



The new Perth Stadium Project

Subcontractor Deed of Novation

PROJECT NO: 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

[insert name of Builder/FM Subcontractor/Project Co]
(**Outgoing Party**)

and

[insert name of Subcontractor]
(**Continuing Party**)

1	Interpretation	1
	1.1 Definitions	1
	1.2 Interpretation	2
	1.3 Related matters	4
	1.4 This Deed prevails	4
2	Operation	4
3	Novation	4
4	Obligations prior to Execution Date	4
5	Acknowledgments	5
6	Release	5
7	Assignment	5
8	Further assurances	5
9	Dispute resolution	6
10	Notices	6
11	General	7
	11.1 Relationship of the parties	7
	11.2 State's rights, duties, powers and functions	7
	11.3 Counterparts	7
	11.4 Governing law	7
	11.5 Waiver and estoppel	7
	11.6 Variations and waivers	8
	11.7 Joint and several liability	8
	11.8 Clauses to survive termination	8
	11.9 Costs and expenses	8
	11.10 Further acts and documents	8
	11.11 Severability of provisions	8
	Execution page	9
	Schedule 1 – Particulars	12

Subcontractor Deed of Novation

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

[insert name of Builder/FM Subcontractor/Project Co] (**Outgoing Party**) [**To be changed to FM Subcontractor or Project Co as appropriate**]

and

[insert name of Subcontractor] (**Continuing Party**)

and the parties agree as follows:

Recitals

- A. The State and Project Co have entered into the Agreement for the design, build, finance and maintenance of the DBFM Project by Project Co.
- B. The Outgoing Party and the Continuing Party have entered into the Subcontract to undertake the Works in respect of the design, build, finance or maintenance of the DBFM Project.
- C. The Agreement and the Subcontract require the Continuing Party to enter into this Deed for the purpose of effecting a novation of the Subcontract from the Outgoing Party to the State or a third party nominated by the State.

Operative Provisions

1 INTERPRETATION

1.1 Definitions

In this Deed, unless the context indicates otherwise:

Term	Meaning
Agreement	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].
Business Day	has the meaning given to it in the Agreement.
Claim	means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) made: <ol style="list-style-type: none"> (a) under or arising in connection with this Deed; (b) at Law; or (c) for specific performance, restitution, payment of money (including for damages), or any other form of relief.
DBFM Project	means the project the subject of the Agreement.

Term	Meaning
Deed	has the meaning given to it in Clause 1.3(f).
Execution Date	means the date that this Deed is executed by the State.
Law	means: <ul style="list-style-type: none"> (a) Commonwealth, Western Australian and local government legislation, including statutes, ordinances, instruments, codes (but excluding any building codes or Quality Standards), requirements, regulations, by-laws and other subordinate legislation; (b) common law; and (c) principles of equity.
Quality Standards	has the meaning given to it in the Agreement.
Schedule	means the schedule to this Deed.
State	means: <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.
Subcontract	means the agreement identified as such in the Schedule.
Works	means the works the subject of the Subcontract, described in general terms in the Schedule. [Note: To be replaced with 'Services' throughout if the Continuing Party or the Key Subcontractor provides Services]

1.2 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 contract, agreement, document, circular, policy or instrument includes a reference to this Deed or such other contract, 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) **(obligations)**: a reference to an obligation includes a warranty and a reference to a failure to observe or perform an obligation includes a breach of warranty;
- (k) **(singular)**: words in the singular include the plural (and vice versa) and words denoting any gender include all genders;
- (l) **(headings)**: headings are for convenience only and do not affect the interpretation of this Deed;
- (m) **(schedules)**: a reference to this Deed includes all Schedules;
- (n) **(Clauses)**: a reference to:
- (i) a Clause, Schedule or Attachment is a reference to a Clause, Schedule or Attachment of or to this Deed;
 - (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;
- (o) **(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;
- (p) **(\\$)**: a reference to "\$" is to Australian currency;
- (q) **(time)**: a reference to time is a reference to Australian Western Standard Time;
- (r) **(form)**: writing includes any mode of representing or reproducing words in tangible and permanently visible form and includes facsimile transmissions and communication by email;
- (s) **(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;
- (t) **(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;
- (u) **(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;
- (v) **(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 the Outgoing Party or the Continuing Party to do so;
- (w) **(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
- (x) **(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.

1.3 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) **(Continuing Party obligations):** In complying with or accepting any obligation or risk in accordance with this Deed, the Continuing Party must procure that, to the extent applicable, each subcontractor that the Continuing Party has subcontracted with is required to comply with or accept the relevant obligation or risk and not cause the Continuing Party to breach its obligations in accordance with this Deed.
- (d) **(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.
- (e) **(Discretion):** Any consent or approval in accordance with this Deed from the State may be given or withheld, or may be given subject to such conditions (other than the payment of money), as the State (in its absolute discretion) thinks fit, unless this Deed provides otherwise.
- (f) **(Deed composition):** This Deed comprises:
 - (i) Clauses 1 to 11; and
 - (ii) Schedule 1 (Particulars).

1.4 This Deed prevails

To the extent of any inconsistency between this Deed, the Subcontract or any subcontract, this Deed prevails unless the parties expressly agree otherwise.

2 OPERATION

This Deed does not come into full force and effect until the Execution Date.

3 NOVATION

From the Execution Date, subject to Clause 4, the novated Subcontract will take effect:

- (a) as an agreement between the State and the Continuing Party;
- (b) as if the State had been named as the Outgoing Party in the Subcontract;
- (c) so that each reference in the Subcontract to the Outgoing Party is a reference to the State;
- (d) so that the rights, obligations and liabilities of the Outgoing Party under the Subcontract become the rights, obligations and liabilities of the State;
- (e) so that the Continuing Party must comply with all of its obligations under the Subcontract for the benefit of the State; and
- (f) so that the Outgoing Party is released from those obligations and liabilities under the Subcontract assumed by the State.

4 OBLIGATIONS PRIOR TO EXECUTION DATE

- (a) Notwithstanding Clause 3:
 - (i) subject to Clause 4(a)(ii), the State does not accept liability for any obligations that arose under the Subcontract before the Execution Date;
 - (ii) the Continuing Party will have no entitlement to make any Claim against the State for any costs, losses, expenses or damages (including consequential loss) incurred by the Continuing Party arising out of or in connection with the performance of the Works or the Subcontract prior to the Execution Date except for amounts owing to the Continuing Party which are the subject of payment claims delivered by the Continuing Party to the Outgoing Party in accordance with the Subcontract (but

- without limiting the State's right to recover that amount from the Outgoing Party);
- (iii) subject to Clause 4(a)(iv), the State is entitled to all rights to which the Outgoing Party was entitled in accordance with the Subcontract including all rights which arose prior to the Execution Date; and
 - (iv) the Outgoing Party is entitled to rights which accrued prior to the Execution Date in connection with any liability of the Outgoing Party in accordance with the Subcontract which is the subject of a dispute as at the Execution Date.
- (b) The Continuing Party will continue to be bound by the Subcontract as if the State was an original party to the agreement in place of the Outgoing Party.
- (c) The Continuing Party:
- (i) will have the benefit of any extensions of time granted to the Continuing Party prior to the Execution Date;
 - (ii) is not entitled to exercise any right of set-off or counterclaim against the State if, and to the extent that, such right arose prior to the Execution Date;
 - (iii) is entitled to the benefit of all of the rights it had against the Outgoing Party prior to the Execution Date, however, the Continuing Party is not entitled to exercise any such right against the State other than in accordance with Clause 4(a)(ii); and
 - (iv) is entitled to rely on any limitation or right of defence it has under the Subcontract whether that limitation or right of defence arose prior to or after the Execution Date.

5 ACKNOWLEDGMENTS

The Continuing Party acknowledges and agrees that as at, and from, the Execution Date, it will continue to diligently perform its obligations under the novated Subcontract notwithstanding that they were incurred prior to the Execution Date and notwithstanding any costs, losses, expenses or damages (including consequential loss) incurred by the Continuing Party in connection with the performance of the Works or the Subcontract prior to the Execution Date.

6 RELEASE

- (a) The Continuing Party releases the Outgoing Party from all of its obligations in accordance with the Subcontract and all liabilities that it may have against the Outgoing Party in connection with the Subcontract other than those obligations or liabilities which arose or relate to events occurring before the Execution Date and which are not obligations or liabilities which are assumed by the State.
- (b) The Outgoing Party releases the Continuing Party from all its obligations in accordance with the Subcontract and all liabilities that it may have against the Continuing Party in connection with the Subcontract other than those obligations or liabilities which arose or relate to events occurring before the Execution Date and which are not obligations or liabilities which are assumed by the State.

7 ASSIGNMENT

Except as expressly contemplated by this Deed or agreed to by the State, neither the Outgoing Party nor the Continuing Party may assign or transfer any of its rights or obligations under this Deed.

8 FURTHER ASSURANCES

The Outgoing Party and the Continuing Party undertake, upon request by the State, to execute all documents and do all things necessary to vest in the State the Subcontract or otherwise to give effect to the terms of this Deed.

9 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 9.
- (b) If a matter is referred for expert determination in accordance with this Clause 9:
 - (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.

10 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 10, '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) 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 in Schedule 1 (Particulars) (or as otherwise notified by that party to each other party from time to time).
- (c) **(Date of receipt):** Subject to Clause 10(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 Schedule 1 (Particulars); 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 10. Any text in the body of the email or the subject line will not form part of the communication; and
 - (ii) the Continuing Party 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 GENERAL

11.1 Relationship of the parties

- (a) No duty of good faith is implied on the State in connection with its relationship with the Continuing Party.
- (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) The Continuing Party must not act as or represent itself to be the servant or agent of the State.

11.2 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 or the Subcontract.
- (b) **(State's powers, functions or duties):** Notwithstanding anything contained or implied in this Deed or the Subcontract 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 department, or to influence, over-ride or direct any government agency or department 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 11.2(e), the Continuing Party will not 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 11.2(a) to 11.2(d) do not limit any liability of the State which the State would have had to the Continuing Party in accordance with this Deed as a result of a breach by the State of a term of this Deed but for Clauses 11.2(a) to 11.2(d).

11.3 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.

11.4 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.

11.5 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 the Agreement.
- (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.

11.6 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.

11.7 Joint and several liability

- (a) If the Outgoing Party consists of more than one person, then the rights and obligations of the Outgoing Party in accordance with this Deed are joint and several as between those persons.
- (b) If the Continuing Party consists of more than one person, then the rights and obligations of the Continuing Party in accordance with this Deed are joint and several as between those persons.

11.8 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.
- (b) Nothing in this Clause 11.8 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.

11.9 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.

11.10 Further acts and documents

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.

11.11 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 **[insert]** in **his/her** capacity as the Premier of Western Australia, **on behalf of the State of Western Australia** in the presence of:

|

Signature of Witness

[insert]

Print Full Name of Witness

SIGNED BY THE HONOURABLE [insert]

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

[insert]

*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*

*sign
here*



Authorised Representative

*print
name*

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

Signature of Director

Name of 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

Name of 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

Name of Director in full

Signature of Secretary/other Director

Name of Secretary/other Director in full

Signature of Secretary/other Director

Name of Secretary/other Director in full

Signature of Secretary/other Director

Name of Secretary/other Director in full

Schedule 1 – Particulars

Item	Particulars
Outgoing Party notice details	[address for notices to be inserted]
State notice details	State's Representative John Tondut Locked Bag 11 Cloisters Square Perth Western Australia 6850 +61 8 9366 7801
Continuing Party notice details	[address for notices to be inserted]
Agreement	[To be inserted]
Subcontract	[To be inserted]
Works	[To be inserted]