

# Early Contractor Involvement Agreement

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# Early Contractor Involvement Agreement

## Details

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### Parties:

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**Principal:** Name:  
ABN:  
Address:  
Email:

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**PBS:** Name:  
ACN:  
Address:  
Email:

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**Background**

A. Prior to entering into a construction contract for the Project the Principal wishes to obtain advice and input from a contractor in order to develop the Project Works scope and achieve a cost effective design (**ECI**).

B. (Builder) has offered to provide the ECI Services on the terms set out in this Agreement.

C. The intention is that the Principal will also enter into the Construction Contract with (Builder) at completion of the ECI Services.

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**Project** Construction of residential units and associated basement carparking, servicing and site amenities more specifically described and detailed within the Schedules.

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**Agreement Term** The period commencing on the Commencement Date and ending on the earlier of the issuance of a Notice to Proceed or a notice by the Principal under subclause 5.2(b)(ii).

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**ECI Services and Fees** Schedule 1

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**ECI Program** Schedule 2

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**Construction Contract** Schedule 3

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**Development Application** Schedule 4

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**Construction Cost** Schedule 5

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**Clarifications and Qualifications** Schedule 6

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**ECI Milestones** See Schedule 1

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## 1. GENERAL

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### 1.1 Two Phases

The Principal and (Builder) agree the Project is to be carried out in two phases:

- (a) the first phase involves the performance of the ECI Services by (Builder) (**ECI Phase**);  
and
- (b) the second phase involves the construction of the Project (**Construction Phase**).

### 1.2 Construction Phase

Only after the Principal has issued a Notice to Proceed pursuant to this Agreement will (Builder) proceed to perform the Construction Phase.

### 1.3 ECI outcomes and objectives

- (a) (Builder) and the Principal agree to work with each other (and all stakeholders) in an open, co-operative and collaborative manner.
- (b) The primary objective of this Agreement is to identify savings and efficiencies in terms of design, construction cost, preliminary and general cost and ongoing life cycle cost.

### 1.4 ECI Milestones

(Builder) will use best endeavours to achieve each of the ECI Milestones and provide value engineering solutions throughout the Term.

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## 2. OBLIGATIONS

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### 2.1 BUILDER

(Builder) will:

- (a) carry out and complete the ECI Services set out at **Schedule 1** in accordance with the ECI Program;
- (b) should a Notice to Proceed be given under subclause 4.1 carry out and complete the construction of the Project Works in accordance with the Construction Contract; and
- (c) perform and observe all provisions of this Agreement which are to be performed by (Builder).

### 2.2 Principal

The Principal must:

- (a) pay the ECI Fee set out in **Schedule 1**; and
- (b) perform and observe all provisions of this Agreement which are to be performed by the Principal.

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## 3. SITE

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The Principal must give (Builder) access to the Site within such time and at such times as will allow (Builder) to undertake and perform the ECI Services in the times agreed (including but not limited to the undertaking of site investigations).

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## 4. CONSTRUCTION COSTS

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### 4.1 Cost Plan

- (a) At each of the ECI Milestones (builder) will prepare a construction cost estimate which will include:
  - (i) target construction cost (subject to the Clarifications and Qualifications in **Schedule 6**);
  - (ii) elemental cost analysis of the works;
  - (iii) a value engineering summary; and
  - (iv) a report on risks, assumptions and uncertainties,
- (b) (Builder) and the Principal agree the Cost Plan will not contain provision for any aspect of the ECI Services or any work undertaken and paid for under this Agreement.

### 4.2 Offer

- (a) Once the ECI Services are complete, or at any time during the Term as agreed with the Principal, (Builder) will submit an offer for the Construction Phase.
- (b) (Builder) will submit to the Principal:
  - (i) the proposed price to perform the Construction Phase (subject to the Clarifications and Qualifications in **Schedule 6**) (**Contract Price**); and
  - (ii) the Construction Contract identified in **Schedule 3**,  
(**PBS's Offer**).

## 5. NOTICE TO PROCEED

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### 5.1 Acceptance

- (a) (Subject to clause 5.1(b)) on receipt of (Builder's) Offer, the Principal must provide a Notice to Proceed to PBS.
- (b) If the Contract Price in (Builder's) Offer is more than the Target Construction Cost, the Principal may provide notice to (Builder) that it does not accept (Builder's) Offer, in which case clause 5.2 shall apply.

### 5.2 Negotiations

- (a) Should the Principal not accept (Builder's) Offer the Principal and (Builder) may confer and the Principal and (Builder's) may agree that (Builder's) is to submit a revised offer.
- (b) (If it is agreed that a revised offer is to be made) within seven (7) days of receipt of a revised offer from (Builder) the Principal must:
  - (i) provide a Notice to Proceed; or
  - (ii) notify (Builder) that it does not accept the revised offer.

### 5.3 Costs

If the Principal does not accept the (Builder) Offer (or revised offer) (Builder) is entitled to claim the full balance of the ECI Fee and any other costs incurred under or in connection with this Agreement, that has been agreed between the parties

## 6. INTELLECTUAL PROPERTY

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All Intellectual Property Rights in respect of design documents, drawings, specifications, calculations, material test results, and other information in computer readable or written forms which (Builder) creates

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arising out of or in connection with this Agreement (but not any copyright or other intellectual property which subsists in those documents prior to the date of this Agreement) (**ECI Documents**) are the property of the Principal. The Principal grants to (Builder) an irrevocable licence to use the ECI Documents for the purposes of the Project.

## **7. PAYMENT**

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### **7.1 Payment claims**

(Builder) may submit payment claims once per month on the 25<sup>th</sup> day of the month.

### **7.2 Payment schedules**

The Principal must provide a payment schedule within five (5) Business Days of receipt of a payment claim.

### **7.3 Due date**

The Principal must pay the amount shown in a payment schedule as owing to (Builder), or if no payment schedule is provided the amount claimed in a payment claim by (Builder), within 15 Business Days of receipt of a payment claim.

### **7.4 GST**

- (a) Unless expressly stated, amounts payable under this Agreement are exclusive of GST.
- (b) If GST is payable on a supply under this Agreement:
  - (i) the recipient will pay GST at the same time that consideration for the supply is to be provided; and
  - (ii) the supplier must provide a tax invoice to the recipient as a precondition to that payment.

## **8. INSURANCE**

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PBS will effect and maintain the insurance required to be taken out by the contractor under the Construction Contract (and ensure all consultants effect and maintain required insurances).

## **9. VARIATIONS AND EOTS**

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### **9.1 Variation**

- (a) The Principal may direct (Builder) to carry out a variation to the ECI Services.
- (b) The price of a variation is to be agreed up-front or if not agreed priced by the Principal (acting reasonably) applying agreed or reasonable rates and prices and applying an agreed margin for overheads and profits for additions but not deductions.

### **9.2 EOTs**

- (a) If either party becomes aware of anything which will probably cause delay to the ECI Services or the Project that party must give notice to the other of that cause and the estimated delay.
- (b) (Builder) will be entitled to an extension of time to complete the ECI Services if it is delayed by an event outside of its control provided:
  - (i) it has taken adequate steps to mitigate the effects of the delay; and
  - (ii) it has provided an extension of time (**EOT**) claim to the Principal within 10 Business Days of the start of the delay.
- (c) If (Builder) is entitled to an EOT the Principal will grant a reasonable EOT to (Builder) within 10 Business Days of receipt of (Builder's) EOT claim.

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### 9.3 Claim

If (Builder) considers a direction by the Principal to constitute a variation it may make a variation claim. The Principal may dispute the claim through the dispute resolution process in clause 11.

## 10. TERMINATION

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- (a) Should either party commit a substantial breach of this Agreement then a notice to show cause may be given by the other party which sets out the breach and provides a time for a response which shall not be less than five (5) Business Days.
- (b) If (Builder) or the Principal (as the case may be) fails to show cause to the reasonable satisfaction of the other party or an Event of Insolvency is committed by either party then, by written notice, the Principal or PBS (as the case may be) may terminate this Agreement.

## 11. DISPUTE

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### 11.1 Notice of Dispute

If a party wishes to dispute any matter arising out of or in connection with this Agreement then that party must deliver to the other party a notice of dispute (**Notice of Dispute**).

### 11.2 Conference

- (a) Within 10 Business Days of receipt of the Notice of Dispute, the parties shall confer (acting in good faith) in an attempt to resolve the dispute.
- (b) If the dispute is not resolved by the parties within 10 Business Days of receipt of the Notice of Dispute, the dispute shall be referred to mediation under subclause 11.3.

### 11.3 Mediation

- (a) The mediation shall be conducted by a mediator who is independent of the parties and appointed by agreement of the parties or, failing agreement within 15 Business Days of receipt of the Notice of Dispute, by the Chair of the Resolution Institute.
- (b) The then current Resolution Institute Mediation Rules shall apply to the mediation.

### 11.4 Litigation

If the dispute is still not resolved after mediation, either party may commence legal proceedings.

### 11.5 Survival

This clause survives the termination or expiry of this Agreement.

## 12. CONFIDENTIAL INFORMATION

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The parties must ensure that all Confidential Information is kept confidential and must not disclose directly or indirectly any Confidential Information to a third party without the prior approval of the other party. This clause does not apply to Confidential Information which:

- (a) the party proves was in its possession prior to the date of this Agreement;
- (b) has become generally available to the public or is in the public domain through no fault of the party;
- (c) is required to be produced by order of any court or under the requirements of any law; or
- (d) was obtained from a third party without breach of any confidentiality obligations.

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## **13. GENERAL**

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### **13.1 Severability**

If any provision of this Agreement is illegal, void, invalid or unenforceable for any reason, all other provisions which are self-sustaining and capable of separate enforcement will, to the maximum extent permitted by law, be and continue to be valid and enforceable.

### **13.2 Waiver**

Waiver, partly or wholly, of any term of this Agreement will be effective only if in writing and signed by the parties and apply only to a particular occasion (unless otherwise noted).

### **13.3 Consents in writing**

A party's consent to a departure from a provision of this Agreement by another party is not effective unless in writing.

### **13.4 Entire understanding**

This Agreement contains the entire agreement and understanding between the parties in relation to the ECI Services and supersedes any prior agreement or understanding on anything connected with that subject matter.

### **13.5 Amendment**

This Agreement can only be amended by written agreement executed by the parties.

### **13.6 Assignment**

A party must not assign a right or interest under this Agreement without the prior written consent of the other party.

### **13.7 Preservation of existing rights**

The expiration or termination of this Agreement does not affect any right that has accrued to a party before the expiration or termination date.

### **13.8 No Merger**

Any right or obligation of any party that is expressed to operate or have effect on or after the completion, expiration or termination of this Agreement for any reason, will not merge on the occurrence of that event but will remain in full force and effect.

### **13.9 Counterparts**

This Agreement may be executed in any number of counterparts which, when taken together, will constitute one instrument.

### **13.10 Service of notices**

A notice (and other documents) shall be deemed to have been given and received:

- (a) if addressed or delivered to the relevant address in the Details or last communicated in writing to the person given the notice, when delivered; and
- (b) in the case of:
  - (i) email communications, at the time the email containing the notice left the sender's email system unless the sender receives notification that the email containing the notice was not received by the recipient; and
  - (ii) communications other than email communications, on the earliest date of:
    - (A) actual receipt; and



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(B) three (3) Business Days after posting.

### 13.11 Governing Law and Jurisdiction

This Agreement is subject to and is to be construed in accordance with the laws of the state or territory of Australia in which the Site is situated. The parties submit to the non-exclusive jurisdiction of the courts of that state or territory.

## 14. DEFINITIONS AND INTERPRETATION

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### 14.1 Definitions

In this document:

**Agreement** means this document and its Schedules.

**Business Day** means any day which is not a Saturday, Sunday or public holiday in the state or territory of Australia in which the Site is situated or 27, 28, 29, 30 and 31 December.

**Commencement Date** means the date of this Agreement.

**Confidential Information** means all information and materials disclosed, provided or otherwise made accessible to a party in connection with this Agreement or the Services.

**Construction Contract** means the form of construction contract set out in or identified in **Schedule 3**.

**Details** means the section of this Agreement entitled 'Details'.

**Development Application** means the development consent for the Project identified in **Schedule 4**.

**ECI Fee** means the fee set out in **Schedule 1**.

**ECI Milestones** means the milestones (if any) identified in the Details.

**ECI Program** means the program set out in **Schedule 2**.

**ECI Services** means the services set out in **Schedule 1**.

**Event of Insolvency** means the events detailed in the insolvency clause of the Construction Contract.

**GST** means amounts defined as GST under the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

**Intellectual Property** means all intellectual and industrial property rights, including trademarks, copyright, inventions, patents, designs, circuits and other eligible layouts, database rights and other rights resulting from intellectual activity including any application or right to apply for any registration of these rights.

**Notice to Proceed** means a notice to proceed with the Construction Phase issued by the Principal pursuant to clause 5.

**Principal** means the person named in the Details.

**Project** has the meaning given in the Details.

**Project Works** means the whole of the work to be carried out and completed to deliver the Project.

**Site** means the site where the Project Works are intended to be constructed.

**Target Construction Cost** means the target construction cost set out in **Schedule 5** (which may be adjusted by written agreement between the parties).

~~**Term** means the period specified in subclause 1.5.~~

### 14.2 Interpretation

(a) Headings are for convenience only and do not affect interpretation.

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- (b) A reference to: legislation is to that legislation as amended, re-enacted or replaced, and includes any subordinate legislations issued under it; 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; a party includes a permitted substitute or a permitted assign of that party; a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person; anything (including a right, obligation or concept) includes each part of it.
  - (c) No rule of construction applies to the interpretation of the Agreement to the disadvantage of one party on the basis that the party prepared it.

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## Signing page

**Executed as an agreement** by the parties:

### **Principal**

Executed by

in accordance with section 127 of the *Corporations Act 2001* (Cth):

.....  
Signature of director/secretary

.....  
Signature of director/secretary

.....  
Name

.....  
Name

### **(Builder)**

Executed by (Builder) in accordance with section 127 of the *Corporations Act 2001* (Cth):

.....  
Signature of director/secretary

.....  
Signature of director/secretary

.....  
Name

.....  
Name

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# Schedule 1 – ECI Services and ECI Fee

Milestone	Fee Applicable
Gate 2	
Gate3	
<b>PBS Schedule of Rates</b>	
General Manager	
Construction Manager	
Project Manager	
Senior Estimator	
Estimator	
	<p>*All rates are subject to GST</p> <p>* PBS claims for payment will be made using the above rates and supported by suitable timesheets</p>

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## ~~Schedule 2 – ECI Program~~

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## **Schedule 3 – Form of Construction Contract**

The form of contract is to be agreed during the ECI process and prior to commencement of any formal contract award leading to the construction stage.

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## **Schedule 4 – Development Approved Plans**

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## **Schedule 5 – Construction Cost Schedule**

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## **Schedule 6 – Clarifications and Qualifications**

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