

# Management Agreement – Courthouse Gallery, Port Hedland

Contract Extension from 1/7/2015 to 30/6/2017

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Town of Port Hedland

FORM Building a State of Creativity Inc.



McLeods

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Ref: TF:PORT 32647

# Details

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## Parties

### **Town of Port Hedland**

of PO Box 41, Port Hedland, Western Australia  
(Town)

### **FORM Building a State of Creativity Inc.**

(Registration Number A0800288T)  
of L1 King St Arts Centre, 357 Murray Street, Perth, Western Australia  
(Contractor)

## Background

- A The Town has care, control and management of the Gallery.
- B The Town has agreed to appoint the Contractor to manage the Gallery for the Contract Term, on the terms and conditions of this Contract.

## Agreed terms

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### 1. DEFINITIONS

Unless otherwise required by the context or subject matter the following words have these meanings in this Contract:

**Budgeted Surplus** means the amount specified in the approved Operating Budgets as the surplus between the budgeted income to be earned by the Contractor and the budgeted expenses to be incurred by the Contractor for a Gallery for the budget period on an accruals basis;

**Business Day** means a day that is not a Public Holiday;

**Business Plans** means the business plans to be prepared by the Contractor in accordance with **clause 27.1(1)**;

**Commencement Date** means the date specified in **Item 2** of the Schedule;

**Condition Audits** means the further audits of all the assets at the Gallery as referred to in **clause 17.5(2)**;

**Confidential Information** means all information and materials, in any form, not lawfully in the public domain, in the possession of or under the control of the Contractor or to which the Contractor gains access at any time including the period preceding the execution of this Contract:

- (a) concerning the Town, its business, systems, customers, ratepayers, residents, properties, assets and affairs;
- (b) concerning the terms and subject matter of this Contract; or
- (c) which the Town nominates in writing to be confidential;

**Contract** means the contract evidenced by this document;

**Contract Material** means all material in any form at all that is, pursuant to this Contract, produced by or provided to the Contractor (including material provided by or to an employee, agent or sub-contractor of the Contractor);

**Contractor's Plant** means all or any of the appliances and equipment used by the Contractor for carrying out its obligations under this Contract, whether or not owned by the Contractor;

**Contractor's Plant Policy** means the policy of insurance referred to in **clause 15**;

**Contractor's Representative** means the person appointed by the Contractor as its representative, the details of such representative must be reported to the Town in writing;

**Contract Term** means the term of this Contract as outlined in **clause 5.1** and the Initial Extension (if applicable);

**Council** means the Council of the Town of Port Hedland;

**CPI** means the Consumer Price Index (All Groups for Perth) compiled by the Australian Bureau of Statistics;

**Gallery** means the Port Hedland Courthouse Gallery located at 16 Edgar Street, Port Hedland, and for the avoidance of doubt includes all current fixtures, fittings, plant and equipment currently situated at the Gallery for use in the Gallery. The extent of the Gallery is generally outlined in red on the sketch annexed hereto as **Annexure 1**;

**Initial Audit** means the condition audit of all the assets at the Gallery referred to in **clause 17.5(1)**;

**Initial Contract Term** means the period specified in Item 1 of the Schedule;

**Initial Extension** means the extension of the Contract Term referred to in **clause 5.2**;

**KPI** means Key Performance Indicators annexed hereto as **Annexure 2**, as amended from time to time in accordance with this Contract;

**Litter** includes but is not limited to rubbish, debris and green waste;

**Maintenance Schedules** means the maintenance schedules prepared by the Contractor in accordance with **Annexure 4**;

**Management Fee** means the annual fee payable by the Town to the Contractor in consideration of the due performance by the Contractor of its obligations

pursuant to this Agreement. The Management fee for the Initial Contract Term is specified in **Item 3** of the Schedule;

**Municipal District** means the district of the Town as established and defined by the provisions of the *Local Government Act 1995*;

**Operating Budget** means the approved operating budgets for the Gallery;

**Operational Surplus** means the operational surplus referred to in **clause 6.2(1)**;

**OS&H** means Occupational Safety and Health;

**Professional Indemnity Policy** means the policy of insurance referred to in **clause 13.3(1)**;

**Proposal** means the Contractor's completed offer, response to the Selection Criteria and attachments in respect of the Request for Proposal;

**Proposal Documents** means the Request for Proposal and the Proposal;

**Public Holiday** means a public holiday, within the meaning of the *Public and Bank Holidays Act 1972*, applying in the Town of Port Hedland;

**Public Liability Policy** has the meaning ascribed to it by **clause 13.2**;

**Request for Proposal** means the request for proposal for the management of the Gallery entitled 'Request for Proposal – Management of the Port Hedland Visitors Centre and/or the Courthouse Gallery RFT Number 12/02';

**Schedule** means the schedule to this Contract;

**Services** means:

- (a) the performance of work;
- (b) the supply of materials; and
- (c) all other things required to be done;

under this Contract and the Proposal Documents by the Contractor and includes any matters reasonably to be inferred from the Proposal Documents or trade usage;

**Sponsorship Plan** means the sponsorship plan to be prepared by the Contractor in accordance with **clause 27.3(1)**;

**Surrounds** means all of the grass, garden beds, paved areas and other areas of the Gallery;

**Town** means the Town of Port Hedland;

**Town's Fixtures and Fittings** means the Town's property currently at the Gallery; and

**Written Law** includes all acts and statutes (State or Federal) for the time being enacted and all regulations, schemes, ordinances, local laws, by-laws,

requisitions, orders or statutory instruments made under any Act from time to time by any statutory, public or other competent authority.

## **2A. ORDER OF PRECEDENCE**

If there is any inconsistency between the terms of this Contract and the Proposal Documents then the terms of this Contract will prevail.

## **2. APPOINTMENT**

The Town appoints the Contractor, and the Contractor accepts the appointment, to manage the Gallery for the Contract Term under the terms and conditions provided by this Contract and the Proposal Documents.

## **3. CONTRACTOR'S OBLIGATIONS**

The Contractor agrees:

- (a) to provide the Services to the Town in accordance with this Contract and Proposal Documents;
- (b) to perform its obligations under this Contract in a competent and professional manner and ensure that all staff employed or subcontracted by the Contractor to carry out the Contractor's obligations are of a standard sufficient to satisfy the above obligation; and
- (c) to comply with all reasonable instructions and directions issued by the Town in relation to the provision of the Services having regard to the terms of this Contract.

## **4. CONTRACTOR TO COMPLY WITH PROPOSAL**

The Contractor shall at all times comply with the Proposal submitted by it and with any acceptance by the Town of that Proposal, provided it is not inconsistent with this contract.

## **5. CONTRACT TERM**

### **5.1 Initial Contract Term**

The Contract Term is for a period of three years (**Initial Contract Term**) and any period for which the operation of the Contract is extended under **clause 5.2**, if any.

### **5.2 Initial Extension of Contract**

- (1) The Town may in its sole discretion extend this Contract for an additional term of up to 2 years provided the Town gives the Contractor written notice of its intention to put into effect the Initial Extension at least three months prior to the expiry of the Initial Contract Term.
- (2) In the event the Town exercises its right to enforce the Initial Extension, the terms and conditions of this Contract will apply to the Initial Extension except for **clause 5.2(1)**.

## **6. CONTRACT PAYMENTS**

### **6.1 Management Fee**

If the Contractor complies with its obligations under this Contract and subject to compliance with **clause 6.3**, the Town covenants and agrees to pay to the Contractor the Management Fee in advance the quarterly instalments over the Contract Term, provided that the Town is not required to make any payment to the Contractor in respect of any of the Services which are not performed or are not performed in accordance with this Contract.

### **6.2 Operational Surplus**

- (1) If the Contractor, through its management and operation of the Gallery, generates an actual better net profit/loss position for the Town at 30 June during any year of the Contract Term, to the amount forecast in the approved Operating Budgets (or Budget Surplus, if applicable), the Operational Surplus will be utilised into arts and cultural development strategies for the Town through the Gallery.
- (2) The Contractor must submit an audited profit/loss statement for the Contractor by 30 September each year for examination by the Town or its representative.
- (3) The Contractor must submit a profit/loss statement for the Gallery, for the previous quarter, within 16 days of the new quarter for examination by the Town or its representative. An Audit and Finance report will be examined once a financial quarter, by Council.
- (4) When determining the Operational Surplus, the following costs incurred by the Contractor must not be included in the operational costs for the purpose of this calculation:
  - (a) losses incurred by failing to insure its assets or cash collected at the Gallery;
  - (b) costs to make and remove alterations and additions made at the Gallery without the Town or its representative's prior written approval;
  - (c) costs to rectify services and the damage caused when the relevant service authority approval was not obtained;
  - (d) costs and losses incurred in the misappropriation or theft of the Gallery income;
  - (e) costs of repairing damage caused by non-conformance with manufacturers and suppliers, warranties and direction; and
  - (f) losses incurred due to operational interruption caused as a result of Contractor error or failure to comply with contract requirements including the requirement to service and maintain plant.

### **6.3 Tax Invoices**

- (1) Where quarterly payments are due to be paid to the Contractor, the Contractor must provide a tax invoice to the Town by the 1st day of the previous month for Services to be provided for the following quarter.
- (2) The Town agrees to pay any validly provided tax invoice, within 30 days of receipt.

### **6.4 Full Payment for Services**

The Contractor acknowledges and agrees that payment of the amounts specified in this clause will constitute full payment for the provision of the Services.

## **7. FEES & OTHER OUTGOINGS**

- (1) The Contractor must pay all fees, charges and costs incurred in its performance of the Services and the management and operation of the Gallery, as stated in this Contract.
- (2) The obligation in paragraph (1) above, includes but is not limited to:
  - (a) the payment of all ongoing fees and charges for gas, electricity, telephone, water (not associated with landscaping) internet charges and insurances for the Gallery from the commencement to the expiry or earlier termination of this Contract as outlined in the Proposal document;
  - (b) labour, materials, equipment and other such costs required to provide the Services as outlined in the Proposal;
  - (c) attendance by the Contractor's Representative at bi-monthly management meetings (on phone or electronic medium or in person); and
  - (d) all information technology and point of sale hardware and software.

## **8. OPERATING BUDGETS**

### **8.1 Obligation to comply with approved Operating Budgets**

- (1) The Contractor must implement and comply with the approved Operating Budgets for the Gallery, pro-rated for the period the Gallery is operational.
- (2) The Contractor, through fund raising from alternative sources has the ability to increase their expenditure, but not to the detriment of the Operating Budgets, or to cover losses outlined in **clause 6.2(4)**.

### **8.2 Review of Operating Budgets**

- (1) The approved Operating Budgets for the first, second and third year of the Contract Term will be the Operating Budgets provided by the Contractor as part of the Proposal, pro-rated for the period the Gallery is operational.

- (2) By 28 February in each year of the Contract Term, the Contractor must submit to the Town the proposed Operating Budget for the next financial year for the Gallery for the Town's approval. The proposed Operating Budgets must be fully itemised and be in a form generally acceptable to the Town.
- (3) The Town covenants and agrees to act reasonably, and not to unreasonably fail to approve or withhold approval to the proposed Operating Budgets.
- (4) If the Town does not approve the proposed operating budgets it will, within 14 days of advising the Contractor of its decision not to approve the proposed operating budgets (or part thereof), provide to the Contractor written reasons for the decision not to approve the proposed operating budgets, and will provide the Contractor with a reasonable opportunity to submit a further proposed operating budget.

## **9. VARIATIONS TO SERVICES & OPERATING BUDGETS**

### **9.1 Variation to Services by Mutual Agreement**

- (1) During the Contract Term, the Town and the Contractor may mutually agree to:
  - (a) alter the extent of the Services;
  - (b) alter the character, quality or mode of performance of the Services; or
  - (c) carry out any work of a character similar to the Services.
- (2) The value, if any, of any variation must be added to or subtracted from any payment to the Contractor under **clause 6**. The value of each variation will be determined by the Town or its representative, in agreement with the Contractor, by applying:
  - (a) any relevant rates or prices contained in this Contract or the Proposal Documents which are expressly stated to be provided for the purposes, or partly for the purposes, of this clause, if these rates still apply;
  - (b) reasonable rates or prices, if there are no rates or prices contained in this Contract or the Proposal Documents which are expressly stated to be provided for the purposes, or partly for the purposes, of this clause; or
  - (c) if the variation involves a decrease in the Services or the omission of part of the Services, the Town or its representative must make a reasonable allowance for the Contractor's profit and overheads in the Operating Budgets.

### **9.2 Variation for reasons beyond the Contractor's reasonable contract**

- (1) Subject to paragraph (2) below, the Town and the Contractor agree that the approved Operating Budgets may be varied by the Town in an amount or amounts determined by the Town, acting reasonably and in



consultation with the Contractor, for a reason or reasons beyond the reasonable control of the Contractor, including but not limited to:

- (a) acts of God, including fire, bushfire, lightning, storm, tidal wave, cyclone, hurricane, earthquake, landslide, mudslide, washouts and flood;
  - (b) epidemics, public health scares or outbreaks of disease;
  - (c) war, revolution or other state of armed hostility of a like nature;
  - (d) insurrection, civil disturbances or riot (except where arising within the custodial areas);
  - (e) collisions or accidents which constitute a major catastrophe, an example being an aircraft crash or nuclear contamination;
  - (f) unavailability or lack of reasonable availability in the State of labour;
  - (g) a strike, lockout, or other industrial disturbance or restraint of labour which also involved employees; and
  - (h) an action or event which occurs which could not at the time of preparing the Operating Budgets for the year, could not have been reasonably been expected to occur and which has or could materially alter the capacity of the Contractor to operate within the parameters of the approved Operating Budgets.
- (2) Prior to varying the approved Operating Budgets in accordance with paragraph (1), the Contractor must provide to the Town reasonable evidence within a reasonable period of time, as to the need for the amendment to the approved Operating Budgets and the steps taken by the Contractor to minimise the impact upon the approved Operating Budgets.

## **10. POWERS OF THE TOWN AND ITS REPRESENTATIVES**

The Town or its duly appointed representative may exercise any powers conferred, and perform any duties imposed or functions conferred, on the Town or its representative.

## **11. STATUTORY OBLIGATIONS**

- (1) The Contractor must obey and ensure that its employees, sub-contractors and agents comply with and observe all Written Laws which relate to the Gallery, the Services and/or the operation of the Gallery by the Contractor.
- (2) Without limiting its obligations under paragraph (1) above, the Contractor must:
  - (a) comply with the terms of any relevant Commonwealth and State awards in respect of its employees;
  - (b) ensure that any agents and sub-contractors of the Contractor also comply with the obligations imposed by paragraph (2)(a).

## 12. LICENCES, PERMITS & CERTIFICATES

- (1) The Contractor must ensure that all licences, permits and certificates required for the operation of the Gallery are obtained and maintained in accordance with all relevant Written Laws and must ensure that licences, permits and certificates required for the operation of the Gallery remain in force throughout the duration of this Contract.
- (2) The Contractor must forward to the Town or its representative, within 14 days of receipt, copies of all licences, permits and certificates.
- (3) The Contractor is responsible for all costs associated with obtaining or transferring all licences permits and certificates throughout the duration of this Contract.
- (4) Wherever the approval of a statutory authority is required, such approval must be obtained by the Contractor and a copy of the approval certificate forwarded to the Town or its representative before proceeding under the approval.
- (5) Where a certificate of approval by a statutory authority requires renewal, such renewal must be obtained by the Contractor and a copy of the renewal certificate forwarded to the Town or its representative before continuing operation under the certificate.

## 13. INSURANCE OBLIGATIONS & INDEMNITY

### 13.1 Workers' Compensation Insurance and Indemnities

- (1) The Contractor must itself effect, and ensure that each of its sub-contractors effects, a policy of insurance complying with the provisions of *the Workers Compensation and Injury Management Act 1981* in respect of all of its employees.
- (2) The Contractor must itself comply, and ensure that each of its sub-contractors complies with any other workers compensation legislation in force from time to time and must, in the absence of any such legislation, or if so directed by the Town or its representative, insure against any claims that may be made in respect of the death of or injury to any of their employees.
- (3) The Contractor must indemnify, keep indemnified and hold harmless the Town and all of the Town's staff, sub-contractors or agents against any liabilities, costs, penalties or additional premiums they may incur arising, whether directly or indirectly, from any provision of the *Workers Compensation and Injury Management Act 1981* (including, without limitation, section 10A of that Act, or any later amendment to this Act) which:
  - (a) deems any employees or agents of the Contractor, or any employees or agents of any sub-contractor of the Contractor, to be employees or workers of the Town, or the Town's employees, sub-contractors or agents; or
  - (b) otherwise makes the Town, or any of the Town's staff, sub-contractors or agents, in any way responsible for, or liable to pay

any moneys to or in respect of, such persons, except for liabilities arising directly from the negligence of the Town or any of the Town's staff, sub-contractors or agents.

### **13.2 Public Liability Insurance**

- (1) The Contractor must, at all times during the Contract Term, be the holder of a current public liability policy of insurance in the amount of \$10,000,000 for any one claim (or such other amount as the Town may require at any time and from time to time consistent with usual prudent commercial practice).
- (2) The Contractor must ensure that the Public Liability Policy is effected with a reputable insurer and the policy representative of what the Australian insurance market provides as standard cover to businesses and groups similar to the Contractor.
- (3) The Contractor must ensure in consultation with a broker that the Public Liability Policy notes the interests of the Town in its capacity as the body with care, control and management of the Gallery and as principal under this Contract and which:
  - (a) requires the insurer to give notice in writing to the Town immediately if a notice of cancellation or other notice is given under the Public Liability Policy; and
  - (b) requires the insurer to give notice in writing to the Town immediately if the Contractor does not renew the Public Liability Policy or pay a premium for the Public Liability Policy.
- (4) The Contractor shall promptly and as soon as reasonably practicable give the Town notice of any event that may result in a claim made against any of the insurances policies held/effected by the Contractor referred to in this **clause 13**.
- (5) The Contractor agrees not to make, agree, settle or compromise any claims which may have an impact on the Town's' interest in respect of the insurance policies unless the prior written consent of the Town is provided.
- (6) The Town must, at all times during the Contract Term, be the holder of a current public liability policy of insurance in at least the same amount as the Contractor may be required to hold in accordance with clause 13.2(1) for any one claim.

### **13.3 Professional Indemnity Insurance**

- (1) The Contractor must, at all times during the Contract Term, be the holder of a current professional indemnity policy of insurance providing coverage for an amount per event of at least of \$5,000,000 (or such other amount as the Town may require at any time and from time to time consistent with usual prudent commercial practice).
- (2) The Contractor must ensure that the Professional Indemnity Policy is affected with a reputable insurer; and cover such risks, and be subject only to such conditions and exclusions, as what the Australian

insurance market provides as standard cover to groups such as the Contractor.

#### **13.4 Contractor's Product Liability Insurance**

The Contractor must effect a comprehensive product liability insurance policy with a cover equivalent to the value of the Contractor's Product (including without limitation of point of sale equipment) to be used in the performance of the Contractor's obligations under this Contract.

#### **13.5 Evidence of Insurance**

- (1) The Contractor must produce to the Town or its representative policies of insurance and receipts showing that the insurances required pursuant to this clause have been paid not less than two (2) days before the Commencement Date.
- (2) The Contractor must provide the Town or its representative with certificates of currency in respect of the insurances required pursuant to this clause:
  - (a) immediately after the Commencement date; then every July during the Contract Term; and
  - (b) within two (2) days after a written request being made by the Town or its representative.

#### **13.6 Failure to Insure**

- (1) If the Contractor fails to comply with its obligations under this clause, the Town or its representative may:
  - (a) in the case of a failure by the Contractor to comply with its obligations under **clauses 13.2, 13.3 or 13.4**, effect or maintain the Public Liability Policy, the Professional Indemnity Policy, the Contractor's Product Liability Policy, as the case may be, and pay the premiums thereof, the cost of which must be paid on demand by the Contractor to the Town or may be deducted by the Town from any moneys due or becoming due to the Contractor under this Contract, at the option of the Town; or
  - (b) immediately terminate this Contract.
- (2) If this Contract is terminated under **clause 13.6(1)(b), clauses 39.2 and 39.3** will operate, to the extent that they are applicable, as if the termination had been made by the Town under **clause 39.1**.
- (3) Any failure by the Contractor to comply with its obligations under **clause 13.5** will constitute conclusive proof of its failure to effect or maintain the insurances, as the case may be, for the purposes of **clause 13.6(1)(a)**.
- (4) The exercise of a power by the Town under **clause 13.6(1)(a)** does not prevent the Town terminating the Contract under **clause 13.6(1)(b)** in respect of that or any subsequent breach of **clauses 13.1, 13.2, 13.3 or 13.4**.

#### **13.7 Not to Affect Other Obligations**

The effecting of insurances by the Contractor under this Contract does not affect the obligations of the Contractor under this or any other clause of this Contract.

### **13.8 Town to Insure Gallery**

- (1) The Town will insure the Gallery and the Town's Fixtures and Fittings against liabilities for damage or loss by fire, flood, storm or tempest to their full insurable value.
- (2) The Contractor must not do or permit anything which might vitiate or interfere with any policy of insurance in respect of the Gallery and the Town's Fixtures and Fittings or which might prejudice any claim under such policy or render the Town liable for any increased premium on any policy of insurance in respect of the Gallery and fixtures and fittings supplied by the Town.

### **13.9 Indemnity**

The Contractor must indemnify and keep indemnified the Town from and against all claims, actions, demands, loss, damages, costs and expenses incurred by the Town in respect of anything done or omitted to be done in the exercise of the powers conferred on the Contractor by this document or in the carrying out of the duties and functions of the Contractor under this Contract in so far as the loss, damages, costs and expenses are caused or contributed to by the act or default of the Contractor. The Contractor's liability to indemnify the Town will be reduced proportionally to the extent that any negligence, or wilful act or omission of the Town or its officers, employees, contractors, agents, invitees or licensees contributed to the relevant actions, claims, losses, damages, penalties, demands or costs.

## **14 TOWN'S RIGHT TO TERMINATE**

If the Contractor fails to comply with any of its obligations under this clause, the Town may immediately terminate this Contract and **clauses 39.2** and **39.3** will operate, to the extent that they are applicable, as if the termination had been made by the Town under **clause 39.1**.

## **15. CONTRACTOR'S PLANT**

### **15.1 Obligations**

The Contractor must ensure that all of the Contractor's Plant:

- (a) complies with all applicable Written Laws;
- (b) is suitable for the purpose for which it is to be used; and
- (c) is maintained in good repair and condition.

### **15.2 Third Party Arrangements**

- (1) Subject to paragraph (2) below, the Contractor must not make any agreement or other arrangement under which any person would have

rights to the possession of the Contractor's Plant in priority to the rights of the Town under **clause 39.2(1)(b)**.

- (2) Notwithstanding paragraph (1) above, the Town or its representative may approve in writing a lease, lease back, hire purchase, chattel mortgage, hire agreement or other financial arrangement between the Contractor and a third party (Third Party) for any of the Contractor's Plant provided that the Town or its representative is provided in writing by the Contractor with:
  - (a) the name and address of the Third Party;
  - (b) written details of the proposed agreement or arrangement between the Contractor and the Third Party; and
  - (c) a copy of the contract, the terms of which in the Town's absolute opinion adequately secure the Town's rights under **clause 29**.

### **15.3 Maintain Register**

The Contractor must maintain at all times an accurate register of all of the Contractor's Plant, and must permit the Town to inspect the register upon reasonable notice.

## **16. TOWN'S FIXTURES & FITTINGS**

- (1) For the purpose of this Contract, the Contractor will have the right to use the Town's Fixtures and Fittings.
- (2) Within 31 days of the Commencement Date the Town must give to the Contractor all written instructions and warranty specifications for the Town's Fixtures and Fittings within its possession.
- (3) The Town's Fixtures and Fittings will remain the property of the Town at all times and must be maintained, repaired or replaced (as the case requires) in accordance with **clause 17.2** of this Contract.
- (4) For the avoidance of doubt, the Town's Fixtures and Fittings are included within the definition of "Gallery".
- (5) Once an audit of the Gallery's existing Fixtures and Fittings has been carried out and signed by both parties, in accordance with the requirements of **clause 17.5**, the Contractor must maintain at all times an accurate register of all of the Town's Fixtures and Fittings, and must permit the Town to inspect the register upon reasonable notice.

## **17 MAINTENANCE & CLEANING**

### **17.1 Cleaning of the Gallery**

- (1) The Contractor must ensure that the Gallery is kept clean, neat and tidy at all times, and in accordance with the requirements set out in **Annexure 4**.

## 17.2 Servicing and Maintenance

- (1) The Contractor must ensure that the Gallery, and all minor fixtures, fittings (servicing of administration equipment: fax, computers, printers etc) are maintained in good repair and condition, fair wear and tear excepted.
- (2) The Town shall be responsible for maintaining the building comprising the Gallery, including, pest control, safety and fire equipment, air conditioning, landscaping and its maintenance and water (associated with landscaping) costs of the Gallery. The Town will attempt to rectify any major maintenance or structural defect or problem in relation to the building comprising the Gallery within a reasonable amount of time, having consulted with Council.
- (3) All requests for major maintenance and repairs must be recorded and reported to the Town representative within 48 hours. Authorisation of the repairs of a capital nature is submitted to the Building Maintenance unit for his / her initial actioning. Building Maintenance will determine any maintenance or structural damage caused by the negligence of the Contractor.
- (4) The Maintenance Schedules will be reviewed annually in February in each year of the Contract Term.
- (5) On 31 January in each year of the Contract Term, the Contractor must submit to the Town the proposed Maintenance Schedules (which will include any proposal for upgrades, repairs or major maintenance or the like for the Building) for the next financial year for the Gallery for the Town's approval. The proposed Maintenance Schedules must be fully itemised and be in a form generally acceptable to the Town.
- (6) The Town (and where applicable its Council) will review the proposed Maintenance Schedules, and advise the Contractor in writing if the proposed Maintenance Schedules are approved.
- (7) The Town covenants and agrees to act reasonably, and not to unreasonably fail to approve or withhold approval to the proposed Maintenance Schedules.
- (8) If the Town does not approve the proposed Maintenance Schedules it will, within 14 days of advising the Contractor of its decision not to approve the proposed Maintenance Schedules (or part thereof), provide to the Contractor written reasons for the decision not to approve the proposed Maintenance Schedules, and will provide the Contractor with a reasonable opportunity to submit further proposed Maintenance Schedules.
- (9) The maintenance performance of the Contractor will be monitored as a performance indicator in respect to the overall performance of this Contract.
- (10) The Contractor must report on the achievement of all maintenance required in **Annexure 4**, within its quarterly reports.

### 17.3 Make Good Damage

Notwithstanding any other provisions of this Contract, the Contractor must make good any loss or damage to any property of the Town caused by the negligence or default of the Contractor or any of its agents, employees and subcontractor of the Contractor.

### 17.4 Report Defects

The Contractor must immediately report to the Town in writing:

- (a) any structural report or defect, or any major maintenance in respect of Gallery;
- (b) all notices, orders and summonses received by the Contractor and which affect the Gallery; and
- (c) any circumstances of which it is aware and which are likely to be a danger or cause any damage or danger to the Gallery or to any person in or on the Gallery.

### 17.5 Condition Audit of the Gallery

- (1) The Contractor and the Town or its representative will within 31 days of the date of this Contract undertake a condition audit of all the assets at the Gallery, including the Gallery (**Initial Condition Audit**).
- (2) The Contractor and the Town or its representative will undertake an annual condition audit of all the assets at the Gallery, including the Gallery themselves, no later than 3 months before the end of each Contract Term.
- (3) The purpose of the Initial Audit and Condition Audits is to evaluate and compare the condition of the Gallery during the Contract and at the end of each Contract Term with the condition at the Commencement Date of the Contract Term.
- (4) Subject to sub-clause (6), any deterioration of the minor fittings and fixtures or its assets identified by the Condition Audits, fair wear and tear excepted, must be rectified at the Contractor's expense within 30 days of receipt of the Condition Audit.
- (5) Subject to sub-clause (6), unless otherwise directed by the Town or its representative, the Contractor must replace within seven (7) days at its cost all missing assets identified by the Condition Audits.
- (6) Where any deterioration of the condition of the Gallery or its assets or any missing assets are identified by the Condition Audits and the matter is subject to a claim on any insurance policy then the Contractor is not obliged to rectify the condition or replace the assets until a reasonable time after either the claim has been allowed and paid by the insurer or declined by the insurer as the case may be PROVIDED that if any deterioration of the condition of the Gallery or its assets or any missing assets is not adversely impacting upon the Contractor's ability to comply with its obligations under this Contract in the Town's reasonable opinion, the Town may issue the Contractor a notice requiring the



Contractor to rectify such deterioration of the condition of the Gallery or its assets within a reasonable period time as specified in the notice.

- (7) If the Contractor fails in any of its obligations under this subclause, the Contractor must:
  - (a) permit the Town or its representative, its agents, contractors or workmen to enter upon the Gallery to carry out any necessary remedial works; and
  - (b) pay on demand all costs incurred by the Town in the performance of remedial work as a liquidated debt.

## **18. CAPITAL WORKS & REDEVELOPMENT**

### **18.1 Capital Works & Redevelopment**

- (1) A capital works budget will be determined jointly between the Contractor and the Town in January of each year. The capital works budget is to be approved by the Council.
- (2) The Town may elect to carry out such major capital works or redevelopment, if any, to such value and at such times as the Town, in consultation with the Contractor, will determine.
- (3) With the exception of urgent works, the Town will give the Contractor a minimum of two months' notice of such works or redevelopment.
- (4) In the event the Contractor considers that the works or redevelopment may cause or contribute to loss of income or revenue, it may lodge with the Town an amended Operating Budget projecting the losses it considers will occur as a result of those works or redevelopment.
- (5) The Town will review the amended Operating Budget, and in its discretion, determine (acting reasonably) whether to accept the Operating Budget in light of the projections.

### **18.2 Contractor's reporting obligations**

The Contractor must report to the Town any need or requirement for structural maintenance, replacement or repair of the Gallery.

## **19. ALTERATIONS/ADDITIONS TO THE GALLERY**

### **19.1 Alterations & Additions the Gallery**

- (1) Except in the case of emergency, the Contractor must not, without the prior written consent of the Town or its representative, alter or interfere with the Gallery or their surrounds, including gas, electricity, water supply, sewerage, drainage, telephone and communication services.
- (2) The Contractor must not make or permit to be made, any alterations or additions to the Gallery or the Town's Fixtures and Fittings without the prior written consent of the Town or its representative.
- (3) Any alterations or additions which have been approved in writing by the Town or its representative must be carried out in accordance with plans

and specifications and by workmen, builders and trades persons approved by the Town or its representative.

- (4) At any time, if so required by the Town, the Contractor must remove any alterations and additions made, which were not prior approved in writing by the Town. The Contractor must make good any damage occasioned to the Gallery or surrounds by such removal and reinstate the Gallery and their surrounds to their former condition.

## **20. USE OF GALLERY**

### **20.1 Permitted Use**

The Contractor must not use, or permit to be used, the Gallery for the following uses under the Contract:

- (a) for any illegal, immoral, objectionable, noxious, noisy or offensive purpose nor for any nuisance or inconvenience to the Town or any other person; or
- (b) for any purpose other than the provision of Services as agreed under the Contract without the prior written approval of the Town or its representative.

### **20.2 Tobacco & Alcohol**

- (1) The Contractor must not permit or allow the sale of tobacco products within the Gallery.
- (2) The sale or consumption of alcohol is not permitted within the Gallery, without the prior written approval of the Town or its representative.
- (3) The Town or its representative may approve alcohol being made available at functions and special events.
- (4) Where the sale or consumption of alcohol is permitted at the Gallery, the Contractor must ensure that all requirements under the *Liquor Control Act* 1988 including the issue of required permits are complied with. Any penalties or loss of income that result from the Contractor failing to abide by the relevant permits or regulations are to be paid in full by the Contractor.

## **21. ACCESS TO GALLERY**

### **21.1 Operating Hours**

The Contractor must provide supervised access to the Gallery by the general public for at least the minimum hours specified in Item 4 of the Schedule, unless otherwise agreed by the Town in writing.

### **21.2 Restriction on Public Access**

The Contractor must not accept bulk bookings where such bookings restrict public access to the Services during the Gallery's normal hours of operation without prior written approval of the Town or its representative. Patrons must be given at least 14 days' notice in advance of any such restrictions.

### **21.3 Access by the Town or its representative**

- (1) The Contractor must at all times allow the Town or its representative full access to the Gallery for the purposes of inspecting and auditing the Gallery within 24 hours of notice.
- (2) The Contractor agrees to permit the Town and its agents with or without tradespersons and others, and with or without plant and equipment at all reasonable times to enter upon the Gallery and all parts thereof to view the condition thereof and to take inventories of the Town's Fixtures and Fittings therein and to effect such repairs, maintenance and amendments as shall be required by the Town.

### **21.4 Security**

The Contractor will be responsible for the security of the Gallery at all times.

### **21.5 Regulation of Entry and Power of Removal**

The Town authorises the Contractor to:

- (1) remove from any of the Gallery any person who in the opinion of the Contractor has acted in a manner that will or may endanger the safety or wellbeing of themselves or other users of any of the Gallery or the Contractor's staff or contractors or who otherwise conducts himself or herself in a manner that causes offence or annoyance or amounts to a breach of any rules imposed by the Contractor for the use of the Gallery; and
- (2) refuse entry to any or all of the Gallery to any person who has been removed from any of the Gallery for any of the reasons referred to in sub-clause (1) or in the opinion of the Contractor is likely to act in a manner that will give rise to the right to remove the person in accordance with sub-clause (1).

## **22. FINANCIAL MANAGEMENT**

### **22.1 Financial Procedures and Protocols**

- (1) The Contractor must establish financial procedures and policies which are capable of being audited and demonstrate good management practice in relation to the collection, management, banking and distribution of financial resources.
- (2) The Gallery is to be operated as part of the Contractor's operations for financial purposes.
- (3) All financial procedures, audits and records associated with the operation of the Gallery are to be available to the Town upon request.

### **22.2 Collection of income**

- (1) The Contractor is responsible for the collection of all income and revenues generated either by the Gallery or associated with the operation of the Gallery, including, but not limited to the following:

- (a) commissions;
  - (b) booking and event fees;
  - (c) memberships;
  - (d) sponsorships; and
  - (e) supply rights, discounts, rebates and any other form of contractor payments relating to the supply of goods or services associated with this Contract.
- (2) The income collection process must provide transparent financial accountability for all income received clearly detailed in the quarterly report.
  - (3) Unless the Contractor has specific and approved arrangements with the Town or its representative, the Contractor must not collect payment for activities, use of the Gallery, or Services which give the customer the right to use the Gallery beyond the term of this Contract.
  - (4) If the Town approves specific arrangements pursuant to sub-clause (3) above, any income collected in advance for use of the Gallery must be reconciled and audited by a qualified person and the audited income forwarded to the Town or its representative prior to the expiry or earlier termination of this Contract.
  - (5) The Contractor is responsible for the accurate and transparent recording of all income, (including supply rights, discounts and rebates) and expenditure (including any internal transactions) associated with the operation of this Contract.
  - (6) The Contractor's financial statements including activities associated with the performance of the Gallery are to be verified by an independent auditor on an annual basis. The costs associated with the annual audit and any other costs incurred in the processing of financial data are to be the responsibility of the Contractor. The Contractor is to forward a copy of the audited accounts for each site to Council by 30 April each year for the Contractor's financial year ending 31 December.

### **22.3 Security and Responsibility for all Income Received**

- (1) The Contractor is strictly responsible for the security and banking of all income received.
- (2) The Contractor must regularly bank all income received into one account for the Gallery in the name of the Contractor.
- (3) The Contractor is responsible for all bank fees, charges and taxes and other requirements associated with the maintenance of any such account and all costs associated with the security, insurance and transportation of all monies.
- (4) The Contractor is to ensure that cash handling procedures for front line staff are in place to limit the opportunity for theft of income and that more senior members of staff are aware of their additional responsibilities in

verifying end of day point of sale transactions and reconciling income generated with banking transactions.

- (5) The Contractor must maintain adequate fidelity guarantee insurance for the life of the Contract to ensure the Town incurs no loss should an employee of the Contractor steal any income received. The Contractor must show proof of this insurance to the Town or its representative upon written request.

## **22.4 Recording of Income and Expenditure**

- (1) The Contractor must accurately and transparently record all income and expenditure associated with the operation of the Gallery and this Contract.
- (2) A qualified person must maintain and prepare all financial records associated with the Gallery.
- (3) All financial reports for the Gallery must be prepared in accordance with accepted accounting standards, reconciled and reflect a true statement of the financial performance of the Contract.
- (4) All records associated with the Gallery must be made available to the Town or its representative upon written request.
- (5) The Contractor is responsible for all costs associated with the maintenance of financial reports including the Contractor's annual audit.
- (6) The Town reserves the right to conduct an independent financial audit on the Gallery. The cost of such audit will be borne by the Town unless the audit establishes that there are errors in the financial recording and reporting not of a minor nature in which case the Contractor will be responsible for audit costs.

## **23. REPORTS & MEETINGS**

### **23.1 Quarterly Meetings**

- (1) Unless otherwise agreed by the parties in writing, the Town and the Contractor must meet on a quarterly basis, at a mutually convenient time, to review and discuss the operation of the Gallery in terms of the agreed KPI's. Meetings may be held over the phone, or in person as convenient.
- (2) The parties must meet immediately following the 21<sup>st</sup> of each third month, to permit discussion of the previous reports required pursuant to **clause 23.2**, and thereafter three months following such meeting.

### **23.2 Quarterly Reports**

By the 21<sup>st</sup> of each month following the last quarter of the financial period, the Contractor must provide to the Town comprehensive written reports concerning the operation of the Gallery during the preceding quarter. The quarterly reports must be in a form reasonably required by the Town and include:

- (1) income and expenditure statements for each of the Gallery for the relevant period;

- (2) a statement of variations between the Operating Budgets and the actual results achieved for the year to date with explanations of variances;
- (3) a statement of the capital expenditure items and maintenance items in respect to the Gallery for the relevant period. All repairs and maintenance items that have been carried out during the period must be outlined and any repairs or maintenance that are recommended by the Gallery for the relevant period;
- (4) a statement of marketing expenses, programmes and initiatives for the Gallery for the relevant period and year to date;
- (5) a report on incidents in the Gallery for the relevant period for which claims are or may be made against the Town or the Contractor, and other relevant details concerning insurances;
- (6) advice on prevailing market conditions and the settling of fees and charges for the relevant period;
- (7) customer feedback received for the Gallery for the relevant period;
- (8) any negligent damage caused to the Gallery or the assets of the Gallery must be reported, including any damage caused by the Contractor its agents, employees and subcontractors for the relevant period;
- (9) reporting in relation to the KPI's established in **Annexure 2** as part of the Contract;
- (10) reporting on items listed in **Annexure 3**; and
- (11) any information on the Gallery and this Contract reasonably required, and requested in writing, by the Town.

### **23.3 Quarterly Reports for Audit and Finance Committee**

- (1) The quarterly reports received from the Contractor by the 21<sup>st</sup> of each month following the last quarter of the financial period must be submitted to the Audit and Finance Committee of Council, facilitated by the Town.
- (2) The Town will advise the Contractor in writing of the:
  - (a) meeting date of the Audit and Finance Committee; and
  - (b) whether the Contractor will be required to attend the Audit and Finance Committee's meeting.

### **23.4 Annual Reports**

The Contractor must provide a comprehensive annual report, by 30 April of each year of the Contract Term, concerning the operation of the Gallery during that year. The annual reports must be in a form reasonably required by the Town and include:

- (1) income and expenditure statements for the Gallery for the relevant period;

- (2) a statement of variations between the Operating Budgets and the actual results achieved for the year to date with explanations of variances;
- (3) a statement of the capital expenditure items and maintenance items in respect to the Gallery for the relevant period. All repairs and maintenance items that have been carried out during the period must be outlined and any repairs or maintenance that are recommended by the Gallery for the relevant period;
- (4) a statement of marketing expenses, programmes and initiatives for the Gallery for the relevant period and year to date;
- (5) a report on incidents in the Gallery for the relevant period for which claims are or may be made against the Town or the Contractor, and other relevant details concerning insurances;
- (6) advice on prevailing market conditions and the settling of fees and charges for the relevant period;
- (7) customer feedback received and actions to resolve for the Gallery for the relevant period;
- (8) any negligent damage caused to the Gallery or the assets of the Gallery must be reported, including any damage caused by the Contractor its agents, employees and subcontractors for the relevant period;
- (9) reporting in relation to the KPI's established in **Annexure 2** as part of the Contract;
- (10) reporting on items listed in **Annexure 3**; and
- (11) any information on the Gallery and this Contract reasonably required, and requested in writing, by the Town.

### **23.5 Accident Reports, Records and Investigations**

Any incident involving emergency services or resulting in any Gallery being closed for more than 1 hour should be communicated to Council immediately or as soon as is possible with regard to Contractor and staff safety.

## **24. OCCUPATIONAL SAFETY & HEALTH OBLIGATIONS**

### **24.1 General**

- (1) The Contractor is obliged to provide and maintain, so far as is practicable, a working environment for its employees and members of the public that is safe and without risk to health.
- (2) The Contractor must itself, and must ensure that any sub-contractors of the Contractor, at all times identify and take all necessary and reasonable precautions for the health and safety of all persons, including the Contractor's employees and sub-contractors, staff of the Town and members of the public, who may be affected by the performance of the Services.

- (3) The Contractor must comply with and provide the reports outlined in the Proposal Documents.

## **24.2 Legislative Compliance**

The Contractor must comply with, and ensure that its employees, sub-contractors and agents comply with any Acts, regulations, local laws, codes of practice and Australian Standards which are in any way applicable to OS&H and the performance of the Services.

## **24.3 Performance Reporting**

The Contractor must, when requested by the Town, or its representative, provide reports on OS&H inspections, audits or assessments undertaken during the Contract Term.

## **24.4 Incident Notification**

- (1) If the Contractor is required by the *Occupational Safety and Health Act* 1984, or by any other Act or regulation, to give any notice of an accident occurring during the performance by the Contractor of its obligations under this Contract, the Contractor must, at the same time, or as soon thereafter as is possible in the circumstances, give a copy of the notice to the Town.
- (2) The Contractor must, within three (3) working days after any such incident, provide a report giving complete details of the incident, including:
  - (a) results of investigations into its cause; and
  - (b) any recommendations or strategies for future prevention.

## **24.5 Non-Compliance**

- (1) If the Town or its representative reasonably forms the opinion that the Contractor is:
  - (a) not performing the Contractor's obligations under the Contract or any other obligation contained in; or
  - (b) performing the Contractor's obligations under the Contract in such a way as to endanger the health or safety of the Contractor's employees or sub-contractors, the Town's staff or the public;the Town may give the Contractor a notice to that effect.
- (2) Upon receipt of the notice, referred to paragraph (1) above, the Contractor must promptly:
  - (a) rectify the Contractor's failure to comply with its obligations; or
  - (b) ensure that it performs its obligations under this Contract so as not to endanger the health or safety of the Contractor's employees, sub-contractors, the Town's staff or the public.



## 24.6 Suspension

- (1) In the event that the Contractor has not:
  - (a) complied with a default notice served on it by the Town under **clause 39.1(1)**; or
  - (b) rectified a failure identified in a notice in accordance with **clause 24.2**;

the Town or its representative may, without limiting any right that the Town or its representative may have under this Contract, direct the Contractor to suspend the Contractor's performance of the Services until such time as the Contractor:

- (a) remedies the default; or
  - (b) rectifies the failure identified in the notice in accordance with **clause 24.2**.
- (2) The Town is not required to make any payment to the Contractor in respect of any period for which the performance of the Services is suspended in accordance with this clause.
- (3) If the Contractor's performance of the Services has been suspended under **clause 24.6(1)** the Town or its representative may:
  - (a) employ or engage any other person, perform the Services, or such part of the Services as the Town or its representative considers it is desirable to perform which, so far as practicable, must be carried out in accordance with this Contract, provided that the Town or its representative is not required to use the least expensive means of performing the Services; or
  - (b) do any other thing which the Town or its representative, in its absolute discretion, considers necessary in the circumstances.
- (4) The Contractor must pay to the Town:
  - (a) all additional costs incurred by the Town or its representative in exercising any power or performing any function conferred on it under **clause 25.6(3)**; and
  - (b) any other losses and expenses incurred by the Town or its representative due to, or in connection with (including, without limitation, indirect losses, consequential losses and all legal costs on a full indemnity basis), any breach of the Contractor's obligations under this clause or the suspension of the performance of the Services.

## 24.7 Town's Determination

- (1) The amounts payable by the Contractor and the Town under **clause 25.6(4)** will be determined by an independent arbitrator, acting reasonably.

- (2) The independent arbitrator will give notice of his or her determination under this clause to the Contractor. Subject to this clause, any amounts payable must be paid within 14 days of the receipt of notice of the independent arbitrator's determination.
- (3) The Town may retain any moneys payable to the Contractor, until any amount payable by the Contractor to the Town has been determined by the independent arbitrator pursuant to this clause and paid by the Contractor.

## **25. HUMAN RESOURCES**

### **25.1 Staffing Obligations**

- (1) The Contractor must:
  - (a) employ staff who have appropriate experience to effectively carry out the functions as assigned to them within the Service operations;
  - (b) employ staff qualified and experienced in operating an art gallery;
  - (c) ensure that all tasks are undertaken by suitably trained or qualified employees; and
  - (d) employ qualified and experienced teams sufficient to ensure high standards of service, supervision, customer care, and safety at all times.

### **25.2 Supervisory Staff**

- (1) The Contractor must ensure that when the Gallery is open to the public:
  - (a) there are in attendance, sufficient staff possessing the necessary management and supervisory skills who are empowered to make any decision necessary to ensure the safety of the public, staff and the Gallery;
- (2) The Contractor must ensure that their staff assists the Town fully in the investigation of complaints, disciplinary matters involving the Contractor's staff, claims for damages and other matters, including investigation and prosecution of criminal offences.

### **25.3 Staff Training**

- (1) The Contractor must:
  - (a) ensure that all staff undertake at its cost an initial comprehensive induction and then regular training to maintain the required standard in accordance with stipulated qualifications and requirements of their employed position; and
  - (b) ensure their staff are fully trained to prepare the Gallery in the event that a cyclone is forecast.

- (2) All costs other than salary and wages of the staff involved in training sessions, requested by the Town or its representative and specific to the needs of the Town will be at the Town's cost.

#### **25.4 Contractor's Staff attending meetings**

The Town or its representative may direct the Contractor and its staff to attend meetings relevant to the provision of the Services, or for any other reason considered necessary to involve the Contractor, without cost to the Operating Budgets.

#### **25.5 Uniforms**

The Contractor must ensure that all staff working at the Gallery wear appropriate clothing.

#### **25.6 Customer Service**

- (1) The Contractor must:
  - (a) provide an efficient, responsive and friendly customer service at all times;
  - (b) ensure their staffs are well presented, trained and educated in the policies and practices associated with providing the required Services;
  - (c) provide a recognised customer feedback mechanism so that patrons are encouraged to provide comments and feedback to the Contractor on the services offered;
  - (d) provide the Town with a summary of feedback in a quarterly report.
- (2) The Contractor must implement a complaints handling process in accordance with best practice. The process must include a register of all complaints and associated actions.
- (3) The Contractor must provide to the Town or its representative upon request copies of all complaints and the Contractor's responses.
- (4) Any complaint that may have safety implications or other implications that may gain external media or have political ramification must be forwarded to the Town or its representative immediately.
- (5) The Contractor must respond to any written complaint within 3 days of receipt.
- (6) A detailed communication strategy is to be followed after any customer service occurrence or event.

#### **26. FIRST AID**

- (1) The Contractor must provide all first aid requirements relative to the operation of the Gallery.

- (2) First aid equipment and supplies must be available for application of first aid treatment as required.

## **27. PLANNING & BUSINESS MANAGEMENT**

### **27.1 Annual Business Plans**

- (1) The Contractor must develop, for the Town's approval, a detailed and comprehensive business plan for the Gallery.
- (2) The Business Plans must be in a form acceptable and set the direction of the Gallery for the forthcoming year.
- (3) The Contractor must comply with and implement the approved Business Plan at all times.
- (4) The Business Plan for the first year of the Contract Term must be approved by the Town, prior to the commencement of the Contract Term.
- (5) The Business Plans will be reviewed annually in February in each year of the Contract Term.
- (6) On 31 January in each year of the Contract Term, the Contractor must submit to the Town the proposed Business Plans for the next financial year for the Gallery for the Town's approval. The proposed Business Plans must in a form generally acceptable to the Town.
- (7) The Town (and where applicable its Council) will review the proposed Business Plans, and advise the Contractor in writing if the proposed Business Plans are approved.
- (8) The Town covenants and agrees to act reasonably, and not to unreasonably fail to approve or withhold approval to the proposed Business Plans.
- (9) If the Town does not approve the proposed Business Plans it will, within 14 days of advising the Contractor of its decision not to approve the proposed Business Plans (or part thereof), provide to the Contractor written reasons for the decision not to approve the proposed Business Plans, and will provide the Contractor with a reasonable opportunity to submit further proposed Business Plans.
- (10) The ability of the Contractor to apply and implement the Business Plans will be monitored as a performance indicator in respect to the overall performance of this Contract.
- (11) The Contractor must report on its ability to implement and apply the Business Plans, within its annual report.

### **27.2 Benchmarking & KPI's**

- (1) The Contractor must comply with, implement and report on approved KPI's and benchmarks outlined in **Annexure 2**, in respect of the operation of the Gallery.

- (2) The approved KPI's for the first year of the Contract Term will be the KPI's specified in this Contract and **Annexure 2**.
- (3) The agreed KPI's will be reviewed annually in May in each year of the Contract Term.
- (4) On 30 April in each year of the Contract Term, the Contractor must submit to the Town the proposed KPI's for the next financial year for the Town's approval.
- (5) The Town (and where applicable its Council) will review the proposed KPI's, and advise the Contractor in writing if the proposed KPI's are approved.
- (6) The Town covenants and agrees to act reasonably, and not to unreasonably fail to approve or withhold approval to the proposed KPI's.
- (7) If the Town does not approve the proposed KPI's it will, within 14 days of advising the Contractor of its decision not to approve the proposed KPI's (or part thereof), provide to the Contractor written reasons for the decision not to approve the proposed KPI's, and will provide the Contractor with a reasonable opportunity to submit further proposed KPI's.
- (8) The KPI's and associated benchmarks, and the Contractor's performance in comply with the approved KPI's, will need to be fully justified and reported on quarterly and discussed at the bi monthly meetings.

### **27.3 Sponsorship**

- (1) The Contractor is encouraged to obtain sponsorship to assist in the promotion of activities, programs and events, subject to the following condition:
  - (a) sponsorship is not permitted from companies who have or promote alcohol or tobacco related products or which may cause offence to the customers or embarrassment to Council.

## **28. CORPORATE IDENTITY, ADVERTISING & PROMOTION**

### **28.1 Corporate Identity**

- (1) All material identifying the Gallery must give primacy to the Town as owner of the Gallery.
- (2) The service identity must be consistent and cohesive with the overall Town corporate identity.
- (3) The Gallery will need to be identified at all times as being the "Courthouse Gallery".
- (4) The Contractor will ensure that the use of its name, corporate logo and branding in all aspects of the signage and marketing strategies are consistent with the Town's current branding guidelines

- (5) The Contract will ensure that the website they create will also be consistent with the Town's current branding guidelines

## **28.2 Use of Contractor's Logo**

The use of the Contractor's corporate logo outside of the below parameters, will require the prior approval of the Town:

- (a) Major External Building Signs- (2m x 2m) Limited to 300mm x 300mm;
- (b) Minor External Signs- (1m x 0.8m) Limited to 200mm x 20mm;
- (c) Street Signs – Limited to 150mm x 150mm;
- (d) Internal Directional Signs- Limited to 150mmx 150mm;
- (e) Temporary Banners – Limited to 150mmx 150mm;
- (f) A3 Posters- Limited to 30mm x 30mm;
- (g) A1 Posters - Limited to 60mm x 60mm;
- (h) Uniforms (each item)- Limited to 30mm x 30mm;
- (i) Business Cards- Limited to 8 mm x 8 mm; and
- (j) Website- Limited to 20mm x 20mm.

## **28.3 Use of the Town's Name or Logo**

- (1) The Contractor will ensure that the Town's name or logo will be used in line with the Town's current branding guidelines.
- (2) The Contractor will ensure that all correspondence with customers, clients and other external bodies and agencies by the Contractor is to be communicated under letter head in line with the Town's current branding guidelines. All dual letter head stationary must be provided by the Contractor at its cost.

## **28.4 Advertising**

The Constructor will ensure that all signage proposed to be erected by the Contractor both in and outside the Gallery will be in line with the Town's current branding guidelines.

## **28.5 Promotions**

All promotions are to be in line with the Town's current branding guidelines.

## **29. PROCUREMENT POLICY**

- (1) The Contractor must comply with ethical business standards and practices in its procurement activities and must have an established procurement policy, which is generally consistent to the Town's Procurement Policy, available from the Town upon request.

- (2) The Contractor's procurement policy should ensure appropriate contesting processes are conducted, and quality, price, delivery, environmental sustainability and service must generally be considered the main criteria in assessing the procurement of goods and services. Other criteria to be considered may include experience, conformance with specifications and project specific matters.
- (3) No contract that has any financial consequences or liability beyond the Contract Term maybe entered into without the prior written permission of Council.

### **30. PROVISION OF POINT OF SALE EQUIPMENT**

The Contractor covenants and agrees to put in place all point of sale hardware and software programs, sufficient for operation of the Gallery.

### **31. CONFLICTS OF INTEREST**

- (1) Contractor must immediately make a full disclosure in writing to the Town or its representative of the existence, nature and extent of any actual or potential conflict of interest that the Contractor, or any of its employees, agents or sub-contractors, may have between the Contractor's obligations under this Contract and the interests of:
  - (a) the Contractor, its employees, agents or sub-contractors;
  - (b) an associate of the Contractor, its employees, agents or sub-contractors;
  - (c) a company in which the Contractor, its employees, agents or sub-contractors are involved, whether as an officer, shareholder, employee or otherwise; or
  - (d) any other person with whom or which the Contractor or its employees, agents or sub-contractors have a financial or business association, whether directly or indirectly.
- (2) If the Contractor fails to comply with its obligations under this clause the Town may immediately terminate this Contract.
- (3) If this Contract is terminated under this clause, **clauses 39.2 and 39.3** will operate, to the extent that they are applicable, as if the termination had been made by the Town under **clause 39.1**.

### **32. MEDIA**

Unless otherwise approved by the Town, the Contractor must:

- (1) not either itself or through its employees, agents or sub-contractors make any statement to the media on behalf of the Town or in relation to the performance of the Services;
- (2) notify the Town or its representative immediately of any event arising in the course of performing the Services which may receive media attention.

### **33. CONFIDENTIALITY**

- (1) The Contractor must keep confidential; and not use or reproduce in any form any Confidential Information in its possession without the prior written consent of the Town or its representative, or as required by law.
- (2) Subject to sub-clause (3), immediately upon receipt of the Town or its representative's written request to do so, the Contractor must:
  - (a) deliver to the Town or its representative all Confidential Information in its possession that is capable of being delivered; and
  - (b) delete, erase, or otherwise destroy all Confidential Information contained in computer memory, magnetic, optical, laser, electronic, or other media in its possession or control which is not capable of delivery to the Town or its representative.
- (3) The Contractor will not be required to comply with sub-clause (2) where the retention of the Confidential Information or copies thereof is required by the Contractor for the performance of the Services or regulatory, legislative, revenue or reporting requirements.
- (4) Subject always to compliance with any Written Laws or Council policies, the Town or its representative must also adhere to **clause 33 (1) (2) (a) (b) and (3)** in relation to keeping all information of the Contractor confidential.

### **34. INTELLECTUAL PROPERTY**

- (1) The parties agree the property and copyright to pre-existing intellectual property associated with the Gallery will vest in the Town.
- (2) Nothing in this Contract affects or in any way alters the Contractor's ownership of or rights to any pre-existing intellectual property.
- (3) Except to the extent that the Contract Material contains the Contractor's rights arising from **clause 34(4)**, the Contractor will not use, reproduce or publish, other than for the Town, material in which Town of Port Hedland holds copyright, without the prior written consent of the Town or its representative.
- (4) Any property, intellectual property or copyrights created by the Contractor in the performance of the services will remain vested in the Contractor.
- (5) The Contractor, in performing the Services, must use its best endeavours not to breach the intellectual property rights of any third party.

### **35. ENVIRONMENTAL CONDITIONS**

#### **35.1 General**

The Contractor must maintain a balanced environment within the Gallery taking into account customer comfort, staff working conditions, and the care of the Gallery.



## **35.2 Lighting**

The Contractor must:

- (a) maintain lighting levels at the Gallery at a safe and comfortable level of illumination for patrons and staff; and
- (b) replace at the Contractor's expense any failed lamp within 48 hours of its failure.

## **36. SUBCONTRACTING, ASSIGNMENT AND EMPLOYEES**

### **36.1 Sub-Contracting**

- (1) The Contractor must not sub-contract the whole or any portion of its rights and obligations under this Contract, except with the prior written consent of the Town or its representative, which may be given subject to such conditions as the Town or its representative considers appropriate.
- (2) With any application for the consent of the Town or its representative to any sub-contracting, the Contractor must provide any information required by the Town or its representative, including, but not limited to, evidence that a proposed sub-contractor will be capable of performing any obligations of the Contractor under this Contract that it may be required to perform.
- (3) Unless otherwise agreed in writing by the Town or its representative, no sub-contracting of any rights or obligations of the Contractor under this Contract will relieve the Contractor from any liability under this Contract or at law in respect of the performance or purported performance of this Contract and the Contractor will be responsible for the acts and omissions of any sub-contractor, or any sub-contractor's employees and agents, as if they were the acts or omissions of the Contractor.

### **36.2 Assignment**

- (1) The Contractor may not assign the whole or any of its rights under this Contract without the prior written consent of the Town (which may be withheld in the Town's absolute discretion).
- (2) If the Contractor is a corporation the shares in which are not quoted on any stock exchange in Australia, any change in the beneficial ownership, issue or cancellation of shares in that corporation or any holding company of that corporation within the meaning of the Corporations Law will be deemed to be an assignment of the interest created by this Contract.

### **36.3 Employees and Sub-Contractors**

The Contractor must ensure that no employee, agent or sub-contractor of the Contractor while engaged in the performance of the Services or any related activities:

- (a) consumes any alcoholic beverage;

- (b) is intoxicated; or
- (c) is under the influence of any drug which could impede his or her ability to safely or efficiently perform the Services.

## **37 TOWN'S WARRANTIES AND INDEMNITY**

### **37.1 Warranties**

The Town warrants to the Contractor that:

- (1) the Town is the legal and beneficial owner of the Town's Fixtures and Fittings and is entitled to give possession of them to the Contractor pursuant to this Contract; and
- (2) the Gallery is, and will be, safe and suitable for their intended use, including complying with all Written Laws.

### **37.2 Indemnity**

The Town must indemnify and keep indemnified the Contractor from and against all claims, actions, demands, loss, damages, costs and expenses incurred by the Contractor by reason of the Town's breach of a warranty or the warranties in **clause 37.1**.

## **38 EXIT TRANSITION**

### **38.1 Final Payments**

- (1) The Contract is programmed to cease the provision of Services on the 30 June of the final year, of the Contract Term and if the Contract concludes at that date:
  - (a) the Contractor must submit a profit/loss statement by the 31 July for the Gallery for examination by the Town or its representative; and
  - (b) within 60 days of both parties agreeing on the value of the profit/saving on (if any) for the Gallery, the payment due must be paid to the Town if not already previously committed for the Town's tourism strategy in **clause 6.2(1)**.
- (2) If the Contract is terminated at a different date (including without limitation if the Initial Extension is granted):
  - (a) the Contractor must submit a profit/loss statement for the Gallery within 30 days of the termination date for examination by the Town or its representative; and
  - (b) within 60 days of both parties agreeing on the value of the profit/saving on deficit payment for the Gallery, the payment due must be paid to the Town.

### **38.2 Contractor's Obligations on Exit**

- (1) If another Contractor, including the Town itself, is appointed to manage the Gallery at the end of this Contract, the Contractor must:

- (a) do everything reasonably within its power to assist with the transfer of the delivery of the Services; and
  - (b) without delay hand up all plant, equipment and records including financial, membership, data base information and any programmes information that belong to the Town, to the Contractor's successor without cost.
- (2) Any action on the part of the Contractor before the end of this Contract which has the effect of delaying, obstructing, damaging, misleading or harassing the operation of any such successor shall constitute a breach of this Contract.

### **38.3 First right to offer purchasing Contractor's Plant**

The Contractor agrees with the Town that upon termination or expiration of this Contract, the Town has the first offer from the Contractor to sell all and any of the Contractor's Plant owned by the Contractor and which is not encumbered in any way (including without limitation point of sale equipment) to the Town at market value and the Town may elect in its absolute discretion to purchase any such equipment, fixtures and fittings or part of the Contractor's Plant. The market value will be determined by agreement between the parties and failing such agreement, will be determined by an appropriately qualified person appointed by the Contractor and the Town.

## **39. DEFAULT & TERMINATION**

### **39.1 Default Notice – Town to Contractor**

- (1) If the Contractor breaches any of its obligations under this Contract for any reason or refuses or neglects to carry out or give effect to any order, instruction, direction or determination which the Town or the Town or its representative is empowered to give or make under this Contract and which is given or made in writing to the Contractor the Town or its representative may, without limiting any other power of the Town or its representative or the Town under this Contract or otherwise, give notice to the Contractor requiring the Contractor to remedy the default within 28 days after service of the notice.
- (2) If the Contractor fails to remedy the default in accordance with the notice issued by the Town or its representative pursuant to sub-clause (1) the Town, without prejudice to any other rights that it may have under this Contract or at common law against the Contractor, may in its sole discretion:
- (a) arrange for the default to be remedied and any costs or charges incurred by the Town or its representative in the remedying the default as determined by the Town or its representative, must be paid on demand by the Contractor to the Town or may be deducted from any moneys due or becoming due to the Contractor under this Contract at the option of the Town or its representative; and/or
  - (b) suspend payment under this Contract; or

- (c) terminate this Contract, in which case the provisions of **clause 39.3** will apply.
- (3) The suspension of payments by the Town under this subclause:
  - (d) will not in any way affect the continuing obligations of the Contractor under this Contract; and
  - (e) may be continued until the default has been rectified or the order, instruction, direction or determination is carried out or given effect to.

### **39.2 Default Notice – Contractor to Town**

- (1) If the Town breaches any of its obligations under this Contract for any reason or refuses or neglects to carry out or give effect to any order, instruction, direction, determination or reasonable request which the Contractor or its representative makes under this Contract in order to perform its responsibilities, the Contractor or its representative may, without limiting any other power of the Contractor or its representative under this Contract or otherwise, give notice to the Town requiring the Town to remedy the default within 28 days after service of the notice.
- (2) If the Town fails to remedy the default or respond to the request in accordance with the notice issued by the Contractor or its representative pursuant to sub-clause (1) the Contractor, without prejudice to any other rights that it may have under this Contract or at common law against the Town, may in its sole discretion:
  - (a) arrange for the default to be remedied and any costs or charges incurred by the Contractor or its representative in the remedying the default as determined by the Contractor or its representative, must be paid on demand by the Town to the Contractor; and/or
  - (b) suspend services under this Contract; or
  - (c) terminate this Contract, in which case the provisions of **clause 39.3** will apply.

### **39.3 Termination of Contract by the Town or Contractor**

- (1) If this Contract is terminated by the Town or Contractor under **clause 39.1** or **39.2** or otherwise, the Town may:
  - (a) itself or by engaging or employing any other person complete the performance of the Services; or such part of the performance of the Services as the Town considers it desirable to complete which, so far as is practicable, must be carried out in accordance with this Contract, provided that the Town is not required to use the least expensive means of completing the performance of the Services; and
  - (b) take possession of and permit other persons to use such of the Town's Plant and data base information as it considers necessary for the completion of the performance of the

Services; or such part of the performance of the Services as the Town considers it desirable to complete.

- (2) If this Contract is terminated by the Town or Contractor, the Town is liable to make payments to the Contractor only in respect of:
  - (a) any part of the Services which have been properly performed and not paid for at the date of termination; and
  - (b) the use by the Town of the Contractor's Plant for the purpose of completing the performance of the Services or part of the Services (but without payment for fair wear and tear), except that the Town is not required to make any payment under this clause if a contract entered into under **clause 15.2** requires the Town to make any payments to any other party in respect of the use of the Contractor's Plant for the purpose of completing the performance of the Services or part of the Services.
- (3) If this Contract is terminated by the Town under this clause or otherwise or repudiated by the Contractor, the Contractor must pay to the Town the amount of the loss and expenses incurred by the Town due to, or in connection with (including, without limitation, indirect losses, consequential losses and all legal costs on a full indemnity basis), the termination or repudiation.
- (4) If this Contract is terminated by the Town or Contractor under this clause or otherwise or repudiated by the Contractor, the Town must pay to the Contractor the amount of the loss and expenses incurred by the Contractor due to, or in connection with (including, without limitation, indirect losses, losses from loss of opportunity, consequential losses and all legal costs on a full indemnity basis), the termination or repudiation

#### **39.4 Independent Arbitration Determination**

- (1) The amounts payable by the Contractor and the Town under **clause 39.3** will be determined by an agreed independent arbitrator.
- (2) The arbitrator will give notice of their determination under this clause to both parties.
- (3) Subject to this clause, any amounts payable must be paid within 14 days of the receipt of notice of the arbitrator's determination.
- (4) The Town may retain any moneys payable to the Contractor under **clause 39.3(2)** until any amount payable by the Contractor to the Town under **clause 39.3(3)** has been determined by the arbitrator and paid by the Contractor.
- (5) If the Town has taken possession of the Contractor's Plant pursuant to this clause, the Contractor's Plant may be held as security for the payment of any amounts payable by the Contractor to the Town under **clause 39.3(3)**.
- (6) The Contractor may retain any Plant or repayments due to the Town under this clause until any amount payable to the Contractor by the Town has been paid.

#### **39.5 Insolvency**

The Town may terminate this Contract immediately and **clauses 39.3** and **39.4** will operate, to the extent that they are applicable, as if the termination had been made by the Town under **clause 39.1**, if the Contractor:

- (a) being a person:
  - (i) becomes bankrupt, or files or is served with a petition in bankruptcy;
  - (ii) is served with a bankruptcy notice;
  - (iii) makes an assignment for the benefit of its creditors;
  - (iv) becomes bound as a debtor by any scheme of arrangement;
  - (v) executes as a debtor any deed of assignment or deed of arrangement; or
  - (vi) has a mortgagee or other creditor takes possession of any of his assets;
  
- (b) being a partnership:
  - (i) is dissolved;
  - (ii) any of the partners becomes bankrupt, or files or is served with, a petition in bankruptcy;
  - (iii) any of the partners is served with a bankruptcy notice;
  - (iv) any of the partners makes an assignment for the benefit of his creditors;
  - (v) any of the partners becomes bound by any scheme of arrangement;
  - (vi) any of the partners executes, as a debtor, any deed of assignment or deed of arrangement; or
  - (vii) any of the partners has a mortgagee or other creditor takes possession of any of his assets;
  
- (c) being a company or other body corporate:
  - (i) takes, or has taken or instituted against it, any action or proceeding, whether voluntary or compulsory, having as its object the winding-up of the company or other body corporate;
  - (ii) an administrator is appointed, or steps are taken for the appointment of an administrator, under the Corporations Law;
  - (iii) enters into a composition or other arrangement with its creditors, other than a voluntary winding-up by members for the purpose of reconstruction or amalgamation;

- (iv) has a mortgagee or other creditor takes possession of any of its assets;
- (v) a receiver or receiver and manager is appointed, or steps are taken for the appointment of a receiver or receiver and manager, in respect of it; or
- (d) in the case of an incorporated association, takes or institutes, or has taken or instituted against it, any action or proceeding having as its object the cancellation of the incorporation of the incorporated association.

### **39.6 Termination of the Contract by the Contractor**

- (1) If the Town has failed to pay to the Contractor any amount due under **clause 6**, other than an amount being the subject of a dispute or difference under this Contract or any legal proceedings commenced in respect of this Contract, within 28 days of any period for payment stated in the Annexure, the Contractor may give notice in writing to the Town stating that notice of termination under this Contract may be served if payment is not made within a further 14 days.
- (2) If the Town fails to make payment within 14 days of the receipt of a notice pursuant to **clause 39.5(1)** the Contractor may, by written notice to the Town, either suspend the performance of the Services or terminate this Contract.
- (3) If the Town fails to respond to requests or provide to the Contractor information or other materials essential to the performance of services, or acts in a way that inhibits the Contractor from effectively performing its work or fulfilling its obligations under this Contract, the Contractor may, by written notice to the Town, either suspend the performance of the Services or terminate this Contract.
- (3) Any suspension of the Services by the Contractor under **clause 39.6** will not prevent the Contractor from terminating this Contract during the period that the performance of the Services is suspended.
- (4) Upon termination of this Contract by the Contractor under **clause 39.6**, without prejudice to the accrued rights or remedies of either party or the other liabilities of the parties under this Contract which may have accrued prior to termination, the Town must, after taking into account amounts previously paid under this Contract, make payments to the Contractor in respect of:
  - (a) any portion of the Services which have been properly performed and not paid for at the date of the termination; and
  - (b) the cost of materials or goods properly ordered for the performance of the Services by the Contractor for which the Contractor has paid, or for which the Contractor is legally bound to pay, provided that such goods and materials must, on the making of the payment by the Town, become the property of the Town and be transferred to the Town's ownership and possession by the Contractor.

- (5) Each party must take any steps to effectively transfer ownership and possession of the material or goods under **clause 39.6(4)(b)**.

## **40. DISPUTE RESOLUTION**

### **40.1 Notice of Dispute**

- (1) In the event of any dispute or difference arising between the Town and the Contractor, either during the period of this Contract or after the termination, abandonment or breach of this Contract, as to any matter or thing connected with this Contract or arising under this Contract, then either party shall, by hand or by registered post, give the other party a written notice of dispute adequately identifying and providing details of the dispute.
- (2) The Notice under this subclause must:
  - (a) not be unreasonably given;
  - (b) indicate that it is a notice under this clause; and
  - (c) give sufficient details of the dispute or difference as to enable the party receiving the notice to ascertain the nature of the dispute or difference alleged.

### **40.2 Mediation**

- (1) Within fourteen (14) days of the receipt of any notice of dispute under **clause 40.1** by either party, at least two (2) representatives of each party must meet to discuss ways of resolving the dispute or difference.
- (2) The representatives may resolve the dispute or difference themselves or refer the dispute or difference to any form of alternative dispute resolution procedure on which they agree.
- (3) The representatives must be authorised by the parties to resolve the dispute or difference on their behalf should this prove to be practicable.

### **40.3 Referral to Arbitration**

- (1) Unless a dispute or difference of which notice has been given under **clause 40.1** is settled within twenty eight (28) days of service of the notice of dispute, then that dispute shall be referred to arbitration.
- (2) The arbitrator must be agreed between the parties within 14 days from the date of the receipt of the notice referring the dispute to arbitration by the Contractor or the Town, as the case may be.
- (3) Such arbitration shall be held in the State of Western Australia.

### **40.4 Services to Continue**

If reasonably possible, performance of obligations under the Contract must continue during arbitration or legal proceedings, and no payment due or payable by the Town that is not in dispute must be withheld on account of the



arbitration or legal proceedings, unless so authorised by the Contractor or by this Contract.

#### **40.5 Commercial Arbitration Act**

Any arbitration under this clause must be conducted in accordance with the *Commercial Arbitration Act 1985*, except where inconsistent with this Contract.

#### **41. SURVIVAL OF RIGHTS & OBLIGATIONS**

The rights and obligations of the parties under the following clauses shall survive the termination or expiry of this Contract:

- (1) 13 (Insurance Obligations & Indemnity);
- (2) 15.2 (Third Party Arrangements);
- (3) 24 (Occupational Safety & Health Obligations);
- (4) 33 (Confidentiality);
- (5) 36 (Subcontracting, Assignment and Employees);
- (6) 38 (Exit Transition);
- (7) 39 (Default & Termination); and
- (8) 40 (Dispute Resolution).

#### **42. RELATIONSHIP BETWEEN THE PARTIES**

##### **43.1 No partnership or Relationship of Employer and Employee**

Nothing in this Contract shall operate or be deemed to create a partnership or relationship of employee and employer between any of the parties to this Contract.

##### **42.2 Several and Joint Liability**

If the Contractor consists of two or more parties, this Contract binds each of them severally and jointly.

##### **42.3 Agency**

The Contractor must not:

- (a) hold itself out as being an agent of the Town or being in any other way entitled to make any contract on behalf of the Town or to bind the Town to the performance, variation, release or discharge of any obligation; or
- (b) hold out its employees, sub-contractors or agents, or allow its employees, sub-contractors or agents to hold themselves out, as being employees or agents of the Town.

#### **42.4 No Restriction of the Town's Powers**

This Contract does not fetter or restrict the powers or discretions of the Town in relation to any powers or obligations it has under any Act, regulation or local law that may apply to the Services, the Contractor or the Municipal District.

#### **42.5 Contractor to Examine Information**

The Contractor is deemed to have examined all information and to have made all enquiries relevant to its obligations under this Contract and to be aware of all risks, contingencies, costs, difficulties and other circumstances in any way connected with the performance of its obligations under this Contract.

#### **43. NOTICE**

- (1) Any communication under or in connection with this Deed:
  - (a) must be in writing;
  - (b) must be addressed in the manner specified in **Item 5** of the Schedule;
  - (c) must be signed by the party making the communication or on its behalf by the solicitor for, or by any attorney, director, secretary, or authorised agent or officer of, any party;
  - (d) must be delivered or posted by prepaid post to the address, or sent by fax to the number, of the addressee, in accordance with paragraph (b) of this clause; and
  - (e) will be deemed to be given or made:
    - (i) if by personal delivery, when delivered;
    - (ii) if by leaving the Notice at an address specified in paragraph (b) of this clause, when left at that address unless the time of leaving the Notice is not on a Business Day or after 5 pm on a Business Day, in which case it will be deemed to be given or made on the next following Business Day;
    - (iii) if by post, on the second Business Day following the date of posting of the Notice to an address specified in paragraph (b) of this clause; and
    - (iv) if by facsimile, when despatched by facsimile to a number specified in paragraph (b) of this clause unless the time of dispatch is not on a Business Day or after 5 pm on a Business Day, in which case it will be deemed to be given or made on the next following Business Day.
- (2) A notice sent by facsimile transmission shall be deemed to have been received by the addressee on the date of its transmission.

#### **44. AMENDMENTS TO CONTRACT**

A variation to this Contract must be in writing and signed by the parties.

#### **45. FURTHER ASSURANCES**

Each party must execute and deliver all such documents, instruments and writings and must do and must procure to be done all such acts and things as may be necessary or desirable to implement and give full effect to the provisions and purpose of this Contract.

#### **46. SEVERANCE**

If any part of this Contract is, or becomes, void or unenforceable that part is or will be, severed from this Contract to the intent 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.

#### **47. WAIVER**

The parties mutually covenant and agree that:

- (a) no right under this Contract is waived or deemed to be waived except by notice in writing signed by the party waiving the right;
- (b) a waiver by one party under paragraph (a) of this clause does not prejudice its rights in respect of any subsequent breach of this Contract by the other party; and
- (c) a party does not waive its rights under this Contract because it grants an extension or forbearance to the other party.

#### **48. APPLICABLE LAW**

This document shall be governed by and construed and interpreted according to the law in force in the State of Western Australia from time to time and the parties hereby submit to the exclusive jurisdiction of the court of that State including the appellate courts thereof.

#### **49. INTERPRETATION**

In this Contract, unless the context otherwise requires:

- (1) headings, underlines and numbering do not affect the interpretation or construction of this Contract;
- (2) words importing the singular include the plural and vice versa;
- (3) words importing a gender include any gender;
- (4) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate;
- (5) references to parts, clauses, parties, annexures, exhibits and schedules are references to parts and clauses of, and parties, annexures, exhibits and schedules to, this Contract;
- (6) a reference to any statute, regulation, proclamation, ordinance or local law includes all statutes, regulations, proclamations, ordinances or local

law varying, consolidating or replacing them, and a reference to a statute includes all regulations, proclamations, ordinances and local laws issued under that statute;

- (7) no rule of construction shall apply to the disadvantage of a party on the basis that that party was responsible for the preparation of this Contract or any part of it;
- (8) a reference to anything (including any real property) or any amount is a reference to the whole and each part of it;
- (9) reference to the parties includes their personal representatives, successors and lawful assigns;
- (10) where a reference to a party includes more than one person the rights and obligations of those persons shall be joint and several;
- (11) the Schedule and Annexures (if any) form part of this Contract.

# Schedule

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**ITEM 1 Initial Contract Term**

Commencing on the Commencement Date and expiring on 30 June 2017.

**ITEM 2 Commencement Date**

1 July 2015.

**ITEM 3 Management Fee (ex GST)**

<b>Courthouse Gallery</b>	<b>July – June 2015/16 and 2016/17</b>
Management Fee	\$407,066 (exc GST) + CPI indexed by CPI (All Groups Perth, June Qtr) for the 2015/16 and 2016/17 financial years.

**ITEM 4 Minimum Hours**

<b>Trading Hours</b>	<b>Peak May to September</b>	<b>Off Peak October to April</b>
Monday to Friday	9.00am to 4.30pm	9.00am to 4.30pm
Saturday	9.00am to 2.00pm	9.00am to 4.30pm
Sunday	9.00am to 2.00pm	Closed

**ITEM 5 Notices**

Contractor

FORM Building a State of Creativity Inc.

Address: L1 King St Arts Centre, 357 Murray Street, Perth, WA

Fax No: (08) 9226 2250

Attention: Executive Director

Town:

Town of Port Hedland

Address: PO Box 41, Port Hedland, Western Australia

Fax No: (08) 9173 1766

Attention: Chief Executive Officer

# Signing page

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**EXECUTED by the parties as a Deed**  
2014

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

\_\_\_\_\_  
Signature of Mayor

\_\_\_\_\_  
Name of Mayor (print)

\_\_\_\_\_  
Signature of Chief Executive Officer

\_\_\_\_\_  
Name of Chief Executive Officer (print)

THE COMMON SEAL of FORM Building a State  
of Creativity Inc. was affixed by authority of  
Directors in the presence of

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Signature of director/president

\_\_\_\_\_  
Name of director (print)

\_\_\_\_\_  
Name of director/president (print)

# Annexure 1 – Sketches of Gallery

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Landgate  
16 Edgar Street, Port Hedland

## Annexure 2 – Key Performance Indicators

Management Fee (exc GST) (*no variation is acceptable)	\$407,066 + CPI indexed by CPI (All Groups Perth, June Qtr) for the 2015/16 and CPI (All Groups Perth, June Qtr) for the 2016/17 financial years.
Expense recovery suggestion	The Town will not be responsible for any expenditure variances and there will not be any variation in income across the two years of tenure, alternative funding sources are suggested
Centre Operations Manual	Rollout of the manual once a year to Staff
Opening hours	Maintain opening hours at the current level, or greater (see Schedule Item 4)
Business Plans	To be reviewed and approved by the Town annually (see 27.1)
Reporting	<ul style="list-style-type: none"> <li>- Quarterly reports to be submitted to the Town by the 21<sup>st</sup> of each month following the last quarter of the financial year (see 23.2)</li> <li>- Annual reports to be submitted by 30 April of each year of the contract term (see 23.4)</li> </ul>
Audit of the Gallery	One audit undertaken per annum conducted by Town
Maintenance and cleaning schedules	Reports to be provided and reviewed annually
Customer complaints	Recorded and responded to within 24 hours
Email enquiries	Responded to within 24 hours
Mail enquiries	Responded to within 24 hours
Call abandonment	Maximum call abandon rate 10%
Call waiting	Average call wait not to exceed 2 minutes
Website	Maintain up-to-date content.



## **2015/16 and 2016/17 Contract Extension Additional Agreements**

The Town of Port Hedland and FORM Building a State of Creativity Inc. agree to the following conditions:

- I. FORM agrees to align the Hedland Art Awards with the start of the North West Festival. For clarification, the 2015 Hedland Art Awards will be held on Thursday evening 20<sup>th</sup> August 2015. The date for the 2016 Art Awards will be determined by mutual agreement between both Parties but will be aligned with the start of the North West Festival.
- II. FORM agrees that it will continue to be actively involved with the fringe activities on the Saturday morning of the North West Festival, which will include activation activities as mutually agreed to by both Parties.
- III. The Town's will make a contribution of \$35K (ex GST) per year (financial years 2015/16 and 2016/17) which is to be used by FORM for the Hedland Art Awards. This money will be used to increase the prize money for the event, and the Town of Port Hedland will be nominated as one of the Category Sponsors of the Hedland Art Awards. The \$35K (ex GST) will be paid to FORM as a lump sum amount in the 1<sup>st</sup> quarter of each new financial year on the provision of a valid tax invoice.
- IV. The contracted amount for the Courthouse Gallery which for 2014/15 is \$407,066 (ex GST) will be indexed by CPI (All Groups Perth, June Qtr) for the 2015/16 and the 2016/17 financial years.

# Annexure 3 – Reporting: Quarterly basis

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<b>Gallery Courthouse Gallery</b>
<b>Reporting quarterly basis</b>
1a) Provide statistics on a quarterly basis to Town in relation to the number of contacts at the Gallery through the following points: <ul style="list-style-type: none"><li>i) Walk in traffic, including a comparison from previous years</li><li>ii) by telephone</li><li>iii) by mail</li><li>iv) by email</li><li>v) on-line</li></ul>
1b) Industry contacts <ul style="list-style-type: none"><li>i) Product briefings</li><li>ii) Brochure distribution</li></ul>
1c) Gallery customer satisfaction survey responses <ul style="list-style-type: none"><li>i) Customer complaints and resolutions</li></ul>
2. Staff training

## Annexure 4 – Maintenance schedule

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Port Hedland Courthouse Gallery	
Task	Frequency
Centre Cleaning	Twice weekly
Toilets	Daily
Window Cleaning	Monthly
Display Shelving	Twice weekly
Fire Extinguisher check	Town
Cyclone Preparation	Biannually
Landscape Maintenance	Town
External lighting	Town
Major structural upgrade, outside of 2012 basic refurbishment	As advised by Council