

# Formal Instrument of Agreement

## **Sydney Modern Project**

Dated 6 September 2019

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("**Contractor**")

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# Formal Instrument of Agreement

The parties agree as follows:

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## 1 Definitions and Interpretation

### 1.1 Terms defined in the Contract

Unless the contrary intention appears:

- (a) a term which has a defined meaning in the General Conditions of Contract has the same meaning when used in the Formal Instrument of Agreement; and
- (b) capitalised terms have the meaning set out below.

**Contract Documents** means:

- (a) the Formal Instrument of Agreement;
- (b) the Contract Information;
- (c) the General Conditions;
- (d) the Schedules; and
- (e) the other Contract Documents listed in Contract Information item 26.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**General Conditions** means the document titled "GC21 (Edition 2) General Conditions of Contract" attached to this Formal Instrument of Agreement.

**Formal Instrument of Agreement** means this formal instrument of agreement.

**Schedules** means the schedules attached to the General Conditions.

### 1.2 Interpretation

In the Contract, unless the contrary intention appears:

- (a) a reference to a document includes any agreement or other legally enforceable arrangement created by it (whether the document is in the form of an agreement, deed or otherwise) or any consolidation, amendment, re-enactment or replacement of it;
- (b) a reference to the Contract or another document or instrument includes any variation, amendment, novation or replacement of either of them;
- (c) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;

- (d) a reference to "regulations" includes instruments of a legislative character under legislation (such as regulations, rules, by-laws, ordinances and proclamations);
- (e) a reference to an entity means a body corporate, an individual, a firm, a partnership, a joint venture, an unincorporated body or association, a trust or a Government Authority;
- (f) a reference to "person" includes an individual, a body corporate, a partnership, a joint venture, an unincorporated association and an authority or any other entity or organisation;
- (g) a reference to a particular person includes a reference to the person's executors, administrators, successors, substitutes (including persons taking by novation) and assigns;
- (h) if a period of time is specified and dates from a given day or the day of an actual event, it is to be calculated exclusive of that day;
- (i) a reference to a time of day is a reference to Sydney time;
- (j) a reference to a Schedule, or attachment is a reference to a Schedule, or attachment to the General Conditions;
- (k) unless otherwise stated:
  - (i) in this Formal Instrument of Agreement, a reference to a clause is a reference to a clause in this Formal Instrument of Agreement; and
  - (ii) in the General Conditions, a reference to a clause is a reference to a clause in the General Conditions;
- (l) a reference to any thing (including an amount) is a reference to the whole and each part of it;
- (m) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning;
- (n) headings are for reference only and do not form part of the Contract;
- (o) the meaning of general words is not limited by specific examples introduced by "including", "for example", "such as" or similar expressions;
- (p) references to the word "agreed" means agreed in writing;
- (q) references to A\$, \$ and AUD means Australian Dollars, the lawful currency of the Commonwealth of Australia; and
- (r) any measurement must be accurate to 3 decimal places and any calculation must be solved to 3 decimal places.

### **1.3 Next Business Day**

If an event under the Contract must occur on a stipulated day which is not a Business Day, then the stipulated day will be taken to be the next Business Day.

### **1.4 Next Day**

If an act under the Contract to be done by a party on or by a given day is done after 5.00pm (AEST time) on that day, it is taken to be done on the next day.

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## **2 Contract Documents**

### **2.1 Contract Documents**

Subject to clauses 2.3, 2.4 and 2.5, the Contract Documents are intended to be correlative, complementary and mutually explanatory of one another. The Contract must be read as a whole.

### **2.2 Notice of Ambiguities**

If the Contractor discovers any error, omission, inconsistency or ambiguity in or between the Contract Documents, the Contractor must immediately notify the Principal of the error, omission, inconsistency or ambiguity.

### **2.3 Order of Precedence**

- (a) In the case of any error, omission, inconsistency or ambiguity in or between any of the Contract Documents, the following order of precedence shall apply to resolve the error, omission, inconsistency or ambiguity:
- (i) the Formal Instrument of Agreement;
  - (ii) the General Conditions;
  - (iii) the Contract Information;
  - (iv) Part B of Schedule 42;
  - (v) Part A of Schedule 42;
  - (vi) Schedule 14 - the Project Brief;
  - (vii) Schedule 15 - the Principal's Design;
  - (viii) Schedule 41 - the ED Works Current Design Documentation;
  - (ix) the documents comprising or referred to in the remaining Schedules, to the extent not referred to in (i) to (viii) above; and
  - (x) the other Contract Documents listed in Contract Information item 26.
- (b) To the extent that clause 2.3(a) does not resolve the error, omission, inconsistency or ambiguity and the error, omission, inconsistency or ambiguity is in relation to the quality or standard of the Works, then (except in the case of an inconsistency between the Project Brief and the Principal's Design) the highest or most stringent standard shall prevail.
- (c) To the extent that clauses 2.3(a) or 2.3(b) do not resolve the error, omission, inconsistency or ambiguity, the Principal shall direct the Contractor as to the interpretation to be followed.

### **2.4 Compliance with Directions**

- (a) The Contractor:
- (i) must comply with any direction issued by the Principal pursuant to clause 2.3(c); and

- (ii) subject to clause 2.4(b), shall not be entitled to any Claim arising out of or in connection with the resolution of any ambiguity, inconsistency or discrepancy pursuant to clauses 2.3(a), 2.3(b) or 2.3(c).
- (b) If the Contractor notifies the Principal under clause 2.2 of an ambiguity, inconsistency or discrepancy between the Principal's Design and the Project Brief, the Principal must either:
  - (i) notify the Contractor that the ambiguity, inconsistency or discrepancy is to be resolved by applying the order of precedence in clause 2.3(a); or
  - (ii) give a direction under clause 2.3(c),

and if the Principal gives a direction under clause 2.3(c), and such direction results in a change to the Project Brief, then the Contractor shall have the same entitlements under clause 48.7 of the General Conditions in respect of such direction as if the Principal had issued a Variation Order.

## **2.5 Principal's Design and ED Works Current Design Documentation**

Notwithstanding any provision of this Contract to the contrary:

- (a) the Contractor is not responsible for any errors, omissions, inconsistencies or ambiguities in the Principal's Design or the ED Works Current Design Documentation;
- (b) the Contractor will correct any such errors, omissions, inconsistencies or ambiguities in the Principal's Design or the ED Works Current Design Documentation and, to the extent that the correction of such errors, omissions, inconsistencies or ambiguities results in a change in the scope of the Works to be constructed by the Contractor, or the Materials to be supplied by the Contractor, then the Contractor shall have the same entitlements under clause 48.7 of the General Conditions in respect of such correction as if the Principal had issued a Variation Order.

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## **3 General**

### **3.1 Cost**

- (a) The parties agree to pay their own legal and other Costs in connection with the preparation, execution and completion of the Contract and other related documentation except for stamp duty.
- (b) The Contractor must:
  - (i) pay all stamp duty (including fines and penalties) payable and assessed by legislation or by any revenue office in respect of the execution of the Contract and the performance of its obligations in respect of the Contract; and
  - (ii) indemnify on demand the Principal against any liability for that stamp duty (including fines and penalties).

### **3.2 Entire Agreement**

- (a) This Contract constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations in respect of that subject matter.
- (b) The parties agree that any pre-contractual representations and warranties, whether made orally or in writing, are of no effect, with the result that neither party is entitled to found any claim to damages in reliance upon any pre-contractual representations and warranties.

### **3.3 Amendment**

No amendment of the Contract is effective unless it is in writing, is dated, expressly refers to the Contract and is signed by a duly authorised representative of each party.

### **3.4 Independent Contractor**

The Contractor is an independent contractor performing the Contract. This Contract does not create any agency, partnership, joint venture or other joint relationship between the parties.

### **3.5 Non-Waiver**

- (a) Subject to clause 3.5(b), no relaxation, forbearance, delay or indulgence by either party in enforcing any of the terms and conditions of the Contract or the granting of time by either party to the other prejudices, affects or restricts the rights of that party under the Contract, nor does any waiver by either party of any breach of the Contract operate as a waiver of any subsequent or continuing breach of the Contract.
- (b) Any waiver of a party's rights, powers or remedies under the Contract must be in writing, dated and signed by an authorised representative of the party granting such waiver, and must specify the right and the extent to which it is being waived.

### **3.6 Discretion in exercising rights**

Unless the Contract expressly states otherwise, the Principal may exercise a right, power or remedy or give or refuse its consent, approval or a waiver in connection with the Contract in its absolute discretion (including by imposing conditions).

### **3.7 Partial exercising of rights**

Unless the Contract expressly states otherwise, if the Principal does not exercise a right, power or remedy in connection with the Contract fully or at a given time, they may still exercise it later.

### **3.8 Indemnities and reimbursement obligations**

Any indemnity, reimbursement or similar obligation in the Contract given by the Contractor:

- (a) is a continuing obligation;
- (b) is independent of any other obligations under this document; and
- (c) continues after this document, or any obligation arising under it, ends.



It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity in connection with the Contract.

### **3.9 Conflicts of Interests**

- (a) The Contractor warrants that, to the best of its knowledge having made diligent enquiries, no conflict of interest exists in the performance of its obligations and the Principal's best interests.
- (b) The Contractor must use reasonable endeavours to prevent any actions or conditions which may conflict with the Principal's best interests. In the event that such a conflict arises, the Contractor shall immediately notify the Principal and takes such steps as the Principal reasonably requires to resolve or otherwise deal with the conflict.

### **3.10 Counterparts**

This Contract may be executed in any number of counterparts. All counterparts when taken together are to be taken to constitute one instrument and the date on which the last counterpart is executed is the date of the Contract.

### **3.11 Further Assurances**

The Contractor must do anything (such as obtaining consents, signing and producing documents and getting documents completed and signed by any person) which the Principal reasonably asks and considers necessary to:

- (a) to bind the Contractor and any other person intended to be bound under the Contract; or
- (b) to show that the Contractor is complying with the Contract.

### **3.12 Severance**

If the whole or any part of a provision of the Contract is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of the Contract has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of the Contract or is contrary to public policy.

### **3.13 Survival**

- (a) The following clauses survive expiry or termination of this Contract and are enforceable at any time, together with any provisions or obligations which are expressed to or by their nature, survive expiry or termination of the Contract:
  - (i) clause 1;
  - (ii) clause 3.5;
  - (iii) clause 3.8; and
  - (iv) those clauses referred to in clause 77 of the General Conditions of Contract.
- (b) The provisions of the Contract survive expiry or termination of the Contract to the extent necessary to give effect to clause 3.13(a).

**EXECUTED** as an agreement



