer to the Subcontractor, which amount shall constitute the Subcontractor's sole entitlement to payment in connection with the acceleration Direction and which amount shall not be payable unless the acceleration Direction is implemented by the Subcontractor to the reasonable satisfaction of Downer.

(d) For the avoidance of doubt, a Direction by Downer to the Subcontractor to accelerate or take any corrective action or other measures to catch up on progressing the Work as a result of any delay in the Work for which the Subcontractor is not entitled to an Extension of Time for any reason, does not constitute an acceleration Direction pursuant to this clause 20.7.

## 21 Delay

### 21.1 Notice

(a) If the Subcontractor:

(i) is or will be delayed in reaching Practical Completion by the Date for Practical Completion by a Qualifying Cause of Delay:

(ii) takes all reasonable steps to prevent, overcome and mitigate the effects of the delay (including by reconfiguring the critical path of the Work to accommodate, minimise or overcome the delay);

(iii) gives Downer within five days of the date of the earliest to occur of:

(A) the commencement of the cause of the delay;

(B) the Subcontractor becoming aware that the Subcontractor is or will be delayed; or

(C) the date that the Subcontractor should reasonably have been aware that the Subcontractor is or will be delayed,

(**Notice Trigger Date**)

written notice that it intends to make a claim for an Extension of Time to the Date for Practical Completion pursuant to clause 21.1(a)(iv), setting out a brief description of the facts upon which the claim may be based and the current estimate of the delay or potential delay based on the information reasonably available to the Subcontractor at that stage;

(iv) gives Downer within 10 days of the Notice Trigger Date, a detailed written claim for an Extension of Time which:

(A) evidences the cause, effect and extent of the delay and the number of days extension claimed together with the basis of such claim;

(B) identifies with a program analysis the critical activities delayed on the Subcontractor's program;

(C) demonstrates the Subcontractor's compliance with clause 21.1(a)(ii); and

(D) is warranted as being true and correct to the best of the Subcontractor's knowledge and belief; and

(v) in the case of an ongoing delay that continues beyond the date on which the claim is submitted pursuant to clause 21.1(a)(iv), an updated written claim for an Extension of Time every five days after the submission of the claim pursuant to clause 21.1(a)(iv) until the delay has ceased,

then, subject to clauses 21.1(b) and 21.2, the Subcontractor is entitled to such Extension of Time to the Date for Practical Completion as Downer (acting reasonably) determines but only to the extent that:

(vi) the Qualifying Cause of Delay has caused delays to the critical path of the Work; and

(vii) the Qualifying Cause of Delay is not caused or contributed to by, or connected with, any act or omission of the Subcontractor, a Secondary Subcontractor or their respective agents, personnel and representatives.

(b) If more than one event causes a delay and the cause of at least one of those events is not a Qualifying Cause of Delay, then to the extent that the events of delay or the effects of those events of delay are concurrent, the Subcontractor is not entitled to an Extension of Time.

(c) If at the time the Subcontractor is required to give a notice under clause 21.1(a), the duration or impact of the delay is not ascertainable then the Subcontractor must in the notice state what details are not yet known and must give a further notice or notices advising those details promptly once they are known.

### 21.2 Failure to give notice

Strict compliance by the Subcontractor with clause 21.1 is a pre-condition to any entitlement to an Extension of Time. The Subcontractor is not entitled to make or maintain any Claim for an Extension of Time in connection with a delay (and irrevocably waives any entitlement to make or maintain any such Claim) if the Subcontractor has not complied strictly with clause 21.1 in connection with the delay.

### 21.3 Response by Downer's Representative

(a) If the Subcontractor is entitled to an Extension of Time pursuant to clause 21.1, Downer must, within 28 days (if the Qualifying Cause of Delay is not the subject, in whole or in part, of an extension of time claim by Downer under the Head Contract) or 45 days (if the Qualifying Cause of Delay is the subject, in whole or in part, of an extension of time claim by Downer under the Head Contract) after receiving a claim by the Subcontractor made in accordance with clause 21.1 (or where the delay is ongoing, after the Subcontractor has issued the final updated claim pursuant to clause 21.1(a)(v)), issue in writing to the Subcontractor its assessment of any Extension of Time to which Downer considers the Subcontractor is entitled.

(b) A delay by Downer or the failure of Downer to grant a reasonable Extension of Time or to grant an Extension of Time within the relevant period referred to in this clause 21.3 shall not cause the Date for Practical Completion to be set at large but nothing in this paragraph shall prejudice any right of the Subcontractor to damages.

### 21.4 Extension of Time claim and accelerations

(a) If the Subcontractor gives a claim under clause 21.1, irrespective of whether the Subcontractor is entitled to any Extension of Time, Downer may direct the Subcontractor to accelerate the Work by taking those measures which are necessary to overcome or minimise the extent and effects of some or all of the delay, including if required, to reach Practical Completion by the Date for Practical Completion. If Downer gives an acceleration Direction that only applies to part of the delay for which the Subcontractor



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is entitled to an Extension of Time, the Subcontractor's entitlement to any Extension of Time shall be reduced to the like extent.

(b) If Downer gives the Subcontractor an acceleration Direction the Subcontractor shall accelerate the Work to overcome or minimise the extent and effect of the delay, including if required, to reach Practical Completion by the Date for Practical Completion. If the Subcontractor would, but for the Direction, have been entitled to an Extension of Time, the Subcontractor shall be entitled to be paid the extra costs reasonably and necessarily incurred by it and directly attributable to accelerating the Work as assessed and certified by Downer's Representative.

**21.5 Downer may extend**

At any time, Downer may, under this clause, grant an Extension of Time to the Subcontractor for the benefit of Downer regardless of whether or not the Subcontractor has made a claim for Extension of Time. Downer is not obliged to exercise the right under this clause 21.5 for the benefit of the Subcontractor and the exercise of the right under this clause 21.5 shall not entitle the Subcontractor to make any Claim.

**21.6 Delay Costs**

(a) For every day the subject of an Extension of Time for a Compensable Cause and for which the Subcontractor gives Downer a claim for Delay Costs strictly in accordance with clause 29, the Subcontractor shall be entitled to recover such additional costs in respect of the Subcontractor's personnel, Secondary Subcontractors and construction plant directly engaged either on-Site or off-Site in the performance of the Work (excluding profit, mark-up or off-Site overheads) which are reasonably, necessarily and actually incurred directly as a result of the delay and which are substantiated to Downer in writing, provided that the Subcontractor will not be entitled to any amount exceeding the amount stated in Item 31.

(b) The amount of Delay Costs payable pursuant to this clause is the agreed damages which will be payable by Downer in these circumstances and will be a limit upon Downer's liability to the Subcontractor for any delay, disruption or prolongation which arises out of or in connection with this Subcontract, howsoever caused, except in respect of a suspension Direction issued by Downer pursuant to clause 20.4 or arising pursuant to a right under clause 27.9(a), in which case the Subcontractor's sole entitlement shall be its entitlement pursuant to clause 20.4(d) or 27.9(b), as the case may be.

(c) The Subcontractor must take all reasonable steps to reduce, and where possible eliminate, the costs referred to in this clause 21.6

(d) Compliance by the Subcontractor with this clause 21.6 and clause 29 is a pre-condition to the Subcontractor's entitlement to the payment of any amount in connection with any delay. If the Subcontractor fails to comply with this clause 21.6 in respect of any delay, the Subcontractor shall have no Claim in connection with the delay.

**22 Payment**

**22.1 Progress Claims**

(a) The Subcontractor must submit progress claims to Downer at the times stated in Item 32, which date shall be a 'reference date' for the purposes of the Security of Payment Act.

(b) The Subcontractor shall have no entitlement to, and will not, submit a payment claim, except in accordance with this clause 22 and at the times set out in Item 32.

(c) An early progress claim will be deemed to have been made on the date for making that claim stated in Item 32.

(d) A progress claim for payment must, as a condition precedent to its validity:

(i) identify all Work carried out by the Subcontractor in the performance of the Subcontract up to the date of the progress claim, with all corresponding amounts then claimed in respect of the Subcontract Sum;

(ii) include the Subcontractor's valuation of Work executed (including, where there are separable portions, the Work performed within each such separable portion);

(iii) include the amount and particulars of any adjustments to the Subcontract Sum;

(iv) include the total amount previously certified pursuant to subclause 22.2;

(v) include the total amount previously paid or deemed to have been paid to the Subcontractor;

(vi) include the amount then claimed by the Subcontractor;

(vii) include the Subcontractor's estimated cost to complete the Works;

(viii) be accompanied by a warranty in the form attached as Schedule 16 duly executed by the Subcontractor;

(ix) be accompanied by certificates of currency in respect of each policy of insurance required to be held by the Subcontractor pursuant to this Subcontract; and

(x) be accompanied by any other documents requested by the Subcontract or reasonably required by Downer.

**22.2 Certificates**

(a) Downer must, within 10 Business Days after receiving a progress claim made in accordance with clause 22.1, assess the claim and issue to the Subcontractor a progress certificate evidencing Downer's opinion, subject always to clause 22.8, of the moneys due from Downer to the Subcontractor pursuant to the progress claim (if any) or from the Subcontractor to Downer (as the case may be) and reasons for any difference (Progress Certificate).

(b) If the Subcontractor does not make a Progress Claim in accordance with clause 21.1, Downer may nevertheless issue a progress certificate.

(c) Upon issue of a Progress Certificate the Subcontractor must within, two Business Days, issue a corresponding Tax Invoice to Downer for the value identified in the Progress Certificate.

(d) Downer must, within the time stated in Item 41, pay the Subcontractor the amount due under the Progress Certificate less any set off Downer is entitled to make.

(e) If the Progress Certificate shows an amount due from the Subcontractor to Downer or Downer's setting off results in an amount due from the Subcontractor to Downer, the Subcontractor must pay such amount within five Business Days after receiving the Progress Certificate.

(f) Downer may, in any subsequent Progress Certificate, amend an earlier Progress Certificate.

**22.3 Unfixed plant and materials**

(a) Downer will not be liable to pay for unfixed plant and materials unless they are listed in Item 33 and the Subcontractor:

(i) provides the additional security in Item 42;

(ii) satisfies Downer that the subject plant and materials have been paid for, properly stored and protected, and labelled the property of Downer; and

(iii) satisfied Downer that the subject plant and materials have been insured and such insurance notes Downer's interests.



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(b) Upon payment to the Subcontractor and the release of any additional security in clause 22.3(a)(i), the subject plant and materials will be the unencumbered property of Downer.

**22.4 Final Payment Claim and certificate**

(a) Within 20 Business Days of the last to occur of the expiry of all Defects Liability Periods or the rectification by the Subcontractor of all Defects in accordance with clause 19.1, the Subcontractor must give Downer a written final payment claim endorsed 'Final Payment Claim' being a progress claim together with all other claims whatsoever in connection with the subject matter of the Subcontract to the extent not already barred (Final Payment Claim).

(b) Within the earlier of 10 Business Days after the receipt of the Final Payment Claim or, where no Final Payment Claim is made by the Subcontractor, 10 Business Days after the last date for submitting the Final Payment Claim pursuant to clause 22.4(a), Downer must issue to both the Subcontractor and Downer a Final Certificate evidencing the moneys finally due and payable between the Subcontractor and Downer on any account whatsoever in connection with the subject matter of the Subcontract.

(c) The Subcontractor must, as a condition precedent to the release of the balance of security pursuant to clause 8.5 and receiving any amount certified as being payable in accordance with clause 22.4(d), provide to Downer an executed Deed of Final Release in the form set out at Schedule 4 setting out the moneys finally due and payable between the Subcontractor and Downer, as certified in the Final Certificate.

(d) Those moneys certified by Downer as due and payable must be paid:

(i) by the Subcontractor (if the Final Certificate shows an amount payable by the Subcontractor) within 10 Business Days after the Final Certificate is issued; or

(ii) by Downer (if the Final Certificate shows an amount payable by Downer) by the later of:

(A) 10 Business Days after the Final Certificate is issued; and

(B) five Business Days after the Subcontractor provides to Downer the executed Deed of Final Release strictly in accordance with this Subcontract.

**22.5 Interest**

The Subcontractor is liable to pay to Downer interest at the rate stated in Item 34 on any amounts that the Subcontractor fails to pay to Downer by the date on which such amount becomes due and payable under this Subcontract.

**22.6 Effect of payment**

Any payment made by Downer to the Subcontractor is on account only and is not evidence of the value of the Work or that the Work has been satisfactorily completed.

**22.7 Provisional sums**

(a) The Subcontract Sum includes the provisional sums (**Provisional Sum Allowance**), if any, stated in Part B of the Subcontract Details.

(b) No part of the Provisional Sum Allowance is itself payable by Downer but where at the Direction of Downer the work or item to which the Provisional Sum Allowance relates is performed or supplied by the Subcontractor, the provisions of clause 22.7(c) to (f) shall apply.

(c) Unless otherwise specified in this Subcontract, the Provisional Sum Allowance includes the costs associated with the supply, delivery, storage and installation of goods and materials, together with any on or off site work. The Provisional Sum Allowance includes all taxes (but excluding GST) as applicable and includes the Subcontractor's allowances for attendance and profit for the work covered by or associated with the scope of the work to which the Provisional Sum Allowance relates.

(d) It is the Subcontractor's responsibility to advise Downer in sufficient time of the date when any items to which a Provisional Sum Allowance applies are required on Site to ensure that the requisite design documentation, tendering, order, manufacture and delivery times will comply with the approved program and not cause a delay to the performance of the Work.

(e) Downer's Representative shall adjust the Provisional Sum Allowance as follows:

(i) where a part or the whole of the work or item to which the Provisional Sum Allowance relates is performed or supplied by or on behalf of the Subcontractor at the Direction of Downer, the actual value of the work or item shall be valued by Downer's Representative and, subject to clause 22.7(f) the difference added to or deducted from the Subcontract Sum; or

(ii) if Downer does not issue a Direction to the Subcontractor to perform work the subject of a Provisional Sum Allowance, the Subcontract Sum shall be reduced by an amount equal to that Provisional Sum Allowance.

(f) If a percentage amount is stated in Item 35, then the adjustment to the Subcontract Sum pursuant to clause 22.7(e)(i) must include an increase at the percentage stated calculated upon any amount by which the actual value of the item or work the subject of a Provisional Sum Allowance as valued by Downer's Representative exceeds the amount of a relevant Provisional Sum Allowance.

**22.8 Set off**

Without prejudice to any other right available to Downer under this Subcontract or at law, Downer may, at any time, deduct or set-off from either or both of any money payable or to become payable by Downer to the Subcontractor under this Subcontract and/or any security provided by the Subcontractor under this Subcontract:

(a) any money due, or reasonably claimed to be due or to become due, from the Subcontractor to Downer whether in connection with this Subcontract or otherwise, including:

(b) any amount payable or allowable in favour of Downer by way of liquidated damages;

(c) any amount which the Subcontractor owes to Downer (whether or not the amount is expressed to be a debt due from the Subcontractor to Downer or is an amount in respect of which the Subcontractor indemnifies Downer); and

(d) any other loss, cost, expense or damage incurred by Downer in respect of which the Subcontractor is or may be liable to Downer (including under this Subcontract, any other agreement or on any other basis whatsoever).

**22.9 Subcontract Sum**

The Subcontract Sum, including any rates set out in this Subcontract (including the Schedule of Rates), will not be subject to adjustment for rise and fall, exchange rate variations or any changes to general or market specific economic conditions.

**22.10 Withholding payment**

Notwithstanding anything else in this Subcontract, if the Subcontractor fails to provide a duly executed warranty in the form of Schedule 16 as required by clause 22.1, or if Downer reasonably forms the view that a Secondary Subcontractor has not been paid an amount due to it under its subcontract, Downer may:

(a) withhold any moneys due and payable to the Subcontractor until the Subcontractor provides the duly executed warranty in the form of Schedule 16 and



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such evidence of payment of employees and Secondary Subcontractors as Downer may reasonably require; and

(b) make payments directly to any Secondary Subcontractors in respect of any unpaid amounts claimed to be due and payable to those persons and:

(i) such payment will be deemed to constitute a payment by Downer to the Subcontractor on account of the Subcontract Sum for the purposes of the Subcontract; and

(ii) the Subcontractor shall have no Claim in respect of the Work to which such payment relates.

**23 Practical Completion**

**23.1 Notice**

(a) The Subcontractor must notify Downer's Representative in writing when it considers it has achieved Practical Completion.

(b) The achievement of Practical Completion requires, in addition to any other requirement of this Subcontract, compliance with the following:

(i) that the Work (including equipment, plant services and installation) has been demonstrated and tested to the satisfaction of Downer's Representative:

(A) to perform as required by this Subcontract both under normal conditions and under emergency conditions; and

(B) to have been tested, commissioned and be in a continually usable condition; and

(ii) the Subcontractor has provided to Downer's Representative:

(A) an executed Deed of Release in the form set out in Schedule 3; and

(B) all warranties, guarantees, manuals and drawings required under this Subcontract or reasonably requested by Downer's Representative, in a format acceptable to Downer's Representative, and any other warranties which are available from suppliers and manufacturers for the equipment, plant or materials used in or provided for the Work; and

(iii) the Subcontractor has:

(A) handed over all necessary information required by Downer's Representative for the operation and maintenance of the Work;

(B) removed all rubbish, plant and surplus material from the Site, other than plant and equipment required for the carrying out of the Subcontractor's obligations in the Defects Liability Period; and

(C) procured all certificates and Approvals from all necessary authorities to the extent the Subcontractor is required by this Subcontract to procure them.

**23.2 Practical Completion**

When Downer's Representative is of the opinion that the Work has achieved Practical Completion and that the Subcontractor has complied with all other relevant obligations, Downer's Representative must certify Practical Completion by issuing a certificate to that effect to the Subcontractor, identifying the date on which Practical Completion was achieved, which date may be a date other than that on which the certificate of Practical Completion is issued.

**23.3 Liquidated damages**

(a) If Practical Completion is not achieved by the Date for Practical Completion, the amount of liquidated damages at the rate set out in Item 36 shall accrue as a debt due and immediately payable by the Subcontractor to Downer for every day after the Date for Practical Completion until and including the earlier of:

(i) the Date of Practical Completion; or

(ii) the date that this Subcontract is terminated or the Work is taken out of the Subcontractor's hands.

(b) The liability of the Subcontractor under this clause 23.3 is not and is not deemed to be, inclusive of nor does it in any way limit or reduce, any amount for which the Subcontractor is liable under any indemnity under this Subcontract.

(c) If liquidated damages are found to be void, voidable or unenforceable on any basis so that Downer is not entitled to claim liquidated damages for the Subcontractor's failure to reach Practical Completion by the Date for Practical Completion, Downer is entitled to claim general law damages if the Subcontractor fails to reach Practical Completion by the Date for Practical Completion.

(d) If an Extension of Time is directed after the Subcontractor has paid or Downer has set-off liquidated damages, Downer shall forthwith repay or allow to the Subcontractor an amount equal to such of those liquidated damages as represent the days the subject of the Extension of Time.

(e) The Parties acknowledge and agree that the amount(s) for liquidated damages payable under this Subcontract are a genuine pre-estimate of Downer's damages if the Work does not reach Practical Completion by the Date for Practical Completion.

(f) A failure by Downer at any time to demand payment or to deduct, withhold or set-off the liquidated damages does not amount to a waiver of, or otherwise affect, Downer's rights and entitlements.

**23.4 Separable portions**

(a) At any time and from time to time, separable portions may be directed by Downer's Representative, including if any part of the Work has reached a stage equivalent to Practical Completion but others have not.

(b) The definitions of Practical Completion, Defects Liability Period, Date for Practical Completion and Date of Practical Completion and clauses 8, 19, 20 and 21 apply separately to each separable portion.

(c) Thereafter, references to the Work mean so much of the Work as is comprised in the relevant separable portion.

(d) The amount of the liquidated damages applicable to a separable portion are such proportion of the amount applicable to the whole of the Work as the value of the separable portion bears to the Subcontract Sum.

(e) Where separable portions have been directed and without limiting any other provision of this Subcontract with respect to Downer's rights in respect of security, security provided by the Subcontractor shall not be released until the circumstances for the release prescribed by this Subcontract have been satisfied in respect of the Work the subject of the last separable portion to reach Practical Completion.

**24 Industrial relations**

**24.1 Compliance**

(a) The Subcontractor must comply, and must ensure that all of its workforce, Secondary Subcontractors and agents comply, with all Legal Requirements in respect of industrial and workplace matters, including:

(i) all state and federal legislation and legally enforceable codes of practice which apply to the Work or the Site; and



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(ii) all applicable legally enforceable agreements, awards and workplace agreements.

(b) The Subcontractor must make available upon reasonable notice whatever documents and records Downer's Representative requests to see concerning compliance with this clause.

**24.2 Industrial disputes**

(a) The Subcontractor must do everything possible to avoid and minimise the consequences of industrial disputes of any kind.

(b) The Subcontractor is responsible for and assumes all risks of and incidental to all industrial actions, actions, bans, limitations and disputes (whether lawful or unlawful) in relation to industrial relations or employment issues both on and off Site with its workforce and those of its Secondary Subcontractors and agents.

**25 Work health and safety**

Without limiting any other obligation of the Subcontractor under this Subcontract, the Subcontractor must comply with the OHS Rules.

**26 Environment**

**26.1 Compliance**

The Subcontractor must comply with all Legal Requirements in respect of environmental matters and the protection or preservation of the environment including all state and federal legislation and codes of practice which apply to the Work or the Site.

**26.2 Hazardous substances and materials**

If the Subcontractor intends to bring onto the Site any material or substance which may be hazardous to health and safety, the Subcontractor must, before doing so, give information to Downer's Representative in respect of such material or substance. The information must include plans for the safe handling, storage and use of the material or substance and precautions to be taken.

**26.3 Preventative measures and contamination**

The Subcontractor must do everything possible to protect and preserve the environment from harm or damage arising from or in connection with the carrying out of the Work and is responsible for all such harm or damage, including any contamination, to the extent caused or contr buted to by the Subcontractor or the Work.

**26.4 Environmental Reporting**

The Subcontractor must provide to Downer, upon request, any data and information that is or may be required by Downer, the Principal or any third party to comply with the *National Greenhouse and Energy Reporting Act 2007* (Cth) to the extent that such data and information relates to the Work or this Subcontract.

**27 Default and termination**

**27.1 Notice of Subcontractor Default**

If in the opinion of Downer, the Subcontractor commits a breach of this Subcontract then, without limiting any other right it may have, Downer may by notice in writing serve upon the Subcontractor a notice entitled "Notice of Subcontractor Default". Upon giving a Notice of Subcontractor Default, Downer may suspend payments to the Subcontractor until the breach is remedied.

**27.2 Contents of Notice of Subcontractor Default**

A Notice of Subcontractor Default given under clause 27.1 must:

(a) state that it is given under clause 27.1;

(b) identify and particularise the breach complained of; and

(c) specify a time which is at least seven days from the date the Notice of Subcontractor Default is given, within which the Subcontractor must either remedy the breach or show cause to Downer's satisfaction why Downer ought not exercise a right under clause 27.3.

**27.3 Failure by Subcontractor to remedy or show cause**

(a) If the Subcontractor fails either to remedy the breach or to show cause to Downer's satisfaction why Downer ought not exercise its rights under this clause 27.3, Downer may by notice in writing with immediate effect:

(i) take out of the hands of the Subcontractor the whole or any part of the Work remaining to be completed, engage others to, or itself, carry out any part or the whole of the remaining Work and suspend payment until an amount (if any) becomes due and payable to the Subcontractor pursuant to clause 27.6(b); or

(ii) terminate this Subcontract.

(b) The exercise of a right under clause 27.3(a) will be effective immediately and will not affect any other rights available to Downer.

**27.4 Breaches**

For the purposes of clause 27.1, a breach by the Subcontractor includes:

(a) suspension of the Work;

(b) failure to proceed with due expedition and without delay (regardless of whether or not the Date for Practical Completion has passed);

(c) failure to use the materials or standards of workmanship required by this Subcontract;

(d) failure to provide evidence of insurances required by this Subcontract;

(e) failure to comply with any Direction of Downer's Representative issued under a provision of this Subcontract;

(f) failure to properly protect any person or property;

(g) failure to maintain any licence or Approval required of the Subcontractor for the performance of the Work;

(h) failure to immediately confirm, upon request for confirmation by Downer's Representative, that the Subcontractor is able and willing to complete performance of this Subcontract in accordance with its obligations;

(i) failure to complete any milestone by any relevant milestone date as required by clause 20.5;

(j) any act or omission by the Subcontractor that results or may result in Downer being in breach of the Head Contract Requirements; and

(k) failure to rectify a Defect, error, omission or deficiency in the Work in accordance with this Subcontract.

**27.5 Subcontractor unable or unwilling to complete**

If the Subcontractor advises Downer that the Subcontractor is unable or unwilling to complete performance of this Subcontract, Downer may immediately (and without serving upon the Subcontractor a Notice of Subcontractor Default) exercise a right under clause 27.3.

**27.6 Procedure upon termination or taking work out of hands**

(a) Despite any other provision of this Subcontract, if Downer terminates this Subcontract or takes any Work out of the Subcontractor's hands and engages others to carry out or itself carries out any part or the whole of the remaining Work (including by way of Variation), Downer may without payment of compensation to the Subcontractor:

(i) take possession of all documents (including Design Documents), information and the like in the Subcontractor's possession which is connected with the Work and reasonably required by Downer to facilitate completion of the Work and the Subcontractor must immediately deliver up all such documents, information and the like to Downer;

(ii) take an assignment of the Subcontractor's rights and benefits under any Secondary Subcontracts including any warranties and guarantees. The Subcontractor must do all



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things necessary to effect such an assignment; and

(iii) take possession of such plant, equipment and other things on or about the Site as are owned by the Subcontractor and are reasonably required by Downer to facilitate completion of the Work. Downer must return any plant, equipment and other things which are surplus to the Subcontractor on completion of the relevant Work, subject to the Subcontractor satisfying the debt to Downer as determined under clause 27.6(c).

(b) When that part of the Work taken out has been completed, Downer shall assess the cost thereby incurred and shall certify as moneys due and payable accordingly the difference between the cost (showing the calculations therefor) and the amount which would otherwise have been paid to the Subcontractor if the work had been completed by the Subcontractor.

(c) If the Subcontractor is indebted to Downer, Downer may retain any Subcontractor's plant or other things taken under clause 27.6 until the debt is satisfied. If after reasonable notice the Subcontractor fails to pay the debt, Downer may sell the Subcontractor's plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Subcontractor.

**27.7 Downer's default**

If Downer fails to pay an amount certified as payable under clause 22.2 of this Subcontract and in respect of which Downer has not exercised a right pursuant to clause 22.8 or any other right under this Subcontract to withhold payment, then without limiting any other right it may have, the Subcontractor may by notice in writing serve upon Downer a notice entitled "Notice of Default by Downer".

**27.8 Contents of Notice of Default by Downer**

A Notice of Default by Downer given under clause 27.7 must:

(a) state that it is given under this clause 27.8;

(b) identify and adequately particularise the amount certified as payable under clause 22.2 but not paid; and

(c) specify a time which is at least 14 days from the date the Notice of Default by Downer is given within which Downer must either:

(i) make payment of the amount;

(ii) compromise the claim of the Subcontractor to the Subcontractor's satisfaction; or

(iii) identify the basis on which it is entitled to refrain from paying the amount certified.

**27.9 Failure by Downer to make payment or compromise claim**

(a) If the Subcontractor is entitled to serve a Notice of Default by Downer and having been served with a valid Notice of Default by Downer, Downer fails within the time specified either to:

(i) pay the amount certified as payable;

(ii) compromise the claim to the satisfaction of the Subcontractor (acting reasonably); or

(iii) identify any basis on which it is entitled to refrain from paying the amount certified,

the Subcontractor may by notice in writing to Downer suspend performance of the Work.

(b) The Subcontractor may, by written notice to Downer terminate this Subcontract if, within 28 days of the date of commencement of suspension pursuant to clause 27.9(a), Downer has failed to remedy the breach.

(c) If Downer remedies the breach after the Subcontractor has suspended the Work in accordance with clause 27.9(a) but before the Subcontractor exercises a right to terminate this Subcontract pursuant to clause 27.9(b), the Subcontractor must immediately recommence performance of the Work and damages reasonably and necessarily incurred by the Subcontractor by reason of a suspension pursuant to clause 27.9(a) shall be assessed by Downer who shall certify the amount due and payable to the Subcontractor. This amount shall be the limit of the Subcontractor's entitlement arising from the suspension of the Work.

(d) If the Subcontractor validly terminates this Subcontract under clause 27.9(b) the Subcontractor is entitled to be paid:

(i) any outstanding amounts due to the Subcontractor under a Progress Certificate;

(ii) an amount for the value of Work done in the period between when the final progress claim was submitted and the date that the Subcontract was terminated, as determined by Downer's Representative in accordance with this Subcontract;

(iii) the cost of materials reasonably ordered by the Subcontractor for the Work, which the Subcontractor is liable to accept, but only if the materials become the property of Downer upon payment as determined by Downer's Representative;

(iv) the reasonable cost of removal of plant and equipment as determined by Downer's Representative; and

(v) all security to which Downer is not otherwise entitled.

(e) The Subcontractor agrees that its entitlements under this clause 27.9 are the Subcontractor's full compensation for all work performed under this Subcontract and for any Claims of the Subcontractor arising out of or in connection with the termination of this Subcontract by the Subcontractor.

**27.10 Insolvency**

(a) Without prejudice to any other right either Party may have, Downer or the Subcontractor may terminate this Subcontract by notice in writing upon the date stated in the notice if the other Party is subject to an Insolvency Event.

(b) Despite any other provision of this Subcontract, from the date Downer is entitled to terminate this Subcontract under clause 27.10(a):

(i) Downer is deemed to have become entitled to recourse to all retention monies and Bank Guarantees still held by Downer; and

(ii) the Subcontractor has no entitlement to (or to make any Claim in respect of) and Downer has no obligation to return to the Subcontractor any retention monies or Bank Guarantees still held by Downer.

**27.11 Termination for convenience**

(a) Without limiting any other right available to Downer under this Subcontract or at law, Downer may at any time and for whatever reason (or no reason and without the need to provide any reason), including its convenience, terminate this Subcontract.

(b) If Downer terminates this Subcontract under clause 27.11(a), the Subcontractor's entitlements are limited to those set out in clause 27.9(d).

**27.12 Termination of the Head Contract**

(a) Without limiting any other right available to Downer under this Subcontract or at law, if the Head Contract is terminated at any time for any reason, Downer may terminate this Subcontract by notice in writing to the Subcontractor.

(b) If the Subcontractor terminates this Subcontract under clause 27.12(a), the Subcontractor's entitlements are limited to those set out in clause 27.9(d).

**27.13 Effect of Termination by Downer**



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If the Subcontract is terminated by Downer pursuant to clause 27.3 or 27.10:

(a) Downer is not required to make any further payment to the Subcontractor, and without limiting any other right of Downer conferred by this Subcontract, the rights and liabilities of the parties shall be the same as they would be at common law if the Subcontractor had wrongfully repudiated this Subcontract and Downer had elected to treat this Subcontract as at an end and recover damages;

(b) Downer may at any time and from time to time estimate the damages to which it is entitled as a consequence of the (deemed) wrongful repudiation of this Subcontract by the Subcontractor and advise the Subcontractor of the amount of the estimated damages. Until the damages to which Downer is entitled are finally ascertained, that estimate shall be a debt due and immediately payable by the Subcontractor to Downer, and Downer is entitled to withhold, set-off or otherwise deduct the amount of that estimate; and

(c) the Subcontractor must cease the performance of the Work and make the Site safe for employees and others and report any hazards or risks to Downer.

## 28 Dispute resolution

### 28.1 Notice

(a) If a dispute or difference arises between Downer and the Subcontractor out of or in connection with the Work or this Subcontract, either Party may give the other a written notice specifying the dispute or difference. The notice must specify in reasonable detail the nature of the dispute or difference and the notice must specify in reasonable detail the legal basis of any Claim made by the Party serving the notice.

(b) Subject to clause 28.5, neither Party may commence proceedings (other than to recover an amount due and payable by the Subcontractor under this Subcontract, or for injunctive or other urgent relief) in respect of any dispute or difference unless a notice under clause 28.1(a) has been served and the procedure in clauses 28.2, 28.3 and 28.4 have been complied with.

### 28.2 Meeting

(a) If a dispute or difference notified under clause 28.1(a) has not been settled within 14 days of the date of that notice, either Party may, by written notice to the other, require that a person holding a position of senior management of each of Downer and the Subcontractor meet and undertake genuine and good faith negotiations on a without prejudice basis with a view to resolving the dispute or difference.

(b) If a meeting is required under this clause by either Party, then each Party must ensure attendance on its behalf by a person holding a position of senior management. Each Party must use its best endeavours to ensure that a meeting required under this clause takes place within 14 days of the receipt of a valid written notice requiring the meeting.

(c) If the dispute or difference involves or may involve the Principal, at the option of Downer, the Principal may participate in any meeting held under this clause 28.2 (and the Subcontractor hereby irrevocably consents to such participation).

### 28.3 Mediation

(a) If the dispute or difference is not resolved within 28 days of the giving of notice under clause 28.1, the Parties must refer the dispute or difference to mediation in accordance with clause 28.3(b).

(b) If a dispute or difference is referred to mediation as referred to under clause 28.3(a), the Parties agree that:

(i) a mediator is to be appointed by agreement between the parties or failing such agreement within 14 days of the referral to mediation, is to be appointed by the Chairman of the relevant Chapter of the Resolution Institute in the State or Territory stated in Item 11 or the Chairman's nominee;

(ii) each Party must bear its own costs of the mediation save that the Parties must share equally the mediator's fees, fees for mediation rooms and costs of shared equipment, facilities and services of the mediation;

(iii) the Parties must agree the venue for the mediation and if they cannot agree, the mediator appointed must nominate the venue;

(iv) each Party may be legally represented in the mediation if they so wish;

(v) complete confidentiality must be preserved in respect of the mediation and any documents and information used at or in relation to the mediation; and

(vi) mediation proceedings including any documents and information used at or in relation to the mediation must not be used as evidence in any legal proceedings and the Parties agree not to compel the mediator to give evidence as to any matter in relation to the mediation in any legal proceedings.

### 28.4 Resolution not involving Head Contract

(a) Subject to clauses 28.5 and 28.6, if the dispute has not been resolved within 14 days after the Parties have attended mediation in accordance with clause 28.3, (or such other period as agreed by the parties), either Party may refer the dispute to the dispute resolution forum identified in Item 43.

(b) Subject to clause 28.4(c), neither Downer nor the Subcontractor may refer the dispute to the forum identified in Item 43 unless they have first complied with clauses 28.1 to 28.3 in relation to the dispute or difference.

(c) Clause 28.4(b) does not prevent either Party from instituting proceedings to seek injunctive or other urgent relief in respect of a Dispute or difference arising under this Subcontract.

(d) In the event that the forum for resolution of the dispute identified in the Subcontract Details is arbitration, the arbitrator's decision or majority decision of arbitrators (as applicable) shall be final and binding on the Parties.

### 28.5 Consistent Resolution

(a) Where a dispute arises between Downer and the Principal under the Head Contract that is the subject of an arbitration or expert determination process, which Downer considers concerns matters which are relevant to the Subcontractor's rights and obligations under this Subcontract, Downer may at any time prior to the final resolution of that dispute, elect to have Downer's and the Subcontractor's rights and obligations determined in that dispute simultaneously, and if so:

(i) the Subcontractor must, at the expense of the Subcontractor give Downer all necessary assistance and co-operation with respect to the dispute; and

(ii) Downer must ensure that any claims of the Subcontractor in respect of the Principal are put to the dispute resolution procedures referred to in the Head Contract.

(b) The Subcontractor agrees that, in respect of a dispute to which this clause 28.5 applies, clauses 28.3 and 28.4 shall cease to apply to the subject matter of that dispute and it will be bound by any determination in the dispute resolution procedures under the Head Contract that affects the Subcontractor's rights and obligations as though that determination had been made under the dispute resolution procedures in this Subcontract.



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**28.6 Consolidation**

If Downer and the Principal are parties to litigation, arbitration or an expert determination in connection with the Head Contract (**Head Contract Dispute Process**), Downer may direct that:

(a) any dispute that arises between Downer and the Subcontractor (whether such dispute arises before or after the commencement of the Head Contract Dispute Process) be referred to litigation, arbitration or expert determination (as applicable);

(b) such litigation, arbitration or expert determination (as applicable) between Downer and the Subcontractor will be consolidated with the Head Contract Dispute Process,

in which case, clauses 28.3 and 28.4 shall cease to apply to the subject matter of that dispute and the Subcontractor irrevocably agrees to the referral of the relevant dispute to litigation, arbitration or expert determination (as applicable) and agrees (and irrevocably waives any entitlement to object) to such consolidation of litigation, arbitral proceedings or expert determination processes (as applicable).

**29 Claims**

**29.1 Making of Claims**

Except for Claims for an Extension of Time under clause 21.1 or payment under clause 22, the Subcontractor must give Downer the notices required by clause 29.2 if it wishes to make a Claim against Downer in respect of any Direction, act, omission or any other fact, matter or thing (including a breach of this Subcontract by Downer) under, arising out of or in any way in connection with the Work or this Subcontract.

**29.2 Prescribed Notice**

The notices referred to in clause 29.1 are:

(a) a notice within 10 Business Days after the commencement of the first occurrence of the Direction, act, omission or any other fact, matter or thing upon which the Claim is based, expressly specifying that the Subcontractor proposes to make a Claim and the Direction, act, omission or any other fact, matter or thing upon which the Claim is based; and

(b) a written Claim within 10 Business Days after the date on which the notice was required to be given to Downer pursuant to clause 29.2(a), which must include:

(i) detailed particulars concerning the Direction, act, omission or other fact, matter or thing upon which the Claim is based;

(ii) the legal basis for the Claim, including the terms of this Subcontract upon which the Claim is based;

(iii) the facts and evidence relied upon in support of the Claim in sufficient detail to permit verification; and

(iv) details of the amount claimed and how it has been calculated.

**29.3 Continuing Events**

If the Direction, act, omission or other fact, matter or thing upon which the Claim under clause 29.2 is based or the consequences of the Direction, act, omission or other fact, matter or thing are continuing, the Subcontractor must continue to give the information required by clause 29.2(b) every 20 Business Days after the written Claim under clause 29.2(b) was required to be given to Downer, until after the Direction, act, omission or any other fact, matter or thing upon which the Claim is based, has, or the consequences thereof have, ceased.

**29.4 Condition Precedent**

It is a condition precedent to the Subcontractor's entitlement to make a Claim that the Subcontractor has fully complied with the requirements of clauses 29.1, 29.2 and 29.3.

If the Subcontractor fails to comply with clause 29.1, 29.2 or 29.3, Downer will not be liable upon any Claim by the Subcontractor and the Subcontractor will be absolutely barred from making any Claim against Downer, arising out of, or in any way in connection with, the relevant Direction, act, omission or other fact, matter or thing (as the case may be) to which clause 29.1 applies.

**30 Goods and services tax**

**30.1 Exclusive of GST**

Unless otherwise expressly stated, prices or other sums payable or consideration to be provided under or in accordance with this Subcontract are exclusive of GST.

**30.2 Payment of GST**

If a Party makes a taxable supply under or in connection with this Subcontract, the other Party must pay to the supplier at the same time, and in addition to the GST-exclusive consideration, an amount equal to the GST payable on that supply.

**30.3 Tax Invoice**

The supplier must, as a precondition to the payment of GST, give the other Party a tax invoice by the end of the month in which the supply is made.

**30.4 Adjustments**

If an adjustment event arises in connection with a supply made under this Subcontract, the supplier must give the other Party an adjustment note in accordance with the GST law.

**30.5 Reimbursements**

If this Subcontract requires one Party to pay for, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the other Party, the amount required to be paid, reimbursed or contributed by the first Party will be reduced by the amount on input tax credits (if any) to which the other Party is entitled in respect of the reimbursable expense.

**30.6 Defined terms**

In this clause 30:

(a) words and expressions which have a defined meaning in the *A New Tax System (Goods and Services Tax) Act* 1999 (Cth) (**GST Act**) have the same meaning as in the GST Act; or

(b) if that GST Act does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.

**31 Security of payment**

**31.1 Application**

The provisions set out in the State and Territory Specific Provisions with respect to the Security of Payment Act shall apply in accordance with clause 1.4 of this Subcontract.

**31.2 Downer's Representative's role**

Without limiting Downer's right to issue a payment schedule under the Security of Payment Act, the Subcontractor acknowledges and agrees that in issuing payment schedules under the Security of Payment Act, Downer's Representative does so (and is authorised by Downer to do so) as agent of Downer.

**31.3 Adjudication**

If the Subcontractor applies for adjudication under the Security of Payment Act, the authorised nominating authority in respect of such an adjudication application is one of the bodies stated in Item 37.

**32 General**

**32.1 Notices**

(a) A notice or other communication connected with this Subcontract (Notice) has no legal effect unless it is in writing.

(b) Subject to clause 32.1(c), in addition to any other method of service provided by law, the Notice must be:

(i) sent by prepaid post to the address for service of the addressee set out in the Subcontract Details or subsequently notified;



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(ii) delivered at the address for service of the addressee set out in the Subcontract Details or subsequently notified; or

(iii) sent by email to the email address of the addressee set out in the Subcontract Details.

(c) A Notice given by the Subcontractor under clause 9 or clause 21 or under the Security of Payment Act must not be sent by email. A Notice given by the Subcontractor under clause 27 or clause 28 must be sent by registered mail or delivered (not by email) to Downer's address set out in Item 38.

(d) A notice is taken as given by the sender and received by the intended recipient:

(i) if sent by post, three Business Days after posting;

(ii) if sent by email:

(A) when the sender receives an automated message confirming delivery; or

(B) four hours after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the delivery failed,

whichever happens first; or

(iii) if otherwise delivered before 5pm on a Business Day at the place of delivery, upon delivery, and otherwise on the next Business Day at the place of delivery.

(e) The Subcontractor, Downer and Downer's Representative must each notify the others in writing of any change of contact details set out in Item 38.

**32.2 Governing law and jurisdiction**

(a) This Subcontract is governed by the law of the State or Territory set out in Item 11. Each Party irrevocably submits to the non-exclusive jurisdiction of the courts of that State or Territory and any courts hearing appeals from them.

(b) A Party must not object to the jurisdiction of a court merely because the forum is inconvenient.

(c) Where the Subcontractor is not incorporated within the jurisdiction of any of the States or Territories of the Commonwealth of Australia, the Subcontractor:

(i) submits to the non-exclusive jurisdiction of the courts of the Commonwealth of Australia and the State or Territory stated in Item 11 and any courts which have jurisdiction to hear appeals from any courts of that State or Territory;

(ii) waives any objections on the ground of venue or forum non-convenience or any similar grounds;

(iii) consents to service of process (which term includes any communication, notices, including any notices under this Subcontract, demand, summons, writ, statement of claim, pleading, judgment, order, decree or document) by mail or in any other manner permitted by the relevant law; and

(iv) the Subcontractor must at all times maintain an agent for service of process in the State or Territory stated in Item 11. Any process shall be sufficiently served on the Subcontractor if delivered to the agent for service at that agent's address for the time being.

(d) The Subcontractor hereby appoints the person named in Item 12 as its agent for service for the purpose of this clause 32.2. The Subcontractor shall not revoke the authority of any agent for service and if for any reason, the agent no longer serves as agent for the Subcontractor to receive service of process, the Subcontractor shall promptly advise Downer and appoint another such agent approved by Downer in writing. If the Subcontractor does not immediately appoint another such agent, Downer may thereafter

**32.3 Confidentiality**

(a) The Subcontractor must keep all aspects of this Subcontract and all matters arising from the Work confidential and must not disclose these details to any third party without the written Approval of Downer except to the extent required by law and to enable performance of this Subcontract.

(b) Subject to clause 32.3(c), the Subcontractor must not, and must ensure that its officers, advisers, agents, consultants, sub-subcontractors and employees do not, without the prior written Approval of Downer, at any time, including after the termination or expiry of this Subcontract:

(i) disclose or give to any person any Confidential Information; or

(ii) without limitation to the above, disclose or give to any person any information of the kind described in section 275(1) of the PPSA.

(c) Clause 32.3(b) does not apply to the extent that the Confidential Information is:

(i) lawfully in the public domain at the time that the Confidential Information was disclosed or given; or

(ii) required to be disclosed or given to comply with any applicable law, the rules of any securities or stock exchange or an order of a court or tribunal and Downer is given prior notice of the disclosure.

(d) Where the Subcontractor discloses any Confidential Information pursuant to this clause 32.3, it:

(i) must ensure that the party to whom the Confidential Information is provided or disclosed to complies with the terms of this clause 32.3; and

(ii) will be responsible and liable for any breach of the terms of this clause 32.3 by such third party as if the Subcontractor committed the breach.

**32.4 Entire agreement**

This Subcontract:

(a) contains the entire agreement and understanding between the parties on everything connected with the subject matter of this Subcontract; and

(b) supersedes any prior agreement or understanding on anything connected with that subject matter.

**32.5 Waiver**

(a) A party's failure or delay to exercise a power or right does not operate as a waiver of that power or right.

(b) The exercise of a power or right does not preclude either its exercise in the future or the exercise of any other power or right.

(c) A waiver is not effective unless it is in writing.

(d) Waiver of a power or right is effective only in respect of the specific instance to which it relates and for the specific purpose for which it is given.

**32.6 Severability**

If a provision or part of a provision in this Subcontract is wholly or partly invalid or unenforceable, the provision or part must, to that extent, be treated as deleted from this Subcontract. This does not affect the validity or enforceability of the remaining provisions.

**32.7 Attorneys**

Each attorney who executes this Subcontract states that the attorney has no notice of the revocation of the power of attorney appointing that attorney.

**32.8 Retrospectivity**

(a) This Subcontract applies to all Work performed by the Subcontractor for Downer and any preliminary works



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in relation to the subject matter of this Subcontract performed by the Subcontractor, including any preliminary work performed by the Subcontractor before the date of this Subcontract.

(b) The Parties acknowledge and agree that all payments made by Downer to the Subcontractor before the date of this Subcontract have been paid on account of the liability of Downer to pay to the Subcontractor the Subcontract Sum.

**32.9 Variation of Agreement**

Any variation or amendment of this Subcontract must be in writing and signed by both Parties or by persons authorised to sign for them.

**32.10 Counterparts**

This Subcontract may be executed in a number of counterparts. It comprises all the counterparts, taken together.

**32.11 Costs and outlays**

(a) Each Party must pay its own costs and outlays connected with the negotiation, preparation and execution of this Subcontract.

(b) The Subcontractor must pay all stamp duty and other government imposts payable in connection with this Subcontract and all other documents and matters referred to in this Subcontract when due or earlier if requested in writing by Downer.

**32.12 UN Convention on Contracts for the International Sale of Goods**

The parties agree that the Convention on Contracts for the International Sale of Goods does not apply to this Subcontract.

**32.13 Liability of Downer**

This Subcontract codifies the Subcontractor's entitlement to payment or reimbursement of any cost, loss, expense or damage and the Subcontractor shall have no entitlement to payment or reimbursement of any cost, loss, expense or damage unless expressly so provided in this Subcontract.

To the fullest extent permitted by law, Downer and its directors, employees, consultants, other subcontractors and agents shall not be liable to the Subcontractor:

(a) under or in connection with this Subcontract (including in respect of any breach of this Subcontract);

(b) in tort for negligence or otherwise;

(c) otherwise at law (including by statute, to the extent that it is possible to so exclude liability) and in equity, including for restitution for unjust enrichment; or

(d) on any other basis whatsoever,

for any cost, loss, expense or damage which is not expressly provided for in this Subcontract and the Subcontractor irrevocably waives any entitlement to make (and irrevocably releases Downer from) a Claim for any such cost, loss, expense or damage.

(e) had been terminated under clause 27.11.

**32.14 Non-performance of obligations**

If the Subcontractor fails to perform or comply with any of its obligations or agreements contained in this Subcontract, Downer or the Principal may perform or comply with (or procure performance of or compliance with) those obligations or agreements. Any costs incurred by Downer in connection with the rights referred to in this clause 32.14 will be a debt due and payable by the Subcontractor to Downer on demand.

**32.15 Customs Duties**

The Subcontract Sum includes all customs duties. The Subcontractor shall be responsible for payment of customs duties, provided that Downer shall provide such assistance and documentation as the Subcontractor may require to expeditiously pay such customs duties. In the event the customs duties are reduced then the Subcontractor shall reduce the Subcontract Sum by the same amount as any reduction in customs duties.

**32.16 Inspection**

The Subcontractor shall at all times permit Downer and the Principal, their respective employees, agents and consultants during working hours, to have access to any place where Work or any related or ancillary activities are being done in connection with the Work for the purpose of inspecting the same. Any such inspection will not relieve or affect the Subcontractor's obligation to execute Work which complies with this Subcontract.

**32.17 Facilities for Downer's Inspector**

If requested by Downer, the Subcontractor shall provide office facilities including desk and telephone, at the Subcontractor's or the Secondary Subcontractor's manufacturing plants for use by Downer and the Principal's representatives.

**32.18 Media**

The Subcontractor shall not disclose any information concerning the Project for distribution through any communications media without Downer's prior written Approval (which may be withheld in Downer's absolute discretion). The Subcontractor shall refer to Downer any enquiries from the media concerning the Work.

**32.19 Trust**

If the Subcontractor enters into this Subcontract as trustee of a trust (**Trust**), it warrants that:

(a) it has power to enter into and perform its obligations under this Subcontract in its capacity as trustee of the Trust;

(a) the Trust has been validly created and is in existence at the date of this Subcontract;

(b) the Subcontractor has been validly appointed as trustee of the Trust and is the sole trustee of the Trust;

(c) the Subcontractor has valid rights of indemnity against the assets of the Trust, which rights are available for satisfaction of all liabilities and other obligations incurred by it under this Subcontract; and

(d) the rights of the beneficiaries of the Trust relating to, and their interests in, the property of the Trust are subject to the prior rights and interests of the Subcontractor in the property of the Trust pursuant to its right of indemnity.

**33 Personal Property Securities Act**

The Subcontractor:

(a) acknowledges and agrees that:

(i) this Subcontract constitutes a Security Agreement; and

(ii) this Subcontract creates a Security Interest of Downer in:

(A) all materials, equipment and other things intended for Work which are located onsite or offsite;

(B) all construction plant, temporary works and other things on-site or off-site as are used by the Subcontractor or any Secondary Subcontractors; and

(C) all Work documents,

(**Collateral**);

(b) consents to Downer registering Downer's Security Interest in the Collateral;

(c) must not purport to dispose of, or grant any interest in, or give any form of security over the Collateral;

(d) undertakes to:

(i) promptly sign any further documents and provide any further information (such information to be complete, accurate and up-to date in all respects) which Downer may reasonably require to:

(A) register a Financing Statement or Financing Change Statement on the PPS Register in relation to a Security Interest in the Collateral;



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(B) register any other document on the PPS Register which is necessary to perfect Downer's Security Interest in the Collateral; or

(C) correct any error in any such document;

(ii) not register, or permit to be registered by any third party, a Financing Statement or a Financing Change Statement in respect of the Collateral without the prior consent of Downer;

(iii) keep full and complete records of the Collateral; and

(iv) do anything which Downer reasonably requires for the purpose of ensuring that the Security Interest is enforceable and perfected and to enable Downer to exercise its rights in connection with the Security Interest;

(e) agrees that, to the extent permitted by law, the following provisions of the PPSA do not apply to this Subcontract: (i) section 95; (ii) section 121(4); (iii) section 125; (iv) section 129; (v) section 130; (vi) section 132(3)(d); (vii) section 132(4); (viii) section 135; (ix) section 142; and (x) section 143;

(f) unless otherwise agreed to by Downer in writing, the Subcontractor waives its right to receive a Verification Statement in accordance with section 157 of the PPSA; and

(g) must give Downer written notice of any change to the Subcontractor's name, address or other details set out in this Subcontract within five Business Days after the date of such change.

**34 Compliance with Anti-Bribery Laws**

(a) The Subcontractor will at all times comply with:

(i) all Legal Requirements relating to anti-bribery, anti-corruption and anti-money laundering (and must not do anything, or omit to do anything, to cause Downer to be in breach of any such Legal Requirements); and

(ii) Downer's 'Standards of Business Conduct and Anti Bribery and Corruption Policy' as published from time to time.

(b) The Subcontractor warrants that neither it, nor any Relevant Person, has been convicted of any offence, and has not been the subject of any investigation or enforcement proceedings by any governmental, administrative or regulatory body regarding any offence or alleged offence, under any applicable laws, rules and regulation relating to anti-bribery, anti-corruption and anti-money laundering.

(c) At any time before the expiry of three years from the completion or termination of this Subcontract, the Subcontractor must permit Downer, its nominee, or the Principal (in this clause 34, each the Auditor) to conduct an audit and investigation:

(i) to verify the Subcontractor's compliance with this clause 34 (irrespective of whether there has been a breach or suspected breach); and/or

(ii) in relation to a Probity Event (or suspected Probity Event).

(d) As part of an audit or investigation under this clause 34, the Subcontractor must:

(i) make available to the Auditor (and allow the Auditor to make and retain copies of) any documents, records and other information in the power, possession or control of the Subcontractor; and

(ii) meet with the Auditor and make available the Subcontractor's personnel to meet with the Auditor and answer reasonable questions in relation to the subject matter of the audit.

(e) The Subcontractor must give Downer notice immediately upon becoming aware of a Probity Event or any breach (or suspected breach) of this clause 34.



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# Subcontract Details

## Part A

| | | | |
|---|---|---|---|
| Item 1 | Downer's Representative | Clause 1.1 | Gavin Cason (Project Manager) |
| Item 2 | Date for Practical Completion | Clause 1.1 | 18 February 2020 |
| Item 3 | Head Contract | Clause 1.1 | BOP Contract for Bango Wind Farm |
| Item 4 | Site | Clause 1.1 | Bango Wind Farm<br>14km South of Boorowa, Lachlan Valley Way,<br>Kangiara, NSW 2582 |
| Item 5 | Principal | Clause 1.1 | General Electric International Inc. ('GEII') |
| Item 6 | Superintendent | Clause 1.1 | John Woodall (GEII) |
| Item 7 | Subcontract Sum | Clause 1.1 | $5,805,123.79 |
| Item 8 | Subcontractor's Representative | Clause 1.1 | Justin Williams |
| Item 9 | Work | Clause 1.1 | The construction and completion of work and associated works as more particularly described or reasonably to be inferred from document 24120142-DOW-SOW-CV-0011 (0) BNWF2-20 Tracks Hardstands and 24120142-DOW-SOW-CV-0012(0) WTG Excavation |
| Item 10 | Date for commencement | Clause 3 | 23/09/2020 |
| Item 11 | Governing law | Clause 32.2(a) | Laws of the State of New South Wales |
| Item 12 | Subcontractor's process agent (where Subcontractor not incorporated in Australia) | Clause 32(d) | Not Applicable |
| Item 13 | Currency | Clause 1.2(i) | AUD (Australian Dollars) |
| Item 14 | Place for Payments | Clause 1.2(i) | T3, Triniti Business Campus,<br>39 Delhi Road, North Ryde, NSW 2113 |
| Item 15 | Hours and days for access to the Site | Clause 3.1(b) | Construction of the Work may be undertaken during the periods noted below. With reference to these periods, actual working hours and days shall be determined at the sole discretion of Downer, inclusive of decision to work rosters:<br>Monday to Friday – 06:45am to 18:00pm<br>Saturday – 08:00am to 13:00pm<br>Sundays and Public Holidays – No Work. |
| Item 16 | Subcontract Documents | Clause 1.1, clause 6 | 1. Formal Instrument of Agreement.<br>2. Special Conditions of Subcontract as listed in Part C and Schedule 17.<br>3. General Conditions of Subcontract (including Schedules).<br>Drawings and Specifications as listed in Subcontract Details. |
| Item 17 | What obligations of the Subcontractor with respect to design of the Work are excluded | Clause 5 | Design only for temporary works |
| Item 18 | Are retention monies to be deducted in lieu of provision of Bank Guarantees | Clauses 8.1 and 8.2 | No |
| Item 19 | Bank Guarantees | Clause 8.1 | One Bank Guarantee of 5% of the Subcontract Sum to be held until the end of the Defects Liability Period. |
| Item 20 | Retention moneys to be deducted | Clause 8.2 | Nil |
| Item 21 | Percentage by which security reduced | Clause 8.4 | 0% |
| Item 22 | Public liability insurance to be taken out by Subcontractor | Clause 9.2 | $20,000,000.00 for each and every occurrence and to be retained for the duration of the performance of the Work. |

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| | | | |
|---|---|---|---|
| Item 23 | Product liability insurance to be taken out by the Subcontractor | Clause 9.2 | $20,000,000.00 for each and every occurrence and to be retained for the duration of the performance of the Work. |
| Item 24 | Insurance for temporary works and any plant and equipment supplied by the Subcontractor for use on the Site to be taken out by Subcontractor | Clause 9.2 | Refer to Clause 9.2 |
| Item 25 | Workers compensation insurance to be taken out by Subcontractor | Clause 9.2 | Required by law in the State or Territory in which the Work is being carried out |
| Item 26 | Professional indemnity Insurance to be taken out by Subcontractor | Clause 9.2 | . Not required |
| Item 27 | Work insurance to be taken out by Downer | Clause 9.4(a) | Principal provided insurance. |
| Item 28 | Key Personnel | Clause 7.3(d) | Justin Williams |
| Item 29 | Approvals not being obtained by the Subcontractor | Clause 17.2 | As per Scope of Work document 24120142-DOW-SOW-CV-0011 (0) BNWF2-20 Tracks Hardstands and 24120142-DOW-SOW-CV-0012(0) WTG Excavation |
| Item 30 | Defects Liability Period | Clause 19 | Commencing at 4:00pm on the Date of Practical Completion and continuing until the later of:<br>(i) the date which is 24 months after the Date of Practical Completion; or<br>(ii) the date which is 18 months after the date on which Downer notifies the Subcontractor that the Head Contract Works have achieved completion in accordance with the Head Contract. |
| Item 31 | Delay Costs maximum amount per day | Clause 21.6(a) | Not applicable |
| Item 32 | Date for submission of progress claims | Clause 22.1 | Only as follows:<br>(i) from the commencement of the Work until the earlier of:<br>(i) the date on which Downer gives the certificate of Practical Completion pursuant to clause 23.2;<br>(ii) the date on which the Subcontract is terminated; and<br>(iii) the date on which Work is taken out of the Subcontractor's hands in accordance with clause 27.3,<br>once per month, claimable on and from the 25th day of each month for Work performed in the preceding month; and<br>(ii) after the date on which Downer gives the certificate of Practical Completion in accordance with clause 23.2:<br>(i) once on and from the date of the certificate of Practical Completion; and<br>(ii) once in accordance with clause 22.4(a). |
| | | Other information required for claims submission: | A statutory declaration confirming that all employees, suppliers and subcontractors have been paid. |
| Item 33 | Unfixed plant and materials for which progress claims may be made | Clause 22.3(a) | Not Applicable |
| Item 34 | Interest rate on overdue payments | Clause 22.5 | Not Applicable |



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| | | | | |
|---|---|---|---|---|
| Item 35 | Percentage amount for profit and overheads | Clause 22.7 | 10% | |
| Item 36 | Liquidated damages rate | Clause 23.3 | $10,000.00 per calendar day capped at 5% of the Subcontract Sum. | |
| Item 37 | Authorised nominating authorities | Clause 31.3 | Not Applicable | |
| Item 38 | Address and email for service of notices | Clause 32.1 | **Downer's details** | |
| | | | Address: Level 1, T1 Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113<br><br>Email: gavin.cason@downergroup.com and the Project Aconex email address as advised by Downer | |
| | | | **Subcontractor's details**<br><br>Address: Unit 26 5 Inglewood Place Baulkham Hills NSW 2153<br><br>Email: Justin@greencivilcon.com.au | |
| Item 39 | Secondary Subcontracting | Clause 10.2 | **Work by Subcontractor's consultants** | None |
| Item 40 | **Legal Requirements**<br>(i) Those already accepted under the Head Contract Clause 11.1 | Clause 11 | | |
| | Those excepted under the Subcontract | Clause 11.1 | | |
| Item 41 | Time for payment | Clause 22.2(d) | 30 days after receipt of progress claim | |
| Item 42 | Subcontractor's security for unfixed plant and materials | Clause 22.3(a) | | |
| Item 43 | Dispute resolution method | Clause 28.4 | (a) The dispute resolution method is:<br>Arbitration<br><br>(b) Where the dispute resolution method is arbitration:<br>The arbitration will be finally resolved under the Resolution Institute Arbitration Rules.<br>There will be one arbitrator, appointed in accordance with the Resolution Institute Arbitration Rules. The arbitrator must give written reasons for their award.<br>The seat of the arbitration will be Sydney NSW and the arbitration proceedings (including all hearings) will take place in **Sydney NSW.**<br>The arbitration will be conducted in English. | |
| Item 44 | Commonwealth Building Code | Schedule 4 and clause 1.5 | Does Schedule 14 apply?<br>Yes ☐ No ☒ | |
| Item 45 | Date for Handover Milestones | Clause 23.4 | Listed in Schedule 1 | |



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## Part B

| | | |
|---|---|---|
| **Provisional Sums** | Clause 22.7 | Not Applicable |



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## Part C

| | |
|---|---|
| **Special Conditions** | refer to Schedule 17 |



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**Part D**

**Subcontract Sum (clause 1.1)**

For the 24120142-DOW-SOW-CV-0011 BNWF2-20 Access Tracks and Hardstands and 24120142-DOW-SOW-CV-0012(0) WTG Excavation for the Lump Sum amount of $5,805,123.80 Excluding GST



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## Part E

### Variation Rates

These rates will be deemed to include profit and overheads (includes offsite overheads), LAHA, travel and all allowances. Where an item is not applicable or listed, the rate applicable for profit and overheads shall be 10%. Supporting documentation must be submitted with each claim. Examples of supporting documentation includes but not limited to daily timesheets and invoices.

These rates are fixed for the duration of the Subcontract.

| Item | Plant/Equipment/Labour | Rate | U.O.M |
|---|---|---|---|
| 1 | Supervisor | $ 135.00 | hour |
| 2 | Site engineer | $ 100.00 | hour |
| 3 | Pipelayer | $ 115.00 | hour |
| 4 | Plant Operator | $ 98.00 | hour |
| 5 | Skilled Labourer | $ 85.00 | hour |
| 6 | General Labourer | $ 72.00 | hour |
| 7 | Living away from home allowance (LAFHA) | Included | day |
| 8 | GPS Rover | $ 1,800.00 | week |
| 9 | Accommodation | Included | day |
| 10 | Pipe cradle | $ 300.00 | week |
| 11 | Extra over time hours | $ 45.00 | hour |

| | | | |
|---|---|---|---|
| 12 | **Vehicles** | | |
| 13 | Light Vehicle 4x4 - including basic tools | $ 180.00 | day |
| 14 | Min Van 12 seat people mover | $ 170.00 | day |



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| | | | | |
|---|---|---|---|---|
| 15 | **Plant and Machinery** | | | |
| 16 | Pipe Laser | $ | 480.00 | week - 6d |
| 17 | Jumping Jack/Rammer - Upright | $ | 480.00 | week - 6d |
| 18 | 5T Excavator with buckets | $ | 115.00 | hour |
| 19 | 14T excavator with bucket and skilled operator | $ | 135.00 | hour |
| 20 | 14T Excavator (Rubber Tracks) w/buckets andforks w/operator | $ | 155.00 | hour |
| 21 | 14T Excavator (Rubber Tracks) w/GPS Optionw/operator | $ | 165.00 | hour |
| 22 | GPS Attachment for Excavators up to 20T | $ | 43.00 | hour |
| 23 | Trailer | $ | 245.00 | day |
| 24 | 89t Excavator with Buckets and Ripper | $ | 405.00 | hour |
| 25 | 10t Hammer for Item 24 | $ | 190.00 | hour |
| 26 | GPS Attachment for 89t - item 24 | $ | 1,800.00 | week |
| 27 | 60t Exacavtor with Buckets and Ripper | $ | 295.00 | hour |
| 28 | Hammer for item 27 | $ | 3,300.00 | week |
| 29 | 50t Exacavtor with Bucket and Ripper | $ | 230.00 | hour |
| 30 | Hammer for Item 29 | $ | 3,300.00 | week |
| 31 | GPS for Item 29 | $ | 1,800.00 | week |
| 32 | 45t Excavator | $ | 210.00 | hour |
| 33 | Hammer for item 32 | $ | 2,800.00 | week |
| 34 | GPS for item 32 | $ | 1,800.00 | week |
| 35 | 30-38t Excavator | $ | 180.00 | hour |
| 36 | Hammer for item 35 | $ | 2,800.00 | week |
| 37 | GPS for item 35 | $ | 1,800.00 | week |
| 38 | 30t Dump Truck | $ | 180.00 | hour |
| 39 | 40t Dump Truck | $ | 195.00 | hour |
| 40 | 825 Compactor | $ | 255.00 | hour |
| 41 | GPS for item 40 | $ | 1,800.00 | week |
| 42 | Water cart 12000lt | $ | 135.00 | hour |
| 43 | Watercart 18,000lt | $ | 150.00 | hour |
| 44 | D10 with GPS | $ | 398.00 | hour |
| 45 | D9 with GPS | $ | 340.00 | hour |
| 46 | D8 With GPS | $ | 305.00 | hour |
| 47 | Grader GPS 140H with GPS | $ | 200.00 | hour |
| 48 | Grader GPS 140M With GPS | $ | 200.00 | hour |
| 49 | Scraper 627 | $ | 360.00 | hour |
| 50 | Scraper 621 | $ | 210.00 | hour |
| 51 | 20t Pad foot roller wet | $ | 135.00 | hour |
| 52 | 20t Smooth drum Dry hire | $ | 1,500.00 | week |
| 53 | IT Loader with forks and lifting jib 15t / Dry hire | $ | 2,650.00 | week |
| 54 | Floats | | | |
| 55 | 60t excavator | $ | 6,000.00 | each way |
| 56 | 50t excavator | $ | 3,000.00 | each way |
| 57 | 30-38t excavator | $ | 2,500.00 | each way |
| 58 | D9 out of ACT | $ | 2,200.00 | each way |
| 59 | D9 out of Sydney | $ | 3,000.00 | each way |
| 60 | 14t excavator | $ | 2,000.00 | each way |
| 61 | 5t excavator | $ | 1,250.00 | each way |
| 62 | Hammer for 30t ex and above | $ | 1,100.00 | each way |
| 63 | 825 compactor | $ | 2,500.00 | each way |
| 64 | Grader | $ | 900.00 | each way |
| 65 | Scraper 627 | $ | 2,500.00 | each way |
| 66 | Scraper 621 | $ | 1,200.00 | each way |



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# Schedule 1 - Scope of Works, Drawings, Specifications and Program.

**Scope of Work and Specifications:**

As per Scope of Works Document: 24120142-DOW-SOW-CV-0011 BNWF2-20 Access Tracks and Hardstands

And

24120142-DOW-SOW-CV-0012(0) WTG Excavation



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**Program:**



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## Schedule 2 - Further purposes or requirements (clause 5(i)(iv))

Not Applicable.



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## Schedule 3 - Deed of Release (Clause 8.4)

| | |
|---|---|
| **To** | Downer Utilities Australia Pty Ltd<br>ACN 075 194 857<br>of Level 1, T1 Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113]<br>(**Downer**) |
| **Project** | The construction of [insert description of the Subcontract Works] as further described in the Subcontract (the **Work**) |
| **Subcontractor** | **[insert full name of Party]**<br>(ACN [insert]<br>of [insert address of Party] (the **Subcontractor**) |
| **Subcontract** | Agreement made between Downer and the Subcontractor on ..... (the **Subcontract**) |

**1** The Subcontractor agrees that, to the extent permitted by law, except for the amounts specified in clause 2 below, the total monies payable or that may in the future become payable under or in any way arising out of or connected with the Subcontract or the Work or any other work (**Other Work**) executed by the Subcontractor, its Secondary Subcontractors and/or suppliers on or about the Site of the Work is $..... (including the retention amount) (the **Practical Completion Payment**).

**2** The Practical Completion Payment does not include the amount for retention of $ …… but in circumstances where Downer is entitled to terminate the Subcontract under clause 27.10 of the Subcontract the Subcontractor acknowledges and agrees that Downer is entitled to the proceeds of all then held retention and the Subcontractor has no entitlement to have that retention returned.

**3** The Subcontractor acknowledges and agrees that to the extent permitted by law, payment by Downer to the Subcontractor of the Practical Completion Payment is acceptance by the Subcontractor of full and final payment to the Subcontractor of all amounts due and payable at Practical Completion of the whole of the Work and any Other Work, except for amounts described in clause 2 above (if any).

**4** To the extent permitted by law, the Subcontractor waives, releases and forever discharges Downer from all or any liabilities, claims, actions, demands, suits, proceedings, damages, expenses, costs and the like (whether direct, indirect or consequential, past, present or future, certain or contingent, ascertained or not ascertained) howsoever arising under or in connection with the Subcontract or in any way connected with execution of the Work and any Other Work. The Subcontractor indemnifies and keeps indemnified Downer from all such liabilities, claims, entitlements, actions, demands, suits, proceedings, damages, expenses, costs and the like, which but for this provision, the Subcontractor may have had or may arise at any time.

**5** Clause 4 does not apply in respect of the amounts described in clause 2 above (if any).

**6** The Subcontractor certifies that at Practical Completion of the Work:

(a) all wages and allowances, including in respect of overtime and loadings, which become due and payable to all persons who have at any time been employed by the Subcontractor on the Work have been paid in full;

(b) all entitlements which have or should have accrued in respect of all persons who have at any time been employed by the Subcontractor on the Work, including in relation to annual leave, personal leave and RDOs, have been properly accounted for in accordance with any applicable legislation and legally binding agreement, award, workplace agreement or workplace policy;

(c) all Secondary Subcontractors engaged by the Subcontractor on the Work and all suppliers to the Subcontractor of plant, equipment and material for the Work have been paid in full; and

(d) all contributions and payments to any scheme for superannuation, long service leave, redundancy and severance pay or the like as required by legislation and any applicable and legally binding award or workplace agreement have been paid in full.

Executed as a DEED on the day of 20



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Executed by [insert **Subcontractor**] ACN [insert] in accordance with section 127 of the *Corporations Act 2001:*

| | |
|---|---|
| Director/Company Secretary | Director |
| Name of Director/Company Secretary<br>(BLOCK LETTERS) | Name of Director<br>(BLOCK LETTERS) |



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## Schedule 4 - Deed of Final Release (clause 8.5, 22.4)

| | |
|---|---|
| **To** | Downer Utilities Australia Pty Ltd<br>ACN 075 194 857<br>of Level 1, T1 Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113 (**Downer**) |
| **Project** | The construction of [insert description of the Subcontract Works] as further described in the Subcontract (the **Work**) |
| **Subcontractor** | **[insert full name of Party]**<br>(ACN [insert]<br>of [insert address of Party] (the **Subcontractor**) |
| **Subcontract** | Agreement made between Downer and the Subcontractor on ..... (the **Subcontract**) |

**1** The Subcontractor agrees that the total monies payable or that may in the future become payable under or in any way arising out of or connected with the Subcontract or the Work or any other work executed by the Subcontractor, its Secondary Subcontractors and/or suppliers on or about the Site of the Work is $..... (including the retention of $.....) of which the Subcontractor acknowledges having received the sum of $.....leaving a balance of $.....(the **Final Payment**).

**2** The Subcontractor acknowledges and agrees that payment by Downer to the Subcontractor of the Final Payment is acceptance by the Subcontractor of full and final payment to the Subcontractor of all amounts due and payable now or in the future in connection with the Subcontract and the Work or any other work executed by the Subcontractor, its Secondary Subcontractors and/or suppliers on or about the site of the Work.

**3** The Subcontractor waives, releases and forever discharges Downer from all or any liabilities, claims, actions, demands, suits, proceedings, damages, expenses, costs and the like (whether direct, indirect or consequential, past, present or future, certain or contingent, ascertained or not ascertained) howsoever arising under or in connection with the Subcontract or in any way connected with execution of the Work or work executed or materials supplied on or about the site of the Work. The Subcontractor indemnifies and keeps indemnified Downer from all such liabilities, claims, entitlements, actions, demands, suits, proceedings, damages, expenses, costs and the like, which but for this provision, the Subcontractor may have had or may arise at any time.

**4** The Subcontractor certifies that:

(a) all wages and allowances which become due and payable to all persons who have at any time been employed by Subcontractor on the Work have been paid in full;

(b) all entitlements which have or should have accrued in respect of all persons who have at any time been employed by the Subcontractor on the Work, including in relation to annual leave, personal leave and RDOs, have been properly accounted for in accordance with any applicable legislation and legally binding agreement, award, workplace agreement or workplace policy;

(c) all Secondary Subcontractors engaged by the Subcontractor on the Work and suppliers to the Subcontractor of plant, equipment and material for the Work have been paid in full; and

(d) all contributions and payments to any scheme for superannuation, long service leave, redundancy and severance pay or the like as required by legislation and any award requirements have been paid in full.



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**Executed** as a deed and delivered on the date shown on the first page.

Executed by [insert **Subcontractor**] ACN [insert] in accordance with section 127 of the *Corporations Act 2001:*

| | |
|---|---|
| Director/Company Secretary | Director |
| Name of Director/Company Secretary<br>(BLOCK LETTERS) | Name of Director<br>(BLOCK LETTERS) |



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# Schedule 5 – Moral Rights Consent (clause 16.1)

**Deed poll** dated

| | |
|---|---|
| **Made by** | **[insert full name of Author]**<br>of [insert address]<br>(**Author**) |
| **in favour of** | Downer Utilities Australia Pty Ltd ACN 075 194 857 of Level 1, T1 Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113 (**Contractor**) |

**Introduction**

A. Downer and [insert name and ACN of Subcontractor] entered into a building contract dated [insert date of building contract] (the **Agreement**) to perform or create certain building works (the **Work**).

B. The Author has created or will create copyright material as described in this deed which may be used in connection with, or as part of, the Work.

**The [Author] declares**

**1 Definitions**

In this Deed:

(a) **Authorised Persons** means Downer and any assignee or sub-licensee of Downer in relation to the Copyright Material or any subcontractor of Downer in relation to the Work; and

(b) **Copyright Material** means:

(i) [describe the copyright works which the author has or will create as precisely as possible]; and

(ii) any other material in which copyright subsists for the purposes of the *Copyright* Act *1968* (Cth) (as amended) which the Author creates or has created for the purpose of the Agreement or the Work.

**2 Consent**

2.1 The Author consents to the Authorised Persons:

(a) not attributing to the Author authorship of the Copyright Material;

(b) falsely attributing authorship of the Copyright Material;

(c) modifying, varying or amending the Copyright Material;

(d) using the Copyright Material other than for the purpose for which it was intended when created; and

(e) changing, relocating, demolishing or destroying any three dimensional reproduction of the Copyright Material without prior notification to the Author.

2.2 The Author acknowledges that the consent given in this deed is genuinely given and is not provided under duress and is given in full knowledge that the Author is giving up rights granted under Part IX of the *Copyright Act 1968* (Cth)

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**3 Further actions**

The Author agrees to do all things and execute all documents as Downer reasonably requests in order to give full effect to the consent provided in this deed.

**4 Warranty**

The Author warrants that the Author will not sue, enforce any claim, bring any action or exercise any remedy in respect of a breach of its moral rights in respect of the any Copyright Material by the Authorised Persons.

**Executed** as a deed poll and delivered on the date shown on the first page.

Signed, sealed and delivered by [insert name of author]
in the presence of:

| | |
|---|---|
| Signature of witness | |
| Name of witness (BLOCK LETTERS) | |
| Address of witness | |



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# Schedule 6 - South New Wales

**1 Civil Liability Act 2002 (NSW)**

All rights, obligations and liabilities under or in connection with this Subcontract are to apply, even where the relevant circumstances involve a failure to take reasonable care and the existence of concurrent wrongdoers (as that term is defined in section 34(2) of the *Civil Liability Act 2002* (NSW)), unlimited and otherwise unaffected by anything that, but for this clause, may by virtue of the provisions of the *Civil Liability Act 2002* (NSW) have limited or otherwise affected those rights, obligations and liabilities.

**2 OHS Rules (NSW)**

2.1 The Subcontractor:

(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;

(b) acknowledges that Downer (or another party as advised by Downer) is engaged as the 'principal contractor' under the OHS Rules for the Site;

(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor;

(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements; and

(e) shall, to the extent the Subcontractor designs any structure (or part of a structure) which is to be constructed, provide to Downer a written report that specifies the hazards relating to the design of that structure which, so far as the Subcontractor is reasonably aware, creates a risk to the health or safety of persons who are carrying out any construction work on the structure or part.

2.2 For the purpose of this clause:

(a) "**OHS Rules**" means:

(i) the WH&S Act and WH&S Regulation as updated from time to time*;* and

(ii) all relevant associated legislation, regulations, rules, Standards, Australian Standards, codes of practice and compliance guidelines applicable to the Work, workplace health and safety, environmental protection, dangerous goods and electrical safety together with any Directions on safety or notices issued by any relevant authority including, to the extent applicable to the Work the following:

(A) *Dangerous Goods (Road and Rail Transport) Act 2008* (NSW);

(B) *Explosives Act 2003* (NSW);

(C) *Explosives Regulation 2013* (NSW);

(D) *Work Health and Safety (Mines and Petroleum Sites) Act 2013* (NSW);

(E) *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (NSW);

(F) codes of practice relating to the *NSW Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* (NSW);

(G) *Rail Safety National Law* (NSW);

(H) *Rail Safety (Adoption of National Law) Act 2012* (NSW);

(I) *Rail Safety National Law National Regulations 2012* (NSW);

(J) *Rural Workers Accommodation Act 1969* (NSW);

(K) *Heavy Vehicle National Law* (NSW);

(L) *Heavy Vehicle (Adoption of National Law Regulations 2013* (NSW);

(M) all *Heavy Vehicle Regulations*;

(N) national compliance and enforcement policies;

(O) model codes of practice; and

(P) NSW codes of practice;

(b) **"WH&S Act**" means the *Work Health and Safety Act 2011* (NSW); and

(c) **"WH&S Regulation"** means the *Work Health and Safety Regulation 2017* (NSW).

**3 Building and Construction Industry Security of Payment Act 1999 (NSW)**

3.1 The Subcontractor shall:

(a) promptly give Downer a copy of any notice the Subcontractor:

(i) receives from a subcontractor under sections 15, 16 or 24 of the Security of Payment Act; or

(ii) has been required to supply to a subcontractor under section 15(1) of the Contractors Debts Act setting out Downer's name;

(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under sections 15, 16 or 24 of the Security of Payment Act; and

(c) promptly notify Downer if it becomes aware that a subcontractor intends to exercise a statutory lien, under section 11(3) of the Security of Payment Act, over unfixed plant and materials supplied by the subcontractor for use in carrying out the Work.

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3.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 27 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work and Downer may recover any amount paid as a debt.

3.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:

(a) a suspension by a subcontractor of work, which forms part of the Work, under section 27 of the Security of Payment Act;

(b) a notice of claim being served on Downer under Part 2 of the Contractors Debts Act;

(c) a subcontractor exercising a statutory lien, under section 11(3) of the Security of Payment Act, over unfixed plant or materials supplied by the subcontractor for use in carrying out work forming part of the Work; or

(d) a failure by the Subcontractor to comply with this clause.

3.4 If Downer is served with a payment withholding request under section 26A of the Security of Payment Act by a subcontractor or any other party in connection with any work carried out or material supplied by the Subcontractor to Downer forming part of the Work and Downer consequently retains money that is or becomes payable by Downer to the Subcontractor under this Subcontract:

(a) Downer is not in breach of its payment obligations under this Subcontract as a result only of the retention of such money in such circumstances; and

(b) the Subcontractor waives its rights and releases Downer from liability in respect of all losses or expenses of any nature suffered or incurred by the Subcontractor, and may not terminate, rescind or treat as repudiated the Subcontract arising out of or in connection with Downer retaining such money in such circumstances.

3.5 For the purposes of this clause:

(a) "**Contractors Debts Act**" means the *Contractors Debts Act 1997* (NSW).

(b) "**Security of Payment Act**" means the *Building and Construction Industry Security of Payment Act 1999* (NSW);

(c) "**subcontractor**" means any person engaged by the Subcontractor, its Secondary Subcontractors or any other person to do work, which forms part of the Work; and

(d) "**work**" refers to work which the Subcontractor is, or may be, required to do under this Subcontract and includes equipment, materials, plant, design and other services and temporary works.

**4 Subcontractor's Statement**

Each progress claim shall be accompanied by a duly signed written statement in a form approved by Downer and which complies with the Subcontractor's obligations under section 127 of the *Industrial Relations Act 1996* (NSW), Schedule 2 Part 5 of the *Payroll Tax Act 2007* (NSW) and section 175B of the *Workers Compensation Act 1987* (NSW) to provide a statement to the "principal contractor" as contemplated by those acts.

**5 NSW Code of Practice for Construction Work**

(a) In this clause:

(i) "**Construction Compliance Unit**" means any unit established to monitor compliance with and receive reports of alleged breaches of the NSW Code; and

(ii) "**NSW Code**" means the New South Wales Code of Practice for Procurement, as varied or replaced from time to time, and:

(A) prior to 1 July 2013, includes the Implementation Guidelines for the NSW Code of Practice and Code of Tendering

(B) from 1 July 2013, includes the Implementation Guidelines to the New South Wales Code of Practice for Procurement, as varied or replaced from time to time.

(The NSW Code is currently available at www.procurepoint.nsw.gov.au)

(b) The Subcontractor must comply, and must ensure that its employees, agents, Secondary Subcontractors and Related Companies comply, with the NSW Code.

(c) Compliance with the NSW Code does not relieve the Subcontractor from responsibility to perform the Subcontract, or from liability for any Defects arising from compliance with the NSW Code.

(d) If the National Code applies, the National Code should be read conjointly with the NSW Code to the maximum extent lawfully possible.

(e) The Subcontractor acknowledges and accepts that the NSW Government and Downer, and those authorised by the NSW Government or Downer, may:

(i) request full access to any Work to:

(A) inspect any work, material, machinery, appliance, article or facility;

(B) inspect and copy any record; and

(C) interview any person,

and on such request the Subcontractor must provide such access as is necessary to allow validation of compliance with the NSW Code by the Subcontractor and its employees, agents, Secondary Subcontractors and Related Companies;



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(ii) request specified documentation to be produced within a specified period, in person, by fax or by post and on such request the Subcontractor must provide such documentation; and

(iii) publish or otherwise disclose information in relation to compliance with the NSW Code.

(f) Where a change in the provision of the Work is proposed under the Subcontract and that change would affect compliance with the NSW Code, the Subcontractor must prepare a report to Downer, for provision to the NSW Government, specifying the extent to which compliance with the NSW Code by the Subcontractor or its employees, agents, Secondary Subcontractors or Related Companies will be affected (as applicable). Downer will, after consultation with the New South Wales Government and consideration of the legislation and relevant OHS Rules, direct the Subcontractor as to the course it must adopt once the report is received. The Subcontractor shall have no Claim in connection with any such Direction or compliance with any such Direction.

(g) The Subcontractor must maintain, and must ensure that its Secondary Subcontractors and Related Companies maintain, adequate records of compliance with the NSW Code.

(h) From 1 July 2013, the Subcontractor must notify Downer of any alleged breaches of the NSW Code (and voluntary remedial action proposed) within 24 hours of becoming aware, or when a competent contractor exercising good industry practice should have become aware, of the alleged breach.

(i) If the Subcontractor, or any of its employees, agents, Secondary Subcontractors or any Related Company, does not comply with the requirements of the NSW Code, in the provision of the Work, such that a sanction is applied as a consequence, without prejudice to any rights that would otherwise accrue, the NSW Government will be entitled to record that non-compliance and take it into account in the evaluation of any future tenders that may be lodged by the Subcontractor, or any of its employees, agents, Secondary Subcontractors or Related Companies, in respect of work for any part of the State of New South Wales or its agencies.

(j) The Subcontractor must:

(i) not engage any Secondary Subcontractor where the engagement would breach a sanction imposed by the Construction Compliance Unit;

(ii) ensure that each Secondary Subcontractor maintains and provides access for any person or entity authorised by the New South Wales Government to the same extent as required from the Subcontractor under this clause; and

(iii) ensure that all contracts with Secondary Subcontractors contain requirements equivalent to the requirements set out in this clause.



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# Schedule 7 – Victoria

~~**1 OHS Rules**~~

~~1.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer) is appointed as the 'principal contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor; and~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements.~~

~~1.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the OH&S Act and OH&S Regulation; and~~

~~(ii) all relevant associated legislation, regulations, rules, Standards, Australian Standards, codes of practice and compliance guidelines applicable to the Work, workplace health and safety, environmental protection, dangerous goods and electrical safety together with any Directions on safety or notices issued by any relevant authority including, to the extent applicable to the Work, the following (without limitation):~~

~~(A) *Rail Safety National Law Application Act 2013 No 22*;~~

~~(B) *Rail Safety (Local Operations) Act 2006* (Vic);~~

~~(C) *Rail Safety National Law (Limited Accreditation Exemptions) Regulations 2014* (Vic);~~

~~(D) *Transport (Safety Schemes Compliance and Enforcement) Act 2014* (Vic);~~

~~(E) *Dangerous Goods Act 1985* (Vic);~~

~~(F) *Dangerous Goods (Transport by Road or Rail) Regulation 2008* (Vic);~~

~~(G) *Dangerous Goods (Storage and Handling) Regulations 2000* (Vic);~~

~~(H) *Dangerous Goods (Explosives) Regulations 2011* (Vic);~~

~~(I) *Occupational Health and Safety (Major Hazard Facilities) Regulations 2000* (Vic);~~

~~(J) *Occupational Health and Safety (Mines) Regulations 2002* (Vic);~~

~~(K) *Equipment (Public Safety) Act 1994* (Vic);~~

~~(L) *Equipment (Public Safety) Regulations 2017* (Vic);~~

~~(M) *Heavy Vehicle National Law Application Act 2013* (Vic);~~

~~(N) *Heavy Vehicle National Law Application (Infringements) Regulations 2013* (Vic);~~

~~(O) national compliance and enforcement policies;~~

~~(P) Victorian compliance codes; and~~

~~(Q) Victorian codes of practice;~~

~~(b) "**OH&S Act**" means the Occupational Health and Safety Act 2004 (Vic); and~~

~~(c) "**OH&S Regulation**" means the Occupational Health and Safety Regulations 2017 (Vic).~~

~~**2 Building and Construction Industry Security of Payment Act 2002 (Vic)**~~

~~2.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor:~~

~~(i) receives from a subcontractor under any of sections 16, 17 or 28O of the Security of Payment Act; or~~

~~(ii) has been required to supply to a subcontractor under section 41(1) of the Security of Payment Act setting out Downer's name;~~

~~(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under any of sections 16, 17 or 28O of the Security of Payment Act; and~~

~~(c) promptly notify Downer if it becomes aware that a subcontractor intends to exercise a statutory lien, under section 12A(1) of the Security of Payment Act, over unfixed plant or materials or both supplied by the subcontractor for use in performing any part of the Work.~~

~~2.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 29 of the Security of Payment Act, Downer may pay the subcontractor the money that is, or may be, owing to the subcontractor for work forming part of the Work. Downer may recover from the Subcontractor each amount paid as a debt.~~

~~2.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:~~

~~(a) a suspension by a subcontractor of work, which forms part of the Work, under section 29 of the Security of Payment Act;~~

~~(b) a notice of claim being served on Downer under Part 3 - Division 4 of the Security of Payment Act;~~

~~(c) a subcontractor exercising a statutory lien, under section 12A(1) of the Security of Payment Act, over unfixed plant or materials supplied by the subcontractor for use in performing any part of the Work; and~~



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~~(d) a failure by the Subcontractor to comply with this clause.~~

~~2.4 For the purposes of this clause:~~

~~(a) "**Security of Payment Act**" means the *Building and Construction Industry Security of Payment Act 2002* (Vic);~~

~~(b) "**subcontractor**" means a person engaged by the Subcontractor, its subcontractors or any other person to carry out work which forms part of the Work; and~~

~~(c) "**work**" means work which the Subcontractor is, or may be, required to do under this Subcontract.~~



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# Schedule 8 – Queensland

~~**1 OHS Rules**~~

~~1.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer) is engaged as the 'principal contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor;~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements; and~~

~~(e) shall, to the extent the Subcontractor designs any structure (or part of a structure) which is to be constructed, provide to Downer a written report that specifies the hazards relating to the design of that structure which, so far as the Subcontractor is reasonably aware, creates a risk to the health or safety of persons who are carrying out any construction work on the structure or part.~~

~~1.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the WH&S Act and WH&S Regulation; and~~

~~(ii) all relevant associated legislation, regulations, rules, Standards, Australian Standards, codes of practice and compliance guidelines applicable to the Work, workplace health and safety, environmental protection, dangerous goods and electrical safety together with any Directions on safety or notices issued by any relevant authority including, to the extent applicable to the Work, the following (without limitation):~~

~~(A) *Rail Safety National Law (Queensland) Act 2017* (Qld);~~

~~(B) *Rail Safety National Law (Queensland)* (Qld);~~

~~(C) *Rail Safety National Law (Queensland) Regulation 2017* (Qld);~~

~~(D) *Electrical Safety Act 2002* (Qld);~~

~~(E) *Electrical Safety Regulation 2013* (Qld);~~

~~(F) electrical safety codes of practice (including the codes of practice referred to in the *Electrical Safety (Code of Practice) Notice 2013* (Qld);~~

~~(G) *Mining and Quarrying Safety and Health Act 1999* (Qld);~~

~~(H) *Mining and Quarrying Safety and Health Regulation 2017* (Qld);~~

~~(I) *Coal Mining Safety and Health Act 1999* (Qld);~~

~~(J) *Coal Mining Safety and Health Regulation 2017* (Qld);~~

~~(K) Recognised standards (coal mines) issued under the *Coal Mining Safety and Health Act 1999* (Qld);~~

~~(L) Guidelines (metalliferous mines and quarries) and guidance notes issued under the *Mining and Quarry's Safety and Health Act 1999* (Qld);~~

~~(M) Petroleum and Gas (Production and Safety) Act 2004 (Qld);~~

~~(N) Petroleum and Gas (Production and Safety) Regulation 2004 (Qld);~~

~~(O) Heavy Vehicle National Law (Queensland);~~

~~(P) *Heavy Vehicle National Law Act 2012* (Qld);~~

~~(Q) Heavy Vehicle National Regulations;~~

~~(R) *Explosives Act 1999* (Qld);~~

~~(S) *Radiation Safety Act 1999* (Qld);~~

~~(T) *DNRM Annual compliance plans for Queensland mineral and energy resources;~~

~~(U) guidance notes;~~

~~(V) general directives and letters;~~

~~(W) national compliance and enforcement policies;~~

~~(X) model codes of practice~~

~~(Y) explanatory memorandum of associated or relevant Acts; and~~

~~(Z) Queensland codes of practice;~~

~~(b) "**WH&S Act**" means the *Work Health and Safety Act 2011* (Qld); and~~

~~(c) "**WH&S Regulation**" means the *Work Health and Safety Regulation 2011* (Qld).~~

~~**2 Building and Construction Industry Payments Act 2004 (Qld)**~~

~~2.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor:~~

~~(i) receives from a subcontractor under sections 19, 20 or 30 of the Security of Payment Act; or~~

~~(ii) has been required to supply to a subcontractor under section 9A of~~



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the Subcontractors' Charges Act setting out Downer's name; and

(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under sections 19, 20 or 30 of the Security of Payment Act.

2.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 33 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work. Downer may recover from the Subcontractor each amount paid as a debt.

2.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:

(a) a suspension by a subcontractor of work, which forms part of the Work, under section 33 of the Security of Payment Act;

(b) a notice of claim being served on the Principal under section 10 of the Subcontractors' Charges Act; and

(c) a failure by the Subcontractor to comply with this clause.

2.4 For the purposes of this clause:

(a) "**Security of Payment Act**" means *the Building and Construction Industry Payments Act 2004* (Qld);

(b) "**subcontractor**" means a person engaged by the Subcontractor, its subcontractors or any other person to carry out work which forms part of the Work;

(c) "**Subcontractors' Charges Act** means the *Subcontractors' Charges Act 1974* (Qld); and

(d) "**work**" means work which the Subcontractor is, or may be, required to do under this Subcontract.

**3 Queensland Code of Practice for Construction Work**

3.1 In this clause:

(a) "**Building and Construction Code Branch**" or "BCCB" means any branch established within the Department of Justice and Attorney General which will have operational responsibility for administering the Queensland Code, investigating suspected breaches and reporting non-compliance; and

(b) "Queensland Code" means the Queensland Code of Practice for the Building and Construction Industry, as varied or replaced from time to time, and:

(i) prior to 1 July 2013, includes any Implementation Guidelines which expand on key aspects and objectives of the Queensland Code of Practice for the Building and Construction Industry; and

(ii) from 1 July 2013, includes the Implementation Guidelines for the Queensland Building and Construction Industry Code of Practice, as varied or replaced from time to time.

(The Queensland Code is currently available at www.justice.qld.gov.au)

3.2 The Subcontractor must comply, and must ensure that its employees, agents, Secondary Subcontractors and Related Companies comply, with the Queensland Code.

3.3 Compliance with the Queensland Code does not relieve the Subcontractor from responsibility to perform this Subcontract, or from liability for any Defects arising from compliance with the Queensland Code.

3.4 If the National Code applies, the National Code should be read conjointly with the Queensland Code to the maximum extent lawfully possible.

3.5 The Subcontractor acknowledges and accepts that the Queensland Government and Downer, and those authorised by the Queensland Government or Downer, may:

(a) request full access to the Site and any Work to:

(i) inspect any work, material, machinery, appliance, article or facility;

(ii) inspect and copy any record; and

(iii) interview any person,

and on such request the Subcontractor must provide such access as is necessary to allow validation of compliance with the Queensland Code by the Subcontractor and its employees, agents, Secondary Subcontractors and Related Companies;

(b) request specified documentation to be produced within a specified period, in person, by fax or by post and on such request the Subcontractor must provide such documentation; and

(c) publish or otherwise disclose information in relation to compliance with the Queensland Code.

3.6 Where a change in the provision of the Work is proposed under the Subcontract and that change would affect compliance with the Queensland Code, the Subcontractor must prepare a report to Downer, for provision to the Queensland Government, specifying the extent to which compliance with the Queensland Code by the Subcontractor or its employees, agents, Secondary Subcontractors or Related Companies will be affected (as applicable). Downer will, after consultation with the Queensland Government and consideration of the legislation and relevant OHS Rules, direct the Subcontractor as to the course it must adopt once the report is received. The Subcontractor shall have no Claim in connection with any such Direction or compliance with any such Direction.

3.7 The Subcontractor must maintain, and must ensure that its Secondary Subcontractors and Related Companies maintain, adequate records of compliance with the Queensland Code.

3.8 From 1 July 2013, the Subcontractor must notify Downer of any alleged breaches of the Queensland Code (and voluntary remedial action proposed) within 24 hours of becoming aware, or when a competent contractor exercising good industry practice should have become aware, of the alleged breach.

3.9 If the Subcontractor, or any of its employees, agents, Secondary Subcontractors or any Related Company, does not comply with the requirements of the



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~~Queensland Code, in the provision of the Work, such that a sanction is applied as a consequence, without prejudice to any rights that would otherwise accrue, the Queensland Government will be entitled to record that non- compliance and take it into account in the evaluation of any future tenders that may be lodged by the Subcontractor, or any of its employees, agents, Secondary Subcontractors or Related Companies, in respect of work for any part of the State of Queensland or its agencies.~~

~~3.10 The Subcontractor must:~~

~~(a) not engage any Secondary Subcontractor where the engagement would breach a sanction imposed by the BCCB;~~

~~(b) ensure that each Secondary Subcontractor maintains and provides access for any person or entity authorised by the Queensland Government to the same extent as required from the Subcontractor under this clause; and~~

~~(c) ensure that all contracts with Secondary Subcontractors contain requirements equivalent to the requirements set out in this clause.~~



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# Schedule 9– Western Australia

~~**1 Civil Liability Act 2002 (WA)**~~

~~The provisions of Part 1F of the *Civil Liability Act 2002* (WA) are excluded from applying to this Subcontract and the Subcontractor's performance of the Work.~~

~~**2 OHS Rules**~~

~~2.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer) is engaged as the 'main contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of Downer; and~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements.~~

~~2.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the OH&S Act and OH&S Regulation; and~~

~~(ii) all relevant associated legislation, regulations, rules, Standards, Australian Standards, codes of practice and compliance guidelines applicable to the Work, workplace health and safety, environmental protection, dangerous goods and electrical safety together with any Directions on safety or notices issued by any relevant authority including, to the extent applicable to the Work, the following:~~

~~(A) *Mines Safety and Inspection Act 1994* (WA);~~

~~(B) *Mines Safety and Inspection Regulations 1995* (WA);~~

~~(C) *Dangerous Goods Safety Act 2004* (WA);~~

~~(D) *Dangerous Goods Safety (Storage and Handling of Non explosives) Regulation 2007* (WA);~~

~~(E) *Dangerous Goods Safety (General) Regulation 2007* (WA);~~

~~(F) *Dangerous Goods Safety (Major Hazard Facilities) Regulations 2007* (WA);~~

~~(G) *Dangerous Goods Safety (Road and Rail Transport of Non explosives) Regulation 2007* (WA);~~

~~(H) *Dangerous Goods Safety (Explosives) Regulation 2007* (WA);~~

~~(I) *Rail Safety National Law (WA) Act 2015* (WA);~~

~~(J) *Rail Safety National Law Regulations 2015* (WA);~~

~~(K) national compliance and enforcement policies;~~

~~(L) explanatory memorandum of associated or relevant Acts; and~~

~~(M) Western Australia codes of practice;~~

~~(b) "**OH&S Act**" means the *Occupational Safety and Health Act 1984* (WA); and~~

~~(c) "**OH&S Regulation**" means the *Occupational Safety and Health Regulations 1996* (WA).~~

~~**3 Construction Contracts Act 2004 (WA)**~~

~~3.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor receives from a subcontractor under section 42 of the Security of Payment Act; and~~

~~(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under section 42 of the Security of Payment Act.~~

~~3.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 42 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work. Downer may recover from the Subcontractor each amount paid as a debt.~~

~~3.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:~~

~~(a) a suspension by a subcontractor of work which forms part of the Work under section 42 of the Security of Payment Act; and~~

~~(b) a failure by the Subcontractor to comply with this clause.~~

~~3.4 If the Subcontractor makes a payment claim to Downer under the Security of Payment Act, and the Subcontractor applies for adjudication of the payment to be made, the prescribed appointer for the purposes of section 26(1)(c)(ii) of the Security of Payment Act is the Resolution Institute, Australia (formerly known as the Institute of Arbitrators and Mediators Australia).~~

~~3.5 For the purposes of this clause:~~

~~(a) "**Security of Payment Act**" means the *Construction Contracts Act 2004* (WA);~~

~~(b) "**subcontractor**" means a person engaged by the Subcontractor, its Secondary Subcontractors or any other person to do work which forms part of the Work under this Subcontract; and~~

~~(c) "**work**" means work which the Subcontractor is, or may be, required to do under this Subcontract.~~

~~**4 Building Code**~~

~~(a) In this clause, "**WA Code**" means the Western Australia Building and Construction~~



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~~Industry Code of Conduct 2016, as varied or replaced from time to time.~~

~~(b) The Subcontractor must comply, and must ensure that its employees, agents, Secondary Subcontractors and Related Companies comply, with the WA Code.~~

~~(c) Compliance with the WA Code does not relieve the Subcontractor from responsibility to perform the Subcontract, or from liability for any Defects arising from compliance with the WA Code.~~

~~(d) If the National Code applies, the National Code should be read conjointly with the WA Code to the maximum extent lawfully possible.~~

~~(e) The Subcontractor acknowledges and accepts that the WA Government and Downer, and those authorised by the WA Government or Downer, may:~~

~~(i) request full access to any Work to:~~

~~(A) inspect any work, material, machinery, appliance, article or facility;~~

~~(B) inspect and copy any record; and~~

~~(C) interview any person,~~

~~and on such request the Subcontractor must provide such access as is necessary to allow validation of compliance with the WA Code by the Subcontractor and its employees, agents, Secondary Subcontractors and Related Companies;~~

~~(ii) request specified documentation to be produced within a specified period, in person, by fax or by post and on such request the Subcontractor must provide such documentation; and~~

~~(iii) publish or otherwise disclose information in relation to compliance with the WA Code.~~

~~(f) Where a change in the provision of the Work is proposed under the Subcontract and that change would affect compliance with the WA Code, the Subcontractor must prepare a report to Downer, for provision to the WA Government, specifying the extent to which compliance with the WA Code by the Subcontractor or its employees, agents, Secondary Subcontractors or Related Companies will be affected (as applicable). Downer will, after consultation with the WA Government and consideration of the legislation and relevant OHS Rules, direct the Subcontractor as to the course it must adopt once the report is received. The Subcontractor shall have no Claim in connection with any such Direction or compliance with any such Direction.~~

~~(g) The Subcontractor must maintain, and must ensure that its Secondary Subcontractors and Related Companies maintain, adequate records of compliance with the WA Code.~~

~~(h) The Subcontractor must notify Downer of any alleged breaches of the WA Code (and voluntary remedial action proposed) within 24 hours of becoming aware, or when a competent contractor exercising good industry practice should have become aware, of the alleged breach.~~

~~(i) If the Subcontractor, or any of its employees, agents, Secondary Subcontractors or any Related Company, does not comply with the requirements of the WA Code, in the provision of the Work, such that a sanction is applied as a consequence, without prejudice to any rights that would otherwise accrue, the WA Government will be entitled to record that non compliance and take it into account in the evaluation of any future tenders that may be lodged by the Subcontractor, or any of its employees, agents, Secondary Subcontractors or Related Companies, in respect of work for any part of the State of Western Australia or its agencies.~~

~~(j) The Subcontractor must:~~

~~(i) not engage any Secondary Subcontractor where the engagement would breach a sanction imposed by the relevant Western Australian Government compliance unit;~~

~~(ii) ensure that each Secondary Subcontractor maintains and provides access for any person or entity authorised by the Western Australian Government to the same extent as required from the Subcontractor under this clause; and~~

~~(iii) ensure that all contracts with Secondary Subcontractors contain requirements equivalent to the requirements set out in this clause.~~



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# Schedule 10 - Northern Territory

~~**1 OHS Rules (NT)**~~

~~1.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer is engaged as the 'principal contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor;~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements; and~~

~~(e) shall, to the extent the Subcontractor designs any structure (or part of a structure) which is to be constructed, provide to Downer a written report that specifies the hazards relating to the design of that structure which, so far as the Subcontractor is reasonably aware, creates a risk to the health or safety of persons who are carrying out any construction work on the structure or part.~~

~~1.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the WH&S Act and WH&S Regulation; and~~

~~(ii) all legislation applicable to work health and safety, environment protection, dangerous goods and electrical safety and regulations together with any Directions on safety or notices issued by any relevant authority or under any code of practice or compliance code appropriate to or relevant to the Work including, to the extent applicable to the Work, the following (without limitation):~~

~~(A) *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act* (NT);~~

~~(B) *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Regulations* (NT);~~

~~(C) *Dangerous Goods Act* (NT);~~

~~(D) *Dangerous Goods Regulations* (NT);~~

~~(E) *Electricity Reform Act* (NT);~~

~~(F) *Electricity Reform (Safety and Technical) Regulations* (NT);~~

~~(G) *Electricity Reform (Administration) Regulations* (NT);~~

~~(H) *Rail Safety (National Uniform Legislation) Act* (NT);~~

~~(I) *Radioactive Ores and Concentrates (Packaging and Transport) Act* (NT);~~

~~(J) national compliance and enforcement policies;~~

~~(K) model codes of practice;~~

~~(L) explanatory memorandum of associated or relevant Acts;~~

~~(M) Northern Territory codes of practice;~~

~~(N) Australian Standards; and~~

~~(O) best practice guidelines;~~

~~(b) "**WH&S Act**" means the Work Health & Safety (National Uniform Legislation) Act (NT); and~~

~~(c) "**WH&S Regulation**" means the Work Health & Safety (National Uniform Legislation) Regulations (NT).~~

~~**2 Construction Contracts (Security of Payments) Act (NT)**~~

~~2.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor receives from a subcontractor under section 44 of the Security of Payment Act; and~~

~~(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under section 44 of the Security of Payment Act.~~

~~2.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 44 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work. Downer may recover from the Subcontractor each amount paid as a debt.~~

~~2.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:~~

~~(a) a suspension by a subcontractor of work which forms part of the Work under section 44 of the Security of Payment Act; and~~

~~(b) a failure by the Subcontractor to comply with this clause.~~

~~2.4 If the Subcontractor makes a payment claim to Downer under the Security of Payment Act, and the Subcontractor applies for adjudication of the payment to be made, the prescribed appointer for the purposes of section 28(1)(c)(ii) of the Security of Payment Act is the Resolution Institute, Australia (formerly known as Institute of Arbitration and Mediation Australia).~~

~~2.5 For the purposes of this clause:~~

~~(a) "**Security of Payment Act**" means the *Construction Contracts (Security of Payments) Act* (NT);~~

~~(b) "**subcontractor**" means a person engaged by the Subcontractor, its Secondary Subcontractors or any other person to do work which forms part of the Work; and~~



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~~(c) "**work**" means work which the Subcontractor is, or may be, required to do under this Subcontract.~~



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# Schedule 11 – Tasmania

~~**1 Civil Liability Act 2002 (Tas)**~~

~~All rights, obligations and liabilities under or in connection with this Subcontract are to apply, even where the relevant circumstances involve a failure to take reasonable care and the existence of concurrent wrongdoers (as that term is defined in section 43A of *the Civil Liability Act 2002* (Tas)), unlimited and otherwise unaffected by anything that, but for this clause, may by virtue of the provisions of the *Civil Liability Act 2002* (Tas) have limited or otherwise affected those rights, obligations and liabilities.~~

~~**2 OHS Rules**~~

~~2.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer) is or may in the future be engaged as the 'principal contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor;~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements; and~~

~~(e) shall, to the extent the Subcontractor designs any structure (or part of a structure) which is to be constructed, provide to Downer a written report that specifies the hazards relating to the design of that structure which, so far as the Subcontractor is reasonably aware, creates a risk to the health or safety of persons who are carrying out any construction work on the structure or part.~~

~~2.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the WH&S Act and WH&S Regulation; and~~

~~(ii) all legislation applicable to work health and safety, environment protection, dangerous goods and electrical safety and regulations together with any Directions on safety or notices issued by any relevant authority or under any code of practice or compliance code appropriate to or relevant to the Work including, to the extent applicable to the Work, the following (without limitation):~~

~~(A) *Gas Act 2000* (Tas);~~

~~(B) *Gas (Safety) Regulations 2014* (Tas);~~

~~(C) *Gas Pipelines Act 2000* (Tas);~~

~~(D) *Gas Pipelines Regulations 2014* (Tas);~~

~~(E) *Dangerous Goods (Road and Rail Transport) Act 2010* (Tas);~~

~~(F) *Dangerous Goods (Road and Rail Transport) Regulations 2010* (Tas);~~

~~(G) *Rail Safety National Law (Tasmania)*;~~

~~(H) *Rail Safety National Law (Tasmania) Act 2012* (Tas);~~

~~(I) *Electrical Industry Safety and Administration Act 1997* (Tas);~~

~~(J) *Electrical Supply Industry Act 1995* (Tas);~~

~~(K) *Occupational Licensing Act 2005* (Tas);~~

~~(L) *Mines Work Health and Safety (Supplementary Requirements) Act 2012* (Tas);~~

~~(M) *Heavy Vehicle National Law (Tasmania)* (Tas);~~

~~(N) *Heavy Vehicle National Law (Tasmania) Act 2013 (Tas)*;~~

~~(O) *Heavy Vehicle National Law (Tasmania) Regulations 2014* (Tas);~~

~~(P) national compliance and enforcement policies; and~~

~~(Q) model codes of practice;~~

~~(b) "**WH&S Act**" means the *Work Health and Safety Act 2012* (Tas); and~~

~~(c) "**WH&S Regulation**" means the *Work Health and Safety Regulations 2012* (Tas).~~

~~**3 Building and Construction Industry Security of Payment Act 2009 (Tas)**~~

~~3.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor receives from a subcontractor under sections 19, 20 or 26 of the Security of Payment Act; or~~

~~(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under sections 19, 20 or 26 of the Security of Payment Act; and~~

~~(c) promptly notify Downer if it becomes aware that a subcontractor intends to exercise a statutory lien, under section 14(1) of the Security of Payment Act, over unfixed plant and materials supplied by the subcontractor for use in carrying out the Work.~~

~~3.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 29 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work and Downer may recover any amount paid as a debt.~~

~~3.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:~~

~~(a) a suspension by a subcontractor of work, which forms part of the Work, under section 29 of the Security of Payment Act;~~



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~~(b) a notice of claim being served on Downer under Part 5 of the Security of Payment Act;~~

~~(c) a subcontractor exercising a statutory lien, under section 14(1) of the Security of Payment Act, over unfixed plant or materials supplied by the subcontractor for use in carrying out work forming part of the Work; and~~

~~(d) a failure by the Subcontractor to comply with this clause.~~

~~3.4 For the purposes of this clause:~~

~~(a) "**Security of Payment Act**" means the Building and *Construction Industry Security of Payment Act 2009* (Tas);~~

~~(b) "**subcontractor**" means any person engaged by the Subcontractor, its Secondary Subcontractors or any other person to do work, which forms part of the Work; and~~

~~(c) "**work**" refers to work which the Subcontractor is, or may be, required to do under this Subcontract and includes equipment, materials, plant, design and other services and temporary works.~~

~~**4 Tasmanian Annexure to the National Code of Practice for the Construction Industry**~~

~~Pursuant to the Tasmanian Annexure to the National Code, the Subcontractor acknowledges and agrees that the obligations imposed on the Subcontractor in respect of the National Code in Schedule 14, will also be adopted and imposed on the Subcontractor in respect of the Tasmanian Annexure (making only those changes to Schedule 14, as are necessary to give effect to the Tasmanian Annexure) where this Subcontract requires the Subcontractor to do work on a Tasmanian Government construction project.~~



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# Schedule 12 – South Australia

~~**1 OHS Rules**~~

~~1.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer) is, or may in the future be, engaged as the 'principal contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor;~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements; and~~

~~(e) shall, to the extent the Subcontractor designs any structure (or part of a structure) which is to be constructed, provide to Downer a written report that specifies the hazards relating to the design of that structure which, so far as the Subcontractor is reasonably aware, creates a risk to the health or safety of persons who are carrying out any construction work on the structure or part.~~

~~1.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the WH&S Act and WH&S Regulation; and~~

~~(ii) all legislation applicable to work health and safety, environment protection, dangerous goods and electrical safety and regulations together with any Directions on safety or notices issued by any relevant authority or under any code of practice or compliance code appropriate to or relevant to the Work including, to the extent applicable to the Work, the following (without limitation):~~

~~(A) *Dangerous Substances Act 1979* (SA);~~

~~(B) *Dangerous Substances (General) Regulations 2017* (SA);~~

~~(C) *Dangerous Substances (Dangerous Goods Transport) Regulations 2008* (SA);~~

~~(D) *Explosives Act 1936* (SA);~~

~~(E) *Explosives Regulations 2011* (SA);~~

~~(F) *Electricity Act 1996* (SA);~~

~~(G) *Rail Safety National Law (South Australia) Act 2012* (SA);~~

~~(H) *Rail Safety National Law National Regulations 2012* (SA);~~

~~(I) *Mines and Works and Inspection Act 1920* (SA);~~

~~(J) *Mines and Works Inspection Regulations 2013* (SA);~~

~~(K) *Heavy Vehicle National Law (South Australia) Act 2013* (SA);~~

~~(L) all Heavy Vehicle National Regulations;~~

~~(M) *Radiation Protection and Control Act 1982* (SA);~~

~~(N) all Radiation Protection and Control Regulations;~~

~~(O) national compliance and enforcement policies;~~

~~(P) model codes of practice;~~

~~(Q) explanatory memorandum of associated or relevant Acts; and~~

~~(R) South Australia codes of practice;~~

~~(b) "**WH&S Act**" means the *Work Health and Safety Act 2012* (SA); and~~

~~(c) "**WH&S Regulation**" means the *Work Health and Safety Regulations 2012* (SA).~~

~~**2 Building and Construction Industry Security of Payment Act 2009 (SA)**~~

~~2.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor receives from a subcontractor under sections 15, 16 or 24 of the Security of Payment Act; or~~

~~(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under sections 19, 20 or 26 of the Security of Payment Act;~~

~~(c) ensure that a copy of any written communication it delivers or arranges to deliver to a subcontractor regarding a payment dispute or adjudication under the Security of Payment Act is provided to Downer at the same time;~~

~~(d) promptly and without delay give Downer a copy of any written communication regarding a payment dispute or adjudication under the Security of Payment Act, which the Subcontractor receives from a subcontractor; and~~

~~(e) require each subcontractor promptly and without delay, to give Downer a copy of any written communication regarding a payment dispute or adjudication under the Security of Payment Act, which the subcontractor receives from another party.~~

~~2.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 28 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work and Downer may recover any amount paid as a debt.~~

~~2.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an~~



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~~indemnity basis, suffered or incurred by Downer arising out of or in connection with:~~

~~(a) a suspension by a subcontractor of work, which forms part of the Work, under section 28 of the Security of Payment Act;~~

~~(b) a notice of claim being served on Downer under the Security of Payment Act; and~~

~~(c) a failure by the Subcontractor to comply with this clause.~~

~~2.4 For the purposes of this clause:~~

~~(a) "**Security of Payment Act**" means the *Building and Construction Industry Security of Payment Act 2009* (SA);~~

~~(b) "**subcontractor**" means any person engaged by the Subcontractor, its Secondary Subcontractors or any other person to do work, which forms part of the Work; and~~

~~(c) "**work**" refers to work which the Subcontractor is, or may be, required to do under this Subcontract and includes equipment, materials, plant, design and other services and temporary works.~~



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# Schedule 13– Australian Capital Territory

~~**1 OHS Rules**~~

~~1.1 The Subcontractor:~~

~~(a) shall comply with and ensure that its Secondary Subcontractors comply with the OHS Rules and shall do all things necessary and in a manner which ensures that Downer satisfies its obligations under the OHS Rules;~~

~~(b) acknowledges that Downer (or another party as advised by Downer) is engaged as the 'principal contractor' under the OHS Rules for the Site;~~

~~(c) shall comply with and ensure that its Secondary Subcontractors comply with any Direction of the principal contractor;~~

~~(d) shall, before commencing any Work, prepare and submit details of its work health, safety and rehabilitation management system and a Site specific safety plan incorporating safe work method statements; and~~

~~(e) shall, to the extent the Subcontractor designs any structure (or part of a structure) which is to be constructed, provide to Downer a written report that specifies the hazards relating to the design of that structure which, so far as the Subcontractor is reasonably aware, creates a risk to the health or safety of persons who are carrying out any construction work on the structure or part.~~

~~1.2 For the purpose of this clause:~~

~~(a) "**OHS Rules**" means~~

~~(i) the WH&S Act and WH&S Regulation; and~~

~~(ii) all legislation applicable to work health and safety, environment protection, dangerous goods and electrical safety and regulations together with any Directions on safety or notices issued by any relevant authority or under any code of practice or compliance code appropriate to or relevant to the Work including, to the extent applicable to the Work, the following (without limitation):~~

~~(A) *Dangerous Substances Act 2004* (ACT);~~

~~(B) *Dangerous Goods (Road Transport) Act 2009* (ACT);~~

~~(C) *Machinery Act 1949* (ACT);~~

~~(D) *Fuels Control Act 1979* (ACT);~~

~~(E) *Scaffolding and Lifts Act 1912* (ACT);~~

~~(F) *Gas Safety Act 2000* (ACT);~~

~~(G) *Heavy Vehicle National Law* (ACT);~~

~~(H) *Heavy Vehicle National Law (ACT) Act 2013* (ACT);~~

~~(I) *Heavy Vehicle National (Transitional Provisions) Regulation 2014* (ACT);~~

~~(J) national compliance and enforcement policies;~~

~~(K) model codes of practice;~~

~~(L) explanatory memorandum of associated or relevant Acts;~~

~~(M) ACT codes of practice;~~

~~(N) Australian Standards; and~~

~~(O) Best practice guidelines;~~

~~(b) "**WH&S Act**" means *the Work Health and Safety Act 2011* (ACT); and~~

~~(c) "**WH&S Regulation**" means the *Work Health and Safety Regulation 2011* (ACT).~~

~~**2 Building and Construction Industry (Security of Payment) Act 2009 (ACT)**~~

~~2.1 The Subcontractor shall:~~

~~(a) promptly give Downer a copy of any notice the Subcontractor:~~

~~(i) receives from a subcontractor under section 17, 18 or 26 of the Security of Payment Act; or~~

~~(ii) has been required to supply to a subcontractor under section 40 of the Security of Payment Act setting out Downer's name;~~

~~(b) ensure that each subcontractor promptly gives Downer a copy of any notice that the subcontractor receives from another person under section 17, 18 or 26 of the Security of Payment Act; and~~

~~(c) promptly notify Downer if it becomes aware that a subcontractor intends to exercise a statutory lien, under section 13(3) of the Security of Payment Act, over unfixed plant and materials supplied by the subcontractor for use in carrying out the Work.~~

~~2.2 If Downer becomes aware that a subcontractor is entitled to suspend work under section 29 of the Security of Payment Act, Downer may pay the subcontractor such money that is, or may be, owing to the subcontractor for work forming part of the Work and Downer may recover any amount paid as a debt.~~

~~2.3 The Subcontractor shall indemnify Downer against any loss, expense or damage of any nature, including financial loss and legal costs on an indemnity basis, suffered or incurred by Downer arising out of or in connection with:~~

~~(a) a suspension by a subcontractor of work, which forms part of the Work, under section 29 of the Security of Payment Act;~~

~~(b) a notice of claim being served on the Principal under Part 4 – Division 4.2 of the Security of Payment Act;~~

~~(c) a subcontractor exercising a statutory lien, under section 13(3) of the Security of Payment Act, over unfixed plant or materials supplied by the subcontractor for use in carrying out work forming part of the Work; and~~

~~(d) a failure by the Subcontractor to comply with this clause.~~

~~2.4 For the purposes of this clause:~~



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~~(a) "**Security of Payment Act**" means the Building and Construction Industry (Security of Payment) Act 2009 (ACT);~~

~~(b) "**subcontractor**" means any person engaged by the Subcontractor, its Secondary Subcontractors or any other person to do work, which forms part of the Work; and~~

~~(c) "**work**" refers to work which the Subcontractor is, or may be, required to do under this Subcontract and includes equipment, materials, plant, design and other services and temporary works.~~



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# Schedule 14 – National Code

**1 National Code of Practice for the Construction Industry (National Code)**

1.1 In this Schedule 14:

**ABCC** means the body referred to in subsection 29(2) of the Act.

**ABC Commissioner** means the Australian Building and Construction Commissioner referred to in subsection 15(1) of the Act.

**Act** means the *Building and Construction Industry (Improving Productivity) Act 2016.*

**Building Code** means the *Code for the Tendering and Performance of Building Work 2016*, which is available at https://www.legislation.gov.au/Details/F2016L01859.

**Building Contractor** has the same meaning as in the Act.

**Building Industry Participant** has the same meaning as in the Act.

**Building Work** has the same meaning as in subsection 3(4) of the Building Code.

**Commonwealth Funded Building Work** means Building Work in items 1-8 of Schedule 1 of the Building Code.

**Enterprise Agreement** has the same meaning as in the *Fair Work Act 2009* (Cth).

**Exclusion Sanction** has the same meaning as in subsection 3(3) of the Building Code.

**Related Entity** has the same meaning as in subsection 3(2) of the Building Code.

**Sub-subcontractor** means a Building Contractor or Building Industry Participant who the Subcontractor has entered, or proposes to enter, into a sub-subcontract with to undertake any of the Works.

**Works** means Commonwealth Funded Building Work that is the subject of this Subcontract.

1.2 The Subcontractor declares as at the date of commencement of this Subcontract in relation to the Works, that it:

(a) is not subject to an Exclusion Sanction;

(b) unless approved otherwise by the ABC Commissioner, is not excluded from performing Building Work funded by a state or territory government; and

(c) is not covered by, and does not have Related Entities covered by, an Enterprise Agreement that does not meet the requirements of section 11 of the Building Code.

1.3 The Subcontractor:

(a) declares as at the date of commencement of this Subcontract in relation to the Works; and

(b) must ensure that during the term of this Subcontract in relation to the Works,

that it and its Sub-subcontractors:

(c) comply with the Building Code;

(d) will only use products in relation to the Works that comply with the relevant Australian Standards published by, or on behalf of, Standards Australia;

(e) comply with the Workplace Relations Management Plan approved by the ABCC in accordance with Part 6 of the Building Code that applies to the Work.

1.4 Without limiting and notwithstanding the other provisions of this Schedule 14, the Subcontractor will ensure that remedial action is taken to rectify any behaviour on the part of it and its Sub-subcontractors that is non-compliant with the Building Code.

1.5 The Subcontractor must every six months during the term of this Subcontract advise Downer whether:

(a) it has in the preceding six months or since it last advised Downer, whichever is the earliest, had an adverse decision, direction or order of a court or tribunal made against it for a breach of a designated building law, work health and safety law or *the Migration Act 1958* (Cth);

(b) it has in the preceding six months or since it last advised Downer, whichever is the earliest:

(i) been required to pay any amount under an adjudication certificate (provided in accordance with a law relating to the security of payments that are due to persons in respect of building work) to a Building Contractor or Building Industry Participant; or

(ii) owed any unsatisfied judgement debts to a Building Contractor or Building Industry Participant.

1.6 Compliance with the Building Code does not relieve the Subcontractor from responsibility to perform this Subcontract, or from liability for any Defect in the Works arising from compliance with the Building Code.

1.7 The Subcontractor must notify the ABCC of any breach or suspected breach of the Building Code as soon as practicable but no later than two working days after becoming aware of the breach or suspected breach and of the steps proposed to be taken to rectify the breach.

1.8 The Subcontractor acknowledges the powers and functions of the ABC Commissioner and the ABCC under the Act and the Building Code and will ensure that it and its Sub-subcontractors comply with any requests made by the ABCC and the ABC Commissioner within those powers and functions, including but not limited to requests for entry under section 72 of the Act, requests to interview any person under section 74 of the Act, requests to produce records or documents under sections 74 and 77 of the Act and requests for information concerning matters relating to the Building Code under subsection 7(c) of the Building Code.

1.9 The Subcontractor must only enter into a sub-subcontract for any of the Work where:

(a) the Sub-subcontractor has submitted a declaration of compliance, including the further information outlined in Attachment A to the declaration of compliance, in substantively the same form as the model declaration of compliance applicable to contractors and subcontractors in relation to the Building Code (located in Part 4 in the document entitled Model Clauses Type B, available on the ABCC website (www.abcc.gove.au)); and

(b) the sub-subcontract with the Sub-subcontractor contains clauses in substantively the same form as the model contract clauses applicable to contractors



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and subcontractors in relation to the Building Code.

1.10 The Subcontractor must ensure that it and its Sub-subcontractors comply with clauses contained in the sub-subcontract referred to in this Schedule.



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## Schedule 15 – Deed of Novation

THIS DEED is made the day of 20….

**Parties:**

1 Downer Utilities Australia Pty Ltd ACN 075 194 857 of Level 1, T1 Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113 (**Downer**)

2 [**Insert**] (ACN ) of [insert address] (**Subcontractor**)

3 [**Insert**] (ACN ) of [insert address] (**Novatee**)

**Background**

A Downer has engaged the Subcontractor pursuant to the Subcontract.

B The parties have agreed to novate the Subcontract on the terms and conditions of this Deed.

**1 Definitions and Interpretation**

**1.1 Definitions**

In this Deed:

**Deed** means this document;

**Effective Date** means the date of this Deed; and

**Subcontract** means the contract between Downer and the Subcontractor dated [insert].

Interpretation

Unless expressed to the contrary, in this Deed:

(a) headings are for convenience only and do not affect the interpretation of this Deed;

(b) the singular includes the plural and vice versa;

(c) words that are gender neutral or gender specific include each gender;

(d) where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings;

(e) the words 'such as', 'including', 'particularly' and similar expressions are not used as nor are intended to be interpreted as words of limitation;

(f) a reference to:

(i) a person includes a natural person, partnership, joint venture, government agency, association, corporation or other body corporate;

(ii) a thing (including a chose in action or other right) includes a part of that thing;

(iii) a party includes its successors and permitted assigns;

(iv) a contract includes all amendments or supplements to that contract;

(v) a clause, term, party, schedule or attachment is a reference to a clause or term of, or party, schedule or attachment to this Deed;

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(vi) a law includes a constitutional provision, treaty, decree, convention, statute, regulation, ordinance, by-law, judgment, rule of common law or equity or a rule of an applicable financial market and is a reference to that law as amended, consolidated or replaced;

(vii) an agreement other than this Deed includes an undertaking, or legally enforceable arrangement or understanding whether or not in writing; and

(viii) a monetary amount is in Australian dollars;

(a) an agreement on the part of two or more persons binds them jointly and severally;

(b) when the day on which something must be done is not a business day, that thing must be done on the following business day;

(c) in determining the time of day where relevant to the Deed, the relevant time of day is:

(i) for the purposes of giving or receiving notices, the time of day where a party receiving a notice is located; or

(ii) for any other purpose under this Deed, the time of day in the place where the party required to perform an obligation is located; and

(d) no rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of this Deed or any part of it.

## 2 Novation

### 2.1 Novation

With effect on and from the Effective Date, the parties novate the Subcontract so that:

(a) the Novatee replaces Downer under the Subcontract as if it were an original party to the Subcontract; and

(b) all references in the Subcontract to Downer must be read as references to the Novatee.

### 2.2 Assumptions of rights and obligations

Subject to clause 3, on and from the Effective Date:

(a) the Novatee:

(i) must comply with the Subcontract as if the Novatee had been originally named as a party to the Subcontract in place of Downer; and

(ii) obtains all rights and assumes all obligations of Downer under the Subcontract; and

(b) the Subcontractor must comply with the Subcontract on the basis that the Novatee has replaced Downer under it in accordance with this Deed.

## 3 Release

### 3.1 Release by the Subcontractor and the Novatee

The Subcontractor and the Novatee release Downer from all obligations and liabilities of Downer arising out of or in connection with the Subcontract including:

(a) any claims for payment made or to be made in relation to work or services provided or matters arising prior to the Effective Date; or

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(b) any claims made on any other basis whatsoever in relation to matters occurring prior to and after the Effective Date.

### 3.2 Warranty

The Subcontractor warrants to the Novatee that:

(a) it has performed the Work under the Subcontract in accordance with the Subcontract;

(b) it must perform the remaining Work under the Subcontract in accordance with the Subcontract; and

(c) it is aware that the Novatee is relying on it to fulfil its obligations under the Subcontract.

## 4 Assignment

This Deed is personal between the parties and no party may assign any right under this Deed except with, and in strict compliance with any conditions of, the prior written consent of each of the other parties.

## 5 Governing law and jurisdiction

This Deed will be construed in accordance with the laws [insert relevant State or Territory] and the parties irrevocably submit to the jurisdiction of the Courts of that State.

## 6 Miscellaneous

### 6.1 Variation

No variation of this Deed is effective unless made in writing and signed by each party.

### 6.2 Waiver

(a) No waiver of a right or remedy under this Deed is effective unless it is in writing and signed by the party granting it. It is only effective in the specific instance and for the specific purpose for which it is granted.

(b) A single or partial exercise of a right or remedy under this Deed does not prevent a further exercise of that or of any other right or remedy.

(c) Failure to exercise or delay in exercising a right or remedy under this Deed does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

### 6.3 Further assurances

Each party agrees, at its own expense, on the request of any one of the other parties, to do everything reasonably necessary to cause this Deed and the transactions contemplated by it to be completed and become and remain effective.

### 6.4 Counterparts

This Deed may be executed in any number of counterparts, each of which, when executed, is an original. Those counterparts together make one instrument.

### 6.5 Cumulative rights

Except as expressly provided in this Deed, the rights of a party under this Deed are in addition to and do not exclude or limit any other rights or remedies provided by law.

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### 6.6 Entire agreement

(a) This Deed is the entire agreement between the parties about its subject matter and replaces all previous agreements, understandings, representations and warranties about that subject matter.

(b) Each party represents and warrants that it has not relied on any representations or warranties about the subject matter of this Deed except as expressly provided in this Deed.

### 6.7 Relationship of the parties

Except as expressly provided in this Deed:

(a) nothing in this Deed is intended to constitute a fiduciary relationship or an agency, partnership or trust; and

(b) no party has authority to bind any other party.

### 6.8 Survival and merger

(a) No term of this Deed merges on completion of any transaction contemplated by this Deed.

(b) Clauses 1, 3, 5 and 6 survive termination or expiry of this Deed together with any other term which by its nature is intended to do so.

### 6.9 Capacity

Except as expressly provided in this Deed each person who executes this Deed does so solely in its own legal capacity and not as agent or trustee for or a partner of any other person.

---

**Execution page**

**Executed as a deed**

Signed and delivered by [**Downer entity**] in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

| | |
|---|---|
| Signature of director | Signature of director/secretary |
| Name of director (print) | Name of director/secretary (print) |

Signed and delivered by [**Subcontract**] in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

| | |
|---|---|
| Signature of director | Signature of director/secretary |
| Name of director (print) | Name of director/secretary (print) |

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Signed and delivered by [**Novatee**] in accordance with section 127 of the *Corporations Act 2001* (Cth) and by:

| | |
|---|---|
| Signature of director | Signature of director/secretary |
| Name of director (print) | Name of director/secretary (print) |

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# Schedule 16 – Subcontractor's Warranty

**Form of Warranty**

**Subcontractor's Warranty**

**This Deed Poll is made on** [insert]

**Party**
**Made by** [**Insert Entity**] (ACN ) of [insert] (**Subcontractor**)

**In favour of** **[Insert relevant Downer Entity]** (ACN ) of [insert] (**Downer**)

**Background**

A. Downer and the Subcontractor entered into [insert relevant description of work and subcontract]. (**Subcontract**).

B. The Subcontractor as part of its payment claim submitted under the Subcontract provides the representations, warranties and indemnities as set out below.

## 7 Defined terms and interpretation

### 7.1 Definitions in the Dictionary

A term or expression starting with a capital letter which is defined in the Subcontract has the meaning given to it in the Subcontract.

### 7.2 Interpretation

The interpretation clause of the Subcontract (clause 1.2) sets out the rules of interpretation for this deed.

## 8 Representations and Warranties

The Subcontractor unconditionally and irrevocably represents and warrants that for the period to which the submitted payment claim relates:

(a) all moneys due and owing by the Subcontractor to all contractors, subcontractors, suppliers, consultants and others who have been engaged by the Subcontractor in relation to the Subcontract, have been duly paid in accordance with the Security of Payment Act or otherwise under the Subcontract;

(b) all workers and others who have been engaged by the Subcontractor in relation to the Subcontract have at the date of submitting the payment claim been paid all moneys due and payable to them in respect of their engagement in relation to the Subcontract;

(c) all wages, allowances and other entitlements payable by the Subcontractor to its employees who performed the Work under the Subcontract, have been paid as required by Legal Requirements;

(d) all payroll tax due in respect of employees who performed the Work under the Subcontract, as at the date of submitting the payment claim has been paid;

(e) the Subcontractor has received a written statement from its Secondary Subcontractors engaged to perform work under the Subcontract in relation to those matters listed above in paragraphs (a) to (d) inclusive; [Delete if not applicable]

(f) insurance policies as required under the Subcontract remain in force and all insurance premiums have been paid as required by the insurers; and

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(g) it has carried out the Work:

(iii) in accordance with the Subcontract so that the Work, when completed, will be fit for its Intended Purpose and comply with all the requirements of the Subcontractand all relevant Legal Requirements; and

(iv) in accordance with the express provisions of the Subcontract, including Downer's Project Objectives, and where no more specific and/or higher standard is specified, with due expedition and diligence, with sound workmanship and materials, safely and in accordance with good industry practice, applicable Legal Requirements and to the reasonable satisfaction of Downer.

## 9 Indemnity

The Subcontractor indemnifies Downer against any breach of the Subcontractor's representations and warranties provided in clause 8.

**Executed as a deed poll.**

Signed and delivered by [**Insert**] in accordance with section 127 of the *Corporations Act 2001 (Cth)* and by:

| | |
|---|---|
| Signature of director | Signature of director/secretary |
| Name of director (print) | Name of director/secretary (print) |

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## Schedule 17 - Special Conditions

This document contains the Special Conditions under the agreed Subcontract between Downer and the Subcontractor.

The General Conditions of Subcontract are amended as set out below. To the extent of any ambiguity or discrepancy between the terms of the General Conditions of Subcontract and the terms set out in these Special Conditions, the terms of these Special Conditions prevails.

| No | Clause | Special Condition |
|---|---|---|
| 1 | 1.1 – Definitions | Add the following new terms into the definitions:<br>*"**Equipment** means the plant and equipment listed in Part B of this requirement and as required for the performance of the Scope of Works"*<br>*"**Good Design and Construction Practices** means practices followed when work is undertaken in accordance with all of the following:*<br>*1 in a sound and workmanlike manner;*<br>*2 with sound management;*<br>*3 with due diligence, care and skill;*<br>*4 in a manner which allows for this Subcontract to be complied with;*<br>*5 using new materials of merchantable quality which are fit for the Intended Purpose;*<br>*6 in accordance with all applicable Legal Requirements; and*<br>*7 consistently with good and proper practice for an experienced subcontractor of high skill and quality, taking into account specific Australian conditions, for the engineering, design, procurement, supply, construction, testing and commissioning of wind generation facilities; and*<br>*8 to the extent applicable, includes compliance with good electricity industry practice as defined in the National Electricity Rules."*<br>*"**Independent Expert** means the independent expert appointed under the Head Contract in respect of Serial Defects under the Head Contract."*<br><br>*"**Land Lease Agreements** means the lease agreements as defined in the Head Contract."*<br><br>*"**Lenders** means any of the lenders who have entered into financing arrangements with the Owner in relation to the Project, including the security trustee."*<br>*"**Material** means the material listed in Part B of this Agreement and as required to complete the Scope of Works"*<br>*"**National Electricity Law** means the law set out in the schedule to the National Electricity (South Australia) Act 1996 (South Australia) and incorporated into the laws of New South Wales by the National Electricity (New South Wales) Act 1997 (NSW) and the National Electricity Rules."*<br>*"**National Electricity Rules** means the rules made pursuant to the National Electricity Law, as amended from time to time."*<br>*"**Owner** means BWF Nominees Pty Ltd (ACN 633 105 405) as trustee for the BWF Trust."*<br>*"**Plant** means all materials, tools, equipment and machinery necessary and incidental to the performance of the BOP Works in accordance with this Agreement, but excluding Materials and Equipment."*<br>*"**Project Contract** means the agreement between the Owner and the Principal for the delivery of the Project."*<br>*~~"**Project Agreements** means the following agreements:~~*<br>*~~(a) Land Lease Agreements;~~*<br>*~~(b) NSP Project Agreement;~~*<br>*~~(c) NSP Connection Agreement;~~*<br>*~~(d) Development Approvals;~~*<br>*~~(e) Works Authorisation Deed;~~*<br>*~~(f) Power Purchase Agreement; and~~*<br>*~~(g) Project Contract."~~*<br><br>*"**Project ~~Agreement~~ Requirements** means the extracted requirements of the Project Agreements that are to be complied with by the Subcontractor in the performance of the Works as set out in Schedule 1 of this Agreement"*<br>*"**Non-rippable Rock** means rock encountered in an activity specified in Column A below (or an analogous activity) which cannot reasonably be removed, excavated, ripped or piled (as applicable) using machinery referred to in Column B below for the activity (or equivalent machinery) at a productivity rate which is higher than the productivity rate specified in Column C below referable to that activity."* |

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<table>
<tr><td></td><td></td><td>
<table>
<tr><th>Column A – Activity</th><th>Column B – Machinery</th><th>Column C – Productivity Rate</th></tr>
<tr><td>Earthworks</td><td>D9</td><td>60 bm3 /</td></tr>
<tr><td></td><td>D8</td><td>55 bm3 / h</td></tr>
<tr><td></td><td>45T Excavator</td><td>40 bm3 / h</td></tr>
<tr><td>Detailed Excavation</td><td>45T Excavator</td><td>40 bm3 / h</td></tr>
<tr><td>Trenching</td><td>Vermeer 755</td><td>20 bm3 / h</td></tr>
<tr><td></td><td>Trenching Wheel</td><td>20 bm3 / h</td></tr>
<tr><td>Power pole piling</td><td>SR30</td><td>2.5 bm3 / h</td></tr>
</table>
“Serial Defect means a “Serial Defect” as determined under clause 24.9 of the Head Contract.”<br>“Work Health and Safety Requirements means those requirements under Legislation”<br>“Work Health and Safety Management Plan means those requirements under the Subcontractor’s Work Health and Safety Management Plan and as required by Legislation”
</td></tr>
<tr><td>2</td><td>1.1 – Definition of Consequential Loss</td><td>
Delete and replace the definition of Consequential Loss with the following:
“Consequential Loss means any of the following:<br>(a) Business interruption;<br>(b) Loss of use;<br>(c) Loss of actual or anticipated profit or revenue (but for the avoidance of doubt does not include the Subcontractor’s profit that forms part of the Subcontract Sum)’;<br>(d) Loss of generation or production; or<br>(e) Increased financing costs.”
</td></tr>
<tr><td>3</td><td>10.2(g) - Subcontracting</td><td>
In clause 10.2(g)(i), insert the following words: “(or its nominee (including, for the avoidance of doubt, the Owner and the Lenders)” after the words: “Downer and the Principal”.
In clause 10.2(g)(i), delete the following words: “in a form reasonably required by Downer” and replace with the following words: “in the form set out in Schedule 16”
</td></tr>
<tr><td>4</td><td>New sub-clause 2.1A</td><td>
Insert a new optional sub-clause 2.1A as follows:
“2.1A Provision of Materials and Equipment
(a) The Subcontractor:<br>(i) must supply:<br>(A) the Materials and Equipment; and<br>(B) the Plant and labour necessary for the performance of the Works; and<br>(C) anything else necessary for the performance of the Works and the Subcontractor’s other obligations under this Subcontract;<br>(ii) warrants that for the Design Life the Materials and Equipment comprising any part of the Subcontractor’s scope of Work, or a suitable replacement, will be available or may be manufactured;<br>(iii) will at its own risk and expense, transport all items referred to in clause 2.1A(a) to the Site in a manner and by the mode of transport which the Subcontractor judges most suitable under all the circumstances to comply with the requirements of this Subcontract and all applicable Legal Requirements;<br>(iv) subject to clause 2.1A(d), will use every reasonable means to prevent damage to any of the roads or bridges communicating with or on the routes to the Site by any traffic of the Subcontractor or any of its Secondary Subcontractors and agents; and<br>(v) will be responsible for and pay the costs of remedying any damage to, altering or improving any roads and surroundings and related infrastructure or strengthening any bridges communicating with or on the routes to the Site caused by or in order to facilitate the movement of the Plant and Materials and Equipment.
(b) Where the nature of the Works requires the use by the Subcontractor of waterborne transport, the provisions of this clause 2.1A will be construed as though:<br>(A) ‘road’ includes a lock, dock, sea wall or other structure related to a waterway; and<br>(B) ‘vehicle’ includes craft.
(c) The Subcontractor will:<br>(A) take all such measures as may be reasonably necessary to ensure that its and its Secondary Subcontractors’ arrangements with respect to the transport of Materials and Equipment and labour to the Site does not interfere with local traffic in the vicinity of the Site; and<br>(B) where such interference is unavoidable, make such arrangements as may be
</td></tr>
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| | | |
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| | | *reasonably required to provide alternative routes for local traffic and otherwise minimise the effect of such interference*." |
| 5 | New clause 4.6 | Insert new clause 4.6 as follows:<br><br>"***4.6 Compliance with Project Agreements***<br>*(a) The Subcontractor will perform the Works having regard to the requirements of the Project Agreement Requirements:*<br>*(i) to the extent indicated in Schedule 19, Schedule 20 ~~and Schedule 21~~ and*<br>*(ii) so as not to cause or contribute to a breach or default by the Owner of such Project Agreements.*<br>*(b) The Subcontractor must comply with the Project Agreement Requirements set out in Schedule 19, Schedule 20 ~~and Schedule 21~~.*<br>*(c) The Subcontractor acknowledges and agrees that:*<br>*(i) it has read, and is familiar with, the terms and conditions of the Project Agreement Requirements indicated in Schedule 19, Schedule 20 ~~and, Schedule 21~~ and*<br>*(ii) it is fully aware of the duties, functions and tasks to be performed by, the Subcontractor under the Project Agreement Requirements indicated in Schedule 19 and Schedule 20 ~~and Schedule 21~~ which affect the construction, maintenance and operation of the Works.*<br>*(d) Where required by Downer in writing, the Subcontractor will, at its cost:*<br>*(i) cooperate with the Lenders to the extent reasonable upon request by the Owner; and*<br>*(ii) provide to the Lenders all documents and information deliverable under this Subcontract in connection with the Works and the Subcontractor's obligations under this Subcontract.*<br>*(e) Where a breach of this clause 4.6 causes the Principal to incur a loss under or in connection with a Project Agreement and Downer to incur a liability under clause 4.6(e) of the Head Contract, the Subcontractor agrees that such loss shall not be construed as a Consequential Loss solely due to the fact that it was incurred under the Project Agreement or the Head Contract.* |
| 6 | 6.3 – Supply of documents by the Subcontractor | Add the following sentence to the start of clause 6.3:<br><br>"(a) While the Works are being performed, any documents supplied by the Subcontractor must be available at all reasonable times for reference by Downer." |
| | | Add new paragraph (b):<br><br>"(b) Downer may direct the Subcontractor to supply to Downer and Downer's Representative at any time particulars of the Plant and Materials and Equipment as follows:<br>*(i)* the mode and place of manufacture;<br>*(ii)* the source of supply; and<br>*(iii)* where applicable, the performance capacities." |
| 7 | 9 – Indemnity, liability and insurance | Insert new sub-clause 9.10:<br><br>"***9.10 Subcontractor to comply with insurance policy***<br>*(a) The Subcontractor will, and will procure its Secondary Subcontractors to:*<br>*(i) comply with the terms of any policy of insurance to be effected pursuant to the Project Contract and not do anything or omit to do anything that may render such policies voidable; and*<br>*(ii) assist Downer, the Principal and the Owner with any claims made by the Owner, or the Principal, or Downer (as applicable) under any insurance policy required under this Subcontract, including by promptly (and no later than 7 Business Days after a request by the Owner, or the Principal, or Downer) furnishing information and documentation that is available and as reasonably requested by the Owner, or the Principal, or Downer, and where not available, furnishing to the Owner, or the Principal, or Downer as soon as it is available.*<br>*(b) Clause 9.10(a) only applies in respect of the insurances which the Owner is required to effect and maintain to the extent that the Subcontractor has received the relevant terms and conditions of such policy of insurance.*<br>*(c) The Subcontractor shall, as soon as reasonably practicable, notify Downer in writing of any occurrence which may give rise to a claim under any insurance policy and shall keep Downer informed of subsequent developments concerning the claim.*<br>*(d) The Subcontractor must, at its own cost and risk, at all times fully co-operate with the Owner, or the Principal, or Downer in pursuing recovery of any insurance claims made by the Owner, or the Principal, or Downer under any policy of insurance to be effected* |

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| | | |
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| | | *pursuant to the Project Contract and do everything reasonably required to enable the Owner, or the Principal, or Downer to claim, collect or recover money due under any such insurance policy, including the provision of reports, information, and any other matters required by the Owner, or the Principal, or Downer from time to time.*<br>*(e) Unless otherwise provided in this Subcontract or required by the Owner, or the Principal, or Downer, the Subcontractor must promptly and diligently prepare and conduct all and any claims made by it under the insurance policies it effects under this Subcontract. All monies payable by any insurers in respect of a claim by the Subcontractor will be paid to the Subcontractor and to the extent the relevant claim relates to loss or damage to the Works or the Project, the Subcontractor must apply such moneys to the repair or reinstatement of such loss or damage. In respect of insurance claims in which the Owner's, or the Principal's, or Downer's insurable interest is involved, the Subcontractor must not give any release or make any settlement or compromise with the insurer without the prior written approval of the Owner, the Principal and Downer.*<br>*(f) If the Subcontractor fails to comply with its obligations under clause 9.10(e), the Owner, or the Principal, or Downer (as applicable) are entitled to prepare and conduct any such claims.*<br>*(g) The Owner, or the Principal, or Downer (as applicable) must give the Subcontractor all such reasonable assistance in the preparation and conduct of claims made by the Subcontractor under the insurance policies required under this Subcontract as is required by the Subcontractor."* |
| | | In clause 9.9(b)(iv), insert the following words: "*and the Owner*" after the words "(including the Principal)". |
| 8 | 13.4 – Quality | Insert the following words in sub-clause 13.1(a)(i): "fit for its Intended Purpose" after the words: "materials which are". |
| 9 | 14A – Non-rippable Rock | Insert new clause 14A:<br><br>"***14A Non-rippable Rock***<br>*(a) If at any time during the execution of the Works, the Subcontractor encounters Non-rippable Rock, the Subcontractor shall, as soon as practicable but in any event within 1 Business Day of encountering Non-rippable Rock, submit to Downer's Representative written notice specifying:*<br>*(i) the extent of Non-rippable Rock encountered;*<br>*(ii) the extent of the additional work and additional resources which the Subcontractor estimates to be necessary to deal with the Non-rippable Rock; and*<br>*(iii) the Subcontractor's estimate of the cost of the measures necessary to deal with the Non-rippable Rock.*<br>*(b) Following receipt of a Subcontractor's notice under clause 14A(a) (which may be submitted by the Subcontractor on each occasion it encounters Non-rippable Rock), Downer's Representative will issue a written direction to the Subcontractor agreeing to the removal of the Non-rippable Rock.*<br><br>*(c) The Subcontractor is not to proceed with Non-rippable Rock work until a written direction is received in accordance with clause 14A(b).*<br>*(d) the Subcontractor will not make any Claim, and releases Downer from all Claimsarising out of or in connection with Non-rippable Rock."* |
| 10 | New clause 13.9 – Serial Defects | Insert new clause 13.9 as follows:<br><br>**"13.9 *Serial Defects***<br><br>*(a) "Subject to clauses 13.9(b) to 13.9(g) inclusive, if a Serial Defect is identified at any time prior to expiry of the initial 2 year Defects Liability Period:*<br>*(i) the Subcontractor must, at its cost, immediately (or within such other time agreed with Downer) redesign, replace or rectify (as applicable) any identical part of the Works (regardless of whether the Serial Defect has become apparent in each identical part); and*<br>*(ii) the Defects Liability Period for all parts that are the subject of the Serial Defect will be extended by a further 5 years, provided that the Defects Liability Period will not in any event, exceed 6 years from the Date of Practical Completion.*<br>*(b) Where either party discovers or becomes aware of a Defect which it reasonably believes is a Serial Defect, that party must, as soon as reasonably practicable, notify the other party in writing (a **Serial Defect Investigation Notice**).*<br>*(c) Upon receipt or delivery of a Serial Defect Investigation Notice, the Subcontractor must investigate whether a Defect is a Serial Defect as soon as reasonably practicable and in any event within 42 Business Days from the date of the Serial Defect Investigation Notice or* |

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| | | *such later time as otherwise agreed by Downer (acting reasonably and having regard to the nature of the Defect and the circumstances) and provide to Downer:*<br>*(i) a notice stating that the Subcontractor is of the view that a Serial Defect does not exist and providing detailed reasons supporting that view, such notice to be accompanied by a comprehensive investigation report that supports that conclusion (a **Serial Defect Rejection Notice**); or*<br>*(ii) a detailed written report stating that the Subcontractor accepts that a Serial Defect exists, such report to contain:*<br>*(A) details of the investigations carried out in relation to the Serial Defect; and*<br>*(B) details of the remedial actions that the Subcontractor will implement to rectify, remedy and avoid the repetition of the Defect that gave rise to the Serial Defect,*<br>*(a **Serial Defect Diagnostic Report**).*<br>*(ca) The Subcontractor must keep Downer informed of the progress of the investigation under clause 13.9(c).*<br><br>*(d) The Subcontractor must provide the Independent Expert with sufficient access to the Works to enable the Independent Expert to carry out an inspection pursuant to the Head Contract (including where the relevant part has been removed from the Site).*<br>*(e) The Parties acknowledge that the Independent Expert will have the power to require the Subcontractor to provide all information which the Independent Expert considers relevant to determining whether a Serial Defect exists.*<br>*(f) Where:*<br>*(i) the Independent Expert determines that there is a Serial Defect; or*<br>*(ii) the Subcontractor accepts there is a Serial Defect under clause 13.9(c)(ii),*<br>*then clause 13.9(a) will apply.*<br>*(g) Where clause 13.9(f) is satisfied, the costs of the Independent Expert investigating the Serial Defect shall be borne by the Subcontractor."* |
| 11 | 20.2 – Subcontractor's program | Add the following new sub-clause (f):<br><br>"(f) In performing the Works, the Subcontractor will:<br><br>(i) take all reasonable steps to plan, coordinate and program, and to the maximum extent poss ble, integrate, the performance of the Works (including the work of Secondary Subcontractors or agents) with:<br><br>*(A) the Owner's related works;*<br>*(B) the activities of public or private utilities, statutory and other relevant authorities and others who may be engaged on the Site or who are on or carry out work on the Site; and*<br>*(C) any others entitled to access the Site (including any landowner or Principal's contractor).* |
| 12 | 21A – Inclement Weather Event | Insert the follow new defined terms:<br><br>**Inclement Weather Assumptions** means fourteen (14) Inclement Weather Days.<br><br>**Inclement Weather Cost** means *$ 31,000 (excluding GST) per day.*<br><br>**Inclement Weather Day** means a scheduled working day on which an Inclement Weather Event occurs.<br><br>**Inclement Weather Event** means a day on which, for a continuous period of at least four (4)hours, the Subcontractor is prevented by actual rain exceeding 5 mm (as recorded at Downer Site office) in any 12 hour period from: (a) accessing the Site or any location where the Works are being undertaken; or (b) undertaking the Works; because to do so during the event at that location is agreed to be unsafe while such conditions prevail<br><br>**Qualifying Inclement Weather Condition** means an Inclement Weather Event which causes delay to the Subcontractor reaching Practical Completion. |

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| | | |
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| | | Insert the following new clause 21A:<br><br>*21A.1 Inclement Weather*<br><br>(a) *If the Subcontractor is delayed in reaching Practical Completion by the Date for Practical Completion as a result of an Inclement Weather Event, the Subcontractor may submit an Extension of Time claim to Downer, but must do so within 3 Business Days of the day on which the delay occurred.*<br><br>(b) *Where the aggregate number of Inclement Weather Days for which Downer has approved an Extension of Time does not exceed the Inclement Weather Assumptions the Subcontractor shall not be entitled, and warrants that it will not claim from Downer, any cost associated with the Inclement Weather Days.*<br><br>(c) *Where the aggregate number of Inclement Weather Days for which Downer has approved an Extension of Time exceeds the Inclement Weather Assumptions and is less than 20 Inclement Weather Days in the aggregate the Subcontractor shall be entitled to claim an amount equal to the Inclement Weather Cost*<br><br>(d) *The Subcontractors notice under 21A.1(a) must include:*<br><br>(i) *Detailed particulars of the Qualifying Inclement Weather Conditions and why a delay was necessary;*<br><br>(ii) *The number of inclement weather days claimed and, if the number of aggregate Inclement Weather Days claimed exceeds the Inclement Weather Assumptions, a claim for payment of the Inclement Weather Cost;*<br><br>(iii) *Any items for an Extension of Time claim required by clause 21.1;*<br><br>(iv) *The corrective action which the Subcontractor proposes to take to overcome the effects of the delay; and*<br><br>(v) *The mitigation actions taken or proposed to be taken to avoid or minimise the delay.*<br><br>(e) *The Subcontractor agrees that sole entitled to claim is limited to an amount equal to the Inclement Weather Cost for each day in excess of the Inclement Weather Assumptions.* |
| 13 | 23.4 – Separable portions | At the beginning of clause 23.4(a), insert the following words: *"(in addition to the separable portions listed in item 45*" after the following words: "Downer's Representative". |
| 14 | 24 – Industrial relations | Insert the following new sub-clause 24.1(c):<br><br>*"(c) The Subcontractor warrants that, before the execution of this Subcontract, it informed itself of:*<br><br>*(i) all industrial relations matters relevant to the Works, and the Site; and*<br>*(ii) all matters relevant to the employment of labour at the Site.*<br><br>*(d) Except as provided in clause***Error! Reference source not found.** *21.1:*<br><br>*(i) Downer is not liable for, or in connection with any Claim by the Subcontractor; and*<br>*(ii) the Subcontract will not make any Claim against Downer,*<br><br>arising out of, or in connection with, any industrial relations matter or industrial action." |
| 15 | 26 – Environment | In sub-clause 26.1, add the following words:<br><br>- "*Without limiting any other provision of this Subcontract,"* before the words: *"*the |

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| | | Subcontractor must";<br>- "*(and other requirements of this Subcontract for the protection of the environment including the Principal's Environmental Management Strategy"* after the words "Legal Requirements"; and<br>- At the end of the paragraph: "*The Subcontractor must ensure that its Secondary Subcontractors and agents comply with the requirements referred to in this clause 26. The Subcontractor must upon request by Downer demonstrate compliance with the requirements of clause 26.1, including by providing evidence of measures taken to achieve such compliance."* |
| | | In sub-clause 26.3, add the following words: "*pollution and"* before the word "contamination". |
| | | Include a new sub-clause 26.4 as follows:<br><br>"**26.4 Corrective action**<br>Without limiting any other provision of this Subcontract, the Subcontractor must in performing the Works:<br><br>*a) to the extent required by Legal Requirements, remediate, implement corrective action, or take any other necessary action to address any pollution or contamination to the environment arising out of its performance of the Works, whether or not it has complied with all environmental laws or other requirements of this Subcontract for the protection of the environment; and*<br>*b) not exacerbate or spread any contamination that may be discovered during the course of construction, except as otherwise authorised by Downer in writing or as otherwise addressed in clause 12 relating to Site conditions."* |
| | | Include a new sub-clause 26.5 as follows:<br><br>"**26.5 Indemnity**<br>*The Subcontractor indemnifies, and holds harmless, Downer for the full extent permitted by Legal Requirements against:*<br><br>*a) any liability to, or a Claim by, a third party; and*<br>*b) all fines, penalties, costs, losses or damages suffered or incurred by Downer,*<br><br>*arising out of or in connection with the Subcontractor's breach of this clause 26**Error! Reference source not found.**."* |
| 16 | Clause 25 – Work health and safety | Insert the following new sub-clause 25.1:<br><br>"**25.1 Work health and safety warranty**<br>*The Subcontractor warrants that it is familiar with and has the capability and resources to comply with the applicable OHS Rules, any Work Health and Safety Requirements and Work Health and Safety Management Plan relevant to the Works*." |

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| | | Insert the following new sub-clause 25.2:<br><br>***"25.2 Subcontractor obligations***<br>*The Subcontractor must:*<br><br>*(a) comply with, and ensure that any and all of its Secondary Subcontractors or other persons engaged by the Subcontractor in the performance of the Works comply with:*<br>*(i) OHS Rules;*<br>*(ii) any Work Health and Safety Requirements; and*<br>*(iii) the Work Health and Safety Management Plan,*<br><br>*and upon reasonable request by or on behalf of Downer, demonstrate compliance with such requirements including, but not limited to, providing evidence of measures taken to achieve compliance;*<br><br>*(b) consult, cooperate and coordinate its activities with any other contractors or other persons engaged in or associated with the Works or the business of the Owner, Downer and their subcontractors and employees in order to maintain uniform safety and industrial practices; and*<br>*(c) cooperate with and do all things necessary to assist, and refrain from doing anything that may impede, the Owner in discharging its obligations under the OHS Rules applicable or relevant to the Works; and*<br>*(d) immediately advise the Owner in writing of any act, fact or circumstance associated with the activities of the Contractor or any other person relevant to the ability of the Subcontractor to perform the Works in a manner that is safe and without risks to health; and*<br>*(e) supply all Plant necessary to ensure the performance of the Works in a manner that is safe and without risks to health. The Subcontractor must ensure that all Plant supplied by it is and is maintained in a condition that is safe and without risks to any person."* |
| | | Insert the following new sub-clause 25.3:<br><br>"***25.3 Subcontractor to undertake risk assessment***<br>*The Subcontractor must:*<br><br>*(a) before commencement of the Works, undertake an assessment of the risks associated with the Works and identify and implement appropriate measures to control all such risks; and*<br>(b) *provide details of the risk assessment and evidence of implementation of adequate risk control measures to Downer on and in accordance with any reasonable request by or on behalf of Downer."* |
| | | Insert the following new sub-clause 25.4:<br><br>*"**25.4 Subcontractor to notify of incident in accordance with OHS Rules***<br>*The Subcontractor will perform all relevant functions and comply with all relevant duties in relation to any incident which is notifiable under OHS Rules and which occurs in connection with the Works or the Site."* |
| | | Insert the following new sub-clause 25.5:<br><br>***"25.5 Subcontractor to give notice of accident, injury, damage to Downer***<br>*The Subcontractor must:*<br><br>*(a) promptly notify Downer (and, in any case, within 24 hours) of any incident, accident, notifiable incident (being an incident which is notifiable under OHS Rules), injury, property or environment damage which:*<br>*(i) occurs during the performance of the Works; or*<br>*(ii) is associated with the Works; and*<br>*(b) within 3 Business Days of any such incident, provide a written report to Downer giving the initial details of the incident, including the results of initial investigations into its cause and any recommendations or strategies for prevention of a recurrence; and*<br>(c) *within 15 Business Days of any such incident, provide a written report to Downer giving the complete details of the incident, including the results of investigations into its cause and any recommendations or strategies for prevention of a recurrence."* |

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| | | Insert the following new sub-clause 25.6:<br><br>"***25.6 Subcontractor to provide information regarding goods***<br><br>*(a) The Subcontractor must, where necessary or required by Legal Requirements, supply adequate health and safety information concerning any goods it (or its agents or Secondary Subcontractors) may use for the purpose of providing the Works and must ensure that any such goods will be safe when properly used and/or stored.*<br>(b) *The Subcontractor must at all times keep Downer informed of all relevant information which becomes known to the Subcontractor (or its agents or Secondary Subcontractors) concerning the use, supply, maintenance and/or storage of the goods."* |
| | | Insert the following new sub-clause 25.7:<br><br>***"25.7 OHS Rules Audits***<br><br>*(a) The Subcontractor must at any time permit Downer or its nominee (each an **Auditor**) to conduct an audit and investigation to verify the Subcontractor's compliance with its obligations under this clause 25, and as part of an audit or investigation the Subcontractor must:*<br>*(i) make available to the Auditor any documents, records and other information in the power, possession or control of the Subcontractor; and*<br>*(ii) meet with the Auditor and make available the Subcontractor's personnel to meet with the Auditor and answer reasonable questions in relation to the subject matter of the audit."* |
| 17 | 27.12 – Termination of the Head Contract | Insert new sub-clause 27.12(c):<br><br>"*If the Head Contract is terminated at any time for any reason, the Subcontractor must return as soon as reasonably practicable to Downer any property of Downer's in the possession of the Subcontractor, its employees, agents or Secondary Subcontractors*." |
| 18 | 33 – Personal Property Securities Act | Insert new sub-clause 33(h):<br><br>"*The Subcontractor must, if requested by Downer in writing ensure that any security interest in each part of the Materials and Equipment recorded on the PPS register by the Subcontractor, in breach of this clause 33, is removed from the PPS register within 20 Business Days from the Date of Practical Completion*." |
| 19 | Schedule 6 (New South Wales – clause 3.1(a) | Delete the following words from clause 3.1(a)(i): "sections 15, 16 or 24" and replace with the following words: "*any section*". |

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# Schedule 18 - Collateral Warranty Deed

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**Collateral Warranty Deed**

**Date:**

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**Parties**

1. **Insert Name of Subcontractor** (ABN: [insert]) of [Address] **(**Subcontractor**);**
2. **General Electric International Inc** (ABN: 85 002 420 751) of Building 8, Level 2, 572 Swan Street, Richmond, Vic 3121, Australia (Principal); and
3. **Downer Utilities Australia Pty Ltd** (ABN 65 075 194 857) of Level 2, T3 Triniti Business Campus, 39 Delhi Road, North Ryde NSW 2113.

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**Background**

A. The Owner has engaged the Principal to deliver the Project.

B. The Principal and the Contractor have entered into the BOP Contract.

C. The Contractor has been engaged under the BOP Contract by the Principal to engineer, procure and construct the balance of plant works on the Project.

D. The Contractor and the Subcontractor have entered into the Subcontract.

**E.** It is a term of the Subcontract or has otherwise been agreed that the Subcontractor enters into this deed with the Principal and the Contractor**.**

**The Parties agree**

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## 1. Interpretation

In this deed:

**Beneficiaries** means the Contractor and the Principal, including their legal successors and permitted assignees, and **Beneficiary** means either of them;

**BOP Contract** means the balance of plant agreement dated 7 August 2019 between the Beneficiary and the Contractor in relation to the Bango Wind Farm;

**Contractor** means Downer Utilities Australia Pty Ltd (ABN 65 075 194 857), including its legal successors and permitted assignees;

**Encumbrance** means any:

a) security for the payment of money or performance of obligations, including a mortgage, charge, lien, pledge, trust, power or title retention or flawed deposit arrangement;
b) right, interest or arrangement which has the effect of giving another person a preference, priority or advantage over creditors including any right of set-off;

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c) right that a person (other than the owner) has to remove something from land (known as a profit à prendre), easement, public right of way, restrictive or positive covenant, lease, or licence to use or occupy; or
d) third party right or interest or any right arising as a consequence of the enforcement of a judgment, or any agreement to create any of them or allow them to exist;

**Lender** has the meaning set out in the BOP Contract;

**Materials and Equipment** means [***Insert, prior to execution of the Subcontract, materials / equipment from Item 23 of Schedule 1 of the BOP Contract relevant to this Subcontract***];

**Owner** means BWF Nominees Pty Ltd (ACN 633 105 405) as trustee for the BWF Trust;

**Party** means the Contractor, the Subcontractor or the Principal as the context requires and **Parties** mean all of them;

**Practical Completion** has the meaning given in the Subcontract;

**Principal** means General Electric International Inc (ABN: 85 002 420 751), including its legal successors and permitted assignees;

**Project** has the meaning set out in the BOP Contract;

**Subcontract** means the contract between the Contractor and the Subcontractor for the provision of goods and/or services in relation to the Project;

**Warranty Period** means [***To be inserted prior to execution of the Subcontract***] from the Date of Practical Completion (as that term is defined in the Subcontract);

**Work** has the meaning given in the Subcontract;

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## 2. Warranty and replacement

### 2.1 Warranty

The Subcontractor warrants to the Beneficiaries that the Materials and Equipment will be to the quality and standard stipulated by the Subcontract and will in all respects comply with the requirements of the Subcontract.

### 2.2 Replacement

The Subcontractor warrants to the Beneficiaries that it will replace so much of the Materials and Equipment as is found, within the Warranty Period, to:

(a) Not meet the requirments referred to in clause 2.1; or

(b) show deterioration of such extent that the Materials and Equipment ought to be made good or replaced in order to achieve the requirements referred to in clause 2.1.

The Subcontractor shall bear the cost of any work necessary, including to any part of the Works, to enable the requirements of clause 2.2 to be satisfied.

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## 3. Assignment

(a) The Beneficiaries may, without the consent of the Subcontractor:

(i) assign or transfer; or

(ii) create or allow to exist any Encumbrance over,

all or any of their rights under this deed to, or in favour of, any person.

(b) Without limiting the generality of clause **Error! Reference source not found.**, the Subcontractor agrees that the Beneficiaries may assign all (but not part) of their rights under this deed to the Owner, Lenders, Related Bodies Corporate of the Beneficiaries or any subsequent purchaser of any part of the Project.

(c) The Subcontractor shall be entitled to assert in any proceedings the contributory or proportionate liability of a Beneficiary, novatees, or assigns where the asserted facts and circumstances reasonably support such assertions.

(d) The Subcontractor must not:

(i) assign or transfer; or

(ii) create or allow to exist any Encumbrance over,

all or any of its rights or obligations under this deed without the Beneficiary's prior written consent

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## 4. Liability of the Subcontractor

(a) Subject to clause 4:

(i) Unless the contrary is stated, no provision of this deed is intended to exclude any obligation or liability which would otherwise be implied whether by statute, the law of contract, tort, equity or otherwise,

(ii) The responsibility of the Subcontractor under this deed is not to be reduced or in any way released or limited by any enquiry or inspection by or on behalf of any person notwithstanding that such enquiry or inspection may give rise to a claim by a Beneficiary against a third party.

(iii) The rights and benefits conferred upon the Beneficiaries by this deed are in addition to any other rights and remedies that the Beneficiaries may have against the Subcontractor including (without prejudice to the generality of the foregoing) any remedies in negligence.

(b) Nothing in this deed will make the Subcontractor liable for the same loss twice for the same breach of an obligation by the Subcontractor under this deed and the Subcontractor will not be liable to the:

(i) Principal for any liability or claim, action, demand or proceeding pursued by the Contractor; or

(ii) Contractor for any liability or claim, action, demand or proceeding pursued by the Principal,

in connection with the same breach of an obligation by the Subcontractor under this deed.

(c) The Principal acknowledges and agrees that it will not pursue any claim, action, demand or proceeding against the Contractor to the extent that it is pursuing a claim, action, demand or proceeding against the Subcontractor in connection with the same breach of an obligation by the Subcontractor under this deed.

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## 5. Notices

(a) Any notice required to be given under this deed must be in writing.

(b) In addition to any other lawful means, if a Party has previously notified the other Parties of its email address for notice purposes, any notice to that Party must also be copied to its email address.

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## 6. General

(a) The Parties accept the laws of the jurisdiction of New South Wales as the governing law of this deed and all Parties submit to the non-exclusive jurisdiction of those Courts and any court hearing appeals from those Courts

(b) This deed may be executed in any number of counterparts, each of which, when executed, is an original. Those counterparts together make one instrument.

(c) Except as expressly provided in this deed, each Party must, at its own expense, do all things reasonably necessary to give full effect to this deed and the matters contemplated by it.

(d) Any term of this deed which is wholly or partially void or unenforceable is severed to the extent that it is void or unenforceable. The validity or enforceability of the remainder of this deed is not affected.

(e) No waiver of a right or remedy under this deed is effective unless it is in writing and signed by the Party granting it. It is only effective in the specific instance and for the specific purpose for which it is granted. A single or partial exercise of a right or remedy under this deed does not prevent a further exercise of that or of any other right or remedy. Failure to exercise or delay in exercising a right or remedy under this deed does not operate as a waiver or prevent further exercise of that or of any other right or remedy.

(f) No variation of this deed is effective unless it is made in writing and signed by each Party.

**Execution page**

**Executed as a deed.**

Signed and delivered by **General Electric International Inc Pty Ltd** by its duly authorised representative in the presence of:

| | |
|---|---|
| Signature of witness | Signature of authorised representative |
| Name of witness (print) | Name of authorised representative (print) |
| Position of authorised representative (print) | |

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Executed by **Downer Utilities Australia Pty Ltd** in accordance with section 127 of the *Corporations Act 2001 (Cth)*:

| | |
|---|---|
| Signature of director | Signature of director/secretary |
| Name of director (print) | Name of director/secretary (print) |

Executed by **[insert subcontractor]** in accordance with section 127 of the *Corporations Act 2001 (Cth)*:

| | |
|---|---|
| Signature of director | Signature of director/secretary |
| Name of director (print) | Name of director/secretary (print) |

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## Schedule 19 – General Requirements Bango Wind Farm

Refer to document: BWF_Schedule 03_General Requirements_REVG.1_BOP Contract FINAL.pdf (General Requirements Bango Wind Farm)

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## Schedule 20 – BWF Lease Obligations

Refer to document: BWF_EPC_Schedule 24 – Landowner Obligations_REVF.1 31072019 BOP CONTRACT FINAL

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## Schedule 21 - Statutory Declaration

**STATUTORY DECLARATION** – OATHS ACT 1900, NSW, EIGHT SCHEDULE

I, _____ (Full name of Declarant)

of _____ (Address),

do solemnly and sincerely declare that:

I am the representative of the Subcontractor: _____
(Name of Subcontractor/Supplier and ABN)

In the Office Bearer capacity of: _____
(Position Title of Declarant)

The said Subcontractor having a subcontract for: _____
(Name of Subcontract/Agreement)

_____
(Subcontract/Agreement Number)

With: Downer Utilities Australia Pty Ltd
(Name of Downer Entity)

All workers who have at any time been engaged by the Subcontractor

a) Have been paid all moneys which as at the date of this declaration are due and payable to them by the Subcontractor in respect of their employment on work under the Subcontract, and

b) have otherwise received or had accrued to their accounts all benefits to which they are entitled from the Subcontractor as at the date of this declaration in respect to their employment on work under the Subcontract pursuant to any award, enterprise agreement, act or regulation,

with the exception of the workers and the respective amounts listed below: (insert names & addresses of workers, amounts owing, and whether in respect to wages, holiday pay, allowances etc.)

_____

_____

All secondary subcontractors and suppliers to the Subcontractor have been paid all moneys which as the date of this declaration are due and payable to them by the Subcontractor for the performance of work under the Subcontract and the supply of materials for use in work under the Subcontract, with the exception of the Secondary Subcontractors and suppliers and the respective amounts listed below: (insert names & addresses of Secondary Subcontractors and suppliers, the amounts owing and whether in respect of materials supplied, work performed, etc.)

_____

_____

In all cases where a Secondary Subcontractor or supplier to the Subcontractor has provided services and / or materials in respect of the Subcontract and has submitted a claim to the Subcontractor for these services or materials as at the date of this declaration would have been due and payable but which the Subcontractor disputes, the reasons for such dispute have been notified in writing to the Secondary Subcontractor or supplier by the Subcontractor prior to the date of this declaration. Where such dispute relates to part only of the Secondary Subcontractor or supplier's claim that part of the claim not in dispute has been paid by the Subcontractor to the Secondary Subcontractor or supplier as at the date of this declaration except for the amounts listed above.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1900*.

Declared at _____ in the state of _____ this _____
(Day / Month / Year)

Signature and name of person making this declaration: _____

in the presence of an authorised witness, who states:

I, _____ , a _____
[name of authorised witness] [qualification of authorised witness]

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certify the following matters concerning the making of this statutory declaration by the person who made it:
*[* please cross out any text that does not apply]*
1. *I saw the face of the person *OR* *I did not see the face of the person because the person was wearing a face covering, but I am satisfied that the person had a special justification[1] for not removing the covering, and
2. *I have known the person for at least 12 months *OR* *I have confirmed the person's identity using an identification document and the document I relied on was:

_____ [describe identification document relied on]

_____ [signature of authorised witness]

_____ [date]

1 The only "special justification" for not removing a face covering is a legitimate medical reason (at September 2018)

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