



**TERMS OF AGREEMENT FOR  
PROFESSIONAL SERVICES TERMS OF  
AGREEMENT**

**PART 1 – DEFINITIONS**

Unless the context otherwise requires, then in construing the Agreement:

“**Agreement**” means the entire contractual agreement between the parties and includes these terms of Agreement, any variation, the Proposal and any other documents identified in the letter of acceptance as forming part of the Agreement.

“**Consultant**” means Rapallo Pty Ltd.

“**Fee**” means the amount set out in the Agreement.

“**Reimbursable Expenses**” means the amounts set out in the Agreement.

“**Subconsultant**” means and includes:

a) any person, firm, group or company engaged by the Consultant or with whom the Consultant may arrange for any work to be performed for the Client and

b) any person who is now or hereafter a servant, agent or subcontractor of the Subconsultant, and includes the successors and assigns of the Subconsultant.

“**Client**” means the party with whom the Consultant contracts to provide Services.

“**Project**” means the scope of work described in the Agreement in respect of which the Client has engaged the Consultant to provide Services.

“**The Services**” means those professional services specifically described in the Agreement.

“**Proposal**” means the letters or other documents prepared by the Consultant and submitted to the Client to describe the scope of work to be undertaken, the personnel and equipment proposed to be utilised, and the amount or method of calculation of the fee and reimbursable expenses.

**PART 2 – ROLE OF THE CONSULTANT**

**2.1 Professional Standard of Care**

In performing the Services, the Consultant shall exercise the degree of skill, care and diligence normally exercised by members of the Consultant’s profession performing services of a similar nature, in accordance with the ethics of the Consultant’s profession.

**2.2 Professional Duty of Independent Judgement**

If the Consultant is required to exercise its professional judgement between the client and a third party with whom the Client has a contract then it shall do so independently and as required by the terms of that contract.

**2.3 Knowledge of Client Requirements**

The Consultant shall use all reasonable efforts to inform itself of the Client’s requirements for the Project to which the Services relate and for that purpose it shall consult the Client throughout the performance of the Services.

**2.4 Additional Information Documents and Other Particulars**

If the Consultant considers that the information, documents and other particulars made available to it by the client are not

sufficient to enable the Consultant to provide the Services in accordance with this Agreement the Consultant may advise the Client who shall then provide such further assistance, information, or other particulars as necessary in the circumstances.

**2.5 Appoint a Representative**

The Consultant shall appoint a person to act as its representative and give written notice to the Client of the name of the person so appointed. The Consultant agrees that the person appointed shall have authority to act on behalf of the Consultant for all purposes in connection with this Agreement.

**2.6 Notice of Matters Likely to Change Scope or Timing of Services**

If the Consultant becomes aware of any matter which may change or which has changed the scope or timing of the Services or the Project then it will give written notice to the Client as soon as practicable and the notice will contain, as far as practicable in the circumstances, particulars of the change.

**2.7 Timely Provision of Services**

The Consultant shall perform the Services in a timely manner to the extent that it is within its control to do so.

**PART 3 – ROLE OF THE CLIENT**

**3.1 Provide Information, Documents and Other Particulars**

The Client shall as soon as practicable make available to the Consultant all information, documents and other particulars relating to the Client’s requirements for the Project.

**3.2 Arrange Access to the Site and Other Lands**

The Client shall as soon as practicable make arrangements to enable the Consultant to enter upon the Site and other lands as necessary to enable the Consultant to perform the Services.

**3.3 Obtain All Necessary Approvals**

Unless the parties specifically agree otherwise, the Client shall as soon as practicable obtain all approvals, authorities, licences and permits which are required from governmental, municipal or other responsible authorities for the lawful implementation and completion of the Project.

**3.4 Provide Additional Professional Services**

The Client agrees that the Services do not include any services which are properly carried out by other professions such as legal or accounting and if other such professional services are required the Consultant shall obtain these services after consultation with the Client and at the Client’s cost.

**3.5 Supply Necessary Equipment and Facilities**

The Client shall make available to the Consultant at the place and at the time specified in the Proposal the equipment and facilities specified in the Proposal.

**3.6 Appoint a Representative**

The Client shall appoint a person to act as its representative and give written notice to the Consultant of the name of the person so appointed. The Client agrees that the person appointed shall have authority to act on behalf of the client for all purposes in connection with this Agreement.

**3.7 Notice of Matters Likely to change Scope or Timing of Services**

If the Client becomes aware of any matter which may change the scope or timing of the Services or the Project, then the Client will give written notice to the Consultant as soon as practicable but in any event no later than seven (7) days after the event occurs.

**3.8 Comply with Additional Special Obligations**

The Client shall carry out the additional special obligations set out in the Proposal.

**3.9 Co-operate with Consultant**

The Client shall co-operate with the consultant and shall not interfere with or obstruct the proper performance of the Services.

**PART 4 – PAYMENT TO CONSULTANT FOR SERVICES**

**4.1 Client to Make Payment**

In consideration of the promise by the Consultant to perform the Services the Client promises to pay the Consultant the Fee and the Reimbursable Expense at the times and in the manner set out in this Agreement

**4.2 Amount or the method of Calculation of Fee**

The amount or the method of calculation of the Fee for the Services is set out in the Agreement.

**4.3 Goods and Services Tax**

a) This clause applies if GST is imposed in respect of any supply or deemed supply of Services or of any other act, matter or thing by the Consultant under or in connection with this Agreement (a “Supply”).

c) The Client must pay to the Consultant in respect of a Supply the amount which is necessary to ensure that the Consultant receives a net amount (after payment of the GST imposed in respect of that Supply) that is equal to the full amount it would have received under this Agreement had that GST not been imposed.

d) Any price or other consideration referred to in this Agreement does not include GST unless it is expressly included.

e) The Consultant must provide to the Client a tax invoice or other document, or any information or other things, as required by law.

f) This clause takes precedence over any other term of this Agreement to the extent of any inconsistency.

g) In this clause:

“**GST**” means a goods and services tax, value added tax or a similar tax levied or imposed in relation to a supply (or deemed supply) of any goods, property, services or any other thing.

**4.4 Reimbursable Expenses**

In addition to the payment referred to in Clause 4.2 the Client agrees to pay and indemnify the consultant for all costs and expenses incurred by the Consultant in connection with the matters set out in the Agreement.

**4.5 Timing of Payment**

At or about the end of each payment period specified in the Agreement the Consultant will give to the Client an account for the Services performed, and for Reimbursable expenses incurred, during the period. The Client shall pay the full amount owing in respect of each account by the due date for

payment stated on the account. Unless otherwise agreed, the due date for payment shall be fourteen days after the date of issue of the account.

#### **4.6 Failure of Client to Make Payment by Due Date**

In the event that the Client fails to make payment by the due date, the consultant reserves the right to cease work, or to withhold delivering up to the client the documentation of any work which has been carried out. In the event that the Consultant exercises this right, then the Project shall be considered to be delayed by the Client, and Clause 4.9 shall apply.

#### **4.7 Interest on Overdue Payment**

The Client agrees that in addition to all other rights and remedies of the Consultant if the client fails to pay all moneys as and when due, the consultant shall be entitled to payment of interest on overdue accounts. The interest shall be calculated on daily balances at the current CBA corporate Overdraft Reference Rate plus 2% per annum on all moneys which are not paid by the due date.

#### **4.8 Disputed Claims**

If the Client disputes the whole or any portion of the amount claimed in an account submitted by the Consultant it shall pay that portion of the amount stated in the account which is not in dispute and it shall simultaneously notify the Consultant in writing of the reasons for disputing the account. If the parties are unable to reach agreement within seven (7) days of the Client's notice, the dispute may be determined in accordance with this Agreement. If it is resolved that some or all of the amount in dispute ought properly to have been paid at the time it was first claimed, then the Client shall pay the amount finally resolved together with interest on that amount in accordance with Clause 4.7.

#### **4.9 Payment of Costs if Project Delayed**

If the performance of the Services is delayed beyond a reasonable period for any reason other than a breach of the Agreement by the Consultant, the Client shall be liable to the Consultant for loss and damage suffered, including loss of profits and consequential costs and expenses incurred as a result of the delay.

#### **4.10 Effect of Termination on Right to Payment**

If the engagement of the Consultant is terminated by any reason other than for breach of this Agreement by the Consultant, the Consultant shall be entitled to pro rata payment for the services carried out and the Client shall be liable to the Consultant for loss and damage suffered, including loss of profits and consequential costs and expenses incurred as a result of the termination.

#### **4.11 Effect of Change of Circumstances**

The Fee for the Services performed under this Agreement has been calculated on the assumption of both parties that the Services are to be provided under circumstances normally pertaining to the carrying out of the type of project in question. The parties agree that if the Consultant is required to perform the Services in circumstances other than those normally pertaining to such a project or if there is a change in the scope, timing or order of the services, then the Consultant

shall be entitled to payment of an amount which is reasonable in the circumstances.

#### **4.12 Changes in Laws**

If after the date of this Agreement there is any change to the laws, by-laws, regulations or ordinances of the Commonwealth of Australia or a State or Territory of Australia or any statutory authority and that change directly or indirectly affects the cost or reimbursable expenses incurred by the Consultant in performing the Services then the fee and reimbursable expenses otherwise payable to the Consultant under this Agreement shall be increased or decreased accordingly.

### **PART 5 – SCOPE OF LIABILITY**

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#### **5.1 Direct and Indirect Loss**

Under no circumstances, whether as a result of any act, neglect or default or otherwise howsoever, shall the Consultant have any liability for or in relation to any work, reports, information, plans, designs or specifications supplied or performed by any third party, including any Subconsultant or any third party engaged by or at the suggestion of the Consultant. The Consultant and any Subconsultants engaged by the Consultant shall not be liable to the Client for any consequential loss or damages or loss of profits.

#### **5.2 Maximum Amount of Liability**

Notwithstanding any other provisions of this Agreement, the Consultant's liability to the Client:

- a) under or arising from the Agreement;
- b) in tort (including negligence) or under any statute arising from the Consultant's acts or omissions, shall not exceed the sum of
- c) The cost of re-performing the Services the subject of this Agreement

The Client will indemnify and keep indemnified the Consultant and any Subconsultants engaged by the Consultant from any suit, cost, demand or claim for damage which exceeds the maximum amount referred to above. The Consultant's liability to the Client for any loss or damage, including a claim for damages for a breach of the Agreement by the Consultant shall be reduced to the extent that an act or omission of the client or its employees, agents or consultants contributed to the loss or damage.

#### **5.3 Third Party Claims**

The client will indemnify the Consultant and the Consultant's Subconsultants against all claims, costs, suits and demands by third parties howsoever arising whether in respect of the Services or in respect of the performance or non-performance of the Services or otherwise.

#### **5.4 Duration of Liability**

Unless otherwise agreed in writing, the Consultant and the Consultant's Subconsultants shall be deemed to have been discharged from all liability in respect of the Services, whether under the law of contract, tort or otherwise, on the expiration of one year from the date of invoice in respect of the final amount claimed by the Consultant pursuant to Part 4, and the Client (and persons claiming through or under the Client) shall not be entitled to commence any action or claim whatsoever against the Consultant or the Consultant's Subconsultants (or any employee of the Consultant or the

Consultant's Subconsultants) in respect of the Services after that date.

#### **5.5 Estimates of Project Cost**

If the Services include giving to the Client an estimate of the likely costs for the Project the Consultant warrants only that it will exercise the reasonable skill, care and diligence normally exercised by members of the Consultant's profession in the preparation of its professional opinion of those costs.

#### **5.6 Extent of Warranty**

The Consultant does not give any warranty nor accept any liability in relation to the performance or non-performance of the Services except to the extent, if any, required by law or specifically provided for in this Agreement. If apart from this Clause any warranty would be implied whether by law, custom or otherwise that warranty is to the full extent permitted by law hereby excluded. Nothing herein contained shall be read or applied so as to purport to exclude, restrict or modify or have the effect of excluding, restricting or modifying the application in relation to the supply of any goods or services pursuant to this Agreement of all or any of the provisions of Part V of the Trade Practices Act 1974 (as amended) or any relevant State Act or Territorial Ordinance which by law cannot be excluded, restricted or modified.

#### **5.7 Client Directing Consultant**

Where the Client is instructing a staff member of the Consultant directly as to their work to be performed the Client shall acquire professional liability insurance for the work performed by the Consultant. The Client, will indemnify and will forever keep indemnified the Consultant from any claim, loss, damage, demand, suit, costs, actions, interest, expenses and liability whatsoever or howsoever arising whether presently accrued or arising in the future for the work performed by the Consultant's staff that the Client has instructed the Consultant's staff to perform directly.

### **PART 6 – COPYRIGHT AND USE OF DOCUMENTS**

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#### **6.1 Copyright**

Copyright in all drawings reports, specifications bills of quantities, calculations and other documents provided or produced by the Consultant in connection with the Services shall remain vested in the Consultant.

#### **6.2 Client's Right to Use Documents**

The Client shall have a licence to see the documents referred to in Clause 6.1 for the purpose of completing the Project; however, the Client shall not use nor make copies of such documents in connection with any work other than work comprised in the Project unless express approval is given in advance by the Consultant.

#### **6.3 Application for Archived Files**

Clients Rights to use of documents is specified in Section 6.2. Requests to produce project documentation after finalisation and invoicing of the original project will be considered as a new project and will incur costs to the client. The minimum cost to the client will be two (2) hours at the original project senior Professional rate and increase in half hour intervals from there on for any part thereof. No document will be allowed out without a purchase order from the client and the information being provided being vetted by a company Senior Staff member.

#### 6.4 Publication of Articles

The Consultant may with the consent of the Client publish, either alone or in conjunction with others, articles, photographs and other illustrations relating to the Project.

### PART 7 – DISPUTE TERMINATION

#### 7.1 Dispute Procedure

Unless a party has complied with the provisions of this Part 7, that party may not commence court proceedings relating to any dispute, controversy or claim arising under this Agreement except where that party seeks urgent interlocutory relief or the other party has failed to comply with this Part 7.

#### 7.2 Executive Negotiation

If any dispute, controversy or claim in relation to this Agreement arises between the Parties, then a Senior representative from each Part shall meet, within 10 days of the giving of a notice setting out the areas of dispute between the parties and negotiate in good faith to resolve the dispute, controversy or claim.

#### 7.3 Mediation

In the event that the dispute, controversy or claim has not been resolved within 28 days (or such other period as agreed to in writing between the parties hereto) of the giving of notice referred to in Clause 7.2, the dispute, controversy or claim shall be submitted to mediation. Mediation of the dispute shall be conducted by a person or body agreed to by the parties, or failing agreement, within twenty-eight (28) days after receipt of the dispute notice as nominated by the President of the Australian Commercial Disputes Centre Limited (“ACDC”). Any mediation meetings and proceedings shall be held in the cMMLT cit of the State or Territory in which the Agreement is made.

#### 7.4 Costs of Mediation

The costs of any mediation proceedings shall be borne between the parties equally.

### PART 8 – TERMINATION OF SERVICES

#### 8.1 Termination by Client

The Client may by notice in writing served on the Consultant terminate the client’s obligations under this Agreement:

- a) If the Consultant is in breach of the terms of this Agreement and the breach has not been remedied within twenty-eight (28) days (or longer period as the Client may allow) of the service by the Client on the Consultant of a notice requiring the breach to be remedied; or
- b) If the client serves on the Consultant a notice requiring that this Agreement be terminated on a date specified in the notice being not less than sixty (60) days after the date of service of the notice.

#### 8.2 Termination by Consultant

The Consultant may by notice in writing served on the Client terminate the Consultant’s obligations under the Agreement:

- a) If the Client is in breach of any of the terms and conditions of Part 4 of the Agreement; or
- b) If the Client is in breach of the terms and conditions of any other Part of the Agreement and the breach has not been remedied within twenty-eight (28) days (or such longer period as the Consultant may allow) of the service by the Consultant on the

Client of a notice requiring the breach to be remedied; or

- c) If the Consultant serves on the Client a notice requiring that the Agreement be terminated on a date specified in the notice being not less than sixty (60) days after the date of service of the notice.

#### 8.3 Termination Not to Affect Rights in Respect to Prior Breaches

Termination shall be without prejudice to any claim which either party may have against the other in respect of any breach of the terms of the Agreement which occurred prior to the date of termination.

### PART 9 – GENERAL MATTERS

#### 9.1 Transfer and Assignment

a) The Consultant and the Client each binds itself and its partners, successors, executors, administrators, assigns and legal representatives to the other party to this Agreement and to the partners, successors executors, administrators, assigns and legal representatives of the other party in respect of all covenants and obligations of this Agreement.

b) Neither the Consultant nor the Client shall assign, sublet or transfer any right or obligation under the Agreement without the written consent of the other party. Unless specifically stated to the contrary in any written consent to an assignment, no assignment shall release or discharge the assignor from any obligation under the Agreement.

c) Nothing contained in this clause shall prevent the Consultant from employing within its fee such persons or companies as it may deem appropriate to assist it in the performance of the Agreement.

#### 9.2 Severability

If any provision of this Agreement shall be determined by any statute or any court having jurisdiction in relation thereto to be illegal, invalid, void or voidable the legality or validity of the remainder of this Agreement shall not be affected and the illegal, invalid, void or voidable provision shall be deemed deleted herefrom to the same extent and effect as if never incorporated herein but the remainder of this Agreement shall continue in full force and effect.

#### 9.3 Subconsultants

If circumstances arise which require the services of a specialist or expertise outside the field of the Consultant the Consultant may with the prior approval of the client engage the appropriate Subconsultant. The Subconsultant shall be engaged at the Client’s expense and on its behalf. The Client’s approval shall not be unreasonably withheld.

#### 9.4 Notices

A notice purported to be served under this Agreement shall be deemed to have been properly served if the same is in writing and is sent to the usual business address of the recipient by certified mail, telex message, personal delivery for which a receipt is obtained, or facsimile for which acknowledgment of receipt has been obtained.

#### 9.5 Moneys

All reference to moneys in the Agreement shall be deemed to be references to Australian currency unless otherwise specified and all moneys to be paid shall be

paid to the relevant party in places it may reasonably nominate in writing.

#### 9.6 Provision of Services Not Exclusive

The client acknowledges that, unless agreed otherwise, the provision of Services by the Consultant for the Project is not given on an exclusive basis.

#### 9.7 Governing Law

The Agreement and all disputes arising out of it are governed by the laws of the State or Territory of the Consultant’s office as set out in the Proposal and the parties submit to the jurisdiction of courts of that State or Territory.

#### 9.8 Headings

Headings have been inserted for guidance only and do not form part of the Agreement.

#### 9.9 Non-Poaching

a) The Client will not, without the Consultant’s prior written consent, employ or otherwise engage personnel employed by the Consultant during the term of the Agreement and for a period of 3 months thereafter. The Consultant may give permission on such conditions as it deems appropriate, including but not limited to the payment by the Principal to the Consultant of a fee of up to \$75,000 plus GST. The Consultant will advise the Principal of any conditions in writing prior to the granting of permission.

b) The above stipulation as to a fee is agreed by the parties to represent a genuine estimate of the benefit of the introduction of personnel to the Principal, the cost to the Consultant of having to re-hire and train a new employee and the loss of income expected to arise due to the Principal engaging the employee directly.

c) Reference above to an employee of the Consultant includes all persons employed by the Consultant during the term of this Agreement, whether or not such persons are currently employed by the Consultant at the time the Principal offers employment.

#### 9.10 Acceptance of Terms and Conditions

It will be assumed that the Terms and Conditions within this document have been accepted upon issuance of a company purchase order or written/faxed/email instruction to proceed.

*Based on “Guideline Terms of Agreement between Client and Consulting Engineer for Professional Services” prepared by the Association of Consulting Engineers Australia.*