

Schedule 25 – Expert Determination Agreement

Expert Determination Agreement

WA Schools PPP Project

[]

[#insert party name]

[]

[#insert party name]

[]

Expert

Expert Determination Agreement made on

Parties *[#insert party name and address] (#insert party name)*

[#insert party name and address] (#insert party name)

*[#insert name and address of Expert agreed between the Parties or appointed pursuant to Clause 43.3 (Expert determination) of the Project Deed or the equivalent clause in each Relevant Agreement] (**Expert**)*

Recitals

- A. The background to the Project is set out in the Project Deed.
- B. On *[#insert]*, *[the Parties agreed / (#insert party name) chose]* that the Matter described in Schedule 1 to this Agreement be determined by an Expert appointed under clause *[#insert relevant clause reference]* of the Relevant Agreement.
- C. In accordance with clause *[#insert relevant clause reference]* of the Relevant Agreement, the Expert has been appointed to determine the Matter in accordance with the process set out in this Agreement and the Project Deed.

Operative provisions

1 DEFINITIONS

1.1 Project Agreement definitions

Unless otherwise expressly defined, capitalised terms used in this Agreement have the meanings given to them in the Project Deed.

1.2 Definitions

Agreement means this agreement and includes all schedules, exhibits, attachments and annexures to it.

Code of Conduct means the code of conduct set out in Section 2 of Schedule 2 to this Agreement.

Matter means a dispute under, arising out of, or in connection with the Relevant Agreement and referred to expert determination under clause *[#insert relevant clause reference]* of the Relevant Agreement.

Party means *[#insert party names]*.

Project Deed means the document entitled "WA Schools PPP Project – Project Deed" between the State and Project Co dated *[# insert date]*.

Relevant Agreement means *[#insert the relevant document under which the Matter arose.]*

Rules means the "Rules for Expert Determination Process" set out in Schedule 2 to this Agreement.

Schedule of Fees and Disbursements is contained in Schedule 3 to this Agreement.

1.3 Interpretation

In this Agreement:

- (a) **(headings)**: headings (including any heading at the beginning of any subsection) are for convenience only and do not affect interpretation;

and unless the context otherwise requires:

- (b) **(count and gender)**: a word importing the singular includes the plural and vice versa, and a word indicating a gender includes every other gender;
- (c) **(agreement and schedule references)**: a reference to:
- (i) a "Party", "Section", "Schedule", "exhibit", or "Annexure" is a reference to a party, section, schedule, exhibit or annexure of or to this Agreement;
 - (ii) a "Clause" is a reference to a clause of the Project Deed; and
 - (iii) a "clause" is a reference to a clause of the Relevant Agreement;
- (d) **(agreement as amended)**: a reference to this Agreement or to any other deed, agreement or instrument includes a reference to this Agreement or such other deed, agreement or instrument as amended, novated, supplemented, varied or replaced from time to time;
- (e) **(Party)**: a reference to a party includes that party's legal representatives, trustees, executors, administrators, successors and permitted substitutes and assigns, including any persons taking part by way of novation;
- (f) **(person)**: a reference to a person includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (g) **(legislation)**: a reference to legislation includes its delegated legislation and a reference to such legislation or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
- (h) **(definitions)**: if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
- (i) **("includes")**: "includes" will be read as if followed by the phrase "(without limitation)";
- (j) **("or")**: the meaning of "or" will be that of the inclusive, being one, some or all of a number of possibilities;
- (k) **(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;
- (l) **("\$")**: a reference to "\$", AUD or dollar is to Australian currency;
- (m) **(time)**: a reference to time is a reference to time in Perth, Australia;
- (n) **(rights)**: a reference to a right includes any benefit, remedy, function, discretion, authority or power;
- (o) **(obligations and liabilities)**: a reference to an obligation or a liability assumed by, or a right conferred on, two or more persons binds or benefits them jointly and severally;
- (p) **("may")**: unless the State is expressly required to act reasonably in exercising a power, right or remedy, the term "may", when used in the context of a power, right or remedy exercisable by the State, means that the State can exercise that power,

right or remedy in its absolute and unfettered discretion and the State has no obligation to do so;

- (q) **(construction)**: where there is a reference to an Authority, institute or association or other body referred to in this Agreement which:
 - (i) is reconstituted, renamed or replaced or if its powers or functions are transferred to, or assumed by, another entity, this Agreement is deemed to refer to that other entity; or
 - (ii) ceases to exist, this Agreement is deemed to refer to that new entity which serves substantially the same purpose or object as the former entity;
- (r) **(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
- (s) **(contra proferentem rule not to apply)**: each provision will be interpreted without disadvantage to the party who (or whose representative) drafted or proffered that provision.

2 APPOINTMENT OF EXPERT

- (a) **(Parties to appoint Expert)**: The Parties appoint the Expert to determine the Matter in the manner and within the times set out in this Agreement and the Expert accepts the appointment on the basis set out in this Agreement.
- (b) **(Agreement of Conditions)**: The Parties agree that:
 - (i) the Expert will act as an expert and not as an arbitrator;
 - (ii) neither the determination of the Matter, nor the process required by this Agreement is an arbitration and any conference conducted during the determination is not a hearing conducted under any legislation or rules relating to any form of arbitration;
 - (iii) the rules of evidence do not apply to the determination; and
 - (iv) the Expert must conduct the determination of the Matter in accordance with the Rules including the Code of Conduct.
- (c) **(Independence and bias)**: If, at any time during the determination, the Expert becomes aware of circumstances that might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially, the Expert must inform the Parties immediately and, unless the Parties agree otherwise, terminate this Agreement.

3 CONFIDENTIALITY

- (a) Subject to Section 3(b) of this Agreement, all proceedings and submissions relating to the determination (including the fact that any step in the determination is occurring), and all documents prepared for the purposes of the determination (including the Expert's determination), must be kept confidential.
- (b) No such proceedings, submissions or documents, nor any other information relating to or arising out of the determination, may be divulged to any person except:
 - (i) with the prior written consent of both Parties;
 - (ii) as may be required by Law;
 - (iii) for the purpose of subsequent arbitration; or

- (iv) to the extent necessary to enforce the Expert's determination.

4 COSTS AND FEES

- (a) **(Parties joint and severally liable):** As between the Parties and the Expert, the Parties are jointly and severally liable for the payment of the Expert's fees and disbursements, calculated in accordance with Schedule 3 of this Agreement.
- (b) **(Calculation of costs and fees):** The Parties agree, subject to the terms of the Relevant Agreement, as between themselves that:
 - (i) they will each pay one half of the Expert's fees and disbursements, calculated in accordance with Schedule 3 of this Agreement; and
 - (ii) they will each bear their own costs of and incidental to the preparation of this Agreement and their participation in any determination.

5 EXCLUSION OF LIABILITY AND INDEMNITY

Except in the case of fraud, the Expert will not be liable to either Party for any act or omission by the Expert in the performance or purported performance of this Agreement. The Parties jointly and severally indemnify the Expert against all Claims or Liability in connection with any act or omission by the Expert (except fraud) in the performance or purported performance by the Expert of the terms of this Agreement.

6 CO-OPERATION OF THE PARTIES

Each Party agrees to take part in the determination in good faith and to comply with the reasonable requests and directions of the Expert in relation to the conduct of the determination.

7 GOVERNING LAW AND JURISDICTION

- (a) **(Governing law):** This Agreement is governed by, and must be construed according to, the Laws of Western Australia, Australia.
- (b) **(Jurisdiction):** Each Party irrevocably submits to the non-exclusive jurisdiction of the courts of Western Australia, and the courts competent to determine appeals from those aforementioned courts, with respect to any proceedings which may be brought in connection with this Agreement.

Schedule 1
The Matter

Schedule 2

Rules for Expert Determination Process

1 COMMENCEMENT

The expert determination process begins when the Expert accepts an appointment to determine the Matter in accordance with these Rules including the Code of Conduct.

2 CODE OF CONDUCT

- (a) The function of the Expert is to make a determination of the Matter in accordance with the Relevant Agreement, the Project Deed and this Agreement, including these Rules and the Code of Conduct.
- (b) The Expert must receive the written submissions and responses of the Parties in accordance with the procedures specified in these Rules and may require further information or documentation from the Parties which is reasonably necessary to determine the Matter.
- (c) The Expert must decide whether a conference is necessary to receive further information. The Expert must inform the Parties of the subject matter of any conference and may hear representations only on those matters during any such conference.
- (d) The Expert must disclose to both Parties all information and documents received.
- (e) If a Party fails to make a written submission, the Expert may continue with the process.
- (f) Subject to Section 4 in relation to conferences, meetings and discussions with the Expert must only take place in the presence of both Parties.

3 WRITTEN SUBMISSIONS

- (a) Within 5 Business Days after the date this expert determination process begins, the Party who gave notice under Clause 43.3 (Expert determination) of the Project Deed or the equivalent clause of the Relevant Agreement (**Party A**) must give the other Party and the Expert a written statement of the Matter referred for Expert determination, any agreed statement of facts and a written submission on the Matter in support of Party A's contentions.
- (b) Within 5 Business Days after the statement in Section 3(a) is served, the other Party must give Party A and the Expert a written response to Party A's submissions.
- (c) If the Expert considers it appropriate, Party A may reply in writing to the other Party's response in Section 3(b) within the time allowed by the Expert.
- (d) If the Expert decides further information or documentation is required for the determination of the Matter, the Expert may direct one or more Parties to provide such further submissions, information or documents as the Expert may require.

4 CONFERENCE

- (a) The Expert may, if he or she thinks appropriate, call a conference of the Parties. Unless the Parties agree otherwise, the conference will be held in Perth, Australia.
- (b) At least 5 Business Days before the conference, the Expert must inform the Parties of the date, venue and agenda for the conference.
- (c) The Parties must appear at the conference and may make submissions on the subject matter of the conference. If a Party fails to appear at a conference of which

that Party had been notified under Section 4(b), the Expert and the other Party may nevertheless proceed with the conference and the absence of that Party will not terminate or discontinue the expert determination process.

- (d) The Parties:
 - (i) may be accompanied at a conference by legal or other advisers; and
 - (ii) subject to the terms of this Agreement and the Relevant Agreement, will be bound by any procedural directions given by the Expert in relation to the expert determination process.
- (e) The conference must be held in private except to the extent that representatives of the Key Subcontractors will be permitted to attend on reasonable notice, where the Dispute may impact on their rights or liabilities under their Subcontracts.
- (f) If required by any Party, transcripts of the conference proceedings must be taken and made available to the Expert and the Parties.

5 GENERAL

- (a) In making a determination or calling or holding a conference, the Expert must proceed in accordance with the Relevant Agreement, this Agreement and these Rules.
- (b) Subject to Section 4(c), meetings and discussions with the Expert must only take place in the presence of both Parties.
- (c) Without limiting Section 2(c), the Expert must:
 - (i) inform the Parties of:
 - (A) any relationship or interest with the Parties or their respective Associates;
 - (B) any interest the Expert has in the Matter or Matters; and
 - (C) any circumstance which might reasonably be considered to adversely affect the Expert's capacity to act independently or impartially,immediately upon becoming aware of any such circumstance; and
 - (ii) upon making any disclosure under Section 5(c), unless and until the Parties agree otherwise, terminate the proceedings.

6 THE DETERMINATION

- (a) As soon as possible after receipt of the submissions or after any conference and, in any event not later than 30 days after the Expert's acceptance of appointment, the Expert must:
 - (i) determine the Matter between the Parties; and
 - (ii) notify the Parties of that determination.
- (b) The determination of the Expert must:
 - (i) be in writing stating the Expert's determination and giving reasons;
 - (ii) be made on the basis of the submissions (if any) of the Parties, the conference (if any) and the Expert's own expertise; and

- (iii) meet the requirements of the Relevant Agreement.
- (c) To the extent permitted by Law, the Expert's determination will be final and binding on the Parties unless a notice of dissatisfaction is given in accordance with Clause 43.3(n) (Expert determination) of the Project Deed or the equivalent clause of the Relevant Agreement].

7 COSTS

Security for costs of the Expert must be deposited by both Parties at the commencement of the Expert determination process in accordance with any direction of the Expert.

8 MODIFICATION

These Rules may be modified only by agreement of the Parties and, if the Expert has been appointed, the Expert.

9 PROPORTIONATE LIABILITY

Notwithstanding anything else, to the extent permissible by Law, the Expert will have no power to apply or to have regard to the provisions of any proportional liability legislation which might, in the absence of this provision, have applied to any dispute referred to Expert determination

Schedule 3 – Schedule of fees and disbursements

Signed as an agreement.

[Parties' details to be inserted]