
ECI AGREEMENT



Rainbow Bay 2021 Pty Ltd

and

McNab Developments (QLD) Pty Ltd

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Early Contractor Involvement (ECI) Agreement

DATE2021

BETWEEN

Rainbow Bay 2021 Pty Ltd ACN 644 787 002
of 38 Warry Street, Fortitude Valley, QLD 4006
(Principal)

AND

McNab Developments (QLD) Pty Ltd ACN118 748 548
of Level 1, 12 Neil Street, Toowoomba, QLD 4350
(Contractor)

BACKGROUND

- A. The Principal has an agreement to purchase the development site from its current owner(s). The Principal has confirmed that settlement of the development site purchase will likely occur on or about September 2021.
- B. The Principal intends to enter into a 'Works Contract' with the Contractor for the Design and Construction of the development for a fixed price.
- C. The Principal's Budget for the design and construction of the development is \$30,000,000 excluding GST (impact assessable scheme).
- D. The Contractor has been engaged by the Principal to construct the project display suite, provide buildability, design management and cost planning advice through design development of the project.
- E. The Contractor will contract and manage the consultant team (excluding the Architect) to substantially develop the design (50% Design Development) to confirm a lump sum Design and Construct offer.
- F. The Contractor will employ and manage relevant subcontractors to construct the sales display suite in accordance with the Principal's requirements. The Contractor will perform these works on a cost plus 10% basis.
- G. The Contractor will procure, source and manage additional site investigations and reports to adequately support ongoing design development. This is to include Geotechnical testing. The Contractor will perform these works on a cost plus 10% basis. The Contractor must gain the Principals consent prior to committing to expenditure.
- H. The Contractor has provided an indicative order of cost for the project (initial cost plan) dated 17th March 2021.
- I. The initial cost plan amounts to \$33,312,114.00 + GST.
 - I.1 The initial cost plan is based upon the November 2020 'Impact Scheme' design.
 - I.2 The initial cost plan includes an allowance of \$1,500,000 for a third basement, not designed at the time of the cost planning exercise.

- I.3 The initial cost plan includes an allowance of \$500,000 for civil works and service connections from site boundary through easement to Eden Terrace.
- I.4 The initial cost plan includes an allowance of \$250,000.00 for purchaser upgrades and variation works.
- I.5 The initial cost plan does not include ECI Consultant Fees, Energex or Authority Fees, purchaser variations and sales suite works.
- J. The Principal requires the Contractor to provide advice and Value Management (VM) proposals for the Principal's consideration and inclusion into the design so that the works contract sum is equal to or less than the Principal's Budget.
- K. The Contractor will undertake the works detailed in the proceeding ECI introduction and Stages.
- L. Upon execution of this agreement, the Contractor will enter into a separate agreement with each of the Appointed Consultants currently proposed by the Contractor to produce the developed design documentation.
- M. The Contractor may competitively market test the design with the key trades.
- N. The Contractor is to provide a fixed lump sum price for the design and construction of the Works.

1. Interpretation

1.1 Definitions

The following definitions apply to this Early Contactor Involvement (ECI) Agreement;

Appointed Consultant means any Consultant listed and identified or Discipline listed and identified in Annexure 2 with which the Contractor enters into an agreement.

Authority includes any government, any provider of public utility services, and any other governmental person, instrumentality or body having jurisdiction, rights, powers, duties or responsibilities over the Site or the Development.

Business Day has the same meaning as it does in the *Building Industry Fairness (Security of Payments) Act 2017* (Qld).

Contractor Principal means 'McNab Developments (QLD) Pty Ltd' or the related entity that enters into the Works Contract.

Contractor's design obligations has the same meaning as in the Works Contract.

Contractor's Documents means all documents, reports, assessments, materials, plans, sketches, methods of working and models provided or procured by the Contractor under this Agreement including all ECI Services.

Contractor's Representative means Beau Enkelaar.

Claim includes any claim, demand, suit, damage, loss, cost, expense, liability, action, proceeding or right of action including for breach of contract, negligence or breach of statute.

Completion means the earlier of:

- (a) the Contractor's performance of all ECI Services; or
- (b) the Contractor and Principal entering into the Works Contract.

Day means calendar day.

Date for Completion means 30th June 2021.

Design Documents has the meaning given to that term in the Works Contract.

Design Services means performance of the Contractor's design obligations.

Development means the development including the design and construction of all the Works summary as follows: A residential tower containing common amenities such as podium mounted pool and gymnasium facilities servicing twenty-one (21) single occupancy units across a rise of thirteen (13) stories and of three (3) under-ground basements.

Development Brief has the same meaning as Principal's Project Requirements (Design Brief) in the Works Contract.

Developed Design means the developed design prepared by the Contractor and Appointed Consultants as set out in this Agreement.

Disclosed Information means all information of whatever nature which is obtained by or on behalf of the Contractor from the Principal or Principal's Consultants including drawings, documents, plans, design specifications, geotechnical reports, site information, other reports or other information or data which relate directly or indirectly to the Development, the ECI Services or the Works including the Development Brief and (to the extent provided) any Design Documents.

ECI Fee means the document at Annexure 3 which are based on current fee proposals received from consultants, authorities and The Contractor ECI fees to perform the ECI Services.

ECI Consultant Services means those works and services described in The Contractor ECI Process on pages 3 to 9 of this agreement.

ECI Services Program means the program for the performance of the ECI Services prepared by the Contractor setting out the start date and services during [4 month] period, a copy of which is set out in Annexure 1.

Key Personnel means the Contractor's Representative.

Legislative Requirement includes

- (a) acts, ordinances, regulations, by-laws, orders, awards and proclamations of the jurisdiction where the Development is being carried out;
- (b) certificates, licences, consents, permits, approvals and requirements of Authorities having jurisdiction in connection with the carrying out of the Development; and
- (c) fees and charges payable in connection with the foregoing.

Moral Rights Owner means an owner of moral rights under the *Copyright Amendment (Moral Rights) Act 2000* (Cth) in relation to any Contractor's Documents (as that term is defined in clause 10.1.1).

Planning Permit means the planning approval which will permit the construction and use of the Development as amended.

Principal means Rainbow Bay 2021 Pty Ltd or the related entity that enters into the Works Contract.

Principal's Budget means the maximum sum that the Principal can draw upon to complete the design and construction of the development. The budget is based on the 'impact assessable' scheme with 3 basement levels. The Principal's Budget does not include provision for the display suite, Contractors ECI Fee's, ECI consultant fees, infrastructure charges, Energex and Authority Fees. (excluding of GST). The Principal requires the Contractor to make a \$250,000 provisional allowance, within the budget, for purchaser variations.

Principal's Representative means Joe Adsett.

Project has the same meaning as the 'Development'; the design and construction of the residential tower known as Rockpool located at the site address.

Site means the property/lot where the Project is to be constructed.

Site address: 154-156 Marine Parade, Coolangatta, QLD 4225.

Works means the design and construction of Rockpool in accordance with the Principal's defined requirements.

Works Contract means a design and construction contract for all or any part of the Development based upon mutually agreeable amended AS4902-2000 (General Conditions of Contract for design and construct).

1.2 Interpretation

Headings are for convenience only and do not affect interpretation. The following rules apply unless the context requires otherwise:

- 1.2.1 the singular includes the plural and vice versa;
- 1.2.2 a gender includes all genders;
- 1.2.3 where a word or phrase is defined, its other grammatical forms have a corresponding meaning;
- 1.2.4 a reference to a person, corporation, trust, partnership, unincorporated body or other entity includes any of them;
- 1.2.5 a reference to a party to this Agreement or another agreement or document includes the party's successors and permitted substitutes or assigns;
- 1.2.6 mentioning anything after **include**, **includes** or **including** does not limit what else might be included;
- 1.2.7 a reference to any agreement or document (including this Agreement) is to that agreement or document as amended, novated, supplemented, varied or replaced from time to time, except to the extent prohibited by this Agreement; and
- 1.2.8 a reference to **dollars** or **\$** is to Australian currency.

2. General

2.1 General Requirements

- 2.1.1 The Contractor shall perform the ECI Services in accordance with the ECI Agreement and any directions authorised by the ECI Agreement. The Principal to approve key design decisions that have an impact on the feasibility or would likely result in fees under this agreement being exceeded.
- 2.1.2 The Contractor and the Principal shall use reasonable endeavours to negotiate the Contract Sum and the Works Contract as soon as possible after the Contractor has submitted their lump sum fixed price offer.
- 2.1.3 The Principal shall pay the Contractor the ECI Fees (exclusive of GST) as payment for the due and proper performance of the ECI Services.

2.2 Parties to cooperate

The Parties must:

- 2.2.1 cooperate with each other in relation to the performance of their obligations under this ECI Agreement;
- 2.2.2 act in good faith towards each other in relation to all matters under this ECI Agreement;
- 2.2.3 take all steps reasonably required to give effect to the transactions contemplated by this ECI Agreement; and
- 2.2.4 respond to a request made by the other party in accordance with this ECI Agreement within the time limits specified in this ECI Agreement or, where no time limits are specified, promptly and in a commercially reasonable manner.

3. ECI Services

3.1 Term

This Agreement shall commence on the date on which it is executed by both of the parties and continue until the completion of the Services as set out within the time periods of the ECI Programme set out in Annexure 1.

3.2 Performance of ECI Services

The Contractor must perform the ECI Services:

- 3.2.1 with due expedition and without delay and in any case in accordance with the ECI Services Program so as to achieve Completion by the Date for Completion;
- 3.2.2 in an efficient, proper and workmanlike manner and to that standard of care and diligence to be expected of a contractor experienced in carrying out services such as the ECI Services; and
- 3.2.3 in accordance with:
 - (a) all Legislative Requirements;

- (b) all lawful requirements or directions of any relevant Authority; and
- (c) this Agreement.

3.3 Contractor's Warranties

The Contractor warrants to the Principal that:

- 3.3.1 it has the personnel necessary to perform the ECI Services in accordance with this Agreement;
- 3.3.2 it has, and its consultants, employees and agents engaged in the performance of the ECI Services have, the skill, competence, experience, qualifications and ability necessary to perform the ECI Services in accordance with this Agreement;
- 3.3.3 it is registered or licensed in accordance with the requirements of all Legislative Requirements relevant to the performance of the ECI Services; and
- 3.3.4 it shall comply with all other requirements set out in the Development Brief as they relate to the ECI Services.

3.4 Access to Site

The Principal has granted the Contractor access to site in order to complete the display suite and site investigation works; the Contractor must not access the Site without the Principal's prior consent for any other reason.

3.5 Reports and Meetings

Without limitation to any other clause of this Agreement, the Contractor must:

- 3.5.1 as required under the ECI Services Program or as otherwise reasonably requested by the Principal:
 - (a) attend any meetings with the Principal and/or the Appointed Consultants; and
 - (b) provide to the Principal any written reports on the progress of the ECI Services and any other information relating to the ECI Services.

3.6 ECI Consultant Services

- 3.6.1 The Contractor must develop and submit to the Principal progressively as set out in the ECI Consultant Services the deliverables as prescribed within the ECI Process document.
- 3.6.2 Any review of, comments upon or approval of any ECI services or deliverables by the Principal will not relieve the Contractor from or alter its liabilities under this Agreement.

3.7 Payment for ECI Services

- 3.7.1 The Contractor shall deliver to the Principal progressive claims for payment of the ECI Fees on the last business day of each month ('progress claim') for the works completed up to and including the claim date.
- 3.7.2 A progress claim submitted under clause 3.7.1 shall:
 - (a) be in a form acceptable to the Principal; and

- (b) if requested by the Principal, include supporting information satisfactory to the Principal.
- 3.7.3 Within 10 Business Days of services of a progress claim under clause 3.7.1, the Principal's Representative shall assess the claim and shall issue to the Contractor and the Principal a progress certificate stating the amount of the payment which, in the Principal's Representative's opinion, is to be made by the Principal to the Contractor.
- 3.7.4 The Principal must pay to the Contractor the amount stated in the progress certificate within 15 Business Days of service of the progress claim to which the certificate relates.

4. Works Contract

4.1 Good faith negotiations

The parties shall attempt to negotiate and agree the value of the lump sum fixed price and the terms of the Works Contract in order to reach written agreement on or before the Date for Completion.

4.2 Issue of Works Contract

The Contractor shall use its reasonable endeavours to issue a draft of the Works Contract (which shall be based on a mutually agreeable modified AS4902-2000 document to the Principal by no later than the date specified in the ECI Services Programme.

4.3 Application of the Works Contract

If the Works Contract is executed, the terms and conditions of the Works Contract shall apply retrospectively to govern the ECI Services carried out under this ECI Agreement. All ECI fees shall be paid in full at completion of the ECI services agreement, they are not considered part of the Principals budget nor the contract sum of the works contract.

4.4 Failure to enter into a Works Contract

If the parties do not enter a Works Contract for the project, the Principal will pay the Contractor for ECI Services costs performed in accordance with terms under this ECI Agreement. Neither party will have any other liability to the other party in the event a Works Contract is not entered into.

5. Design Development

5.1 Design Obligations

The Contractor must:

- 5.1.1 Manage the Appointed Consultants to prepare, produce and develop the Design Documents so that they:
 - (a) comply with and satisfy the Contractor's Design Obligations; and
 - (b) are fit for their stated purpose;

- 5.1.2 inform the Principal of any reviews or changes to the Design Documents that may be necessary to enable the performance of the Contractor's obligations under this Agreement or the Works Contract.

5.2 Design Responsibility

The Contractor:

- 5.2.1 acknowledges that:

- (a) the ECI Services include collaborating with the Appointed Consultants in developing the design of the Works; and
- (b) the extent of the design must be complete sufficiently to enable the execution of the Works Contract
- (c) the Works Contract will provide that the Contractor will assume responsibility for all the design and completion of the residual design of the Works, other than those created by the Principal or its related entities.

5.3 Appointed Consultants

- 5.3.1 Subject to clause 5.3.2 the Contractor must, on behalf of the Principal:

- (a) give directions, in coordination with the Principal, to the Appointed Consultants;
- (b) supervise, co-ordinate and control the work of all Appointed Consultants and provide and direct all necessary personnel to administer, supervise, co-ordinate and control the Appointed Consultants, for the purposes of the ECI Services.

- 5.3.2 If the Contractor proposes that any Appointed Consultant carry out any additional or varied services not contemplated by the Appointed Consultant appointment and that may cause the Principal to incur additional cost, the Contractor shall not direct the Appointed Consultant to carry out those services without:

- (a) first providing the Principal with a written notice setting out:
 - (i) the time for commencement and completion of the proposed services;
 - (ii) the proposed fees for such services; and
 - (iii) the benefit of such services; and
- (b) the Principal agreeing in writing to the proposed services and the proposed fees.

5.4 No Relief of Responsibility

No review, vetting or approval of, or comments made by the Principal or the Appointed Consultants in relation to any Design Documents or other materials, information or data provided by the Contractor the Principal or the Appointed Consultants, will lessen or otherwise affect any of the Contractor's responsibilities and obligations under this Agreement or the Works Contract.

6. Not Used

7. Not Used

8. Representatives and Personnel

8.1 The Principal's Representative

- 8.1.1 The Principal's Representative has the authority to exercise any of the Principal's powers or duties under this Agreement unless and until the Principal notifies the Contractor in writing varying the scope of, or withdrawing, the Principal's Representative's authority.
- 8.1.2 The Contractor and the Contractor's Representative must communicate directly with the Principal's Representative in relation to any matters within the Principal's Representative's authority.

8.2 Contractor's Representative

- 8.2.1 The Contractor's Representative has the authority to act for and on behalf of the Contractor in relation to this Agreement and the performance of the ECI Services.
- 8.2.2 An instruction given to the Contractor's Representative will be deemed to be given to the Contractor.

8.3 Resources

The Contractor must provide, at its own expense, everything necessary (including all necessary on-site and off-site personnel) to perform the ECI Services and its obligations under this Agreement.

8.4 Changes in Key Personnel

Until termination of this Agreement or commencement of the Works Contract, the Contractor shall not change any of the Key Personnel unless due to events beyond the reasonable control of the Contractor, in which case the Contractor may do so with the prior written consent of the Principal (which consent must not be unreasonably withheld).

9. Termination

9.1 Termination for Convenience

- 9.1.1 Either the Principal or Contractor may terminate this ECI Agreement in their sole and absolute discretion and for any reason, by written notice to the other parties.

9.2 Rights After Termination

- 9.2.1 If the ECI Agreement is terminated under clause 9.1, the Contractor shall make a progress claim on account of the ECI Fees for ECI Services performed up to and including the date of termination.
- 9.2.2 The Principal shall pay the Contractor:
 - (a) the amount due to the Contractor evidenced by all unpaid certificates; and

- (b) the amount certified in respect of the Contractor's progress claim under clause 9.2.1;
- (c) the total cost of the Contractor's liability to any Appointed Consultant;
- (d) the Contractor's overheads and preliminary costs to perform the ECI Services, up to and including the date of termination.

10. Intellectual Property Rights

10.1 Warranty

- 10.1.1 The Contractor warrants that the Contractor's Documents shall not infringe any right of any person in relation to any patent, registered design, trademark or name, copyright, moral right or other protected right.
- 10.1.2 The Contractor indemnifies the Principal against all Claims suffered or incurred by the Principal arising out of any infringement referred to, and any breach of the warranty given by the Contractor, in clause 10.1.1.

10.2 Intellectual Property Rights granted to the Principal

- 10.2.1 The Principal grants to the Contractor a non-exclusive irrevocable licence to use the Contractor's Documents for performing the ECI Services.
- 10.2.2 The Contractor must procure the assignment of all rights, title and interest in any documentation or information created by subcontractors or consultants which the Contractor is required to provide to the Principal under this Agreement.
- 10.2.3 All intellectual property created under this ECI Agreement shall be owned by the Principal
- 10.2.4 The Contractor will on request from the Principal at its own cost do all things reasonably necessary (including enter into documents) to give effect to this clause 10.2.

11. Marketing, Promotion and signs

11.1 Marketing and Promotion

Without the prior written consent of the Principal, the Contractor must not:

- 11.1.1 market, promote, advertise or publish any statement or information (other than for the purposes of performing the ECI Services); or
- 11.1.2 release any statement or information to the media or for general distribution, regarding any matter relating to the Development, this Agreement or the performance of the ECI Services.

12. GST

12.1 Definitions and interpretation

- 12.1.1 Capitalised expressions which are not defined in this clause 12 but which have a defined meaning in the GST Law have the same meaning in this clause.
- 12.1.2 **GST** means the goods and services tax as imposed by the GST Law including, where relevant, any related interest, penalties, fines or other charge.
- 12.1.3 **GST Amount** means, in relation to a Payment, an amount arrived at by multiplying the Payment (or the relevant part of a Payment if only part of a Payment is the consideration for a Taxable Supply) by the appropriate rate of GST (being 10% when the GST Law commenced) or any lower rate notified from time to time by the person making the relevant Supply.
- 12.1.4 **GST Law** has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth), or, if that Act is not valid or does not exist for any reason, means any Act imposing or relating to the imposition or administration of a goods and services tax in Australia and any regulation made under that Act.
- 12.1.5 **Payment** means:
- (a) the amount of any monetary consideration (other than a GST Amount payable under this clause); and
 - (b) the GST Exclusive Market Value of any non-monetary consideration,
- paid or provided by either party to the other for a Supply made under or in connection with this Agreement and includes any amount payable by way of indemnity, reimbursement, compensation or damages.

12.2 Payment of GST

The parties agree that:

- 12.2.1 all Payments have been set or determined without regard to the impact of GST;
- 12.2.2 if the whole or any part of a Payment is the consideration for a Taxable Supply for which the payee is liable to GST, the GST Amount in respect of the Payment must be paid to the payee as an additional amount, either concurrently with the Payment or as otherwise agreed in writing; and
- 12.2.3 the payee will, as a pre-condition to any entitlement to payment under this Agreement, provide to the payer a Tax Invoice.

12.3 Input tax credit

Despite any other provision of this Agreement, if a Payment due under this Agreement is a reimbursement or indemnification by one party of an expense, loss or liability incurred or to be incurred by the other party, the Payment shall exclude any part of the amount to be reimbursed or indemnified for which the other party can claim an Input Tax Credit.

13. Relationship between the Parties

13.1 Exclusivity & Confidentiality

The agreement and co-operation between the parties are exclusive with respect to the Design and Construct aspects of the Project. The parties shall insure that such documents, samples, models, patterns, cost estimates or tenders and other information as are supplied and generated under this agreement shall remain confidential except to the extent that disclosure

is required by law. If required in writing by a party, the other party shall enter into a separate agreement (in a form to be agreed) not to disclose to the anyone else any confidential matter even after final certificate or earlier termination of this agreement except to the extent that disclosure is required by law.

14. Miscellaneous

14.1 Notices

- 14.1.1 A notice or other communication connected with this Agreement ("Notice") has no legal effect unless it is in writing.
- 14.1.2 A Notice or other document required to be given or served will be deemed to have been received at the earlier of the time of actual receipt and deemed receipt, being:
- (a) if the Notice or document is delivered by hand to the receiver, at the time of delivery;
 - (b) if the Notice or document is posted in a postage paid envelope addressed to the receiver, 2 Business Days from the date of posting; or
 - (c) if the Notice or document is transmitted by electronic mail or facsimile machine to the receiver, upon receipt by the sender of a confirmation or transmission report indicating the facsimile / email was validly received.
- 14.1.3 The relevant details for service of Notices or documents are those which have been last communicated in writing by one party to the other.

14.2 Entire Agreement

This Agreement contains the entire agreement of the parties with respect to its subject matter. It sets out the only conduct relied on by the parties and supersedes all earlier conduct by the parties with respect to its subject matter.

14.3 No Waiver

- 14.3.1 No failure to exercise and no delay in exercising any right, power or remedy under this Agreement will operate as a waiver. Nor will any single or partial exercise of any right, power or remedy preclude any other or further exercise of that or any other right, power or remedy.
- 14.3.2 The parties shall not be taken to have waived any of their rights under this Agreement unless such a waiver is contained in a Notice given to the other party. Any such waiver shall only operate to the extent specified in the Notice.

14.4 No Merger

The rights and obligations of the parties will not merge on completion of any transaction under this Agreement. They will survive the execution and delivery of any assignment or other document entered into for the purpose of implementing any transaction.

14.5 Costs

The parties shall pay their own costs in relation to the preparation and execution of this Agreement and the Works Contract or any other agreement or document to be entered into pursuant to any of them.

14.6 Survival of provisions and indemnities

Obligations of confidentiality and the indemnities contained in this Agreement continue and remain in full force and effect following the expiration or termination of this Agreement.

14.7 Governing Law

This Agreement is governed by the laws of Queensland. The parties submit to the non-exclusive jurisdiction of courts exercising jurisdiction there.

14.8 Further Assurances

Each party must take all steps, execute all documents and do everything reasonably required by another party to this Agreement to give full effect to this Agreement and to any of the transactions contemplated by it.

14.9 Severability

If one or more of the provisions in this Agreement be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions of this Agreement and the Works Contract shall not be affected or impaired thereby in any way.

EXECUTED as an Agreement

EXECUTED by Rainbow Bay 2021 Pty Ltd)
 in accordance with Section 127 of the)
 Corporations Act 2001 in the presence of:)
)

..... Director

..... Full name

..... Director (or Company Secretary)

..... Full name

EXECUTED by McNab Developments (QLD))
Pty Ltd in accordance with Section 127 of the)
 Corporations Act 2001 in the presence of:)
)

..... Director

..... Full name

..... Witness

..... Witness Full name

Annexure 1

ECI Services & Process – ECI Key Milestone Programme

Annexure 2

ECI Consultant Fees

Annexure 3

ECI Fee Expenditure Cash Flow

Annexure 4

Sales Display Trade Breakdown