



CONSTRUCTION RELATED CONSULTANCY AGREEMENT

Date

Parties

AUSTRALIAN CAPITAL TERRITORY

**KARINA HARRIS & NEIL HOBBS
T/A HARRIS HOBBS LANDSCAPES
ABN 49 968 027 249**

**COMMUNITY AND NEIGHBOURHOOD
PRIORITIES – PLAYSPLACE REVIEW –
NARRABUNDAH**

**CONTRACT NUMBER
2019.30689.110.20**

Prepared by

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PARTIES: **AUSTRALIAN CAPITAL TERRITORY**, the body politic established by section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Territory**) represented by the Transport Canberra and City Services Directorate.

KARINA HARRIS & NEIL HOBBS t/a HARRIS HOBBS LANDSCAPES ABN 49 968 027 249 of Canberra in the Australian Capital Territory 2600 (**Consultant**).

BACKGROUND

- A. The Territory has undertaken a procurement process and has selected the Consultant to provide the Services.

- B. The Territory has agreed to purchase and the Consultant has agreed to provide the Services in accordance with the provisions of this Agreement.

IT IS AGREED by the parties as follows.

1. Interpretation

1.1 Definitions

The following definitions apply in this Agreement, unless the context otherwise requires.

- Business Day** any day other than a Saturday, Sunday, public holiday in the Australian Capital Territory or the 27th, 28th, 29th, 30th or 31st December.

- Confidential Text** any text of this Agreement that, for the purposes of the Procurement Act, either party proposes should not be published and which is specified in **Item 7 Schedule 1**.

- Consultant Material** all material owned by the Consultant and used for the purpose of providing the Services, including documents, information and data stored by any means.

- Contract Material** all material created, written or otherwise brought into existence as part of, or for the purpose of performing the Services including all reports (whether in draft or final form), documents, information and data stored by any means.

- Contract Officers** in relation to each party, the representatives whose names and contact details are specified in **Item 1 Schedule 1**, or as notified from time to time by one party to the other.

Contract Price	the amounts specified in, or calculated in accordance with, Item 3 Schedule 1 .
Expert	an independent expert engaged to conduct an Expert Determination.
Expert Determination	determination of a Dispute by an Expert under clause 12 .
GST	has the same meaning as in the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
Information Privacy Act	the <i>Information Privacy Act 2014</i> (ACT).
Insolvency Event	<p>(1) in respect of a natural person:</p> <p>(a) any orders, agreements or arrangements are made in respect of the affairs of the person in accordance with the <i>Bankruptcy Act 1966</i> (Cth); or</p> <p>(b) in the reasonable opinion of the Territory the person is likely to be declared bankrupt or lose control of the management of their financial affairs; or</p> <p>(2) in respect of all other entities:</p> <p>(a) any of the events listed in sub-sections 459C(2)(a) to (f) of the <i>Corporations Act 2001</i> (Cth) occur in respect of the entity; or</p> <p>(b) any other event occurs which, in the reasonable opinion of the Territory is likely to result, or has resulted, in the:</p> <p>(i) insolvency;</p> <p>(ii) winding up; or</p> <p>(iii) appointment of a controller (as that term is defined in the <i>Corporations Act 2001</i> (Cth)) in respect of part or all of the property,</p> <p>of the entity.</p>

For the purpose of subparagraph (2)(b), subsections 459C(2)(a) to (f) *Corporations Act 2001*(Cth) are to be read as if applying to all incorporated entities.

Invoice an invoice that:

- (1) if GST is payable in respect of the provision of the Services, is a valid tax invoice for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth);
- (2) clearly sets out details of the Services provided and of the amount that is due for payment, is correctly calculated and is in respect of Services that have been performed in accordance with this Agreement;
- (3) is accompanied by any other details or reports required under this Agreement; and
- (4) is rendered at the times specified in **Item 3 Schedule 1** (if any) and addressed to the Territory's Contract Officer.

Personal Information

is personal information as defined in section 8 of the Information Privacy Act, namely, information or an opinion about an identified individual or an individual who is reasonably identifiable:

- (1) whether the information is true or not; and
- (2) whether the information or opinion is recorded in a material form or not,

but does not include personal health information (as defined in the *Health Records (Privacy and Access) Act 1997* (ACT)) about the individual.

Prescribed Insurer

an insurer that is authorised by the Australian Prudential Regulation Authority to conduct new or renewal insurance business in Australia and rated at AA or better by Standard & Poor's.

Procurement Act

the *Government Procurement Act 2001* (ACT).

Program

a program for the performance and completion of the Services required to be submitted by the Consultant under **clause 2.2**.

Services

the services described in **Schedule 2**.

Special Condition

any provision set out in **Schedule 3**.

Specified Personnel	any person named in Item 4 Schedule 1 , or any other employee or agent of the Consultant, who is approved by the Territory from time to time for the purpose of clause 6 .
Term	the term specified in Item 2 Schedule 1 , and if extended, the initial term and the extended term.
Territory	when used: <ul style="list-style-type: none"> (1) in a geographical sense, the Australian Capital Territory; and (2) in any other sense, the body politic established by section 7 of the <i>Australian Capital Territory (Self-Government) Act 1988</i> (Cth).
Territory Information	the kind of information that: <ul style="list-style-type: none"> (1) is or relates to documents, submissions, consultations, policies, strategies, practices and procedures of the Territory which are by their nature confidential; (2) is notified (whether in writing or not) by the Territory to the Consultant as being confidential; (3) is specified in Item 6 Schedule 1; or (4) is Personal Information, but does not include information that: <ul style="list-style-type: none"> (5) is or becomes public knowledge other than by breach of this Agreement; (6) has been independently developed or acquired by the Consultant; or (7) has been notified by the Territory to the Consultant as not being confidential.
Territory Material	any material provided by the Territory to the Consultant for the purposes of this Agreement including documents, equipment, information and data stored by any means.
TPPs	the Territory Privacy Principles provided for in section 13 and set out in Schedule 1 of the Information Privacy Act.

TPP Code	a code of practice about information privacy which, having regard to section 21(1) and (3) of the Information Privacy Act, binds an agency that engages the Consultant in the provision of the Services.
Variation	any change to the Services (including any increase or addition to, or decrease or omission from).
WHS Legislation	<ol style="list-style-type: none"> (1) the <i>Work Health and Safety Act 2011</i> (ACT); (2) the <i>Work Health and Safety Regulation 2011</i> (ACT); (3) all instruments issued under the <i>Work Health and Safety Act 2011</i> or the <i>Work Health and Safety Regulation 2011</i>; (4) all laws that replace the above laws; and (5) all other laws applicable in the Australian Capital Territory dealing with work health and safety matters.

1.2 General

In this Agreement, unless a contrary intention is expressed:

- (1) references to “Consultant” include any employees, agents or subcontractors of the Consultant;
- (2) references to legislation or to provisions in legislation include references to amendments or re-enactments of them and to all regulations and instruments issued under the legislation;
- (3) words in the singular include the plural and vice versa;
- (4) headings are for convenience only and do not affect the construction or interpretation of this Agreement;
- (5) an obligation imposed on more than one person binds them jointly and severally; and
- (6) the word “include” and any derivation is not to be construed as a word of limitation.

2. Services

2.1 Standard of care

The Consultant must perform the Services in accordance with the provisions of this Agreement and to a standard of care, skill and diligence expected of a person who regularly

acts in the capacity in which the Consultant is engaged.

2.2 Program

The Consultant must, if required under **Item 11 Schedule 1**, within the time specified in **Item 11 Schedule 1**, submit to the Territory (in electronic and/or hard copy form as requested by the Territory) a Program that at a minimum complies with the requirements in **Item 1 Schedule 2**.

2.3 Alterations to approved documents

The Consultant must not make any substantial alteration to, addition to, or omission from the plans, drawings, layouts, design, specifications or other material without the prior written consent of the Territory.

2.4 Approvals

The Consultant must obtain all approvals, authorities, licences and permits which are required for the lawful implementation and completion of the Services, unless the Territory otherwise agrees in writing.

2.5 Knowledge requirements

The Consultant must use all reasonable efforts to inform itself of the requirements of the Territory and must regularly consult with the Territory during the performance of the Services.

2.6 Discrepancies in information

If the Consultant considers that information, documents and other particulars made available to it are inadequate or contain errors or ambiguities, the Consultant must give written notice as soon as practicable to the Territory detailing the errors or ambiguities.

3. Term

This Agreement is for the Term unless terminated under the provisions of this Agreement.

4. Contract Price

4.1 Invoice

The Territory must pay the Consultant the Contract Price following its receipt of an Invoice and otherwise in accordance with **Item 3 Schedule 1**.

4.2 Incorrect payments

If, after payment, an invoice is found to have been incorrectly rendered, any underpayment or overpayment will be recoverable by or from the Consultant, as the case may be, and, without limiting recourse to other available remedies, may be offset against any amount subsequently due by the Territory to the Consultant under this Agreement.

4.3 Right of set-off

If the Territory claims a sum under or arising out of this Agreement, or any other Agreement between the parties or between the Consultant and any other Territory entity as defined in section 3(1) of the *Government Procurement Act 2001* (ACT), the Territory may withhold, deduct or set-off the claimed sum against any sum to which the Consultant is otherwise entitled under or arising out of this Agreement.

4.4 Effect of payment

Payment, in part or in total, of the Contract Price does not constitute an acceptance by the Territory of the Services and does not amount to a waiver of any right or action which the Territory may have at any time against the Consultant.

5. Ownership and use of material

5.1 Ownership of material

Ownership of:

- (1) all Contract Material, including any intellectual property rights, vests on its creation in the Territory;
- (2) all Territory Material, including any intellectual property rights, remains with the Territory; and
- (3) all Consultant Material, including any intellectual property rights, remains with the Consultant.

5.2 Licence of material

- (1) The Territory grants to the Consultant a royalty-free, limited licence to use the Contract Material and Territory Material for the Term.
- (2) The Consultant grants to the Territory a royalty-free, perpetual, limited licence to use the Consultant Material.
- (3) For the purpose of this clause, “use” includes:
 - (a) such uses as are reasonably necessary for the Territory to obtain the full benefit of the Services, including use of the Contract Material, and
 - (b) such uses as are reasonably necessary for the Consultant to undertake the Services or as otherwise agreed by the Territory,

and may include supply, reproduce, publish, perform, communicate, broadcast, adapt and copy as the context requires.

5.3 Third party rights

The Consultant must ensure:

- (1) the use of any Contract Material will not infringe the intellectual property rights of

any third party; and

- (2) no fees, royalties or other payments are payable in respect of any third party rights as a result of the Territory's (or its agents') use of any Contract Material.

5.4 Moral rights

The Consultant must, in relation to the authors of any work that comprises or forms part of the Contract Material:

- (1) use its best endeavours to include in the Contract Material an attribution of those authors; and
- (2) procure from those authors their genuine written consent for the Territory to:
 - (a) attribute the authorship of the work to the Territory or a third party where that attribution was inadvertent,
 - (b) not attribute the authorship of the author when using the work (including exhibiting or performing the work in or to the public), and
 - (c) materially alter the work in any way.

5.5 Safekeeping and preservation of material

The Consultant must ensure the safe-keeping and proper preservation of Contract Material and Territory Material in its possession or control and deliver to the Territory all Contract Material and Territory Material on the expiration or termination of this Agreement (other than copies of material that the Territory has authorised the Consultant to retain).

6. Consultant's personnel

The Consultant must:

- (1) in performing the Services, engage only persons who have the skills, training and expertise appropriate for the Services;
- (2) comply with all reasonable requirements notified by the Territory regarding the suitability and fitness of persons engaged by the Consultant for the performance of Services;
- (3) ensure the services are performed by Specified Personnel (if any) and provide replacement personnel acceptable to the Territory at no additional charge and at the earliest opportunity if the Specified Personnel are unable to perform any of the Services; and
- (4) if the Territory requires, ensure that each person engaged in the performance of the Services executes a deed of confidentiality in a form acceptable to the Territory (including with respect to not accessing or otherwise safeguarding Personal Information as applicable), and provide those executed deeds to the Territory in accordance with any requirements that the Territory notifies.

7. Non-disclosure of Territory Information

7.1 Consultant's use of Territory Information

The Consultant must:

- (1) use Territory Information held in connection with this Agreement only for the purposes of fulfilling its obligations under this Agreement;
- (2) not transfer Territory Information held in connection with this Agreement outside the Territory, or allow any person (other than its authorised personnel) outside the Territory to have access to it, without the prior approval of the Territory; and
- (3) notify the Territory immediately if the Consultant becomes aware that a disclosure of Territory Information is required by law, or an unauthorised disclosure of Territory Information has occurred; and
- (4) in respect of any Personal Information held in connection with this Agreement:
 - (a) comply with the TPPs and any applicable TPP Code and must not (and procure that any subcontractor engaged by the Consultant under this Agreement does not) act or engage in a practice that breaches a TPP or a TPP Code; and
 - (b) co-operate with any reasonable requests or directions of the Territory arising directly from, or in connection with, the exercise of the functions of the information privacy commissioner under the Information Privacy Act.

7.2 Consultant to protect Territory Information

- (1) Except as provided in this Agreement, the Consultant must not disclose Territory Information to any person without the prior written consent of the Territory except to the extent that the Territory Information is:
 - (a) required or authorised to be disclosed by law,
 - (b) disclosed to the Consultant's solicitors, auditors, insurers or advisers,
 - (c) generally available to the public, or
 - (d) in the possession of the Consultant without restriction in relation to disclosure before the date of receipt from the Territory.
- (2) The Consultant must take all reasonable measures to ensure that Territory Information accessed or held by it in connection with this Agreement is protected against loss, unauthorised access, use, modification, disclosure or other misuse in accordance with reasonable procedures for that purpose and that only its authorised personnel have access to Territory Information.
- (3) The Consultant must do all things necessary to ensure that Territory Information accessible to the Consultant and the Consultant's personnel by virtue of the performance of this Agreement is not accessed, published or communicated in any

way, including imposing upon the Consultant's personnel obligations of confidentiality with respect to Territory Information.

7.3 Acknowledgement of effect of Crimes Act

The Consultant acknowledges that the publication or communication of any fact or document by a person which has come to its knowledge or into its possession or custody by virtue of the performance of this Agreement (other than to a person to whom the Consultant is authorised to publish or disclose the fact or document) may be an offence under section 153 of the *Crimes Act 1900* (ACT).

8. Confidential Text under Procurement Act

8.1 Territory may make Agreement publicly available

In giving effect to the principles of open and accountable government, the Territory may disclose documents and information unless it has otherwise agreed, or is otherwise required under law, to keep the information confidential. In accordance with those principles, this Agreement may be a notifiable contract under the Procurement Act and, if so, the Territory will be required to make the text of this Agreement available to the public, including by publication on a public contracts register.

8.2 Confidential Text

If **Item 7 Schedule 1** states that this Agreement is a notifiable contract under the Procurement Act and specifies Confidential Text, the grounds on which the text is confidential are set out in **Item 8 Schedule 1**, and **clause 8.3** applies.

8.3 Territory must not disclose Confidential Text

Except as provided in this Agreement, the Territory must not disclose Confidential Text to any person without the prior written consent of the Consultant (which consent will not be unreasonably withheld) except to the extent that Confidential Text:

- (1) is required or authorised to be disclosed under law;
- (2) is reasonably necessary for the enforcement of the criminal law;
- (3) is disclosed to the Territory's solicitors, auditors, insurers or advisers;
- (4) is generally available to the public;
- (5) is in the possession of the Territory without restriction in relation to disclosure before the date of receipt from the Consultant;
- (6) is disclosed by the responsible Minister in reporting to the Legislative Assembly or its committees; or
- (7) is disclosed to the ombudsman or for a purpose in relation to the protection of public revenue.

9. Insurance and indemnity

9.1 Consultant's insurance

The Consultant must effect and maintain for the Term all insurance coverage required to be effected by it by law, public liability insurance and professional indemnity insurance in amounts not less than the amounts (if any) specified by **Item 5 Schedule 1**, and any other insurance specified in **Item 5 Schedule 1** with a Prescribed Insurer.

9.2 Indemnity

The Consultant indemnifies the Territory, its employees and agents against liability in respect of all claims, costs and expenses in relation to all loss, damage, injury or death to persons or property caused by the Consultant, in connection with the provision of the Services, except to the extent that the Territory caused the relevant loss, damage or injury.

9.3 Claims to be made good

The Consultant must, at its expense, make good the amount of all claims, loss, damage, costs and expenses the subject of the indemnity in **clause 9.2** and the Territory may deduct the amount, or any part of it, from any moneys due or becoming due to the Consultant under this Agreement.

10. Variations

10.1 Change of scope or timing

As soon as practicable after becoming aware of any matter which is likely to change or has changed the scope and/or timing of the Services, the Consultant must give written notice to the Territory detailing the circumstances and extent or likely extent of the change of scope and/or timing and whether the Consultant will be proposing a Variation in accordance with **clause 10.2(9)**.

10.2 Proposed Variations

- (1) The Territory may instruct Variations in writing and the Consultant must comply with these instructions.
- (2) The Consultant must take all reasonable steps to minimise the effects of Variation work on the time to complete the Services.
- (3) Unless the Territory instructs the Consultant to proceed, the Consultant must not begin to carry out the Variation until the parties have resolved price and time implications (including delay costs, if any).
- (4) When requested by the Territory, the Consultant must, within the time specified in the request, advise the Territory of its price (including reasonable delay costs, if any, but not including any amount on account of loss of profits) for a proposed Variation and its effect on the time to complete the Services, or on any other matter specified in the request.

- (5) Unless otherwise agreed, the price of a Variation will be determined using the hourly rates set out in **Item 9 Schedule 1** (if any). If hourly rates are not included in **Item 9 Schedule 1**, reasonable rates and prices apply.
- (6) If the parties are unable to reach agreement as to whether a Variation applies, they must refer to the matter for Expert Determination under **clause 12.2**.
- (7) If the parties agree that a Variation applies they must endeavour to agree in writing on its price and effect on the time to complete the Services. Failing agreement on price or time they must refer the matter for Expert Determination under **clause 12.2**.
- (8) The Contract Price must be adjusted to account for the price of a Variation.
- (9) If the Consultant considers that a Variation applies but the Territory has not instructed a Variation, the Consultant must make its claim for a Variation in writing to the Territory within 5 Business Days from the start of the event giving rise to the Variation, or from the time when the event should have become known to the Consultant with reasonable diligence on its part.
- (10) Variations instructed by the Territory must be generally consistent with or of a similar nature to the type of work included in the Services.
- (11) To the extent a Variation has reduced the scope of Services, the Territory may thereafter carry out that omitted or deleted work either itself or by engaging other contractors.
- (12) Any Variations agreed or determined under **clause 12.2** including the resultant adjustment to the Contract Price should be documented by the parties in writing.
- (13) For the avoidance of doubt, where a Variation results in a reduction of Services the Consultant will have no claim for loss of profits.

11. Novation

11.1 Territory may novate this Agreement

The Territory may at any time, without the consent of the Consultant, novate this Agreement to a contractor ("**Contractor**") engaged or to be engaged by the Territory to construct or design and construct the works the subject of the Services.

11.2 Consultant to execute deeds

- (1) If the Territory elects to novate this Agreement under **clause 11.1**, the Consultant must:
 - (a) execute a consultant deed of novation in the form set out in **Attachment A** (if any) to give effect to the novation within 7 days of receipt of the consultant deed of novation from the Territory; and
 - (b) if requested by the Territory, execute a consultant deed of covenant in the form set out in **Attachment B** (if any), duly completed with all relevant

particulars, within the period specified by the Territory in such request and deliver the executed consultant deed of covenant to the Territory.

- (2) No consultant deed of covenant will be construed in any way to modify or limit any rights, powers or remedies of the Territory against the Consultant whether under this Agreement or otherwise.

12. Dispute resolution

12.1 Parties to negotiate

- (1) The Consultant and the Territory must endeavour to resolve any disagreement or dispute (“**Dispute**”) speedily by negotiation.
- (2) Each party must continue to perform its obligations under this Agreement notwithstanding the existence of a Dispute.

12.2 Expert Determination

- (1) If a Dispute is not resolved by negotiation, then, before either party has recourse to litigation, the party must submit the matter to Expert Determination. If the Consultant and the Territory do not agree upon an Expert to conduct the Expert Determination, either may request the Chief Executive Officer of the Australian Commercial Disputes Centre to nominate an Expert.
- (3) Within 14 days of acceptance by the Expert of the appointment, the claimant will submit in writing to the Expert the claim and all the evidence which the claimant wishes the Expert to take into account. Within 28 days thereafter the other party will submit in writing to the Expert that party’s response to the claim, particulars of any counterclaim and all the evidence which that party wishes the Expert to take into account.
- (4) Copies of documents sent to the Expert must be sent to the other party at the same time. The Expert may meet with the parties jointly but not separately and may ask questions of the parties which must be answered orally or in writing as requested by the Expert.
- (5) As soon as possible the Expert must give the parties the Expert’s determination in writing as to:
 - (a) the respective rights and entitlements of the parties; and
 - (b) the amount or service (if any) which the Expert considers is due from one party to the other.
- (6) The determination of the Expert shall be made as an expert and not as an arbitrator and shall be final and binding on the parties except where:
 - (a) the Expert’s determination relating to a Dispute is that one party shall pay to the other an amount, or carry out work to a value, in excess of the amount which is specified in **Item 10 Schedule 1**; and

- (b) either party gives notice to the other party of its dissatisfaction within 28 days of the determination being given.
- (7) The Expert will not be liable to the parties for negligence in the conduct of the determination.
- (8) The Territory and the Consultant will be jointly and severally liable to the Expert for the fees of the Expert. As between themselves, the Territory and the Consultant will each bear half the Expert's fee and each will bear their own costs of the Expert Determination, unless otherwise agreed.

13. Termination

13.1 Default

The Territory may terminate this Agreement, at any time by notice to the Consultant, if the Consultant:

- (1) is the subject of an Insolvency Event;
- (2) fails to commence timely provision of the Services or to meet any timeframes specified in this Agreement; or
- (3) is in breach of a provision of this Agreement, where that breach:
 - (a) if capable of being remedied, is not remedied within the period specified in a notice by the Territory, or
 - (b) is not capable of being remedied.

13.2 Termination for any reason

The Territory may, at any time by notice to the Consultant, terminate this Agreement, and in that event:

- (1) the Territory will be liable only for:
 - (a) payments under this Agreement for Services rendered before the date of termination, and
 - (b) subject to **clauses 13.2(2) and 13.2(3)**, any reasonable costs incurred by the Consultant and directly attributable to the termination, but not in respect of loss prospective profits;
- (2) on receipt of a notice of termination, the Consultant must:
 - (a) stop work as specified in the notice, and
 - (b) take all available steps to minimise loss resulting from that termination.

13.3 No prejudice

Nothing in this **clause 13** prejudices any other rights or remedies of the Territory in respect of any breach of this Agreement.

14. Work Health and Safety

- (1) The Consultant must comply with the WHS Legislation and ensure all Services are carried out safely and in a manner that does not put the health and safety of persons at risk.
- (2) The Consultant must comply with its duty under the WHS Legislation to consult, cooperate and coordinate activities with all persons who have a work health and safety duty in relation to the same matter.
- (3) The Consultant must exercise a duty of utmost good faith to the Territory in carrying out the Services to enable the Territory to discharge the Territory's duties under the WHS Legislation.
- (4) The obligations set out in this Agreement do not detract from the Consultant's obligations under the WHS Legislation. If there is an inconsistency between this Agreement and the WHS Legislation, the Consultant must comply with the WHS Legislation.

15. General

15.1 General responsibilities of parties

Each party will:

- (1) fully cooperate with each other to ensure timely progress and fulfilment of the Agreement; and
- (2) act reasonably and in good faith with respect to matters that relate to the Agreement.

15.2 Conflict of interest

The Consultant warrants that no conflict of interest exists or is likely to arise in the performance of the Services and its other obligations under this Agreement and must, if a conflict or risk of conflict arises, notify the Territory and comply with any requirement of the Territory to eliminate or deal with that conflict or risk.

15.3 No employment, partnership or agency relationship

Nothing in this Agreement constitutes the Consultant, or its employees, agents or subcontractors as employees, partners or agents of the Territory or creates any employment, partnership or agency for any purpose and the Consultant must not represent itself, and must ensure its employees, agents and subcontractors do not represent themselves, as being employees, partners or agents of the Territory.

15.4 No assignment or subcontracting

- (1) The Consultant must not subcontract the performance of the Services or assign the whole or part of this Agreement without the prior written consent of the Territory. If the Territory gives its consent, the Territory may impose any conditions.
- (2) A change in the control of the Consultant or a company that controls the Consultant (except a company listed on an Australian stock exchange) is taken to be an assignment, the term “control” including the direct or indirect holding of more than 50% of the share capital of a corporation.
- (3) If the Consultant breaches **clause 15.4(1)**, the Territory reserves its rights, including requiring the Consultant to provide information regarding the proposed subcontractor’s or assignee’s capability to continue performing this Agreement or to provide security to ensure the proper performance of this Agreement.

15.5 Entire agreement

This Agreement comprises the entire agreement between the parties in relation to the Services and supersedes any prior representations, negotiations, writings, memoranda and agreements.

15.6 Severability

Any provision of this Agreement that is illegal, void or unenforceable will not form part of this Agreement to the extent of that illegality, voidness or unenforceability. The remaining provisions of this Agreement will not be invalidated by an illegal, void or unenforceable provision.

15.7 Variation

Subject to **clause 10** with respect to Variations, this Agreement may be varied or the Term extended only by the written agreement of the parties prior to the expiration of this Agreement.

15.8 No waiver

Failure or omission by the Territory at any time to enforce or require strict or timely compliance with any provision of this Agreement will not affect or impair that provision in any way or the rights and remedies that the Territory may have in respect of that provision.

15.9 Governing law and compliance with the law

This Agreement is governed by and construed in accordance with the law for the time being in force in the Territory and the parties submit to the non-exclusive jurisdiction of the courts of the Territory. The Consultant must comply with the laws from time to time in force in the Territory in performing the Services.

15.10 Notices

Any notice, including any other communication, required to be given or sent to either party under this Agreement must be in writing and given to the relevant Contract Officer. A

notice will be deemed to have been given:

- (1) if delivered by hand, on delivery;
- (2) if sent by prepaid mail, on the expiration of two business days after the date on which it was sent;
- (3) if sent by facsimile, on the sender's facsimile machine recording that the facsimile has been successfully and properly transmitted to the recipient's address; or
- (4) if sent by electronic mail, on whichever of the following occurs first:
 - (a) the other party's acknowledgment of receipt by any means,
 - (b) the sender's electronic mail device recording that the electronic mail has been successfully transmitted to the recipient's address, or
 - (c) expiration of two business days after the date on which it was sent without receipt of a notification that the delivery failed,

and if given in two or more ways, on the first of paragraphs (1) to (4) occurring.

15.11 Special Conditions

In the event of any inconsistency between any Special Condition and any other provision of this Agreement then, to the extent of any inconsistency, the Special Condition will prevail.

15.12 Survival of clauses

Clauses 7, 9.2 and 9.3 will survive the expiration or earlier termination of this Agreement.

SCHEDULE 1

CONTRACT DETAILS

- Item 1. Contract Officers**
See clauses 1.1 and 15.10
- For the Territory:
- Stephen Thomas
Senior Project Officer
Infrastructure Finance and Capital Works
Level 2 Nature Conservation House
Cnr Benjamin Way and Emu Bank
BELCONNEN ACT 2617
- Telephone: (02) 6205 4972
Email: Stephen.thomas@act.gov.au
- For the Consultant:
- Neil Hobbs
Director
Harris Hobbs Landscapes
16 Robe Street
DEAKIN ACT 2600
- Telephone: (02) 6273 4661
Email: hhl@hhl.com.au
- Item 2. Term**
See clause 3
- From the date of this Agreement until 30 December 2019.
- Item 3. Contract Price**
See clause 4
- (1) Contract Price: \$52,692.00 (GST is included).
- (2) The Contract Price is payable by monthly instalments. Invoices may only be rendered monthly in arrears.
- (3) Except if otherwise stated in this Agreement, the Contract Price is:
- (a) payable within 30 days of receipt by the Territory of an Invoice;
- (b) inclusive of GST and all other taxes, duties and charges; and
- (c) inclusive of all disbursements, including out-of-pocket expenses incurred by the Consultant.

Item 4. Specified Personnel <i>See clause 6</i>	Neil Hobbs Karina Harris Stephen Kirsu Jordan Evans-Tse
Item 5. Other amounts and insurance <i>See clause 9.1</i>	<p>(1) Public liability insurance: \$10 million (in respect of each claim).</p> <p>(2) Professional indemnity insurance: \$5 million (in the annual aggregate).</p> <p>The Consultant must maintain the professional indemnity insurance coverage required under this Item 5 for an additional period of 6 years from the expiration of the Term. This Item survives the expiration or earlier termination of this Agreement.</p>
Item 6. Territory Information <i>See clauses 1.1 and 7</i>	Item 6 not used.
Item 7. Confidential Text <i>See clauses 1.1 and 8</i>	Item 7 not used.
Item 8. Grounds for confidentiality of Confidential Text <i>See clause 8</i>	Item 8 not used.
Item 9. Hourly rates for variations <i>See clause 10.2(5)</i>	<p>Hourly rates for determining the price of a variation are included in the Consultant's pricing incorporated into this Agreement at Attachment 1.</p> <p><i>Note: Additional work outside the scope of the Brief may only be undertaken with the prior written consent of the Territory Contract Officer.</i></p>
Item 10. Expert Determination <i>See clause 12</i>	\$100,000 (GST inclusive).
Item 11. Program <i>See clause 2.2</i>	A Program submitted with tender is sufficient.

SCHEDULE 2

THE SERVICES

The Consultant must provide the Services in accordance with the conditions and timeframes of this Agreement and the Statement of Requirements which is incorporated into this Agreement at **Attachment 2**.

SCHEDULE 3

SPECIAL CONDITIONS

See clause 15.11

Item 1. Complaints in relation to interference with privacy

Reserved

Item 2. Changes in control of Consultant

Reserved

Item 3. Work Health and Safety

Reserved

Item 4. Audit

Without limiting the powers of the Territory's Auditor-General under the *Auditor-General Act 1996* (ACT) the Territory (or its nominated representative) may, at its cost, inspect records kept by the Consultant and conduct audits and other checks, to monitor the Consultant's delivery of the Services and compliance with this Agreement. The Consultant must act reasonably to cooperate with persons authorised to conduct an audits or checks.

Item 5. Local Industry Participation

- 5.1 The Consultant must implement its commitments set out in its local industry participation plan ("**IPP Plan**") submitted as part of its tender for the Services.
- 5.2 The Consultant must provide a local industry participation report ("**IPP Report**") on its compliance with this clause in a format and addressing matters reasonably required by the Territory within 6 months of the date of this Agreement and on or before the first, and each subsequent, anniversary of this Agreement.
- 5.3 Before or concurrently with the Consultant's submission to the Territory of its final Invoice for payment under this Agreement, the Consultant must provide to the Territory a final IPP Report ("**Final IPP Report**") that sets out its level of compliance with the commitments provided for in the IPP Plan throughout the Term and which is accompanied by a statutory declaration stating the information provided in the Final IPP Report is true and correct.
- 5.4 The Territory may withhold payment of the final Invoice until submission of a satisfactory Final IPP Report by the Consultant.
- 5.5 The Consultant must attend any meeting scheduled by the Territory to review how its IPP Plan is being implemented and advanced, and for this purpose, the Consultant must provide all information reasonably requested by the Territory.

5.6 The Consultant's failure to comply, in whole or in part, with the commitments contained within the IPP Plan may be a factor taken into account in the award of future contracts for the Territory.

Item 6. Agency

Reserved

Item 7. Sub Consultants

The Territory accepts the use of the following sub-consultants in the delivery of the Services. The Consultant must ensure that the Territory's interests are protected at all times by making sure that all sub-consultants effect and maintain all appropriate insurances.

SQC Architecture
JE Consultants

SCHEDULE 4

PAYMENT SCHEDULE RECOMMENDATION

See description of Services – Schedule 2

Reserved

DATE OF THIS AGREEMENT

SIGNED for and on behalf of the)
AUSTRALIAN CAPITAL TERRITORY)
in the presence of:) Signature of Territory delegate

.....
Signature of witness)
.....
Print name

.....
Print name

SIGNED by or for and on behalf of)
KARINA HARRIS & NEIL HOBBS)
t/a HARRIS HOBBS LANDSCAPES) Signature of director/ authorised
ABN 49 968 027 249) officer/ individual*
in the presence of: * (see note below)

.....
Signature of director/ secretary/ witness*)
* (see note below))
.....
Print name

.....
Signature of second authorised officer*)
* (see note below))
.....

.....
Print name)
.....
Print name



Note:

- Date: Must be dated on the date the last party signs the Agreement or, if signed counterparts of the Agreement are exchanged, the date of exchange. Also date the cover page.
- Company: Must be signed in accordance with section 127 of the *Corporations Act 2001* (Cth), for example, by 2 directors or a director and a secretary. Common seal may be affixed if required under the Consultant’s constitution.
- Individual: Must be signed by the individual Consultant and witnessed.
- Incorporated Association: Must be signed in accordance with the Consultant’s constitution, which may or may not require the common seal to be affixed. As a minimum, 2 authorised officers must sign.

ATTACHMENT A

CONSULTANT DEED OF NOVATION

Deed made at on, 20.....

Parties

AUSTRALIAN CAPITAL TERRITORY, the body politic established by section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Territory**) represented by the [INSERT name of Directorate / Agency].

[INSERT FULL NAME, INCLUDING ACN FOR A COMPANY OR ABN FOR OTHER ORGANISATION AND CHECK IT IS A LEGAL ENTITY] of [INSERT address (of registered office if for a company)] (**Contractor**).

[INSERT FULL NAME, INCLUDING ACN FOR A COMPANY OR ABN FOR OTHER ORGANISATION AND CHECK IT IS A LEGAL ENTITY] of [INSERT address (of registered office if for a company)] (**Consultant**).

Recitals

- A. The Territory has engaged the Contractor under the contract described in **Item 1 of the Schedule ("Works Contract")** to effect certain works ("**Works**").
- B. The Territory and the Consultant have entered into the contract described in **Item 2 of the Schedule ("Services Contract")** to effect certain work ("**Services**"), which work forms part of the Contractor's obligations under the Works Contract.
- C. The Works Contract and the Services Contract require the Contractor and the Consultant to enter into this Deed for the purpose of effecting a novation of the Services Contract from the Territory to the Contractor.

This Deed provides

1. INTERPRETATION

1.2 Definitions

In this Deed, terms defined in the Works Contract and not otherwise defined in this Deed have the same meanings, unless the context otherwise requires.

1.3 General

In this Deed, unless the context otherwise indicates:

- (a) words in the singular include the plural and vice versa;
- (b) headings are for convenience only and do not affect the interpretation of this Deed;

- (c) references to legislation or to provisions in legislation include references to amendments or re-enactments of them and to all regulations and instruments issued under the legislation;
- (d) the words "including" and "includes", and any variants of those words, will be read as if followed by the words "without limitation";
- (e) references to any document (including this Deed) include any amendment to or substitute for such document; and
- (f) references to any party to or in this Deed or any other document include its successors or permitted assigns.

1.4 This Deed Prevails

To the extent of any inconsistency between this Deed, the Works Contract or the Services Contract, this Deed prevails unless the parties expressly agree otherwise.

2. NOVATION

In accordance with the terms of the Works Contract and the Services Contract:

- (a) the Territory and the Consultant mutually agree:
 - (i) to terminate the Services Contract and (subject to **clause 2(a)(ii)**) to release each other from all obligations and liabilities under the Services Contract; and
 - (ii) that the amount set out in **Item 3 of the Schedule** is payable by the Territory to the Consultant in full and final settlement of all claims under the Services Contract prior to the termination under **clause 2(a)(i)**; and
- (b) the Contractor and the Consultant will be deemed to have entered into a new contract on the same terms and conditions as the Services Contract, subject to the following:
 - (i) the Contractor will be named in the new contract in lieu of the Territory;
 - (ii) the rights, obligations and liabilities of the Contractor and the Consultant will be as if the Contractor had executed the Services Contract in lieu of the Territory;
 - (iii) the amount set out in **Item 4 of the Schedule** is the balance payable by the Contractor to the Consultant for the Services under the new contract; and
 - (iv) the Consultant will indemnify the Contractor against all claims, costs, expenses, losses or damages suffered or incurred by the Contractor arising out of or incidental to any failure by the Consultant to perform its obligations under the Services Contract with the Territory prior to its termination.

3. ASSIGNMENT

Except as expressly contemplated by this Deed, neither the Contractor nor the Consultant may assign or transfer any of its rights or obligations under this Deed or the Services Contract.

4. FURTHER ASSURANCES

The Contractor and the Consultant undertake upon request by the Territory to execute all documents and do all things necessary to vest in the Contractor the Services Contract or otherwise to give effect to the terms of this Deed.

5. GOVERNING LAW AND JURISDICTION

This Deed will be governed by and construed in accordance with the law applicable to the Works Contract.

7. NOTICES

Any notice, including any other communication, required to be given or sent to either party under this Deed must be in writing and given to the relevant contact officer set out in **Item 5 of the Schedule**. A notice will be deemed to have been given:

- (a) if delivered by hand, on delivery;
- (b) if sent by prepaid mail, on the expiration of two business days after the date on which it was sent;
- (c) if sent by facsimile, on the sender's facsimile machine recording that the facsimile has been successfully and properly transmitted to the recipient's address; or
- (d) if sent by electronic mail, on the other party's acknowledgment of receipt by any means.

8. COUNTERPARTS

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

9. WAIVERS, REMEDIES CUMULATIVE

9.1 No waiver

No failure to exercise and no delay in exercising, on the part of the Territory, any right or remedy under this Deed will operate as a waiver, nor will any single or partial exercise of any right or remedy preclude any other or further exercise, of that or any other right or remedy.

9.2 Remedies cumulative

The rights and remedies provided in this Deed are cumulative and are not exclusive of any rights or remedies provided by law or any other such right or remedy.

Schedule

Item 1 (Recital A)	Works Contract:	[Head / Managing Contractor] Contract number [INSERT] dated on or about [INSERT] for [INSERT BRIEF DESCRIPTION]
Item 2 (Recital B)	Services Contract:	Services contract number [INSERT] dated on or about [INSERT] for [INSERT BRIEF DESCRIPTION]
Item 3 (Clause 2(a)(ii))	Amount payable:	[INSERT AMOUNT] (GST inclusive)
Item 4 (Clause 2(b)(iii))	Balance payable:	[INSERT AMOUNT] (GST inclusive)
Item 5 (Clause 6.1(b)(i))	Notices:	[INSERT CONTRACT OFFICER NAME, ADDRESS, EMAIL ADDRESS & FAX NUMBER FOR EACH PARTY]

EXECUTED AS A DEED ON

SIGNED, SEALED AND DELIVERED)
for and on behalf of the)
AUSTRALIAN CAPITAL TERRITORY) Signature of Territory delegate
in the presence of:

.....
Signature of witness)
.....
Print name

.....
Print name

SIGNED, SEALED AND DELIVERED)
by or for and on behalf of)
[NAME & ACN OF CONSULTANT]) Signature of director/ authorised
in the presence of: officer/ individual*
*DELETE whichever is not applicable (see note below)

.....
Signature of director/ secretary/ witness*)
*DELETE whichever is not applicable (see note below))
.....
Print name

.....
Signature of second authorised officer*)
*only use if Incorporated Association (see note below))
.....
Print name

.....
Print name



SIGNED, SEALED AND DELIVERED)

by or for and on behalf of)

[NAME & ACN OF CONTRACTOR])

in the presence of:

Signature of director/ authorised officer/ individual*

*DELETE whichever is not applicable (see note below)

Signature of director/ secretary/ witness*

*DELETE whichever is not applicable (see note below)

Print name

Print name

Signature of second authorised officer*

*only use if Incorporated Association (see note below)

Print name



Note:

- Date: Must be dated on the date the last party signs the Agreement or, if signed counterparts of the Agreement are exchanged, the date of exchange. Also date the front page.
- Company: Must be signed in accordance with section 127 of the *Corporations Act 2001* (Cth), for example, by 2 directors or a director and a secretary. Common seal may be affixed if required under the entity's constitution.
- Individual: Must be signed by the individual person and witnessed.
- Incorporated Association: Must be signed in accordance with the entity's constitution, which may or may not require the common seal to be affixed. As a minimum, 2 authorised officers must sign.

ATTACHMENT B

CONSULTANT DEED OF COVENANT

Deed made at on, 20.....

Parties **AUSTRALIAN CAPITAL TERRITORY**, the body politic established by section 7 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) (**Territory**) represented by the [INSERT name of Directorate / Agency].

[INSERT FULL NAME, INCLUDING ACN FOR A COMPANY OR ABN FOR OTHER ORGANISATION AND CHECK IT IS A LEGAL ENTITY] of [INSERT address (of registered office if for a company)] (**Consultant**).

Recitals

- A. The Territory engaged the Consultant under the contract described in **Item 1 of the Schedule ("Services Contract")** to effect certain work ("**Services**").
- B. The Territory has engaged the contractor described in **Item 2 of the Schedule ("Contractor")** under the contract described in **Item 3 of the Schedule ("Works Contract")** to effect certain works ("**Works**").
- C. The Services Contract has been novated to the Contractor and the Consultant is required to execute this Deed under the Services Contract.

This Deed provides

1. INTERPRETATION

1.1 Definitions

In this Deed, terms defined in the Services Contract and not otherwise defined in this Deed have the same meanings and the following term has the following meaning unless the context otherwise requires.

Services Subcontract means the contract between the Consultant and the Contractor.

1.2 General

In this Deed, unless the context otherwise indicates:

- (a) words in the singular include the plural and vice versa;
- (b) headings are for convenience only and do not affect the interpretation of this Deed;
- (c) references to legislation or to provisions in legislation include references to amendments or re-enactments of them and to all regulations and instruments issued under the legislation;
- (d) the words "including" and "includes", and any variants of those words, will be read as if followed by the words "without limitation";

- (e) references to any document (including this Deed) include any amendment to or substitute for such document; and
- (f) references to any party to or in this Deed or any other document include its successors or permitted assigns.

1.3 This Deed Prevails

To the extent of any inconsistency between this Deed, the Services Contract, or the Works Contract, this Deed prevails unless the parties expressly agree otherwise.

2. NOVATION

If the Territory gives a notice under the Terms of the Works Contract requiring novation of the Services Subcontract in accordance with this **clause 2** and (where applicable) of the name of the person, firm or corporation (if any) which is to be a party to the new contract referred to in paragraph (b) ("**Nominee**") then:

- (a) the Services Subcontract is immediately terminated on and from the date of the notice;
- (b) the Territory or the Nominee (as the case may be) and the Consultant will be deemed to have immediately on and from the date of the notice entered into a new contract on the same terms and conditions as the Services Subcontract, subject to the following:
 - (i) the Territory or the Nominee (as the case may be) will be named in the new contract in lieu of the Contractor; and
 - (ii) the rights, obligations and liabilities of the Territory or the Nominee (as the case may be) and the Consultant will be as if the Territory or the Nominee (as the case may be) had executed the Services Subcontract in lieu of the Contractor; and
- (c) the Consultant will indemnify the Territory against all claims, costs, expenses, losses or damages suffered or incurred by the Territory arising out of or incidental to any failure by the Consultant to perform its obligations under the Services Subcontract with the Contractor prior to its termination.

12.8 DUTY OF CARE

The Consultant:

- (a) warrants to the Territory that it will exercise the standard of skill, care and diligence in the performance of the Services that would be expected of a person who regularly acts in the capacity in which the Consultant is engaged;
- (b) must:
 - (i) ensure that it complies with the requirements of the Services Subcontract; and
 - (ii) use its best endeavours to ensure that any designs, plans, documentation and the like required to be produced by it under the Services Subcontract will be fit for its intended purpose;
- (c) must ensure that the Services are provided economically and in accordance with any budgetary requirements of the Territory notified to the Consultant; and

- (d) must exercise the utmost good faith in the best interests of the Territory and keep the Territory fully and regularly informed about all matters affecting or relating to the Services and the Services Contract or otherwise.

13.8 ASSIGNMENT

Except as expressly contemplated by this Deed, the Consultant may not assign or transfer any of its rights or obligations under this Deed or the Services Contract.

14.8 FURTHER ASSURANCES

The Consultant undertakes upon request by the Territory to execute all documents and do all things necessary to vest in the Territory or the Contractor the Services Contract or otherwise to give effect to the terms of this Deed.

15.8 GOVERNING LAW AND JURISDICTION

This Deed will be governed by and construed in accordance with the law applicable to the Services Contract.

16.8 NOTICES

Any notice, including any other communication, required to be given or sent to a party under this Deed must be in writing and given to the relevant contact officer set out in **Item 4 of the Schedule**. A notice will be deemed to have been given:

- (a) if delivered by hand, on delivery;
- (b) if sent by prepaid mail, on the expiration of two business days after the date on which it was sent;
- (c) if sent by facsimile, on the sender's facsimile machine recording that the facsimile has been successfully and properly transmitted to the recipient's address; or
- (d) if sent by electronic mail, on the other party's acknowledgment of receipt by any means.

17.8 COUNTERPARTS

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

18.8 WAIVERS, REMEDIES CUMULATIVE

9.1 No waiver

No failure to exercise and no delay in exercising, on the part of the Territory, any right or remedy under this Deed shall operate as a waiver, nor shall any single or partial exercise of any right or remedy preclude any other or further exercise, of that or any other right or remedy.

9.2 Remedies cumulative

The rights and remedies provided in this Deed are cumulative and are not exclusive of any rights or remedies provided by law or any other such right or remedy.

SIGNED, SEALED AND DELIVERED)

by or for and on behalf of)

**[NAME & ACN OR ABN OF
CONSULTANT]**)

in the presence of:

Signature of director/ authorised
officer/ individual*

*DELETE whichever is not applicable (see note below)

Signature of director/ secretary/ witness*

*DELETE whichever is not applicable (see note below)

Print name

Signature of second authorised officer*

*only use if Incorporated Association (see note below)

Print name

Print name

Affix common seal
if required under
constitution

Note:

Date: Must be dated on the date the last party signs the Agreement or, if signed counterparts of the Agreement are exchanged, the date of exchange. Also date the front page.

Company: Must be signed in accordance with section 127 of the *Corporations Act 2001* (Cth), for example, by 2 directors or a director and a secretary. Common seal may be affixed if required under the entity's constitution.

Individual: Must be signed by the individual person and witnessed.

Incorporated Association: Must be signed in accordance with the entity's constitution, which may or may not require the common seal to be affixed. As a minimum, 2 authorised officers must sign.

ATTACHMENT 1
Hourly Rates

ATTACHMENT 2
Statement of Requirements