Model Clauses: Offsite Construction

The Office of Projects Victoria (OPV) and Department of Treasury and Finance (DTF) have prepared a suite of model clauses to assist delivery agencies adopt offsite construction (OSC) where it is considered appropriate at a project level. The objective is to maximise the productivity, efficiency, commercial and legal benefits to the State while eliminating (or if elimination is not possible, minimising and mitigating) the risks to the State posed by OSC.

The model clauses are intended to supplement the Victorian Public Construction Contracts (VPCC), which comprise DTF Standard Form Contracts and approved Agency Specific Contracts. While the clauses are designed to work with the VPCC, modification and tailoring may be necessary to align with those specific Contracts at a project level.

The model clauses facilitate the consistent treatment by the State of key issues that arise in projects employing significant OSC elements. Use of these clauses will provide significant efficiency when integrating OSC provisions into the relevant Contracts. The clauses also document the State’s position on fundamental commercial principles for inclusion in bespoke contracts that are developed for High Value, High Risk projects incorporating OSC.

The model clauses are intended to be used in projects employing significant OSC elements where standard clauses are not suitable or commercially acceptable (e.g. typical unfixed plant and equipment clauses in a construction contract).

The suite comprises three sets of model clauses, each designed to accommodate a different delivery scenario:

1. Offsite Construction Model Clauses - Supply Model 1 & Supply Model 2 - Supply Contract
2. Offsite Construction Model Clauses - Supply Model 2 - Construction Contract
3. Offsite Construction Model Clauses - Subcontracting Model - Construction Contract

This set of model clauses applies to contracting approach **Supply Model 2** (shown below).

| 1. Contracting Approach
 | 1. Base Contract / Party
 | 1. Model Clauses
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| Supply Model 1 and Supply Model 2 | Supply Contract / Supplier | Model Clauses as relevant for Supply Only/Supply and Design/Supply and Install/Supply, Design and Install (as relevant) are set out in: * Offsite Construction Model Clauses - Supply Model - Supply Contract
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| **Supply Model 2** | Construction Contract/or | All Model Clauses are set out in: * Offsite Construction Model Clauses - Supply Model - Construction Contract
 |
| Subcontractor Model | Construction Contract/or | All Model Clauses set out in: * Offsite Construction Model Clauses - Subcontractor Model - Construction Contract
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The intention is that all of the Model Clauses will be included in the relevant Base Contract, other than where they are specified to be “Optional”, in which case the “Option” that is not applicable should be deleted. If a Model Clause is otherwise “not applicable”, rather than being deleted, it should be switched off in the “Particulars” or "Annexure Part A" as indicated in the Guidance Notes

Model Clauses: Offsite Construction

Contracting approach: Supply Model 2 with base construction contract/or

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| **Guidance Note:** This document is intended for use when the State wishes to employ Offsite Construction in projects delivered under a variety of different procurement models (e.g. Construct Only, Design and Construct, Managing Contractor) in a **Supply Model 2 scenario**.This document is **not a standalone contract**. The clauses following are designed to be included in a base construction contract, which must be DTF endorsed and approved under the Ministerial Directions (**Base Contract**). The clauses included in the Base Contract will vary depending on whether the Supply Contract in this Model also requires design and/or installation. You may also need to add additional items to the "Particulars" or "Annexure Part A", as well as additional "Schedules" or "Annexures" in, the Base Contract. Guidance Notes are provided to assist with this exercise and to indicate when existing clauses in the Base Contract should be replaced, or new clauses inserted.Please note that certain terms within this document will be flagged with a "##". For example, the term "the Contract" appears as <##the Contract>. This formatting has been used in circumstances where the terminology or numbering in the clauses will need to be aligned with the relevant terminology or numbering in the Base Contract. The model clauses and the Base Contract will also need to be carefully checked, and conformed, to ensure that the model clauses align and integrate with the Base Contract.Also please note that, in the Contract Particulars and Schedules, items highlighted:* ***green*** are to be completed by the agency before going to tender; and
* ***yellow*** are to be completed by the agency using information provided by the tenderer in response to the RFT.

A Base Contract into which these clauses are integrated **must be legally reviewed** prior to issue to tender. |

# Definitions

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| 1. **Guidance Note:** The following definitions should be inserted in alphabetical order in the "Definitions" section of your contract. Note that if your contract already includes a definition for the same term, this should be replaced with the definition in this list.
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1. **Approval** means any licence, permit, registration, consent, assessment, approval, authorisation, determination, certificate, accreditation, clearance, permission or the like which is required by an Authority or under any Law to be issued, obtained, held or satisfied to perform the <##Contractor’s Activities> or to occupy or use the Works.
2. **Authority** means any:
	1. government of the Commonwealth of Australia or any Australian State or Territory and their departments, authorities, ministers, statutory corporations and instrumentalities, and any governmental, semi-governmental or local government authority, local council, administrative or judicial body or tribunal, in Australia; or
	2. person to the extent that it has legally enforceable jurisdiction over the whole or part of the Site, the <##Contractor’s Activities> or the Works.
3. **Business Days** means a day in Melbourne that is not:
	1. a Saturday or Sunday; or
	2. a day that is wholly or partly observed as a public holiday throughout Victoria.
4. **Claim** includes any claim, action, demand, suit or proceeding (including by way of contribution or indemnity), made in any way in connection with, <##the Contract>, the <##Contractor’s Activities> or the Works or otherwise at Law or in equity, including under any statute, in tort or for restitution.
5. **Collateral Warranty** means a warranty in the form of Schedule <##insert>.
6. **Component** means:
	1. each consolidated item identified in the Component Schedule and described more fully in the Component Brief, or, if <##the Contract> refers to more than one Component:
		1. means each of the Components identified in the Component Schedule and described more fully in the Component Brief; and
		2. references in <##the Contract> to "Component " are taken to apply separately to each such Component; and
	2. if it is identified as a Component in the Component Schedule, the Component Prototype.
7. **Component Brief** means the section of the <##Delivery Requirements> named as such that sets out the requirements for the Components.
8. **Component Design** means:

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| 1. **Guidance Note:** Select one of Option A or Option B.
2. Select Option A where Option A has been selected in clause 6.1.
3. Select Option B where Option B has been selected in clause 6.1.
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1. **Option A**: those Component Design Deliverables that have been through the process set out in clause 6.1 and in respect of which the Contractor has:
	1. had the period referred to in section 6.1(d)(ii) to review the Component Design Deliverables; and
	2. not provided any notice referred to in clause 6.1(d)(ii).

**Option B:** those deliverables set out in the Component Brief.

1. **Component Design Deliverables** means design documentation created by the Supplier for the Manufacture of the Components (or any Component Part).
2. **Component Part** means, in respect of a Component, each part of the relevant Component specified in the Component Schedule and includes a Component Part.
3. **Component Prototype** has the meaning identified in Item <##13 replace with relevant reference to item in the Contract Particulars of your contract> and described more fully in the Component Brief.
4. **Date for Handover and Acceptance** means, in respect of a Component Part, the date the identified as such in the Milestone Schedule.
5. **Date of Handover and Acceptance** means, in respect of a Component Part, the date notified in any Handover and Acceptance Certificate.
6. **Defect** means any:
	1. defect, deficiency, error, fault or omission, whether in design, quality, materials, workmanship, the <##Contractor's Activities> or the Works (including any Component or Component Part);
	2. other aspect of the <##Contractor's Activities> or the Works (including any Component or Component Part) which is not in accordance with the requirements of <##the Contract>; or
	3. physical damage resulting from any of the events of circumstances referred to in paragraph (a) or (b) of this definition.
7. **Delivery Point** means, in respect of a Component Part, the location identified as such in the Component Schedule.
8. **Engineering Certificate** means a certificate in the form of Schedule <##insert>, or such other form as is acceptable to the Principal.
9. **Fit for Purpose** means fit for its intended purposes, functions and uses as specified in, or reasonably inferred from, the <##Delivery Requirements> or any other parts of <##the Contract>.
10. **Handover and Acceptance** means, in respect of a Component or Component Part (as the case may be), that stage when:
	1. if clause 7.2 applies:
		1. a Manufacturing Completion Certificate has been issued in respect of the Component or Component Part (as the case may be); and
		2. delivery has occurred;
	2. if clause 7.2 does not apply:
		1. the Component or Component Part (as the case may be) is free from Defects (as that term is defined in the Supply Contract), other than minor Defects (as that term is defined in the Supply Contract) which:
			1. do not prevent the Component (including in the case of a Component Part, the Component of which that Component Part is a part) or Component Part (as the case may be) from being reasonably capable of being used for the purposes stated in or reasonably able to be inferred from the Supply Contract; and
			2. can be corrected without prejudicing the convenient use of the Component (including in the case of a Component Part, the Component of which that Component Part is a part) or Component Part (as the case may be);
		2. all tests required by the Supply Contract to be carried out and passed to achieve Handover and Acceptance have been carried out and passed;
		3. all documents and information required by the Supply Contract to be provided to the Principal to achieve Handover and Acceptance have been so provided, including all Engineering Certificates required in connection with the relevant Component or Component Part (as the case may be) and all Approvals as are necessary for the use of the Component or Component Part (as the case may be); and
		4. the Contractor has done everything identified in the Component Schedule (as that term is defined in the Supply Contract) (or elsewhere in the Supply Contract) as being required to be done before, or as a condition precedent to, Handover and Acceptance; and
	3. the Supplier has executed and provided the Contractor with a Collateral Warranty.

**Handover and Acceptance Certificate** means a certificate of that name issued by the Principal to the Supplier under the Supply Contract.

1. **Hold Point** means:
	1. each Milestone identified as such in the Milestone Schedule; and
	2. any other point in the Manufacture of a Component Part identified as such in the Component Brief.
2. **Loading Protocol** has the meaning given in clause 8(a).
3. **Loss** means any:
	1. loss, damage (including damages at common law or in equity), liability, debt, cost (including legal costs, deductibles or increased premiums), expense, fee, compensation, charge or other amount; or
	2. fine or penalty (to the extent not prohibited by Law),
4. whether direct, indirect, consequential, present, future, fixed, unascertained, actual or contingent.
5. **Manufacture** includes construction, manufacture and assembly.

**Manufacture Completion** means, in respect of a Component:

* 1. the Component Part is free from Defects (as that term is defined in the Supply Contract), other than minor Defects (as that term is defined in the Supply Contract) which:
		1. do not prevent the Component from being reasonably capable of being used for the purposes stated in or reasonably able to be inferred from the Supply Contract; and
		2. can be corrected without prejudicing the convenient use of the Component; and
	2. all tests required by the Supply Contract to be carried out and passed to achieve Manufacture Completion have been carried out and passed;
	3. all documents and information required by the Supply Contract to be provided to the Principal to achieve Manufacture Completion have been so provided, including all Engineering Certificates required in connection with the relevant Component Part and all Approvals as are necessary for the use of the Component Part; and
	4. the Supplier has done everything identified in the Completion Schedule (as that term is defined in the Supply Contract) (or elsewhere in the Supply Contract) as being required to be done before, or as a condition precedent to, Manufacture Completion.
1. **Manufacture Completion Certificate** means a certificate of that name issued by the Principal to the Supplier under the Supply Contract.
2. **Manufacturing Facility** means the location at which any Component or Component Part is Manufactured and includes those locations identified in Item <##15 replace with relevant reference to item in the Contract Particulars of your contract>.
3. **Milestone** means an event or stage described as such (if at all) in the Milestone Schedule.
4. **Milestone Date** means the date by which a Milestone must be achieved, as specified in the Milestone Schedule.
5. **Milestone Schedule** means Schedule <##insert>.
6. **Other Works** means the Works, other than any Component or Component Part. [[1]](#footnote-1)
7. **Supplier** means those parties engaged by the Principal to Manufacture the Components and Component Parts and includes those parties identified in Item <##10 replace with relevant reference to item in the Contract Particulars of your contract>.
8. **Works** means all of the physical things which the Contractor must design (if and to the extent required by the Contract), construct and complete in accordance with the requirements of the Contract and, on and from the Date of Handover and Acceptance in respect of any Component or Component Part (as the case may be), includes the Components and the Component Parts notwithstanding that they have not been designed or Manufactured by the Contractor.

# Not used

# Not used

# Intellectual Property

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| 1. **Guidance Note:** Agencies will need to carefully vet the intellectual property clauses in their Base Contracts to ensure they do not require the agency to grant a licence in respect of Supplier IP, in particular, the Supplier’s Manufacturing processes (unless caught by the exception in paragraph (d) of the definition of “Supplier IP” in the Model Clauses - Supply Model 1 - Supply Contract.
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# Not used

# Component Design

## Component Design, Review and Warranties

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| 1. **Guidance Note:** Select one of Option A or Option B.
2. The clause below address risk where the Components and Component Parts must integrate with the Works or the Contractor will assume liability for the Components or Component Parts.
3. This clause should be added as a new clause in the Base Contract, preferably this clause would be inserted together with other clauses addressing the design, Manufacturing and Handover and Acceptance of the Components and Component Parts.
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1. **OPTION A**

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| 1. **Guidance Note:** If the design review process under the Supply Contract is ongoing at the time that the Contractor is engaged, select this Option A and attach the Component Brief from the Supply Contract to this Contract.
2. This process entitles the Contractor to provide comments where the Contractor considers that any Component Design Deliverable does not comply with the Component Brief, prior to providing any warranties in respect of the adequacy of that design.
3. The comments provided by the Contractor may then be adopted by the Principal and provided as Principal comments under the Supply Contract. Note this will require that the Principal review the comments provided by the Contractor to assess whether they arise out of a non-compliance with the requirements of the Supply Contact.
4. For this clause to operate as intended, the Principal will need to ensure that it provides all Component Design Deliverables to the Contractor upon receipt from the Supplier.
5. The clauses set out below are aligned with the clauses addressing the design review process under the Supply Contract and you should refrain from amending these clauses without first ensuring the alignment of any such amendment with the corresponding clauses in the Supply Contract.
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### The Principal will procure that the Supplier liaises with and seeks input from the Contractor in respect of the Component Design Deliverables including providing the Contractor with drafts of the Component Design Deliverables and involving the Contractor in meetings to discuss the Component Design Deliverables.

### The Contractor must attend and actively participate in any meetings convened by the Supplier to discuss the Component Design Deliverables.

### The <##Principal's Representative> will provide the Contractor with copies of Component Design Deliverables promptly following receipt by the Principal from the Supplier.

### The Contractor may, after the provision (or reprovision) of a Component Design Deliverable:

#### review the Component Design Deliverable; and

#### within *##*5 Business Days after its submission, notify the Principal in writing where it considers that the Component Design Deliverable (or any part) does not comply with the requirements of the Component Brief including the nature of the non-compliance.

### The Principal will consider any comments provided by the Contractor under clause 6.1(d)(ii) and, if the Component Design Deliverable (or any part) does not comply with the requirements of the Component Brief, will require that the Supplier amend and resubmit the Component Design Deliverable under the Supply Contract.

### The Contractor acknowledges and agrees that the Principal is not obliged to require the Supplier to amend and resubmit any Component Design Deliverable in connection with any:

#### alleged non-compliance set out in any notice referred to in clause 6.1(d)(ii), if the Component Design Deliverable (or any part) does, in fact, comply with the requirements of the Component Brief; or

#### non-compliance set out in any notice referred to in clause 6.1(d)(ii), if the Contractor does not specify the nature of such non-compliance in such notice,

#### and the Contractor will not be entitled to make (and the Principal will not be liable upon), any Claim arising out of or in any in connection with any such alleged or actual non-compliance (as the case may be).

### The Principal will provide the Contractor with a copy of any amended Component Design Deliverable promptly following receipt from the Supplier, and this clause 6.1 will reapply.

### If the process in this clause 6.1 has been followed and the Contractor has:

#### had the period referred to in section 6.1(d)(ii) to review the Component Design Deliverables; and

#### not provided any notice referred to in clause 6.1(d)(ii),

#### then, without limiting the Contractor's obligations under <##the Contract>, the Contractor warrants that:

#### it has satisfied itself that there is nothing in the Component Designs that would prevent the Components from being Fit for Purpose; and

#### if the Components are designed and Manufactured in accordance with the Component Designs (as applicable), they will:

##### be suitable, appropriate and adequate for the purposes of interfacing with, and incorporation into, the Other Works; and

##### enable the Works to be Fit for Purpose.

1. **OPTION B**

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| 1. **Guidance Note:** If the design review process under the Supply Contract is complete at the time that the Contractor is engaged, select this Option B and attach the Component Design prepared under the Supply Contract to this Contract.
2. This clause requires the Contractor to given warranties regarding the adequacy of the Component Design.
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1. Without limiting the Contractor's obligations under <##the Contract>, the Contractor warrants that:

### it has carefully checked, examined and analysed the Component Design and, if the Component Design includes a Component Prototype, the Component Prototype and is satisfied that the Component Design and Component Prototype are appropriate and suitable for the purposes of enabling the Contractor to perform its obligations under <##the Contract>, including <## insert the following if the Contractor is responsible for design of the Other Works "the production of the <##insert the term describing design documents under the Contract> and" the integration of the Other Works with the Components;

### it has satisfied itself that there is nothing in the Component Design that would prevent the Components from being Fit for Purpose; and

### if the Components are designed and Manufactured in accordance with the Component Design (as applicable), they will:

#### be suitable, appropriate and adequate for the purposes of interfacing with, and incorporation into, the Other Works; and

#### enable the Works to be Fit for Purpose.

# Handover and Acceptance

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| 1. **Guidance Note:** The purpose of the followingis to create a regime under which the Contractor will accept risk in the Components and Component Parts. Accordingly, the following provisions involve the Contractor in the inspection and handover and acceptance process and provide for the Contractor to receive a Collateral Warranty from the Supplier. This means that if there are any Defects in the Components or Component Parts once handed over to the Contractor, as between the Principal and the Contractor, the Contractor is responsible for rectifying them, but may seek to enforce the Collateral Warranty against the Supplier.
2. For these provisions to operate as intended, the definition of "Works" under your contract must include the Components and Component Parts (see revised definition in clause 1) so that the warranties given by the Contractor, and the obligations applying to the Contractor under your contract in respect of the Works, will apply to the Components and Component Parts.
3. This clause should be added as a new clause in the Base Contract. This clause would be inserted where other clauses addressing the design, Manufacturing and Handover and Acceptance of the Components and Component Parts are located.
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## Component Part Manufacture and inspection

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| 1. **Guidance Note:** This clause assumes that Manufacturing of Components is ongoing at the time that the Contractor is engaged. This process entitles the Contractor to be involved in the inspection process in respect of the Manufacture of Components and Component Parts at specified points in their Manufacture.
2. The clause provides the Contractor with the opportunity to comment where the Contractor considers that any Component or Component Part does not comply with the Component Design. The comments provided by the Contractor may then be adopted by the Principal and provided as Principal comments under the Supply Contract. Note this will require that the Principal review the comments provided by the Contractor to assess whether they arise out of a non-compliance with the requirements of the Supply Contact.
3. Note that these clauses make the Principal responsible, as between the Principal and the Contractor, for non-compliances of the Supplier under the Supply Contract. It is up to the Principal to pursue the Supplier under the Supply Contract for any liability the Principal may have to the Contractor.
4. The clauses set out below are aligned with the clauses addressing the Manufacture and inspection process under the Supply Contract and you should refrain from amending these clauses without first ensuring the alignment of any such amendment with the corresponding clauses in the Supply Contract.
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### The Contractor acknowledges and agrees that:

#### the Principal has engaged the Supplier to Manufacture and supply the Components in accordance with the Component Designs; and

#### at Hold Points during the Manufacture of the Components, the Principal and the Contractor will have the opportunity to inspect the Components to establish whether the Components have been Manufactured in accordance with the Component Designs.

### The Contractor must cooperate and collaborate with the Supplier, including participating in meetings (if any) with the Supplier as requested by the Principal.

### The Principal will procure that:

#### the Manufacture of a Component Part is not progressed beyond a relevant Hold Point until the requirements of this clause 7.1 have been complied with; and

#### the Supplier gives, or otherwise give the Contractor's Representative, not less than ##4 Business Days prior written notice of the date on which, in respect of a Component or Component Part, a Hold Point will be reached.

### At each Hold Point the Principal will procure that the Supplier provides the Contractor's Representative with:

#### access to the Component or Component Part (as the case may be) so that it can be inspected; and

#### other documents and evidence that demonstrate that the Supplier has complied with its obligations under the Supply Contract in relation to the Component or Component Part (as the case may be).

### The Contractor's Representative may, within ##3 Business Days after the last to occur of:

#### an inspection of a Component or Component Part (as the case may be); and

#### the provision of the documentation referred to in clauses 7.1(d)(i) and 7.1(d)(ii) in respect of that Component or Component Part (as the case may be),

* 1. notify the Principal in writing that the Component or Component Part (as the case may be):

#### has not been constructed in accordance with the Component Design; and

#### if the Component Design includes a Component Prototype, the Component or Component Part (as the case may be) does not match the quality, finish, aesthetic and operational capability of the relevant Component Prototype,

#### together with reasons.

### The Principal will consider any comments provided by the Contractor under clause 7.1(e) and, if the Component or Component Part (as the case may be):

#### has not been constructed in accordance with the Component Design; or

#### if the Component Design includes a Component Prototype, the Component or Component Part (as the case may be) does not match the quality, finish, aesthetic and operational capability of the relevant Component Prototype,

#### will require that the Supplier promptly rectifies the Component or Component Part (as the case may be) under the Supply Contract.

### The Contractor acknowledges and agrees that the Principal is not obliged to require the Supplier to rectify any Component or Component Part (as the case may be) in connection with any:

#### alleged non-compliance set out in any notice referred to in clause 7.1(e), if the Component or Component Part (as the case may be):

##### has been constructed in accordance with the Component Design; and

##### if the Component Design includes a Component Prototype, does match the quality, finish, aesthetic and operational capability of the relevant Component Prototype; or

#### non-compliance set out in any notice referred to in clause 7.1(e), if the Contractor does not specify the nature of such non-compliance in such notice,

#### and the Contractor will not be entitled to make (and the Principal will not be liable upon), any Claim arising out of or in any in connection with any such alleged or actual non-compliance (as the case may be).

## Manufacture Completion and delivery

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| 1. **Guidance Note:** This clause assumes that Manufacturing of Components is ongoing at the time that the Contractor is engaged.
2. This clause applies where the Supplier is required to deliver any Component or Component Part to a location other than the Manufacturing Facility.
3. This clause entitles the Contractor to be involved in the process for signing off factory acceptance testing and inspections of Components and Component Parts in the Manufacturing Facility before delivery to the Delivery Point.
4. The clause provides the Contractor the opportunity to comments where the Contractor considers that any Component or Component Part does not comply with the Component Design.
5. The comments provided by the Contractor may then be adopted by the Principal and provided as Principal comments under the Supply Contract. Note this will require that the Principal review the comments provided by the Contractor to assess whether they arise out of a non-compliance with the requirements of the Supply Contact.
6. Note that these clauses make the Principal responsible, as between the Principal and the Contractor for non-compliances of the Supplier under the Supply Contract. It is up to the Principal to pursue the Supplier under the Supply Contract for any liability the Principal may have to the Contractor.
7. The clauses set out below are aligned with the clauses addressing the Component Part Manufacture and inspection process under the Supply Contract and you should refrain from amending these clauses without first ensuring the alignment of any such amendment with the corresponding clauses in the Supply Contract.
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### This clause applies where stated in Item <##16 replace with relevant reference to item in the Contract Particulars of your contract>.

### The Principal will procure that the Supplier:

#### completes the Manufacture of each Component and Component Part;

#### gives the Contractor's Representative not less than ##10 Business Days written notice of the date on which the Supplier anticipates Manufacture Completion of a Component Part;

#### when the Supplier considers that Manufacture Completion of a Component Part has occurred, gives written notice to that effect to the Contractor's Representative; and

#### provide the Contractor's Representative access to the Component or Component Part (as the case may be) within ##7 Business Days after giving a notice under clause 7.2(b)(iii) so that it can be inspected.

### Within ##8 Business Days after receiving a notice under clause 7.2(b)(iii), the Contractor's Representative may give the Principal, in respect of the relevant Component or Component Part (as the case may be), written notice if that the Component or Component Part (as the case may be):

#### has not been constructed in accordance with the Component Design; or

#### if the Component Design includes a Component Prototype, the Component or Component Part (as the case may be) does not match the quality, finish, aesthetic and operational capability of the relevant Component Prototype,

#### together with reasons.

### The Principal will consider any comments provided by the Contractor under clause 7.2(c) and may proceed to issue a Manufacture Completion Certificate unless the Component or Component Part (as the case may be):

#### has not been constructed in accordance with the Component Design; or

#### if the Component Design includes a Component Prototype, the Component or Component Part (as the case may be) does not match the quality, finish, aesthetic and operational capability of the relevant Component Prototype,

#### in which case the Principal will require that the Supplier promptly rectifies the Component or Component Part (as the case may be) under the Supply Contract.

### The Contractor acknowledges and agrees that the Principal is not obliged to require the Supplier to rectify any Component or Component Part (as the case may be) in connection with any:

#### alleged non-compliance set out in any notice referred to in clause 7.2(c), if the Component or Component Part (as the case may be):

##### has been constructed in accordance with the Component Design; and

##### if the Component Design includes a Component Prototype, does match the quality, finish, aesthetic and operational capability of the relevant Component Prototype; or

#### non-compliance set out in any notice referred to in clause 7.2(c), if the Contractor does not specify the nature of such non-compliance in such notice,

#### and the Contractor will not be entitled to make (and the Principal will not be liable upon), any Claim arising out of or in any in connection with any such alleged or actual non-compliance (as the case may be).

### The Principal will procure that the Supplier:

#### does not deliver the Component or Component Part (as the case may be) to the Delivery Point:

#### unless a Manufacture Completion Certificate has been issued in respect of that Component or Component Part (as the case may be); and

#### earlier than the date or time so specified in the Component Schedule or, if no date or time is so specified, the date or time notified by the <##Principal's Representative> (acting reasonably);

#### gives the Contractor's Representative not less than ##8 Business Days' prior written notice of delivery; and

#### loads and then, at the Delivery Point, unloads the Component or Component Part (as the case may be).

### If a Manufacture Completion Certificate has been issued in respect of a Component or Component Part (as the case may be), the Contractor must:

#### if clause 7.2 applies, coordinate the delivery of the Component or Component Part (as the case may be) to and unloading at the Delivery Point, with the Supplier; and

#### accept delivery of a Component or Component Part (as the case may be) at the Delivery Point on the date notified to the Contractor by the Supplier.

## Handover and Acceptance

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| 1. **Guidance Note:** This clause assumes that manufacturing of Components is ongoing at the time that the Construction Contractor is engaged.
2. This clause applies irrespective of whether the Supplier is required to deliver any Component Part to a location other than the manufacturing Facility.
3. This clause entitles the Construction Contractor to be involved in the process under which the Principal signs off that the Component or Component Part has been accepted under the Supply Contract. Under this clause, the Construction Contractor accepts risk in the Component or Component Part.
4. The clause provides the Construction Contractor the opportunity to comment where the Construction Contractor considers that any Component or Component Part does not comply with the Component Design.
5. The comments provided by the Construction Contractor may then be adopted by the Principal and provided as Principal comments under the Supply Contract. Note this will require that the Principal review the comments provided by the Construction Contractor to assess whether they arise out of a non-compliance with the requirements of the Supply Contact.
6. Note that these clauses make the Principal responsible, as between the Principal and the Construction Contractor, for non-compliances of the Supplier under the Supply Contract. It is up to the Principal to pursue the Supplier under the Supply Contract for any liability the Principal may have to the Construction Contractor.
7. This clause must be aligned with the clauses addressing handover of Component Parts in the Supply Contract and you should refrain from amending this clause without first ensuring the alignment of any such amendment with the corresponding clauses in the Supply Contract.
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### The Principal will procure that the Supplier:

#### achieves Handover and Acceptance for each Component or Component Part (as the case may be) by its corresponding Date for Handover and Acceptance;

#### gives the Contractor not less than ##10 Business Days written notice of the date on which the Supplier anticipates a Component or Component Part (as the case may be) will achieve Handover and Acceptance; and

#### when it considers Handover and Acceptance of a Component or Component Part (as the case may be) has occurred:

##### gives written notice to that effect to the Contractor; and

##### provides the Contractor with access to the Component or Component Part (as the case may be) if it is housed at the Manufacturing Facility within ##7 Business Days after giving a notice under clause 7.3(a)(iii) so that it can be inspected.

### Within ##8 Business Days after a notice referred to in clause 7.3(a)(iii), the Contractor's Representative may give the Principal written notice that the Component or Component Part (as the case may be):

#### if clause 7.2 does not apply:

##### has not been constructed in accordance with the Component Design; or

##### if the Component Design includes a Component Prototype, the Component or Component Part (as the case may be) does not match the quality, finish, aesthetic and operational capability of the relevant Component Prototype,

##### together with reasons; or

#### if clause 7.2 applies, has been physically damaged in delivery and unloading, together with a description of the nature of the damage,

#### and the impact that such non-compliance or damage, if not rectified, would have on the any of the warranties provided by the Contractor under <##the Contract>.

### The Principal will consider any comments provided by the Contractor under clause 7.3(b) and may proceed to issue a Handover and Acceptance Certificate unless the Component or Component Part (as the case may be):

#### if clause 7.2 does not apply:

##### has not been constructed in accordance with the Component Design; or

##### if the Component Design includes a Component Prototype, the Component or Component Part (as the case may be) does not match the quality, finish, aesthetic and operational capability of the relevant Component Prototype; or

#### if clause 7.2 applies, has been physically damaged in delivery and unloading,

#### in which case the Principal will require that the Supplier promptly rectifies the Component or Component Part (as the case may be) under the Supply Contract.

### The Contractor acknowledges and agrees that the Principal is not obliged to require the Supplier to rectify any Component or Component Part (as the case may be) in connection with any:

#### alleged non-compliance or damage (as the case may be) set out in any notice referred to in clause 7.3(b), if the Component or Component Part (as the case may be):

##### if clause 7.2 does not apply:

###### has been constructed in accordance with the Component Design; and

###### if the Component Design includes a Component Prototype, does match the quality, finish, aesthetic and operational capability of the relevant Component Prototype; or

##### if clause 7.2 applies, has been physically damaged in delivery and unloading; or

#### non-compliance or damage (as the case may be) set out in any notice referred to in clause 7.3(b), if the Contractor does not specify the nature of such non-compliance or damage in such notice,

#### and the Contractor will not be entitled to make (and the Principal will not be liable upon), any Claim arising out of or in any in connection with any such alleged or actual non-compliance (as the case may be).

### Notwithstanding anything to the contrary in <##insert reference to care of the Works clause in your contract>, on and from the Date of Handover and Acceptance in respect of any Component or Component Part (as the case may be), the Contractor:

#### bears the risk of loss or damage to that Component or Component Part (as the case may be):

##### until the Date of Practical Completion; and

##### arising from any Defect, default or negligent act or omission of the Contractor, from the Date of Practical Completion until the <##Defects Completion Date>,

### except to the extent caused by a negligent act or omission of the Principal; and

#### must promptly rectify, at its own cost, any loss or damage to any Component or Component Part (as the case may be) for which the Contractor bears the risk in accordance with clause 7.3(e)(i).

### On and from the Date of Handover and Acceptance in respect of any Component or Component Part (as the case may be):

#### the Contractor accepts the risk of all Defects in that Component or Component Part (as the case may be); and

#### until the <##Defects Completion Date> the Contractor must promptly, at its own cost, rectifying any Defects in that Component or Component Part (as the case may be).

## Component Delay

1. The Contractor acknowledges and agrees that the Contractor's only entitlements in connection with a failure by the Principal to procure that a Component Part achieves Handover and Acceptance by its corresponding Date for Handover and Acceptance will be to an extension of time under and in accordance with clause <##insert clause number> and delay costs under and in accordance with clause <##insert clause number>.

## Collateral Warranty

### The Principal will, on or before Handover and Acceptance in respect of a Component of Component Part (as the case may be), assign, or procure that the Supplier provides, a duly executed Collateral Warranty to the Contractor.

### The Contractor acknowledges and agrees that neither this clause 7.5, nor any Collateral Warranty or assignment of rights as contemplated by this clause, will limit or affect any of the Contractor’s obligations or liabilities, or derogate from any rights which the Principal may have against the Contractor, in respect of the subject matter of the Collateral Warranty.

# Loading Protocol

### The Contractor acknowledges that the Supplier or the <##Principal's Representative>:

#### will, prior to the Date for Handover and Acceptance in respect of the first Component Part to be brought to the stage of Handover and Acceptance, provide a protocol (**Loading Protocol**) which will include:

##### where clause 7.2 does not apply, a description of how the Contractor must load the Component Part onto, and then unload the Component Part from, the delivery vehicle; and

##### a detailed installation guide for the Component Part; and

#### may subsequently provide amended versions of the Loading Protocol to reflect:

##### requirements specific to any Component Part; or

##### changes required by the <##Principal's Representative> (including changes of the nature referred to in clause 8(c)(i)).

### Not later than ##6 Business Days after a Loading Protocol is provided under clause 8(a), the Contractor may give written notice to the <##Principal's Representative> of any changes that the Contractor (acting reasonably) considers should be made to the Loading Protocol.

### Following receipt of a notice under clause 8(b), the <##Principal's Representative> will advise the Contractor in writing that either the Principal:

#### will require the Supplier to give effect to the changes to the Loading Protocol requested by the Contractor; or

#### does not agree with the changes to the Loading Protocol requested by the Contractor, in which event the Contractor must continue to perform its obligations under <##the Contract> as if, subject to clause 8(e), the Contractor had not given notice under clause 8(b).

### The Contractor must comply with the Loading Protocol (and any amended versions) provided under clause 8(a).

### Compliance with clause 8(c) does not prejudice the Contractor's rights, under clause <##insert dispute resolution clause number>, to dispute the Principal's advice under clause 8(c)(ii).

# Not used

Contract Particulars

|  |
| --- |
| **Guidance Note:** The following additional items should be inserted by the Agency into the Particulars in your Contract and the clause references in the "Description" column updated to reflect the clause references in your Contract prior to issue for tender. |

| 1. Item No.
 | 1. Description
 | 1. Detail
 |
| --- | --- | --- |
| * 1.
 | Not used |  |
| * 1.
 | Not used |  |
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| * 1.
 | Not used |  |
| * 1.
 | Not used |  |
|  | Not used |  |
| * 1.
 | Supplier:(Clause 6) |

|  |
| --- |
| **Guidance Note:** Insert the names of any Supplier(s). If the supplier responsible for Manufacturing any Components to Component Parts is not known at the time of entering into the Contract, state "To be advised" in this item. |

[insert] |

|  |
| --- |
| **Guidance Note:** Insert Components and Component Parts to be Manufactured by the Supplier (including reference to further detail provided in the Component Brief). |

[insert] |
| * 1.
 | Not used |  |
| * 1.
 | Not used |  |
| * 1.
 | Component Prototype:(Clause 7) |

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| **Guidance Note:** This should set out a brief description of any Component Prototype including whether the prototype needs to be connected to any services etc to operate. This should cross refer to the relevant sections of the Component Brief. |

[insert] |
| * 1.
 | Not used |  |
| * 1.
 | Manufacturing Facility:(Clause 7.3) |

|  |
| --- |
| **Guidance Note:** Insert address(es) for Supplier's manufacturing facility/facilities. |

[insert] |
| * 1.
 | Not used |  |
| * 1.
 | Not used |  |
| * 1.
 | Not used |  |

Component Schedule

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| **Guidance Note:** This table should be consistent with the corresponding Completion Schedule in the Supply Contract |

| 1. Component No.
 | Component / Component Part Title | Component / Component Part Description | 1. Additional Requirements for Manufacture Completion/Handover and Acceptance
 | 1. Delivery Point
2. (Clause 7.2)
 | 1. Earliest date for delivery
2. (Clause 7.2)
 |
| --- | --- | --- | --- | --- | --- |
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| **Guidance Note:** This needs to clear identify the relevant Component or Component Part (noting that a Component Part will be a part of a particular Component set out in this schedule and in respect of which a separate Milestone Payment will apply), including by reference to any relevant section of the Component Brief that further specifies the Component or Component Part.  |

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| **Guidance Note:** If Components will be delivered to the Delivery Point fully assembled, this will only apply to Components. If Components are to be delivered to the Delivery Point in Component Parts, this will also apply to Component Parts. |

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| **Guidance Note:** If Components will be delivered to the Delivery Point fully assembled, this will only apply to Components. If Components are to be delivered to the Delivery Point in Component Parts, this will also apply to Component Parts. |

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Milestone Schedule

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| **Guidance Note:** This table should be consistent with the corresponding Milestone Schedule in the Supply Contract |

| 1. Milestone No.
 | Milestone Title | Milestone Description | 1. Hold Point
 | 1. Milestone Date
2. OR
3. Date for Handover and Acceptance
 |
| --- | --- | --- | --- | --- |
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| **Guidance Note:** This should include all Components and Component Parts together with any additional Milestones (e.g. delivery of Design Deliverables, completion of training). |

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| **Guidance Note:** Where this includes Components and Component Parts, cross refer to the relevant description in the Component Schedule. |

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| **Guidance Note:** State "yes" or "no" against each Milestone. State "no" against each Component and Component Part. |

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Delivery Requirements

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| **Guidance Note:** The Delivery Requirements must include a section with the title "Component Brief". This section should be drawn from the Supply Contract, but need not include any section of that document with the title "Returned Temporary Works". |

Collateral Warranty

**Date**

**Parties** [##insert name] (ACN [##insert ACN]) of [##insert address] (**Supplier**)

[##insert name] (ACN [##insert ACN]) of [##insert address] (**Contractor**)

**Background**

A. The Principal has entered into:

(a) the Supply Contract with the Supplier for the Manufacture of the Components; and

(b) <##the Contract> with the Contractor for the performance of the <##Contractor’s Activities> and the Works, which include installation of the Components.

B. Under the Supply Contract the Supplier is required to execute, and under the Contract the Principal is required to procure that the Supplier executes, this deed.

**Operative provisions**

#  Definitions

## Incorporated terms

1. In this deed, terms defined in <##the Contract> and not otherwise defined in clause 1.2 have the same meanings, unless the context otherwise requires.

## Defined terms

1. In this deed:
2. **Business Day** means a day that is not:
	1. a Saturday or Sunday; or
	2. a day that is wholly or partly observed as a public holiday throughout Victoria.
3. **Components** means the Components or Component Parts identified in the Schedule.
4. **<##Contract>** means the contract between the Principal and the Contractor dated [##insert date].
5. **Defect** means any defect in any one or more of the Components, including any failure to comply with this deed, the Contract or the Supply Contract.
6. **Principal** means the person so named in the Schedule.
7. **Supply Contract** means the contract between the Principal and the Supplier dated [##insert date].
8. **Warranty Period** means the period stated in the Schedule.

# Warranty

### The Supplier warrants to the Contractor that:

#### the Components will:

##### be to the quality and standard stipulated by, and will comply in all respects with the requirements of, the Supply Contract and this deed;

##### comply with the all relevant laws and standards;

##### be Manufactured in a good and workmanlike manner using materials of merchantable quality and which are fit for their purpose; and

##### be fit for the purpose for which they are required; and

#### it has, and will maintain, the skill and experience to properly fulfil its obligations under this deed and the Supply Contract.

### The Supplier agrees that the warranties set out in this deed extend to the acts defaults and neglects of any subcontractor, supplier, employee or agent of the Supplier as fully as if they were the acts defaults or neglects of the Supplier.

# Replacement or making good Component

### The Supplier must at its cost make good, to the reasonable satisfaction of the Contractor, the Components or any parts which, within the Warranty Period, are found to not comply with the requirements referred to in clause 2(a) of this deed.

### The liability of the Supplier under this clause 3 is reduced to the extent that deterioration is caused by:

#### normal wear and tear; or

#### incorrect operational procedures or maintenance, in each case not attributable to the Supplier.

# Rectification of Defects

### The Contractor may at any time give the Supplier written notice of any Defect, which notice may specify the time within which the Supplier must rectify the Defect.

### The Supplier must rectify any Defect the subject of a notice given under clause 4(a):

#### to the satisfaction of the Contractor;

#### at the Supplier’s expense; and

#### within the time specified in the Contractor's notice or, if the Contractor does not specify a time, within a reasonable time from receipt of the Contractor’s notice.

### If the Supplier fails to rectify any Defect in accordance with this deed, the Contractor may arrange for the Defect to be rectified at the Supplier’s expense and the Supplier indemnifies the Contractor against all costs, losses and damages suffered or incurred by the Contractor in so doing.

# Urgent action by Contractor

### The Contractor may take any urgent action necessary to protect the Contractor’s Activities or the Works, other property or people as a result of a breach of clause 2(a) of this deed.

### Where the Contractor takes action in accordance with clause 5(a), the Supplier:

#### agrees that the Contractor taking such action does not affect any obligation of the Supplier under this deed; and

#### indemnifies the Contractor against all costs, losses and damages suffered or incurred by the Contractor in taking that action.

# Contractor's rights

### The rights of the Contractor pursuant to:

### this deed are in addition to and do not derogate from any other rights which the Contractor may have; and

### any clause of this deed are cumulative and the rights arising under one clause do not derogate from rights arising under any other clause.

# Operation of deed

1. This deed comes into effect when executed by the Supplier and is effective whether or not executed by the Contractor.

# Assignment

1. The Contractor may assign its interest in this deed at any time without notice to the Supplier.

# Notices

## How notice to be given

1. Each communication (including each notice, consent, approval, request and demand) under or in connection with this deed must:

### be given to a party by hand delivery, courier service, prepaid express post or email;

### be delivered to the address or other details for the party set out in the Schedule (or as otherwise notified by that party to the other party from time to time under this clause 9); and

### must be in legible writing and in English.

## When notice taken to be received

1. Without limiting the ability of a party to prove that a notice has been given and received at an earlier time, each communication (including each notice, consent, approval, request and demand) under or in connection with this deed is taken to be given by the sender and received by the recipient:

### (in the case of delivery by hand or courier service) on delivery;

### (in the case of prepaid express post sent to an address in the same country) on the 6th Business Day after the date of posting;

### (in the case of prepaid express post sent to an address in another country) on the 10th Business Day after the date of posting;

### (in the case of email, whether or not containing attachments) the earlier of:

#### the time sent (as recorded on the device from which the sender sent the email) unless, within 4 hours of sending the email, the party sending the email receives an automated message that the email has not been delivered;

#### receipt by the sender of an automated message confirming delivery; and

#### the time of receipt as acknowledged by the recipient (either orally or in writing),

### provided that if the communication would otherwise be taken to be received on a day that is not a Business Day or after 5.00pm, it is taken to be received at 9.00am on the next Business Day.

# No waiver

### Failure to exercise or enforce, or a delay in exercising or enforcing, or the partial exercise or enforcement of, a right, power or remedy provided by law or under this deed Contractby a party does not preclude, or operate as a waiver of, the exercise or enforcement, or further exercise or enforcement, of that or any other right, power or remedy provided by law or under this deed.

### A waiver or consent given by a party under this deed is only effective and binding on that party if it is given or confirmed in writing by that party.

### No waiver of a breach of a term of this deed operates as a waiver of another breach of that term or of a breach of any other term of this deed.

# Governing law and jurisdiction

### This deed is governed by and must be construed according to the law applying in Victoria.

### Each party irrevocably:

#### submits to the non‑exclusive jurisdiction of the courts of Victoria, and the courts competent to determine appeals from those courts, with respect to any proceedings that may be brought at any time relating to this deed; and

#### waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceedings have been brought in an inconvenient forum, if that venue falls within clause 11(b)(i).

# Further acts

1. Each party must promptly do all further acts and execute and deliver all further documents (in form and content reasonably satisfactory to that party) required by law or reasonably requested by another party to give effect to this deed.

# Counterparts and electronic signature

## Electronic signature

Each party warrants that immediately prior to entering into this deed, it has unconditionally consented to:

### the requirement for a signature under any law being met; and

### any other party to this deed executing it,

1. by any method of electronic signature that other party uses (at that other party's discretion), including signing on an electronic device or by digital signature.

## Counterparts

1. This deed may be executed in any number of counterparts and by the parties on separate counterparts. Each counterpart constitutes the deed of each party who has executed and delivered that counterpart.

## Electronic communication

1. Without limitation, the parties agree that this deed may be exchanged by hand, post, facsimile or any electronic method that evidences a party's execution of this deed, including by a party forwarding a copy of its executed counterpart by hand, post, facsimile or electronic means to the other party.

# Severability

1. If at any time a provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair:

### the legality, validity or enforceability in that jurisdiction of any other provision of this deed; or

### the legality, validity or enforceability under the law of any other jurisdiction of that or any other provision of this deed.

1.

|  |  |  |
| --- | --- | --- |
| **Item** | **Description** | **Details** |
|  | **Principal**(Clause 1) | [##Insert] |
|  | **Components**(Clause 1) | [##Insert] |
|  | **Warranty Period**(Clause 1) | [##Insert] |
|  | **Notices**(Clause 9) | **Contractor:**[##Insert]**Supplier:**[##Insert] |

**Executed** as a deed.

|  |
| --- |
| **Guidance Note:** Insert appropriate execution block. |

Engineering Certificate

|  |  |
| --- | --- |
| **To:** | [##insert name] of [##insert address] (**Principal**) |
| **From:** | [##insert name] (ACN [##insert ACN]) of [##insert address] (**Engineer**) |
| **Project:** | [##insert project name] (**Project**) |
| **Contract:** | between the Principal and the Supplier dated [##insert] in relation to the Project (**Contract**) |

1. This certificate is issued for the benefit of the Principal in relation to the <##Component> <Component Part> provided by the Supplier and listed in the attached Schedule.
2. I certify as follows:
	* 1. I have undertaken an independent detailed inspection of the <##Component> <Component Part>;
		2. I am satisfied that the <##Component><Component Part> has been manufactured in accordance with the approved Component Design identified in the attached Schedule; and
		3. the <##Component><Component Part> is free from Defects, other than the following minor Defects:

[##List]

1. I have used the due skill, care and diligence of a professional engineer in my inspection of the <##Component><Component Part>.
2. Terms defined in the Contract have the same meaning in this certificate.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Signed for and on behalf of
[##insert name of Engineer]

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
Date

**Schedule**

|  |  |  |
| --- | --- | --- |
| **No** | **Item** | **Details** |
|  | <##Component><Component Part> | [##Insert] |
|  | Component Design | [##Insert] |

1. This sits in the Construction Contract for the Supply Model. [↑](#footnote-ref-1)