

Consultancy Agreement

Project Name

Contract Number

Frankston City Council Consultancy Agreement

BETWEEN Frankston City Council
ABN: 49 454 768 065
30 Davey Street
FRANKSTON VIC 3199 ('Frankston City Council')

AND Consultant
ABN:
Address ('Consultant')

AGREEMENT TERMS AND CONDITIONS:

1. Consultancy Agreement

1.1. This Agreement establishes exclusively the terms and conditions by which the Consultant will provide Frankston City Council with the consultancy services as set out in this Contract Agreement.

1.2. In the event any ambiguity, discrepancy or inconsistency exists between the correspondence referred to in clause 1.1 and the terms of this Agreement, then the terms of this Agreement shall prevail over the correspondence referred to in clause 1.1 to resolve the ambiguity, discrepancy or inconsistency.

1.3. In this Agreement 'Force Majeure Event' means any event:

- (a) which is beyond the reasonable control of the Consultant;
- (b) which could not reasonably have been anticipated or avoided by the Consultant at the date of this Agreement; and
- (c) which having arisen could not have been avoided or overcome by the Consultant,

including war, acts of foreign enemies, invasion, revolution, insurrection, military or usurped power, acts of terrorism and natural catastrophes such as earthquake, hurricane, typhoon, lightening, flood or fire.

2. Appointment

2.1. Frankston City Council appoints the Consultant to provide the Services on the

terms set out in this Agreement. Except as otherwise provided in this Agreement, the Consultant performs the Services at its own cost and risk.

2.2. The Consultant is an independent contractor, is not Frankston City Council's agent, employee or a partner of and has no authority to bind or act on Frankston City Council's behalf at any time.

3. Provision of Services

3.1. The Consultant undertakes that it possesses the qualifications, expertise and experience appropriate to perform the Services.

3.2. The Consultant must, and undertakes that it will:

- (a) provide the Services with due skill care and diligence and (without limiting this Agreement) to the best of the Consultant's knowledge and expertise, and comply with all laws and any relevant policies of Frankston Council in carrying out such Services;
- (b) comply with any reasonable direction given by Frankston City Council within the time which the direction is to be complied with;
- (c) otherwise carry out and complete the Services in accordance with the Agreement;

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- (d) not act dishonestly, fraudulently or illegally;
- (e) not act in a manner which brings Frankston City Council into disrepute or affects Frankston City Council's reputation or may have the effect of bringing Frankston City Council into disrepute or affecting Frankston City Council's reputation; and
- (f) comply with and require all its sub consultants, servants and agents to comply with the *Occupational Health and Safety Act 2004* and regulations or similar laws, and to ensure that, if appropriate, it maintains a quality plan containing an element covering the management of occupational health and safety.

3.3. The Consultant remains fully responsible for the Services notwithstanding any subcontracting, or any review or acceptance of the Services by Frankston City Council.

4. Time

4.1. The Consultant shall complete the Services with due expedition and without delay and in accordance with the time requirements set out in the Agreement, subject to adjustment in accordance with this clause 4.

4.2. If the Consultant believes that any cause beyond the control of the Consultant will delay the performance of the Services, the Consultant must notify Frankston City Council in writing within seven (7) days of the cause of delay arising.

4.3. If the cause of the delay is:

- (a) an act, default or omission of Frankston City Council (including the ordering of a variation, or a delay caused by a third party); or
- (b) a Force Majeure Event,

and such delay is beyond the reasonable control of the Consultant and which could not reasonably have been anticipated or avoided at the date of this Agreement the time for completion of the Services shall

be extended by a reasonable period determined by Frankston City Council. The Consultant agrees that an extension of time to the date for completion of the Services is its exclusive remedy for delays.

4.4. The Consultant must co-operate with Frankston City Council and all other consultants, sub-contractors or authorities involved in the Services and any associated works.

5. Payment

5.1. Provided the Consultant performs the Services under the Agreement as specified or subsequently varied, Frankston City Council will pay the Consultant the consultancy fee set out in Schedule 1 or subsequently agreed in writing by Frankston City Council. Such payment shall be the Consultant's exclusive entitlement to payment. Payment by Frankston City Council shall be on account only and shall not imply that the Services or any part of the Services is approved by Frankston City Council.

5.2. The Consultant and the Consultant's employees and sub consultants have no claim against Frankston City Council in respect of personal disability, accident or workers compensation in respect of its engagement under this Agreement.

5.3. The Consultant and the Consultant's employees and sub consultants have no claim against Frankston City Council in respect of annual leave, public holidays, sick leave and long service leave in respect of its engagement under this Agreement.

5.4. The Consultant undertakes that it is registered for GST purposes.

5.5. Each payment due under this Agreement must be increased by an amount equal to any GST which a party becomes liable to pay for any supply made under or in connection with this Agreement so that that party retains, after payment of GST, the amount which it would have retained but for the imposition of GST.

5.6. Frankston City Council is not required to make a payment until it receives a tax invoice for that payment and the Consultant must provide to Frankston City Council all documentation required to

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claim any GST tax credit, set off, rebate or refund for or in relation to any GST included in any payment under the Agreement.

6. Variations

6.1. Frankston City Council may vary the scope or the extent of the Services. A fee for the variation shall be agreed prior to the execution of the variation. If agreement cannot be reached, Frankston City Council may direct the Consultant to perform the variation, and Frankston City Council must pay the Consultant a reasonable fee for doing so as determined by Frankston City Council. The Consultant must not commence any variation to the Services until it receives a written notice from Frankston City Council stating that the work is a variation under this clause 6. The Consultant must carry out the variation after receiving the notice.

6.2. If the Consultant carries out extra work without receiving a notice under this clause 6, it will bear the entire cost of such work regardless of whether the work confers a benefit on Frankston City Council or Frankston City Council was aware that the work was being performed.

7. Confidentiality & Privacy

7.1. The Consultant acknowledges that, except where information is generally available to the public (other than by reason of a breach of this Agreement) or which is required to be disclosed by law, it at all times, including after this Agreement ends, must:

- (a) keep all information, whether oral, graphic, electronic, written or in any other form, which it receives, possess or acquires in relation to Frankston City Council, its agents, employees or contractors and/or the Services, confidential and take all reasonable steps to secure and keep secure all such confidential information; and
- (b) not memorise, use, modify, reverse engineer or make copies, notes or records of the confidential information for any purpose other than in connection with the performance by the

Consultant of its obligations under this Agreement.

7.2. If requested by Frankston City Council at any stage prior to or during the carrying out of the Services, the Consultant must execute a deed of confidentiality, the form of which is available from Frankston City Council on request. Notwithstanding any other clause of the Agreement, Frankston City Council may withhold any payment under the Agreement until the Consultant has complied with this clause 7.

7.3. The Consultant must comply, and must ensure that its employees, agents and contractors comply, with any privacy legislation which binds Frankston City Council including the National Privacy Principles under the *Privacy Act 1988* (Cth) and the Information Privacy Principles under the *Privacy and Data Protection Act 2014* (Vic) and any equivalent or similar legislation in Australia ('Privacy Laws'), and must not do or allow the doing of anything that would cause Frankston City Council to breach any Privacy Laws.

7.4. The Consultant will indemnify and hold harmless Frankston City Council for any loss or damage suffered or incurred arising from the Consultant being in breach of its obligations under this clause 7.

8. Intellectual Property Rights

8.1. The Consultant assigns to Frankston City Council copyright and property in anything supplied to Frankston City Council by the Consultant under this Agreement or otherwise created, discovered or otherwise coming into existence as a result of or arising out of this Agreement or the Services ('Materials'). The Consultant must sign all documents and do all things reasonably required by Frankston City Council to give effect to the assignment of the Materials. Frankston City Council hereby grants the Consultant a revocable non-exclusive licence to use Materials for the purpose of providing the Services where copyright and property in those Materials has vested in the Frankston City Council pursuant to this clause 8.1. This does not restrict the Consultant's ongoing rights to use its original ideas, equipment, processes or systems.

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8.2. The Consultant undertakes that:

- (a) it has obtained valid consents from all relevant authors in the creation of any copyright work under this Agreement so that the use by Frankston City Council or its assignees of such work will not infringe any copyright, including any author's moral rights under the *Copyright Act 1968* or any other Intellectual Property Rights held by a third party; and
- (b) the consents permit Frankston City Council in its absolute discretion, reproducing, publishing, copying, adapting, performing, communicating to the public, materially distorting or in any other way changing or using the work (or a substantial part of adaptation of it):
 - (i) with or without attribution of authorship;
 - (ii) with no title, the same title or any other title; and
 - (iii) in any way it sees fit.

8.3. The Consultant indemnifies Frankston City Council its Councillors, Officers, employees and agents (collectively 'Frankston City Council') against any and all losses, costs, expenses, claims, demands or any other actions in each case of any kind whatsoever which:

- (a) may be brought against Frankston City Council or incurred by Frankston City Council as a result of a breach of the undertakings given by the Consultant in clause 8.2; or
- (b) arise by reason of any infringement by the Consultant of any intellectual property rights by the Consultant or supplied by the Consultant for the purposes of this Agreement.

8.4. Frankston City Council will be entitled as it sees fit and at no cost either directly or through any other party to make use of any ideas, designs, data, reports or other products or outcomes used or developed by the Consultant in conjunction with this Agreement which are not subject to royalties or patent rights for carrying out

additional or similar work. The Consultant will not be liable to Frankston City Council or any third party in any way for such use of these outcomes or products.

9. Scope of liability & Insurance

9.1. The Consultant indemnifies Frankston City Council, its Councillors, Officers, employees and agents (collectively in this clause 'Frankston City Council') against any and all losses, costs, expenses, claims, demands or any other actions in each case of any kind whatsoever (collectively 'liability') which may be brought against Frankston City Council or incurred by Frankston City Council arising out of or in connection with the Services as follows:

- (a) without limiting sub-clauses 9.1(b) or (c), any liability for any negligent act, error or omission on the part of the Consultant arising out of the performance of the Services;
- (b) any liability in respect of personal injury, death or property damage (including in relation to the Materials) arising out of the performance of the Services; or
- (c) any liability arising out of a breach by the Consultant of this Agreement.

9.2. The Consultant's liability under this clause 9 shall be reduced to the extent that the liability in question is caused, or contributed to, by a breach of the Agreement or negligence by Frankston City Council.

9.3. The Consultant and Frankston City Council agree that, for the purposes of section 24AI of the *Wrongs Act 1958* (Vic), the Consultant is entirely responsible for any failure to take reasonable care on the part of any of its sub-consultants, sub consultants or agents.

9.4. Before proceeding with the Services and as a condition of entitlement to any payment of the Fee, the Consultant must arrange the following types of insurance:

- (a) workers' compensation insurance for any of the Consultant's employees or anyone treated as an employee of the Consultant under

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- any legislation of not less than the amount set out in Schedule 1;
- (b) professional indemnity of not less than the amount set out in Schedule 1;
 - (c) public liability insurance of not less than the amount set out in Schedule 1; and
 - (d) such other insurance required by law or any authority in order to perform the Services.
- 9.5.** The professional indemnity and the public liability policies must include provisions for at least one automatic reinstatement of the sum insured and provide cover for loss of documents.
- 9.6.** The Consultant must use best endeavours to provide Frankston City Council with a letter from its insurance broker or insurer which is addressed to Frankston City Council, and which confirms that the Consultant's insurer and/or insurance broker agrees to notify Frankston City Council in the event that any of the following events occur in respect of any insurance required by clause 9.4:
- (a) cancellation and/or lapse of the policy; and/or
 - (b) non-renewal of the policy; and/or
 - (c) a claim is made under the policy.
- 9.7.** Notwithstanding clause 9.6 the Consultant must notify Frankston City Council in the event that any of the events set out in sub-clause 9.6(a) to (b) occur in respect of any insurance required by clause 9.4.
- 9.8.** The policies referred to in clause 9.4 must not contain any terms (including any limitations, exclusions and conditions) not commonly found in policies of the relevant type. The Consultant must provide to Frankston City Council upon request evidence reasonably acceptable to Frankston City Council (comprising Certificates of Currency) that the insurances required to have been effected in accordance with this Agreement and must provide written insurers in reasonable detail to any reasonable questions raised by Frankston City Council regarding such insurances. Frankston City Council may, acting reasonably, on reviewing the evidence and answers provided by the Consultant under this Clause 9.8, inspect the Consultant's policies of insurance effected under this Clause 9.
- 9.9.** The Consultant must keep the workers' compensation and public liability insurance in force at all times while the Agreement continues and keep the professional indemnity insurance in force for the number of years after the performance of the Services set out in the Schedule (which period shall not be less than 7 years from completion of the Services) ('the run off period').
- 9.10.** Failure to comply with this clause 9 constitutes a breach of a material term for the purpose of clause 12.2.
- 10. Conflict of Interest**
- 10.1.** The Consultant and the Consultant's other employees and sub consultants must not undertake any activities or be interested in (directly or indirectly) any business or activity which concerns or proposes to concern any development undertaken by Frankston City Council or which is likely to give rise to a conflict of interest unless prior written consent is obtained from Frankston City Council (on such terms as it sees fit).

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10.2. The Consultant undertakes as at the date of this Agreement that no conflict of interest exists or is likely to arise during the course of the Agreement. If the Consultant becomes aware that it is at risk of being placed in a position of conflict, the Consultant must immediately notify Frankston City Council in writing and do all things necessary to remove itself from any such position and co-operate with Frankston City Council to resolve the conflict.

11. Assignment and Subcontracting

11.1. The Consultant must not assign or subcontract this Agreement or any part of it to any other person without Frankston City Council's prior written consent, which consent may be conditional on approval of the proposed subcontract or assignment terms. Approval by Frankston City Council of any assignment or subcontract will not relieve the Consultant of any liabilities under this Agreement and the Consultant will remain responsible for the acts, omissions or defaults of any subcontractor as if they were the Consultant's own acts, omissions or defaults.

11.2. Frankston City Council may assign this agreement or any part of it to any other person at any time.

12. Termination

12.1. This Agreement ends on the earlier of:

- (a) the date on which the Services are completed;
- (b) the expiry of the term set out in Schedule 1; or
- (c) the termination of the Agreement.

12.2. Frankston City Council may end the Agreement at any time by giving the Consultant thirty (30) days' notice in writing, and may end the Agreement immediately if:

- (a) the Consultant breaches a material term of the Agreement;
- (b) the Consultant is unable to assign all or any part of the Intellectual Property Rights in the Materials;
- (c) the Consultant enters or threatens to enter into bankruptcy,

liquidation or other analogous type of insolvency or if the Consultant ceases to conduct business;

- (d) Frankston City Council becomes aware that there is a real or potential conflict of interest and the matter is not resolved within 7 days of Frankston City Council giving notice to the Consultant of Frankston City Council's concerns;
- (f) the Consultant or any of its employees are charged with any criminal offence which, in Frankston City Council's reasonable opinion, brings the Consultant or Frankston City Council into disrepute;
- (g) the Consultant acts dishonestly, fraudulently or illegally;
- (h) the Consultant acts in a manner which brings Frankston City Council into disrepute or affects Frankston City Council reputation or may have the effect of bringing Frankston City Council into disrepute or affecting Frankston City Council's reputation; or
- (i) the Consultant fails to execute a deed of confidentiality upon request by Frankston City Council pursuant to clause 7.2.

12.3. Frankston City Council may end the Agreement for convenience by written notice to the Consultant. Subject to the Consultant's compliance with clause 12.6, Frankston City Council shall pay to the Consultant (as full compensation but without prejudice to any accrued rights of the Consultant) the portion of the Fee due to the Consultant at the time of ending the Agreement, plus a sum for the reasonable direct costs and expenses (but not losses, whether loss of profit or otherwise) the Consultant incurs solely as a consequence of Frankston City Council ending the Agreement.

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12.4. Any costs or expenses incurred or damage sustained by Frankston City Council in remedying any breach of the Consultant or in any way arising out of the Consultant's default shall become a debt due and payable to Frankston City Council by the Consultant and may be recoverable from the Consultant by deduction from any moneys held on account of the Consultant or by action at law.

12.5. The Consultant may only end this Agreement if Frankston City Council does not pay any money owing to the Consultant under the Agreement within 30 days after Frankston City Council has received written notice from the Consultant advising Frankston City Council that the money is overdue for payment in accordance with the Agreement and that the Consultant intends to terminate the Agreement.

12.6. Upon completion of the Services, or the earlier termination of the Agreement, the Consultant must immediately provide to Frankston City Council all confidential information and other materials, which Frankston City Council has provided to the Consultant or any of the Consultant's employees and sub-contractors, and all other materials (including the Materials and all copies) in a form capable of re-use by Frankston City Council (except for one copy of the Materials which, subject to Clause 7, may be retained by the Consultant for record keeping purposes).

13. Notices

Where a notice has to be given under the Agreement, it may be given by hand, or facsimile (provided confirmation is sent by post on the same day), or sent by post to the address set out in the Agreement, or a substitute address that has been notified to the other party.

14. Information

The Consultant must provide to Frankston City Council any information reasonably requested by Frankston City Council in connection with the Services.

15. Non-Reliance

15.1. The Consultant undertakes that it did not in any way rely upon:

- (a) any information, data, representation, statement or document made by or provided to the Consultant by Frankston City Council or anyone on behalf of Frankston City Council; or
- (b) the accuracy or adequacy of any such information, data, representation, statement or document,

for the purposes of entering into the Agreement, except to the extent that any such information, data, representation, statement or document forms part of the Agreement.

15.2. The Contractor undertakes that it enters into this Agreement based on its own investigations, interpretations, deductions, information and determinations, and all information provided by the Consultant to Frankston City Council prior to entering into the Agreement (including the document(s) described in clause 1) is accurate and complete.

15.3. The Consultants acknowledges that it is aware that Frankston City Council has entered into the Agreement relying upon the undertakings in clauses 15.1 and 15.2.

16. Clauses Surviving Termination

Any indemnity or any obligation of confidence under this Agreement is independent and survives termination of this agreement. Any other term by its nature intended to survive termination of this agreement survives termination of this agreement, including this clause 16 and clauses 7, 8, 9, 10, 11 and 20.

17. Applicable Law

This Agreement will be governed by the laws of Victoria, Australia and both parties will conduct any litigation or other proceedings in the Courts or tribunals in Victoria.

18. Entire Agreement and Alteration

This Agreement is the entire agreement between the parties relating to the Services. The Agreement cancels and supersedes all previous offers and negotiations between Frankston City

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Council and the Consultant in relation to the Services. The parties may add to or alter this Agreement but only in writing signed by both Frankston City Council and the Consultant.

19. Severability

Any provision in this Agreement which is invalid or unenforceable in any jurisdiction is to be read down for the purposes of that jurisdiction, if possible, so as to be valid and enforceable, and is otherwise severed to the extent of the invalidity of unenforceability, without affecting the remaining provisions of the Agreement or affecting the validity or enforceability of that provision in any other jurisdiction.

20. Dispute Resolution

20.1. If a dispute arises under or in connection with the Agreement (for the purposes of this clause '**Dispute**'), either party may at any time give written notice to the other requesting that a settlement meeting take place between nominated senior representatives (being at or not less than general manager level) of both parties with authority to settle the Dispute. The nominated senior representatives must meet within seven (7) days of the notice and endeavour to resolve the Dispute in good faith.

20.2. Notwithstanding the existence of a Dispute, the Consultant must continue to perform the Services in accordance with the Agreement.

CONSULTANCY AGREEMENT

PARTIES: FRANKSTON CITY COUNCIL (Council)

AND: **CONSULTANT NAME** (the Consultant)

THE PARTIES AGREE that the following documents –

- Letter of Acceptance;
- Consultancy Agreement;
- Specifications;
- Consultant's Submission;

together with this Contract Agreement, constitute the contract between the Parties, noting that if any inconsistencies exist between the different documents, the order of priority is as listed.

EXECUTED AS AN AGREEMENT by **Consultant Name**

ABN: **XXXXX** in accordance with section 127(1) of the Corporations Act 2001

on _____ by its duly authorised officer

Director's signature

Full Name

Executed for and on behalf of

FRANKSTON CITY COUNCIL

ABN: 49 454 768 065

on the _____ by its duly authorised officer

Authorised Officer's Signature

Full Name of Authorised Officer

Position Held

Schedule 1

1.	CONSULTANT: <div style="text-align: right;"> Name: ABN: Address: Telephone: </div>	
2.	SERVICES & DELIVERABLES: (clause 1)	DESCRIPTION , as per the Specification attached
3.	TERM: (clause 12.1)	
4.	CONSULTANCY FEES and PAYMENT PROCEDURE (clause 5.1)	
5.	PROFESSIONAL INDEMNITY INSURANCE (clause 9.4)	\$5 million
6.	RUN OFF PERIOD FOR PROFESSIONAL INDEMNITY INSURANCE: (clause 9.9)	7 years after this Agreement has ended in accordance with clause 9.9.
7.	PUBLIC LIABILITY INSURANCE: (clause 9.4)	\$20 million
8.	WORKERS' COMPENSATION INSURANCE (clause 9.4)	As required by statute.