***[Goods and services procurement templates - Novation of contract deed]***

**Novation of Contract Deed**

**[Abc Pty Ltd] (Outgoing Party)**

ACN **[000 000 000]** / ABN **[00 000 000 000]**

**[Xyz Pty Ltd] (Incoming Party)**

ACN **[000 000 000]** / ABN **[00 000 000 000]**

AND

*[****Important Note:*** *The legal entity name of the State Agency “Continuing Party” is the Contract Authority or Customer named in the relevant Request. For a government department the name is “The State of Western Australia acting through [insert name of department]”. For a statutory authority or other body corporate, the legal entity name is the body corporate name as specified in the relevant enabling legislation. For CUAs the Contract Authority is either “The Chief Executive Officer of the Department of Finance (Director General)” or the “Procurement Executive Body”.]*

**[Insert Entity Name]** **(Continuing Party)**

***Before final sign off it is recommended that the Deed be referred to the State Solicitor’s Office to ensure there is no liability risk to the Department of Finance or the WA Government***

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NOVATION OF CONTRACT DEED

DATE: [insert date]

# PARTIES

**[Abc Pty Ltd]** ACN **[000 000 000]** / ABN **[00 000 000 000]** having its registered office at [insert address] (**Outgoing Party**)

**[Xyz Pty Ltd]** ACN **[000 000 000]** / ABN **[00 000 000 000]** having its registered office at [insert address] (**Incoming Party**)

***[For Contracts, other than CUAs]*[Insert Contract Authority or Customer Entity Name]***[this must be the same as the Contract Authority / Customer specified in the Request]* of [insert agency address in full] (**Continuing Party**)

***[or]***

***[For CUAs, select required Contract Authority]*The Chief Executive Officer of the Department of Finance (Director General)**, exercising powers conferred by the *Procurement Act 2020* (WA), ***[or]*** **The Procurement Executive Body**, a body corporate established under section 18(1) of the *Procurement Act 2020* (WA) of [insert agency address in full] (**Continuing Party**)

# RECITALS

1. The Continuing Party and the Outgoing Party are parties to the Contract.
2. The Incoming Party is to replace the Outgoing Party under the Contract on the terms of this Deed.

# OPERATIVE PROVISIONS

1. INTERPRETATION
   1. Definitions

The following definitions apply in this Deed.

**Authorisation** means:

* + 1. an authorisation, consent, declaration, exemption, notarisation or waiver, however it is described; and
    2. in relation to anything that could be prohibited or restricted by law if a Government Agency acts in any way within a specified time period, the expiry of that period without that action being taken,

including any renewal or amendment.

**Business Day** means a day that is not a Saturday, Sunday or public holiday in Perth.

**Contract** means the contract formed by the Outgoing Party’s offer under Request **[insert Number]** and the Continuing Party’s acceptance of that offer contained in the letter of advice of acceptance dated **[insert date day/month/year]**, and any extension of that Contract. The Contract is for the supply of **[insert description]**.

**Corporations Act** means the *Corporations Act 2001* (Cth).

**Deed** means this Novation of Contract Deed.

**Effective Date** means the date of this Deed.

**Government Agency** means a:

* + 1. a government, government authority, government department or government body;
    2. a governmental, semi - governmental or judicial person; or
    3. a person (whether autonomous or not) who is charged with the administration of a law.

**Tax** means a tax, levy, duty, charge, deduction or withholding, however it is described, that is imposed by a Government Agency, together with any related interest, penalty, fine or other charge, other than one that is imposed on net income.

* 1. Rules for interpreting this Deed

Headings and catchwords are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Deed, except where the context makes it clear that a rule is not intended to apply.

* + 1. A reference to:
       1. legislation (including subordinate legislation) is to that legislation as amended, re‑enacted or replaced, and includes any subordinate legislation issued under it;
       2. a document or agreement, or a provision of a document or agreement, is to that document, agreement or provision as amended, supplemented, replaced or novated;
       3. a party to this Deed or to any other document or agreement includes a permitted substitute or a permitted assign of that party;
       4. a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal personality, and any executor, administrator or successor in law of the person; and
       5. anything (including a right, obligation or concept) includes each part of it.
    2. A singular word includes the plural, and vice versa.
    3. A word which suggests one gender includes the other genders.
    4. If a word is defined, another part of speech has a corresponding meaning.
    5. If an example is given of anything (including a right, obligation or concept), such as by saying it includes something else, the example does not limit the scope of that thing.
    6. The word **agreement** includes an undertaking, contract, warranty, representation or other binding arrangement or understanding, whether or not in writing.
  1. Business Days

If the day on or by which a person must do something under this Deed is not a Business Day:

* + 1. if the act involves a payment that is due on demand, the person must do it on or by the next Business Day; and
    2. in any other case, the person must do it on or by the previous Business Day.

1. CONSIDERATION

Each party acknowledges that it has received valuable consideration for entering into this Deed.

1. NOVATION
   1. Novation

With effect from the Effective Date, the parties novate the Contract so that the:

* + 1. Incoming Party replaces the Outgoing Party under the Contract;
    2. Incoming Party has and assumes all the rights, liabilities and obligations of the Outgoing Party under the Contract including rights, liabilities and obligations that arise before the Effective Date;
    3. Incoming Party and the Continuing Party are bound by and must comply with the Contract; and
    4. Continuing Party has and may enforce all its rights and remedies under the Contract against the Incoming Party, including rights and remedies that arise before the Effective Date.

as if the Incoming Party were named as a party to the Contract instead of the Outgoing Party.

* 1. No further rights and release from obligations

With effect from the Effective Date, the Continuing Party and the Outgoing Party:

* + 1. have no further rights against each other under the Contract including rights that arise before the Effective Date; and
    2. release each other from all obligations and liabilities under the Contract including obligations and liabilities that arise before the Effective Date.

1. REPRESENTATIONS AND WARRANTIES
   1. Representations and warranties of each party

The Incoming Party and the Outgoing Party jointly and severally represent and warrant to each other and to the Continuing Party that:

* + 1. (**Power**) they have/it has full legal capacity and power:
       1. to own their/its property and to carry on their/its business; and
       2. to enter into this Deed and to carry out the transactions that this Deed contemplates;
    2. (**Corporate authority**) they have/it has taken all corporate action that is necessary or desirable to authorise their/its entry into this Deed and to carry out the transactions that this Deed contemplates;
    3. (**Authorisations**) they hold/it holds each Authorisation that is necessary or desirable to:
       1. enable them/it to properly execute this Deed and to carry out the transactions that this Deed contemplates; and
       2. ensure that this Deed is legal, valid, binding and admissible in evidence,

and they are/it is complying with any conditions to which any of these Authorisations is subject;

* + 1. (**Deed effective**) this Deed constitutes their/its legal, valid and binding obligations, enforceable against them/it in accordance with its terms;
    2. (**No contravention**) neither their/its execution of this Deed, nor the carrying out by them/it of the transactions that this Deed contemplates, does or will:
       1. contravene any law to which they/it or any of their/its property is subject or any order of any Government Agency that is binding on them/it or any of its property;
       2. contravene any Authorisation;
       3. contravene any undertaking or instrument binding on it/them or any of its/their property; or
       4. contravene their/its constitution; and
    3. (**No trust**) it is not entering into this Deed as trustee of any trust or settlement.*[This clause must be deleted if a party notifies you that it acts as a trustee]*

(g) (**No** **Breach**) there is no unremedied default or breach of the Contract.

* 1. Repetition of representations and warranties

The representations and warranties in this clause 4 are taken to be repeated on the Effective Date on the basis of the facts and circumstances as at that date.

* 1. Reliance on representations and warranties

Each party acknowledges that each other party has executed this Deed and agreed to take part in the transactions that it contemplates in reliance on the representations and warranties that are made or repeated in this clause 4.

1. NOTICES
   1. How to give a notice

A notice, consent or other communication under this Deed is only effective if it is:

* + 1. in writing, signed by or on behalf of the person giving it;
    2. addressed to the person to whom it is to be given; and
    3. either:
       1. delivered or sent by pre‑paid mail (by airmail, if the addressee is overseas) to that person's address; or
       2. sent by email to that person's email address.
  1. When a notice is given

A notice, consent or other communication that complies with this clause 5 is regarded as given and received:

* + 1. if it is delivered or sent by email:
       1. by 5 pm (local time in the place of receipt) on a Business Day ‑ on that day; or
       2. after 5 pm (local time in the place of receipt) on a Business Day, or on a day that is not a Business Day ‑ on the next Business Day; and
    2. if it is sent by mail ‑ on actual receipt.
  1. Address for notices

A person's address and email address are those set out below, or as the person notifies the sender:

**Outgoing Party**

Address:

Email address:

Attention:

**Incoming Party**

Address:

Email address:

Attention:

**Continuing Party**

Address: [insert State Agency address] *[for agency specific contracts]*

Email address:

Attention: [insert State Agency contract manager]

*[or]*

Address: [insert Finance address] *[for CUAs]*

Email address:

Attention: Contract Manager CUA **XXX**.

1. GENERAL
   1. Governing law

This Deed is governed by the law in force in Western Australia.

* 1. Liability for expenses

The Outgoing Party and Incoming Party must jointly pay all the Continuing Party's expenses incurred in negotiating, executing and stamping this Deed but otherwise the Outgoing Party and the Incoming Party will each pay its own expenses incurred in negotiating, executing and stamping this Deed.

* 1. Giving effect to this Deed

Each party must do everything (including execute any document), and must ensure that its employees and agents do anything (including execute any document), that any other party may reasonably require to give full effect to this Deed.

* 1. Amendment

This Deed can only be amended, supplemented, replaced or novated by another agreement in writing signed by the parties.

* 1. Counterparts

This Deed may be executed in counterparts.

* 1. Attorneys

Each person who executes this Deed on behalf of a party under a power of attorney declares that he or she is not aware of any fact or circumstance that might affect his or her authority to do so under that power of attorney.

1. TRUST WARRANTIES
   1. Generally

Where the Incoming Party or any one or more of the parties so described as Incoming Party is or are now acting or in the future may act as trustee (hereinafter called “the Trustee”), the Incoming Party covenants with and warrants to the Continuing Party that the Trustee has or have or will have full powers pursuant to its constitution or memorandum and articles (if a company) and its deed of trust (hereinafter called “the Trust”) under which it purports to act when entering into this Deed.

* 1. Trust Covenants

The Incoming Party covenants that:-

* + 1. the Trust is lawfully and validly constituted and all deeds and other instruments in respect thereof have been properly executed;
    2. the Trust is and throughout the term of the Contract will remain unrevoked and not varied;
    3. the assets of the Trust as well as the assets of the Incoming Party will at all times be available to satisfy the obligations of the contractor under the Contract;
    4. the consents or approvals of all parties necessary to execute this Deed so as to bind the property of the Trust have been obtained and all necessary conditions precedent for that purpose have been met;
    5. no one has taken or threatened, nor is or the Incoming Party aware of any one who is likely, to take action to have the Trust wound-up or otherwise administered by action brought in any Court of competent jurisdiction or to charge the Trustee or any person at any time connected with the Trustee or acting on behalf or purportedly on behalf of the Trustee with any breach of trust or misappropriation of trust moneys in connection with the Trust;
    6. no facts are known to the Incoming Party whereby the Trust might be wound-up voluntarily or otherwise or the Trustee changed or the assets of the Trust vested in any other person or that the Trust may cease to operate or be deprived of funds prior to the expiration of the Term of the Contract.

# EXECUTED as a Deed

*[This document is a deed, which requires specific execution clauses, dependent on the type of companies with which we are engaging. The following execution clauses may be applicable. Choose from the options after consultation with the parties, who are in the best position to tell drafters how the parties are required to execute deeds.*

*Example execution clauses, to be used for incoming or outgoing parties in the execution table below:]*

**Outgoing and Incoming Parties**

|  |
| --- |
| **EXECUTED** by **[Name of Incoming or Outgoing Party] ACN [000 000 000]/ABN [00 000 000 000]** underSection 127 (1) of the *Corporations Act 2001* (Cth) by being signed by the sole director and company secretary of the company**:** |
|  |
| **Signature of sole Director and sole Company Secretary** |
|  |
| **Name of sole Director and sole Company Secretary (Please type)** |

***[or]***

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by **[Name of Incoming or Outgoing Party] ACN [000 000 000]/ABN [00 000 000 000]** underSection 127 (1) of the *Corporations Act 2001* (Cth) by being signed by two of its directors**:** | | |
|  |  |  |
| **Signature of Director** |  | **Signature of Director** |
|  |  |  |
| **Name of Director (Please type)** |  | **Name of Director (Please type)** |

***[or]***

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by **[Name of Incoming or Outgoing Party] ACN [000 000 000]/ABN [00 000 000 000]** underSection 127 (1) of the *Corporations Act 2001* (Cth) by being signed by a director and company secretary of the company: | | |
|  |  |  |
| **Signature of Director** |  | **Signature of Company Secretary** |
|  |  |  |
| **Name of Director (Please type)** |  | **Name of Company Secretary (Please type)** |

|  |  |  |
| --- | --- | --- |
| **EXECUTED** by**[insert applicable execution clause for Incoming or Outgoing Party]:** | | |
|  |  |  |
| **Insert applicable signature instruction** |  | **Insert applicable signature instruction** |
|  |  |  |
| **Insert applicable name instruction (Please type)** |  | **Insert applicable name instruction (Please type)** |

**Continuing Party**

|  |
| --- |
| **EXECUTED** by the **[insert Accountable Authority title], [insert State Agency entity name]: *[Describe the Contract Authority or Customer (as applicable) as specified in the Request.]*** |
|  |
| **Signature of [insert Accountable Authority title]** |
|  |
| **Name of [insert Accountable Authority title] (Please Type)** |

***[EXECUTION TABLE TO BE ADAPTED (AS REQUIRED) AND INCLUDED IN EVERY DEED]***