

**Department of Treasury and Finance, Victoria  
Commercial Division**

# Alliance Development Agreement

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*[Insert Project Owner]*

*[Insert Member of Proponent]*

*[Insert Member of Proponent]*

**October 2010**

This Model Alliance Development Agreement (**Model ADA**) is the result of collaborative work between the States of Western Australia, Queensland, New South Wales and Victoria.

The development of the Model ADA is founded on the Policy for Alliance Contracting (State of Victoria, July 2010; State of Queensland, September 2010; the other states to follow suit shortly) and the Practitioners' Guide to Alliance Contracting. The document draws on leading practices from Western Australia, Queensland, New South Wales and Victoria.

### **Document Updates**

This Model ADA will be updated from time to time to reflect evolving best practices and lessons learned.

<b>Document change</b>	<b>Date</b>
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# Alliance Development Agreement

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Date ►

Between the Parties

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Project Owner            **[Insert Project Owner]**  
of *[insert address]*

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Proponent                **[insert Member]**  
ABN *[insert ABN]* of *[insert address]*  
and  
**[insert Member]**  
ABN *[insert ABN]* of *[insert address]*  
(together, jointly and severally, the **Proponent**)

Background	<ol style="list-style-type: none"><li>1 The Project Owner intends to <i>[insert description of Project]</i> (<b>Project</b>).</li><li>2 The Project Owner issued the Request for Proposal.</li><li>3 The Proponent and others have submitted a Proposal in response to the Request for Proposal.</li><li>4 The Proponent has been selected by the Project Owner to participate in the AD Phase in accordance with this Agreement and the Request for Proposal.</li><li>5 The Other Proponent has also been selected to participate in the AD Phase in accordance with its Alliance Development Agreement and the Request for Proposal.</li></ol> <p><b>Guidance Note:</b> This Agreement has been prepared on the basis that the Project Owner will enter into the Agreement with two or more Proponents selected under the Request for Proposal. This reflects the competitive selection process described in the Practitioner's Guide to Alliance Contracting.</p> <p>However, it is recognised that the Project Owner may determine that a different approach to selection is required to satisfy the Project Owner's VFM Statement and the specific circumstances of the Project. Where the Project Owner determines that only one Proponent will be selected to enter into the Agreement, it will be appropriate to delete or modify a number of clauses. For example, the Project Owner will need to review and modify (as appropriate),</p>
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	<p>the following provisions: clause 2 (Purpose and scope of AD Phase), clause 8 (Information Barriers), clause 9 (Provision of information by Project Owner), and clause 11 (Selection of Successful Proponent). The Project Owner would also need to delete any references to the "Other Proponent" and tailor the Agreement accordingly.</p>
<p>This Agreement witnesses</p>	<p>that in consideration of, among other things, the mutual promises contained in this Agreement, the Parties agree as set out in the Operative part of this Agreement.</p>

## 1 Definitions and interpretation

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### 1.1 Definitions

The meanings of the terms used in this Agreement are set out below.

Term	Meaning
<b>Actual Reimbursable Costs</b>	the total verified sum of all Reimbursable Costs reasonably and actually incurred by the Proponent on or before the termination or expiration of this Agreement, except for any amounts specifically excluded under this Agreement.
<b>AD Establishment Framework</b>	the establishment framework described in paragraph (b)(2) of Schedule 3.
<b>AD Foundation Workshop</b>	the workshop described in paragraph (b)(2)(A) of Schedule 3.
<b>AD Payment Amount</b>	means the amount of \$[insert] (exclusive of GST) which is the Proponent's maximum entitlement to payment for submitting the Project Proposal and performing the Services in accordance with this Agreement.
<b>AD Phase</b>	<p>the phase of the procurement process as described in the Request for Proposal and as set out in this Agreement, which commences on the Commencement Date and ends on the earlier of:</p> <ol style="list-style-type: none"> <li>1 the date of execution of the Project Alliance Agreement by the Project Owner and the Proponent; or</li> <li>2 the date of termination of this Agreement.</li> </ol>
<b>Agreement</b>	this Alliance Development Agreement.
<b>Alliance Charter</b>	the alliance charter (including the Alliance Principles, alliance purpose and alliance objectives) set out in Schedule 2 of the Draft Project Alliance Agreement.
<b>Alliance Corporate Overhead and Profit</b>	has the meaning given to the term "Corporate Overhead and Profit" under the Draft Project Alliance Agreement.

<b>Alliance Principles</b>	the alliance principles set out in Schedule 2 of the Draft Project Alliance Agreement.
<b>Alliance Reimbursable Costs</b>	has the meaning given to the term “Reimbursable Costs” under the Draft Project Alliance Agreement.
<b>Authorisation</b>	any consent, registration, filing, agreement, notarisation, certificate, licence, approval, permit, authority or exemption from, by or with a Government Agency or a Third Party.
<b>Bank Account</b>	the Proponent’s nominated bank account for payments by the Project Owner to the Proponent under this Agreement as described in clause 12.2.
<b>Best For Project</b>	an approach, determination, decision, method, solution, interpretation, outcome or resolution that is consistent with the Project Owner’s VFM Statement and the Alliance Charter.
<b>Business Day</b>	a day on which banks are open for business in [ <i>insert relevant capital city, State</i> ], excluding a Saturday, Sunday or public holiday in [ <i>insert relevant capital city, State</i> ].
<b>Change in Control</b>	<p>in respect of a Member, occurs if:</p> <ol style="list-style-type: none"> <li>1 there is a change in the person that controls the Member (other than if the Ultimate Holding Company of the Member remains the same following the change);</li> <li>2 a person that controls the Member ceases to control that Member (other than if the Ultimate Holding Company of the Member remains the same following the change); or</li> <li>3 if the Member is not controlled, another person acquires control of the Member.</li> </ol> <p>For the purposes of this definition, the term ‘control’ (including the term ‘controlled’) has the same meaning as in section 50AA of the Corporations Act.</p>
<b>Commencement Date</b>	the date of this Agreement.
<b>Commercial Alignment Framework</b>	the activities described in paragraph (b)(3) of Schedule 3.
<b>Consequential Loss</b>	<p><b>Guidance Note</b> – The Project Owner needs to consider the definition of ‘Consequential Loss’ on a case by case basis to confirm whether or not the losses included are ‘consequential’ (and hence not to be recoverable under the Agreement) for the purposes of the relevant AD Phase and whether or not there are other losses which the Project Owner wishes to include in the definition of ‘Consequential Loss’ under the Agreement.</p> <p>Loss of production, loss of revenue, loss of profit or anticipated profit or loss of business reputation, but does not include any payment entitlement of the Proponent to payment under this Agreement or any loss expressly stated under clause 10.6(b) of the Draft Project Alliance Agreement.</p>

<b>Core Team</b>	the Project Owner's team and employees who will, among other things, perform the functions set out in clause 5.1(a).
<b>Corporations Act</b>	the <i>Corporations Act 2001</i> (Cth).
<b>Default</b>	is defined in clause 16.2.
<b>Diligence</b>	the exercise of the degree of skill, care, expertise, diligence and foresight which would from time to time be expected of skilled and experienced professional persons engaged in undertakings of a similar type as the Services.
<b>Draft Project Alliance Agreement</b>	the draft Project Alliance Agreement included in the Request for Proposal.
<b>Financial Establishment Audit</b>	the financial audit to be undertaken as described in Schedule 3.
<b>Final Certificate</b>	has the meaning given to that term under the Draft Project Alliance Agreement.
<b>Financial Year</b>	any 12 month period commencing on 1 July and ending on the next 30 June.
<b>Good Faith</b>	<p>in the context of this Agreement means:</p> <ol style="list-style-type: none"> <li>1 acting in accordance with the Alliance Charter both in a literal sense and with their intent;</li> <li>2 undertaking, adopting and implementing all things reasonably necessary to ensure a Best For Project outcome; and</li> <li>3 being fair, honest and reasonable and acting with integrity at all times.</li> </ol>
<b>Government Agency</b>	any government, parliament or governmental, semi-governmental, administrative, monetary, fiscal or judicial body, department, commission, authority, tribunal, government minister, agency or entity.
<b>GST Exclusive Consideration</b>	is defined in clause 12.8(b).
<b>Information Barrier Protocols</b>	the information barrier protocols developed by the Project Owner and provided to the Proponent under clause 8.
<b>Industrial Relations Principles</b>	<p><b>Guidance Note</b> – Please note that where the Project Owner is using this Agreement for a Project in a jurisdiction other than Victoria, this definition will need to be amended to reflect the applicable Industrial Relations Principles.</p> <p>the Code of Practice for the Building and Construction Industry – Victoria Industrial Relations Principles, a copy of which is available at</p>

	<a href="http://www.buildingcommission.com.au">http://www.buildingcommission.com.au</a> .
<b>Insolvency Event</b>	<p>where the Proponent or any Member:</p> <ol style="list-style-type: none"> <li>1 informs the Project Owner or creditors generally that it is insolvent;</li> <li>2 has a meeting of its creditors called with a view to entering a scheme of arrangement or composition with creditors;</li> <li>3 enters a scheme of arrangement or composition with creditors;</li> <li>4 has a controller (as that term is defined in the Corporations Act) of its property or part of its property appointed;</li> <li>5 is the subject of an application to a court for its winding up, which application is not stayed within 10 Business Days;</li> <li>6 has a winding up order made in respect of it;</li> <li>7 has an administrator appointed under section 436A, 436B or 436C of the Corporations Act;</li> <li>8 enters into voluntary liquidation;</li> <li>9 fails to comply with a statutory demand issued under section 459E of the Corporations Act, unless the demand is set aside by a court within 10 Business Days; or</li> <li>10 has execution levied against it by creditors, debenture holders or trustees or under a floating charge.</li> </ol>
<b>Intellectual Property</b>	all intellectual property rights existing worldwide and the subject matter of such rights including any patent, design (whether registered or not), copyright, trade mark, protected circuit layout (or similar right) trade secret or other right whether existing under a Statutory Requirement, at common law or in equity.
<b>Issue</b>	any issue, disagreement, difference of opinion or failure to agree arising out of or in connection with this Agreement other than in relation to a Default.
<b>Key Result Areas or KRAs</b>	are set out in Schedule 7 of the Draft Project Alliance Agreement.
<b>Liable Party</b>	is defined in clause 14.2(a).
<b>Limit of Liability</b>	is defined in clause 14.2.
<b>MCOS Performance</b>	the minimum conditions of satisfaction or benchmark level of performance for each KRA, which will be set out in the Project Proposal submitted to the Project Owner under this Agreement.
<b>Member</b>	any person comprising the Proponent.
<b>Notice</b>	is defined in clause 17.1.

<b>Other Proponent</b>	any other Proponent selected by the Project Owner under the Request for Proposal to participate in the AD Stage.
<b>Parties</b>	is a reference to the Project Owner and the Proponent collectively and <b>Party</b> means either one of them, as the context requires.
<b>Project</b>	is defined in paragraph 1 of the Background of this Agreement.
<b>Project Alliance Agreement</b>	the alliance agreement for the Project to be entered into between the Project Owner and the Proponent (if the Project Proposal is accepted by the Project Owner in accordance with this Agreement) substantially in the form of the Draft Project Alliance Agreement.
<b>Project Owner</b>	is defined in Schedule 1.
<b>Project Owner's Representative</b>	is defined in Schedule 1.
<b>Project Owner's VFM Statement</b>	the Project Owner's value for money proposition for the Project set out in Schedule 4 of the Draft Project Alliance Agreement.
<b>Project Proposal</b>	the proposal for the Project which is developed by the Proponent and submitted to the Project Owner in accordance with clause 7, or, depending on the context, by the Other Proponent under its Alliance Development Agreement.
<b>Proponent Team Protocols</b>	the protocols to be complied with by the Proponent in performing the Services as set out in Schedule 6.
<b>Proponent's Representative</b>	is defined in Schedule 1.
<b>Proposal</b>	the proposal submitted by the Proponent in response to the Request for Proposal.
<b>Reimbursable Costs</b>	is defined in Schedule 5.
<b>Related Body Corporate</b>	has the meaning given to that term in the Corporations Act.
<b>Relevant Period</b>	the period commencing on the Commencement Date and ending on: <ul style="list-style-type: none"> <li>1 a date agreed by the Project Owner and the Proponent; or</li> <li>2 failing agreement, the date necessary to ensure that the Parties comply with any</li> </ul>

	Statutory Requirement relating to record keeping.
<b>Representatives</b>	means the Project Owner's Representative and the Proponent's Representative.
<b>Request for Proposal</b>	is defined in Schedule 1.
<b>Risk &amp; Contingency Provisions</b>	the provision for all possible Alliance Reimbursable Costs associated with risks and contingencies that may arise in performing the Works, which will be included in the TOC.
<b>Services</b>	those services identified in Schedule 3 to be performed by the Proponent during the AD Phase in accordance with this Agreement.
<b>Statutory Requirements</b>	<ol style="list-style-type: none"> <li>1 Acts of Parliament;</li> <li>2 Authorisations;</li> <li>3 directions given under a statute that affect the performance of the Services; and</li> <li>4 all other laws, regulations, conventions, orders, directions, guidelines and policies given by or on behalf of any Government Agency which may apply to the Services including the Code and Guidelines, the Victorian Code and the Industrial Relations Principles.</li> </ol>
<b>Submission Date</b>	is defined in Schedule 1.
<b>Successful Proponent</b>	the Proponent selected by the Project Owner to enter into the Project Alliance Agreement with the Project Owner.
<b>Supplier</b>	is defined in clause 12.8(d).
<b>Tax Invoice</b>	includes any document or record treated by the Commissioner of Taxation as a tax invoice or as a document entitling a recipient to an input tax credit.
<b>Third Party</b>	a person who is not a Party or a director, officer or employee of a Party or a Related Body Corporate of a Party.
<b>Target Outturn Cost or TOC</b>	the specific sum to be developed by the Proponent under this Agreement as being the estimate of all Alliance Reimbursable Costs, Alliance Corporate Overhead and Profit and Risk & Contingency Provisions required to achieve MCOS Performance, perform the Works and to bring the Works to a stage where the Final Certificate can be issued under the Project Alliance Agreement, that will be specified in the Project Proposal submitted to the Project Owner under this Agreement.
<b>Termination Notice</b>	is defined in clause 16.3.

<b>Ultimate Holding Company</b>	has the meaning given in section 9 of the <i>Corporations Act 2001</i> (Cth).
<b>Works</b>	the whole of the works and services to be performed in accordance with the Project Alliance Agreement.

## 1.2 Interpretation

In this Agreement:

- (a) headings and bold type are for convenience only and do not affect the interpretation of this Agreement;
- (b) the singular includes the plural and the plural includes the singular;
- (c) words of any gender include all genders;
- (d) other parts of speech and grammatical forms of a word or phrase defined in this Agreement have a corresponding meaning;
- (e) an expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual;
- (f) a reference to a clause, party, schedule, attachment, annexure or exhibit is a reference to a clause of, and a party, schedule, attachment, annexure or exhibit to, this Agreement and a reference to this Agreement includes any clause, schedule, attachment, annexure and exhibit;
- (g) a reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments;
- (h) a reference to a document (including this Agreement) is that document as varied, amended, novated, ratified or replaced from time to time;
- (i) a covenant or agreement on the part of the Proponent binds the Members jointly to the Project Owner, with the exception of the covenant of the Proponent under clause 13 to take out certain insurances which will bind the Members severally only and not jointly to the Project Owner;
- (j) all money referred to under this Agreement is in Australian dollars;
- (k) a reference to a body (including an institute, association or authority), other than a Party to this Agreement, whether statutory or not which ceases to exist or whose powers or functions are transferred to another body, is a reference to the body which replaces it or which substantially succeeds to its powers or functions; and
- (l) specifying anything in this Agreement after the words "include" or "for example" or similar expressions does not limit what else is included.

### 1.3 Business Day

Where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next Business Day.

### 1.4 Ambiguities and inconsistencies

- (a) If the Proponent discovers any ambiguity, discrepancy or inconsistency between any of the provisions of this Agreement or any other document expressly incorporated into this Agreement:
  - (1) it must notify the Project Owner of this in writing; and
  - (2) the Project Owner will direct the Proponent as to the interpretation to be followed by the Proponent in performing its obligations under this Agreement.
- (b) If the Project Owner discovers any ambiguity, discrepancy or inconsistency between any of the provisions of this Agreement or any other document expressly incorporated into this Agreement, the Project Owner will direct the Proponent as to the interpretation to be followed by the Proponent in performing its obligations under this Agreement.
- (c) The Proponent is not entitled to any additional costs by reason of a direction from the Project Owner under this clause 1.4.

### 1.5 Exclusion of the Wrongs Act 1958 (Vic)

To the extent permitted by Statutory Requirements, the Parties agree that Part IVAA of the *Wrongs Act 1958* (Vic) has no operation in relation to the obligations of the Proponent under this Agreement.

### 1.6 Future tendering and contracting opportunities

The Proponent acknowledges and agrees that the Proponent's performance under this Agreement may be taken into account by the Project Owner and any other Government Agency when considering the Proponent (and any or all of the Members of the Proponent) for future tendering and contracting opportunities.

## 2 Purpose and scope of AD Phase

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- (a) The purpose and scope of the AD Phase is:
  - (1) for the Proponent to perform the Services in accordance with this Agreement (including the Proponent Team Protocols);
  - (2) without limiting the Project Owner's rights under the Request for Proposal, to enable the Proponent to do everything it can to become the Successful Proponent;

- (3) to provide a competitive environment for the Project Owner to select either the Proponent or the Other Proponent as the Successful Proponent;
  - (4) to enable the Project Owner to observe and experience the reality of working collaboratively with the Proponent;
  - (5) to enable the Proponent to demonstrate how it will participate in the alliance with the Project Owner (if the Project Alliance Agreement is entered into by the Project Owner and the Proponent in accordance with this Agreement); and
  - (6) to enable the Project Owner to conduct the Financial Establishment Audit.
- (b) The Proponent acknowledges and accepts that while the Project Owner will co-operate with and assist the Proponent to perform the Services, the Project Owner will simultaneously be co-operating with and assisting the Other Proponent to provide its Services under its Alliance Development Agreement.
  - (c) The Proponent releases the Project Owner from any losses, damages or claims arising out of or in connection with:
    - (1) any co-operation or assistance provided, or any failure to provide any co-operation or assistance, by the Project Owner or the Project Owner's Representative to the Proponent under this Agreement; and
    - (2) any co-operation or assistance provided, or any failure to provide any co-operation or assistance, by the Project Owner or the Project Owner's Representative to the Other Proponent under its Alliance Development Agreement.
  - (d) The Project Owner is not liable for any losses, damages or claims suffered by the Proponent arising from the Proponent not being selected as the Successful Proponent except for the payment of costs in accordance with clause 12 and Schedule 5.

## 3 Commitments

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### 3.1 Alliance Principles

In performing the Services, the Parties agree at all times to act (to the maximum extent possible and subject to the terms of the Request for Proposal), in accordance with the Alliance Principles set out in the Draft Project Alliance Agreement.

### 3.2 Good Faith

In performing the Services, the Parties agree at all times to act in Good Faith.

### 3.3 Open book commitment

- (a) Each Party commits to:

- (1) maintain, for at least the Relevant Period, all of their records and other documentation referred to in this Agreement that relate to the Services in accordance with, where applicable, good accounting practices, standards and procedures;
  - (2) make their records and other documentation referred to in this Agreement that relate to the Services available to each other (or each other's nominated auditor) on request; and
  - (3) make available to each other (or each other's nominated auditor) any existing documentation or information in whatever form relating to the Services.
- (b) The obligation to make records and documentation available does not apply to records or documentation that may be the subject of legal professional privilege or are confidential lawyer/client communications.
  - (c) For the purposes of this clause 3.3, all of the references to the nominated auditor of the Project Owner will include the Auditor-General of the State of Victoria.

### 3.4 Proponent's obligations

The Proponent and each Member must:

- (a) at all times be suitably qualified and experienced and ensure that their employees, contractors and consultants are so qualified and experienced;
- (b) exercise due skill, care and diligence in the performance of the Services and its other obligations under this Agreement;
- (c) ensure that the Services and the Project Proposal are fit for their intended purpose; and
- (d) develop a Project Proposal taking into account all of the above and the other requirements of this Agreement.

## 4 Resolution of Issues

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### 4.1 General

- (a) The Parties acknowledge and agree that, by making the commitments set out in clause 3, any Issues which may arise between the Parties under this Agreement will be minimised, if not eliminated.
- (b) Each Party agrees to immediately notify the other of any matter which may amount to or result in an Issue between the Parties in relation to this Agreement.
- (c) An Issue that arises in connection with this Agreement will be resolved, wherever possible, at the level where the Issue initially arises.

## 4.2 Referral to Representatives

- (a) If, within 2 Business Days of an Issue being notified to a Party under clause 4.1(b), it has not been resolved by the Parties, then the Issue will be referred to the Representatives.
- (b) The Representatives will attempt to resolve the Issue (including by reducing the resolution to writing signed by both Representatives) within 5 Business Days of the Issue being referred to the Representatives. The Issue will not be taken to have been resolved by the Representatives until the resolution has been reduced to writing signed by both Representatives and will not be binding on the Parties until so reduced to writing and signed.
- (c) If the Representatives fail to resolve the Issue in accordance with clause 4.2(a), the Project Owner may, at any time, in its absolute discretion and with immediate effect, terminate this Agreement by giving the Proponent a written notice of termination and clause 16.1 will apply.

## 4.3 Parties to continue to perform

Subject to any clause in this Agreement to the contrary, each Party must continue to perform its obligations under this Agreement, notwithstanding any Issue under this clause 4.

## 4.4 Survival

The Parties agree that this clause 4 survives termination of this Agreement.

# 5 Role of Project Owner

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## 5.1 Core Team

- (a) The Proponent acknowledges and agrees that:
  - (1) the Project Owner has nominated the Core Team to:
    - (A) co-ordinate and administer the AD Phase up to the execution of the Project Alliance Agreement with the Successful Proponent;
    - (B) provide documents and information to the Proponent to assist it in performing the Services;
    - (C) participate in the various activities to be performed in the AD Phase as set out in Schedule 3; and
    - (D) provide feedback to the Project Owner to assist in the consideration and evaluation of the Project Proposal under clause 11.1; and

- (2) while the Core Team will co-operate with and assist the Proponent to perform the Services, the Core Team will simultaneously be co-operating with and assisting the Other Proponent to provide its Services under its Alliance Development Agreement.
- (b) The Proponent releases the Project Owner from any loss or damage arising out of, or in connection with:
  - (1) any co-operation or assistance provided, or any failure to provide any co-operation or assistance, by the Project Owner or the Core Team to the Proponent under this Agreement;
  - (2) any co-operation or assistance provided, or any failure to provide any co-operation or assistance, by the Project Owner or the Core Team to the Other Proponent under its Alliance Development Agreement.
- (c) The members of the Core Team will initially be as set out in Schedule 7. The Project Owner may change the members of the Core Team at any time during the AD Phase by notifying the Proponent in writing.

## 5.2 Project Owner representative

- (a) The Project Owner must perform its obligations under this Agreement through a representative appointed in writing by the Project Owner from time to time.
- (b) The Proponent will provide all assistance necessary to ensure the Project Owner's Representative can fulfil the responsibilities, perform those roles and functions and exercise those rights.
- (c) The Project Owner has initially selected the person named in Schedule 1 as its representative for the purposes of this Agreement. The Project Owner may, from time to time, change its representative by giving notice in writing to the Proponent.

## 6 Term

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This Agreement commences on the Commencement Date and, subject to the termination rights set out in this Agreement, terminates:

- (a) if the Proponent is selected as the Successful Proponent in accordance with this Agreement, on the date the Project Alliance Agreement is executed by the Project Owner and the Proponent; or
- (b) if the Proponent is not selected as the Successful Proponent in accordance with this Agreement, on the date contemplated by clause 11.4(b).

## 7 Project Proposal

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### 7.1 Development of Project Proposal

- (a) The Project Proposal must be developed by the Proponent in accordance with this clause 7.
- (b) In developing the Project Proposal, the Proponent must have regard to the requirements of the Project Alliance Agreement and the obligations and liabilities of a Non Owner Participant under the Project Alliance Agreement.
- (c) The Project Proposal must, as a minimum, incorporate the information, details and documentation set out in Schedule 4.
- (d) At any time prior to the Submission Date, the Project Owner may advise the Proponent in writing of any additional documents or further information that the Project Owner reasonably requires to be incorporated into the Project Proposal and the Proponent must incorporate the additional documents or further information into the Project Proposal.
- (e) Once the Project Proposal has been developed by the Proponent, the Proponent must submit the Project Proposal to the Project Owner for approval (or otherwise) in accordance with clause 7.1(f).
- (f) The Proponent must submit the Project Proposal to the Project Owner by no later than the Submission Date.

### 7.2 Proponent's warranties

The Proponent warrants that it will:

- (a) exercise proper professional skill, care and Diligence in the development of all aspects of the Project Proposal, and that it will ensure that its Members, employees, contractors and consultants are so qualified and experienced and exercise such professional skill, care and Diligence;
- (b) examine and verify the Project Owner's VFM Statement to the extent necessary for the preparation and submission of the Project Proposal under this Agreement;
- (c) prepare a Project Proposal that the Proponent honestly and genuinely believes, if the Proponent is selected as the Successful Proponent, will achieve the Project Owner's VFM Statement; and
- (d) develop the Project Proposal on the principles that:
  - (1) the TOC will be developed applying first principles elemental estimating procedures utilising a structure that has been agreed with the Project Owner;
  - (2) all efforts by the Proponent will be open, transparent and collaborative;
  - (3) all technical solutions will be robust and fit for purpose, and will satisfy the requirements of the Project Owner's VFM Statement;

- (4) to the extent possible, all estimates of production rates, plant, equipment, materials and subcontract procurement costs will be validated by competitive market testing, or will otherwise be established by benchmarking to current industry best practice;
- (5) all innovations and technical solutions identified by the Proponent in developing the Project Proposal will be incorporated into the Project Proposal and considered in determining the Risk & Contingency Provisions;
- (6) there will be a genuine commitment to innovation and continuous improvement in the development of the Project Proposal and to satisfying the requirements of the Project Owner's VFM Statement;
- (7) the Services will be performed in accordance with this Agreement; and
- (8) the Works will be performed in accordance with the Project Alliance Agreement.

## 8 Information Barriers

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- (a) The Project Owner is committed to ensuring that the Proponent and the Other Proponent develop each Project Proposal independently and without knowledge of each other's activities, ideas and outputs.
- (b) The Project Owner will develop Information Barrier Protocols. These information barrier protocols may incorporate processes and procedures put forward by the Proponent in its Proposal to ensure probity and competitiveness where a Member is related to a party which comprises part of the Other Proponent's team.
- (c) The Project Owner and the Proponent will implement and comply with the Information Barrier Protocols.
- (d) If a party becomes aware of a breach of any aspect of the Information Barrier Protocols, they must immediately notify the Project Owner and request advice on the action that must be taken to remedy the breach.

## 9 Provision of information

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### 9.1 Provision of information by the Project Owner

- (a) Subject to clause 9.2, the Project Owner intends to:
  - (1) disclose to the Proponent any material information which it discloses to the Other Proponent; and
  - (2) disclose to the Other Proponent any material information which it discloses to the Proponent.

- (b) The Project Owner may, from time to time, make presentations (or arrange for others to make presentations) to the Proponent of information relevant to the preparation of the Project Proposal or the Project.

## 9.2 Limits on provision of information

The Owner:

- (a) may in its absolute discretion determine:
  - (1) the extent to which any information should be disclosed to the Proponent and/or the Other Proponent; and
  - (2) the scope and form of any presentations to the Proponent and/or the Other Proponent; and
- (b) acknowledges that neither the Proponent nor the Other Proponent should be given any commercial advantage by the disclosure of information in respect of any aspect of the other's Project Proposal or the Project.

## 9.3 Jointly required information

- (a) If the Proponent intends to incur costs in obtaining any information (including any geotechnical information) which:
  - (1) is also likely to be required by the Other Proponent; and
  - (2) it is reasonable for both the Proponent and the Other Proponent to share to avoid the duplication of costs,
 the Proponent may request the Project Owner to procure the relevant information on behalf of the Proponent and the Other Proponent.
- (b) The Project Owner may:
  - (1) refuse or agree (including subject to any conditions) to a request made under clause 9.3(a) in its discretion; and
  - (2) if it agrees, procure the information and provide it to the Proponent and Other Proponent, at the Project Owner's cost and expense.

## 10 Independent advisers

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- (a) The Proponent acknowledges and accepts that the Project Owner may appoint advisers including:
  - (1) a probity auditor;
  - (2) a financial auditor;
  - (3) an estimator;
  - (4) a construction, engineering or technical reviewer;

- (5) commercial advisers; and
  - (6) legal advisers,
- to be accountable independently and directly to the Project Owner to validate the Project Proposal, to perform any task required by the Project Owner and to provide independent reports and validation of any aspect of the Project Proposal.
- (b) Without limiting clause 10(a), the Project Owner will engage the services of an independent adviser to:
    - (1) observe the preparation of the TOC by the Proponent and verify all of the methodology, approaches, assumptions, quantities, rates, amounts, estimations and contingencies used or included in the TOC prepared as part of the Project Proposal; and
    - (2) provide a report to the Project Owner in respect of the TOC.
  - (c) The Proponent agrees, in the spirit of the commitments it has made in clause 3 and elsewhere in this Agreement, to:
    - (1) provide the Project Owner's independent advisers with full access to all records and the basis of all of the methodology, approaches, assumptions, quantities, rates, amounts, estimations and contingencies referred to above during the investigations and the preparation of the TOC; and
    - (2) fully co-operate with and assist the Project Owner's advisers to ensure that such advisers are able to effectively and expeditiously carry out their duties.
  - (d) In preparing the TOC, the Proponent commits to an 'open book' approach, meaning that, without limiting clause 3.3, the Project Owner can have access to all records, information and data in the possession of the Proponent which in any way has a bearing on the TOC. This aspect of the open book philosophy must be carried forward by the Proponent into all aspects of costing and accounting.
  - (e) The Proponent must honestly and openly answer any questions the Project Owner's independent advisers and the Project Owner may have in connection with the Project Proposal (including the TOC) in a manner consistent with the Proponent's commitments under clause 3 of this Agreement.
  - (f) The Project Owner must bear all of the costs of any independent advisers appointed under this clause 10.

## 11 Selection of Successful Proponent

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### 11.1 Consideration of Project Proposal

- (a) After the Submission Date, the Project Owner will:
  - (1) review and evaluate:

- (A) the Project Proposal which has been developed by the Proponent and submitted to the Project Owner;
  - (B) the Project Proposal submitted by the Other Proponent; and
  - (C) the Proponent and the Other Proponent,
- against the evaluation criteria set out in the Request for Proposal;
- (2) review any comments in respect of the Project Proposal received from its independent advisors, including any report in respect of the Project Proposal (including the TOC) provided to the Project Owner by an independent adviser in accordance with clause 10;
  - (3) consider the views, experiences and responses of the Core Team on the Proponent and other key stakeholders of the Project Owner involved in the AD Phase;
  - (4) without limiting the Project Owner's rights under the Request for Proposal or otherwise, within a reasonable time of having received the Project Proposal, determine whether the Proponent or the Other Proponent is selected as the Successful Proponent; and
  - (5) within a reasonable time of having made a decision, notify both the Proponent and the Other Proponent in writing of its decision.
- (b) The Proponent must honestly and openly answer any questions which the Project Owner and its independent consultants may have in connection with the Project Proposal in a manner consistent with the Proponent's commitments under clause 3 of this Agreement.

## 11.2 Decision of the Project Owner

If, following consideration of the Project Proposal under clause 11.1, the Project Owner notifies the Proponent in writing under clause 11.1(a)(5) that:

- (a) the Proponent is selected as the Successful Proponent, then clause 11.3 will apply; or
- (b) the Proponent is not selected as the Successful Proponent, then clause 11.4 will apply.

## 11.3 Consequences of being selected as the Successful Proponent

- (a) If the Proponent is selected as the Successful Proponent and:
  - (1) the Project Owner requires amendments to the executed form of the Project Alliance Agreement provided by the Successful Proponent in its Project Proposal, to which the Successful Proponent agrees, the Successful Proponent and the Project Owner must execute the amended Project Alliance Agreement; and
  - (2) the Project Owner does not require any amendments to the executed form of the Project Alliance Agreement provided by the Successful Proponent in its Project Proposal, the Project Owner will execute that form of the Project Alliance Agreement,

within 10 Business Days of the date of notification by the Project Owner to the Proponent under clause 11.1(a)(5).

- (b) The Proponent acknowledges that the Project Owner may select the Other Proponent as the Successful Proponent, and proceed to execution of a Project Alliance Agreement with the Other Proponent in accordance with its Alliance Development Agreement.

#### 11.4 Consequences of not being selected as the Successful Proponent

- (a) If the Proponent is not selected as the Successful Proponent, the Proponent must immediately cease to perform the Services on the date of notification by the Project Owner to the Proponent under clause 11.1(a)(5).
- (b) Notwithstanding that the Proponent is not selected as the Successful Proponent, the Project Proposal remains valid and capable of acceptance by the Project Owner until the date that is *[insert]* days from the Submission Date.

**Guidance Note:** The appropriate time period for the Project Proposal to remain valid and capable of acceptance will need to be considered by the Project Owner on a case by case basis. This mechanism is intended to allow the Project Owner to revert to the unsuccessful Proponent if the Project Owner is unable to reach final agreement with the Successful Proponent.

- (c) If the Project Owner selects the Proponent as the Successful Proponent within the time period referred to in clause 11.4(b), the Proponent will be deemed to be the Successful Proponent for the purposes of this Agreement.
- (d) If the time period referred to in clause 11.4(b) expires prior to selection of the Proponent as the Successful Proponent, this Agreement terminates on the date of expiry of that period.

#### 11.5 Acknowledgements

The Proponent acknowledges and agrees that:

- (a) there is no guarantee that the Proponent or the Other Proponent will be selected as the Successful Proponent;
- (b) the process for selecting the Successful Proponent (if that occurs), outlined under this Agreement supplements the process contained in the Request for Proposal. If there is any inconsistency or ambiguity between this Agreement and the Request for Proposal, that inconsistency or ambiguity will be resolved by the Project Owner in its discretion;
- (c) there are a number of Authorisations that are required to be obtained by the Project Owner prior to the selection of the Successful Proponent and execution by the Project Owner of the Project Alliance Agreement (if that occurs) which may not be given or which may be given on terms which are not acceptable to the Project Owner, in which case, in the Project Owner's absolute discretion, the Successful Proponent will not be selected, the Project Alliance Agreement will not be executed by the Project Owner and the Project will not proceed;
- (d) the Project Proposal and the Proponent's commitments and obligations under this Agreement remain unaffected notwithstanding:

- (1) the Project Owner's co-operation and participation in the development of the Project Proposal, including the involvement of the Project Owner's Representative, the Core Team and any independent advisers appointed by the Project Owner;
  - (2) any receipt or review of, or comment or direction on, the development of the Project Proposal or any of the inputs into the Project Proposal by the Project Owner, the Project Owner's Representative or anyone acting on behalf of the Project Owner, during the AD Phase or at any other time, or any failure by the Project Owner, the Project Owner's Representative or anyone acting on behalf of the Project Owner to receive or review or provide comment or direction on the development of the Project Proposal or any of the inputs into the Project Proposal; and
  - (3) the Project Owner's co-operation with and assistance given to the Other Proponent to develop its Project Proposal under its Alliance Development Agreement; and
- (e) nothing in this Agreement may be construed as an indication or representation to the Proponent by the Project Owner that the Proponent will be selected as the Successful Proponent. The Project Owner is not liable for any loss or damage suffered by the Proponent arising from Proponent not being selected as the Successful Proponent except for the payment of costs in accordance with clause 12 and Schedule 5.

## 11.6 Project Alliance Agreement

- (a) During the AD Phase, the Proponent and the Project Owner must negotiate in a manner consistent with the commitments under clause 3 of this Agreement, the Project Alliance Agreement.
- (b) The Proponent must submit, as part of its Project Proposal, its proposed final form of the Project Alliance Agreement which must be executed by each Member and, subject to clause 11.3(a), ready for execution by the Project Owner in accordance with clause 11.3(a).

## 11.7 Ownership of Project Proposal

Subject to clause 15, ownership of the Project Proposal and all documentation and information comprising the Project Proposal and/or prepared for the purposes of the Project Proposal (**Information**), immediately vests in the Project Owner upon its creation and the Proponent has no right to:

- (a) use any part of the Project Proposal or Information without the Project Owner's prior written approval; or
- (b) disclose any part of the Project Proposal or Information without the Project Owner's prior written approval, except as permitted under clause 18.9.

## 12 Payments

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### 12.1 Payment to Proponent

- (a) If:
- (1) the Proponent has submitted the Project Proposal on or before the Submission Date; and
  - (2) the Project Owner is satisfied, acting reasonably, that:
    - (A) the Project Proposal has been submitted in accordance with this Agreement and the Request for Proposal; and
    - (B) the Proponent has otherwise complied with the requirements of this Agreement and the Request for Proposal to the extent requested or required of the Proponent,
- the Project Owner will pay the Proponent the AD Payment Amount in accordance with this clause 12.
- (b) Unless otherwise expressly provided in this Agreement, no matter what events, circumstances, contingencies, conditions or degree of difficulty is encountered by the Proponent in performing the Services or otherwise performing its obligations under this Agreement, the Parties agree that:
- (1) the Proponent's only entitlement to payment under this Agreement:
    - (A) if the Proponent is selected as the Successful Proponent, until such time as the Project Alliance Agreement is executed by the Proponent and the Project Owner; or
    - (B) if the Proponent is not selected as the Successful Proponent, until the date contemplated by clause 11.4(b),is for the AD Payment Amount; and
  - (2) the AD Payment Amount is fixed and will not be increased for any reason whatsoever.

### 12.2 Bank Account

- (a) Within 5 Business Days of the Commencement Date, the Proponent must notify the Project Owner in writing of the Proponent's nominated bank account for payment by the Project Owner to the Proponent under this Agreement (**Bank Account**).
- (b) The Proponent may change the Bank Account by notifying the Project Owner in writing of the Proponent's new nominated bank account for payments by the Project Owner to the Proponent under this Agreement provided that any notice under this clause 12.2(b) is given by the Proponent to the Project Owner at least 10 Business Days prior to the due date for payment under this Agreement.

### 12.3 Payment to Proponent

- (a) If the Proponent has satisfied the requirements under clause 12.1(a):
- (1) the Project Owner must notify the Proponent of that fact within [*insert days*] of the submission of the Project Proposal; and
  - (2) the Proponent must promptly submit a Tax Invoice to the Project Owner for the AD Payment Amount, together with any supporting documentation which the Project Owner may reasonably require.
- (b) The Project Owner must within [*insert days*] of the Proponent submitting the Tax Invoice under clause 12.3(a), review the Tax Invoice and issue a payment schedule to that Proponent setting out:
- (1) the AD Payment Amount;
  - (2) where the Project Owner disputes any amount in the Tax Invoice, the reasons for withholding payment of those amounts; and
  - (3) any amount that the Project Owner is entitled to deduct or set off in accordance with this Agreement or the Request for Proposal.
- (c) The Project Owner must pay:
- (1) the AD Payment Amount; or
  - (2) if the Project Owner disputes any amount in the Tax Invoice submitted by the Proponent under clause 12.3(a), the balance of the Tax Invoice, subject to the Proponent providing an "Adjustment Note" to the Project Owner for the disputed amount within [*insert days*] of being requested to do so by the Project Owner,
- into the bank account nominated by the Proponent under clause 12.2 within [*insert days*] of the issue of a payment schedule under clause 12.3(b).
- (d) The Issue regarding the amount payable to the Proponent will then be resolved in accordance with clause 4.2 and, upon resolution, the Project Owner will (if required) make the payment to the Proponent within [*insert days*] of the date of the resolution.

### 12.4 Payment not evidence

Payment of moneys is not evidence of the value of the Services, or that the Services have been executed satisfactorily, or an admission of liability, but is payment on account only.

### 12.5 No entitlement to payment

- (a) If the Proponent has not satisfied the requirements under clause 12.1(a):
- (1) the Project Owner will notify the Proponent of that fact as soon as practicable;
  - (2) the Project Owner is entitled to terminate this Agreement; and

- (3) the Proponent will have no entitlement to payment under this Agreement.

For the avoidance of doubt, if the Proponent considers that it has satisfied the requirements under clause 12.1(a) and the Project Owner does not agree, this is an Issue to be resolved under clause 4.

- (b) If the Proponent commits a Default which causes the Project Owner to terminate this Agreement, then:
  - (1) the Proponent is not entitled to any payment under this Agreement; and
  - (2) the Proponent must reimburse the Project Owner, on demand, all payments (if any) previously made by the Project Owner to the Proponent under this Agreement.

## 12.6 Overpayments and underpayments

- (a) If, on completion of any inspection and audit it is discovered that the total payments made to the Proponent are greater than the Proponent's entitlement to payment under this Agreement, the Project Owner may either:
  - (1) deduct an amount equal to the excess from moneys due or becoming due to the Proponent whether under this Agreement or otherwise; or
  - (2) require the Proponent to reimburse the excess to the Project Owner.
- (b) If, on completion of any inspection and audit it is discovered that the total payments made to the Proponent is less than the Proponent's entitlement to payment under this Agreement, the Proponent may require the Project Owner to pay any shortfall to the Proponent.

If the Project Owner is required or the Proponent is required to make a payment under this clause 12.6, the Project Owner or the Proponent (as the case may be) must make that payment within 20 Business Days of a written request for payment being made.

## 12.7 Audit

- (a) The Proponent must keep and maintain:
  - (1) an adequate internal control system (including policies, controls and procedures) for the effective planning, performance and reporting of the Services in accordance with this Agreement;
  - (2) books of account kept in accordance with recognised accounting principles which, among other things, clearly show the amounts that are payable by the Project Owner under this Agreement and ledgers solely related to the performance of the Services; and
  - (3) all of their records and other documentation referred to in this Agreement that relate to the Services,
 at the principal place of business in [*insert relevant jurisdiction*] of the Proponent.

- (b) The Project Owner or its nominated auditor may at any time during the AD Phase and for a period of 12 months thereafter, audit, inspect, transcribe, investigate or copy, the quality system and the records referred to in clause 12.7(a) and any document prepared or maintained by the Proponent for the purposes of performing the Proponent's obligations under this Agreement.
- (c) The Proponent will provide whatever records, documents, access, facilities or assistance is necessary to conduct whatever audit, inspection, transcription, investigation or copying is required by the Project Owner or its nominated auditor.
- (d) In the course of an audit under clause 12.7(b), the Project Owner or its nominated auditor may:
  - (1) review and assess the reliability, integrity, timeliness and accuracy of financial operating information relating to the Services, and the means and systems used to identify, measure, classify and report such information; and
  - (2) interview relevant staff of the Members.
- (e) At the conclusion of an audit under clause 12.7(b), the Project Owner must, acting reasonably, determine the actions (if any) required to be taken by the Proponent to rectify problems, weaknesses, deficiencies or non-compliance detected during the audit including whether the Proponent must reimburse the Project Owner for any payments in excess of the value of the Services performed.
- (f) Any records or documents provided to the Project Owner or its nominated auditor or to which the Project Owner or its nominated auditor has access to or any information obtained through any audit, inspection or investigation must be treated as confidential information in accordance with clause 18.9.
- (g) If this Agreement is terminated, the Proponent must give the Project Owner any records referred to in clause 12.7(a). The Project Owner must allow the Proponent access to those books of account and records for a period of two years after the last day of the accounting period to which the record relates.
- (h) For the purposes of this clause 12.7, all of the references to the nominated auditor of the Project Owner will include the Auditor-General of the State of Victoria.

## 12.8 Goods and Services Tax (GST Exclusive Prices)

- (a) Any reference in this clause to a term defined or used in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include an amount on account of GST in respect of the supply (**GST Exclusive Consideration**) except as provided under this clause 12.8.
- (c) Any amount referred to in this Agreement (other than an amount referred to in clause 12.8(h)) which is relevant in determining a payment to be made by one of the Parties to another is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.

- (d) To the extent that GST is payable in respect of any supply made by a Party (**Supplier**) under or in connection with this Agreement, the consideration to be provided under this Agreement for that supply (unless it is expressly stated to include GST) is increased by an amount equal to the GST Exclusive Consideration (or its GST exclusive market value if applicable) multiplied by the rate at which GST is imposed in respect of the supply.
- (e) The recipient must pay the additional amount payable under clause 12.8(d) to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.
- (f) The Supplier must issue a tax invoice to the recipient of the taxable supply at or before the time of payment of the consideration for the supply as increased on account of GST under clause 12.8(d) or at such other time as the Parties agree.
- (g) Whenever an adjustment event occurs in relation to any taxable supply made under or in connection with this Agreement the Supplier must determine the net GST in relation to the supply (taking into account any adjustment) and if the net GST differs from the amount previously paid under clause 12.8(e), the amount of the difference must be paid by, refunded to or credited to the recipient, as applicable.
- (h) If one of the Parties is entitled to be reimbursed or indemnified for a loss, cost, expense or outgoing incurred in connection with this Agreement, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit to which the Party being reimbursed or indemnified (or its representative member) is entitled in relation to that loss, cost, expense or outgoing and then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of GST under clause 12.8(d).

## 12.9 Survival

This clause 12 survives the termination of this Agreement.

# 13 Insurances

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## 13.1 Insurances

**Guidance Note** – This Agreement does not include a requirement for the Members to effect professional indemnity insurance. However, to the extent that any design work is included in the Services, the Project Owner should assess the need for professional indemnity insurance on a case-by-case basis.

- (a) Throughout the AD Phase, each Member must effect and maintain public liability insurance, professional indemnity insurance and workers' compensation insurance in accordance with this clause 13, with insurers and for coverage and on terms all approved by the Project Owner, which approval will not be unreasonably withheld.
- (b) It is acknowledged that each Member is free to use its existing insurance policies for the purposes of this clause 13.

- (c) The Proponent must ensure that any subcontractor engaged by the Proponent or any Member in respect of the performance of the Services effects and maintains insurance which meets the requirements set out in this clause 13.

### 13.2 Public liability insurance

Each Member must effect and maintain a public insurance policy for an amount not less than \$*[insert]* arising from any one occurrence in respect of:

- (a) death of or personal injury (including illness) to any person not being a person who at the time of the occurrence is engaged in or upon the service of the insured under a contract of service or apprenticeship; and
- (b) damage to property not belonging to nor in the care, custody or control of the insured,

caused by an event occurring during the period of insurance arising out of or in the course of or by reason of the performance or purported performance of the Services.

### 13.3 Workers' compensation

- (a) Each Member must insure its liability (including its common law liability), as required under any Statutory Requirement, to its employees engaged in doing anything for the purpose of exercising or performing the relevant Member's rights or obligations under this Agreement. The common law cover required by this clause 13.3 must be for an amount of not less than \$*[insert]* in respect of any one accident other than as required by a Statutory Requirement.
- (b) The workers' compensation policies required by this clause 13.3 must be endorsed to:
- (1) indemnify the Project Owner against any liability which it may incur to such employees, arising by virtue of a Statutory Requirement and at common law; and
  - (2) provide cover in respect of each and every claim for an amount not less than the minimum as specified in any Statutory Requirement.

### 13.4 Evidence of insurance

By no later than 10 Business Days after the Commencement Date, the Proponent must produce evidence to the satisfaction of the Project Owner for each Member, whether by certificate of currency or otherwise, that:

- (a) the insurances referred to in this clause 13 are taken out and maintained; and
- (b) all premiums in respect of the policies of insurance contemplated by this clause 13 have been paid and are up to date.

### 13.5 Obligation to assist

The Proponent must provide the Project Owner, and any person nominated by the Project Owner (including the Project Owner's insurance adviser), with all assistance and cooperation that the Project Owner reasonably considers is necessary (including providing all information and making available relevant personnel) to enable the Project

Owner to procure and implement the insurance policies which the Project Owner will effect and maintain under the Project Alliance Agreement.

## 14 Limit of liability

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### 14.1 No liability for Consequential Loss

Except to the extent that Consequential Loss is covered and is recoverable under a policy of insurance taken out under this Agreement or otherwise taken out or maintained by the Project Owner or the Proponent, including any Member (as the case may be), in which case a Party will be liable, no Party will be liable to another Party for any Consequential Loss sustained by a Party, whether caused by that Party's breach of this Agreement, negligence or otherwise.

### 14.2 Limit of Liability

- (a) The total liability of a Party (**Liable Party**) to the other Party for any losses, damages or claims arising out of, or in connection with, this Agreement is limited in the aggregate to the greater of:
- (1) the AD Payment Amount; and
  - (2) the amount which the Liable Party and any Member (if the Liable Party is the Proponent) are able to recover under a policy of insurance taken out by the Liable Party or the Member (whether separately or together) under this Agreement or otherwise taken out or maintained by the Project Owner or the Proponent (including any Member),  
**(Limit of Liability).**
- (b) The Limit of Liability is an aggregate limit of liability for all losses, damages or claims arising in relation to, or in connection with, this Agreement. The Limit of Liability does not apply where the loss, damage or claim:
- (1) relates to any death, personal injury or damage to property; or
  - (2) arises out of fraud of the Liable Party or its officers, agents, contractors or employees or any Member (if the Liable Party is the Proponent).

## 15 Intellectual Property

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### 15.1 Ownership

- (a) This Agreement does not assign ownership of any Intellectual Property existing on the Commencement Date and neither Party may assert ownership of all or any part of the other Party's pre-existing Intellectual Property.

- (b) If the Proponent has any pre-existing Intellectual Property as at the Commencement Date or as at the date of termination of this Agreement that are applied in the development or content of the Project Proposal or the Project Alliance Agreement, the Proponent grants to the Project Owner by this Agreement an irrevocable, non-exclusive, world-wide, perpetual, transferable, sub-licensable, royalty-free licence of that pre-existing Intellectual Property for use in relation to the Project.

## 15.2 New developments

- (a) If any Intellectual Property is developed solely by the Proponent or jointly by the Parties in the course of the Parties performing their obligations under this Agreement, the Project Owner owns that Intellectual Property.
- (b) If the Proponent is selected as the Successful Proponent, the Project Owner by this Agreement grants to the Proponent an irrevocable, non-exclusive, perpetual, royalty-free licence of the Intellectual Property in clause 15.2(a) for use in relation to the Project and for any other purpose.
- (c) If the Proponent is not selected as the Successful Proponent, the Project Owner by this Agreement grants to the Proponent an irrevocable, non-exclusive, perpetual, royalty-free licence to use the Intellectual Property in clause 15.2(a) for any purpose.

## 15.3 Survival

This clause 15 survives the termination of this Agreement.

# 16 Termination

---

**Guidance Note:** The Project Owner may also wish to consider whether the Proponent should be required to provide a bid bond to secure possible liability of the Proponent for a breach of this Agreement. The requirement to provide such security would need to be considered by the Project Owner on a case by case basis, and noted in the EOI / RFP documentation.

## 16.1 No fault termination

- (a) The Project Owner may, at any time, in its absolute discretion and with immediate effect, terminate this Agreement by giving the Proponent a written notice of termination.
- (b) Subject to any rights the Project Owner has arising out of or in connection with this Agreement (including any right to set off payments), if the Project Owner terminates this Agreement under clause 16.1(a), the Proponent will be entitled to be paid its Reimbursable Costs for Services performed in accordance with this Agreement prior to the date of termination.
- (c) The Proponent's maximum entitlement under clause 16.1(b) is limited to the amount of the AD Payment Amount.

- (d) Other than as described in this clause 16.1, the Project Owner is not required to make any other payment to the Proponent if it terminates this Agreement under this clause 16.1 and is not liable for any loss or damage suffered or incurred by the Proponent arising from any decision by the Project Owner to terminate this Agreement under this clause 16.1.

## 16.2 Default

A Default for the purposes of this clause 16 occurs where the Proponent (or any Member):

- (a) commits a material breach of this Agreement;
- (b) submits a Project Proposal that the Project Owner considers, in its discretion, fails to satisfy the requirements of clause 12.1(a); or
- (c) is the subject of an Insolvency Event.

## 16.3 Termination for Default

- (a) If the Proponent (or any Member) commits a Default, which Default remains unremedied 10 Business Days after receipt of notice by the Proponent from the Project Owner requiring the Default to be remedied to the Project Owner's reasonable satisfaction, the Project Owner may terminate this Agreement by serving a notice under this clause 16.3 which notice specifies the Default (**Termination Notice**).
- (b) A Default by any Member is deemed to be a Default by the Proponent.
- (c) Where the Project Owner has terminated this Agreement under this clause 16.3, the Parties will have the same rights, remedies and liabilities as if the Proponent repudiated this Agreement and the Project Owner elected to treat this Agreement to be at an end and recover damages.

## 16.4 Consequences of termination

- (a) On termination of this Agreement:
  - (1) the Proponent must promptly return to the Project Owner all copies of information and documentation provided by the Project Owner (including by the Core Team) for the purposes of this Agreement; and
  - (2) the Project Owner may, at no cost, use any of the work, documentation or information developed by the Proponent under this Agreement for any purpose whatsoever, and the Proponent must provide any such work, documentation or information to the Project Owner within 10 Business Days of the Project Owner's request for it to do so.
- (b) The Proponent warrants, notwithstanding the termination of this Agreement, that it will not do, or omit to do, anything to prevent the Project Owner from carrying out the Project.

## 16.5 Rights preserved

The expiry or termination of this Agreement will not affect any rights of a Party against the other Party in respect of any act, omission, matter, or thing occurring or under this Agreement prior to that expiry or termination.

## 16.6 Survival

This clause 16 survives the termination of this Agreement.

# 17 Notices

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## 17.1 How and where Notices may be sent

A notice or other communication under this Agreement (**Notice**) must be in writing and delivered by hand or sent by pre-paid post or fax to a Party at the address or the fax number for that Party set out in [Schedule 2] or as otherwise specified by a Party by Notice.

## 17.2 Notices sent by company

A Notice sent by a company must be signed by a duly authorised officer of the sender.

## 17.3 Email not to be used

Email or similar electronic means of communication must not be used to give Notices under this Agreement.

## 17.4 When Notices are taken to have been given and received

- (a) A Notice sent by post is regarded as given and received on the second Business Day following the date of postage.
- (b) A fax is regarded as given and received on production of a transmission report by the machine from which the fax was sent which indicates that the fax was sent in its entirety to the recipient's fax number, unless the recipient informs the sender that the Notice is illegible or incomplete within 4 hours of it being transmitted.
- (c) A Notice delivered or received other than on a Business Day or after 4.00pm (recipient's time) is regarded as received at 9.00am on the following Business Day and a Notice delivered or received before 9.00am (recipient's time) is regarded as received at 9.00am.

## 18 General

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### 18.1 Governing law and jurisdiction

**Guidance Note** – Please note that where the Project Owner is using this Agreement for a Project in a jurisdiction other than Victoria, this clause will need to be amended for use in that jurisdiction.

- (a) This Agreement is governed by the law in force in Victoria.
- (b) Each Party irrevocably submits to the [**exclusive/non-exclusive**] jurisdiction of courts exercising jurisdiction in Victoria and courts of appeal from them in respect of any proceedings arising out of or in connection with this Agreement. Each Party irrevocably waives any objection to the venue of any legal process in these courts on the basis that the process has been brought in an inconvenient forum.

### 18.2 Invalidity and enforceability

If any term or part of this Agreement is or becomes for any reason invalid or unenforceable at law, then in that event, that term or part of this Agreement will be and be hereby deemed to be severed from this Agreement without thereby affecting the remainder of this Agreement and the remainder of this Agreement will continue to be valid and enforceable in all things.

### 18.3 Waiver

No Party to this Agreement may rely on the words or conduct of any other Party as a waiver of any right unless the waiver is in writing and signed by the Party granting the waiver.

In this clause 18.3:

- (a) **conduct** includes delay in the exercise of a right;
- (b) **right** means any right arising under or in connection with this Agreement and includes the right to rely on this clause; and
- (c) **waiver** includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

### 18.4 Amendments

Amendment of this Agreement must be in writing and signed by the Parties.

### 18.5 Entire agreement

This Agreement states all the express terms of the agreement between the Parties in respect of its subject matter. It supersedes all prior discussions, negotiations, understandings and agreements in respect of its subject matter.

## 18.6 Counterparts

This Agreement may be executed in any number of counterparts.

## 18.7 Assignment

The Proponent (or any Member) must not, without the Project Owner's prior written approval (which must not be unreasonably withheld), assign, mortgage, novate, charge or encumber this Agreement or any part of it or any right, benefit, money or interest under this Agreement.

## 18.8 Change in Control

- (a) The Proponent must ensure that there is no Change in Control in respect of any Member without the Project Owner's prior written approval (which must not be unreasonably withheld).
- (b) Without limiting clause 18.8(a), in the event of a proposed Change in Control occurring, the Proponent must:
  - (1) provide the Project Owner with any documentation or information requested by the Project Owner in respect of the proposed Change in Control (including information in respect of the financial and technical capability of the third party acquiring or exercising control over the relevant Member); and
  - (2) attend any meetings requested by the Project Owner including arranging for attendance at those meetings by the third party acquiring or exercising control over the relevant Member.

## 18.9 Confidentiality

The Parties agree that this Agreement, and any information relating to or arising from the Agreement, is confidential, and that they will not disclose the Agreement, or any information relating to or arising from the Agreement, to any person, unless that disclosure or that information:

- (a) is at the material time in the public domain;
- (b) is required by any Statutory Requirement to be communicated to a person who is authorised by any Statutory Requirement to receive it;
- (c) is necessarily made to a court, or to an arbitrator or administrative tribunal or to legal counsel in the course of proceedings provided that, in the case of any arbitration proceedings, the Party concerned first obtains from each other party to those proceedings an undertaking, enforceable by any Party, that each party must similarly not divulge or communicate, without the Project Owner's written consent, any information referred to in this clause;
- (d) is required to be disclosed to any Government Minister, Parliament or Government Agency whether in connection with the granting of any licence or otherwise;
- (e) is to a servant, employee, agent or contractor of the Parties, when that disclosure is reasonably necessary for the conduct of this Agreement;

- (f) is to a Related Body Corporate of the Parties;
- (g) was consented to in writing by each of the other Parties; or
- (h) is required to be disclosed to the Australian Stock Exchange Limited (ABN 98 008 624 691).

### **18.10 Publicity or media statements**

- (a) The Proponent acknowledges and accepts that it must not issue any information, publication, document or article relating to this Agreement, the Project or the Services without the prior written approval of the Project Owner.
- (b) The Proponent must immediately refer to the Project Owner any media enquiries relating to this Agreement, the Project or the Services.

### **18.11 Relationship of the Parties**

- (a) Nothing in this Agreement gives a Party authority to bind any other Party in any way.
- (b) The Proponent is an independent contractor of the Project Owner. The employees, agents and subcontractors of the Proponent will not be deemed to be employees, agents or subcontractors of the Project Owner and each Party must pay all costs associated with its employees.
- (c) This Agreement is not intended to create, nor will it be construed as creating, any partnership, joint venture or fiduciary obligation with regard to, or as between, the Parties.

### **18.12 Corporate power and authority**

Each Party represents and warrants to the others that it has full power to enter into and perform its obligations under this Agreement and that when executed it will constitute legal, valid and binding obligations under its terms.

### **18.13 Financial difficulties**

A Party must immediately notify the other Parties in writing if it forms the opinion that it will be unable to, or be unlikely to be able to, satisfy any of its financial obligations in relation to this Agreement from the financial resources available, or likely to be available to it, at the time the financial obligation is due.

### **18.14 Project Owner's statutory functions**

Nothing contained in or implied by this Agreement or any document contemplated by this Agreement has the effect of constraining:

- (a) the Project Owner's, or placing any fetter on the Project Owner's, statutory rights, duties, powers and functions, including those contained or referred to in any Statutory Requirement; and
- (b) the Auditor-General for the State of Victoria or placing any fetter on its statutory rights, duties, powers and functions.

**18.15 Costs**

Each Party must pay its own costs and disbursements in connection with the negotiations, preparation and execution of this Agreement, which costs will not be Reimbursable Costs.

**18.16 Stamp duty**

- (a) The Proponent must pay any stamp duty in respect of the execution, delivery and performance of this Agreement.
- (b) Stamp duty referred to in clause 18.16(a) is not a Reimbursable Cost.

# Schedules

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# Schedule 1

## Schedule 1 – Agreement Particulars

No.	Reference	Description	Particular
1	Clause 1.1	Project Owner	the Project Owner, in its capacity as <b>[insert specific role e.g. the Commissioner of Main Roads]</b> , being the client for the performance of the Services.
2	Clause 1.1	Project Owner's Representative	a representative nominated by the Project Owner, from time to time, in writing to the Proponent for the purposes of clause 4.2.
3	Clause 1.1	Proponent's Representative	a representative nominated by the Proponent, from time to time, in writing to the Project Owner for the purposes of clause 4.2.
4	Clause 1.1	Request for Proposal	the Request for Proposal No. <b>[insert]</b> for the Project issued by the Project Owner on <b>[insert date]</b> .
5	Clause 1.1	Submission Date	the date for submission by the Proponent of the Project Proposal to the Project Owner, being <b>[insert]</b> , or the date resulting from any extension of that date by the Project Owner.

# Schedule 2

## Schedule 2 – Parties' contact details

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### 1 Project Owner

---

Address:            **[insert name]**  
                          **[insert address]**

Fax:                 **[insert facsimile number]**

Attention:         **[insert name]**

### 2 Proponent

---

Address:            **[insert name]**  
                          **[insert address]**

Fax:                 **[insert facsimile number]**

Attention:         **[insert name]**

### 3 Member

---

Address:            **[insert name]**  
                          **[insert address]**

Fax:                 **[insert facsimile number]**

Attention:         **[insert name]**

### 4 Member

---

Address:            **[insert name]**  
                          **[insert address]**

Fax:                 **[insert facsimile number]**

Attention:         **[insert name]**

# Schedule 3

## Schedule 3 – Services

---

**Guidance Note** – The Project Owner will need to review and modify the Services to be provided by the Proponent under the Agreement on a case-by-case basis, to reflect the requirements of its specific Project. This Schedule 3 is provided as an example only.

The Services comprise:

- (a) preparation of the Project Proposal for submission to the Project Owner in accordance with the terms of this Agreement; and
- (b) participation in the following activities:
  - (1) **Progress reporting**

The Proponent must prepare a monthly progress report in respect of the Services and the Proponent's progress against the schedule for the AD Phase agreed as part of the AD Establishment Framework. The Proponent will provide a monthly progress report to the Project Owner.
  - (2) **AD Establishment Framework**

The AD Establishment Framework will comprise the following activities.

    - (A) Participation in the AD Foundation Workshop for the members of the Proponent's team and the Core Team to introduce each other.
    - (B) Agreement on schedule for the AD Phase to deliver the tasks that need to be completed by the Proponent in that phase.
    - (C) Confirmation of Proponent Team Protocols.
    - (D) Confirmation of the non-negotiable items from the Request for Proposal and the offers made by the Proponent in the Proposal.
    - (E) Agreement on how the Project Proposal is going to be produced by the Proponent.
  - (3) **Commercial Alignment Framework**

The Commercial Alignment Framework will comprise the following activities.

    - (A) Verification of the commercial information provided by the Proponent in the Proposal.
    - (B) Verification of the business rules of the Members for generating costs.
    - (C) Agreement on the costs which will be reimbursed, and the costs which will not be reimbursed, to the alliance participants under the Project Alliance Agreement.

- (D) Agreement on the corporate overhead and profit which will be payable to the Proponent under the Project Alliance Agreement.
- (E) Agreement on the payment procedures which will apply under the Project Alliance Agreement.
- (F) Finalisation of the terms and conditions of the Project Alliance Agreement.
- (G) Confirmation of payments to the Proponent during the AD Phase.

(4) **Financial Establishment Audit**

The Financial Establishment Audit will be undertaken by the Project Owner's internal financial and commercial personnel (and any other independent advisers selected by the Project Owner in its discretion) or the Project Owner's external financial auditors. The primary purpose of this audit is to gather sufficient information from each Member as to:

*[insert]*.

Each Member will be required to participate in the Financial Establishment Audit.

(5) **Presentation of Project Proposal to the Project Owner**

On or prior to the Submission Date, the Proponent will present the Project Proposal to the Project Owner (together with the Project Owner's independent consultants).

# Schedule 4

## Schedule 4 – Project Proposal

---

**Guidance Note:** The required content of the Project Proposal as set out in this Schedule 4 will need to be developed by the Project Owner to reflect the specific circumstances of the Project. For example, the Project Owner may require the Project Proposal to include a separate outline of the construction methodology, the agreed contracting strategy and an innovations register.

The Project Proposal comprises:

- (a) **Design Development Report**  
[insert]
- (b) **Scope of Works**  
[insert]
- (c) **TOC Validation Report (which will include the TOC)**  
[insert]
- (d) **All details and matters relevant to the Risk or Reward Regime under the Project Alliance Agreement**  
[insert]
- (e) **Scope Variation Benchmarking Guidelines**  
[insert]
- (f) **Alliance Risk and Opportunity Report**  
[insert]
- (g) **Adjustment Event Guidelines**  
[insert]
- (h) **Governance Plan**  
[insert]
- (i) **Project Management System**  
[insert]
- (c) **Final form of Project Alliance Agreement**  
[insert]

## Schedule 5

### Schedule 5 – Reimbursable Costs

---

Subject to specific exclusions contained in this Agreement for the Services, all costs which are reasonably and actually incurred by the Proponent in connection with the Services (excluding any corporate overhead component not specific to the Services and any profit or mark up of any kind) will be reimbursable costs under this Agreement (**Reimbursable Costs**).

It is a fundamental underlying principle of this Agreement that no Participant will derive any mark up, overhead, profit or unreasonable advantage from the utilisation of their resources for the Services.

Reimbursable Costs include the following costs which are reasonably and actually incurred:

**[insert]**.

## Schedule 6

### Schedule 6 – Proponent Team Protocols

---

*[insert]*

# Schedule 7

## Schedule 7 – Core Team

---

*[insert]*

# Signing page

Executed as a deed

---

*[Insert execution block for Project Owner]*

## Proponent

Signed by  
***[Insert Member]***  
by

*sign here* ► \_\_\_\_\_  
Company Secretary/Director

*print name* \_\_\_\_\_

*sign here* ► \_\_\_\_\_  
Director

*print name* \_\_\_\_\_

---

**Proponent**

Signed by  
**[Insert Member**  
by

*sign here* ► \_\_\_\_\_  
Company Secretary/Director

*print name* \_\_\_\_\_

*sign here* ► \_\_\_\_\_  
Director

*print name* \_\_\_\_\_

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