

Your Ref: 145870
Our Ref: JT1 2014 02801 V01
Enquiries: John Leccese
Telephone: 9420 3327



22 August 2016

TOWN OF PORT HEDLAND
PO BOX 41
PORT HEDLAND WA 6721



Attention: Daniel Roberts

**SIGNING OF DEVELOPER FUNDED AND CONSTRUCTED WORKS AGREEMENT
DN200/DN300 DISTRIBUTION MAINS, PORT HEDLAND AIRPORT REDEVELOPMENT
GREAT NORTHERN HIGHWAY, PORT HEDLAND
WAPC 145870
PROJECT CW03258**

Please find enclosed two amended copies of the Developer Funded and Constructed Works Agreement (DFCWA) specifying the arrangements for the DN200 and DN300 distribution mains, Port Hedland Airport redevelopment.

Please arrange for the Developer to sign both documents and return both originals to John Leccese at Development Services for the Water Corporation's signature.

When the original documents have been signed, one will be held by the Corporation and the other returned.

This DFCWA is valid for 1 month from the date of this letter. It must be finalised and returned within this period or the agreement may need to be reviewed and new arrangements negotiated.

Should you have any queries, please contact John Leccese on 9420 3327.



John Leccese
Infrastructure Advisor
DEVELOPMENT SERVICES

**DEVELOPER FUNDED AND CONSTRUCTED WORKS
AGREEMENT**

for

**CW03258 - DN200 and DN300 distribution mains
Port Hedland Airport Redevelopment**

between

WATER CORPORATION

and

TOWN OF PORT HEDLAND

Legal Services
Water Corporation

John Tonkin Water Centre
629 Newcastle Street Leederville
Perth 6007 Western Australia
Telephone (08) 9420 2514 Facsimile (08) 9420 3360

This Developer Funded and Constructed Works Agreement

is made _____ 2016 between the following parties:

Water Corporation (ABN 28 003 434 917) a statutory body corporate created by the *Water Corporations Act 1995*, of John Tonkin Water Centre, 629 Newcastle Street, Leederville in the State of Western Australia.

(Corporation)

TOWN OF PORT HEDLAND (ABN 19 220 085) of PO BOX 41 PORT HEDLAND WA 6721.

(Developer)

Recitals

- A. The Developer is undertaking a development on the Land and requires water and waste water services infrastructure to service the Land.
- B. The Developer has requested the Corporation to provide water and wastewater service infrastructure necessary for the Developer to undertake development of the Land.
- C. The Corporation's schedule of works does not propose to provide the water and/or wastewater infrastructure required by the Developer in accordance with the Developer's time line.
- D. In order to progress the Developer's development, the Corporation and the Developer agree that the Developer will fund and construct the water and wastewater infrastructure required and will handover the Works to the Corporation.
- E. Before entering into a Developer Funded and Constructed Works Agreement to construct the Works the Corporation required the Developer to provide a Scoping Report and the Developer has submitted the Scoping Report.
- F. The parties agree to enter into this agreement for the purpose of constructing the Works.

This Agreement witnesses

That in consideration of, among other things, the mutual promises contained in this Agreement, the parties agree the following:

1 Definition

1.1 Definitions

Agreement means this agreement as may be amended from time to time in accordance with the terms of the Agreement.

Approvals means:

- (a) any consent, registration, filing, agreement, notarisation, certificate, licence, approval, authorisation, permit, authority or exemption from, by or with a Governmental Agency; and
- (b) any consent or authorisation regarded as given by a Governmental Agency due to the expiration of the period specified by a statute within which the Governmental Agency should have acted if it wished to proscribe or limit anything already lodged, registered or notified under that statute.

Business Day means a day on which banks are open for business in Perth excluding Saturday, Sunday or a public holiday.

Chartered Professional Engineer means an engineer who is a member of the Institute of Engineers Australia.

Claim means any action, claim, cost, proceeding, suit or demand of whatsoever nature in respect of any loss (including loss of use) injury or damage of or to property of any kind and in respect of any death, disease, illness or injury sustained by any person.

Commencement Date means the date on which the last party to sign this Agreement signs;

Construction Contract means the agreement between Developer and the Construction Contractor to construct the Works and meets all design and operational standards and applicable laws.

Construction Contractor means the contractor or contractors engaged by the Developer to perform the Works.

Construction Program means the timeline for the construction, completion and commissioning of the Works which is attached in Schedule 2 of this Agreement.

Date of Takeover means the date upon which the Corporation takes over the Works in accordance with clause 5.5.

Defaulting Party is defined in clause 10.3(a).

Defects means that part of the Works that in the Corporation's opinion are not in compliance with the Detailed Design.

Design Standards means the Corporation's design standard for water services as issued by the Corporation from time to time.

Detailed Design means a comprehensive set of documentation necessary for the construction and operation of Works that meet the Corporation's design and operational standards, and applicable laws.

Detailed Design Acceptance Notice is defined in clause 3.3(b).

Developer's Address means the address or facsimile number of the Developer set out in Schedule 1;

Developers' Manual means the manual published by the Corporation on the Corporation's website www.watercorporation.com.au.

Developer's Representative means the employee or position nominated by the Developer set out in Schedule 1;

Engineer means a person qualified as a Chartered Professional Engineer appointed by the Developer to undertake the Detailed Design.

Force Majeure means acts of God, strikes, lockouts or other industrial disturbances, acts of the public enemy, acts of terrorism, war declared or undeclared, sabotage, blockade, revolution, riots, insurrections, civil disturbances, epidemics, cyclones, tidal waves, landslides, lightning, earthquakes, floods, storms, fire, adverse weather conditions, explosions, breakage or accident to machinery or lines or pipes, governmental restraint or requirements other than by the affected party, embargoes, inability to obtain or delay in obtaining equipment, materials, transport, governmental approvals, permits or allocations, withdrawal of governmental approvals, permits or allocations (provided that the party affected by such withdrawal is not in default) or any other cause which is not within the control of, or could be attributed either directly or indirectly, to the affected party but does not include:

- (i) any event which could have been prevented or overcome by the exercise by it of the standard of a reasonable and prudent person;
- (ii) lack of funds for any reason; or
- (iii) inability to use available funds.

Governmental Agency means any government or any governmental, semi-governmental, administrative, fiscal or judicial body, department, commission, authority, tribunal, government Minister, agency or entity.

GST means the goods and services tax imposed pursuant to the GST law on a supply or any similar tax.

GST Act means *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

GST Law has the same meaning as in the GST Act.

GST Supply has the same meaning as in section 9.10 of the GST Act.

Innocent Party is defined in clause 10.3(a).

Land means the land described in Schedule 1.

Liability Limit means \$5,000.

Prerequisites to Works means the statutory process specified in Part 6 of the WSA which are required to be undertaken prior to the Works being constructed.

Project Management Plan means the plan developed by the Corporation and the Developer in accordance with clause 3.4 or clause 5.3, as the context applies.

Project Manager means the Corporation's project manager.

Related Body Corporate has the meaning given in the *Corporations Act 2001* (Cth).

Representatives mean the Developer's Representative and the Corporation's Representative.

Scoping Report means the Scoping Report prepared by the Developer for the Corporation under the terms of the Developer Funded and Constructed Works Scoping Agreement, between the Developer and the Corporation.

Term is defined in clause 10.1.

Unconditional Undertaking has the meaning given in clause 2.1(c).

Unconditional Undertaking Amount means the amount set out in Schedule 1.

WSA means the *Water Services Act 2012* (WA).

Works means the water and/or wastewater infrastructure as set out in Schedule 1.

1.2 Interpretation

In this Agreement:

- (i) words importing the singular include the plural and vice versa;
- (ii) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any Governmental Agency;
- (iii) a reference to a clause, party, annexure or schedule is a reference to a clause of, and a party, annexure and schedule to, this Agreement and a reference to this Agreement includes any annexure and schedule;
- (iv) a reference to legislation includes any change to, or consolidation or replacement of it and any delegated legislation or proclamation issued under it;
- (v) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (vi) a reference to a party to a document includes that party's successors and permitted assigns;
- (vii) a reference to a body, other than a party to this Agreement (including an institute, association or authority), whether statutory or not:
 - A. which ceases to exist; or
 - B. whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its powers or functions;
- (viii) a reference to time is to local time in Western Australia;

- (ix) where time is to be reckoned by reference to a day or event, that day or the day of that event will be excluded;
- (x) where the day on or by which any thing is to be done is not a Business Day, that thing must be done on or by the next preceding Business Day;
- (xi) a reference to currency is a reference to Australian currency and all amounts payable under this Agreement must be paid in Australia in Australian currency; and
- (xii) no provision of this Agreement will be construed adversely to a party solely on the ground that the party was responsible for preparation of this Agreement or that provision.

2 Condition Precedent

2.1 Commencement of work

- (a) The Developer must provide the Unconditional Undertaking to cover the actual costs incurred by the Corporation in the:
 - (i) reviewing and acceptance of the Detailed Design; and
 - (ii) project management of the construction and takeover of the Works.
- (b) The Corporation will not commence any work under this Agreement until the Developer has provided the Unconditional Undertaking to the Corporation in accordance with clause 2.1(c).
- (c) Within 14 days of the Commencement Date the Developer must provide an unconditional undertaking, for the Unconditional Undertaking Amount, in favour of the Corporation, in a the form acceptable to the Corporation and from a financial institution acceptable to the Corporation (**Unconditional Undertaking**), as security for the performance by the Developer of their obligations to make certain payments to the Corporation under this Agreement.

2.2 Consequence of non-satisfaction

If the condition specified in clause 2.1 is not satisfied nor waived by notice in writing from the Corporation then the Corporation may terminate this Agreement after the expiry of 14 days after the Commencement Date.

3 Detailed Design

3.1 Developer's obligations

- (a) The Developer must undertake the Detailed Design in accordance with the terms of this Agreement to a standard sufficient for the Corporation to accept the Detailed Design under clause 3.3(b).
- (b) The Developer acknowledges that the Corporation has a right to a copy of the Detailed Design and all materials relevant to the development of the Detailed Design.

- (c) The Developer agrees to ensure that it will provide a copy of the Detailed Design to the Corporation upon request.

3.2 Requirements for Detailed Design

- (a) The Developer must commission the Detailed Design on behalf of the Corporation.
- (b) The Developer must ensure the Detailed Design:
 - (i) is carried out by an Engineer who is acceptable to the Corporation.
 - (ii) is in the form set out in the Corporation's Design Standards, as amended from time to time and comply with all applicable laws relating to those Works.

3.3 Detailed Design provided to Corporation

- (a) The Developer must submit the Detailed Design to the Corporation who will examine the Detailed Design and, based on that examination, either accept or reject the Detailed Design in accordance with clause 3.3(b).
- (b) If the Corporation determines that the Detailed Design is acceptable, the Corporation must, as soon as practicable after making that determination, notify the Developer in writing that the Detailed Design is acceptable to the Corporation. (**Detailed Design Acceptance Notice**).
- (c) If the Corporation determines that the Detailed Design is not acceptable, the Corporation must, as soon as practicable after making that determination:
 - (i) notify the Developer in writing that the Corporation has determined that the Detailed Design is not acceptable to the Corporation; and
 - (ii) identify and notify the Developer in writing of the actions that must be taken in order to ensure the Detailed Design is acceptable to the Corporation.
- (d) The process in clauses 3.3(a) and (c) will be repeated until the Corporation determines that the Detailed Design is acceptable to the Corporation.
- (e) If at any point in the acceptance process the Corporation determines that the Developer is unable to complete the Detailed Design to the Corporation's satisfaction, the Corporation may advise the Developer that it will not continue with this Agreement and in which case the Corporation will be entitled to exercise its rights under clause 10.3(d)(ii).
- (f) The Developer acknowledges that acceptance of the Detailed Design by the Corporation is made without the assumption of any liability by the Corporation and the Developer acknowledges that the risks associated with the design remain with the design.

3.4 Corporation's role and responsibilities for Detailed Design

- (a) The Corporation will appoint a Project Manager to oversee the Detailed Design process in accordance with the Project Management Plan.
- (b) The Project Manager, in conjunction with the Developer, will establish a Project Management Plan.
- (c) Once the Project Management Plan has been completed the Corporation will issue the Project Management Plan to the Developer.
- (d) The Developer must use its best endeavours to comply with the Project Management Plan.

3.5 Limitation of Liability

- (a) The Developer remains entirely responsible for the Detailed Design despite any receipt or review of, or comment or direction on, the Detailed Design by the Corporation or any person acting on behalf of the Corporation as specified in clause 3.3(a) and 3.3(c).
- (b) The Developer shall be liable for and indemnifies the Corporation against any additional direct or indirect costs that may be incurred by the Corporation throughout the period during which the Works are being constructed which result, whether directly or indirectly, from any act or omission, (negligent or otherwise), committed or omitted by the Developer in the investigation or the Detailed Design.

4 Construction Contract

4.1 Selection of Construction Contractor

- (a) The tender process to select the Construction Contractor shall be acceptable to the Corporation.
- (b) The Construction Contractor selected to construct the Works must be of a level of appropriate capability, competence and experience acceptable by the Corporation and any subcontractor that the Construction Contractor engages to perform any element of the Works must also be of a level of appropriate capability, competence and experience acceptable by the Corporation.
- (c) The Developer remains entirely responsible for the Construction Contractor despite any consideration or comment on the selection of the Construction Contractor by the Corporation or any person acting on behalf of the Corporation.

4.2 Developer must enter into Construction Contract

- (a) The Developer shall enter into a Construction Contract with the Construction Contractor for the undertaking of the Works.
- (b) The Construction Contract shall be acceptable to the Corporation.
- (c) Prior to signing the Construction Contract the Developer must submit the Construction Contract to the Corporation for acceptance.
- (d) The Developer shall not enter into the Construction Contract before the Corporation has accepted the Construction Contract and has notified the Developer in writing.

4.3 Basis of the Construction Contract

- (a) The Construction Contract shall be in the form of the relevant Australian Standards for works contracts, and incorporate the Detailed Design and require compliance with the Corporation's design specifications and manuals.
- (b) The defects liability period shall end one year from the Date of Takeover of the Works by the Corporation under clause 5.5.
- (c) Any Defect required to be remediated, as determined by the Project Manager, not performed by the Developer will be effected by the Corporation and the costs of such works will be recovered from the Developer as a debt due and payable.
- (d) The Construction Contract shall contain a comprehensive schedule and breakdown of the costs paid and any other information requested by the Corporation for each asset that comprises the Works.

5 Undertaking of the Works

5.1 Developer to fund Works

The Developer shall at its cost, undertake the design, construction and commissioning of the Works in accordance with the requirements of this Agreement to a standard sufficient for the Corporation to take over the Works under clause 5.5.

5.2 Approvals and Prerequisites to Works

- (a) The Developer is responsible for obtaining all necessary Approvals required for the construction of the Works in accordance with the Corporation's External Approvals Manual.
- (b) The Developer must immediately provide to the Corporation any information requested by the Corporation in relation to the Approvals and/or Approvals process.

- (c) The Developer may only commence construction of the Works once all Approvals are received.
- (d) The Developer is to provide to the Corporation copies of all Approvals obtained for the construction of the Works.
- (e) If an Approval has as a condition or a requirement that is perpetual or ongoing in nature that is likely to continue after the date that the Corporation takes over the Works, the Developer must immediately notify the Corporation of the condition and on behalf of the Corporation, if the Corporation deems the condition to be unacceptable, challenge to the satisfaction of the Corporation, that condition. The Corporation will provide all assistance, comment and information that may be required from the Corporation to challenge the condition under the terms of this subclause (e).
- (f) The Corporation will use its best endeavours to assist the Developer in obtaining those Approvals if reasonably requested to do so by the Developer but nothing contained in or implied by this clause serves to deprive the Corporation of its statutory rights and duties with respect to any application it may receive from Developer for an Approval that the Corporation is obliged to consider or process.

5.3 Project Manager

- (a) The Project Manager will act on behalf of the Corporation to oversee the undertaking and construction of the Works, in accordance with the Project Management Plan and is authorised to direct a change or variation to the Works if in the Corporation's opinion the Works are not in compliance with the Detailed Design.
- (b) The Developer must as soon as reasonably practicable after receiving the direction or variation under clause 5.3(a), issue that direction or variation to the Construction Contractor.
- (c) Only directions or variations issued by the Project Manager must be complied with by the Developer.
- (d) The Project Manager and the Developer will agree to reporting requirements which shall be set out in the Project Management Plan. The Developer shall report to the Project Manager in accordance with the reporting requirements as provided in the Project Management Plan.
- (e) The Project Manager, in conjunction with the Developer, will establish a Project Management Plan.
- (f) Once the Project Management Plan has been completed the Corporation will issue the Project Management Plan to the Developer.

- (g) The Developer must use its best endeavours to comply with the Project Management Plan.
- (h) The Developer shall allow the Project Manager and/or any other Corporation officer, employee or agent access from time to time upon request, to the Works and the site upon which the Works are situated, in order to allow the Project Manager to inspect the Works and any records.
- (i) The Developer must comply with any direction or request from the Project Manager.

5.4 Construction of the Works

- (a) The Developer will cause the Works to be undertaken in accordance with the Construction Program.
- (b) The Developer will undertake the Works in accordance with good industry practice, with due care and skill, utilising the services of appropriately qualified and trained personnel and will be undertaken in accordance with the Corporation's Design Standards and the Developers' Manual for the design and construction of the Works.
- (c) The Corporation acknowledges that in performing its obligations under clause 5.4(b) the Developer may engage competent contractors to undertake any aspect of the Works. Notwithstanding any such engagement, the Developer remains liable for its obligations under clause 5.4(b).
- (d) Subject to clause 5.5, the Developer will be responsible for the Works and will bear all risk in relation to the Works.
- (e) The Developer must ensure that the construction and commissioning of the Works is done:
 - (i) in a proper and workmanlike manner;
 - (ii) in accordance with the Corporation's policies and standards including the Asset Handover Guidelines, all relevant Approvals and the requirements of Governmental Agencies;
 - (iii) so as to ensure that the Works can be used by the Corporation immediately upon being commissioned; and
 - (iv) in accordance with the Construction Program that must be structured so as to minimise the interruption to Corporation customers within the locality of the Works proposed.

5.5 Corporation ownership of Works

Subject to any Defects being rectified in accordance with clause 4.3(c), the Corporation will take over and be responsible for the Works from the date that all of the items as set out in the Developer's Manual have been satisfied, including but not limited to;

- (a) the Works have been certified as having been constructed in accordance with the Detailed Design that are prepared by the Engineer under clause 3.1;
- (b) the Developer has certified that the Developer has made good any physical damage done to property during the construction Works;
- (c) the Corporation has inspected the Works and has approved the Works in its sole and absolute discretion;
- (d) all warranties that are given by contractors or suppliers for the Developer in undertaking the Works have been novated to the Corporation;
- (e) as-constructed drawings for the Works have been provided to the Corporation and the Corporation has determined those as-constructed drawings are acceptable to the Corporation;
- (f) all documents or actions required to be provided or undertaken in the Asset Handover Guideline have been provided or completed and accepted by the Corporation's Representative;
- (g) the actual costs incurred in the design, construction and commissioning for each asset that comprises the Works have been provided as required under clause 4.3(d);
- (h) all land access matters that may be applicable are resolved to the Corporation's satisfaction; and
- (i) the Developer has provided a statement declaring that all matters in this subclause 5.5 have been completed and that all costs incurred by the Developer pursuant to this Agreement have been paid,

the Works will then vest in the Corporation from and including the date that the Corporation notifies in writing the Developer that this clause 4.5 has been satisfied and takeover of the Works by the Corporation has occurred.

6 Costs

- (a) The Developer must pay to the Corporation all costs incurred by the Corporation in the:
 - (i) reviewing and acceptance of the Detailed Design; and
 - (ii) project management of the construction and takeover of the Works.
- (b) At the end of each month during the Term, the Corporation will provide the Developer with an invoice of the actual costs incurred by the Corporation during that month.
- (c) The Developer must pay to the Corporation, within 28 days of the date of the invoice issued under clause 6(b), the amount specified in the invoice.

- (d) If the Developer fails to pay the invoice in accordance with clause 6(c), the Corporation may call on the Unconditional Undertaking and the Corporation may cease to carry on work on the Scoping Report and terminate this Agreement in accordance with clause 10.3.

7 Step in rights of the Corporation

7.1 The Corporation's Step-in rights

- (a) If the Developer fails to comply with its obligations to undertake the Detailed Design or the construction of the Works under this Agreement, or is unable to complete the Detailed Design or construction of the Works in accordance with this Agreement (**Construction Default**), the Corporation may give notice to the Developer and the Developer must within 14 days of receipt of such notice provide to the Corporation a written cure plan setting out in reasonable detail:
 - (i) the reasons for the Developer failing to comply with its obligations to undertake the Detailed Design or not completing the Detailed Design, or for not constructing the Works in accordance with this Agreement, whichever is relevant;
 - (ii) the steps the Developer intends to take to rectify or cure the Construction Default, so as to ensure that the Detailed Design or construction of the Works is undertaken in accordance with this Agreement; and
 - (iii) the time frame within which the Construction Default will be rectified or cured by the Developer,

(Cure Plan).
- (b) The Corporation will review the Cure Plan to determine whether it is reasonable in all the circumstances (including whether the Construction Default may reasonably be rectified or cured in a shorter timeframe than that set out in the Cure Plan), and will ensure that the Detailed Design or the construction of the Works is undertaken in accordance with this Agreement.
- (c) The Developer agrees to:
 - (i) cooperate with the Corporation and use all reasonable endeavours to assist the Corporation in its review of the Cure Plan;
 - (ii) consider all of the Corporation's recommendations and incorporate them, if any, into its Cure Plan, and
 - (iii) provide weekly written reports to the Corporation describing, in reasonable detail, the Developer's progress in implementing the Cure Plan (as amended pursuant to this clause 7.1 if required).
- (d) If:
 - (i) the Developer does not provide an Cure Plan within the time specified in clause 7.1;

- (ii) the Developer fails to comply with its obligations under clause 7.1;
- (iii) in the Corporation's reasonable opinion, the Developer is not (other than due to force majeure) diligently implementing the Cure Plan; or
- (iv) the Developer fails to cure the Construction Default within the time frame specified in the Cure Plan (as amended in accordance with clause 7.1) and such failure is not accepted as reasonable by the Corporation,

then the Corporation may, in its absolute and sole discretion, determine that it will exercise its right to assume the Developer's obligations with respect to the undertaking of the Detailed Design or the construction of the Works in accordance with this clause 7.1(d) (**Step-In Right**) and give a notice (**Step-In Notice**) to the Developer, notifying the Developer that the Corporation will exercise its Step-In Right.

- (e) the Corporation will, upon giving a Step-In Notice (and as and from the date specified in that Step-In Notice), be entitled to exercise its Step-In Right and complete the Detailed Design or the construction of the Works.
- (f) the Developer acknowledges that the Corporation may engage subcontractors to carry out the undertaking of the Detailed Design or construction of the Works.
- (g) If the Corporation gives the Developer a Step-In Notice, the Developer will be required to:
 - (i) give the Corporation the Detailed Design in its current form and all documents, plans and materials associated with the Detailed Design (as applicable); and
 - (ii) give the Corporation control over the Works and the area on which the Works are to be constructed (as applicable);
 - (iii) make available to the Corporation and its subcontractors all plant, equipment and facilities associated with the Works; and
 - (iv) make available to the Corporation and its subcontractors all necessary information, including the Developer's construction documentation relating to the Works for use by the Corporation solely for the purpose of undertaking the Works.
- (h) Any reasonable expenditure incurred by the Corporation in exercising its Step-In Right in accordance with clause 7.1(d) must be paid by the Developer to the Corporation on demand.
- (i) Without limiting anything in clause (d), both Parties agree to use reasonable endeavours to give effect to the Corporation's Step-In Right, including in negotiations and documentation with financiers.
- (j) The Corporation does not waive any of its rights under this agreement (including its right to terminate this agreement in accordance with its terms) as a result of having exercised its Step-In Right.

7.2 Liability of the Corporation

- (a) The Developer acknowledges and agrees that the Corporation will have no liability and the Developer will not be entitled to make any claim against the Corporation arising out or in respect of or in connection with the Corporation exercising its Step-In Rights except to the extent that the claim relates to an act of wilful misconduct, wilful default, fraud or negligence of the Corporation.
- (b) The Corporation will not be responsible for any liability arising prior to the Corporation exercising its Step-In Rights.

8 Security

8.1 Developer to provide security

- (a) The Corporation will return the Unconditional Undertaking to the Developer once the Corporation is satisfied that all the Developer's obligations under this Agreement have been completed.
- (b) The Developer must not, at any time, seek or obtain a court injunction or other legal remedy to take or instigate any other action to hinder or prevent the Corporation from having recourse to the Unconditional Undertaking.
- (c) The Developer must ensure that the Unconditional Undertaking is kept in full force and effect for the full Unconditional Undertaking Amount throughout the Term.

8.2 Access to Security

- (a) The Corporation may have recourse to the Unconditional Undertaking at any time where the Developer fails to pay an invoice issued by the Corporation under clause 6(b).
- (b) This clause 8.2 does not limit the Corporation's entitlement to enforce the indemnity in clause 13.1.

9 Statutory powers and limitations

9.1 Statutory powers add to express powers

The powers conferred on the Corporation by or under any Act of Parliament, are in addition to the powers conferred on the Corporation by this agreement, except to the extent inconsistent with the provisions expressed in this agreement.

9.2 Acts of Parliament that alter agreement of parties

- (a) If at any time and for so long as:
 - (i) any Act of Parliament applies to this agreement;
 - (ii) a provision of that Act of Parliament conflicts with a provision of this agreement; and
 - (iii) under that Act of Parliament the conflicting provision of that Act of Parliament prevails,
- (b) each conflicting provision of this agreement is deemed to be amended to the extent necessary to resolve the conflict with that Act of Parliament.

9.3 Corporation's statutory functions

Nothing contained in or implied by this agreement has the effect of constraining the Corporation or placing any fetter on its statutory rights, duties, powers, functions and protections, including those contained or referred to in any Act of Parliament.

10 Default and Termination

10.1 Term

- (a) This Agreement commences on the Commencement Date and subject to this clause 10, terminates on the Date of Takeover.
- (b) The provisions of clause 4.3(b) and 4.3(c) (defects liability period) clause 12 (Insurance) and clause 13 (Indemnity) survive the termination of this Agreement.

10.2 Failure to commence Works

If the Developer has not commenced Works within 6 months of execution of this Agreement, the Corporation may terminate this Agreement.

10.3 Termination for default by either party

If:

- (a) a party ("**Defaulting Party**") fails to observe or perform any of its obligations under this Agreement and the other party ("**Innocent Party**") has served a notice on the Defaulting Party asking that the default be remedied within 7 days from the date of service of the notice and the Defaulting Party fails to remedy the default; or
- (b) the Developer or the Construction Contractor goes into liquidation, is wound up or dissolved or a provisional liquidator, administrator, controller, receiver or receiver and manager is appointed to any of its assets.
- (c) a party repudiates or commits a fundamental breach of this Agreement; or

- (d) then, in the case of (a) above, the Innocent Party and in the case of (b) to (c) above, the party or parties not in default, is entitled to exercise one or more of the following remedies as in its absolute discretion it thinks fit:
 - (i) to enforce specific performance of this Agreement; and/or
 - (ii) in the case of the Corporation only, to terminate this Agreement and/or to continue the Works.
- (e) If the Corporation terminates this Agreement:
 - (i) the Developer must, as soon as practicable, give to the Corporation the Detailed Design and all materials relevant to the development of the Detailed Design; and
 - (ii) the Corporation may in its sole and absolute discretion, assume ownership of the Works in progress and continue the Works, but will not be responsible for any liability arising prior to the date the Corporation steps in and continues the Works.
- (f) The Corporation may at its discretion appoint another consulting Engineer to complete the Works as it deems necessary.

11 Dispute

- (a) The parties agree that if a dispute arises during the performance of this Agreement it will be resolved, wherever possible, at the level where the dispute initially arises.
- (b) If, within 21 days of a dispute arising, it has not been resolved, the dispute will be referred to the Developer's Representative, and to the Corporation's Representative.
- (c) The Representatives referred to in the preceding clause must meet within 7 days after the dispute is referred to them, and attempt to resolve the dispute. If they resolve the dispute, the resolution is final and binding on the parties who must give effect the resolution.
- (d) If the Representatives cannot resolve the dispute within 14 days of the date of their first meeting, the parties consent to mediation of the dispute. The parties agree to appoint, by agreement, an independent mediator. If the parties do not within 14 days agree on an independent mediator or if the person agreed does not accept the appointment, either party may request the President for the time being of the Law Society of Western Australia (Inc), or the President's nominee to appoint an independent mediator.
- (e) The costs of the mediator will be borne by the parties equally.

- (f) Except to the extent inconsistent with this clause, the mediation will be conducted in accordance with the then current mediation rules of the Law Society of Western Australia.
- (g) The parties will hold the mediation in Perth, Western Australia and, subject to clause 11(h), must comply with any resolution facilitated between them by the independent mediator.
- (h) If a party is dissatisfied with proceedings before the mediator, it may take what action it considers appropriate, including the commencement of legal proceedings. For the avoidance of doubt, the right referred to in this clause 11(h) is not in any way dependent on or conditional upon the initiation or completion of the proceedings before the mediator.

12 Insurances

12.1 Insurances

- (a) The Developer must ensure throughout the Term, the following insurances are effected and maintained. Each of the policies must be approved by the Corporation, which approval the Corporation will not unreasonably withhold:
 - (i) public liability insurance in respect of:
 - A. injury or illness to or death of any person;
 - B. physical loss, damage or destruction to any property (including that of the Corporation); and
 - C. sudden and accidental (or either) pollution,which insurances will each provide cover in respect of each occurrence to an amount of not less than \$20 million, or more per claim or occurrence giving rise to a claim, in respect of activities undertaken under this Agreement.
 - (ii) professional indemnity insurance for \$10 million or more per claim or occurrence giving rise to a claim, in respect of activities undertaken under this Agreement;
 - (iii) workers' compensation insurance to cover liability arising out of death or injury to persons employed by the Developer on or in connection with performing the Works; and
 - (iv) contract works insurance in respect of the Works for the full value of the Works for loss and damage to the Works including allowances for the removal of debris, professional fees and expediting expenses.

12.2 Evidence of insurance

Before the Commencement Date, and, during the Term, whenever the Corporation reasonably requests it in writing, the Developer must produce evidence by certificate of currency, to the reasonable satisfaction of the Corporation, that the insurances referred to in this clause 12 are effected and maintained, and that all premiums have been paid.

12.3 Default

- (a) If the Developer fails to take out or maintain any of the insurances required under this clause 12, or to promptly produce to the Corporation any evidence referred to in clause 12.2 if the Corporation requests it, the Corporation may in its absolute discretion:
 - (i) take out and maintain any such insurances reasonably acceptable to the Corporation, and include any additional costs of them in the next invoice issued by the Corporation to the Developer under this Agreement; or
 - (ii) treat that failure to insure, or failure to maintain insurance, as a Default for the purposes of this Agreement.

12.4 Notification

- (a) The Developer must:
 - (i) as soon as practicable, inform the Corporation, in writing, of any occurrence of which it becomes aware, that may give rise to a claim under any policy of insurance taken out by it in compliance with this agreement,
 - (ii) keep the Corporation informed of subsequent developments concerning the claim; and
 - (iii) use its best endeavours to ensure that its sub-contractors, in respect of their operations, similarly inform the Corporation.

12.5 No variation to insurances

- (a) The Developer must not do, omit to do, or permit or allow to be done, anything whereby any insurances contemplated by this Agreement will be:
 - (i) varied in an manner that might materially reduce the coverage and level of protection afforded from those insurances previously approved by the Corporation; or
 - (ii) cancelled or allowed to lapse unless they are first replaced with other insurances that comply with the provisions of clause 12.

13 Indemnity

13.1 Indemnity by Developer

The Developer indemnifies and will keep the Corporation indemnified against any loss or Claim arising out of, related to or connected with:

- (i) this Agreement;
- (ii) the Works, including without limitation the design or construction of the Works;
- (iii) any third party who suffers property damage or personal injury;

suffered or incurred by the Corporation or brought against it by a third party by reason of any act, omission or breach of the Developer of its obligations under this Agreement, except to the extent that such loss or Claim is solely and directly caused by the Corporation or any of its employees, agents, contractors and sub-contractors (other than the Developer).

13.2 No Liability

- (a) The Developer agrees that it will not bring any Claim against the Corporation whether during the Term or after the Term.
- (b) If a Court holds that despite clause (a), the Developer may bring a Claim and the Corporation has a liability to the Developer in respect of a Claim, then the total liability of the Corporation and its servants and agents to the Developer for all Claims, including interest on any Claim accruing from the date on which the claim first arose to the date of judgment, settlement, deduction or set off, is limited in the aggregate to the Liability Limit.

14 Notices

Every notice:

- (a) must be in legible writing and in English addressed as shown below:
 - (i) if to the Corporation, to the Corporation's Representative at the Corporation's Address; and
 - (ii) if to the Developer, to the Developer's Representative at the Developer's Address.
- (b) must be signed by a person authorised by the sender.

15 General

15.1 Governing law

This Agreement shall be interpreted in accordance with the laws of the State of Western Australia and with respect to any proceeding claim, action or demand under or arising out of the Agreement, the parties submit to the exclusive jurisdiction of the courts of the State of Western Australia.

15.2 Entire agreement

The terms and provisions of this Agreement comprise the entire agreement between the parties at the date of this Agreement in respect of the subject matter of this Agreement and no other term or provision, representation or warranty is to apply to the Agreement or the transactions contemplated by it.

15.3 Costs and Duty

- (a) The parties must each pay their own legal costs in respect of this Agreement.
- (b) If any duty is assessed in respect of this Agreement, the Developer must pay the amount of duty assessed in respect of this Agreement and its counterparts.

15.4 Assignment

The benefit of this Agreement can only be assigned with the Corporation's consent.

15.5 Variation

Any variation to or amendment of this Agreement will not be binding upon the parties unless in writing and signed by the parties.

15.6 Waiver

A waiver of a breach of this Agreement or of the rights created by, or arising under, this Agreement must be in writing and signed by the party giving the waiver for the waiver to be of effect.

15.7 Severability

If any part of this Agreement is, or becomes, void or unenforceable, that part is, or will be, severed from this Agreement so that all parts that are not, or do not become void or unenforceable remain in full force and effect and are unaffected by that severance.

15.8 Counterparts

If this Agreement has been executed in 2 counterparts, each of which is to be regarded as an original, and all of those counterparts together are to constitute one instrument.

15.9 Limitation of liability

Neither party will be liable to the other for any loss of business, loss of opportunity, loss of profit, loss of any contract or for any indirect or consequential loss or damage whether arising out of the breach of this Agreement or otherwise, including without limitation, negligence.

15.10 Relationship of parties

- (a) This agreement is not intended to create, nor will it be construed as creating, any partnership, joint venture obligation or liability between the Corporation and the Developer.
- (b) The Developer will not:
 - (i) act as an agent for, or make representations or commitments on behalf of the Corporation;
 - (ii) bind or impose any obligation on the Corporation; or
 - (iii) incur any joint or joint and several liability on behalf of the Corporation,

without the Corporation's consent in writing or except as expressly provided in the agreement.

16 GST

- (a) Unless expressly included, the consideration for any supply under or in connection with this Agreement does not include GST.
- (b) If GST is imposed on any GST Supply made under this Agreement by a party ("**Supplier**") to another party ("**Recipient**") then the Recipient must pay to the Supplier an amount equal to that GST in addition to any other amount payable or other consideration provided for the GST Supply.
- (c) The Recipient's obligation to pay an amount equal to the GST under clause 16(b) only applies if the Supplier has given the Recipient a tax invoice for the GST Supply that details the relevant amount in respect of which GST is payable and the amount of that GST, unless however the parties have established that a recipient created tax invoice can and will be utilised.
- (d) If the amount paid by the Recipient under clause 16(b) differs from the amount of GST payable at law by the Supplier on the GST Supply, the amount paid by the Recipient to the Supplier will be adjusted accordingly.

Executed as an agreement:

SIGNED by *DEANNE MC DONALD* the person holding the office of the **General Manager, Assets Planning, Water Corporation (a Level 1 Attorney)** and *JOHN TODD* **Manager, Development Services, Water Corporation (a Level 1 Attorney)** as the attorneys for the Water Corporation who state that they have no notice of revocation of the **Power of Attorney No N285555 PA dated 29 March 2016** under which they sign in the presence of:

Witness

Attorney

Name (please print)

DEANNE MC DONALD
Name (please print)

C/- 629 NEWCASTLE STREET
LEEDERVILLE WA 6007
Address

General Manager, Assets Planning
Designated Post

Occupation

Date

Witness

Attorney

Name (please print)

JOHN TODD
Name (please print)

C/- 629 NEWCASTLE STREET
LEEDERVILLE WA 6007
Address

Manager, Development Services
Designated Post

Occupation

Date

EXECUTED by the parties as a Deed

2016

THE COMMON SEAL of the **Town of Hedland**
is affixed in the presence of -

Signature of Mayor

Signature of Chief Executive Officer

Name of Mayor (Print)

Name of Chief Executive Officer (Print)

SCHEDULE 1

PARTICULARS

Developer's Address	PO BOX 41 PORT HEDLAND WA 6721.
Developer's Representative	Daniel Roberts
Corporation's Address	629 Newcastle Street, Leederville Western Australia
Corporation's Representative	John Leccese
Corporation's Asset Delivery Representative	Vic Adams
Land	GREAT NORTHERN HIGHWAY, PORT HEDLAND
Scope of Works:	DN200 and DN300 distribution mains, Port Hedland Airport redevelopment
CIP Project No	CW03258
WAPC	145870
Estimated Cost of the Works:	
Contractor's Prelims and Commissioning	\$737,072.30
Provisional Quantities	\$465,019.68
Professional Fees	\$191,264.00
Main Works	<u>\$2,156,142.71</u>
Estimated Total Cost of the Works	\$3,549,498.69

SCHEDULE 2

CONSTRUCTION PROGRAM

The Engineering Summary Report (ESR) prepared by JACOBS has the scheduled completion date as 17th March 2017.

SCHEDULE 3

PROJECT MANAGEMENT PLAN

A project management plan shall be prepared by the Developer's consulting engineer. Once accepted by the Corporation it will form part of the agreement.