



Government of **Western Australia**
Department of **Treasury**
Strategic Projects

The new Perth Stadium Project

Independent Certifier Agreement

Minister for Works
(State)

and

Ertech Geomarine Pty Ltd

and

Keller Ground Engineering Pty Ltd
(Contractor)

and

SMEC Australia Pty Ltd
(Independent Certifier)

State Solicitor's Office
Level 16, 141 St Georges Terrace
PERTH WA 6000
SSO 1547/12

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INDEPENDENT CERTIFIER AGREEMENT

This agreement is made on

between

The Minister for Works, a body corporate constituted under section 5 of the *Public Works Act 1902 (WA)* of 12th floor, Dumas House, 2 Havelock Street, West Perth, WA, 6005 (**State**)

and

Ertech Geomarine Pty Ltd ABN 26 155 997 069 of 118 Motivation Drive, Wangara, WA 6065

and

Keller Ground Engineering Pty Ltd ABN 68 008 673 167 of Level 1, 4 Burbank Place, Baulkham Hills, NSW 2153

(Contractor)

and

SMEC Australia Pty Ltd ABN 47 065 475 149 (**Independent Certifier**)

and the parties agree as follows:

Recitals

- A. The State and the Contractor entered into the Design and Construct Contract.
 - B. It is anticipated that Project Co will enter into a contract with the State for the DBFM Project.
 - C. It is a condition of the Design and Construct Contract that the State and the Contractor enter into this agreement.
 - D. The State and the Contractor wish to appoint the Independent Certifier to perform the Services on the terms and conditions set out in this agreement.
 - E. Once executed, it is a condition of the DBFM Project Agreement that Project Co become a party to this agreement.
 - F. This is the "Independent Certifier Agreement" as referred to in the Design and Construct Contract and the "PCS Works Independent Certifier Agreement" as referred to in the DBFM Project Agreement.
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The parties agree as set out in the operative part of this agreement, in consideration of, among other things, the mutual promises contained in this agreement.

OPERATIVE PROVISIONS

1. DEFINITIONS AND INTERPRETATION**1.1 Definitions**

In this agreement:

Term	Meaning
40% Complete	means that the Design Document presents the design concepts, preliminary calculation and results, preliminary drawings and includes a list of all the significant design parameters and standards specified for the design element.
80% Complete	means the relevant document is at the final review stage.
100% Complete	means that the Design Document is complete and ready to be issued for construction ("Final" copy).
APRA	means the Australian Prudential Regulation Authority.
Authorisation	means any consent, authorisation, registration, filing, agreement, notarisation, clearance, certificate, permission, licence, permit, waiver, approval, authority or exemption from, by or with a Government Agency required under any Laws, and includes any renewal of, or variation to, any of them but does not include any act or omission by the State under this agreement.
Best Industry Practice	means: <ul style="list-style-type: none"> (a) the exercise of that degree of skill, diligence, prudence and foresight that would be reasonably expected from a reputable and prudent person with skill and experience in, and resources necessary to complete, works and services similar to the Independent Certifier's Obligations and under conditions comparable with those applicable to the Independent Certifier's Obligations; (b) compliance with applicable standards and codes, being the standards and codes specified in this agreement or, if this agreement does not specify the applicable standards and codes, those standards and codes as would ordinarily be applied in the circumstances; and (c) compliance with all applicable Laws.
Business Day	means any day other than: <ul style="list-style-type: none"> (a) a Saturday or a Sunday; or (b) a gazetted holiday in Perth, Western Australia under the <i>Public and Bank Holidays Act 1972 (WA)</i>.
Change in Control	means in respect of any person, a change in the person or persons who,

directly or indirectly, ultimately Control that person other than as a result of any dealing in securities listed on a stock exchange.

Claim means any claim, proceeding, action, cause of action, demand or suit (including by way of contribution or indemnity) made:

- (a) under or arising in connection with this agreement or the Project; or
- (b) under any Law.

Client Parties means the State and the Contractor and Project Co once Project Co executes the Deed of Accession.

Comment Documentation Process has the meaning in paragraph of (a) of Schedule 2

Conditions Precedent Deadline Date 2pm on the date which is 20 Business Days after the last of the parties to the DBFM Project Agreement executes the DBFM Project Agreement or such other date as agreed between the State and Project Co.

Confidential Information is any information relating to the affairs of the State, the State Entities, the Contractor's Activities, the Independent Certifier's Obligations, the Project or the DBFM Project generally that:

- (a) is by its nature confidential;
- (b) is specified by the State to be confidential, including any information specified to be confidential in this agreement or the Design and Construct Contract; or
- (c) the Independent Certifier knows or exercising Best Industry Practice ought to know, is confidential,

and includes the Project Information.

Consequential Loss is any of the following:

- (a) direct expenditure of time by managers and employees consequential upon any Loss;
- (b) loss of opportunity;
- (c) loss of anticipated savings;
- (d) loss of profit, revenue or business;
- (e) damage to reputation; and
- (f) the cost of capital or other financing costs,

but excludes any Loss arising from, or in connection with:

- (g) any statutory fine arising from any breach of Law by the other party;
- (h) personal injury, sickness or death;
- (i) damage to property caused or contributed to by a party;
- (j) criminal acts of, fraudulent acts or omissions of, and fraudulent misrepresentation by, a party;
- (k) wrongful acts committed by a party with a reckless indifference to

- the consequences;
- (l) wilful default by a party;
 - (m) the abandonment of this Contract by the Independent Certifier;
 - (n) matters that cannot be excluded at Law;
 - (o) a breach of confidentiality by the Independent Certifier;
 - (p) an infringement of any Intellectual Property Rights by the Independent Certifier;
 - (q) any matter which is the subject of a Third Party Claim against the State or State Entities and for which the Contractor has given an indemnity under this Contract provided that the State or State Entity (as the case may be) has taken reasonable steps to limit or avoid such Loss;
 - (r) any rework or associated work as a consequence of the negligence of the Independent Certifier; and
 - (s) any reasonably foreseeable Loss.

Contractor's Activities means all of the activities which the Contractor is required to perform for the Project, including the Design Work and the Works, and all incidental and ancillary works and services (including all Preliminaries) required to carry out and complete the activities.

Control has the same meaning as defined in the Corporations Act.

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

Date for Practical Completion means the date for achieving Practical Completion of the PCS Works, as set out for each Separable Portion in Schedule 12 of the Design and Construct Contract, as may be amended under the Design and Construct Contract.

DBFM Project means the design, construction, partial financing and maintenance of the new Perth Stadium and surrounding sports precinct.

DBFM Project Agreement has the meaning given in the Deed of Accession.

Deed of Accession a deed of accession in the form set out in Schedule 4.

Defect means:

- (a) any error, deficiency, omission, non-conformity, fault, failure, irregularity or other defect in the PCS Works including an error demonstrated in the I&M Report;
- (b) any likely failure of the PCS Works to meet the requirements of the Ground Performance Criteria or the Scope of Work and Technical Criteria; or
- (c) any aspect of the PCS Works (including the results in the I&M Report) which is not in accordance with the requirements of the Design and Construct Contract, Scope of Work and Technical

Criteria,

and the term “*Defective*” is to be construed accordingly.

- Design and Construct Contract*** means the “Design and Construct Contract for the design, construction and handover of the PCS Works” between the State and the Contractor dated 16 May 2013.
- Design Documents*** means all documents required or developed as part of the Design Work necessary for the delivery of the PCS Works, including those documents required to be delivered under Schedule 5 of the Design and Construct Contract, the Design Reports, designs for Temporary Works, all draft and final drawings, details, specifications, reports, schedules, models, samples and ‘As Built’ documentation, but does not include any State’s Conceptual Designs.
- Design Life*** is 50 years in respect of:
- (a) all elements of the PCS Works that include temporary and permanent works; and
 - (b) ground improvement replacement or fill material.
- Design Report*** means a report documenting the development of the design of an element of the Works.
- Design Work*** means all work performed or managed, or required to be performed or managed by the Contractor or any Subcontractor to prepare the design of the PCS Works, including all such work performed or managed by the Contractor or any Subcontractor prior to the date of commencement of the Design and Construct Contract.
- Dispute*** means any real or perceived conflict, difference of opinion, or unresolved issue in relation to this agreement or the parties’ rights or obligations under this agreement.
- Fee*** means the amount payable to the Independent Certifier for the performance of the Services in accordance with clause 3.3 and Schedule 3.
- Fee Paying Parties*** the State and the Contractor.
- Geotechnical Interpretive Report*** means the report of that name prepared by the Contractor and included as Attachment 4 to the Design and Construct Contract, as updated in accordance with clause 8.9 of the Design and Construct Contract.
- Government Agency*** means any government or any governmental, semi-governmental, administrative, fiscal, judicial or quasi-judicial body, department, commission, authority, tribunal, Minister of the Crown, agency, entity or Parliament and includes any State Entity.
- Ground Improvement Works*** means the modification of existing soils or fills such that those soils or fill may safely and effectively support the defined future loads while achieving

the specified design criteria for strength, bearing capacity, stability, settlement and lateral movement (as applicable).

Ground Performance Criteria means the criteria relating to the performance of the PCS Works, specified in the Scope of Work and Technical Criteria.

GST has the meaning given in the GST Law.

GST Exclusive Consideration is defined in clause 11.1(d).

GST Law has the same meaning as in the *A New Tax System (Goods and Services) Tax Act 1999* (Cth).

Handover has the meaning given to it in clause 11.4(a) of the Design and Construct Contract.

I&M Report has the meaning given to it in clause 16.3(a) of the Design and Construct Contract.

Independent Certifier's Obligations means all of the liabilities, obligations and requirements imposed or assumed by the Independent Certifier under this agreement, express or implied, or arising from or in connection with this agreement from time to time including the performance of the Independent Certifier's obligations as amended by any variation to the agreement.

Independent Certifier's Representative Allan Garrard.

Independent Expert means a person with suitable expertise and experience required to determine a Dispute having regard to the nature of the Dispute, appointed in accordance with clause 32.5 of the Design and Construct Contract.

Industrial Award, Agreement or Order means an award, a registered or certified agreement or an order of the Western Australian Industrial Relations Commission or Australian Industrial Relations Commission and includes Preserved State Agreements and Notional Agreements Preserving State Awards, and any agreement including a workplace or enterprise agreement between an individual or group of individuals and the Independent Certifier that is lodged, registered or certified in accordance with any Law applying in Western Australia.

Insolvency Event means the occurrence of any of the following events:

- (a) **(informs creditors)**: a corporation informs its creditors generally that it is insolvent;
- (b) **(receiver)**: a liquidator, administrator, trustee in bankruptcy, receiver or receiver and manager or similar officer is appointed in respect of any of the assets of a corporation;
- (c) **(execution)**: a distress, attachment or other execution is levied or

enforced upon or against any assets of a corporation and in the case of a writ of execution or other order or process requiring payment, it is not withdrawn or dismissed within 10 Business Days;

- (d) **(voluntary liquidation)**: the corporation enters into voluntary liquidation;
- (e) **(application)**: an application is made for the administration, dissolution or winding up of a corporation which application is not stayed, withdrawn or dismissed within 10 Business Days of being made;
- (f) **(winding up)**: an order is made for the administration, dissolution or winding up of a corporation other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;
- (g) **(resolution)**: a resolution is passed for the administration or winding up of the corporation;
- (h) **(arrangement or composition)**: a corporation enters, or resolves to enter into or has a meeting of its creditors called to enter into any scheme of arrangement or composition with its creditors generally, or any class of its creditors, other than for the purposes of a solvent reconstruction or amalgamation on terms approved by the State;
- (i) **(statutory demand)**:
 - (i) a corporation fails to comply with, or apply to have set aside, a statutory demand within 10 Business Days of the time for compliance; or
 - (ii) if the corporation applies to have the statutory demand set aside within 10 Business Days of the time for compliance, the application to set aside the statutory demand is unsuccessful and the corporation fails to comply with the statutory demand within 5 Business Days of the order of the court dismissing the application;
- (j) **(execution levied against it)**: a corporation has execution levied against it by creditors, debenture holders or trustees or under a floating charge; or
- (k) **(insolvency)**: a corporation is unable to pay its debts when they fall due, or is deemed unable to pay its debts in accordance with any applicable Law (other than as a result of a failure to pay a debt or claim which is the subject of a good faith dispute).

Instrumentation and Monitoring Plan

means the plan of that name to be prepared and updated by the Contractor in accordance with clause 8.7 and Schedule 6 of the Design and Construct Contract.

Insurance Policies

means the insurance policies described in clause 7.1.

Key Personnel

each of the Independent Certifier's personnel identified in section 2 of Schedule 1.

- Law** means all applicable present and future laws comprised of:
- (a) all acts, ordinances, regulations, by-laws, orders, awards and proclamations of the State of Western Australia, the Commonwealth of Australia or a local authority;
 - (b) Authorisations;
 - (c) principles of common law or equity; and
 - (d) the ASX listing rules,
- whether or not existing at the date of this agreement.
- Loss** means:
- (a) any liability of any kind whatsoever, cost, expense, loss, personal injury (including illness), death or damage and includes direct and indirect, consequential or special damage, loss of use, loss of revenue; and
 - (b) in respect of a Claim or Third Party Claim, includes amounts payable on the Claim and (whether or not the Claim is successful) legal costs and disbursements on a full indemnity basis,
- whether or not such liability, cost, expense, loss, personal injury, death or damage, Claim or Third Party Claim is based on contract, statute, warranty, tort (including negligence), indemnity or otherwise.
- Monitoring and Tests** means any testing, monitoring, calibrating, assessing or evaluating (as applicable) required to be performed by the Contractor under the Design and Construct Contract, including as set out in the Instrumentation and Monitoring Plan and including all testing and monitoring to determine whether the Ground Performance Criteria are likely to be met for the duration of the Design Life, and **Monitoring and Testing** is to be construed accordingly.
- PCS Works** means the works the subject of the Design and Construct Contract and includes the works described in Separable Portion 1 to Separable Portion 4 inclusive and Separable Portion 6 and Separable Portion 7.
- Practical Completion** has the meaning given to it in clause 18.1 of the Design and Construct Contract.
- Practical Completion and Handover Sub-Plan** means the sub-plan of that name forming part of the Project Works Plan.
- Practical Completion Criteria** means the criteria that must be demonstrated for Practical Completion to be achieved, as set out in Schedule 12 of the Design and Construct Contract.
- Preliminaries** means the activities and obligations described in Schedule 3 of the Design and Construct Contract.
- Program** means the program for the Project, which as at the commencement of the Design and Construct Contract is the program set out in Attachment 1 to the Design and Construct Contract, as updated from time to time in accordance with the Design and Construct Contract.

Project	means the design, construction and handover of the PCS Works.
Project Co	has the meaning given in the Deed of Accession.
Project Documents	means the agreements described in Schedule 1.
Project Information	means each of the documents provided in Volume 4 of the Request for Proposal.
Project Works Plan	means the plan of that name prepared by the Contractor and attached to the Design and Construct Contract at Attachment 3 to be updated by the Contractor in accordance with clause 8.7 and Schedule 6 of the Design and Construct Contract.
Records	<p>means all records and information of any kind (including originals and copies of all accounts, financial statements, books, files, reports, records, correspondence, documents, drawings, diagrams, graphs, photographs, videos, computer models, design models and other materials) created for, or relating to, or used in connection with, the Project or the performance of the Independent Certifier's Obligations, whether or not containing Confidential Information, and however those records and information are held, stored or recorded. Records include:</p> <ul style="list-style-type: none">(a) all documentation and information relevant to the Design Work;(b) any electronic communication in any format;(c) the results of any Monitoring and Testing;(d) anything which is a "record" under the <i>State Records Act 2000</i> (WA); and(e) any Industrial Award, Agreement or Order.
Related Entity	means a "related entity" as defined in the <i>Corporations Act</i> .
Relevant Period	<p>means in respect of any Record:</p> <ul style="list-style-type: none">(a) a minimum of 7 years after the creation of the Record; and(b) any additional length of time required under any Law or by any Government Agency.
Request for Proposal	means the document entitled Request for Proposal for the design, construction and handover of the PCS Works issued on 18 October 2012.
Schedule	means a schedule to this agreement.
Schedule of Rates	means the schedule of rates in section 7 of Schedule 3.
Scope of Work and Technical Criteria	means the State's requirements for the PCS Works, as set out in Volume 2 of the Design and Construct Contract.

Separable Portion	means a part of the Contractor's Activities identified as a separable portion: (a) in Schedule 12 of the Design and Construct Contract; or (b) by the State in accordance with clause 12.3 of the Design and Construct Contract.
Services	means those services to be provided by the Independent Certifier in respect of the Design and Construct Contract as listed in Schedule 2.
Site	means the area where the Works will be carried out, being that area contained within the red line on Drawing No. PCS3 of the Site Plans as may be varied from time to time under the Design and Construct Contract.
Site Plans	means the plans of the Site set out in Schedule 18 of the Design and Construct Contract.
State Entities	means the State of Western Australia and includes any entity, department, agency or instrumentality of the State of Western Australia, and any Minister (including the State), whether body corporate or otherwise and their respective employees, agents, contractors and consultants.
State's Conceptual Designs	means those conceptual design documents for Separable Portion 2 and Separable Portion 3 provided by the State to the Contractor.
Subcontract	means a contract or agreement between the Contractor and a third party under which the third party agrees to perform any part of the Contractor's Activities under the Design and Construct Contract.
Subcontractor	means a person engaged by the Contractor under a Subcontract.
Supplier	has the meaning set out in clause 11.1(f).
Temporary Works	means all construction works that are not part of the PCS Works but are required in order to complete the PCS Works and, for the avoidance of doubt, does not include any surcharge materials.
Term	has the meaning set out in clause 2.
Third Party Claim	means any Claim, demand, action, proceeding or suit of any nature, whether actual or threatened, initiated by a person other than the parties to this agreement or a Related Entity of the Contractor, the Independent Certifier or Project Co, including any Claim by: (a) or with respect to any person engaged in or associated with the performance of the Services, for damages or workers' compensation payments or contribution to such payments; (b) any relevant authority or other person, for any premium or levy associated with the performance of the Services; or (c) any authority or other person, for an indemnity for or recovery of workers' compensation benefits paid or other costs and expenses

incurred under the *Workers' Compensation and Injury Management Act 1981 (WA)* or like legislation and paid to or with respect to any person engaged in or associated with the performance of the Services.

Volume means a volume of the Design and Construct Contract.

Works means all activities necessary for, and incidental to, the construction and handover of the PCS Works, including:

- (a) the Ground Improvement Works;
- (b) the construction of all Temporary Works;
- (c) the construction of the PCS Works;
- (d) the Preliminaries;
- (e) rectifying Defects;
- (f) achieving Practical Completion; and
- (g) all work arising out of variation orders, but excluding the Design Work.

1.2 Interpretation

In this agreement unless the context otherwise requires:

- (a) **(references)**: 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), 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 agreement and includes Project Co once Project Co executes the Deed of Accession pursuant to clause 3.2;
- (e) **(other persons)**: a reference to any party or person includes each of their legal representatives, 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, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
 - (ii) if that authority, utility company, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or objects as that authority, utility company, institute, association or body;
- (g) **(this agreement)**: a reference to this agreement or to any other deed, agreement, document, instrument or guidelines includes a reference to this agreement or such other deed, agreement, document, instrument or guidelines 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 agreement;
- (m) **(inclusive)**: a reference to this agreement includes all Schedules;
- (n) **(clauses)**: a reference to:
 - (i) unless expressly stated otherwise, a clause or Schedule is a reference to a clause or Schedule of or to this agreement;
 - (ii) a paragraph or a sub-paragraph is a reference to a paragraph or sub-paragraph in the clause or section 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 and any amounts stated in this agreement are exclusive of GST, unless otherwise stated;
- (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 agreement 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 agreement means that the event to be remedied must be cured or its effects overcome; and
- (v) **(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 agreement.

1.3 Time

- (a) **(Business Day)**: Where the day on or by which an act is required to be done under this agreement is not a Business Day, the time for doing that act will be taken to be the next Business Day.
- (b) **(Day of event)**: Where time is to be reckoned by reference to a day or event, that day or the day of the event is excluded.
- (c) **(Month)**: Where time is to be counted in months and the period commences on the 29th, 30th or 31st day of a month and the month at the end of the period does not have a 29th, 30th or 31st day (as applicable), then the period will end on the last day of that month (for example, a period of 2 months which begins on 31 July will end on 30 September; a period which begins 30 July will end on 30 September).

1.4 State's Interests and Statutory Functions

- (a) **(Benefit of agreement)**: The Independent Certifier acknowledges that the State enters into this agreement for the benefit of other State Entities including the Government of Western Australia.

- (b) **(State's rights):** Any right of the State may be exercised for the benefit of any other State Entity and any reference in this agreement to the Loss of, or costs incurred by, the State includes direct Losses of, and direct costs incurred by, these State Entities.
- (c) **(State's interests):** Except where this agreement expressly provides otherwise, to the extent permitted by Law nothing in this agreement gives rise to any duty on the part of the State to consider interests other than the State's interests (including the public interest) when exercising any of its rights or performing any of its obligations.
- (d) **(Fetter):** Nothing contained in this agreement or contemplated by this agreement has the effect of constraining the State or the State Entities or placing any fetter on the State's or the State Entities' statutory rights, duties, powers or functions.
- (e) **(State's powers, functions and duties):** Notwithstanding anything contained or implied in this agreement to the contrary, the parties agree that the State is not obliged to exercise a power, function or duty which is granted to or within the responsibility of any Government Agency, or to influence, over-ride or direct any Government Agency in the proper exercise and performance of its legal duties and functions.
- (f) **(No Claim):** Subject to clause 1.4(g), the Independent Certifier is not entitled to make any Claim against the State for any Loss relating to any exercise or failure by the State to exercise its statutory rights or duties.
- (g) **(Liability for breach):** Clauses 1.4(c) to 1.4(f) do not limit any liability of the State which the State would have had to the Independent Certifier in accordance with this agreement as a result of a breach by the State of a term of this agreement but for clauses 1.4(c) to 1.4(f).

1.5 Related Matters

- (a) **(Provisions limiting or excluding liability):** Any provision of this agreement 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) **(Standards):** Unless agreed or notified in writing by the State, a reference to Standards Australia standards, overseas standards or other similar reference documents in this agreement is a reference to the edition last published prior to the preparation of the relevant documentation.

1.6 Civil Liability

- (a) The operation of Part 1F of the *Civil Liability Act 2002* (WA) is excluded to the extent necessary for the Independent Certifier to be liable, in accordance with the terms of this agreement, for any Loss suffered by one or more of the Client Parties arising out of or in connection with the acts or omissions of its Subcontractors, other contractors, consultants or personnel.
- (b) The Independent Certifier must ensure that all Insurance Policies required by this agreement which cover third party liability:
 - (i) cover the Independent Certifier for potential liability to the Client Parties assumed by reason of the exclusion of Part 1F provided for in clause 1.6(a); and
 - (ii) do not exclude cover for any potential liability the Independent Certifier may have to the Client Parties under or by reason of this agreement.

1.7 Amendments

Any amendment to this agreement must be in writing and signed by all parties.

1.8 Waiver

- (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 agreement by a party 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 under this agreement.

- (b) A waiver given by a party under this agreement is only effective and binding on that party if it is given or confirmed in writing by that party.
- (c) No waiver of a breach of a term of this agreement operates as a waiver of any other breach of that term or of a breach of any other term of this 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 agreement 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 agreement.

1.9 Ambiguity

- (a) If any party discovers any inconsistency, ambiguity or discrepancy in this agreement, that party must promptly notify the other parties.
- (b) The State will, acting reasonably, direct the parties as to the interpretation to be followed by the parties in performing their obligations under this agreement with respect to the Services, provided that any direction must not be inconsistent with the Design and Construct Contract.

1.10 Project Co

- (a) At the date of execution of this agreement, Project Co has not been appointed.
- (b) The State wishes Project Co to receive the benefit of and be bound by this agreement.
- (c) Until the Deed of Accession is executed by Project Co, this agreement will be read as if there is no reference to Project Co, except for this clause 1.10.

1.11 Contractor comprising more than one entity

If the Contractor consists of more than one entity then those entities shall be jointly and severally liable to the Independent Certifier for performance of the Contractor's obligations under this agreement.

2. TERM

The term of this agreement commences on the date this agreement is executed and will continue until 30 days after the Independent Certifier has completed all the Services and discharged all of its obligations, functions and duties under this agreement (as notified by the Independent Certifier and agreed by the Client Parties), subject to the earlier termination of this agreement in accordance with its terms or at Law (**Term**).

3. APPOINTMENT OF INDEPENDENT CERTIFIER

3.1 Appointment

- (a) The Client Parties appoint the Independent Certifier to perform the Services.
- (b) The Independent Certifier confirms its acceptance of the appointment in this clause 3 and agrees to perform the Services as required by this agreement.

3.2 Accession of Project Co

- (a) The parties acknowledge that as at the date of this agreement Project Co and the State have not entered into the DBFM Project Agreement.
- (b) As soon as reasonably practicable after execution of the DBFM Project Agreement and in any event, prior to the Conditions Precedent Deadline Date:
 - (i) the State and the Independent Certifier must execute the Deed of Accession; and

- (ii) the State must ensure that Project Co becomes a party to this agreement by executing the Deed of Accession.
- (c) Each party to this agreement consents to Project Co becoming a party to this agreement and agrees to perform their obligations under this agreement in favour of Project Co (to the extent relevant) as if Project Co had originally been a party to this agreement.

3.3 Payment

- (a) In consideration of the provision of the Services under this agreement, the Fee Paying Parties are severally liable to each pay the Independent Certifier 50% of the Fee.
- (b) The relevant Fee Paying Party must pay its proportion of the Fee calculated as set out in Schedule 3 and otherwise in accordance with Schedule 3.
- (c) Nothing in this agreement makes any Fee Paying Party liable for any other Fee Paying Party's proportion of the Fee.
- (d) Unless expressly stated otherwise in this agreement, the Fee is the Independent Certifier's sole entitlement to payment.

4. ACKNOWLEDGEMENTS AND RELIANCE

The Independent Certifier acknowledges and agrees that:

- (a) it has received a copy of the Design and Construct Contract and that it has read, and is familiar with, the terms of the Design and Construct Contract to the extent that it relates to the Services;
- (b) its obligations under this agreement with respect to the Services extend to, and include, the obligations, functions, duties and services of the "Independent Certifier" as described in the Design and Construct Contract;
- (c) each of the Client Parties:
 - (i) is relying on the skill and expertise of the Independent Certifier in performing its obligations under this agreement; and
 - (ii) may suffer loss if the Independent Certifier does not perform its obligations in accordance with the requirements of this agreement;
- (d) without limiting clauses 4(c) and 5.1(b), the Client Parties are entitled to and will rely on any certificate or other document signed or given by the Independent Certifier under this agreement; and
- (e) it must perform the Services in a manner which will not prevent, hinder, disrupt, delay or otherwise interfere with any work or services performed by any person, except where it is the unavoidable consequence of performing the Services.

5. INDEPENDENT CERTIFIER'S OBLIGATIONS

5.1 Performance of the Services

- (a) The Independent Certifier must perform the Services in accordance with this agreement and at the times specified in this agreement, the Design and Construct Agreement, Program, Instrumentation and Monitoring Plan and the Practical Completion and Handover Sub-Plan.
- (b) The Independent Certifier must, in performing the Services:
 - (i) comply with all Laws, act honestly, diligently, reasonably and with the degree of professional care, knowledge, experience and skill which would be expected of an expert professional providing services similar to the Services for projects similar to this project;
 - (ii) act independently and impartially of the Client Parties;
 - (iii) take into consideration all documents, information and material (whether written or oral) that any Client Party places before the Independent

Certifier provided that it is relevant to the decision being made by the Independent Certifier at that time;

- (iv) make a reasonable determination on any matter which it is required to make in respect of the Services in any form the Independent Certifier so desires and stating the Independent Certifier's determination;
- (v) not waive, act in a manner which waives or gives effect to any waiver of any terms or conditions of the Project Documents, or any amendments or variations to the Project Documents; and
- (vi) not act in a way which discharges or releases the respective obligations of the parties to the Project Documents, without the prior written consent of those parties, except as required in order to perform the Services (such as certifying that Practical Completion has occurred).

5.2 Conflict of Interest

- (a) The Independent Certifier represents and warrants to the Client Parties that:
 - (i) no conflict of interest exists or is likely to arise in the performance of the Services and its other obligations and the discharge of its duties and functions under this agreement;
 - (ii) it and its Related Entities are not a partner, joint venturer, employee or agent of any of the Client Parties (unless each of the Client Parties has otherwise agreed in writing); and
 - (iii) it has disclosed in writing to all other parties all contractual relationships that it and any of its Related Entities has in connection with this Project or the DBFM Project and all contractual relationships that it and any of its Related Entities has with any of the Client Parties.
- (b) If any conflict or risk of conflict of interest arises during the Term, the Independent Certifier must:
 - (i) immediately notify the Client Parties in writing of that conflict or risk; and
 - (ii) take such action as directed by the State to avoid, prevent or mitigate a conflict or risk of conflict arising out of, or in connection with, the performance of the Services.

5.3 Independent Certifier's Representative

The Independent Certifier must:

- (a) appoint an Independent Certifier's Representative to carry out all of the functions of the Independent Certifier in accordance with this agreement;
- (b) ensure that the Independent Certifier's Representative is engaged on a day to day basis in the performance of the Services, is available by telephone and email at all reasonable times during the Term and responds to all communications from the Client Parties with 24 hours;
- (c) procure that the Independent Certifier's Representative attends all meetings as requested by the Contractor or the State for the duration of the Term; and
- (d) not, without the prior written consent of the Client Parties:
 - (i) remove the Independent Certifier's Representative; or
 - (ii) substitute another person as the Independent Certifier's Representative.

5.4 Key Personnel

- (a) The Contractor acknowledges that the State has engaged the Independent Certifier on the basis that the Key Personnel will be involved in the performance of the Services.
- (b) The Independent Certifier must:

- (i) ensure that the Key Personnel are employed or otherwise retained by the Independent Certifier to carry out the functions of the Independent Certifier assigned to them in section 2 of Schedule 1; and
- (ii) not, without the prior written consent of the Client Parties:
 - (A) remove any of the Key Personnel; or
 - (B) substitute another person for one or more of the Key Personnel.
- (c) Without limiting clause 5.4(b), if any of the Key Personnel cease to perform the Services, the Independent Certifier must provide a replacement acceptable to the Client Parties at no additional cost to the Client Parties.
- (d) The Independent Certifier must procure that the relevant Key Personnel attend all meetings as requested by the Contractor or the State for the duration of the Term.

5.5 Quality Assurance and Audit

- (a) The Independent Certifier must implement a quality assurance system complying with the requirements of ISO AS NZS 9001:2000 to ensure that the Services comply with the requirements of this agreement.
- (b) The Independent Certifier will not be relieved of any requirement to perform any obligation under this agreement as a result of:
 - (i) its compliance with the quality assurance requirements of this agreement; or
 - (ii) any acts or omissions of the Client Parties with respect to the quality assurance requirements of this agreement, including any audit under clause 5.5(c).
- (c) The Independent Certifier must:
 - (i) at the request of any Client Party in respect of the performance of the Independent Certifier's Obligations, allow any audit of its quality assurance system under this agreement by a third party;
 - (ii) give that third party access to premises occupied by the Independent Certifier where the Independent Certifier's Obligations are being performed;
 - (iii) permit that third party to inspect applicable information relevant to the quality assurance audit; and
 - (iv) fully cooperate with that third party in respect of the carrying out of the quality assurance audit.

5.6 Time Requirements

- (a) If, at any time during the performance of the Services, the Independent Certifier is of the opinion that it will not be able to perform the Services within the time specified in this agreement, the Design and Construct Contract, the Program, the Instrumentation and Monitoring Plan or the Practical Completion and Handover Sub-Plan, the Independent Certifier must provide notice of that opinion to the Client Parties.
- (b) The giving of notice by the Independent Certifier under this clause 5.6 does not constitute nor will it be taken to constitute any waiver by any party of any breach of this agreement or the granting of any extension of time or other indulgence by any Client Party in respect of the performance of the Services.

5.7 Records, Access and Audit

- (a) The Independent Certifier must maintain for the Relevant Period a complete set of all Records in whatever form that relate to the performance of the Independent Certifier's Obligations.
- (b) Without limiting its obligations under clause 5.7(a), the Independent Certifier must comply with the requirements of the *State Records Act 2000 (WA)* insofar as that Act applies to any of the Records.

- (c) At any time and from time to time during the Relevant Period, each Client Party has the right to inspect and audit the Records held and maintained by the Independent Certifier in accordance with this agreement. Upon a Client Party's request, the Independent Certifier must make such Records available to that Client Party to enable that Client Party (including proper access to the Independent Certifier's Representative and the Key Personnel or, as the case may be, replacement key personnel, and facilities) to perform any inspection and audit of such Records.

5.8 Confidentiality and Publicity

- (a) The Independent Certifier must keep confidential details of this agreement, the Project Documents and all information and documents (including the Confidential Information) provided to, or by, the Independent Certifier in connection with the Services and not provide, disclose, or use such information or documents except:
 - (i) to the extent necessary for the purpose of performing the Independent Certifier's Obligations under this agreement provided that the persons to whom the information is disclosed are bound by the confidentiality obligations imposed on the Independent Certifier under this clause 5.8;
 - (ii) as authorised in writing by the State and, if the information to be disclosed relates to the Contractor or Project Co, by the Contractor or Project Co, whichever party the information relates to;
 - (iii) as is required by a Law or to the extent required by a stock exchange, and no more; or
 - (iv) when required (and only to the extent required) to the Independent Certifier's professional advisers and the Independent Certifier must ensure that those professional advisers are bound by the confidentiality obligations imposed on the Independent Certifier under this clause 5.8.
- (b) The Independent Certifier must not make or publicise any announcements, advertisements or releases relating to this agreement or the Project without the prior approval of the Client Parties, except to the extent that the Independent Certifier is required by Law to make a statement in which case, the Independent Certifier must:
 - (i) first provide a draft of the proposed statement to the Client Parties; and
 - (ii) make such changes as the Client Parties may reasonably require (having regard to the nature and content of the requirement of Law to make the statement).

5.9 Public Disclosure of Agreement Details

- (a) The State may publicly disclose the identity of the Independent Certifier, the value of this agreement and this agreement (other than information that the State considers is confidential or which would involve the disclosure of information that has a commercial value).
- (b) The Independent Certifier, the Contractor and Project Co acknowledge that this agreement and the information held or compiled by the State in relation to this agreement and the Independent Certifier's Obligations supplied under this agreement are subject to the *Freedom of Information Act 1992 (WA)*.

5.10 Document Management

- (a) Without limiting clause 5.7, the Independent Certifier must:
 - (i) implement and maintain a document management system acceptable to the State which must be used by the Independent Certifier to record all documents and written communications sent and received by the Independent Certifier in relation to this agreement, the Services, the PCS Works and the Design and Construct Contract; and
 - (ii) ensure that the Client Parties are provided with access to the document management system required under clause 5.10(a)(i) at all times during the Term.

- (b) Without limiting clause 5.10(a), the Independent Certifier must ensure that a copy of each written communication between the Independent Certifier and the Client Parties, or third parties which relates to the performance of the Services, is given to the other parties within 2 Business Days.

5.11 Independent Certifier not liable

The Independent Certifier will not be liable for any delay in performing the Services to the extent that the delay is caused, or contributed to, by:

- (a) any act or omission of a Client Party or its employees, Subcontractors or other contractors or consultants that is not authorised by this agreement;
- (b) a suspension under clause 6.5(d);
- (c) a change to the Services under clause 6.5(a) which increase the Services to be performed by the relevant date to which the delay relates; or
- (d) delivery by a Client Party of documents, information or material to the Independent Certifier, as referred to in clause 5.1(b)(iii), other than in sufficient time (having regard to the volume of information provided) prior to the time for making the relevant decision, to reasonably allow the Independent Certifier to make that decision.

6. OBLIGATIONS OF THE CLIENT PARTIES

6.1 No Interference or Influence

The Client Parties must not interfere with or attempt to influence or direct the Independent Certifier in the performance of any of the Services.

6.2 Cooperation

- (a) The Client Parties must:
 - (i) cooperate with the Independent Certifier;
 - (ii) provide the Independent Certifier with all information, documents and materials within its possession, custody or control reasonably requested by the Independent Certifier for the purpose of the performance of the Services or required to be provided to the Independent Certifier under this agreement or the Design and Construct Contract, at the times reasonably required by the Independent Certifier; and
 - (iii) provide the Independent Certifier with such support as is reasonable to facilitate the performance of the Services in accordance with this agreement.
- (b) The Contractor must provide the Independent Certifier with the latest:
 - (i) Program;
 - (ii) Practical Completion and Handover Sub-Plan;
 - (iii) Design Documents;
 - (iv) Instrumentation and Monitoring Plan and I&M Report;
 - (v) Geotechnical Interpretive Report; and
 - (vi) results of all Monitoring and Tests conducted in accordance with the Instrumentation and Monitoring Plan or the Practical Completion and Handover Sub-Plan,

as and when amended.

6.3 Right to Enter, Inspect and Monitor and Test

- (a) The Independent Certifier (and any person authorised by the Independent Certifier) for the purposes of performing the Services may, at any time before the expiry of the Term, upon giving reasonable notice to the Client Parties, enter the Site and

any other place where the PCS Works or materials are being Monitored and Tested.

- (b) The Contractor and Project Co must give such assistance as is reasonably required by the Independent Certifier in respect of any inspection or certifying any Monitoring and Testing under clause 6.3(a).

6.4 Client Parties to Have no Liability

Each party acknowledges that none of the Client Parties is liable, or may be taken to have assumed a liability, or to have become (on enforcement of any of their powers or otherwise) liable, for:

- (a) the performance of any obligation of any other Client Party under this agreement or the Project Documents; or
- (b) any act or omission of the Independent Certifier or for any Claim or liability arising from the Independent Certifier's exercise of its functions, or failure to exercise its functions, under this agreement.

This clause 6.4 does not apply to relieve any party from any obligation arising under this agreement.

6.5 Change to Services and Suspension of Services

- (a) **(Change to Services):** The Fee Paying Parties may, by written notice to the Independent Certifier, direct the Independent Certifier to make a change to the Services (including an addition or omission) which is within the general scope of this agreement. The Independent Certifier must comply with the direction, provided the increase or decrease in the Fee payable in relation to the change is agreed or determined in accordance with clause 6.5(b).
- (b) **(Change to Fee):** The increase or decrease in the Fee to be paid to the Independent Certifier due to a change to the Services referred to in clause 6.5(a) is to be determined in accordance with the Schedule of Rates.
- (c) **(Increase to Fee cannot be determined):** If the increase or decrease in the Fee cannot be determined by reference to the Schedule of Rates, it will be a reasonable amount agreed between the Independent Certifier and those Fee Paying Parties that are obliged to pay the additional Fee. If those parties are unable to agree, the matter will be referred for resolution in accordance with clause 10.
- (d) **(Suspension of Services):** The Fee Paying Parties may jointly, by written notice to the Independent Certifier, direct the Independent Certifier to suspend any or all of the Services for the period specified in that notice.

7. INSURANCE

7.1 Insurance Policies

- (a) **(Public Liability Policy):** The Independent Certifier must maintain a public liability policy. The public liability policy must:
 - (i) cover liability for loss of, or damage to, property and the death or sickness of, or injury to, any person (other than liability which is required by Law to be insured under a workers compensation policy of insurance);
 - (ii) to the extent commercially available from the insurance market from time to time:
 - (A) cover the Client Parties for claims against them arising out of or in connection with any negligent act or omission of the Independent Certifier or its directors, agents or employees, arising out of or in connection with the services required under this agreement;
 - (B) provide that any breach of the conditions of the policy by an insured must not in any way prejudice or diminish any rights which the Client Parties have under the policy;

- (C) provide that the insurance is primary with respect to the interests of the Client Parties and any other insurance and self-insurance arrangements maintained by the Client Parties is excess to and not contributory with the policy;
 - (D) include a cross liability endorsement that all agreements and endorsements except limits of liability must operate in the same manner as if there was a separate policy of insurance covering each party insured and a failure by any insured party to observe and fulfil the terms and conditions will not affect any other party; and
 - (E) provide that a notice of claim given to the insurer by an insured under the policy must be accepted by the insurer as a notice of claim given by the Client Parties where the Client Parties are also an insured;
- (iii) be endorsed to cover:
 - (A) the use of unregistered motor vehicles and plant and equipment; and
 - (B) sudden and accidental pollution; and
 - (iv) be for an amount of \$10 million in respect of any one occurrence and unlimited in the aggregate during any one 12 month period of insurance.
- (b) **(Professional Indemnity Policy):** The Independent Certifier must maintain a professional indemnity policy. The professional indemnity policy must:
- (i) be for an amount of \$20 million in respect of any one claim and \$20 million in the aggregate during any one 12 month period of insurance;
 - (ii) cover liability arising from any negligent act, error or omission in connection with or arising out of the professional activities and duties under this agreement;
 - (iii) cover claims in respect of this agreement under the *Competition and Consumer Act 2010 (Cth)*, *Fair Trading Act 2010 (WA)* and any similar legislation in any other State or Territory insofar as they relate to the provision of professional advice; and
 - (iv) include one full automatic reinstatement of the limit of liability in each 12 month period of insurance.
- (c) **(Insurance of employees):** The Independent Certifier must insure against liability for death of or injury to natural persons employed or engaged by the Independent Certifier including liability by statute and at common law. This insurance cover must:
- (i) to the extent permitted by Law, be extended to indemnify the Client Parties for their statutory and common law liability to natural persons employed or engaged by the Independent Certifier; and
 - (ii) be for not less than \$50 million common law liability in respect of any one event.

7.2 General

- (a) The Independent Certifier must, at its own cost and expense, as a minimum, effect and maintain the Insurance Policies set out in clause 7.1:
- (i) on the terms and conditions set out in clause 7.1 and otherwise on terms acceptable to the Client Parties, acting reasonably;
 - (ii) from insurers with a credit rating of A- or better with Standard and Poors which either:
 - (A) carry on business in Australia and are authorised by APRA; or
 - (B) if overseas insurers, cover claims lodged and determined in the jurisdiction of Australia. Any limitations regarding this requirement must be notified and agreed to by the Client Parties.

- (b) The Client Parties must not unreasonably withhold or delay their approval of an insurer or the terms and conditions of the Insurance Policies.
- (c) Without limiting clause 7.2(a), the Independent Certifier must:
 - (i) pay all premiums and all deductibles applicable to the Insurance Policies when due; and
 - (ii) promptly reinstate any insurance required under this clause 7 if it lapses or if cover is exhausted.
- (d) For the purposes of the Insurance Policies, the State includes the Crown in the right of the State, any Parliament, department, agency or instrumentality of the State of Western Australia, any Minister (including the State), whether body corporate or otherwise, and their officers, employees, consultants, contractors, agents, and personnel.
- (e) To the extent appropriate, the Insurance Policies must state they are governed by the laws of Western Australia or, subject to this clause 7.2, any other state in Australia and that each insurer irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Western Australia. If a policy is governed by the laws of another state in Australia, that policy must include an endorsement from the insurer irrevocably submitting to the jurisdiction of the courts in Western Australia.
- (f) The effecting and maintaining of insurance by the Independent Certifier does not, in any way, affect or limit the liabilities or obligations of the Independent Certifier under this agreement.

7.3 Term

- (a) The Insurance Policies must come into effect on or before the commencement of the Independent Certifier's Obligations under this agreement or before the Independent Certifier first comes onto Site, whichever is the earlier.
- (b) Subject to clause 7.3(c), the Insurance Policies must be maintained until the Independent Certifier has fully complied with and discharged all the Independent Certifier's Obligations or the end of the Term or any extension of the Term, whichever is the later.
- (c) If the wording of any Insurance Policy required by this clause 7 is constructed on a claims made basis, the insurance must be renewed or otherwise maintained without interruption for a period of 7 years after the expiration or termination of this agreement.

7.4 Approval of the Proposed Terms and Conditions of the Insurance Policies

- (a) The proposed terms and conditions of the Insurance Policies must be provided by the Independent Certifier to the Client Parties for approval:
 - (i) at least 5 Business Days before the date of execution of this agreement (or such other period as may be agreed to by the Client Parties); and
 - (ii) within 28 days of the date set for each annual renewal with respect to the Services.

7.5 Proof of Insurance Policies

Whenever requested in writing by the Client Parties, the Independent Certifier must produce to the Client Parties copies of the Insurance Policies or insurance broker's evidence of cover document (that contains the entirety of the wording including any relevant schedules and endorsements) evidencing the insurance effected and maintained.

7.6 Failure to Produce Proof of Insurance Policies

- (a) If, after being requested in writing by the Client Parties to do so, the Independent Certifier fails to produce evidence of compliance with its insurance obligations under this clause 7 to the satisfaction and approval of the Client Parties within 10 Business Days of the request, then the Client Parties may:

- (i) exercise their rights under clause 9; or
 - (ii) refuse payment of any amount due to the Independent Certifier until evidence of insurance required by this clause 7 is produced to the Client Parties.
- (b) The rights given to the Client Parties by this clause 7.6 are in addition to any other rights the Client Parties may have.

7.7 Independent Certifier's Further Obligations

- (a) The Independent Certifier must not do or omit to do any act that would be grounds for an insurer to refuse to pay a claim made under any of the Insurance Policies.
- (b) The Independent Certifier must give the Client Parties notice of cancellation, non-renewal or a material alteration of any of the Insurance Policies within 3 Business Days of receiving such notice from an insurer.

7.8 Insurance Policies Primary

- (a) The Insurance Policies are primary and not secondary to the indemnities referred to in this agreement. However, the Client Parties are not obliged to make a claim or institute proceedings against any insurer under the Insurance Policies before enforcing any of its rights or remedies under the indemnities referred to in this agreement, or generally.
- (b) The parties acknowledge that if a claim is made under an Insurance Policy by a Client Party, it is their intention that the insurer cannot require the Client Party to exhaust any indemnities referred to in this agreement before the insurer considers or meets the relevant claim.
- (c) The Independent Certifier acknowledges that regardless of whether the Insurance Policies respond or not, and regardless of the reason why the Insurance Policies respond or fail to respond, the Independent Certifier is not released (in whole or in part), from any of its obligations under the indemnities referred to in this agreement, or generally.

8. LIABILITY AND INDEMNITIES

8.1 References to Independent Certifier

For the purposes of this clause 8, any act, error or omission caused by the Independent Certifier's officers, directors, employees or contractors is deemed to be an act, error or omission of the Independent Certifier.

8.2 General Indemnity

The Independent Certifier indemnifies the Client Parties jointly and severally against any Loss, Claim or Third Party Claim suffered or incurred by or made against the Client Parties arising out of or in connection with and to the extent caused by any act, error or omission by the Independent Certifier or its officers, directors, employees or contractors in breach of this agreement or any negligent, wrongful, reckless or unlawful act or omission, in connection with the provision of the Services under this agreement.

8.3 Exclusion

Each of the Client Parties, separately, are not entitled to recover Loss under the indemnity in clause 8.2 to the extent a Client Party or its other consultants, contractors or Subcontractors have caused or contributed to the Loss.

8.4 Benefit of Indemnities

In clause 8.2, "State", as a Client Party, includes the Crown in the right of the State of Western Australia, any Parliament, department, agency or instrumentality of the State of Western Australia, any Minister (including the State), whether body corporate or otherwise, and their officers, employees, consultants, contractors, agents, and personnel.

8.5 Maximum Liability

- (a) Subject to clauses 8.5(b) and 8.5(c), the maximum liability of the Independent Certifier to the Client Parties in respect of this agreement (however arising, including for breach of contract or negligence) is limited in aggregate to \$20,000,000.
- (b) Clause 8.5(a) does not apply in the event of:
 - (i) liability for breach of clauses 5.2, 5.8 or 5.9;
 - (ii) damage to third party property;
 - (iii) death or injury caused by the Independent Certifier or its employees or sub-contractors;
 - (iv) infringement of third party intellectual property rights;
 - (v) liability arising out of criminal acts of, fraudulent acts or omissions of, and fraudulent misrepresentation by the Independent Certifier or its employees or subcontractors;
 - (vi) liability arising out of acts or omissions by the Independent Certifier or its employees or subcontractors with a reckless indifference to the consequences of its act or omission;
 - (vii) liability arising out of wilful default by the Independent Certifier;
 - (viii) liability in relation to exemplary and punitive damages;
 - (ix) liability arising out of matters that cannot be excluded at Law; or
 - (x) damage to third party property.
- (c) The Independent Certifier shall not be liable to any Client Party for Consequential Loss.

9. TERMINATION AND CONSEQUENCES**9.1 Termination for Breach**

The Fee Paying Parties may jointly terminate this agreement immediately by written notice to the Independent Certifier if:

- (a) the Independent Certifier is in material breach of the terms of this agreement and the breach is, in the reasonable opinion of the Fee Paying Parties, not remediable;
- (b) the Independent Certifier is in material breach of the terms of this agreement and the breach is, in the reasonable opinion of the Fee Paying Parties, remediable and such breach has not been remedied within 10 Business Days after service by a Fee Paying Party of a notice specifying the breach and requiring it to be remedied;
- (c) the Independent Certifier fails to provide proof of the Insurance Policies under clause 7.6;
- (d) an Insolvency Event occurs; or
- (e) there is a Change in Control of the Independent Certifier without the consent of the State under clause 13.5.

9.2 Termination for Convenience

The Fee Paying Parties may, in their absolute discretion for any reason whatsoever, serve on the Independent Certifier a notice of termination of this agreement and the appointment of the Independent Certifier, on a date specified in the notice, being not less than 10 Business Days after the date of issue of the notice.

9.3 Termination of Design and Construct Contract

If it has not been terminated earlier, this agreement terminates on the date of termination of the Design and Construct Contract.

9.4 Termination of Appointment of Independent Certifier

- (a) The appointment of the Independent Certifier will terminate on the date specified in the notice of termination under clauses 9.1 or 9.2, in accordance with clause 9.3 or the expiry of the Term, whichever is earlier.
- (b) The Fee Paying Parties will each be responsible for payment of its portion of the Fee for the Services up to the date of termination in accordance with clause 9.6.

9.5 Delivery of Documents

On the date of termination of the appointment of the Independent Certifier, the Independent Certifier:

- (a) must deliver to the Client Parties or their nominee, all books, Records, drawings, specifications and other documents in the possession, custody or control of the Independent Certifier relating to the Services, this agreement, the Project Documents and the PCS Works; and
- (b) acknowledges and agrees that the Independent Certifier permits the Client Parties to use all those documents for the purposes of the Project Documents, the PCS Works, the DBFM Project and any other related project.

9.6 Payment until Date of Termination

- (a) Subject to clause 9.6(b), if the appointment of the Independent Certifier is terminated under this agreement, the Independent Certifier is only entitled to be paid the proportion of the Fee for the Services performed up to the date of the termination.
- (b) If the appointment of the Independent Certifier is terminated under clause 9.2 or 9.3, the Independent Certifier may recover:
 - (i) the proportion of the Fee performed up to the date of the termination from the Fee Paying Parties, determined in accordance with clause 3.3 (subject to clause 3.3(c)); and
 - (ii) its reasonable costs arising out of the termination from the Fee Paying Parties, determined in accordance with clause 3.3 as if those costs formed part of the Fee.

9.7 Termination Without Prejudice

Termination of this agreement under this clause 9 will be without prejudice to:

- (a) any Claim which the Client Parties may have in respect of any breach of the terms of this agreement which occurred;
- (b) any rights or liabilities of the parties under this agreement which may have accrued; or
- (c) any determinations or opinions expressed by the Independent Certifier, before the date of termination.

9.8 Survival of Clause 9

This clause 9 survives the expiry or termination of this agreement.

10. DISPUTE RESOLUTION

10.1 Dispute

- (a) If a Dispute arises and is unable to be resolved, then the Dispute:
 - (i) must be resolved in the same manner that disputes or differences of opinion are referred to an Independent Expert in accordance with the Design and Construct Contract or the DBFM Project Agreement (as the case may be);
 - (ii) accordingly, the provisions of clause 32 (Dispute Resolution) of the Design and Construct Contract are incorporated into this document as if:

- (A) the only persons party to the Design and Construct Contract, and the only persons party to the relevant Dispute or difference of opinion, are the parties to the relevant Dispute; and
 - (B) the only matters for determination by the Independent Expert in accordance with those provisions are the matters referred to the Independent Expert in accordance with this agreement; and
- (iii) accordingly, the provisions of clause 44 (Dispute Resolution) of the DBFM Project Agreement are incorporated into this document as if:
- (A) the only persons party to the DBFM Project Agreement, and the only persons party to the relevant Dispute or difference of opinion, are the parties to the relevant Dispute; and
 - (B) the only matters for determination by the Independent Expert in accordance with those provisions are the matters referred to the Independent Expert in accordance with this agreement.
- (b) For the avoidance of doubt, any decision by the Independent Certifier in respect of the PCS Works is final and binding on the Client Parties and cannot be the subject of a Dispute, except for manifest error.

10.2 Injunctive or Urgent Relief

Nothing in this clause 10 prejudices any party's right to institute proceedings to seek injunctive or urgent declaratory relief in respect of a Dispute or any other matter arising under this agreement.

11. GOODS AND SERVICES TAX

11.1 GST

- (a) The Fee and any other amounts in this agreement (except where otherwise specified) are exclusive of GST and are subject to this clause 11.1.
- (b) This clause will apply as if the GST Law imposed GST, and was able to impose GST, in the circumstances prescribed in the GST Law, on property of any kind belonging to a State (as that expression is used in section 114 of the *Commonwealth of Australia Constitution Act 1900*).
- (c) In this clause 11.1, terms used and defined in this clause 11.1 have the meaning given to them in the GST Law.
- (d) 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 supply (**GST Exclusive Consideration**) except as provided under this clause 11.
- (e) Any amount referred to in this agreement (other than an amount referred to in clause 11.3) which is relevant in determining a payment to be made by one of the parties to the other is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.
- (f) 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.

11.2 Payment and Invoices

- (a) The recipient must pay the additional amount payable under clause 11.1(f) to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.
- (b) 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 11.1(f) or at such other time as the parties agree.

- (c) If an adjustment event occurs in relation to a taxable supply made under or in connection with this agreement, then the consideration payable in respect of the supply will also be adjusted as follows:
- (i) if the adjustment event gives rise to an increase in the GST payable by the Supplier in relation to the supply a payment equal to that increase will be made by the recipient to the Supplier; and
 - (ii) if the adjustment event gives rise to a decrease in the GST payable by the Supplier in relation to the supply a payment equal to that decrease will be made by the Supplier to the recipient.
- (d) If the adjustment event referred to under clause 11.2(c) gives rise to an adjustment, the Supplier must issue an adjustment note or amended tax invoice, as the case may be, to the recipient as soon as it becomes aware of the adjustment event and any payment that is required under clause 11.2(c) must be made within 30 days of the issuing of the adjustment note or amended tax invoice.

11.3 Reimbursements

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 in accordance with clause 11.1(f).

12. NOTICES

12.1 Procedure for Sending Notices

- (a) Each communication (including each notice, consent, approval, request, demand and certificate) in accordance with or in connection with this agreement (in this clause 12, "Notices") must be:
- (i) in writing; and
 - (ii) 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) 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 Client Parties) to the email address (provided that the email contains a read receipt request),
- of the addressee set out in clause 12.2, or as otherwise notified by that party to each other party from time to time.

12.2 Party Details



12.3 When Notices are Deemed to be Received

- (a) A Notice is deemed to be received:
 - (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 12.2; and
 - (iii) in the case of delivery by hand, on delivery.
- (b) If the Notice is taken to be received on a day which is not a Business Day or after 5.00 pm, it is taken to be received at 9.00 am on the next Business Day.
- (c) In connection with Notices 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 12.3. Any text in the body of the email or the subject line will not form part of the Notice; and
 - (ii) the Independent Certifier must ensure that, in connection with any communications in accordance with or in connection with this agreement:
 - (A) its firewall and/or mail server (as applicable):
 - (i) allows messages of up to 10 MB to be received;
 - (ii) does not trap any messages in the spam filter which have been sent from any Client Party domain; and
 - (iii) 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.

13. GENERAL

13.1 Survival

Clauses 1 (Definitions and interpretation), 5.7 (Records, Access and Audit), 5.8 (Confidentiality and Publicity), 7 (Insurance), 8 (Liability and indemnities), 9 (Termination and consequences), 10 (Dispute resolution), 12 (Notices) and 13 (General) survive termination of this agreement and will continue in full force and effect.

13.2 Governing Law and Jurisdiction

This agreement 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.

13.3 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.

13.4 Counterparts

This agreement may be executed in any number of counterparts.

13.5 No Dealing

- (a) The Contractor and Project Co may not assign, novate or otherwise transfer any of its rights or obligations under this agreement except in accordance with an assignment, novation or transfer of the Design and Construct Contract or the DBFM Project Agreement in accordance with their relevant terms (as the case may be).
- (b) The Independent Certifier must not, without the prior approval of the State, acting reasonably, and except on such terms and conditions as are determined by the State:
 - (i) permit a Change in Control of it;
 - (ii) assign, transfer, mortgage, novate, charge or otherwise encumber this agreement or any payment or other right, benefit, money or interest under or in respect of this agreement; or
 - (iii) subcontract the performance of any of the Services.
- (c) The Independent Certifier remains responsible for the performance of the Services in accordance with this agreement, despite any subcontracting, and the acts or omissions of any subcontractor will be deemed to be the acts or omissions of the Independent Certifier.

13.6 Relationship of the Parties

- (a) Nothing in this agreement gives a party authority to bind the other party in any way.
- (b) The Independent Certifier is an independent contractor. The Independent Certifier's Representative and the Key Personnel will not be deemed to be employees, agents, subcontractors or consultants of the Client Parties and each party must pay all costs associated with its employees.
- (c) Neither this agreement, nor the relationship created by it, is intended to create, and will not be construed as creating, any partnership, joint venture or fiduciary obligation with regard to, or as between, the parties.

13.7 Statutory Functions

Nothing contained in or implied by this agreement or any document contemplated by this agreement has the effect of constraining the State or placing any fetter on its statutory rights, duties, powers and functions, including those contained or referred to in any Law.

13.8 Costs

Each party must pay its own costs and disbursements in connection with the negotiation, preparation and execution of this agreement.

13.9 Variations and Waivers

No variation, modification or waiver of any provision in this agreement, 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.

13.10 Further Assurances

Each party must do all things and execute all further documents necessary to give full effect to this agreement.

13.11 Prohibition and Enforceability

- (a) Any provision of, or the application of any provision of, this agreement which is prohibited in any jurisdiction is, in that jurisdiction, ineffective only to the extent of that prohibition.
- (b) Any provision of, or the application of any provision of, this agreement which is void, illegal or unenforceable in any jurisdiction does not affect the validity, legality or enforceability of that provision in any other jurisdiction or of the remaining provisions in that or any other jurisdiction.

13.12 Enurement

The provisions of this agreement will enure for the benefit of and be binding on the parties and the Independent Certifier and their respective successors and permitted substitutes and assigns and (where applicable) legal personal representatives.

13.13 Attorneys

Each person who executes this agreement on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

Schedule 1 – Project Documents and Key Personnel

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Schedule 2 – Services

Without limiting its obligations under this Schedule and its other obligations under this agreement, the Independent Certifier's primary functions are to:

- (a) **(Design Documents):** review and comment in respect of the Design Documents at 40% Complete and 100% Complete and at any other time the Contractor is required to submit the Design Documents to the State for review under the Design and Construct Contract and, if it identifies any issues with the Design Documents, confirm in writing that it is satisfied as to how the issues have been addressed by way of a comment and response documentation process approved by the State (**Comment Documentation Process**);
- (b) **(Geotechnical Interpretive Report):** review and comment on the Geotechnical Interpretive Report at 80% Complete and the final version and any subsequent review or update to the Geotechnical Interpretive Report and identify issues arising out of its review to the Client Parties, and if it has identified any issues with or made any comments on the Geotechnical Interpretive Report, confirm whether it is satisfied as to how the issues and comments are addressed by the Contractor by way of the Comment Documentation Process;
- (c) **(I&M Report):** review each monthly and final I&M Report and identify issues arising out of its review to the Client Parties, and if it has identified any issues with or made any comments on the monthly I&M Report, confirm that it is satisfied as to how the issues and comments are addressed by the Contractor by way of the Comment Documentation Process. In relation to the final I&M Report provide an endorsement that the Monitoring and Testing to date shows compliance of that Separable Portion with the Scope of Work and Technical Criteria and the Ground Performance Criteria have been, or will be able to be, met for the duration of the Design Life;
- (d) **(Instrumentation and Monitoring Plan and Practical Completion and Handover Sub-Plan):** certify in writing that the Instrumentation and Monitoring Plan and the Practical Completion and Handover Sub-Plan and any review or update of those plans:
- (i) are appropriate for the Project;
 - (ii) will demonstrate that the Practical Completion Criteria have been met; and
 - (iii) otherwise comply with the Scope of Work and Technical Criteria;
- and if it has identified any issues with or made any comments on the Instrumentation and Monitoring Plan or the Practical Completion and Handover Sub-Plan or any revisions or updates of those plans, confirm that it is satisfied as to how the issues and comments are addressed by the Contractor by way of the Comment Documentation Process;
- (e) **(Monitoring and Testing):**
- (i) attend the performance of Monitoring and Testing by the Contractor in accordance with a program agreed with the State and as otherwise reasonably required to perform its functions;
 - (ii) direct any additional Monitoring and Tests; and
 - (iii) determine if:
 - (A) the whole or any part of the PCS Works fails to pass any Monitoring and Testing required under the Design and Construct Contract; or
 - (B) the Monitoring and Testing shows results trending such that the performance of the PCS Works indicated in the Design Reports or the requirements of the Design and Construct Contract will not be met,

and if the Independent Certifier deems necessary, review the details of any work, replacement, amendment, reconstruction, rectification and making good of any Defects undertaken by the Contractor under clause 16.6(b)(i) of the Design and Construct Contract;

- (f) **(Defects):**
- (i) identify Defects and if required under clause 17.1(d) of the Design and Construct Contract, determine the method and program for remedying a Defect; and
 - (ii) without limiting paragraph (f)(i) above:
 - (A) at any time prior to Practical Completion, identify, and notify the Client Parties of any issues in the PCS Works, the Design Documents or the Geotechnical Interpretive Report which may delay or prevent the Contractor from achieving Practical Completion by the Date for Practical Completion;
 - (B) recommend steps or remedial work to be undertaken by the Contractor to overcome the issues identified by the Independent Certifier in accordance with paragraph (f)(ii)(A) above in order to achieve Practical Completion by the Date for Practical Completion and notify the Client Parties of its recommendations; and
 - (C) confirm that it is satisfied as to how steps or remedial work has been undertaken by the Contractor to overcome the issue, such that the Independent Certifier is satisfied that the issue will no longer prevent Practical Completion from being achieved by the Date for Practical Completion;
- (g) **(Practical Completion):**
- (i) certify whether or not Practical Completion, including for each Separable Portion, has been achieved; and
 - (ii) notify the Client Parties in writing of its conclusion as to whether Practical Completion, including for each Separable Portion, has been achieved, and if Practical Completion has not been achieved, the reason or reasons why Practical Completion has not been achieved.
- (h) If the Independent Certifier determines that the requirements of Practical Completion, including for each Separable Portion, have not been achieved, then following the completion of any rework, repeat Monitoring and Testing or any other action that may be required to be undertaken by the Contractor, the Independent Certifier must provide further certification under paragraph (g)(i) above. The Independent Certifier must continue to repeat this process and provide further certification until:
- (i) it certifies that the requirements of Practical Completion, including for each Separable Portion, have been achieved; or
 - (ii) the Client Parties otherwise agree.
- (i) The Independent Certifier must do all things necessary to satisfy itself that Practical Completion, including for each Separable Portion, has occurred, except that the Independent Certifier is not required to (but may) undertake its own Monitoring and Testing. The Independent Certifier must perform all of the tasks that are assigned to it in the Design and Construct Contract.

Schedule 3 – Payment Schedule

1. PAYMENT CLAIM

- (a) The Fee payable by the Fee Paying Parties to the Independent Certifier for the provision of the Services will be calculated on a monthly basis and based on the tasks set out in section 6.
- (b) The Independent Certifier must, at least 3 Business Days before the end of each month and upon termination of this agreement, submit to the relevant Fee Paying Parties separate Payment Claims setting out the Fee:
 - (i) subject to clause 1(d), for the Services performed in accordance with this agreement since the last account for which they are responsible under clause 3.3; and
 - (ii) calculated in accordance with this Schedule, **(Payment Claim)**.
- (c) The Payment Claims submitted under section 1(b) of this Schedule must include:
 - (i) a detailed breakdown of work completed in the previous month and, if applicable, the calculation of amounts claimed to which rates apply;
 - (ii) any invoices or receipts necessary to substantiate calculation of amounts claimed to which rates apply; and
 - (iii) any other information reasonably required by the Fee Paying Parties.
- (d) The portion of the Fee claimed for each task set out in section 6 must not exceed the amount specified for that task in section 6.

2. PAYMENT CERTIFICATE

- (a) Within 5 Business Days of receipt of a Payment Claim under section 1(b) of this Schedule, the Fee Paying Party to whom a Payment Claim was issued, acting reasonably, by notice to the Independent Certifier must:
 - (i) advise that the Fee Paying Party intends to make the payment set out in its Payment Claim and deliver a **Payment Certificate** to the Independent Certifier for the amount of its Payment Claim; or
 - (ii) advise that the Fee Paying Party does not intend to make all or part of the payment set out in its Payment Claim, providing the reasons for its decision, and deliver a Payment Certificate to the Independent Certifier for any amounts to which the Fee Paying Party maintains that the Independent Certifier is entitled (if any), and section 5 of this Schedule applies in respect of the remainder.
- (b) The amount set out by the Fee Paying Party in its Payment Certificate under section 2(a) of this Schedule will be adjusted by:
 - (i) any amounts which the relevant Fee Paying Party is owed or entitled to deduct or has deducted under this agreement; and
 - (ii) any correction or modification to previous Payment Certificates of the relevant Fee Paying Party issued under section 2(a) of this Schedule.
- (c) The Fee Paying Party may for any reason in any Payment Certificate:
 - (i) correct any error in any of its previous Payment Certificates; or
 - (ii) acting reasonably, modify any of its previous Payment Certificates, previously issued by the Fee Paying Party.

3. TAX INVOICE

- (a) Within 1 Business Day of receipt of a Payment Certificate, the Independent Certifier must provide a tax invoice in a form approved by the Fee Paying Parties and any other documentation necessary for the Fee Paying Parties to be able to

claim any applicable GST or have payment of any GST recognised under the applicable GST legislation.

- (b) The amount in the tax invoice must be the same as the amount in the Payment Certificate.

4. PAYMENT

- (a) Within 20 Business Days of receiving a tax invoice from the Independent Certifier under section 3(a) and any other documentation a Fee Paying Party requires, the relevant Fee Paying Party must pay the Independent Certifier or the Independent Certifier must pay the relevant Fee Paying Party the amount shown in the Payment Certificate (as adjusted under section 2(c)) of this Schedule.
- (b) Any Payment Certificate under section 2(a) or payment of moneys under section 4(a) of this Schedule is not:
- (i) evidence of the value of work or services or that work or services have been satisfactorily performed in accordance with this agreement;
 - (ii) an admission of liability; or
 - (iii) approval by the Fee Paying Parties of the Independent Certifier's performance or compliance with this agreement,
- but is only to be taken as payment on account.

5. CONDITIONS FOR PAYMENT

Notwithstanding anything else in this agreement and without limiting any other right or remedy of the Client Parties, a Fee Paying Party will not be required to make all or any part of payment to the Independent Certifier required under this agreement unless the Independent Certifier has properly performed all of the Services under this agreement for which the Payment Claim has been issued.

6. MONTHLY PAYMENT SCHEDULE

For the purposes of section 1 of this Schedule and subject to clause 6.5 of this agreement, the portion of the Fee in respect of each of the tasks comprising the Services, excluding the services carried out under the Schedule of Rates as listed in section 7 of this Schedule below, is as follows:

Task	Portion of the Fee
Project Management, Liaison & Coordination including monthly meetings	██████████
Review and Certification of Design Reports and drawings at 40% and 100% Design Stages for: <ol style="list-style-type: none"> 1. Separable Portion 2 2. Separable Portion 3 3. Separable Portion 4 4. Separable Portion 6 5. Separable Portion 7 	██████████
Review and Verification of Geotechnical Interpretation Report at 80% and Final Stage Submissions	██████████
Review of Instrumentation and Monitoring Planning Reports at 80% and Final Stage submissions, plus Review of Monthly	██████████

Monitoring reports and on-site testing	
Defects and Practical Completion Inspections	████████
Expenses (refer to section 9)	████████
TOTAL	████████

provided however that the Independent Certifier is not entitled to make a Claim for payment to the extent that the tasks set out above have not been carried out, whether as a result of suspension under clause 6.5 of this agreement or otherwise. Amendments to the payment schedule above will be agreed in writing between the parties and updated accordingly. The amount set out above is based on the assumptions set out in section 8. Further work as a result of the assumptions not being correct will be charged at the rates set out in section 7.

7. SCHEDULE OF RATES

Any additional works and works carried out due to a change to the Services referred to in clause 6.5(a) will be charged at the following rates:

Position	Rate \$/Day
IC Project Director	████████
IC Representative	████████
IC Expert Reviewer	████████
Principal Geotechnical Engineer	████████
Alternate Expert Reviewer/ Alternate IC Representative	████████
Senior Geological / Geotechnical Engineer	████████
Geotechnical Engineer	████████

These rates:

- (a) are based on an 8 hour day and part days will be paid for on a proportional basis; and
- (b) contain allowances for the provision of all labour, materials, work, disbursements (other than as described in and payable under section 7 of this Schedule) and other costs necessary for and arising out of or in connection with the Services for which the Independent Certifier is to be paid on a Schedule of Rates basis under this agreement.

8. GST

All lump sums, rates and amounts in this Schedule exclude GST.

9. ASSUMPTIONS

The amounts set out in section 6 are based on the following assumptions;

- (a) the total number of design packages for the ground improvement works are limited to five;
- (b) the Instrumentation and Monitoring Planning will be issued at 80% & 100% submission stages for certification before it is implemented on site;

- (c) 3 weeks has been allowed for the review of monthly monitoring reports and or attendance on site for monitoring and testing;
- (d) the amounts set out in section 6 do not allow for review/ certification of any temporary works packages (i.e. working platforms etc.) that may be required to enable construction of the ground improvement works;
- (e) the amounts set out in section 6 do not allow for supervision/ certification of the ground improvement works during construction phase;
- (f) each design package submittal for review is a reasonably complete set of documentation commensurate with the submission stage requirements, suitable for thorough review including all inputs, assumptions, interfaces, ground investigation data, calculations, analyses, reporting, drawings and specifications. Partial submission of any design or monitoring plan may lead to rejection of the package or to additional fees being due;
- (g) the Independent Certifier will review the Contractor's design packages at each stage of the design submission to ensure that the design meets the minimum requirement specified in the Design and Construct Contract. The Independent Certifier must notify the Client parties of any errors in the design and any material errors in calculations;
- (h) the Independent Certifier may decide to undertake independent calculations or proof engineering at its own discretion and by agreement with the Client Parties, in which case it will engage with the Client Parties to gain prior agreement for any additional fees related to those independent calculation and proof checking;
- (i) The amounts set out in section 6 do not make allowance for resolution of issues related to design, planning or construction non-conformances beyond the specified review, comment and certification sequence prescribed in the Design and Construct Contract and this Agreement;
- (j) the amounts set out in section 6 do not allow for review details of construction plant;
- (k) the amounts set out in section 6 make no allowance for the addressing of requests for information by the Contractor during construction phase of the ground improvement works. Addressing requests for information beyond final stage of the design will incur additional costs; and
- (l) Practical Completion Services are assumed to include five completion inspections for each separable portion.

If any of the assumptions in this section 9 are incorrect, the Independent Certifier must notify the Client Parties and provide an estimate of the fees for the additional work prior to undertaking the relevant task.

Schedule 4 – Deed of Accession

Project Co	Name	[Insert details]
	ABN	[Insert details]
	Address	[Insert details]
	Fax	[Insert details]
	Attention	[Insert details]
State	Name	[Redacted]
	ABN	[Insert details]
	Address	[Redacted]
	Fax	[Insert details]
	Attention	[Insert details]
Independent Certifier	Name	[Redacted]
	ABN	[Redacted]
	Address	[Redacted]
	Fax	[Redacted]
	Attention	[Redacted]
Recitals	A	The ICA was executed by the State, [Insert Contractor] and SMEC Australia Pty Limited on [Insert date].
	B	At that time, Project Co had not entered into the DBFM Project Agreement with the State.
	C	Project Co has now entered into the DBFM Project Agreement.
	D	As contemplated by to clause 3.2 of the ICA, Project Co agrees to become a party to the ICA.

1. DEFINITIONS AND INTERPRETATION

Independent Certifier Agreement	Independent Certifier Agreement between the State, [Insert Contractor] and SMEC Australia Pty Limited dated [Insert date] ("ICA").
DBFM Project Agreement	the contract between the State and Project Co dated [Insert date].

Unless otherwise expressly provided in this deed, definitions in the ICA and clause 1.2 of the ICA apply in this deed.

2. ACKNOWLEDGEMENTS AND UNDERTAKINGS BY PROJECT CO

- (a) Project Co acknowledges that it:
 - (i) has read a copy of the ICA before signing this deed; and
 - (ii) is receiving valuable consideration for entering into this deed.
- (b) With effect from and including the date of this deed:
 - (i) Project Co agrees to the appointment of the Independent Certifier under the ICA; and
 - (ii) Project Co assumes the obligations and acquires the rights of Project Co under the ICA.

3. ACKNOWLEDGEMENTS AND UNDERTAKINGS BY THE INDEPENDENT CERTIFIER

The Independent Certifier acknowledges that it is receiving valuable consideration for entering this deed.

4. NOTICES

The address for correspondence of Project Co is the address set out below:

Address:

Fax Number:

Email:

Attention:

5. COSTS

Each party to this deed will bear its own costs arising out of the negotiation, preparation and execution of this deed.

6. GOVERNING LAW

This deed is governed by the law applying to the ICA.

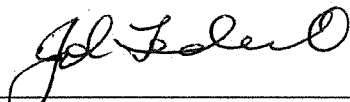
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Signing Page

DATED: 22 Aug 2013

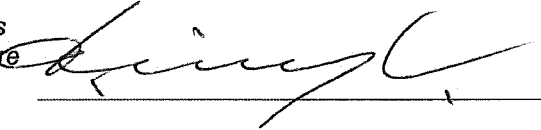
SIGNED for and on behalf of the MINISTER FOR WORKS John Tondut – Principal Project Director pursuant to a delegation from the Minister for Works to the Treasurer dated 1 July 2011 made pursuant to section 5A(f) of the Public Works Act 1902 and a subdelegation from the Treasurer dated 9 September 2011 made pursuant to section 5B(1)(db) of the Public Works Act 1902 in the presence of:

:



John Tondut


print name
of witness Bruce Cunningham

Witness
sign here 
▶ _____

Witness
address Project office: Roger Mackay Drive
Burswood

Witness
occupation Director


Executed by Ertech Geomarine Pty Ltd
ABN 26 155 997 069 in accordance with
section 127 of the Corporations Act 2001 (Cth):




Signature of director

Alec Robert Courts

Full name of director



Signature of company secretary/director



Full name of company secretary/director

Executed by Keller Ground Engineering Pty Ltd
ABN 68 008 673 167 in accordance with
section 127 of the *Corporations Act 2001* (Cth):

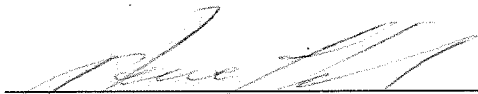


Signature of director

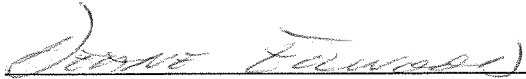


Full name of director

Executed by SMEC Australia Pty Limited ABN
47 065 475 149 in accordance with section 127
of the *Corporations Act 2001* (Cth):



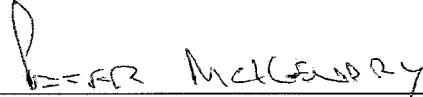
Signature of director



Full name of director



Signature of company secretary/director



Full name of company secretary/director



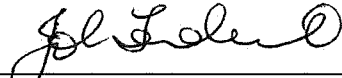
Signature of company secretary/director

Andrew Neil Atkin
Company Secretary

Full name of company secretary/director

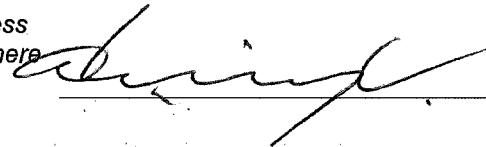
Executed as an agreement.

SIGNED for and on behalf of the MINISTER FOR WORKS John Tondut – Principal Project Director pursuant to a delegation from the Minister for Works to the Treasurer dated 1 July 2011 made pursuant to section 5A(f) of the Public Works Act 1902 and a subdelegation from the Treasurer dated 9 September 2011 made pursuant to section 5B(1)(db) of the Public Works Act 1902 in the presence of:



John Tondut

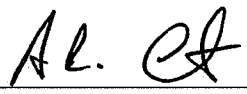
print name
of witness Bruce Cunningham

Witness
sign here 

Witness
address Project office: Roger Mackay Drive
Burswood

Witness
occupation Director

Executed by Ertech Geomarine Pty Ltd
ABN 26 155 997 069 in accordance with
section 127 of the Corporations Act 2001 (Cth);



Signature of director

Alec Robert Coates

Full name of director



Signature of company secretary/director

Gavin Robert Miller

Full name of company secretary/director

Executed by Keller Ground Engineering Pty Ltd
ABN 68 008 673 167 in accordance with
section 127 of the *Corporations Act 2001* (Cth):

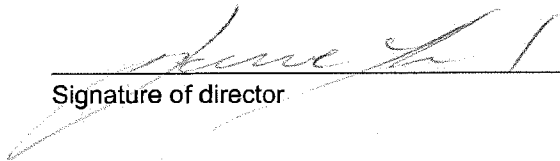


Signature of director



Full name of director

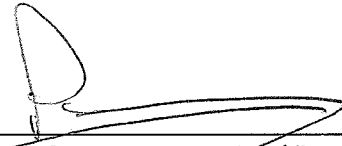
Executed by SMEC Australia Pty Limited ABN
47 065 475 149 in accordance with section 127
of the *Corporations Act 2001* (Cth):



Signature of director



Full name of director



Signature of company secretary/director



Full name of company secretary/director



Signature of company secretary/director

Andrew Neil Atkin

Full name of company secretary/director