



The new Perth Stadium Project

Direct Deed

SP0793712

The State of Western Australia
(State of Western Australia)

and

Minister for Works
(Minister for Works)

and

Western Australian Sports Centre Trust, trading as VenuesWest
(Governance Agency)

and

Westadium Project Co Pty Ltd in its personal capacity and as trustee for
Westadium Project Unit Trust
(Project Co)

and

Brookfield Multiplex Engineering and Infrastructure Pty Ltd
(Builder) [To be changed to FM Subcontractor as appropriate]

and

[insert name of Subcontractor]
(Key Subcontractor)

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Direct Deed

This deed is made on [insert date]

between

The State of Western Australia (**State of Western Australia**)

and

The Minister for Works, a body corporate constituted under section 5 of the *Public Works Act 1902* (WA) (**Minister for Works**)

and

Western Australian Sports Centre Trust (ABN 47 894 197 015), trading as VenuesWest (**Governance Agency**)

and

Westadium Project Co Pty Ltd (ACN 169 900 547) in its personal capacity and as trustee for Westadium Project Unit Trust (ABN 27 901 829 646) (**Project Co**)

and

Brookfield Multiplex Engineering and Infrastructure Pty Ltd (ACN 095 282 992) (**Builder**) **[To be changed to FM Subcontractor as appropriate]**

and

[insert name of Subcontractor] (**Key Subcontractor**)

and the parties agree as follows:

Recitals

- A. The background to the DBFM Project is set out in the Agreement.
- B. The Builder and the Key Subcontractor are or will become parties to the Key Subcontract.
- C. The Key Subcontractor has agreed to grant to the State certain rights in relation to the Key Subcontract.

Operative Provisions

1 DEFINITIONS AND INTERPRETATION

1.1 General

- (a) In this deed, unless the context otherwise requires, or where defined in Clause 1.2, capitalised terms in this deed have the meaning given to them in Clause 1.1 of the Agreement.
- (b) The use of the word "remedy" or any form of that word in respect of a Default Event means that the Default Event must be remedied or its effects overcome.

1.2 Definitions

In this deed, unless the context indicates otherwise:

Term	Meaning
<i>Additional Obligor</i>	means an entity which is wholly owned by the State.
<i>Agreement</i>	means the document entitled "The new Perth Stadium DBFM Project Design, Build, Finance and Maintain (DBFM) Project Agreement" between the State and Project Co executed on [insert].
<i>Default Event</i>	means: <ol style="list-style-type: none"> (a) any breach by the Builder of any of its obligations under the Key Subcontract; or

Term	Meaning
	<p>(b) any other event or circumstance, which alone or with the giving of notice or passage of time or both, would entitle the Key Subcontractor to terminate, rescind, accept the repudiation of, or suspend any or all of the Key Subcontractor's obligations under, the Key Subcontract.</p>
<i>Default Event Notice</i>	means a notice given in accordance with Clause 4.2(a)(i).
<i>Encumbrance</i>	means a mortgage, charge, pledge, lien, encumbrance, security interest, title retention, preferential right, trust arrangement, contractual right of set-off or any other security agreement or arrangement in favour of any person and includes any Security Interest.
<i>Key Subcontract</i>	means the [insert name] entered into, or to be entered into, by the Builder and the Key Subcontractor.
<i>Key Subcontractor Associate</i>	<p>means any:</p> <ul style="list-style-type: none"> (a) Subcontractor of the Key Subcontractor; (b) officers, agents, advisers, consultants, contractors and employees of the Key Subcontractor; and (c) any visitor to the Site invited onto the Site by the Key Subcontractor or a Key Subcontractor Associate.
<i>Novation Date</i>	<p>means:</p> <ul style="list-style-type: none"> (a) in connection with Clause 5.3, the later of the date of the Novation Notice and the date the Key Subcontractor consents or is deemed to have consented to the novation (or such date as is determined in accordance with Clause 6); and (b) otherwise, the date of the Novation Notice.
<i>Novation Notice</i>	has the meaning given to it in Clause 5.1(a).
<i>Power</i>	means any power, right, authority, discretion or remedy, whether express or implied.
<i>Receiver</i>	means a receiver or receiver and manager appointed by the State in accordance with the General Security Agreement.
<i>Security Interest</i>	has the meaning given to it in section 12 of the PPSA.
<i>State</i>	<p>means:</p> <ul style="list-style-type: none"> (a) during the D&C Phase, the Minister for Works, the Governance Agency and the State of Western Australia; and (b) during the Operating Phase, the Governance Agency and the State of Western Australia.
<i>State Representative</i>	means the person referred to as such in Clause 2.1.
<i>Statement Beneficiary</i>	has the meaning given to it in Section 4(a) of Schedule 1.

Term	Meaning
Substitute Party	has the meaning given to it in Clause 5.1(a).

1.3 Interpretation

In this deed unless the context otherwise requires:

- (a) **(persons)**: references to a person include an individual, a body politic, the estate of an individual, a firm, a corporation, an authority, an association or joint venture (whether incorporated or unincorporated), a trust, a trustee or a partnership;
- (b) **(includes)**: the words “including”, “includes” and “include” will be read as if followed by the words “without limitation”;
- (c) **(or)**: the meaning of “or” will be that of the inclusive “or”, that is meaning one, some or all of a number of possibilities;
- (d) **(party)**: a reference to a “party” is to a party to this deed;
- (e) **(other persons)**: a reference to any party or person includes each of their legal representatives, trustees, executors, administrators, successors, and permitted substitutes and assigns, including any person taking part by way of novation;
- (f) **(Authority)**: a reference to any Authority, Utility Company, institute, association or body is:
 - (i) if that Authority, Utility Company, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, Utility Company, institute, association or body are transferred to another organisation, a reference to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as applicable; and
 - (ii) if that Authority, Utility Company, institute, association or body ceases to exist, a reference to the organisation which serves substantially the same purposes or objectives as that Authority, Utility Company, institute, association or body;
- (g) **(this deed)**: a reference to this deed or to any other deed, agreement, document, circular, policy or instrument includes a reference to this deed or such other deed, agreement, document, circular, policy or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (h) **(legislation)**: a reference to any legislation or to any section or provision of it includes any amendment to or re-enactment of, or any statutory provision substituted for, that legislation, section or provision;
- (i) **(rights)**: a reference to a right includes any benefit, remedy, discretion, authority or power;
- (j) **(singular)**: words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (k) **(headings)**: headings are for convenience only and do not affect the interpretation of this deed;
- (l) **(schedules)**: a reference to this deed includes all Schedules;
- (m) **(Clauses)**: a reference to:
 - (i) a Clause or a Schedule is a reference to a Clause or Schedule of this deed unless otherwise stated;
 - (ii) a paragraph is a reference to a paragraph in the Clause in which the reference appears; and
 - (iii) a Section is a section of a Schedule;
- (n) **(defined meaning)**: where any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;

- (o) **(\$)**: a reference to "\$" is to Australian currency;
- (p) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (q) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (r) **(construction)**: no rule of construction applies to the disadvantage of a party on the basis that the party put forward or drafted this deed or any part;
- (s) **(information)**: a reference to "information" includes information, representations, statements, data, samples, calculations, assumptions, deductions, determinations, drawings, design, specifications, models, plans and other documents in all forms including the electronic form in which it was generated;
- (t) **(remedy)**: the use of the word "remedy" or any form of it in this deed means that the event to be remedied must be cured or its effects overcome;
- (u) **(may)**: the term "may", when used in the context of a power or right exercisable by the State or the State Representative, means that the State or the State Representative (as the case may be) can exercise that right or power in its absolute and unfettered discretion and the State or the State Representative (as applicable) has no obligation to Project Co, the Builder or the Key Subcontractor to do so;
- (v) **(no double counting)**: if this deed requires calculation of an amount payable to a party there must be no double counting in calculating that amount; and
- (w) **(writing)**: references to a notice, request, Claim, consent, approval, record or report means that the notice, request, Claim, consent, approval, record or report must be in writing unless otherwise agreed by the parties or expressly stated in this deed.

1.4 Related matters

- (a) **(Provisions limiting or excluding Liability)**: Any provision of this deed which seeks either expressly or by implication to limit or exclude any Liability of a party is to be construed as doing so only to the extent permitted by Law.
- (b) **(Cost of performing obligations)**: Each party must perform its obligations in accordance with this deed at its own cost, unless expressly provided otherwise.
- (c) **(Business Day)**: If the day on or by which any thing is to be done in accordance with this deed is not a Business Day, that thing must be done on the next Business Day.
- (d) **(Discretion)**: A consent or approval in accordance with this deed from the State or the State Representative may be given or withheld, or may be given subject to such conditions (other than the payment of money), as the State or a State Representative (in its absolute discretion) thinks fit, unless this deed provides otherwise.
- (e) **(Deed composition)**: This deed comprises:
 - (i) Clauses 1 to 12; and
 - (ii) Schedule 1 (Key Subcontractor Statements).

1.5 This deed prevails

To the extent of any inconsistency, ambiguity or discrepancy between this deed and the Key Subcontract, this deed prevails to the extent of that inconsistency.

1.6 Continuance of rights

- (a) This deed does not affect the liabilities, rights, powers or remedies of a party in accordance with any other Project Document.
- (b) The failure by a party (other than Project Co or the Builder) to comply with the provisions of this deed does not affect the liability of Project Co or the Builder in accordance with any other Project Document.

1.7 Commencement

The rights and obligations of the parties in accordance with this deed commence on the date that the Key Subcontract becomes unconditional and continues until the earlier of the date of termination of the D&C Subcontract and the date of termination of the Key Subcontract.

1.8 State Project Documents

The Key Subcontractor agrees that it has received [*insert State Project Documents and/or excerpts that are to be provided to the Key Subcontractor*].

1.9 Representations by the Key Subcontractor

The Key Subcontractor represents and agrees that:

- (a) **(does not violate Law)**: the execution, delivery and performance of the Key Subcontract and this deed does not violate any Law, or any deed or agreement to which it is a party or which is binding on it or any of its assets;
- (b) **(Project Documents)**: it has power to execute, deliver and perform its obligations in accordance with the Key Subcontract and this deed and all necessary corporate action has been taken to authorise both;
- (c) **(valid and legally binding)**: the Key Subcontract and this deed constitute valid and legally binding obligations on it in accordance with their terms;
- (d) **(legality)**: the execution, delivery and performance by it of its obligations in accordance with the Key Subcontract and this deed does not violate any Law, or any document or agreement to which it is a party or which is binding on it or any of its assets;
- (e) **(status)**: it is a corporation limited by shares duly and validly incorporated and existing in accordance with the Corporations Act; [*Note: to be included only if this is correct in respect of the relevant Subcontractor*]
- (f) **(litigation)**: no Claim against it is current or pending or (to its knowledge) is threatened, which will or is likely to have a material adverse effect upon the Key Subcontractor or the Key Subcontractor's ability to perform its financial and other obligations under the Key Subcontract or this deed;
- (g) **(solvency)**: it is solvent and is able to pay its debts as and when they become due;
- (h) **(liquidation)**: it is not:
 - (i) insolvent under administration or insolvent (each as defined in the Corporations Act); or
 - (ii) in liquidation, provisional liquidation, under administration to be wound up or had a Controller appointed to any of its property;
- (i) **(no default)**:
 - (i) it is not in default of the Key Subcontract; and
 - (ii) nothing has occurred which would, with the giving of notice or lapse of time, constitute an event of default, cancellation, prepayment event (in accordance with a bona fide right to exercise prepayment) or similar event (whatever called) in accordance with the Key Subcontract;
- (j) **(no undisclosed agreement)**: there are no documents or agreements in existence at the date of this deed and there will not be any documents or agreements in the future which have not been or will not be disclosed to the State which are material in the context of the Key Subcontract or, to the best of its knowledge and belief, the DBFM Project or which have the effect of varying the Key Subcontract;
- (k) **(no immunity)**: neither it nor any of its assets enjoys any immunity from set-off, suit or execution; and
- (l) **(own investigations)**: in entering into the Key Subcontract, it relied upon its own investigations and has not relied upon any representation or warranty about its subject matter by the State or any State Associate, Project Co, the Builder or any other person unless, in connection with Project Co or any person other than the State and the State Associates, expressly set out or permitted to do so in accordance with the Key Subcontract.

The Key Subcontractor, Project Co and the Builder acknowledge that the State has relied on the representations and warranties in this Clause 1.9 in entering into the State Project Documents.

2 DELEGATION

2.1 Parties Representative

The parties may exercise their rights or perform their obligations in accordance with this deed through their representatives appointed in accordance with the Agreement or the Key Subcontract (as applicable).

2.2 Further State delegations

- (a) The State may at any time delegate the exercise of any power or authority of the State Representative in accordance with this deed to a person other than the then appointed State Representative and may terminate or vary that delegation.
- (b) In connection with any delegation in accordance with Clause 2.2(a), the State will promptly notify Project Co, who will notify the Builder, of the identity of each delegate, the powers and authority delegated (including any conditions applying to the delegated power) and of any termination or variation to that delegation.
- (c) Any direction given by a State delegate in accordance with its delegation in accordance with this Clause 2.2 will be deemed to be a direction of the State.

2.3 State Representative as Agent

The State Representative will carry out its powers, authority and functions in accordance with this Clause 2, as the agent of the State.

2.4 Notice of State Representative or delegation

- (a) Project Co may, at any time, request that the State notify Project Co as to:
 - (i) the identity and address of the State Representative or delegate to whom powers or functions or responsibilities of the State under this deed are delegated under Clause 2.2; and
 - (ii) any changes in the identity and address of the State Representative or delegated representative.
- (b) Project Co is entitled to rely upon a notice given by the State in response to a request under Clause 2.4(a) unless and until it receives a notice of revocation of that delegation or appointment.

3 ACKNOWLEDGMENTS

3.1 Acknowledgement of State's rights

- (a) **(State's rights):** The Key Subcontractor acknowledges:
 - (i) the State's rights and protections and Project Co's obligations under Clause 5.10 (Subcontracting), Clause 5.11 (Competence), Clause 10.3 (Occupational health, safety and rehabilitation prior to Date of Commercial Acceptance), Clause 10.4 (Occupational health, safety and rehabilitation during Operating Phase), Clause 10.7 (State's right to enter, inspect and test), Clause 16 (Scheduled and Unscheduled State Works), Clause 29 (Intervening Events), Clause 31 (Handover), Clause 40 (Insurance), Clause 42 (Representations and warranties), Clause 43 (Default), Clause 44 (Termination), Clause 46 (Assignment and ownership), Clause 47.5 (Notice of Probity Event) to Clause 47.10 (No appointment without consent), Clause 50.1 (Confidential Information), Clause 51 (Intellectual Property) and Clause 54.1 (Interest) to Clause 54.8 (Reasonable endeavours) of the Agreement; and
 - (ii) that it has been provided with a copy of the clauses referred to in Clause 3.1(a)(i).

Note: The reference to clause 16 will be removed where the Key Subcontractor performs Services only and the reference to clause 29 will be deleted where the Key Subcontractor performs Works only.

- (b) **(Additional Clauses):** To the extent that the Key Subcontractor requires:

- (i) additional Clauses in order to interpret the Clauses referred to in Clause 3.1(a)(i); or
- (ii) a copy of any definition of a capitalised term in this deed which has the meaning given in Clause 1.1 of the Agreement,

then the Key Subcontractor may request these additional Clauses, or definitions (as applicable) from the State, which request may not be unreasonably denied by the State.

- (c) **(Facilitation of rights)**: The Key Subcontractor must exercise its rights in accordance with the Key Subcontract in a way which gives effect to the exercise by the State of the rights and protections referred to in Clause 3.1(a)(i) and will on reasonable notice permit the relevant State Representative to have access to, and take copies of, the records, reports, documents and other papers to which the State is entitled to have access in connection with the State's rights referred to in Clause 3.1(a)(i).
- (d) **(Subcontracting)**: The Key Subcontractor will not subcontract any of its obligations under the Key Subcontract without ensuring that the Subcontract complies with Clause 5.14 (Requirements for Subcontracting) of the Agreement.
- (e) **(Probity Investigations)**: Without limiting the previous paragraphs, the Key Subcontractor acknowledges and agrees that:
 - (i) in accordance with Clauses 5.10 (Subcontracting) of the Agreement, the State may require Project Co or the Builder to conduct, or may itself conduct, Probity Investigations of a Key Subcontractor Associate;
 - (ii) it will consent to the undertaking of a Probity Investigation in connection with it or procure the consent of a Key Subcontractor Associate to a Probity Investigation;
 - (iii) it will not appoint and will ensure that no other person appoints a person to the position of a Key Subcontractor Associate following a Probity Investigation unless the prior consent of the State is obtained; and
 - (iv) it will remove any person from the position of a Key Subcontractor Associate, if following the results of a Probity Investigation, the State considers that it is not appropriate for that person to continue to be a Key Subcontractor Associate.

3.2 By Project Co and the Builder

Project Co and the Builder are bound by, and must cooperate in, the implementation of this deed. Project Co and the Builder acknowledge that this deed is intended to benefit only the Key Subcontractor and the State and does not in any way affect any obligation of Project Co or the Builder under the Key Subcontract or under any other Project Document.

3.3 Undertakings of Key Subcontractor

The Key Subcontractor undertakes:

- (a) **(proper performance)**: to the State that it must duly and punctually perform all of its obligations under the Key Subcontract in accordance with the terms of the Key Subcontract;
- (b) **(notification of Default Event)**: to the State and Project Co that it must notify the State of any Default Event promptly after it gives notice of that Default Event in accordance with Clause [#] of the Key Subcontract;

Note: To be confirmed once Key Subcontract finalised and subject to Proposals.

- (c) **(documents in relation to Default Event)**: to the State and Project Co that it must give the State and Project Co a copy of all documents issued by the Key Subcontractor to the Builder in relation to a Default Event promptly after giving such documents to the Builder;
- (d) **(no amendment without consent)**: to the State that it must not, without first obtaining the written consent of the State:
 - (i) if approval is required under Clause 5.12(a) of the Agreement, make or permit any amendment or replacement of or addition to;

- (ii) subject to Clause 4.2 and Clause 4.3, terminate, surrender, rescind, suspend or accept repudiation of;
 - (iii) except in circumstances where the Key Subcontractor is required by its Subcontract, permit the novation, assignment or substitution of any party's rights, obligations or interest in; or
 - (iv) allow any express waiver of its material rights or obligations in accordance with,
- the Key Subcontract, provided that the State will not withhold its consent to an amendment which corresponds to an amendment to which it has consented in accordance with the Agreement;
- (e) **(deed of accession)**: to the State that it must not novate, assign or substitute any of its rights, obligations or interest in the Key Subcontract without first procuring that the proposed novatee, assignee or substitute executes a deed in favour of the State (in form and substance approved by the State) in accordance with which the novatee, assignee or substitute agrees to accept and be bound by this deed as if it were the Key Subcontractor;
 - (f) **(attend meetings and inspections)**: to the State that it must when reasonably requested by the State attend meetings with the State, provided that:
 - (i) the State provides the Builder notice of such request at the same time as the request is provided to the Key Subcontractor; and
 - (ii) the Builder may attend such meetings at its discretion;
 - (g) **(competent Subcontractors)**: to the State that it must not enter into, or permit the entry of, any Subcontract unless the proposed Subcontractor is an experienced, creditworthy, reputable and competent party which holds any necessary registrations or licences and which will have sufficient resources to perform the works or the services that are the subject of the proposed Subcontract; and
 - (h) **(requirements for Subcontracting)**: to the State that it must not engage, or permit the engagement, of any Subcontractor, or enter into or permit the entry into of any Subcontract, unless:
 - (i) if the State requires Probity Investigations to be carried out, the State's probity requirements as described in Clauses 47.5 to 47.10 of the Agreement are satisfied; and
 - (ii) the Subcontract contains provisions giving effect to the exercise by the State of its rights and protections under and contains all relevant provisions prescribed by (if applicable), Clauses 5.10, 5.11, 10.3, 10.4, 10.7, 16, 29, 31, 40, 42, 43, 44, 46, 47.5 to 47.10, 50.1, 51 and 54.1 to 54.8 of the Agreement.

4 RIGHT TO REMEDY BEFORE TERMINATION OF KEY SUBCONTRACT

4.1 The State's right to remedy

- (a) The Key Subcontractor must give the State and Project Co Default Event Notices as required by Clause 4.2.
- (b) On receiving a Default Event Notice the State and Project Co may (but are not obliged to) take steps to:
 - (i) remedy, or procure the remedy of, that Default Event; or
 - (ii) if the Default Event is not capable of remedy, commence and continue to perform the obligations of the Builder in accordance with the Key Subcontract.

4.2 Key Subcontractor's right to terminate

- (a) The Key Subcontractor may only terminate, rescind, accept the repudiation of, or suspend the performance of any or all of its obligations in accordance with the Key Subcontract if:
 - (i) the Key Subcontractor has given a notice to the State, Project Co and the Builder that complies with the requirements of Schedule 1 (Key Subcontractor Statements) (**Default Event Notice**);

- (ii) the Key Subcontractor is, but for this deed, about to give a notice to terminate the Key Subcontract including having gone through any dispute resolution process applicable to the event leading to termination in the Key Subcontract and, where relevant, has pursued an adjudication under the *Construction Contracts Act 2004* (WA) to fullest possible extent,

and either:

- (iii) the State, Project Co or the Builder has not undertaken to pay to the Key Subcontractor the amounts stated in the Default Event Notice that gave rise to the Key Subcontractor's right to terminate or suspend within 20 Business Days of receipt of the Default Event Notice, or if the amount in the Default Event Notice is referred to Dispute, within 20 Business Days of the dispute being resolved; or
 - (iv) the State and Project Co notify the Key Subcontractor that they elect not to remedy the Default Event.
- (b) The Key Subcontractor agrees that payment by the State or Project Co of the amounts referred to in the Default Event Notice will, as between the State or Project Co and the Key Subcontractor, fully discharge the State's or Project Co's (as applicable) liability to pay such amounts.

4.3 Termination or suspension without cause

If there is no Default Event, the Key Subcontractor may not suspend the performance of its obligations under the Key Subcontract unless the Builder is entitled to suspend its corresponding obligations under the D&C Subcontract, and may not do so without the State's prior consent.

5 NOVATION OF RIGHTS AND OBLIGATIONS

5.1 Option

- (a) The State may require a novation of the Key Subcontract upon the termination of the Agreement and the D&C Subcontract, by giving a notice (**Novation Notice**) to the Key Subcontractor and the Builder. The Novation Notice must specify the person to whom the State intends to novate the Key Subcontract whether this will be the State, any State Associate or another person (**Substitute Party**).
- (b) If the State issues a Novation Notice then the Key Subcontractor and the Builder must comply with this Clause 5 and, until the Novation Notice date, the Key Subcontractor must continue to perform its obligations in accordance with the Key Subcontract.
- (c) If the Key Subcontractor has exercised any rights it has to suspend under the Key Subcontract and the Agreement, the Key Subcontractor must recommence performance of the Works from the Novation Date or the date on which the cause of the suspension is remedied (whichever is the earlier).
- (d) The Key Subcontractor acknowledges that the giving of a Novation Notice by the State will not of itself contravene, or constitute a Default Event in accordance with, the Key Subcontract or entitle the Key Subcontractor to exercise any Power (including termination) in accordance with it.

5.2 Novation

If the State issues a Novation Notice to the Key Subcontractor, the parties agree to novate, subject to Clause 5.3, the Key Subcontract to the Substitute Party identified in the Novation Notice and must enter into a novation agreement in the form of the deed of novation included in Schedule 25 of the Agreement.

5.3 Novation to a Substitute Party other than the State or State Associate

- (a) (**Information to be provided by the State**): If the State gives a Novation Notice to the Builder that states that the Builder must novate the Key Subcontract to a Substitute Party other than the State or a State Associate, the State must provide the following details in connection with that Substitute Party:
 - (i) the name, place of incorporation and identity of the proposed Substitute Party and its shareholder(s);
 - (ii) if available, its most recent published audited accounts; and

- (iii) sufficient particulars of the finance available to the Substitute Party to enable the Key Subcontractor to decide whether to grant its consent to the Substitute Party.
- (b) **(Consent by Key Subcontractor)**: A novation to a Substitute Party other than the State or a State Associate in accordance with this Clause 5.3 will only be effective if the Key Subcontractor consents to the novation (such consent not to be unreasonably withheld or delayed) or is deemed to have consented in accordance with Clause 5.3(d).
- (c) **(Further information)**: The State must (as soon as practicable) supply the Key Subcontractor with such additional information to that provided in accordance with Clause 5.3(a) as the Key Subcontractor reasonably requires to enable it to decide whether to grant consent in accordance with Clause 5.3(b), and the Key Subcontractor must consider such information expeditiously.
- (d) **(Deemed consent)**: The Key Subcontractor's consent to the novation will be deemed to be given if the Key Subcontractor has not notified the State whether it consents to the novation within 15 Business Days of receipt of the Novation Notice.
- (e) **(Unreasonably withholding consent)**: The Key Subcontractor is not entitled to refuse consent to the novation unless:
 - (i) the grounds for refusal are reasonable and are based on:
 - (A) the proposed documentation for the Substitute Party to assume the rights and obligations of the Builder in accordance with the Key Subcontract not being effective to substitute the Substitute Party for the Builder;
 - (B) the Substitute Party not having the legal capacity, power and authorisation to become a party to and perform the obligations of the Builder in accordance with the Key Subcontract including any necessary authorisations and consents;
 - (C) the technical competence or financial standing of the Substitute Party being insufficient for it to meet the obligations of the Builder in accordance with the Key Subcontract; or
 - (D) the Key Subcontractor being placed in breach of any Laws by the proposed novation and assignment; and
 - (ii) it has notified the State of such reasons.
- (f) **(If Key Subcontractor withholds consent)**: If the Key Subcontractor withholds its consent to the novation in accordance with this Clause, this will not prejudice the ability of the State to give one or more subsequent Novation Notices containing changed particulars relating to the same Substitute Party or particulars relating to another Substitute Party.

6 AMENDMENTS TO KEY SUBCONTRACT

The Key Subcontractor agrees with the State that it will not rescind (unless permitted in accordance with this deed), grant or accept any waiver or discharge of the Key Subcontract, or agree to or permit any variation, waiver or amendment to the terms of the Key Subcontract unless the State has given its prior written consent in accordance with Clause 5.13 of the Agreement. Such approval is not required for:

- (a) acts relating only to administration of the Key Subcontract by Project Co or the relevant Project Co Associate, provided that the act does not give rise to an amendment by conduct;
- (b) a change to a date for completion under the Key Subcontract; or
- (c) a non-material variation to the works or services under the Key Subcontract that will not lead to a non-compliance with the Agreement.

7 RESTRICTION ON DEALINGS

The Key Subcontractor agrees with the State that it will not assign, novate, grant an Encumbrance over or otherwise deal with its interest in the Key Subcontract without the prior written consent of the State and without procuring that such transferee, assignee,

mortgagee, novatee, chargee, encumbrancee or the secured party enters into a deed in which it agrees to be bound by the terms of this deed.

8 CONFIDENTIALITY

8.1 Confidential Information

- (a) **(Confidentiality obligations):** The Key Subcontractor must, and must ensure that each Key Subcontractor Associates, keeps confidential, subject to Clauses 8.1(b) and 8.1(c), the Project Documents, all Records and all Disclosed Information **(Confidential Information)**.
- (b) **(Permitted disclosure):** The Key Subcontractor is not obliged to keep confidential any information:
- (i) which is in the public domain through no default of any party or the Key Subcontractor Associates; or
 - (ii) the disclosure of which is:
 - (A) required by Law, including in accordance with the *Freedom of Information Act 1992 (WA)*;
 - (B) required by a relevant stock exchange;
 - (C) consented to by the State; or
 - (D) made to a court in the course of proceedings to which the disclosing person is a party.
- (c) **(Disclosure to Key Subcontractor Associates):** Without limiting the Key Subcontractor's obligations in accordance with Clause 8.1(a) and providing that the Key Subcontractor ensures that the Key Subcontractor Associates comply with the obligations under Clause 8.1(a), the Key Subcontractor may disclose Confidential Information to the Key Subcontractor Associates to the extent necessary for the purpose of undertaking the DBFM Project.
- (d) **(Government websites):** Subject to the requirements of the Agreement, the contents of the State Project Documents and any other document in connection with the DBFM Project which is authored, executed or authorised by the State or a Government Agency may be published on any Western Australian government internet website.

8.2 Public announcements

- (a) The Key Subcontractor must not and must ensure that the Key Subcontractor Associates do not, without the prior approval of the State:
- (i) use this deed or the name or logo of any person specified in this deed, the State of Western Australia or any other Government Agency;
 - (ii) refer to the Key Subcontractor's or any Key Subcontractor's association with the State or any Government Agency which results from this deed; or
 - (iii) make any statement concerning this deed or the DBFM Project, in any publication, public statement or announcement, advertisement or media release.

8.3 Media releases

The Key Subcontractor must, and must ensure that the Key Subcontractor Associates:

- (a) obtain the State's prior written consent (which may be granted, refused or conditioned at the sole discretion of the State) to:
- (i) issue any information, document or article in connection with this deed for publication in any media; or
 - (ii) nominate the DFBM Project for any award;
- (b) give due recognition to the State and any State Associates where the State consents to a matter specified in Clause 8.3(a); and

- (c) refer all enquiries from any media concerning this deed to the State, and thereafter, as soon as practicable provide to the State details of all enquiries, and any material or information released by the Key Subcontractor or a Key Subcontractor Associate following the State's consent.

8.4 No Association

The Key Subcontractor must not, and must ensure that the Key Subcontractor Associates do not:

- (a) use the State's name nor the name of any State Associate, nor the State's logo, nor attempt to obtain a benefit from the image or reputation of the State or any of the State Associates in any way; or
- (b) hold out to any third party that the Key Subcontractor or any Key Subcontractor Associate has an association or connection with the State or any State Associates other than the Key Subcontractor's engagement under this deed,

without obtaining the State's prior written consent (which may be granted or refused at the sole discretion of the State).

8.5 Confidentiality under PPSA

The parties intend that, by operation of Clause 8.1, this deed is a confidentiality agreement (within the meaning of section 275(5) of the PPSA) and the parties agree that any request for disclosure of this deed made under section 275 of the PPSA must be treated accordingly.

9 ACKNOWLEDGMENT, RELEASE AND INDEMNITY

9.1 No Liability

Each of Project Co, the Builder and the Key Subcontractor agree that:

- (a) subject to the Agreement and Clause 5, the State will have no Liability to Project Co, the Builder or the Key Subcontractor in connection with the exercise by the State of its rights in accordance with this deed except if:
- (i) the State has acted fraudulently or unlawfully; or
 - (ii) in the course of exercising its rights in accordance with this deed, the State has acted with gross negligence; and
- (b) the exercise (or non-exercise) by the State of its rights in accordance with this deed will not limit any other right of the State, whether in accordance with this deed or otherwise.

9.2 Release and indemnity

- (a) Subject to Clause 5, the Builder:
- (i) releases the State and any party acting for or on behalf of the State (including any Additional Obligor) from any Liability in connection with the exercise by the State of its rights in accordance with this deed; and
 - (ii) indemnifies the State and any party acting for or on behalf of the State (including any Additional Obligor) against any Liability incurred by the State or any person acting for or on behalf of the State (including any Additional Obligor) to the Builder in connection with the exercise by the State of its rights in accordance with this deed.
- (b) Subject to Clause 5, Project Co:
- (i) releases the State and any party acting for or on behalf of the State (including any Additional Obligor) from any Liability in connection with the exercise by the State of its rights in accordance with this deed; and
 - (ii) indemnifies the State and any party acting for or on behalf of the State (including any Additional Obligor) against any Liability incurred by the State or any person acting for or on behalf of the State (including any Additional Obligor) to Project Co in connection with the exercise by the State of its rights in accordance with this deed.
- (c) Subject to Clause 5, the Key Subcontractor:

- (i) releases the State and any party acting for or on behalf of the State (including any Additional Obligor) from any Liability in connection with the exercise by the State of its rights in accordance with this deed; and
- (ii) indemnifies the State and any party acting for or on behalf of the State (including any Additional Obligor) against any Liability incurred by the State or any person acting for or on behalf of the State (including any Additional Obligor) to the Key Subcontractor in connection with the exercise by the State of its rights in accordance with this deed.

10 DISPUTE RESOLUTION

- (a) Each party may refer a dispute, despite any other provision, in accordance with this deed to dispute resolution in accordance with this Clause 10.
- (b) If a matter is referred for expert determination in accordance with this Clause 10:
 - (i) any dispute or difference of opinion arising between the parties in relation to that matter must be resolved in the same manner that disputes or differences of opinion referred for expert determination in accordance with the Agreement are resolved;
 - (ii) accordingly, the provisions of Clauses 45 (Dispute Resolution) of the Agreement are incorporated into this deed but as if:
 - (A) the only persons party to the Agreement, and the only persons party to the relevant dispute or difference of opinion, are the parties to the relevant dispute in accordance with this deed; and
 - (B) the only matters for expert determination in accordance with those provisions are the matters referred for expert determination in accordance with this deed.

11 NOTICES

11.1 General Notices

- (a) **(Form of Notices):** Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this deed (in this Clause 11, '**Notices**'):
 - (i) must be in writing; and
 - (ii) must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party.
- (b) **(Procedure for sending Notices):** All Notices must be:
 - (i) delivered or posted by prepaid post to the address; or
 - (ii) except where a Notice relates to Claims, defaults or termination, including:
 - (A) a Default Event Notice; and
 - (B) a Novation Notice;
 (which in each case must be delivered in accordance with paragraph (i)), sent by email in the form of a .pdf file letter (or such other form agreed by the State) to the email address,

of the addressee set out below (or as otherwise notified by that party to each other party from time to time).
- (c) **(Date of receipt):** Subject to Clause 11.1(d), a Notice is taken to be received by the addressee:
 - (i) in the case of prepaid post, on the third Business Day after the date of posting to an address within Australia, and on the fifth Business Day after the date of posting by airmail to an address outside Australia;
 - (ii) in the case of email, at the time in the place to which it is sent equivalent to the time shown on the automatic receipt notification received by the party sending the email from the recipient stated in Clause 11.2; and

- (iii) in the case of delivery by hand, on delivery.
- (d) **(Next Business Day):** If the communication is taken to be received on a day which is not a Business Day or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.
- (e) **(Notices sent by email):** In connection with communications sent by email:
 - (i) only the letter in .pdf format attached to the email and any attachments to such letter which are referred to in the letter, will form part of the communication in accordance with this Clause 11. Any text in the body of the email or the subject line will not form part of the communication; and
 - (ii) the Key Subcontractor must ensure that, in connection with any communications in accordance with or in connection with this deed:
 - (A) its firewall or mail server (or both) (as applicable):
 - (1) allows messages of up to 14 MB to be received;
 - (2) does not trap any messages in the spam filter which have been sent from any State domain; and
 - (3) automatically sends a receipt notification to the sender upon receipt of a message; and
 - (B) its systems automatically send a notification message to each of the sender and the recipient when a message is received by the recipient's domain but cannot or will not be delivered to the recipient.

11.2 Party details

[Not disclosed]

12 GENERAL

12.1 Relationship of the parties

- (a) No duty of good faith is implied on the State in connection with its relationship with the Key Subcontractor.
- (b) Neither this deed nor the relationship created by it, is intended to create, and will not be construed as creating, any partnership or joint venture as between the parties.
- (c) Project Co, the Builder and the Key Subcontractor must not act as or represent itself to be the servant or agent of the State.

12.2 State's rights, duties, powers and functions

- (a) **(State's own interests):** Unless this deed expressly provides otherwise, nothing in this deed gives rise to any duty on the part of the State to consider interests other than its own interests when exercising any of its rights or performing any of its obligations in accordance with this deed.
- (b) **(State's powers, functions or duties):** Notwithstanding anything contained or implied in this deed to the contrary, the parties expressly agree that the State is not obliged to exercise a power, function or duty which is granted to or within the responsibility of any other Government Agency, or to influence, over-ride or direct any Government Agency in the proper exercise and performance of its legal duties and functions.
- (c) **(No fettering):** Nothing contained in this deed or contemplated by this deed has the effect of constraining the State or placing any fetter on the State's discretion to exercise or not to exercise any of its statutory rights, duties, powers or functions.
- (d) **(No Claim):** Subject to Clause 12.2(e), neither Project Co, the Builder nor the Key Subcontractor will be entitled to make any Claim against the State under the Project Documents for any Liability relating to any exercise or failure of the State to exercise its statutory rights or duties.
- (e) **(Liability for breach):** Clauses 12.2(a) to 12.2(d) do not limit any Liability of the State which the State would have had to Project Co, the Builder or the Key

Subcontractor in accordance with this deed as a result of a breach by the State of a term of this deed but for Clauses 12.2(a) to 12.2(d).

12.3 Entire agreement

This deed constitutes the entire agreement and understanding between the parties in respect of its subject matter and supersedes any prior agreement (whether in writing or not), negotiations, discussions, understandings and agreements between the parties in relation to the subject matter of this deed.

12.4 Counterparts

This deed may be executed in any number of counterparts and all of such counterparts taken together will be deemed to constitute one and the same instrument.

12.5 Governing law

This deed is governed by and will be construed according to the Laws of Western Australia and the parties irrevocably submit to the exclusive jurisdiction of the courts of that State and the courts competent to determine appeals from those courts.

12.6 Waiver and estoppel

- (a) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy under any Law or under this deed by the State does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or this deed.
- (b) A waiver given by the State under this deed is only effective and binding on the State if it is given or confirmed in writing by the State.
- (c) No waiver of a breach of a term of this deed operates as a waiver of any other breach of that term or of a breach of any other term of this deed.
- (d) Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under any Law or under this deed by the State does not preclude, or operate as an estoppel of any form of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or under this deed.

12.7 Variations and waivers

No variation, modification or waiver of any provision in this deed, nor consent to any departure by any party from any such provision, will be of any effect unless it is in writing and signed by the parties or (in the case of a waiver) by the party giving it. Any such variation, modification, waiver or consent will be effective only to the extent to or for which it may be made or given.

12.8 Amendments to this deed

This deed may only be varied by a deed executed by or on behalf of each party.

12.9 Joint and several liability

- (a) If Project Co consists of more than one person, then the rights and obligations of Project Co in accordance with this deed are joint and several as between those persons.
- (b) If the Builder consists of more than one person, then the rights and obligations of the Builder in accordance with this deed are joint and several as between those persons.
- (c) If the Key Subcontractor consists of more than one person, then the rights and obligations of the Key Subcontractor in accordance with this deed are joint and several as between those persons.

12.10 Indemnities

- (a) Each indemnity in this deed is a continuing obligation, separate and independent from the other obligations of the parties, and survives termination or expiration of this deed.
- (b) It is not necessary for a party to incur expense or to make any payment before enforcing a right of indemnity conferred by this deed.

- (c) A party must pay on demand any amount it must pay in accordance with an indemnity in this deed.
- (d) The State, Project Co and the Key Subcontractor agree that:
 - (i) each indemnity or promise referred to in this deed in favour of Indemnified Persons is held on trust by the State for the benefit of any of the Indemnified Persons; and
 - (ii) the consent of the Indemnified Persons referred to in Clause 12.10(d)(i) will not be required for any amendment to, or waiver of rights in accordance with a State Project Document.

12.11 Clauses to survive termination

- (a) All provisions of this deed which expressly or by implication from their nature are intended to survive termination, completion or expiration of this deed will survive such termination, completion or expiration, including any provision which is in connection with:
 - (i) the State's rights to recover money;
 - (ii) confidentiality or privacy;
 - (iii) any obligation to make any Records available to the State; or
 - (iv) any right or obligation arising on termination of this deed.
- (b) Nothing in this Clause 12.11 prevents any other provision of this deed, as a matter of interpretation, also surviving the termination of this deed.
- (c) No right or obligation of any party will merge on completion of any transaction in accordance with this deed. All rights and obligations in accordance with this deed survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this deed.

12.12 Costs and expenses

Except as otherwise provided in this deed, each party must:

- (a) pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed; and
- (b) perform its obligations in accordance with this deed at its own cost.

12.13 Further acts and documents

- (a) At the request of the State in the circumstances contemplated in Clause 5, each other party to this deed must take such action as is required to vest in the State or any State Associate full legal and equitable title to any retention account, bank guarantee, performance bond, letter of credit or other security held by Project Co or the Builder to secure the obligations of the Key Subcontractor in accordance with the Key Subcontract.
- (b) For valuable consideration, Project Co, the Builder and the Key Subcontractor each irrevocably appoints the State, on its behalf and in its name or otherwise, as its attorney to do anything which Project Co, the Builder or the Key Subcontractor (as applicable) is obliged to do (but has not done within 5 Business Days of written request) to give effect to the novation pursuant to Clause 5.2 and Clause 12.13(a). Each of Project Co, the Builder and the Key Subcontractor agree to ratify and confirm whatever any such attorney lawfully does in the exercise of the power of attorney in this Clause 12.13(b).
- (c) Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to each party) required by Law or reasonably requested by another party to give effect to this deed.

12.14 Severability of provisions

Any provision of this deed that is prohibited or unenforceable in any jurisdiction is ineffective as to that jurisdiction to the extent of the prohibition or unenforceability. That does not invalidate the remaining provisions of this deed nor affect the validity or enforceability of that provision in any other jurisdiction.

Execution page

Executed as a deed

Executed by THE HONOURABLE COLIN JAMES BARNETT MLA **in his capacity as the Premier of Western Australia, on behalf of the State of Western Australia** in the presence of:

Signature of Witness

The Hon. Colin James Barnett MLA

Print Full Name of Witness

SIGNED BY THE HONOURABLE DR MIKE NAHAN MLA

Treasurer for the time being, acting under delegated authority pursuant to section 5A of the *Public Works Act 1902* (WA), in the presence of:

Hon. Dr Mike Nahan MLA

*print name
of witness* _____

*Witness
sign here*
▶ _____

*Witness
address* _____

*Witness
occupation* _____

The common seal of **Western Australian Sports Centre Trust, trading as VenuesWest** is fixed to this document in the presence of:

*sign
here*
▶ _____
Authorised Representative

*print
name* Graham Partridge

*sign
here*
▶ _____
Authorised Representative

*print
name* David Etherton

Signed, sealed and delivered for and on behalf of **Westadium Project Co Pty Ltd ACN 169 900 547** in its personal capacity and as trustee for the **Westadium Project Unit Trust** by its attorney under a power of attorney dated _____ in the presence of:

Signature of witness

Signature of attorney who declares that the attorney has not received any notice of the revocation of the power of attorney

Full name of witness

Full name of attorney

Executed by Brookfield Multiplex Engineering & Infrastructure Pty Ltd ACN 095 282 992 in accordance with section 127 of the Corporations Act by or in the presence of:

Signature of Director

Signature of Secretary/other Director

Name of Director in full

Name of Secretary/other Director in full

Executed by [insert] (ACN [insert]) in accordance with section 127 of the Corporations Act by or in the presence of:

Signature of Director

Signature of Secretary/other Director

Name of Director in full

Name of Secretary/other Director in full

Schedule 1 – Key Subcontractor Statements

1 CONTENTS OF KEY SUBCONTRACTOR STATEMENT

All Default Event Notices must include the following information in connection with the Default Event:

- (a) all amounts due and payable to the Key Subcontractor in accordance with the Key Subcontract on or before the date of the Default Event Notice but remaining unpaid at such date;
- (b) the nature and, to the best of the Key Subcontractor's knowledge and belief, the amount of any monetary claim asserted by the Key Subcontractor in connection with the Key Subcontract against the Builder; and
- (c) if the Key Subcontractor intends to terminate the Key Subcontract due to a default or breach of condition of a non-financial nature or intends to claim damages or to seek some other form of relief:
 - (i) the provisions of the Key Subcontract alleged to have been breached or not fulfilled;
 - (ii) sufficient information to enable the State to identify the material facts;
 - (iii) the steps reasonably required to remedy the Default Event (if reasonably capable of remedy);
 - (iv) the time within which the specified steps can reasonably be expected to be taken;
 - (v) the amount of damages claimed and the manner in which they have been calculated; and
 - (vi) any other relief to be sought.

2 WARRANTY OF ACCURACY

The Key Subcontractor warrants to the State that each Key Subcontractor Statement will be, true, complete and accurate statements of the amounts to which the Key Subcontractor considers itself entitled.

3 VERIFICATION OF KEY SUBCONTRACTOR STATEMENTS

The State may appoint a firm of independent chartered accountants or a firm of technical advisers to verify (at the Builder's cost) the Key Subcontractor Statements, and the Key Subcontractor must, subject to such firm(s) executing a deed poll or confidentiality undertaking providing for confidentiality on terms that are in substance the same as those included in Clause 8, permit such firm(s) to have access to and to make copies of all records, documents, data and accounting and other information not subject to legal (including solicitor and own client) professional privilege which is reasonably required with a view to confirming the accuracy and completeness of such Key Subcontractor Statements.

4 KEY SUBCONTRACTOR STATEMENTS TO BE CONCLUSIVE EVIDENCE

- (a) Each of the State, Additional Obligor or Receiver (**Statement Beneficiary**) is entitled to rely on the Key Subcontractor Statements for the purpose of determining the extent of the matters occurring prior to a Default Event which are required to be remedied and the requirements to effect the remedy of that Default Event by a Statement Beneficiary.
- (b) The Key Subcontractor Statements will be conclusive evidence in favour of any Statement Beneficiary that the Key Subcontractor has waived and abandoned all claims then known or which ought reasonably to have been known to the Key Subcontractor in connection with the Key Subcontract prior to the date of the Default Event Notice.
- (c) A Key Subcontractor Statement will not prevent any Statement Beneficiary from disputing the amount of any claim by the Key Subcontractor or the existence of any default by Project Co in accordance with the Key Subcontract. In the case of any such dispute:

- (i) the relevant Statement Beneficiary must pay the amount (if any) not in Dispute;
- (ii) the Dispute must be referred to expert determination in accordance with Clause 10 of this deed;
- (iii) upon resolution of the Dispute, the parties must make payments as determined by the expert; and
- (iv) during the period of Dispute resolution, all parties must continue to perform their obligations in accordance with this deed and the Project Documents.