**HAC Project Bank Account Pack**

**ANNEXURE A**

**Project Bank Account Trust Deed Poll**

|  |  |
| --- | --- |
| PBA Trust deed poll  [Name of Contractor] (Contractor)  [ABN/ACN] [number]  *[Insert actual legal name of the Contractor (not trading name) and ACN or ABN of the Contractor above]*  Housing Authority (Principal) | |
| PBA trust in relation to [Project]. Contract No. [insert] *[Insert name of Project and contract number above]* |  |
| [INSERT YEAR] | |

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**THIS DEED POLL** is made on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.  
*[The Principal will insert the date that the deed poll is signed.]*

BY:

1. [Name of Contractor] [ABN/ACN] [number] whose registered office is at [address] (the **Contractor**);  
   *[Insert actual legal name of the Contractor and ACN or ABN of the Contractor above]*;

IN FAVOUR OF:

1. **Housing Authority** being a body corporate continued pursuant to s.6 of the *Housing Act 1980* (WA) (the **Principal**); and
2. **Beneficiaries**.

RECITALS:

1. The Principal and the Contractor have entered into the Contract for the carrying out and completion of the Project.
2. The Contractor has engaged or will engage Subcontractors to carry out and complete parts of the Project.
3. The Principal will make payments to the Contractor as the Project progresses and these payments are to be held on trust by the Contractor for the Beneficiaries.
4. This deed poll establishes the terms of the trust for the benefit of the Beneficiaries.
5. The Principal is a party to this deed poll to accept the obligations placed on it and to benefit from its rights under this deed poll.

THE CONTRACTOR DECLARES AS FOLLOWS:

1. INTERPRETATION
   1. Definitions

The following definitions apply in this deed poll.

1. ABA File Format means the format referred to as "Australian Bankers' Association direct entry file format".
2. Authorised Representative means:
   1. in respect of the Principal and the Contractor, a person it notifies to the Bank (with a certified copy of that person's specimen signature) as being its authorised representative for the purposes of this deed poll where the Bank has no notice of revocation of that authority; and
   2. in respect of the Bank, a person whose title or acting title includes 'manager', 'director', 'executive', 'chief', 'head', 'counsel' or 'president', or a person notified to the other parties as being its authorised representative for the purposes of this deed poll.
3. Bank means a bank (operating in Australia).
4. Beneficiary means:
   1. the Contractor; and / or
   2. any Subcontractor from time-to-time,

and Beneficiaries means the Contractor and all Subcontractors from time-to-time.

1. Business Day means any day other than:
   1. a Saturday or a Sunday; or
   2. a gazetted holiday in Perth, Western Australia under the *Public and Bank Holidays Act 1972* (WA).

**Contract** means the contract between the Principal and the Contractor dated *[insert date of execution of the Contract or date of issue of the letter of award]* in respect of the Project.

Contractor Deposit Instruction means a payment instruction:

* 1. in ABA File Format; and
  2. which gives effect to the requirements set out in Schedule 5,

1. the purpose of which is to initiate deposits or transfers by the Contractor (in each case) from or to the Project Bank Account.
2. First PI has the meaning given in clause 5.8(e).
3. General PBA has the meaning given in clause 2.1.
4. Insolvency Event has the meaning given in clause 1.1.23 of the Contract.
5. Law means:
   1. Commonwealth, Western Australian and local government legislation, including statutes, ordinances, instruments, codes, requirements, regulations, by-laws and other subordinate legislation;
   2. common law; and
   3. principles of equity.
6. Opt-in Notice means a notice in the form contained in Schedule 7.
7. Opt-in Subcontractor means:
   * 1. any person that is contracted by the Contractor to:
        1. undertake work or services; or
        2. undertake work or services and supply goods or materials,

where the total aggregate value of such ‘work or services' or 'work or services and supply of goods or materials' in connection with the Project is less than $20,000 (GST inclusive); or

* + 1. any person that is a Supplier in connection with the Project,

where the person has expressly stated (to the Contractor) that they wish to participate in the trust created by this deed poll.

1. Original PI has the meaning given in clause 5.8(c).
2. Payment Claim means a claim for payment issued by the Contractor to the Principal in accordance with the Contract.
3. Payment Instruction means a valid payment instruction in relation to the operation of the Project Bank Account that is:
   1. authorised by the Contractor or an Authorised Representative of the Contractor acceptable to the Bank;
   2. issued by the Contractor pursuant to this deed poll, contemporaneously to the Principal and to the Bank where the Project Bank Account is held;
   3. in the form of a:
      1. Progress Payment Instruction;
      2. Retention Release Instruction; or
      3. Contractor Deposit Instruction; and
   4. subject to clause 5.5(b), irrevocable.
4. PBA Agreement means the agreement entered into between the Contractor, the Principal and the Bank which establishes the Project Bank Account.
5. PPI – Consolidated Allocation means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 1.
6. PPI – Contractor Allocation means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 2.
7. PPI – Retention Allocation means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 4.
8. PPI – Subcontractor Allocation means a payment instruction, in ABA File Format, which gives effect to the requirements set out in Schedule 3.
9. Progress Payment Instruction means a PPI - Consolidated Allocation or any one or more of a:
   1. PPI - Contractor Allocation;
   2. PPI - Subcontractor Allocation; or
   3. PPI - Retention Allocation,
10. the purpose of which is to originate a payment by the Principal into the Project Bank Account.
11. Project means [*insert a brief description of the Project*].
12. Project Bank Account means the bank account established as a trust account with a single Bank in accordance with clause 2.1.
13. Related Body Corporate has the meaning given to that term in the *Corporations Act 2001* (Cth).
14. Retention Amount means any moneys which the Contractor is entitled to retain from amounts due to Subcontractors pursuant to any express provision of a Subcontract permitting either a specified percentage amount or a specified amount to be retained from payments to be made under the Subcontract.
15. Retention PBA has the meaning given in clause 2.1.
16. Retention Release Event is the agreement or determination or occurrence of an event under a Subcontract consequent upon which retention moneys or any part thereof (retained pursuant to an express provision of that Subcontract) are to (as relevant) be released to the Subcontractor or paid to the Contractor.
17. Retention Release Instruction means a payment instruction:
    1. in ABA File Format; and
    2. which gives effect to the requirements set out in Schedule 6,
18. the purpose of which is to disburse Retention Amounts from the Project Bank Account.

Subcontract means a contract between the Contractor and a Subcontractor in respect of the Project or a part thereof.

1. Subcontractor means:
   1. a person who has been contracted by the Contractor to:
      * 1. undertake work or services; or
        2. undertake work or services and supply goods or materials,

where in either case the total aggregate value of such ‘work or services' or 'work or services and supply of goods or materials' in connection with the Project is equal to or greater than $20,000 (GST inclusive); and

* 1. any Opt-in Subcontractor that has signed an Opt-in Notice and given a copy of that notice to the Contractor.

To avoid doubt, a "Subcontractor" may be a Selected Subcontractor or a Nominated Subcontractor (in each case as defined in the Contract).

**Supplier** means a person who has been contracted to supply goods or materials to the Contractor in connection with the Project but who undertakes no design, fabrication, construction work or service of any kind in connection with the Project.

1. Term means the period from the date of this deed poll until the later of:
   1. such time as all moneys due to the Beneficiaries under the Contract and/or the Subcontracts have been paid in full in accordance with the terms of this deed poll; and
   2. the date that is 24 months from the date of termination of the Contract.
   3. Interpretation

Rules for interpreting this deed poll are set out in Schedule 8.

* 1. Deed poll

This document is a deed poll intended to operate for the benefit of the Principal and the Beneficiaries and is enforceable by the Principal and the Beneficiaries.

1. Account
   1. Establishing and status

The Contractor will:

* + 1. within 10 Business Days of the date of this deed poll, establish the Project Bank Account with a single Bank;
    2. procure that the Project Bank Account will be two separate accounts each being designated a trust account and each:
       1. will be a new interest bearing deposit account;
       2. can have no overdraft facility;
       3. will be an account which the Principal is able to view on-line;
       4. is to be electronically linked to the other; and
       5. is to be established on terms approved in writing by the Principal,

in each case as follows:

* + - 1. one account being for the purpose of receiving and disbursing payments to be made to or from the Contractor (such account being the **General PBA**); and
      2. the other account being for the purpose of receiving and disbursing Retention Amounts (such account being the **Retention PBA**).
  1. Charges and interest

The Contractor:

* + 1. declares it is liable for, and will pay from its own funds, any charges or costs associated with the establishment and operation of the Project Bank Account (including money transmission costs);
    2. may retain (for itself) any interest earned on moneys standing to the credit of the Project Bank Account subject to the limitations on withdrawal in clauses 3.7 and 5.9(c); and
    3. will ensure that the Project Bank Account does not become overdrawn.
  1. Retention obligation

The Contractor will procure that:

* + 1. all Retention Amounts are transferred to and held in the Retention PBA; and
    2. such Retention Amounts are only disbursed from the Retention PBA in accordance with this deed poll; and
    3. notwithstanding the termination, novation or amendment and novation of the Contract, each Retention Amount will be held in the Retention PBA until a Retention Release Event occurs for such Retention Amount under the relevant Subcontract.
  1. Transfer to new Bank
     1. If the Bank (**Retiring Bank**) with whom the Project Bank Account has been established pursuant to clause 2.1:
        1. resigns from its role as holder of the Project Bank Account;
        2. for any reason ceases to hold the Project Bank Account; and/or
        3. provides notice to the Contractor that it intends to resign or cease to hold the Project Bank Account,

the Contractor will procure with the agreement of the Principal that a new Bank assumes the role as holder of the Project Bank Account on the same terms as the account established pursuant to clause 2.1.

* + 1. If the Contractor fails to comply with clause 2.4(a) within 5 Business Days of the earliest to occur of the events in clause 2.4(a)(i), 2.4(a)(ii) or 2.4(a)(iii), the Principal may, but is not obliged to:
       1. nominate a Bank of its choosing to hold the Project Bank Account on terms substantially the same as the account established pursuant to clause 2.1; and
       2. issue a notice to the Retiring Bank directing that all moneys contemplated by this deed poll and held by the Retiring Bank be forthwith transferred to the new Bank,

and following such transfer the Project Bank Account will be transferred to that new Bank and this shall be the Project Bank Account for all purposes of this deed poll.

1. Trust
   1. Creation of trust
      1. The Contractor agrees to act as trustee of the trust created by this deed poll.
      2. The Contractor declares that it holds all moneys standing to the credit of the Project Bank Account on trust for the Beneficiaries upon the terms of and subject to this deed poll.
      3. The Contractor agrees to the Principal making a payment of $1 into the Project Bank Account. This payment will reduce the total amount owing to the Contractor by the Principal under the Contract by $1.
      4. The Contractor also declares that it holds its right to payment from the Principal under the Contract, to the extent that that right to payment reflects work performed by a Beneficiary from time to time, on trust for that Beneficiary upon the terms of and subject to this deed poll.
   2. Operation of the trust

Pending the application of moneys in the Project Bank Account pursuant to a Payment Instruction and subject to clause 3.6, all moneys deposited into and standing to the credit of the Project Bank Account and all choses-in-action connected therewith are held on trust for each Beneficiary in the amounts identified against their respective names in the relevant Payment Instruction.

* 1. Retention Amounts on trust

Where a relevant Payment Instruction identifies any amount as being a Retention Amount, a portion of moneys equating to the Retention Amount (as deposited into and standing to the credit of the Project Bank Account) is held on trust for the Subcontractor from whom it has been retained (pursuant to the Subcontract to which it is a party) as specified in the Payment Instruction, until a Retention Release Event occurs under the relevant Subcontract.

* 1. Beneficiaries bound
     1. This deed poll is made with the intention that the Beneficiaries are bound by it and entitled to its benefits.
     2. The extent of the rights and interests of a Beneficiary in moneys standing to the credit of the Project Bank Account from time to time is determined by relevant Payment Instructions.
     3. The Beneficiaries have no rights and/or interest in the moneys held in the Project Bank Account other than as a beneficiary of the moneys identified against their respective names in the relevant Payment Instruction.
     4. To the extent it is not identified in a relevant Payment Instruction or no amount is allocated to it in a relevant Payment Instruction, or it is not a beneficiary of a Retention Amount that is standing to the credit of the Retention PBA, a Beneficiary will have no interest in moneys deposited into (or standing to the credit of) the Project Bank Account.
  2. Relevant Payment Instructions

In clauses 3.2 to 3.4 a reference to "*relevant Payment Instruction*" means either:

* + 1. the PPI - Consolidated Allocation or any one or more of a:
       1. PPI - Contractor Allocation;
       2. PPI - Subcontractor Allocation; or
       3. PPI - Retention Allocation,

(if any) that most recently preceded the deposit of moneys by the Principal into the Project Bank Account;

* + 1. the Retention Release Instruction insofar as any Retention Amount is standing to the credit of the trust account for Retention Amounts that is linked to the Project Bank Account; or
    2. the Contractor Deposit Instruction that most recently preceded the deposit of moneys by the Contractor into the Project Bank Account.
  1. Shortfall of moneys
     1. If the total amount deposited by the Principal into the General PBA is less than the total amount identified in the relevant Progress Payment Instruction, the moneys standing to the credit of the General PBA are held on trust for each Beneficiary in the relevant proportion. The "relevant proportion" is the proportion that the amount identified in the relevant Payment Instruction against a Beneficiary's name bears to the total amount of moneys identified in the relevant Payment Instruction.
     2. To the extent that:
        1. the total amount due and owing from (or otherwise payable by) the Contractor to a Subcontractor in connection with the Project is greater than the amount identified in the relevant Progress Payment Instruction for that Subcontractor; and / or
        2. amounts are due and owing from the Contractor to a Subcontractor in connection with the Project and the amounts are not referrable to any previously issued Progress Payment Instruction,

the Contractor must pay into the General PBA any amount required to make payment of the total amount due to the Subcontractor. Any such payment into the General PBA must:

* + - 1. be accompanied by a Contractor Deposit Instruction; and
      2. be made in sufficient time so as to allow the Bank (where the Project Bank Account is held) to apply the relevant funds to that Subcontractor at the same time as acting on the relevant Progress Payment Instruction,

and the moneys deposited by such payment into the General PBA will be held on trust for the benefit of the relevant Subcontractor.

* 1. Acknowledgement of Contractor
     1. The Contractor acknowledges and agrees that, irrespective of any dispute or disputes which may arise out of or in connection with work performed by any Beneficiary, the Contractor may not withdraw any moneys from the Project Bank Account other than:
        1. interest in accordance with clause 5.9(c); and
        2. (in its capacity as a Beneficiary) pursuant to a Progress Payment Instruction or Retention Release Instruction.
     2. The Contractor warrants for the benefit of the Subcontractors and the Principal that, to the extent any party has a registered security interest over all or substantially all of the Contractor's assets (as identified under the "Personal Property Securities Register" maintained pursuant to the *Personal Property Securities Act 2009* (Cth)), that security interest will not extend to or cover the Project Bank Account or moneys paid into the Project Bank Account.

1. payment by principal
   * 1. The Principal will pay all moneys due (or otherwise payable) to the Contractor pursuant to the Contract into the General PBA as and when such moneys become due for payment (or are otherwise payable). Such payment shall be in accordance with, and subject to, the terms of the Contract.
     2. The Principal acknowledges and agrees that, on and from the payment of moneys by it into the General PBA in accordance with the Contract, it will (save in the case of manifest error) cease to have any rights and/or interest in such moneys.
2. Operation of the Bank Account
   1. No payment

The Contractor acknowledges and agrees that pursuant to the Contract, the Principal will not be obligated to pay any amount to the Contractor under the Contract until such time as the Project Bank Account has been established.

* 1. Other documents
     1. The Contractor will operate the Project Bank Account at all times in accordance with this deed poll, the PBA Agreement, and the Contract.
     2. If there is any conflict between this deed poll, a Payment Instruction, the PBA Agreement, and/or the Contract, the documents shall take precedence in the following order:
        1. this deed poll;
        2. the PBA Agreement;
        3. the Payment Instruction; and
        4. the Contract.
  2. Records

The Contractor will keep accurate, complete and up to date books of account and records of all transactions relating to the Project Bank Account, including but not limited to details of all payments out of the Project Bank Account.

* 1. On-line account

The Contractor will ensure that the Project Bank Account can be operated via an electronic or on-line facility operated by the Bank, and that:

* + 1. the Principal will have the ability to "view" the account electronically or on-line but (subject to clauses 5.10 and 10) will have no ability or authority to act on the account; and
    2. the Contractor's access details for such facility are only made available to those of its employees and/or representatives which need to know such information and that such employees and/or representatives are aware of the confidential nature of the access details, the Project Bank Account details and the Project Bank Account transactions.
  1. Authorisation to Bank
     1. The Contractor will ensure each Payment Instruction is issued to the Bank and is an instruction to the Bank to make (as relevant):
        1. subject to clause 5.5(b), in the case of a Progress Payment Instruction, any transfers to the Retention PBA, or payments to a Beneficiary from the General PBA, in each case in accordance with the Progress Payment Instruction, not less than 20 Business Days from issue of the associated Payment Claim;
        2. in the case of a Retention Release Instruction, or any transfers from the Retention PBA to any Beneficiary, in each case in accordance with the Retention Instruction, as soon as practicable; and
        3. in the case of a Contractor Deposit Instruction:
           1. any transfers to the Retention PBA or payments to a Beneficiary from the Project Bank Account, in each case in accordance with the Contractor Deposit Instruction, within three days from the issue of the Contractor Deposit Instruction; or
           2. as directed by the Principal pursuant to this deed poll.
     2. The Contractor will forthwith issue a revised Payment Instruction if any previously issued Payment Instruction is invalid pursuant to the PBA Agreement and it is agreed between the Contractor and the Principal that the Payment instructions:
        1. contained errors (including arithmetic errors); or
        2. failed to comply with the requirements of the Contract, the PBA Agreement or this deed poll.

Any such revised Payment Instruction must advise the Bank of the invalidity and instruct the Bank to make payment within 20 Business Days from issue of the associated Payment Claim.

* 1. Informing Subcontractors

The Contractor will promptly inform each Subcontractor of the amounts which are to be paid to them from the Project Bank Account pursuant to a relevant Payment Instruction and the date on which the Subcontractor can expect to receive such payment. The Contractor will supply such information on the same day as the Payment Instruction is supplied to the Bank authorising payments out of the Project Bank Account.

* 1. Related Bodies Corporate

The Contractor acknowledges and agrees that a Payment Instruction may only include an entity that is a Related Body Corporate of the Contractor if and to the extent that entity:

* + 1. is a bona fide provider of construction services to the Contractor in the ordinary course of its business; and
    2. is not a company:
       1. whose primary or substantial purpose is to appoint subcontractors who might otherwise be Subcontractors;
       2. that discharges its obligations solely or primarily through the appointment of subcontractors; or
       3. that would (or is reasonably likely to) use all or substantially all of the moneys it would receive from the Project Bank Account to discharge liabilities to subcontractors.
  1. General rules

The Contractor:

* + 1. acknowledges and agrees that without prejudice to clause 5.5(a)(i), all moneys deposited into the General PBA are to be disbursed from it to other accounts (including pursuant to clause 5.8(b)) as soon as reasonably practicable after funds have been deposited into the General PBA;
    2. acknowledges and agrees that Retention Amounts are to be transferred to the Retention PBA pursuant to clause 2.3 and disbursed in accordance with clause 5.11;
    3. will not issue a Payment Instruction (**Original PI**) which specifies a date into the future for the Bank to effect the transaction(s) contemplated in that instruction, if a different Payment Instruction will be (or is likely to be) issued in the intervening period that is prior to the Bank putting into effect the transactions in the Original PI (unless that different Payment Instruction complies with clause 5.8(d)(i));
    4. acknowledges and agrees that if a Progress Payment Instruction has been issued which specifies a date for the Bank to effect the transaction(s) contemplated in that instruction, the Contractor must not issue a Contractor Deposit Instruction with a processing date that is:
       1. the same date as the processing date of such Progress Payment Instruction; or
       2. the day before or day after the processing date of such Progress Payment Instruction; and
    5. acknowledges and agrees that:
       1. the disbursement or application of funds deposited pursuant to a Contractor Deposit Instruction, must equal the amount deposited pursuant to that Contractor Deposit Instruction; and
       2. if at any time:
          1. there are monies standing to the credit of the General PBA;
          2. a Payment Instruction has been issued (the **First PI**); and
          3. the Bank has not actioned the First PI through the disbursement of moneys,

the Contractor must not issue any other Payment Instruction (other than a Retention Release Instruction) with:

* + - * 1. the same processing date as the First PI; or
        2. an earlier processing date than the First PI.
  1. Account transactions
     1. All payments to the Beneficiaries from the Project Bank Account will be made by bank transfer. The Contractor will inform the Principal of the details of the Project Bank Account so as to (amongst other things) facilitate payment by the Principal into the General PBA. The Contractor will keep the relevant bank account details of each Subcontractor up to date at all times.
     2. The Contractor acknowledges that failure to supply its account details may result in moneys not being paid to it and that the Principal does not have any liability for such failure.
     3. Any interest paid by the Bank in respect of the moneys held in the Project Bank Account shall accrue to the benefit of and become the Contractors and may be withdrawn by the Contractor and transferred into an account in the name of the Contractor (other than the Project Bank Account) at any time.
  2. Authority to direct
  3. The Contractor irrevocably appoints the Principal as its agent for the purpose of preparing a Payment Instruction and issuing a Payment Instruction in relation to the Project Bank Account where the Contract is terminated in accordance with its terms. Disbursement of Retention Amounts
     1. Forthwith upon the occurrence of a Retention Release Event, the Contractor shall duly complete, execute and contemporaneously issue to the Principal and to the Bank with whom the Project Bank Account is held, a Retention Release Instruction.
     2. The Retention Release Instruction issued pursuant to clause 5.11(a) shall:
        1. identify the dollar value of the Retention Amount and to whom it must be paid (in each case consistent with the Subcontract); and
        2. be determinative of the beneficial interest in the Retention Amount the subject of that instruction (the identified recipient of the Retention Amount being the Beneficiary with the beneficial interest).
     3. The beneficial interest in the Retention Amount identified in any Payment Instruction executed and delivered pursuant to clause 5.11(a) shall (on and from the date and time of receipt of that Payment Instruction by the relevant Bank) be as set out in that Payment Instruction.
  4. Forms of Payment Instruction
     1. It is acknowledged and agreed that:
        1. the information set out in the "Payment Instruction" schedules, being Schedules 1 to 6 of this deed poll, reflect the intention of the Contractor and the Principal and describe the operation of the trust and the intended movement of moneys between the Principal, the Contractor and the Subcontractors;
        2. cash transfers will only be effected through the completion and electronic submission of instructions in ABA File Format; and
        3. the Contractor and the Principal will agree a protocol or convention for completing the form and substance of an ABA File Format such that it gives effect to the relevant Payment Instruction and:
           1. no Payment Instruction will be issued by the Contractor unless and until such agreement has been reached; and
           2. Payment Instructions must only be issued by the Contractor if they comply with the protocol or convention that has been agreed (in writing) by the Principal.
     2. A reference in this deed poll to:
        1. a Payment Instruction being a "Progress Payment Instruction, Retention Release Instruction or Contractor Deposit Instruction (as the case may be)"; or
        2. a Payment Instruction that complies with a schedule,

or any reference with same or similar meaning shall (for the purposes of this deed poll) be deemed to be a reference to the Payment Instruction (of any kind) given in ABA File Format as agreed between the Principal and the Contractor pursuant to clause 5.12(a).

1. Subcontractors
   1. Opt-in Subcontractors
      1. The Contractor will ensure that:
         1. any Opt-in Subcontractor who wishes to become a 'Subcontractor' is promptly provided with the form of an Opt-In Notice (which must be within seven calendar days of the Opt-In Subcontractor expressly stating to the Contractor that they wish to participate in the trust created by this deed poll); and
         2. copies of all duly signed Opt-in Notices received by it are forthwith supplied to the Principal.
      2. Upon the supply of a duly signed Opt-in Notice to the Contractor, the Opt-in Subcontractor that has signed that notice will be deemed a Subcontractor (on and from that point) for all purposes of this deed poll and shall be paid via the Project Bank Account pursuant to the operation of this deed poll.
   2. Removal of Subcontractor
      1. If, prior to the expiry of the Term, a Subcontractor ceases to be involved in the Project for whatever reason (including but not limited to the termination of its Subcontract) (**Retiring Subcontractor**), the Contractor shall forthwith duly complete, execute and issue a Retention Release Instruction pursuant to which the Contractor shall ensure payment out of the Project Bank Account of (as relevant):
         1. Retention Amounts (if any) held on trust for the benefit of the Retiring Subcontractor, in accordance with the terms of the Subcontract; or
         2. moneys (if any) held on trust for the benefit of the Contractor consequent upon the occurrence of a Retention Release Event occurring in relation to the Retiring Subcontractor.
      2. The Retention Release Instruction issued pursuant to clause 6.2(a) will direct payment to the Retiring Subcontractor unless and to the extent the Contractor is entitled to the benefit of that Retention Amount (or any part of it).
      3. On payment of all moneys due to it from the Project Bank Account in accordance with clause 6.2(a) above, the Retiring Subcontractor shall cease to be a Beneficiary and to have any further rights and/or interests in the Project Bank Account and any funds standing to the credit of it.
2. Confidentiality

Information that the Contractor receives in the performance of its obligations under this deed poll will be kept confidential except where:

* + 1. the information is public knowledge (but not because of a breach of this deed poll);
    2. disclosure is required by Law or a regulatory body (including a relevant stock exchange);
    3. disclosure is made to a person who must know for the purposes of this deed poll (which, to avoid doubt, includes the Principal and the Bank where the Project Bank Account is held); or
    4. disclosure is made to a legal advisor or financial advisor who has agreed to keep the information confidential.

1. Assignment

The Contractor will not assign or otherwise transfer any of its rights or obligations under this deed poll without the prior written consent of the Principal.

1. Termination
   * 1. This deed poll shall continue for the Term, subject to early termination in accordance with clause 9(c) below.
     2. The Contractor must ensure that the Project Bank Account is maintained for the Term.
     3. This deed poll shall immediately terminate if:
        1. the Contractor and the Principal agree in writing that this deed poll should terminate; or
        2. the Contractor's employment under the Contract terminates and all moneys, including Retention Amounts, have been paid out from the Project Bank Account in accordance with the terms of this deed poll. To avoid doubt, notwithstanding the termination of the Contractor’s employment under the Contract, this deed poll will not terminate if any Retention Amounts remain in the Retention PBA.

An amendment and novation of the Contract is not a termination for the purposes of this clause 9(c).

* + 1. On termination of this deed poll the Contractor will undertake to ensure all moneys held on trust for the benefit of the Beneficiaries and held in the Project Bank Account are promptly paid to the relevant Beneficiary in accordance with the terms of this deed poll (less any outstanding bank charges and costs as referred to in clause 2.2).
    2. The trust established pursuant to this deed poll cannot be terminated without the consent of the Principal and the Contractor.

1. Removal of Trustee
   * 1. Without prejudice to clause 5.10, if:
        1. the Principal terminates or purports to terminate the Contract; or
        2. except to the extent that such right is stayed by reason of the operation of the ipso facto provisions in sections 415D, 415F,434J, 434L, 451E or 451G of the *Corporations Act 2001* (Cth) an Insolvency Event occurs in relation to the Contractor, or where the Contractor comprises two or more persons, to any one of those persons,

then, upon the issue of notice to the Contractor issued by the Principal stating that the Principal is exercising its rights to remove the trustee in accordance with this clause 10:

* + - 1. the Contractor will immediately and without any further action being required, cease to be the trustee;
      2. the Contractor will immediately cease to operate the Project Bank Account and (unless expressly requested otherwise by the Principal) will take no further steps to exercise any rights as account holder of that account; and
      3. the Principal will nominate and appoint another person as the trustee of the Project Bank Account on the terms of this deed poll.
    1. The Principal shall ensure that the person so nominated must calculate the interest accrued upon the moneys standing to the credit of the Project Bank Account to the date that the Contractor ceased to be trustee of the Project Bank Account and will pay this amount to the Contractor.
    2. If the Contractor ceases to be trustee of the Project Bank Account it must do all such acts and do all such things as the Principal may deem necessary for the effectual operation of clauses 10(a) and 10(b).
    3. Without limiting clause 10(c), the Contractor appoints the Principal as the true and lawful attorney of the Contractor with full power and authority to execute all such documents as may be necessary to give effect to the operation of clauses 10(a), 10(b) and 10(c) and thereafter the person nominated by the Principal under this clause 10 as the new trustee will administer the Project Bank Account in accordance with the terms of this deed poll.

1. No liability
   * 1. Neither the Principal, nor the Superintendent, nor the Superintendent's Representative shall:
        1. have any duty of care to any Subcontractor under or in relation to this deed poll;
        2. have any liability to the Subcontractors (whether in contract, tort, or under any other legal theory) under or in relation to this deed poll;
        3. have any liability to the Beneficiaries for any act or omission or breach of any obligation by any party under the Subcontracts;
        4. have any liability to the Subcontractors for any act or omission or breach of any obligation by any party under the Contract; or
        5. have any obligations to make payment into the Project Bank Account or to any Beneficiary or third party (except insofar as the destination of the payment must be the Project Bank Account).
     2. In this clause 11:
        1. the terms **Superintendent** and **Superintendent's Representative** shall have the meanings given to them under the Contract; and
        2. a reference to the Principal, the Superintendent and Superintendent's Representative shall be deemed to include each of their respective employees and agents.
2. General
   1. Notices
      1. (**Form of Notices**) Each communication (including each notice, consent, approval, request and demand) in accordance with or in connection with this deed poll:
         1. must be in writing; and
         2. must be signed by the party making it or (on that party's behalf) by the solicitor for, or any attorney, director, secretary or authorised agent of, that party.
      2. (**Procedure for sending notices**) All notices must be:
         1. delivered or posted by prepaid post to the address; or
         2. sent by email in the form of a .pdf file letter (or such other form agreed by the Principal) to the email address,

of the addressee set out below (or as otherwise notified by that party to each other party from time to time):

* + - 1. the **Contractor**:

[**Insert postal and email address of Contractor**

* + - 1. the **Principal**:

[**Insert postal and email address of the Principal**].

* + 1. (**Date of receipt**) Subject to clause 12.1(d), a notice is taken to be received by the addressee:
       1. in the case of prepaid post, on the sixth Business Day after the date of posting to an address within Australia, and on the seventh Business Day after the date of posting by airmail to an address outside Australia;
       2. in the case of email, when the sender receives confirmation on its server that the message has been transmitted; and
       3. in the case of delivery by hand, on delivery.
    2. (**Next Business Day**) If the communication is taken to be received on a day which is not a Business Day or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.
    3. (**Notices sent by email**) In connection with notices sent by email, 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 12.1. Any text in the body of the email or the subject line will not form part of the notice.
  1. Alterations

This deed poll cannot be varied, modified, or altered in any way unless it has the prior written consent of the Principal and of each Beneficiary in existence at the time of the intended variation, modification or alteration.

* 1. No fettering

Nothing contained in this deed poll or contemplated by this deed poll has the effect of constraining the Principal or placing any fetter on the Principal's discretion to exercise or not to exercise any of its statutory rights, duties, powers or functions.

* 1. Costs

Except as otherwise provided in this deed poll, each of the Contractor and the Principal agrees to:

* + 1. pay its own costs and expenses in connection with negotiating, preparing, executing and performing this deed poll; and
    2. perform its obligations in accordance with this deed poll at its own cost.
  1. Stamp duty

The Contractor agrees to pay any stamp duty, duties or other taxes of a similar nature (including fines, penalties and interest) in connection with this deed poll or any transaction contemplated by this deed poll[[1]](#footnote-1).

* 1. Clauses to survive termination
     1. All provisions of this deed poll which expressly or by implication from their nature are intended to survive termination, completion or expiration of this deed poll will survive such termination, completion or expiration, including any provision which is in connection with:
        1. confidentiality or privacy; and
        2. any right or obligation arising on termination of this deed poll.
     2. Nothing in this clause 12.6 prevents any other provision of this deed poll, as a matter of interpretation, also surviving the termination of this deed poll.
     3. No right or obligation of any party will merge on completion of any transaction in accordance with this deed poll. All rights and obligations in accordance with this deed poll survive the execution and delivery of any transfer or other agreement which implements any transaction in accordance with this deed poll.
  2. Counterparts

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

* 1. Entire agreement

This deed poll constitutes the entire agreement between the Contractor and the Principal in connection with its subject matter and supersedes all previous agreements or understandings between the Principal and the Contractor in connection with its subject matter.

* 1. Further action

The Contractor agrees to do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this deed poll and any transactions contemplated by it.

* 1. Severability

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

* 1. Waiver and estoppel
     1. Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy under any Law or under this deed poll by any 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 this deed poll.
     2. A waiver given by any party under this deed poll is only effective and binding on that party if it is given or confirmed in writing by that party.
     3. No waiver of a breach of a term of this deed poll operates as a waiver of any other breach of that term or of a breach of any other term of this deed poll.
     4. Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power, or remedy under any Law or under this deed poll does not preclude, or operate as an estoppel of any form of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided under any Law or under this deed poll.
  2. Relationship
     1. No duty of any kind (whether to act with good faith, to exercise a duty of care or otherwise) is assumed by (or to be implied on) the Principal in connection with this deed poll or any matter arising out of or in connection with this deed poll.
     2. Neither this deed poll nor the relationship created by it, is intended to create, and will not be construed as creating, any partnership or joint venture as between the Principal, the Contractor and/or the Subcontractors.
     3. The Contractor must not act as or represent itself to be the servant or agent of the Principal.
  3. Joint and several liability

If any Beneficiary consists of more than one person, then the rights and obligations of such persons in accordance with this deed poll are joint and several as between those persons.

* 1. Enforcement

This deed poll may be enforced by any Beneficiary, including pursuant to section 11(2) of the *Property Law Act 1969* (WA).

* 1. Governing law and jurisdiction

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

**EXECUTED** as a deed poll.

Each person who executes this deed poll 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.

|  |  |  |
| --- | --- | --- |
| executed as a deed poll by [NAME OF CONTRACTOR] in accordance with Section 127 of the *Corporations Act 2001*  (Cth): |  |  |
|  |  |  |
| Signature of director |  | Signature of director/company secretary |
|  |  |  |
| Name |  | Name |

The **COMMON SEAL** of the )

**HOUSING AUTHORITY** )

was hereunto affixed )

in the presence of: )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature of Authorised Officer Signature of Authorised Officer

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name of Authorised Officer Name of Authorised Officer

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Position of Authorised Officer Position of Authorised Officer

**OR**\*[[2]](#footnote-2)

Signed for and on behalf of )

**HOUSING AUTHORITY** )

by an authorised officer: )

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Signature of Authorised Officer

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Name of Authorised Officer

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Position of Authorised Officer

\* Delete the execution clause which does not apply.



PPI – Consolidated Allocation

For the purposes of the PBA Agreement, this Schedule 1 establishes the minimum requirements of a 'PPI – Consolidated Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Consolidated Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Consolidated Allocation.
3. Identify the disbursements in paragraph 2 as follows:
   1. amounts to be disbursed from the General PBA to the Contractor; the amount to be disbursed to the Contractor; and the Contractor's account details;
   2. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details; and
   3. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the PPI – Consolidated Allocation.
5. Be in a form acceptable to the Bank and the Principal.

PPI – Contractor Allocation

For the purposes of the PBA Agreement, this Schedule 2 establishes the minimum requirements of a 'PPI – Contractor Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Contractor Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Contractor Allocation.
3. Identify the disbursements in paragraph 2 as follows:
   1. amounts to be disbursed from the General PBA to the Contractor; the amount to be disbursed to the Contractor; and the Contractor's account details.
4. Specify the date for actioning the PPI – Contractor Allocation.
5. Be in a form acceptable to the Bank and the Principal.

PPI – Subcontractor Allocation

For the purposes of the PBA Agreement, this Schedule 3 establishes the minimum requirements of a 'PPI – Subcontractor Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Subcontractor Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Principal into the General PBA within 9 days of the issue of the PPI – Subcontractor Allocation.
3. Identify the disbursements in paragraph 2 as follows:
   1. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details.
4. Specify the date for actioning the PPI – Subcontractor Allocation.
5. Be in a form acceptable to the Bank and the Principal.

PPI – Retention Allocation

For the purposes of the PBA Agreement, this Schedule 4 establishes the minimum requirements of a 'PPI – Retention Allocation' that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

The PPI – Retention Allocation must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to transfer to the Retention PBA the Retention Amount(s) identified in the PPI - Retention Allocation which is / are to be held on trust pending receipt of a Retention Release Instruction within 9 days of the issue of the PPI – Retention Allocation.
3. Identify the transfer in paragraph 2 as follows:
   1. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and
   2. the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the PPI – Retention Allocation.
5. Be in a form acceptable to the Bank and the Principal.

Contractor Deposit Instruction

For the purposes of the PBA Agreement, this Schedule 5 establishes the minimum requirements of a Contractor Deposit Instruction that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

A Contractor Deposit Instruction must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse an amount of money that totals (in aggregate) the amount to be paid by the Contractor into the General PBA within 3 days of the issue of the Contractor Deposit Instruction.
3. Identify the disbursements in paragraph 2 as follows:
   1. amounts to be disbursed from the General PBA to each Subcontractor; the amount to be deposited to the Subcontractor; and the Subcontractor's account details; and
   2. amounts to be disbursed from the General PBA to the Retention PBA (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); and the amount to be transferred in relation to that Subcontractor.
4. Specify the date for actioning the Contractor Deposit Instruction.
5. Be in a form acceptable to the Bank and the Principal.

Retention Release Instruction

For the purposes of the PBA Agreement, this Schedule 6 establishes the minimum requirements of a Retention Release Instruction that are required to be given effect through an instruction in ABA File Format, or in an electronic format from an online banking system, and is to be read and construed subject to clause 1.4 of the PBA Agreement.

A Retention Release Instruction must:

1. Contain a reference or unique identifier which links it to the "PBA Agreement" to which this schedule relates.
2. Be issued as an irrevocable and unconditional direction to the Bank to disburse Retention Amounts from the Retention PBA, to the account(s) specified.
3. Identify the disbursements in paragraph 2 as follows:
   1. amounts to be disbursed from the Retention PBA to each Subcontractor (using a unique identifier for the name of the Subcontractor to which the Retention Amount relates); the amount to be transferred in relation to that Subcontractor; and the Subcontractor's account details);
   2. amounts to be disbursed from the Retention PBA to the Contractor (using a unique identifier for the name of the Contractor); the amount to be transferred in relation to the Contractor; and the Contractor's account details; and
   3. the balance of Retention Amounts in the Retention PBA.
4. Specify the date for actioning the Retention Release Instruction.
5. Be in a form acceptable to the Bank and the Principal.

Form of Opt-in Notice

To:  **Housing Authority** being a body corporate pursuant to s.6 of the *Housing Act 1980* (WA) (the **Principal**)

and

[**the Contractor**] (the **Contractor**),

*[Insert full legal name and ACN or ABN of the Contractor]*

From: **[Opt-in Subcontractor**] (the **Opt-in Subcontractor**)

*[Insert full legal name and ACN or ABN of the Opt-in Subcontractor.]*

Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

*[Insert the date that the Opt-In Subcontractor signs the notice.]*

**PBA Trust Deed Poll in relation to [Contract] (PBA Trust Deed Poll)***[Insert name of Project.]*

We refer to the PBA Trust Deed Poll. Terms used in this notice have the same meaning given in the PBA Trust Deed Poll. This is an Opt-in Notice.

The Opt-in Subcontractor has been contracted by the Contractor in relation to the Project. On and from the date of this notice, the Opt-in Subcontractor agrees to be a Subcontractor under (and for the purposes of) the PBA Trust Deed Poll and to be bound by (and benefit from) all of the terms of the PBA Trust Deed Poll as a Beneficiary (as that term is defined in the PBA Trust Deed Poll).

Our bank account details are as follows:

|  |  |
| --- | --- |
| Name | [Account Name] |
| Short form name | [Opt-in Subcontractor] |
| ABN | [Opt-in Subcontractor ABN] |
| Bank Details | BSB: [Opt-in Subcontractor BSB]  Account number: [Opt-in Subcontractor Account number] |

*[Insert the details of the Opt-in Subcontractor's bank account.]*

This notice is governed by the Laws of Western Australia.

|  |  |  |
| --- | --- | --- |
| SIGNED by [Name of Opt In Subcontractor] acting through a duly authorised representative |  |  |
|  |  |  |
| Signature of duly authorised representative of the Opt-in Subcontractor |  | Name of duly authorised representative of the Opt-in Subcontractor |

Interpretation

In this deed poll, except where the context otherwise requires:

* + 1. the singular includes the plural and vice versa, and a gender includes other genders;
    2. another grammatical form of a defined word or expression has a corresponding meaning;
    3. a reference to a clause, paragraph, or schedule is to a clause or paragraph of, or schedule to, this deed poll, and a reference to this deed poll includes any schedule;
    4. a reference to a document or instrument includes the document or instrument as novated, altered, amended, supplemented or replaced from time to time;
    5. a reference to **A$**, **$A**, **dollar** or **$** is to Australian currency;
    6. a reference to time is to Perth, Western Australia time;
    7. a reference to a party includes the party's executors, administrators, successors and permitted assigns and substitutes;
    8. a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
    9. a reference to a statute, ordinance, code or other Law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
    10. the meaning of general words is not limited by specific examples introduced by **including**, **for example** or similar expressions;
    11. any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
    12. any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
    13. a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this deed poll or any part of it;
    14. a reference to "**contract**" means a legal, valid and binding agreement (whether in writing or not) and a reference to "**contracted**" means entered into a legal, valid and binding agreement (whether in writing or not);
    15. a reference to "**being the ABA File Format**" means the format approved pursuant to clause 5.12;
    16. if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day; and
    17. headings are for ease of reference only and do not affect interpretation.

1. No stamp duty is currently payable on this deed or transactions contemplated by it. [↑](#footnote-ref-1)
2. Delete the execution clause that does not apply. If in doubt seek advice from LLS as to which execution clause should be used. [↑](#footnote-ref-2)