

Start Strong Capital Works Grant Program

Funding Agreement – Terms and Conditions

Start Strong Capital Works Grants Program

Terms and Conditions (Major Works and Crisis Fund (over \$100k))

(Commencing in 2021)

Parties

*The State of New South Wales by its Department of Education through the Early Childhood Education Directorate (**department**) and the Approved Funded Provider (or AFP).*

Background

The Start Strong Capital Works Grants Program improves access to preschool by creating additional Preschool Places in areas of need and demand across the state.

The intended outcome of the program is for the creation of new preschool places aimed at children in the year before school, or children aged three and above.

The Funding Agreement comprises 5 parts:

1. these Terms and Conditions;
2. the Funding Specification (this document should also specify the security to be provided by the Approved Funded Provider for the funding);
3. the Grant Confirmation Letter;
4. the Project Plan with Milestones; and
5. the Program Guidelines.

Once the Funding Agreement is executed by all parties, the department agrees to fund the Approved Funded Provider to perform the Project on the following terms and conditions.

Terms and Conditions

1. Definition and Interpretation

1.1. Definitions

AFP or Approved Funded Provider means an organisation approved to receive Funding under the Program and who is a party to the Funding Agreement.

Budget means the budget to be prepared by the AFP. It is described at clause 4.

Business Day means a day that is not a Saturday, Sunday or any other day which is a public holiday or a bank holiday in New South Wales.

Commencement Date means the date the department executes these Terms and Conditions.

Dispose means to sell, lease or sub-lease, licence or sub-licence, or otherwise transfer or give up ownership or the right to occupy or use, or to enter into an agreement to do any of the preceding acts.

Facility means the existing or proposed facilities (as applicable), including land and any improvement relating to the facilities as detailed in the Funding Specification.

Force Majeure Event means

- (a) fire, explosion, storm, tempest, lightning, cyclone, hurricane, flood, ionising radiation, earthquakes, war (declared or undeclared), terrorism, armed conflict, riot and civil commotion, high sea inundations and droughts declared as a state of emergency;
- (b) failure by an authority (including a provider of utilities) to carry out works or provide services which it is obliged to carry out or provide;
- (c) any blockade or an embargo;
- (d) any industrial action but only to the extent that it affects the construction industry or a significant sector of it;
- (e) a pandemic or other health emergency declared by the Ministry of Health; or
- (f) any event or occurrence (outside the control of either party) which directly causes a party to be unable to comply with all or a material part of its obligations under the Funding Agreement,

unless any of the events listed in paragraphs (a) to (f) inclusive arises (directly or indirectly) as a result of any act or omission of the AFP or any of its contractors or subcontractors.

Funding and Funds means the amounts paid or payable to the AFP under the Funding Agreement.

Funding Agreement means these Terms and Conditions, the Funding Specification, the Grant Confirmation Letter, the Project Plan with Milestones

and the Program Guidelines. The Funding Agreement includes any security documentation to be provided by the AFP.

Funding Specification means a 'Funding Specification' schedule that sets out the statement of Funding. It contains various Project specific requirements (e.g. Project Description, milestones, Project reporting requirements, security requirements). It includes any document referred to in it.

Grant Confirmation Letter means the letter issued by the department to the AFP setting out the total level of funding, the nature of the security to be provided to the department and/or any other requirements that the AFP must comply with in order to secure the acquittal of Funding. The letter is issued after the AFP has returned the signed Terms and Conditions and the Project has been approved by the Department.

Guidelines and Standards means any guidelines and standards which apply to the Project. This may include the Building Code of Australia and relevant Australian Standards. It includes the guidelines and standards specified in the Funding Specification.

Insolvency Event means any of the following events in relation to the AFP:

- (a) becoming unable to pay its debts as and when they fall due;
- (b) an application for winding up is made and not dismissed within 14 days or a winding up order is made;
- (c) a controller, administrator, receiver and manager, provisional liquidator or liquidator is appointed; or
- (d) any actions of a substantially similar effect are taken in any jurisdiction.

Law means any applicable statute, regulation, by-law, ordinance or subordinate legislation in force from time to time anywhere in Australia, whether made by a State, Territory, the Commonwealth, or a local government, and includes the common law as applicable from time to time.

Personnel of a person or entity includes its employees, agents, officers, or contractors. A reference to the AFP's Personnel does not include the department. A reference to department's Personnel does not include the AFP.

Preschool Enrolment means an enrolment in a community preschool that is offered for at least 600 hours per year or 15 hours per week.

Preschool Places refers to the licensed community preschool places that the AFP makes available each day.

Program means the Early Childhood Education Directorate's Start Strong Capital Works Grants Program.

Program Guidelines means the guidelines that apply to the Program as added, amended or replaced by the department from time to time.

Project means the project described in the Funding Specification and includes the conduct of the Works.

Project Period means the period commencing on the Commencement Date and ending on the date that is 10 years from the date the Works are completed.

Project Plan means the project plan to be prepared by the AFP. It is described at clause 4.

Relevant Authority means any:

- (a) department, authority, agency or regulatory body of the Commonwealth or New South Wales; or
- (b) Law where the Works are carried out, or a standard commonly applying in the building or construction industry in New South Wales, which applies or is relevant to the building, construction or fit out by the AFP of the Facilities.

Works means that part of the Project which relates to the design, construction, modification, commissioning, expansion or fit-out (as applicable) and related activities of any Facilities, as contemplated by the Project Plan.

Works Period means the period specified in the Funding Specification during which the Works must be completed. The department may agree to extend the Works Period following the execution of this Funding Agreement.

1.2. Interpretation

In these Terms and Conditions, unless the contrary intention appears:

- (a) a reference to:
 - (i) a document includes any variation or replacement of it;
 - (ii) a statute, government policy or other law includes a regulation or other statutory instrument made or issued under it and consolidations, amendments, or replacements of any of them; and
 - (iii) a party includes the party's executors, administrators, successors and permitted assigns;
- (b) the words **include, including, for example** or **such as** when introducing an example, do not limit the meaning of the words to which the example relates to the example or to examples of a similar kind;
- (c) headings and any index are for convenience only and do not form part of these Terms and Conditions or affect its interpretation.

2. Acceptance and term

The Funding Agreement will be effective on and from the Commencement Date and continues for the Project Period.

3. Conditions

The Funding Agreement is conditional on the AFP:

- (a) holding an approval to operate an early childhood education service in NSW; and
- (b) providing the department with the security described in the Funding Specification for the performance of its obligations under the Funding Agreement.

4. Delivery of Budget and Project Plan

The AFP must deliver to the department (in a form reasonably acceptable to the department):

- (a) a Budget; and
- (b) a Project Plan.

The Budget and Project Plan must include all detail required to be included as specified in the Funding Specification or as otherwise notified by the department.

The AFP is responsible for ensuring that all of the requirements of the Project Plan are complied with at the AFP's cost.

5. Funding for the Project

- (a) **(Funding)** Subject to these Terms and Conditions, the department will provide the Funding to the AFP as detailed in the Funding Specification.

The Funds to be contributed by the department for the Project will not exceed the amount of Funds specified in the Funding Specification. This means that the AFP must fund any Project overruns and/or funding shortfalls.

- (b) **(Funding only to be used for new Work)** Funds will only be made available to enable the AFP to undertake agreed Works and may not be applied towards a completed build or project. Where an AFP intends to partially fund a Project involving agreed Works through other locally available grants, funding or donated services it must:

- (i) have notified the department of any additional sources of funding at the time it applies for a grant of Funding. The AFP must notify the department of any other sources of funding that subsequently become available to it for the Works;

- (ii) have given sufficient particulars of the additional sources of funding; and

- (iii) provide such other information, documents and assistance as the department may reasonably require from time to time.

- (c) **(Timeframes for payment of Funding)** The Funding will be paid in accordance with the timeframe(s) and invoicing requirements as set out in the Funding Specification. Such Funding will be paid by electronic funds transfer directly into a bank account nominated by the AFP.

The department will use all care to ensure Funds are paid in a timely manner but is not liable for late payments.

- (d) **(Other contributions to Project costs)** The AFP must itself contribute funding toward the total cost of the Project. For this Program, the AFP must contribute and spend an amount which is not less than 5% of the

total costs of the Project (unless this is a crisis situation or otherwise agreed in writing by the Department). The total cost includes all costs associated with the Project including the provision of and maintaining security and insurances, any legal costs and all other third party costs. The minimum contribution required by the AFP for this purpose is detailed in the Funding Specification (**AFP Funding Contribution**).

The AFP Funding Contribution must be fully spent on the Project, before any of the Funding is committed.

- (e) (**Funding conditional**) The department's obligation to provide the Funding is conditional on the department actually receiving an appropriate annual allocation from Parliamentary appropriation. If there is no appropriate annual allocation then there will be reduced or no Funding.
- (f) (**No promise for future funding**) There is no promise that the AFP will receive any additional or future funding, in connection with the Program or otherwise. There is also no promise as to what terms would apply to any further funding arrangements (if any).

6. Conduct of the Project

6.1. Project

- (a) In consideration of the provision of the Funds, the AFP must:
 - (i) use the Funds only for the performance of the Project in accordance with the Funding Agreement;
 - (ii) perform the Project according to the Budget and Project Plan, within the Works Period and Project Period and according to these Terms and Conditions;
 - (iii) perform all aspects of the Project as set out in the Funding Specification;
 - (iv) for the Project Period, use reasonable endeavours to fill the additional Preschool Places described in the Funding Specification that will become available when the Works are completed with additional Preschool Enrolments; and
 - (v) endeavour in good faith to ensure that all work undertaken under the Funding Agreement is in support of the objectives, intended outcomes and purpose as set out in the 'Background' to these Terms and Conditions.
- (b) If a Project is dependent on any approvals or licences or other regulatory requirements (e.g. planning approvals or development applications) (**Approvals**), then no Funding will be payable to the AFP until all such Approvals are fully obtained.
- (c) The AFP must expend the Funds only and exclusively for the purposes of performing the Project, and in accordance with the Funding Agreement. Without limiting this obligation, the AFP must not use the Funds as security for the purposes of obtaining any loan or entering into hire purchase agreements or for the purpose of meeting existing loan obligations.

6.2. **Conducting the Works**

The AFP warrants that all activities relating to the Works will be carried out in accordance with the requirements and standards of all Relevant Authorities including as applicable to the building, construction and fit-out of the Facilities. The Works must be performed during, and completed by the end of, the Works Period.

The AFP must conduct a transparent and competitive tendering process for procuring all goods and services in connection with the Works. This includes ensuring that formal contract documents are entered into with the relevant suppliers.

The AFP will be required to engage a project manager for the purposes of overseeing the conduct of the Works.

6.3. **Facilities**

- (a) For the avoidance of doubt, this clause 6.3 (with the exception of clause 6.3(d)) applies whether or not the AFP is the owner of the Facilities or of the completed Works.
- (b) The AFP represents and warrants that:
 - (i) the Facilities are and will at all times be fit for the purposes of carrying out the Project (including the Works);
 - (ii) the undertaking of the Project (including the Works) and/or the use of the Facilities in support of the objectives, intended outcomes and purpose of the Project as stated in the 'Background' to these Terms and Conditions has not and will not infringe any condition of ownership or occupation of the Facilities;
 - (iii) the use of the Facilities for the Project (including the Works) will not infringe any requirements of a Relevant Authority; and
 - (iv) the Facilities (after completion of the Works) will comply with all 'Australian Standards', Laws and any other standards or requirements which relate to the ongoing use of the Facilities.
- (c) The AFP must during the Project Period:
 - (i) only use the Facilities for the purposes of the Project (or any other purpose approved by the department in advance and in writing);
 - (ii) safeguard the Facilities against loss, damage or unauthorised use;
 - (iii) subject to clause 6.3(d)(ii), insure the Facilities for their full replacement value;
 - (iv) maintain the Facilities in good condition;
 - (v) reinstate the Facilities if they are damaged or destroyed.
- (d) If the AFP is not or will not be the owner of the Facilities:

- (i) it must enter into a written agreement with the owner of the Facilities for the undertaking of the Works and the use and occupation of the Facilities for the purposes of the Project until the end of the Project Period, on terms and conditions approved by the department in advance and in writing;
 - (ii) ensure that the Facilities are insured for their full replacement value. If the AFP is not the owner of the Facilities, the AFP must ensure that the owner of the Facilities agrees to apply any insurance proceeds in accordance with clause 16(b); and
 - (iii) the AFP must not do anything that would give the owner of the Facilities the right to terminate or forfeit the AFP's right of occupancy of the Facilities and the use of the Facilities in accordance with clause 6.3(d)(i).
- (e) The AFP must not Dispose of the Facilities or Dispose of the AFP's right to occupy the Facilities during the Project Period.
 - (f) The department has no responsibility for the Facilities.
 - (g) The AFP accepts all liabilities and risks associated with the use, misuse or failure to use the Facilities.

7. Performance and provision of services by the AFP

- (a) **(Performance)** The AFP must perform the Project and accept and use the Funding:
 - (i) **(funding agreement)** in accordance with the terms and conditions of the Funding Agreement;
 - (ii) **(guidelines)** in accordance with the Program Guidelines and any department policies and guidelines (that the department makes it aware of);
 - (iii) **(professional manner)** with due care, skill and diligence and in a proper and professional manner (including in a timely manner) and ensure that the AFP's Personnel do likewise; and
 - (iv) **(laws and other things)** in accordance with all applicable laws and regulatory requirements, relevant Australian industry standards, best practice and guidelines and all authorisations, licences and consents including the Guidelines and Standards.
- (b) **(Data collection activities)** The AFP, if requested (from time to time), must provide input to the department's Early Childhood Education planning processes including providing any requested data to assist with such planning.
- (c) **(Accessibility to AFP sites)** The AFP must ensure that all AFP premises comply, where applicable, with the *Disability (Access to Premises – Buildings) Standards 2010* and are physically accessible to people with disabilities. In determining accessibility, all circumstances of a particular case are to be considered, including the needs of all people accessing the premise, the consequences for people being excluded from services or premises, the financial circumstances of the AFP and the estimated amount of expenditure required to achieve accessibility.

8. Subcontracting

- (a) The AFP agrees not to enter into any arrangement (including without limitation any subcontract) with any other person in relation to the performance of the Works, unless the AFP is satisfied that:
 - (i) the arrangement facilitates compliance by the AFP with its obligations under this Funding Agreement;
 - (ii) the arrangement in no way conflicts with or detracts from the rights and entitlements of the department under this Funding Agreement (this includes any security documentation);
 - (iii) such person is financially viable and has the relevant expertise necessary for the proper performance of the relevant activity in connection with the Works; and
 - (iv) such person has all the appropriate types and amounts of insurance in order to perform its work in relation to the Works.
- (b) The AFP agrees to be fully responsible for the performance of the Project and for ensuring compliance with the requirements of this Funding Agreement. This obligation is not reduced if the AFP enters into any arrangement contemplated by this clause.

9. Assumption of Risks by AFP for all Works

The AFP accepts all risks in respect of the design, construction and commissioning of the Works, including (without limitation) the risk of:

- (a) the actual cost of the design, construction and commissioning of the Works being greater than anticipated;
- (b) the design, construction and commissioning of the Works not being completed in accordance with the requirements of any contract between the AFP and a contractor;
- (c) liabilities in connection with or arising out of:
 - (i) workplace health and safety;
 - (ii) environmental issues;
 - (iii) payments to contractors and subcontractors; and
 - (iv) liabilities to third parties;
- (d) compliance with all Laws relating to the Works.

10. Performance Monitoring and Review

- (a) **(Performance monitoring)** The department may at any time carry out monitoring of the AFP's operations and compliance with the Funding Agreement including compliance with applicable Laws and the Program Guidelines **(Performance Monitoring)**.
- (b) **(Carrying out monitoring)** The department will carry out Performance Monitoring by any means including by requesting a self-assessment by

the AFP, monitoring and/or auditing all records of the AFP and any other information provided by the AFP, by attending the AFP's site(s) and interviewing the AFP's Personnel. This includes giving access to correspondence and reports from anyone relating to the services or the use of Funding. This Performance Monitoring may be carried out by any person authorised by the department (who may include external contractors).

- (c) **(Assistance by AFP)** The AFP will provide all assistance, information or access required by the department to enable the Performance Monitoring to be carried out within the requested timeframe.
- (d) **(Site visits with notice)** The Performance Monitoring may include a department representative, on at least 48 hours' notice, visiting any AFP site related to the Project and inspecting records relating to the Funding.
- (e) **(Access to records)** The Performance Monitoring may also require the AFP to:
 - (i) make, on 7 days written notice, all records in relation to the performance of the Project or Funding available for inspection by a department representative. In doing so, the AFP must provide all necessary assistance to the department representative in carrying out the inspection;
 - (ii) permit and assist the department representative to make such copies of any records as the department representative considers appropriate.

To be clear, any non-compliance with the Funding Agreement is an Event of Default and may result in the department exercising its rights under the Funding Agreement, including the right to suspend or terminate the Funding Agreement or withhold Funding.

11. Warranties by AFP (including as to status)

The AFP warrants that on the Commencement Date and on each day following during the Project Period:

- (a) **(Laws)** it complies with all applicable Laws;
- (b) **(Power to enter)** it has the legal right and power to enter into the Funding Agreement and to perform its obligations under the Funding Agreement;
- (c) **(All corporate actions)** the execution, delivery and performance of the Funding Agreement by it has been duly and validly authorised by all necessary corporate action;
- (d) **(Authorisations)** each authorisation, license or consent necessary to enable it to unconditionally execute and deliver and comply with its obligations under the Funding Agreement, and to carry on its principal business or activity, has been obtained, affected and complied with;
- (e) **(Expertise)** it has the expertise, skills, qualifications and resources required to perform its obligations under the Funding Agreement;
- (f) **(No adverse proceedings)** the AFP is not aware of any circumstances, including any financial circumstances or any litigation or other proceedings that are taking place, pending or threatened, which affects

or might affect the AFP's ability to perform the Funding Agreement;

- (g) **(Resources for Project)** it will provide the necessary resources in addition to the Funds to perform the Project and use those resources or services to perform the Project;
- (h) **(Correct info)** the information provided by the AFP as to the structure, viability, reliability, insurance cover, capacity, experience and expertise of the AFP and its Personnel is correct and complete;
- (i) **(Status)** it is:
 - (i) a not for profit organisation in accordance with applicable laws; or
The AFP must be an organisation that is not operating for the profit or gain of its individual members, whether these gains would have been direct or indirect. The AFP will have a 'non-profit' and a 'dissolution' clause in its governing documents, substantially similar to the following:
 - **(non-profit)** the assets and income of the not for profit organisation shall be applied solely in the furtherance of its objectives and no portion shall be distributed directly/indirectly to the members except as bona fide compensation for services rendered or expenses incurred on behalf of the not for profit organisation.
 - **(dissolution)** if it is being dissolved, then the amount that remains after such dissolution and the satisfaction of all liabilities shall be transferred to another not for profit entity with similar purposes.*(Note. A not for profit can still make a profit, but this profit must be used to carry out its purposes and must not be distributed to owners, members or other private people.)*
 - (ii) a local council operating on a cost recovery basis; and
- (j) **(approved education and care service)** if the AFP falls within the definition of an 'approved education and care service' under either the *Children (Education and Care Services National Law Application) Act 2010 (NSW)* or the *Children (Education and Care Services) Supplementary Provisions Act 2011 (NSW)* and related regulations (as the case may be) then the AFP:
 - (i) is an education and care service under the applicable law;
 - (ii) operated by a person or other entity holding a provider approval issued under the applicable law

The AFP must give written notice to the department, by close of business on the next Business Day after becoming aware, that the AFP no longer complies or is at risk of not being able to comply with the requirements of this clause.

12. Conflict

The AFP warrants that to the best of its knowledge, information and belief, no conflict of interest exists or is likely to arise in connection with this Funding Agreement. If an actual, perceived or potential conflict of interest arises, or is likely to arise, the AFP must immediately notify the department in writing, fully detailing the conflict. The department will then determine how to deal with the conflict.

13. Obligations relating to Funding

13.1. Funds only to be committed during Project Period

The AFP must not commit any part of the Funds for expenditure that is likely to occur after the end of the Project Period.

13.2. Submission of reports for financial and performance matters

The AFP must comply with the relevant '**Financial Accountability and Return Guide NSW Early Childhood Education Grants Programs**' available on the Department's website. This includes completing and submitting all relevant 'acquittals and returns' documents (including the 'ECE Statement of Expenditure') and acquittal requirements. A 'performance accountable statement' is to be provided for relevant programs.

The timing for submission is set out in the Financial Accountability and Return Guide.

To be clear, a failure to provide on time, accurate and complete documentation for the Financial Accountability and Return Guide process is a non-compliance.

Clause 13.4 may then apply.

13.3. Financial accounting

The AFP must ensure that the Funding is recorded in a manner that readily and accurately identifies funds received and spent for the purpose of this program. This could include a separate bank account or costing structure within the financial accounts.

13.4. Wrongful use of Funding

If the Funding is used in a manner not consistent with the Funding Agreement as determined by the department in its absolute discretion, then an amount equal to the wrongfully used funds must be paid to the department. Such funds must be paid within 30 days of a written request from the department.

13.5. Withholding Funding

The department may withhold any Funding (in whole or part) if the AFP is in breach of any of its obligations under the Funding Agreement.

13.6. Return of Unexpended Funds

- (a) The AFP must give written notice to the department of any Unexpended Funds. The AFP must return any Unexpended Funds in accordance with the department's written requirements (including as to timing of the repayment of the funds).
- (b) The amount of Unexpended Funds returned must be certified by the AFP in a financial certificate or audited financial report for the relevant period.
- (c) If the department terminates the Funding Agreement then the AFP must, in addition to paying to the department any Unexpended Funds, pay to the department any Funds which the department determines have not been properly expended by the AFP.

- (d) 'Unexpended Funds' means any Funding not actually expended or committed for the purposes specified in this Funding Agreement (including the Funding Specification).

13.7. **Financial viability**

If the department determines, in its absolute discretion, that the AFP's financial position has or may adversely affect the AFP's performance of the Project or delivery of services (**Financial Viability Issue**), the department may exercise certain rights as detailed in clause 17. This clause does not limit the department's rights under the Funding Agreement.

13.8. **Set-off**

Any monies, fees, costs or other expenses, damages, rebates or losses recoverable by the department from the AFP may be deducted from any money then due to the AFP. If the money due to the AFP is insufficient for that purpose, the balance remaining unpaid will be a debt due by the AFP to the department. Such monies must be paid to the department within 20 Business Days of a written request for such repayment.

14. **Records and Reports**

- (a) (**records generally**) The AFP must keep current and accurate records in connection with this Funding Agreement including use of such Funding. This includes, to be clear, the AFP keeping comprehensive written records of the conduct of the Project including, without limitation, performance against any applicable Guidelines and Standards, progress of the Works and the use of the Facilities (as the case may be).
- (b) (**financial records**) The AFP must keep financial records relating to the Project so as to enable:
 - (i) all income and expenditure related to the Project to be identified in the AFP's accounts; and
 - (ii) the preparation of financial statements in accordance with applicable Australian accounting standards.
- (c) (**access to records**) On the department's written request, the AFP must allow the department's representative access to all records relating to the Project including all accounting and financial records.
- (d) (**retention of records**) The AFP must keep all records for 7 years after the ending of the Funding Agreement. If the AFP ceases to operate then the AFP must ensure that all records remain accessible to the department for the entire 7 year period.
- (e) (**request for information**) The department may at any time request from the AFP additional information which relates to this Funding Agreement, the Project or the AFP's participation in the Project.

If the department requests information under this clause, the AFP must provide the information to the department within 14 days after the request.

- (f) (**Progress Reports**) In accordance with the timetable set out in the Funding Specification or as otherwise requested by the department, the AFP must provide to the department written progress reports

which must include:

- (i) information on whether the objectives, intended outcomes and purpose of the Project as set out in the 'Background' to these Terms and Conditions are being achieved and if not, why not;
 - (ii) sufficient detail to indicate whether the Works are being completed in accordance with the Project Plan;
 - (iii) a statement which gives complete details on the level of Funds committed and the balance of any Funds which remain unspent;
 - (iv) a copy of the Assets register, if requested by the department; and
 - (v) any other requirements set out in the Funding Specification or as otherwise requested by the department.
- (g) **(Final Works Report)** At the time specified in the Funding Specification or on any earlier termination of this Funding Agreement, the AFP must provide to the department a written final report which must include:
- (i) a comprehensive report on actual performance of the Works and the steps the AFP has taken to ensure that the additional Preschool Places funded under this Funding Agreement are filled with Preschool Enrolments;
 - (ii) a statement confirming that the Works were completed in accordance with the Funding Agreement;
 - (iii) a certificate provided by the board or governing committee of the AFP (as the case may be), confirming that all Funds received were spent for the purpose of the Project and in accordance with this Funding Agreement and that the AFP has complied with this Funding Agreement. This certificate may take the form of minutes of meeting; and
 - (iv) any other requirements set out in the Funding Specification or as otherwise requested by the department.

15. GST and RCTI

- (a) **(Payment of GST)** The department will calculate the GST payable on the supplies by the AFP and forward this with any Funding payments. It is then the responsibility of the AFP to remit GST received to the ATO.
- (b) **(RCTI or 'statement of payments')** In applying for preschool grants funding the AFP gave the department details about whether the AFP is registered for GST. If the AFP has not yet provided this information, then it must do so as soon as possible after signing this Funding Agreement. The following applies (as the case may be):

<p>(AFP registered for GST) <i>These provisions apply if the AFP specified that</i></p>	<p>The department will create a Recipient Created Tax Invoice (RCTI) to accompany the payment of Funding. The document format will be an RCTI with additional GST information.</p> <p>The department will issue tax invoices in respect of the supplies made in accordance with the Funding Agreement and detailed in the RCTI.</p> <p>The AFP will not issue tax invoices in respect of the supplies</p>
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<p><i>it is registered for GST.</i></p>	<p>made in accordance with the Funding Agreement and detailed in the RCTI.</p> <p>The AFP acknowledges that it is registered for GST and will notify the department if it ceases to be registered.</p> <p>The AFP agrees to provide to the department any other relevant information from time to time as required to assist the department to issue an RCTI.</p>
<p>(AFP not registered for GST) <i>These provisions apply if the AFP specified that it is not registered for GST.</i></p>	<p>The AFP acknowledges that it is not registered or required to be registered for GST. The AFP will notify the department immediately if the AFP becomes registered or is required to be register for GST. If the AFP later become registered or is required to be registered for GST, then the AFP must comply with the above terms.</p> <p>The department will not issue an RCTI to a non-GST registered entity. Instead, a 'statement of payment' will accompany the Funding payments.</p>

16. Insurance

- (a) **(Insurance specified in Funding Specification)** The AFP must take out and maintain the insurances and the terms of those insurances as specified in the Funding Specification. These insurances will be required during the Works Period.
- (b) **(Insurance for the full replacement value of the Facility)** Following the completion of the Works, the AFP will be required to hold insurance for the full replacement value of the Facility.

If the Facilities is substantially damaged or destroyed then any insurance proceeds must be used in a manner agreed between the department and the AFP. The parties may agree that the insurance proceeds are used to rebuild the Facility or possibly be directed to another preschool for a separate project. If the parties cannot agree on how such insurance proceeds are to be used, then the department may give a written notice to the AFP requiring the AFP to repay all Funds received under the Funding Agreement. Such Funds will be repayable by the AFP on demand. The Funding Specification may set out further details around these requirements.

- (c) **(Other insurances)** Otherwise, the AFP must also take out and maintain all insurances imposed on the AFP by Law.
- (d) **(Evidence)** The AFP must, if requested by the department, provide certificates of currency for all insurances held and maintained by the AFP.
- (e) **(Insurance to be maintained by others)** If the AFP's subcontractor or agent provides any services or undertakes any work in connection with the Project, the AFP will ensure that the subcontractor or agent affects and maintains valid and enforceable insurance of the types and for the coverage appropriate to such sub-contract or agency with respect to such services or work.

17. Termination

- (a) **(Ending early by department)** The department may immediately end the Funding Agreement, in whole or part, for any or no reason by notice in writing to the AFP. This could include if there is no appropriate annual allocation from Parliamentary appropriation. If the department exercises its right under this clause, the AFP is not entitled to any compensation as a result of such termination. No further Funding will be provided after the date of termination.
- (b) **(Ending or suspension for default)** The AFP will not allow an Event of Default to occur. *(An Event of Default is defined below.)*
 - (i) If an Event of Default occurs or is likely to occur, the AFP will immediately notify the department of the event and provide sufficient detail to allow the department to assess the significance and impact of the Event of Default.
 - (ii) If an Event of Default occurs or if there is a Financial Viability Issue *(defined at clause 13.6)* the department may, by written notice to the AFP, immediately:
 - (A) suspend all or part of the AFP's rights under the Funding Agreement;
 - (B) withhold in whole or in part any Funding;
 - (C) exercise any of its other rights under the Funding Agreement; or
 - (D) terminate the Funding Agreement.
 - (iii) **Event of Default** means any of the following:
 - (A) **Non-compliance:** the AFP has not complied with any term or condition of the Funding Agreement
 - (B) **Incorrect or incomplete statement:** any statement made by the AFP is incorrect or incomplete in a way which would have affected the original decision to enter into the Funding Agreement with the AFP
 - (C) **Untrue warranty:** a representation, warranty or statement made by the AFP is untrue or misleading or a reply to a question made by, or on behalf of, the department, is untrue or misleading
 - (D) **Compliance unlawful:** it is unlawful for the AFP to comply with any of its obligations under the Funding Agreement or it is claimed to be so by the AFP
 - (E) **Insolvency Event:** an Insolvency Event occurs
 - (F) **Authorisation ceasing:** an authorisation, licence or consent necessary to allow the AFP to comply with its obligations under the Funding Agreement is withheld or ceases to be in full force and effect.
- (c) **(Breach notice and remedy opportunity)** If the department believes

that the AFP has failed to comply with the Funding Agreement, the department may give the AFP a notice requiring the AFP, within 14 days after receiving the notice, to show that there has been no such failure, or to remedy the failure where the failure is capable of remedy. If, after the 14 days have expired, the department is satisfied that the AFP did fail to comply as alleged in the notice and has not remedied the failure, the department may, by written notice to the AFP, terminate the Funding Agreement. *This clause does not limit the department's rights under clause 17(b)(ii) or at law.*

- (d) **(Effect of suspension)** If all or part of the Funding Agreement is suspended:
 - (i) the AFP will (at its own cost) do anything that the department requests, including:
 - (A) continue to deliver services or cease to deliver services;
 - (B) comply with any condition that the department imposes; and
 - (ii) the department may withhold all or part of the Funding.
- (e) **(Rights)** Ending of this Funding Agreement will be without prejudice to the rights of either party that arose before ending.
- (f) **(On ending)** Within 7 days of the ending of the Funding Agreement, the AFP must give the department any part of the Funds not spent according to the Funding Agreement to the department's satisfaction. The AFP must, unless otherwise agreed in writing, provide to the department within 5 Business Days of ending:
 - (i) any reports due to the department under the Funding Agreement or otherwise requested by the department; and
 - (ii) all the department's confidential information (if any) used by the AFP or its Personnel or otherwise in their possession.

18. Repayment of Funds

- (a) Each of the following is a **Repayment Event**:
 - (i) where the department terminates the Funding Agreement because of an Event of Default in accordance with section 17(b)(ii); or
 - (ii) where the department terminates the Funding Agreement in accordance with clause 17(c).
- (b) If a Repayment Event occurs, the department must notify the AFP in writing that a Repayment Event has occurred.
- (c) Without limiting the department's rights at Law, if a Repayment Event occurs, the department may require the AFP to repay Funds paid to the AFP under this Funding Agreement, within 20 Business Days after the date of the notice given to the AFP by the department (in accordance with clause 18(b)).

19. Information management

19.1. AFP Information

- (a) The AFP agrees that the department may collect from the AFP or any other source, information about the AFP that relates to the AFP's performance under the Funding Agreement and the provision of funding to the AFP (**AFP Information**). This includes any information that the AFP provides the department as part of this Funding Agreement or any other funding arrangement between the department and AFP or under any application and any feedback the department obtains from third parties regarding the AFP.
- (b) The AFP agrees that the department may share and disclose AFP Information to any Australian government agency (including Commonwealth, State and Territory government agencies) which may use AFP Information for any purpose connected to the exercise of their government functions.

19.2. Privacy

- (a) In order for the department to monitor the Programs and the AFP's performance, the AFP will be required to provide the department with Personal Information about its services including as part of data collection activities. Personal Information has the same meaning as in the relevant Privacy Laws. It includes 'Sensitive Information' such as health information. (*Privacy Laws are defined below.*)
- (b) In collecting Personal Information, the AFP must ensure that the individuals providing the Personal Information are aware of and consent to the disclosure of that Personal Information to the department and to the department's use and disclosure of that Personal Information.
- (c) In dealing with the Personal Information described in clause 19.2(a), the AFP must comply with all applicable privacy laws including:
 - (i) the *Privacy Act 1988* (Cth);
 - (ii) the *Privacy and Personal Information Protection Act 1998* (NSW) – as if it is a 'public sector agency'; and
 - (iii) the *Health Records and Information Privacy Act 2002* (NSW). (These are the **Privacy Laws**.)

19.3. Additional research, evaluation and data collection

- (a) The AFP will comply with the research, evaluation and data collection requirements of the department, in relation to the Project, as notified to the AFP from time to time. This will involve cooperating in the provision of statistical and services information including by completing surveys or other research activities.
- (b) The AFP must promptly notify the department if it or any third party intends to conduct research relating to this Funding Agreement including the use of Funding and performance of the Project and provision of services. The AFP must ensure that any such research complies with provisions in the department's Guidelines for External Researchers. These are available on the department's website at <http://www.dec.nsw.gov.au/what-we-offer/regulation-and->

19.4. **Notify of breach**

The AFP must immediately notify the department if the AFP becomes aware of a breach or possible breach of any of the obligations in connection with this clause 19, whether by the AFP or anyone else.

20. **Force Majeure**

- (a) If a Force Majeure Event prevents a party (**Affected Party**) from performing its obligations under the Funding Agreement, the Affected Party will not be in breach of the Funding Agreement and will not incur any liability to the other party for any loss or damage incurred by the other party as a result of the Force Majeure Event preventing the Affected Party from performing its obligations under the Funding Agreement provided that the Affected Party complies with clauses 20(b) to 20(d).
- (b) On the occurrence of a Force Majeure Event, the Affected Party must notify the other party as soon as practicable. The notification must include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.
- (c) The parties must at all times following the occurrence of a Force Majeure Event use all reasonable endeavours to prevent and mitigate the effects of any delay and the AFP must at all times during which a Force Majeure Event is subsisting use reasonable endeavours to overcome or minimise the consequences of the Force Majeure Event.
- (d) The Affected Party must notify the other party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under the Funding Agreement. Following such notification, the Funding Agreement must continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

21. **Indemnity**

The AFP indemnifies the department (including its Personnel) from any and all loss, liability, damages, expenses, costs, charges (including legal fees on a solicitor/client basis) which the department (including its Personnel) pays, suffers, incurs or is liable for in respect of:

- (a) the risks accepted by the AFP under clauses 6.3 (Facilities) and 9 (Assumption of Risks by the AFP for the Project);
- (b) any breach of this Funding Agreement by the AFP; and
- (c) any act or omission by the AFP or its Personnel in connection with or arising out of the Funding Agreement including the Project.

The AFP's liability under this indemnity will be reduced to the extent that any claim, action, damage, loss, liability, cost, charge, expense, outgoing or payment was caused or contributed by the department's or its Personnel's negligent or unlawful acts or omissions.

22. Exclusion of liability

The department will not be liable to the AFP for any loss or damage suffered or incurred by the AFP that:

- (a) does not arise naturally or in the ordinary course of things from that breach; or
- (b) is a loss of goodwill, income, revenue, profit or savings.

23. Acknowledgement, publicity and reputation

- (a) The AFP must acknowledge the financial support received from the department for the Project. The department will, from time to time, advise the AFP of the acknowledgement requirements for NSW Government funded projects.
- (b) Where the financial support received from the department is in excess of \$100,000, the AFP must erect a sign acknowledging this. The department will advise the AFP of the requirements for these signs. The sign will be at the expense of the AFP.
- (c) Otherwise, the AFP must not disclose, distribute or otherwise communicate any media release, promotional material or publicity about or in relation to the Funding Agreement, their relationship or otherwise refer to the department (including use its logo) without the department's prior written approval.
- (d) The AFP must, and ensure that its Personnel will, maintain the department's good name and reputation. This includes taking no action which prejudices that good name and reputation.

24. General

24.1. Change in Control

The department may terminate the Funding Agreement at any time if a change in Control of the AFP occurs without the department's approval. For the purposes of this clause, Control means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of the AFP.

24.2. Obligations

The AFP will perform its obligations under this Funding Agreement at its own cost. The department's only obligation is to provide the Funding in accordance with the Funding Agreement.

24.3. Notices

A notice or communication has no effect unless it is in writing and sent by email, post or delivered to the addressee. Each party's address and email details are set out in the Funding Specification (on page 1, at the 'Approved Funded Provider Details').

A party can change its details by giving notice of it to the other party. A notice is received: if sent by email at the time the email is sent if there is no delivery failure report; if sent by post 2 business days after posting; or if delivered when

it is left at the address.

24.4. Further assurances

Each party must promptly (at its own cost) do all things necessary or desirable to give full effect to the Funding Agreement.

24.5. Approvals

A party may give or not give an approval or consent in its absolute discretion (without reasons), unless stated otherwise.

24.6. Entire understanding

The Funding Agreement (and the documents it specifically refers to) is the entire agreement between the parties on everything connected with the subject matter of the Funding Agreement and supersedes any prior agreement.

24.7. Priority of Documents

If there is any inconsistency between the parts of the Funding Agreement, then the order of priority for the purposes of construction is (a) these Terms and Conditions, (b) the Funding Specification and security documentation, (c) the Grant Confirmation Letter, (d) the Project Plan with Milestones and then (e) the Program Guidelines.

24.8. Survival

Any provision of this Funding Agreement which, by its nature, would reasonably be expected to be performed after the ending of this Funding Agreement will survive the ending of this Funding Agreement such as, clauses 5(f) (No promise for future funding), 6.3 (Facilities), 9 (Assumption of Risks by AFP for all Works), 10 (Performance Monitoring and Review), 13 (Obligations relating to Funding), 14 (Records and Reports), 17 (Termination), 18 (Repayment of Funds), 19 (Information management), 21 (Indemnity), 22(Exclusion of liability), 23(Acknowledgement, publicity and reputation) and 24(General).

24.9. Severable

If any clause of the Funding Agreement is illegal or unenforceable it is to be severed. The rest of the Funding Agreement will not be affected.

24.10. Waiver

If a party has a right arising from another party's failure, the delay in exercising that right does not waive any rights.

24.11. Change

Any change to the Funding Agreement is only effective if in writing.

24.12. Assignment

The AFP must not assign any of its rights or obligations without the department's written consent. The department may assign any of its rights or obligations under the Funding Agreement.

SIGNED as an agreement.

Signed by and on behalf of **The State of)**
New South Wales by its Department of)
Education in the presence of:)
)

.....
Signature of witness

.....
Signature of delegate

.....
Name of witness

.....
Name of delegate
Position:

Execution by AFP (please choose one only)

This signature block is for use where the AFP has authorised a person(s) to sign the agreement on their behalf. Evidence of their authority to sign for the AFP will be required. This may comprise a schedule of delegations or resolution of AFP's board or management committee.

Signed for the **AFP** by:)
)
)
)
)

.....
Signature of witness

.....
Signature of Authorised Officer

.....
Name of witness

.....
Name of Authorised Officer

This signature block is for use where the AFP is a company and has not authorised a person(s) to sign on their behalf. The agreement must be signed by either two directors or one director and the company secretary who should be registered with the ACNC as responsible persons of the AFP.

Signed for the **AFP** by:)
)
)
)
)

.....
Signature of Director

.....
Signature of Director / Secretary

.....
Name of Director

.....
Name of Director / Secretary

This signature block is for use where the AFP is another type of entity including an incorporated association and has not authorised a person(s) to sign on their behalf. The agreement must be signed by two members of the AFP's management committee who should be registered with the ACNC as responsible persons of the AFP.

Signed for the **AFP** by:)
)
)
)
)

.....
Signature of Responsible Person

.....
Signature of Responsible Person

.....
Name of Responsible Person

.....
Name of Responsible Person