

# **PROCURE IT AGREEMENT VERSION 2.1.3**

**STANDARD TERMS AND CONDITIONS [ONE]  
DICTIONARY [TWO]  
SCHEDULE [THREE]  
MODULES [FOUR]  
ORDER FORMS [FIVE]  
SERVICE LEVEL AGREEMENT [SIX]**



**Procurement**

# CONTENTS

<b>STANDARD TERMS AND CONDITIONS .....</b>	<b>2</b>
<b>1. AGREEMENT ADMINISTRATION.....</b>	<b>2</b>
1.1 CONTRACT AUTHORITY.....	2
1.2 AUTHORISED REPRESENTATIVES .....	2
1.3 NOTICES .....	2
<b>2. AGREEMENT OPERATION .....</b>	<b>2</b>
2.1 TERM.....	2
2.2 ENTIRE AGREEMENT .....	2
2.3 NON-EXCLUSIVE SUPPLY.....	2
2.4 CUSTOMER MAY ENFORCE AGREEMENT .....	3
2.5 ORDER OF PRECEDENCE.....	3
<b>3. MANAGEMENT OF AGREEMENT.....</b>	<b>3</b>
3.1 MANAGEMENT FEE.....	3
3.2 REVIEW OF CONTRACTOR'S PERFORMANCE BY CONTRACT AUTHORITY .....	6
3.3 EXCHANGE OF CONTRACTOR INFORMATION .....	6
3.4 NOTIFICATION OF CHANGE IN CONTROL OR TRANSFER OF OWNERSHIP.....	6
3.5 NOTIFICATION OF CONTRACTOR'S INSOLVENCY .....	6
3.6 ELECTRONIC COMMERCE .....	6
<b>4. PRODUCT OR SERVICE.....</b>	<b>7</b>
4.1 PRODUCT AND SERVICE LIST .....	7
4.2 VARIATION OF DESCRIPTION OF PRODUCT OR SERVICE .....	7
4.3 MODIFICATIONS, UPGRADES AND IMPROVEMENTS TO PRODUCT OR SERVICE .....	7
<b>5. PRICING.....</b>	<b>7</b>
5.1 MAXIMUM PRICE FOR THE DELIVERABLES .....	7
5.2 REDUCTIONS IN PRICE .....	8
5.3 BULK PURCHASE DISCOUNTS .....	8
5.4 BEST PRICE .....	8
5.5 TAXES, DUTIES AND GOVERNMENT CHARGES .....	8
<b>6. FORMATION OF CONTRACT.....</b>	<b>9</b>
6.1 CREATION OF CONTRACT .....	9
6.2 NON-COMPLETION OF ORDER DETAILS .....	9
6.3 ADDITIONAL CONDITIONS IN CONFLICT WITH AGREEMENT .....	9
6.4 TERMS AND CONDITIONS OF CONTRACT.....	9
6.5 SUPPLY THROUGH APPROVED PARTIES .....	9
6.6 NOMINEE PURCHASERS.....	10
6.7 RESTRICTIONS ON SUPPLYING TO PARTICULAR CUSTOMERS .....	10
<b>7. CONDUCT AND DISPUTE RESOLUTION .....</b>	<b>10</b>
7.1 CO-OPERATION .....	10
7.2 DUTY NOT TO HINDER PERFORMANCE .....	10
7.3 ISSUE RESOLUTION .....	10
7.4 AMICABLE RESOLUTION.....	11
7.5 REFERRAL TO EXPERT DETERMINATION.....	11
<b>8. RISK MANAGEMENT .....</b>	<b>11</b>
8.1 MINIMUM INSURANCE REQUIREMENTS .....	11
8.2 FINANCIAL SECURITY .....	13
8.3 PERFORMANCE GUARANTEE .....	14
8.4 REDUCTION OF LIABILITY .....	14
8.5 LIMITATION OF LIABILITY .....	14
<b>9. INFORMATION MANAGEMENT .....</b>	<b>16</b>
9.1 CONFIDENTIALITY .....	16
9.2 INTELLECTUAL PROPERTY .....	16
<b>10. ACCESS AND SECURITY.....</b>	<b>17</b>

10.1	ACCESS TO CUSTOMER'S SITE .....	17
10.2	PRIVACY .....	17
10.3	SECREC Y AND SECURITY .....	17
<b>11.</b>	<b>CONTRACTOR'S OBLIGATIONS .....</b>	<b>18</b>
11.1	GENERAL INDEMNITY FOR CONTRACT AUTHORITY AND CUSTOMER.....	18
11.2	INDEMNITY – THIRD PARTY CLAIMS .....	18
11.3	CONTRACTOR'S WARRANTIES .....	19
11.4	PRODUCT AND SERVICE WARRANTIES.....	20
11.5	RECTIFICATION OF DEFECTS .....	20
11.6	THIRD PARTY WARRANTY .....	20
11.7	COMPLIANCE WITH LAWS, STANDARDS AND CODES .....	21
11.8	INDUSTRIAL RELATIONS ISSUES.....	21
11.9	LICENCES AND APPROVALS .....	21
11.10	KEEPING OF RECORDS AND ACCESS TO RECORDS.....	21
11.11	CONTRACTOR'S OBLIGATIONS - CUSTOMER SUPPLIED ITEMS (CSI) .....	21
11.12	REPORTS.....	22
<b>12.</b>	<b>CUSTOMER'S OBLIGATIONS.....</b>	<b>22</b>
12.1	CUSTOMER TO PROVIDE INFORMATION .....	22
12.2	CUSTOMER'S OBLIGATIONS - CUSTOMER SUPPLIED ITEMS (CSI).....	22
12.3	SITE PREPARATION.....	22
12.4	CUSTOMER'S RIGHTS .....	22
<b>13.</b>	<b>PERSONNEL .....</b>	<b>22</b>
13.1	RESTRICTION ON ENGAGING PERSONNEL OF OTHER PARTY .....	22
13.2	CONTRACTOR'S PERSONNEL.....	23
13.3	CUSTOMER'S PERSONNEL .....	23
13.4	REMOVAL OF SPECIFIED PERSONNEL .....	23
13.5	SUB-CONTRACTING .....	23
<b>14.</b>	<b>PERFORMANCE OF THE CONTRACT .....</b>	<b>23</b>
14.1	DELIVERY NOTIFICATION .....	23
14.2	DELIVERY .....	24
14.3	REJECTION AND ACTUAL ACCEPTANCE DATE .....	24
14.4	REJECTION NOTIFICATION.....	24
14.5	ACCEPTANCE TESTING .....	24
14.6	DOCUMENTATION .....	26
14.7	EXTENSION OF TIME .....	26
14.8	ESCROW OF SOURCE CODE .....	26
<b>15.</b>	<b>PROJECT MANAGEMENT.....</b>	<b>27</b>
15.1	APPLICATION OF PROJECT MANAGEMENT CLAUSES .....	27
15.2	MANAGEMENT COMMITTEE .....	27
15.3	PROGRESS REPORTING.....	27
15.4	CONTRACT REVIEW PROCEDURES .....	27
15.5	SITE SPECIFICATION.....	28
15.6	IMPLEMENTATION PLANNING STUDY .....	28
15.7	PROJECT IMPLEMENTATION AND PAYMENT PLAN (PIPP) .....	28
15.8	STAGED IMPLEMENTATION AND THE RIGHT TO TERMINATE .....	28
15.9	SERVICE LEVEL AGREEMENT .....	29
15.10	TIME OF THE ESSENCE / LIQUIDATED DAMAGES .....	29
15.11	BUSINESS CONTINGENCY ARRANGEMENTS.....	29
<b>16.</b>	<b>PAYMENT.....</b>	<b>30</b>
16.1	PAYMENT OF CONTRACT PRICE.....	30
16.2	INVOICES AND TIME FOR PAYMENT.....	30
16.3	SET-OFF/MONEY RECOVERABLE BY THE CUSTOMER .....	30
16.4	SUSPENSION OF PAYMENTS .....	30
16.5	RETENTION OF MONEYS .....	31
<b>17.</b>	<b>VARIATIONS .....</b>	<b>31</b>
17.1	AGREEMENT VARIATIONS.....	31
17.2	CONTRACT VARIATIONS.....	31
<b>18.</b>	<b>TERMINATION.....</b>	<b>32</b>
18.1	TERMINATION OF THE AGREEMENT .....	32

18.2	TERMINATION OF CONTRACT/AGREEMENT FOR BREACH BY CONTRACTOR .....	32
18.3	EFFECT OF TERMINATION OF CONTRACT / AGREEMENT .....	32
18.4	TERMINATION OF CONTRACT FOR CONVENIENCE.....	32
18.5	TERMINATION FOR BREACH BY THE CUSTOMER.....	33
<b>19.</b>	<b>GENERAL .....</b>	<b>33</b>
19.1	DISCLOSURE OF CONFLICT OF INTEREST .....	33
19.2	EVENTS.....	33
19.3	ASSIGNMENT OR NOVATION.....	33
19.4	WAIVER.....	34
19.5	SEVERABILITY .....	34
19.6	COUNTERPARTS .....	34
19.7	APPLICABLE LAW.....	34
19.8	RIGHTS CUMULATIVE.....	34
19.9	NO AGENCY, EMPLOYEE OR PARTNERSHIP RELATIONSHIP .....	34
19.10	LOCAL JOBS FIRST PLAN.....	34

# Agreement

**Deed of Agreement** dated the        day of        20       

**Between** [insert name of the Contract Authority]  
\_\_\_\_\_

**for and on behalf of** [insert Commonwealth/State/Territory]  
\_\_\_\_\_

**of** [insert address]  
\_\_\_\_\_

**in the State of**        ('the Contract Authority')

**and** [insert name and ACN / ABN of Contractor]  
\_\_\_\_\_

**of** [insert business address]  
\_\_\_\_\_

**in the State of**        ('the Contractor')

## Recitals

- A**     This Agreement sets out the mutually agreed terms and conditions under which the Contractor may enter into contracts with Customers for the supply of information technology and telecommunications Products and Services.
  
- B**     The Contract Authority and the Contractor agree that the terms and conditions of this Agreement govern the provision of Products and Services to Customers over the Term of this Agreement.

**PROCURE IT AGREEMENT  
VERSION 2.1.3**

[ONE]

**STANDARD TERMS AND CONDITIONS**  
Version 2.1.3

# STANDARD TERMS AND CONDITIONS

## 1. Agreement Administration

### 1.1 CONTRACT AUTHORITY

- 1.1.1** The Contract Authority is responsible for the administration of this Agreement on behalf of the Eligible Customers and has authority to act on behalf of these entities in this respect.
- 1.1.2** Where the Contract Authority is required to give a consent under the terms of this Agreement it may do so upon such reasonable conditions as it sees fit to impose.

### 1.2 AUTHORISED REPRESENTATIVES

Each Party where applicable must nominate in items 2(b) and 3(b) of the Agreement Details and in the Order, its duly authorised representatives. Each Party warrants that its respective nominated representatives have the power and authority to provide such consents as are required and to issue instructions for the fulfillment of the terms of this Agreement or Contract as applicable.

### 1.3 NOTICES

- 1.3.1** Any notice to or by a Party under this Agreement or a Contract shall be by Notice in Writing.
- 1.3.2** Any Notice in Writing must be sent to the receiving Party's Service Address addressed to the Party's nominee for receipt of notices, or if no such position is nominated, the authorised representative.
- 1.3.3** Any Notice in Writing shall be deemed to be received for the purposes of this Agreement or a Contract at 9.00 am on the next business day following receipt of the notice at the receiving Party's Service Address.

## 2. Agreement Operation

### 2.1 TERM

This Agreement commences on the date specified in item 7 (a) of the Agreement Details and will expire on the date specified in item 7 (b) of the Agreement Details. The Contractor agrees that the Contract Authority may by Notice in Writing extend this Agreement on the same terms for the period specified in item 7 (c) of the Agreement Details.

### 2.2 ENTIRE AGREEMENT

- 2.2.1** This Agreement constitutes the entire agreement between the Contractor and the Contract Authority. Any prior arrangements, agreements, or undertakings by the Contractor and the Contract Authority are superseded and shall have no effect.
- 2.2.2** Subject to clause 6.7, the Contractor agrees to fulfill all Orders under this Agreement in accordance with the terms of this Agreement.

### 2.3 NON-EXCLUSIVE SUPPLY

This Agreement does not:

- (a) imply that the Contractor is the exclusive provider of the Product or Service; or
- (b) oblige any Eligible Customer to place an Order with the Contractor for the Product or Service.

## 2.4 CUSTOMER MAY ENFORCE AGREEMENT

The Parties agree that any Customer, although not a Party to this Agreement, may take the benefit of, and enforce, this Agreement in its own name.

## 2.5 ORDER OF PRECEDENCE

The order of precedence of this Agreement is (in descending order of priority):

- (a) Part 4 Modules referenced in Agreement Details.
- (b) Part 3 Schedules.
- (c) Part 1 Standard Terms and Conditions, and Part 2 Dictionary.
- (d) Orders

# 3. Management of Agreement

## 3.1 MANAGEMENT FEE

If specified in Item 11 of the Agreement Details, a Management Fee will apply to this Agreement and be payable by the Contractor to the Contract Authority in accordance with the following terms and conditions:

- 3.1.1** (a) The Contractor shall, subject to clause 3.1.2, pay to the Contract Authority a Management Fee at the rate set out at Item 11 of the Agreement Details on the value (exclusive of any GST) of all Products or Services invoiced to and paid for by a Customer pursuant to an Order.
- (b) The Contractor shall use its best endeavours to ensure that the obligations imposed on it in relation to the Management Fee are met, including ensuring that:
  - (i) all Eligible Customers use an Order for placing orders for Deliverables,
  - (ii) the Contractor sells the Deliverables to Eligible Customers on the terms and conditions of this Agreement; and
  - (iii) the Contractor acts in good faith in relation to all its obligations under this clause 3.1.1.
- 3.1.2** Within 7 days of the end of each Payment Period the Contractor shall forward electronically through smartbuy® to the Contract Authority a report (hereinafter referred to as a Sales Report) which relates to the relevant Payment Period and which requires the Contractor to report:
  - (i) the total amount all Customers are liable to pay in respect of all items invoiced by the Contractor to those Customers;
  - (ii) the names of the five largest Customers, listed by dollar value, invoiced by the Contractor; and
  - (iii) such other relevant information as the Contract Authority may reasonably require.

The parties agree that the Contract Authority may by prior notice in writing to the Contractor amend the procedure for collection of information set out in this clause 3.1 from time to time.

- 3.1.3** (a) Upon receipt of a Sales Report from the Contractor, the Contract Authority shall compile an invoice for the Management Fee based on the Sales Report and forward that Tax Invoice to the Contractor.

- (b) In the event that the Contractor does not complete the Report within seven days, the Contractor will be liable for interest in accordance with item 11 of the Schedule on the amount which (had this clause been complied with) would have been invoiced to the Contractor, calculated from 7 days after the expiry of the relevant Payment Period.
- 3.1.4** (a) The Contractor shall then forward to the Contract Authority payment, for each Tax Invoice received, within fourteen days of the date of the Tax Invoice.
- (b) In the event that the Contractor does not provide payment within fourteen days the Contractor will be liable for interest in accordance with item 11 of the Schedule on the invoiced amount, calculated from 21 days from the date of the Tax Invoice.
- 3.1.5** Payment shall be by means of electronic funds transfer to a bank as advised in the invoice referred to in Clause 3.1.4 or by a cheque made payable to the addressee set out at Item 11(c) of the Agreement Details and shall be forwarded to the address set out at Item 11(d) of the Agreement Details.
- 3.1.6** Where the Contractor considers that an accounting adjustment to the amount of Management Fee paid or payable during a Payment Period is required, it shall consult with the Contract Authority and the Parties may agree on the amount of any adjustment.
- 3.1.7** Where the Contractor has not issued any invoice to a Customer during a Payment Period, the Contractor shall provide, within 30 days from the conclusion of that Payment Period, a report stating that no payment was made during that Payment Period and shall be supported by a Statutory Declaration.
- 3.1.8** The Parties agree that for the purpose of determining if an Order has been placed under this Agreement the following criteria shall apply:.
- (i) All New South Wales government departments and agencies are Eligible Customers and are required to place their Orders under this Agreement;
- (ii) All other Eligible Customers located in or affiliated with New South Wales, including State owned corporations, councils established under the Local Government Act 1993 and not for profit organisations will be treated as having placed their Orders under this Agreement unless the Contractor can provide evidence to the satisfaction of the Contract Authority that the purchase was made under another contract between the Eligible Customer and the Contractor;
- (iii) All Eligible Customers not located in or affiliated with New South Wales, including other State and Territory governments and the Commonwealth will be treated as having made their purchases under this Agreement only where they have so advised the Contractor at the time of placing their order. The Contract Authority otherwise bears the onus of establishing that any such orders were placed under this Agreement.
- 3.1.9** The Contractor acknowledges that the Management Fee payable has been allowed for in the tendered price together with all costs associated with calculation proving and payment of the Management Fee and agrees that the amount of the Management Fee will not under any circumstances be shown as a separate charge in any quotation or invoice.
- 3.1.10** The Contractor shall set up and maintain a system to the reasonable satisfaction of the Contract Authority, suitable for identifying all purchasers of the Deliverables provided by the Contractor that are Eligible Customers, the monitoring by the Contract Authority of Orders placed with, and invoices issued by, the Contractor, and for the provision of the information required under clause 3.1.2. The system shall enable the Contract Authority to check whether any Eligible Customers have procured Deliverables from the Contractor.
- 3.1.11** The Contract Authority may take such measures as are reasonable in all the circumstances (including the appointment of an auditor) to verify that the Contractor has paid the correct amount of Management Fee due to the Contract Authority. If the Contract Authority appoints

an auditor (being an auditor who must not be a competitor of the Contractor), the Contract Authority will inform the Contractor in writing of the appointment. The Contractor agrees to cooperate with the auditor appointed by the Contract Authority including providing access within 10 working days of the written notification from the Contract Authority that an audit will take place, to information about all sales of Deliverables made to Eligible Customers (whether pursuant to an Order or otherwise), copies of all contracts, orders and invoices (excluding disclosure of the Contractor's internal costings, profit margins and information not associated with compliance with the Agreement) between the Contractor and any Eligible Customers. The Contractor agrees to provide the Auditor appointed by the Contract Authority access on the basis of the appointed auditor entering into an Auditor Confidentiality Agreement in substantially the form set out in Schedule 14, and in accordance with the Contractor's reasonable access and security requirements.

If the measures taken in this clause 3.1.11 demonstrate that the Contractor has not paid the Management Fee that is actually due to the Contract Authority, the Contractor shall:

- (a) pay the difference between the Management Fee paid to the Contract Authority and the Management Fee actually payable to the Contract Authority within 30 days of a direction from the Contract Authority; and
- (b) at the discretion of the Contract Authority, reimburse the Contract Authority's costs and expenses of the measures (including without limitation, the appointed auditor's fees) taken under this clause 3.1.11 to the Contract Authority in accordance with the sliding scale set out below:

<u>Proportion of audit cost to be borne</u>	<u>Difference between Management Fee paid and payable</u>
\$0	95% of payable Management Fee was paid
50% of audit and other costs	75-95% of payable Management Fee paid
75% of audit and other costs	50-75% of payable Management Fee paid
100% of audit and other costs	less than 50% of payable Management Fee paid

- 3.1.12** The Contractor shall, while this Agreement is in force, and for a 12 month period after this Agreement has expired, or, if this Agreement is terminated before that time, for a period of 12 months from the date the Agreement was terminated, keep secure all relevant Documents and supporting materials and give any auditor appointed by the Contract Authority or any auditor it may appoint access at all reasonable times to those Documents and supporting materials.
- 3.1.13** The Contractor will pay to the Contract Authority an amount equal to the GST payable by the Contract Authority on the taxable supply made by the Contract Authority for which the Management Fee is payable under this Agreement. That amount will be paid to the Contract Authority at the time the Management Fee is payable under this Agreement and will be paid in addition to the Management Fee. The Contract Authority will provide the Contractor with a tax invoice in respect of the taxable supply.
- 3.1.14** A breach by the Contractor of this clause (including without limitation, a failure by the Contractor to cooperate satisfactorily with the audit referred to in clause 3.1.11) shall be a Substantial Breach of this Agreement which will entitle the Contract Authority to terminate this Agreement pursuant to clause 18.2 without prejudice however to the right of the Contract Authority to recover from the Contractor any sums payable to the Contract Authority under this Agreement or otherwise, or the right of the Contract Authority to deduct those sums from any money that may be or become payable by the Contract Authority to the Contractor on any other account.
- 3.1.15** For the purposes of this clause, 'Payment Period' means each period of 30 days from the first day of the Term of this Agreement (or part thereof).

**3.1.16** Where the Contractor is required to make payments pursuant to either cl 3.1.3(b) and/or 3.1.4(b) such payment will be made within 30 days after receiving written notice from the Contract Authority which advises the amount payable under those clauses.

### **3.2 REVIEW OF CONTRACTOR'S PERFORMANCE BY CONTRACT AUTHORITY**

**3.2.1** The Contract Authority may from time to time conduct performance reviews to evaluate, monitor or review the Contractor's performance and compliance with this Agreement or any Contracts. This review may include consideration of Contractor Information and/or Performance Criteria.

**3.2.2** The Contract Authority will give the Contractor the opportunity to participate in any performance reviews and to seek a review of each written performance report compiled in response to any performance review by a senior officer of the Contract Authority. A written performance report will note any objections by the Contractor made when participating in the performance review as provided for in this clause. The Contract Authority regards and the Contractor acknowledges that the provision of any performance reports is privileged within the legislation referenced at item 5(b) of the Agreement Details.

### **3.3 EXCHANGE OF CONTRACTOR INFORMATION**

**3.3.1** The Contractor authorises the Contract Authority and its Personnel to make available any Contractor Information to any other Agency.

**3.3.2** The Contract Authority regards and the Contractor acknowledges that the provision of the Contractor Information to any Agency is privileged within the legislation referenced at item 5(b) of the Agreement Details.

**3.3.3** The Contractor releases and indemnifies the Contract Authority, the State, and its Personnel from any claim in respect of any matter arising out of the disclosure of any of the Contractor Information to any other Agency in accordance with clause 3.3.1 where that Contractor information is false or misleading.

**3.3.4** This clause 3.3 shall survive the termination or expiry of this Agreement for a period of 6 years.

### **3.4 NOTIFICATION OF CHANGE IN CONTROL OR TRANSFER OF OWNERSHIP**

During the Term, the Contractor must immediately notify the Contract Authority and any Customers under an existing Contract in writing of any Change in Control or other action to reconstruct or amalgamate itself.

### **3.5 NOTIFICATION OF CONTRACTOR'S INSOLVENCY**

**3.5.1** The Contractor must immediately notify the Contract Authority in writing of the Contractor's insolvency and disclose the details of any:

- (a) action taken in relation to the Contractor's insolvency in so far as it affects this Agreement or any Contracts;
- (b) existing Contracts which the Contractor has entered into under this Agreement; and
- (c) applicable Performance Guarantees or Financial Securities that the Contractor has entered into under a Contract.

**3.5.2** The Contractor must immediately notify all Customers under an existing Contract in writing of the Contractor's Insolvency.

### **3.6 ELECTRONIC COMMERCE**

If requested by the Contract Authority, the Contractor must implement any arrangements for

electronic commerce specified in Schedule 2 or in Item 10 of the Agreement Details.

## 4. Product or Service

### 4.1 PRODUCT AND SERVICE LIST

Any Product or Service listed in Schedule 3 may be supplied by the Contractor under this Agreement.

### 4.2 VARIATION OF DESCRIPTION OF PRODUCT OR SERVICE

**4.2.1** The Contractor must promptly notify the Contract Authority of any proposed variation to the description of a Product or Service offered in Schedule 3.

**4.2.2** A variation under this clause 4.2 excludes a variation:

- (a) to the Price of a Product or Service;
- (b) that modifies or upgrades a Product or Service; or
- (c) that introduces a new Product or Service.

**4.2.3** The Contract Authority will notify the Contractor in writing whether it accepts the variation to the description of the Product or Service and the incorporation of the accepted variations into Schedule 3.

### 4.3 MODIFICATIONS, UPGRADES AND IMPROVEMENTS TO PRODUCT OR SERVICE

**4.3.1** If during the Term the Contractor makes available on a general commercial basis products or services that:

- (a) are modified or enhanced versions or upgrades of a Product or Service; or
- (b) have a function or purpose similar to that performed by a Product or Service; or
- (c) have a new function or purpose consistent with the nature of a Product or Service,

then the Contractor must offer to the Contract Authority within 60 days of the product being available on a general commercial basis to include those products or services in Schedule 3.

**4.3.2** If during the Term the Contractor makes available on a general commercial basis, new products or services with a function or purpose unrelated to a Product or Service, the Contractor may, at its discretion, offer to the Contract Authority to include those products or services in Schedule 3.

**4.3.3** The products and services offered by the Contractor under this clause 4.3 will form part of Schedule 3 when the Contract Authority notifies the Contractor of its acceptance of the offer.

**4.3.4** In the event that the Contract Authority has not notified the Contractor of its acceptance of the Contractor's offer within 30 days, the offer will be deemed not to have been accepted.

## 5. Pricing

### 5.1 MAXIMUM PRICE FOR THE DELIVERABLES

The Price is the maximum price payable by a Customer for a Deliverable during the Term subject to any increase made in accordance with any price variation mechanism specified in Schedule 3.

## 5.2 REDUCTIONS IN PRICE

- 5.2.1** The Contractor may reduce the Price or increase the discount applicable to a Deliverable at any time by notifying the Contract Authority in writing.
- 5.2.2** Where the Contractor offers a temporary price special that is lower than a Price specified in Schedule 3 the Contractor may make available that lower price to all Customers.

## 5.3 BULK PURCHASE DISCOUNTS

- 5.3.1** The Contract Authority may request quotations from the Contractor for:
- (a) discounts on volume purchases of Deliverables on behalf of a Customer; and/or
  - (b) aggregating purchases of Deliverables on behalf of Customers.
- 5.3.2** The Parties agree that any new volume or bulk purchase discount under this clause 5.3 constitutes a variation to Schedule 3 under clause 17.1.

## 5.4 BEST PRICE

- 5.4.1** The Contractor warrants that it will offer to Customers a Price for a Deliverable which is no less favourable than the price paid by any other purchaser in Australia from the Contractor of similar Deliverables purchased in similar circumstances including volumes (where Price is volume dependent) and timing where it has a substantial impact on price or terms and conditions where they have a substantial impact on price.
- 5.4.2** Where the Contractor offers more favourable prices to any other purchaser of similar Deliverables in Australia purchased in similar circumstances including volumes (where Price is volume dependent), timing where it has a substantial impact on price or terms and conditions where they have a substantial impact on price, it must promptly make the more favourable price available to all Eligible Customers entitled to the benefit of this Agreement for future Orders, and amend Schedule 3 accordingly.

## 5.5 TAXES, DUTIES AND GOVERNMENT CHARGES

- 5.5.1** Excepting clause 5.5.2 to 5.5.5 inclusive, the Contractor is liable for all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the performance of any Contract arising out of this Agreement.
- 5.5.2** No amount is payable under this Agreement or a Contract until a Correctly Rendered Invoice is received.
- 5.5.3** If there is any abolition or reduction, increase or introduction of any tax, duty, excise or statutory charge the Consideration payable for the Deliverable must be varied so that the Contractor's net dollar margin for the Deliverable remains the same.
- 5.5.4** Any contract entered into by a Party to this Agreement or a contract with a third party which involves a Supply being made, the cost of which will affect the cost of any Supply made under or in connection with this Agreement or a Contract, must include a clause in equivalent terms to clause 5.5.2.
- 5.5.5** The Parties agree that all amounts payable or Consideration given by a Party to the other under this Agreement are inclusive of all taxes, duties, excises and statutory charges.
- 5.5.6** Any reference in this Agreement or in a Contract to a cost or expense to be reimbursed by one Party to another Party includes any GST payable in connection with a Taxable Supply to which that cost or expense relates, less the amount of any input tax credit that the Party requiring the reimbursement is entitled to claim.

## 6. Formation of Contract

### 6.1 CREATION OF CONTRACT

- 6.1.1** A Contract between a Contractor and Customer will be created under this Agreement upon:
- (a) the Parties mutually agreeing to the Order Details and any Additional Conditions; and
  - (b) the Customer and the Contractor signing the Order on the agreed terms, including by way of an electronic communication with the Contractor.
- 6.1.2** The Parties acknowledge and agree that each time a Customer places an Order with the Contractor in accordance with clause 6.1.1, a separate Contract is created which will take effect from the Commencement Date.
- 6.1.3** No legal or equitable rights or obligations in relation to a Product or Service arise between a Customer and the Contractor unless and until a Contract has been created.

### 6.2 NON-COMPLETION OF ORDER DETAILS

To the extent that a Customer has not included details relevant to an item in the Order, that item will be deemed not applicable unless the Contract Authority and the Contractor have agreed minimum conditions as to this item under the Agreement.

### 6.3 ADDITIONAL CONDITIONS IN CONFLICT WITH AGREEMENT

Any Additional Conditions that have an effect that is contrary to the terms and conditions of this Agreement are void and of no legal effect, unless the Contract Authority has given its prior written consent to their inclusion in the Order.

### 6.4 TERMS AND CONDITIONS OF CONTRACT

The terms and conditions of the Contract are those appearing in:

- (a) the terms of any variation to this Agreement relating to the specified Contract, approved pursuant to this Agreement by the Contract Authority;
- (b) the Modules to this Agreement referenced in or attached to the Order;
- (c) the terms of the Agreement (excluding the Modules) at the Commencement Date; and
- (d) the Order.

Any inconsistency between the above documents shall be determined in the Order of priority from (a), (b), (c) and (d), to the extent of any inconsistency.

### 6.5 SUPPLY THROUGH APPROVED PARTIES

- 6.5.1** The Contractor may supply Deliverables to the Customer through Approved Parties as authorised in writing by the Contract Authority or through those listed in the Agreement Details.
- 6.5.2** If an Order is placed by a Customer with an Approved Party, the Contractor is deemed to have entered into a Contract with the Customer.
- 6.5.3** The Contractor must ensure that its Approved Parties supply the Deliverables only in accordance with the terms of this Agreement and any Contract pursuant to which the Approved Party is to supply the Deliverables.
- 6.5.4** If the Contract Authority requires it, the Contractor must arrange for its Approved Parties to

execute a statutory declaration substantially in the form of Schedule 4.

- 6.5.5** The Contractor's obligations under this Agreement are not affected in any way by the supply through Approved Parties.
- 6.5.6** The Contractor shall at all times indemnify the Customer and its Personnel against all claims, actions, loss or damage and all other liability arising out of the performance by the Approved Party of the Contractor's obligations under the Contract.

## **6.6 NOMINEE PURCHASERS**

- 6.6.1** The Contractor must satisfy any Order placed under this Agreement by a Nominee Purchaser, provided that the Nominee Purchaser:

- (a) provides its current registration number as given by the Contract Authority;
- (b) provides its nominating agency's Australian Business Number (ABN); and
- (c) provides the Contractor with the written authorisation of the Contract Authority that includes the details of the Nominee Purchaser's rights to purchase Deliverables under this Agreement.

- 6.6.2** The terms of this Agreement apply to any Orders placed by the Nominee Purchaser.

- 6.6.3** If the Contractor makes a supply under the Agreement to an entity purporting to be a Nominee Purchaser, the Contractor is taken to be satisfied that the supply is properly made under this Agreement.

## **6.7 RESTRICTIONS ON SUPPLYING TO PARTICULAR CUSTOMERS**

The Contractor may refuse to supply Deliverables to a particular Customer or Nominee Purchaser provided it has used reasonable endeavours to reach agreement with the Customer or Nominee Purchaser and it has first obtained the Contract Authority's prior written consent to the restriction. The Contract Authority will not act unreasonably in delaying or withholding consent.

# **7. Conduct and Dispute Resolution**

## **7.1 CO-OPERATION**

The Parties must do all they reasonably can to co-operate in all matters relating to the Agreement and/or Contract, but their rights and responsibilities under the Agreement and/or Contract remain unchanged unless the Parties agree in writing to vary them.

## **7.2 DUTY NOT TO HINDER PERFORMANCE**

Each Party must do all it reasonably can to avoid hindering the performance of the other under the Agreement and Contract.

## **7.3 ISSUE RESOLUTION**

- 7.3.1** The Parties agree to resolve any conflicts or issues between them in relation to this Agreement or any Contracts in accordance with the provisions of clauses 7.3 to 7.5 inclusive and Schedule 5.
- 7.3.2** The Parties must follow the issue resolution process in clauses 7.4, 7.5 and Schedule 5 which documents the Expert Determination Procedure before either commences legal proceedings or takes similar action except to seek an urgent injunction or declaration.

## 7.4 AMICABLE RESOLUTION

- 7.4.1** A Party may submit notice (“the Issue Notice”) to the other Party of an issue, including a dispute or difference about the meaning or effect of the Agreement or any matter arising under or out of the Contract. The Issue Notice must be submitted within a reasonable time of the Party becoming aware of the issue.
- 7.4.2** The Party submitting the Issue Notice must submit it to the other Party’s authorised representative.
- 7.4.3** If a Party submits an Issue Notice under this clause, each Party will nominate in writing, within 7 days, a senior executive. The nominated senior executives will promptly confer at a time and place that is mutually convenient to resolve the issue. The nominated senior executives may invite other Personnel to attend the mutually convenient conference subject to a list of additional invited Personnel being provided to the other nominated senior executive at least 24 hours prior to the conference.
- 7.4.4** If the Parties are able to agree upon a resolution to the dispute, the terms of the agreement are to be documented and signed by both nominated senior executives. Such an agreement will be binding on both parties.
- 7.4.5** Each Party will bear its own costs under this clause 7.4.

## 7.5 REFERRAL TO EXPERT DETERMINATION

- 7.5.1** A Party is not entitled to refer an issue to Expert Determination until 21 days after the submitting of the Issue Notice and the issue resolution process in clause 7.4 has failed to resolve the dispute within that 21 day period.
- 7.5.2** A Party may only refer an issue to Expert Determination by submitting Notice in Writing specifying the issue to be decided (“the Referral Notice”).
- 7.5.3** The Party submitting the Referral Notice must submit the Referral Notice to the other Party.
- 7.5.4** If the Contract Authority is not the referring party or has not received a notice pursuant to clause 7.5.3, the referring party will provide a copy of the Referral Notice to the Contract Authority.
- 7.5.5** Upon referring an issue to Expert Determination, the Parties will be bound by the provisions and procedures contained in Schedule 5.
- 7.5.6** If a Referral Notice has not been submitted within 28 days of becoming entitled under clause 7.5.1 then the issue is barred from Expert Determination or any other action or proceedings (including court proceedings). The Customer and the Contractor may, in writing, agree to extend this 28 day period for the purposes of continuing to negotiate a resolution of a particular dispute for up to another 28 days.
- 7.5.7** Notwithstanding the existence of a dispute each Party shall continue to perform its obligations under the Agreement and Contract.
- 7.5.8** Unless the Parties otherwise agree in writing this clause 7 does not apply to disputes the subject matter of which exceeds the amount nominated in Item 12 of Schedule 1. In the event that the Parties are unable to agree on the amount of the subject matter, then either Party may submit an Issue Notice to the other Party and the provisions of this clause 7 shall be followed for the sole purpose of determining the amount in dispute.

# 8. Risk Management

## 8.1 MINIMUM INSURANCE REQUIREMENTS

- 8.1.1** The Contractor must hold and maintain, and must take all reasonable steps to satisfy itself

that its subcontractors are beneficiaries under or otherwise hold and maintain, the following insurances for the Term:

- (a) public liability insurance with an indemnity of at least the amount specified in item 8 (a) of the Agreement Details in respect of each claim;
  - (b) products liability insurance with an indemnity of at least the amount specified in item 8 (b) of the Agreement Details for the total aggregate liability for all claims arising out of the Contractor's products for the period of cover, ;
  - (c) workers' compensation insurance in accordance with applicable legislation for all the Contractor's employees;
  - (d) professional indemnity insurance with an indemnity of at least the amount specified in Item 8 (c) of the Agreement Details. The professional indemnity insurance must:
    - (i) indemnify the Contractor for its liability to the Contract Authority and the Customer in respect of the Services and any Products supplied pursuant to or ancillary to the Services;
    - (ii) be maintained by the Contractor for the period specified in Item 8 (c) of the Agreement Details;
- and
- (iv) include, satisfactory to the Contract Authority, a description of the risk covered by the policy; and
- (e) such other insurances as are specified in item 8 (d) of the Agreement Details, or as the Contract Authority reasonably requires.

**8.1.2** Sub-contractors need not hold and maintain the insurance policies required in clause 8.1.1 for the same amounts of coverage as the Contractor where the price of their sub-contract .is less than the Contractor's price to the Contract Authority or Customer.

**8.1.3** All policies of insurance must be effected with an insurer Rated A- or better by AM Best or an equivalent rating organization. The Contractor must notify its subcontractors, the Contract Authority and its Customers of any material variation or cancellation of any policy of insurance required to be held and maintained pursuant to clause 8.1.1.

**8.1.4** The Contractor must, and must ensure that all its subcontractors, as soon as practicable, inform the Contract Authority and the Customer in writing of the occurrence of an event that may give rise to a claim under a policy of insurance effected as required by the Agreement and which may have any material effect upon the obligations of the Contractor under clauses 8.1.1, 8.1.2 and 8.1.3. The Contractor must ensure that the Contract Authority and the Customer are kept fully informed of subsequent action and developments concerning the claim.

**8.1.6** The Contractor must when requested in writing by the Contract Authority:

- (a) supply such proof as may reasonably be required that all insurance policies required to be effected by this Agreement are current; and
- (b) arrange for its insurer or insurance broker to complete and sign a "Confirmation of Insurances Obtained Form" substantially in the form of Schedule 6, and on-send this to the Contract Authority within 30 days of the request.

**8.1.7** If the Contractor fails to comply with clauses 8.1.1, 8.1.2, 8.1.3 or 8.1.4, the Contract Authority may treat the failure as a Substantial Breach of the Agreement.

**8.1.8** Where the Contractor is insured under a parent company's or holding company's insurance

policy, that insurance policy must clearly extend coverage to the Contractor in accordance with clause 8.1.1.

- 8.1.9** The effecting of insurance does not limit the liabilities or obligations of the Contractor under the other provisions of this Agreement.
- 8.1.10** In addition to any insurances provided by the Contractor under this Agreement, the Contractor agrees to effect any insurances required by the Customer and specified in the Order, in accordance with the provisions of this clause 8.1.
- 8.1.11** Where the Contractor does not wish to effect insurance through a recognised insurer or insurance broker as required by clause 8.1.1, it may make application to the Contract Authority supported by such documentation (including but not limited to financial records, details of claims made, and licences from the relevant licensing authority) as is reasonably required by the Contract Authority to be exempted from the provisions of clauses 8.1.1 – 8.1.8. The Contract Authority in its absolute discretion may accept, conditionally accept or reject the Contractor's application.
- 8.1.12** Without limiting the conditions under which the Contract Authority may signify its acceptance under clause 8.1.10, the Contract Authority may require the Contractor to ensure that all its subcontractors hold the relevant insurance policies required by clause 8.1.1.
- 8.1.13** Where the Contract Authority has accepted the Contractor's application under clause 8.1.10, the Contractor must, and must ensure that all its subcontractors, as soon as practicable, inform the Contract Authority and the Customer in writing of the occurrence of an event that may give rise to a claim which may have a substantial impact on the Contractor's ability to meet its potential liabilities arising from a Contract or this Agreement, and must ensure that the Contract Authority and the Customer are kept fully informed of subsequent action and developments concerning the claim.

## **8.2 FINANCIAL SECURITY**

- 8.2.1** The Contract Authority may from time to time on reasonable grounds notify the Contractor in writing that it must provide a Financial Security substantially in the form of the agreement set out in Schedule 7. The Contractor must, following such a request, ensure that the Financial Security is provided before the placement of any further Orders under this Agreement by a Customer.
- 8.2.2** The Financial Security will be held as security for the due and proper performance and completion of all the obligations of the Contractor under this Agreement and any Contracts.
- 8.2.3** The Financial Security must be issued by an Australian domiciled bank, insurance company or other financial institution ("Issuer") acceptable to the Contract Authority.
- 8.2.4** If the Contractor fails to properly perform and complete its obligations under this Agreement or a Contract and the Contract Authority or the Customer suffers loss or damage arising from, or in connection with, such failure by the Contractor, the Contract Authority or the Customer may deduct any or all such loss or damage (as ascertained and certified by the Contract Authority) from the Financial Security.
- 8.2.5** If the Financial Security is not sufficient to meet payment of all the loss or damage suffered by the Contract Authority or the Customer, the balance remaining will be a debt due and owing from the Contractor to the Contract Authority or the Customer and may be recovered by the Contract Authority or the Customer in accordance with clause 16.3.
- 8.2.6** The Contractor agrees that the Contract Authority or the Customer will have no liability for any loss or damage suffered or incurred by the Contractor where the Contract Authority or the Customer exercises its rights under this clause in good faith.
- 8.2.7** The Contractor waives any rights it may have to obtain an injunction or otherwise prevent the Contract Authority or the Customer from making a claim or receiving a payment under the

Financial Security. This clause 8.2.7 does not prevent the Contractor from taking action to recover from the Contract Authority or the Customer any amount invalidly received by the Contract Authority under any such Financial Security.

**8.2.8** The Financial Security must be released to the Contractor (or to whom the Contractor directs) if:

- (a) the Contractor has fully performed and discharged all of its obligations under this Agreement or a Contract; and
- (b) in the reasonable opinion of the Contract Authority or the Customer as applicable, there is no prospect that money or damages will become owing (whether actually or contingently) by the Contractor to the Contract Authority or the Customer.

**8.2.9** The Customer may on reasonable grounds specify in the Order or otherwise request in writing, a Financial Security where one has not previously been provided or an increase in the Financial Security provided by the Contractor at the request of the Contract Authority or a Customer. The Contractor must provide the security required by the Customer in accordance with the provisions of this clause 8.2. The Customer shall not be obliged to make any further payments under the Contract, whether or not such payments are due, until such security has been provided.

**8.2.10** Upon performance of part of the Contract to the satisfaction of the Customer, the Contractor may request the Customer to consent to the discharge of the security provided pursuant to clause 8.2.9 and the substitution of another security in substantially the same form but for a lesser maximum aggregate sum. The Customer shall not unreasonably withhold its consent to the substitution where the part performance of the Contract has proportionately reduced the risk for which the security was originally provided.

### **8.3 PERFORMANCE GUARANTEE**

**8.3.1** If requested by the Contract Authority or the Customer on reasonable grounds, the Contractor must arrange for a guarantor approved in writing by the Contract Authority or the Customer to enter into an agreement with the Contract Authority or the Customer substantially in the form of the agreement set out in Schedule 8.

**8.3.2** The Customer may on reasonable grounds specify in the Order or otherwise request in writing, a Performance Guarantee where one has not previously been provided or additional guarantors where a Performance Guarantee has been provided by the Contractor at the request of the Contract Authority or a Customer. The Contractor must provide the guarantee required by the Customer in accordance with the provisions of this clause 8.3.

### **8.4 REDUCTION OF LIABILITY**

**8.4.1** The liability of a Party for any loss or damage sustained by the other Party will be reduced proportionately but only to the extent that any wrongful (including negligent) act or omission of the other Party or its Personnel caused or contributed to the loss.

**8.4.2** The Contractor will not be held accountable for a failure to meet its contractual obligations to the extent that the failure is attributable to the provision by the Customer of inaccurate or incomplete information which is required by the Contractor for the purposes of the Contract. The Contractor must notify the Customer as soon as practicable if it becomes aware that the provision by the Customer of incomplete or inaccurate information in any instance might prevent the Contractor from complying with its obligations under this Contract.

### **8.5 LIMITATION OF LIABILITY**

**8.5.1** Subject to clause 8.5.5, the Contractor's liability under a Contract in respect of each occurrence giving rise to any action is limited to the amount set out in item 16 of the Agreement Details. Should item 16 not be completed, the Contractor's liability under a Contract will remain uncapped.

**8.5.2** Subject to clause 8.5.5, the Contract Authority may consent to the capped liability outlined in clause 8.5.1 being further reduced under a Contract in the following circumstances:

- (a) the Contractor is in a Small to Medium Enterprise category under the Agreement in which event liability can be capped at the upper limit of insurance specified in the Order form Part B1(a) (per event);
- (b) Contractor is offering telecommunications services under the Agreement which involve end-to-end multi carrier networks without umbrella service level contracts and/or physical network assets which are in the public domain, the liability can be capped at the upper limit of insurance specified in the Order form Part B1(a) (per event).

**8.5.3** To the extent that the Contractor's liability under a Contract is not capped in accordance with clauses 8.5.1 and 8.5.2, liability may only be capped (subject to clause 8.5.5) if:

- (a) a risk management plan consistent with AS/NZ 4360:2004 is completed by the Customer and/or Contract Authority, and the Contractor; and
- (b) the Contract Authority has approved in writing the risk management plan and the liability cap sought.

The risk management plan must include at least:

- (a) a description of the procurement context;
- (b) an identification and schedule of potential risks and their impacts;
- (c) an assessment of risk likelihood and consequences;
- (d) a risk treatment plan; and

must be provided substantially in the form of Schedule 13.

The Parties will each bear their own costs in completing the risk assessment.

**8.5.4** The Customer and the Contractor may agree to increase the amount of the cap on liability in relation to a Contract set under clause 8.5.1 upon such terms as they mutually agree and such agreement must be included in the Order.

**8.5.5** The liability of the Contractor under the Contract in respect of the following occurrences will be unlimited:

- (a) personal injury (including sickness and death);
- (b) loss of, or damage to, tangible property;
- (c) breach of a Statutory Requirement,
- (d) infringement of a third party's intellectual property rights.

including liability under any indemnities provided under clause 11.1 in relation to any such occurrences.

**8.5.6** In clause 8.5 "occurrence" means either a single occurrence, or a series of occurrences if these are linked or occur in connection with one another from one original cause, as the case may be.

**8.5.7** The Parties' liability does not include Consequential Loss.

## 9. Information Management

### 9.1 CONFIDENTIALITY

- 9.1.1** Except to the extent necessary to comply with any Statutory Requirements or government policy relating to the public disclosure of Confidential Information, neither Party will make public, disclose or use any Confidential Information of the Other Party except in accordance with this Agreement or a Contract, unless the other Party gives its prior written consent.
- 9.1.2** Each Party may disclose the Confidential Information of the Other Party to its Personnel where the disclosure is essential to carrying out their duties for the purposes of this Agreement or a Contract.
- 9.1.3** Each Party must ensure that any Confidential Information of the Other Party is used solely in connection with, or for the purposes of fulfilling its obligations under, this Agreement or a Contract.
- 9.1.4** The Contract Authority or the Customer may at any time require the Contractor to arrange for its Personnel engaged in the performance of this Agreement or a Contract to execute without delay a Deed of Confidentiality substantially in the form of Schedule 9.
- 9.1.5** If specified in the Order, the Contractor may disclose or use any information about a Contract where such information is in respect of know-how, techniques or methodologies which may be gained by the Contractor during the period of the Contract or disclosed by the Customer pursuant to a Contract except where such disclosure or use would infringe the Intellectual Property of any other person.
- 9.1.6** This clause 9.1 shall survive the termination or expiry of the Agreement or a Contract for a period of six years.

### 9.2 INTELLECTUAL PROPERTY

- 9.2.1** Subject to clauses 9.2.2 and 9.2.3, all Intellectual Property in the Deliverables shall immediately vest upon their creation in the Customer without further need for assurance.
- 9.2.2** Nothing in this clause 9.2 will affect the ownership of any Intellectual Property in any tools, software (including source or object code), object libraries, methodologies and materials ("Materials") which came into existence independently of this Agreement and are used to produce or are incorporated into a Deliverable. Where the Intellectual Property in such Materials are owned by the Contractor or a third party, the Contractor grants and will ensure that relevant third parties grant to the Customer, at no additional cost a perpetual, non-exclusive, transferable licence which, at a minimum, permits the Customer:
- (a) to use, reproduce and adapt such Materials for its own use in connection with, or for the operation, support and/or use of, any Deliverable; and
  - (b) where and only to the extent specified in the Order, to perform any other act with respect to copyright or to manufacture, sell, hire or otherwise exploit the items or to license any third party to do any of those things in respect of the Materials.
- 9.2.3** The Customer and Contractor may specify in the Order that certain Intellectual Property in a Deliverable or Deliverables does not vest in the Customer under this Agreement. To the extent specified in the Order, Intellectual Property in the Deliverables vests on creation in the Contractor. In that event, the Contractor grants a perpetual, non-exclusive and transferable licence to the Customer to use, reproduce and adapt such Deliverables to support the Customer's business and administrative processes.
- 9.2.4** The Customer grants the Contractor a non-exclusive, non-transferable licence for the Contract Period to use the Customer's Materials to the extent necessary for the Contractor to provide the Deliverables.

- 9.2.5** In this clause 9.2, a reference to a licence being transferable, means that that licence may be transferred from the Customer to another Agency within the same tier of government as the Customer.

## 10. Access and Security

### 10.1 ACCESS TO CUSTOMER'S SITE

- 10.1.1** Where the Customer provides the Contractor with access to the Customer's Site, the Contractor shall:

- (a) ensure that its Personnel comply with the reasonable requirements and directions of the Customer with regard to conduct, behaviour, safety and security; and
- (b) be liable for any damage to the extent that such damage is caused by its Personnel on the Customer's Site.

- 10.1.2** Access to the Customer's Site may be temporarily denied or suspended by the Customer, at its sole discretion.

- 10.1.3** Except where denial of access is due to an adverse finding arising out of an investigation into the conduct of the Contractor or its Personnel, the Customer must give a reasonable extension of time to complete any obligations affected by the denial of access.

- 10.1.4** The Customer must reimburse the Contractor its reasonable, unavoidable and substantiated costs caused by the denial of access (except where the denial is related to an investigation into the conduct of the Contractor or its Personnel). Reimbursement of those costs shall be in total satisfaction of the liability of the Customer to the Contractor in respect of the denial of access.

### 10.2 PRIVACY

- 10.2.1** During this Agreement or a Contract, the Contractor must comply with its obligations under Schedule 10 and any Statutory Requirements relating to privacy.

- 10.2.2** The Contractor must immediately notify the Contract Authority or the Customer when the Contractor becomes aware of or receives a complaint relating to a breach of this clause 10.2 by its Personnel or Approved Parties.

- 10.2.3** The Contractor will indemnify the Contract Authority and the Customer in respect of any loss, liability or expense incurred and arising out of or in connection with the Contractor's breach of any obligations under or pursuant to this clause 10.2.

- 10.2.4** The Contract Authority or Customer must give the Contractor fourteen days Notice in Writing of an intention to claim a liability, loss or expense in accordance with clause 10.2.3 including in that notice an explanation of how that liability or expense was assessed and the Contractor's proposed share of that liability.

- 10.2.5** This clause 10.2 will survive the termination or expiry of this Agreement or relevant Contract for a period of six years.

### 10.3 SECRECY AND SECURITY

- (a) The Contractor shall comply and shall ensure that its Personnel comply with the secrecy and security requirements of the Customer as set out in the Order, or as notified in writing by the Customer to the Contractor from time to time.
- (b) Should the Customer provide notice of additional secrecy and security requirements subsequent to the Commencement Date, the Contractor is entitled to be reimbursed by the Customer for any expenses incurred in complying with such requirements.

- (c) Should the Customer provide notice of additional secrecy and security requirements subsequent to the Commencement Date, the Contractor will be entitled to an extension of time to the extent that any delay is caused by complying with the requirements.
- (d) In relation to paragraphs (b) and (c) the Contractor will mitigate any expenses incurred or delay caused as a result of complying with the requirements.

## 11. Contractor's Obligations

### 11.1 GENERAL INDEMNITY FOR CONTRACT AUTHORITY AND CUSTOMER

**11.1.1** The Contractor will be liable in respect of, and indemnifies, and will keep indemnified, the Contract Authority and the Customer (including their Personnel) against any claim, loss or expense (including a claim, loss or expense arising out of personal injury or death or damage to property) which any of them pays, suffers, incurs or is liable for (including legal costs on a solicitor and client basis) (together, "the Loss") as a result of any wrongful (including negligent) act or omission of the Contractor or its Personnel or subcontractors in the performance of this Agreement; or

The Contract Authority and the Customer must use their best endeavours to mitigate any Loss under the indemnity set out in this clause.

**11.1.2** The Contractor's liability in respect of any indemnity provided under:

- (a) this clause 11.1.1; or
- (b) any of clauses 6.5.6, 10.2.3 and 11.11.2,

will be subject to any applicable limitations on liability contained in clause 8.5.

**11.1.3** The Contract Authority and the Customer must use their best endeavours to mitigate any Loss under the indemnity set out in this clause.

**11.1.4** This clause 11.1 will survive the termination or expiry of this Agreement or any Contract for a period of six years.

### 11.2 INDEMNITY – THIRD PARTY CLAIMS

**11.2.1** The Contractor must indemnify the Contract Authority and the Customer (including their Personnel) against a loss or liability that has been incurred by the Contract Authority or the Customer as the result of any claim made by a third party:

- (a) where that loss or liability, including personal injury, death or property damage, was caused or contributed to (but only to the extent of that contribution) by any wrongful (including negligent) act or omission by the Contractor or its Personnel;
- (b) where that loss or liability arises from a claim made or threatened against the Customer in which it is alleged that a Deliverable (including the Customer's use of a Deliverable) infringes the Intellectual Property, including the Moral Rights of a third party or individual who has performed work under the Contract on behalf of the Contractor.

**11.2.2** For the purposes of clause 11.2.1(b) an infringement of Intellectual Property rights includes unauthorised acts which would, but for the operation of the Patents Act (Cth) 1990 s.163, the Designs Act (Cth) 2003 ss 96, 100, the Copyright Act (Cth) 1968 s.183 and the Circuits Layout Act (Cth) 1989 s.25, constitute an infringement.

**11.2.3** The Customer may in its discretion permit the Contractor, at the Contractor's expense, to handle all negotiations for settlement of such claim and, as permitted by law, to control and direct any litigation that may follow a claim under clause 11.2.1, subject to the Contractor agreeing to comply at all times with the Customer's reasonable directions and government

policy relevant to the conduct of the litigation.

- 11.2.4** Where the Customer permits the Contractor to handle the claim, the Customer will, upon the Contractor confirming its obligations under the indemnity in clause 11.2.1, provide the Contractor with reasonable assistance in defending, settling or otherwise conducting the claim at the Contractor's expense.
- 11.2.5** Notwithstanding clause 11.2.1, the Contractor shall not be required to indemnify the Contract Authority if a Customer institutes legal proceedings against the Contract Authority for a breach of the Authority's obligations to the Customer.
- 11.2.6** Without prejudice to the Customer's rights under clause 11.2.1 if a claim of infringement of Intellectual Property rights is made by a third party, the Contractor must with the consent of the Customer, at the Contractor's expense, either:
- (a) obtain for the Customer the right to the continued use of the Deliverable; or
  - (b) replace or modify the Deliverable so that the alleged infringement ceases and the replaced or modified Deliverable provides the Customer with equivalent functionality and performance as required in the Contract Specifications.
- 11.2.7** This clause 11.2 will survive the termination or expiry of this Agreement or any Contract for a period of six years.
- 11.2.8** Notwithstanding any other provision of this Agreement (including clause 8.5 and clause 11.1), the liability of the Contractor under this clause 11.2 will be unlimited.

### **11.3 CONTRACTOR'S WARRANTIES**

- 11.3.1** The Contractor warrants until the end of the Warranty Period that:
- (a) it has the right and authority to enter into this Agreement and any Contract;
  - (b) to the best of its knowledge, no Conflict of Interest of the Contractor or its Personnel exists or is likely to arise in the performance of their obligations under this Agreement or any Contract;
  - (c) the information provided by the Contractor as to the structure, viability, reliability, insurance cover, capacity, experience and expertise of the Contractor and its Personnel, after making due enquiry, is correct to the best of its knowledge;
  - (d) to the best of its knowledge it has obtained all licences, approvals and consents necessary to grant any rights or perform any obligations under this Agreement or any Contract;
  - (e) to the best of its knowledge the Deliverables do not infringe the Intellectual Property or Moral Rights of a third party;
  - (f) if any information in this clause ceases to remain correct or accurate, it will immediately notify the Contract Authority and Customer; and
  - (g) if a Virus is introduced into the Customer's data processing systems as a result of the supply by the Contractor or an Approved Party of a Deliverable or any wrongful act (including negligent) or omission by the Contractor or its Personnel, then the Contractor, must at its own cost and expense, immediately remove or allow the Customer to remove the Virus and reinstate the affected Deliverable.

This clause, with the exception of subclause (g), survives for a period of six years the termination or expiry of this Agreement and any Contract.

## 11.4 PRODUCT AND SERVICE WARRANTIES

**11.4.1** In relation to a Deliverable that comprises Products, the Contractor warrants, until the end of the Warranty Period, that each Product:

- (a) will be supplied in accordance with the requirements of the Contract;
- (b) will be free from any charge or liability;
- (c) shall be new unless otherwise specified in the Order and shall conform to the Contract Specifications;
- (d) shall conform to the description and model number provided by the Contractor; and
- (e) shall be free from material defects in workmanship.

**11.4.2** In relation to a Deliverable that comprises Services, the Contractor warrants, until the end of the Warranty Period, that:

- (a) the Contractor will provide the Services in accordance with the requirements of the Contract and with due care and skill;
- (b) where specified in the Order, the Contractor has established quality assurance arrangements for the provision of the Services and will comply with and maintain those quality assurance arrangements during the Contract Period; and
- (c) the Contractor will not enter into any arrangement that impedes or is likely to hinder its provision of the Services in a manner, and to a standard, that is not satisfactory to the Customer without obtaining the Customer's prior written consent.

## 11.5 RECTIFICATION OF DEFECTS

**11.5.1** If a Defect occurs during the Warranty Period, the Contractor will promptly undertake any remedial work or supply a replacement in respect of the affected Deliverable at no charge including where applicable, supplying an Update or New Release.

**11.5.2** Any remedial work or replacement provided in accordance with clause 11.5.1, is warranted by the Contractor to the same extent as the Deliverable, from completion of that rectification work or replacement.

**11.5.3** Where the Contractor does not comply with clause 11.5.1 within a reasonable time of becoming aware of a Defect, the Customer may perform or have performed the necessary rectification work and the reasonable costs incurred shall be a debt due by the Contractor to the Customer and recoverable in accordance with clause 16.3.

**11.5.4** Subject to clause 11.5.5, any work performed by or on behalf of the Customer pursuant to clause 11.5.3 shall not have the effect of invalidating any warranty provided by the Contractor under the Contract. The Contractor shall not be required to provide a warranty for the work performed or to fix any problems caused solely by a third party arising from the rectification work.

**11.5.5** The Contractor shall not be liable at any time under this clause 11.5 for any Defect in any Deliverable resulting from any failure of the Customer to use the Deliverable in compliance with any Documentation supplied to the Customer.

## 11.6 THIRD PARTY WARRANTY

**11.6.1** Where the Contractor supplies Deliverables that have been procured from third parties, the Contractor shall as soon as reasonably practical provide to the Customer written notification of any details of any warranties given by the third parties.

**11.6.2** The Contractor must if requested by the Customer, at the Customer's expense, and subject to

the agreement of the third party, procure the assignment of those third party warranties to the Customer within a reasonable period of the request. Any third party warranties so assigned do not relieve the Contractor from its obligation to comply with the Contractor's warranties under the Contract.

#### **11.7 COMPLIANCE WITH LAWS, STANDARDS AND CODES**

The Parties must, in performing their obligations under the Contract, comply with:

- (a) all Statutory Requirements;
- (b) the codes, policies, and guidelines specified in the Schedule 1;
- (c) those standards specified in the Schedule 1; and
- (d) the Worst Forms of Child Labour Convention, 1999 (ILO Convention 182) ensuring that the Deliverables have not been produced using "worst forms of child labour" as defined.

#### **11.8 INDUSTRIAL RELATIONS ISSUES**

The Contractor must immediately notify the Customer of any industrial relations issues that materially adversely affect or are likely to materially adversely affect the Contractor's or its Personnel's performance under the Contract.

#### **11.9 LICENCES AND APPROVALS**

All licences, approvals and consents obtained by the Contractor in relation to the Contract are to be obtained at the Contractor's cost.

#### **11.10 KEEPING OF RECORDS AND ACCESS TO RECORDS**

The Contractor must keep accurate and detailed financial records and other information relevant to the performance of the Contract. The Contractor must give the Customer access to and copies of such records and information (excluding information relating to profit margins) within a reasonable time of a written request from the Customer.

#### **11.11 CONTRACTOR'S OBLIGATIONS - CUSTOMER SUPPLIED ITEMS (CSI)**

##### **11.11.1** The Contractor must:

- (a) not use any CSI other than for the purposes of the Contract without the prior written consent of the Customer;
- (b) not part with possession of any CSI unless the Customer has provided its prior written consent, nor create or allow the creation of any lien, charge or mortgage over any CSI;
- (c) take all reasonable care of all CSI including accounting for, preserving, installing or handling where applicable in accordance with the Contract Specifications;
- (d) pay the costs, if any, set out in the Order, for CSI;
- (e) not modify any CSI without the prior written consent of the Customer;
- (f) promptly inform the Customer of any loss, destruction or damage to any CSI; and
- (g) comply with any instruction of the Customer for preserving, forwarding or disposal of any damaged CSI.

##### **11.11.2** The Contractor shall indemnify the Customer for any loss or destruction of, or damage to any CSI caused by a breach of the Contract by any unlawful or negligent act or omission of the Contractor or its Approved Parties.

**11.11.3** If no longer required for the purposes of the Contract, the CSI must be returned to the Customer as soon as practicable unless other arrangements are agreed by the Parties.

## **11.12 REPORTS**

The Contractor must provide to the Customer the reports specified in the Order in the time frame and format either agreed in the Order or as required by the Customer.

# **12. Customer's Obligations**

## **12.1 CUSTOMER TO PROVIDE INFORMATION**

**12.1.1** The Customer must include in or annex to the Order its Statement of Requirements.

**12.1.2** During the Contract Period the Customer must as soon as practicable when required under a Contract:

- (a) make available to the Contractor all relevant instructions, information, data, documents, specifications, plans, drawings and other materials; and
- (b) answer queries made by the Contractor relating to the Customer's requirements in connection with a Contract.

## **12.2 CUSTOMER'S OBLIGATIONS - CUSTOMER SUPPLIED ITEMS (CSI)**

**12.2.1** The Customer shall provide the CSI specified in the Order.

**12.2.2** The CSI must comply with Contract Specifications.

**12.2.3** Provided the Contractor complies with its obligations under clause 11.11 the Customer must repair or replace CSI within a reasonable time of becoming aware that the CSI does not comply with the Contract Specifications.

## **12.3 SITE PREPARATION**

Subject to clause 15.5, the Customer is responsible for Site preparation and maintenance of Site conditions to enable the supply of a Deliverable, unless otherwise specified in the Order.

## **12.4 CUSTOMER'S RIGHTS**

The Customer shall have the right to appoint a representative of the New South Wales Government to act as its agent for the purpose of exercising any of the Customer's rights arising from the contract.

# **13. Personnel**

## **13.1 RESTRICTION ON ENGAGING PERSONNEL OF OTHER PARTY**

**13.1.1** The Customer and the Contractor agree that neither Party may, without the prior written agreement of the other Party, engage, employ or induce or cause a third party to induce the other Party's Personnel engaged in the performance of the Contract to enter into a contract for service or a contract of employment with it.

**13.1.2** The restriction referred to in clause 13.1.1 shall apply during the performance of the Contract and for a period of six months after termination or expiry of the Contract.

**13.1.3** A general solicitation for employment such as a newspaper advertisement shall not constitute a breach of this clause 13.1.

## 13.2 CONTRACTOR'S PERSONNEL

13.2.1 The Contractor must employ only such persons in respect of the Contract who:

- (a) are skilled and experienced in the provision of the Services or similar Services; and
- (b) hold all necessary qualifications, licences, permits and authorities (where applicable).

## 13.3 CUSTOMER'S PERSONNEL

13.3.1 The Customer shall make available Personnel to work with the Contractor and the Parties will identify such personnel and their roles in the Order.

13.3.2 The Customer must use reasonable efforts to ensure that Personnel made available to work with the Contractor have the requisite qualifications, competencies, skills, and experience to perform the tasks.

13.3.3 The Contractor must ensure a safe system of work for any Personnel made available by the Customer that perform work under the control and direction of the Contractor.

## 13.4 REMOVAL OF SPECIFIED PERSONNEL

If Specified Personnel are unable or not suitable in the reasonable opinion of the Customer to undertake the work assigned to them the Contractor shall promptly provide replacement personnel acceptable (on reasonable grounds) to the Customer at no additional charge.

## 13.5 SUB-CONTRACTING

13.5.1 The Contractor must not subcontract any work under the Contract without obtaining the prior written consent of the Customer which will not be unreasonably withheld, and which may be given on such conditions as the Customer thinks fit.

13.5.2 The Contractor:

- (a) must ensure that the subcontractor is aware of all the terms and conditions of the Contract that are relevant to the subcontractor's performance of any work;
- (b) shall not be relieved of its liabilities and obligations arising out of a Contract by subcontracting any work and shall be responsible for all the subcontractors' acts or omissions;
- (c) must ensure that it has the right to terminate any sub-contract in accordance with the provisions of clause 18.4; and
- (d) must ensure that the subcontractor immediately ceases work upon receipt of a Notice in Writing from the Customer of withdrawal of the consent given under clause 13.5.1.

13.5.3 If required by the Customer, the Contractor shall obtain from the subcontractor a signed statutory declaration substantially in the form of Schedule 4.

# 14. Performance of the Contract

## 14.1 DELIVERY NOTIFICATION

The Customer must specify in the Order any Deliverables required by the Customer, specifying:

- (a) the required nature and volume of the Deliverables;
- (b) the dates for the delivery of those Deliverables; and

(c) the Site for that delivery.

## 14.2 DELIVERY

**14.2.1** The Contractor must deliver any Deliverables to the Site between the hours specified in the Order or as otherwise agreed between the Contractor and the Customer.

**14.2.2** The Contract Price is inclusive of any additional or separate delivery costs, except where otherwise specified in the Order.

## 14.3 REJECTION AND ACTUAL ACCEPTANCE DATE

**14.3.1** The Customer may reject Deliverables in the event that the Deliverables:

- (a) are defective or not in good order and condition; or
- (b) do not comply with or perform substantially in accordance with the Contract Specifications; or
- (c) fail any Acceptance Tests.

**14.3.2** The Actual Acceptance Date (AAD) for a Deliverable occurs:

- (a) where Acceptance Tests are not required, five business days or such other period that is specified in the Order following the delivery of a Deliverable in accordance with the Contract; or
- (b) where Acceptance Tests are required, on the date the Customer issues a certificate of acceptance within the Acceptance Notification Period.

**14.3.3** The AAD for a Deliverable will occur, in all cases other than those specified in clause 14.3.2, on the date acceptance is deemed to have occurred in clause 14.5.12.

## 14.4 REJECTION NOTIFICATION

**14.4.1** The Customer may issue a rejection notice at any time prior to acceptance in accordance with clause 14.3. The rejection notice shall provide instructions to the Contractor relating to the removal, replacement, modification, rectification and/or redelivery of any rejected Deliverables. The Contractor must, at the Contractor's expense, comply with the rejection notice within a reasonable time.

**14.4.2** The Parties may agree to any reduction in the Contract Price as an alternative to the rejection of the Deliverable.

## 14.5 ACCEPTANCE TESTING

**14.5.1** If specified in the Order, Acceptance Tests must be conducted in relation to the Deliverables and the following provisions in this clause 14.5 will apply.

**14.5.2** The Customer must, in consultation with the Contractor, include in the Order an Acceptance Test plan which may include:

- (a) identification of the Deliverables or part thereof to be tested;
- (b) allocation of each Party's responsibilities in relation to testing;
- (c) scheduling of Acceptance Tests;
- (d) the testing methodology to be applied; or

- (e) any other information specified in the Order.
- 14.5.3** The Customer is responsible for setting the Acceptance Criteria for the acceptance of a Deliverable and the preparation, reliability and effectiveness of any data, methodology or process related to any Acceptance Test, as specified in or relevant to the Acceptance Criteria.
- 14.5.4** The Customer's representative must be available between the hours of 9.00am and 4.00pm on a business day to give any instruction necessary for prompt commencement of any Acceptance Test.
- 14.5.5** Each Party shall provide all reasonable cooperation and assistance to enable the performance of any Acceptance Test.
- 14.5.6** The Parties shall be entitled to observe and, to the extent reasonable, participate in the performance of any Acceptance Test.
- 14.5.7** The Party conducting the Acceptance Test must provide a written test notification specifying:
- (a) a written summary of that Acceptance Test; and
  - (b) the results achieved from that Acceptance Test.
- 14.5.8** The Customer may at any time during the Acceptance Period require the Contractor to carry out Supplementary Tests.
- 14.5.9** Subject to clause 14.5.10 the costs of any Supplementary Tests shall be paid by the Customer.
- 14.5.10** Where the Supplementary Tests establish that the Deliverables do not comply with the Contract Specifications, the costs of such of those Supplementary Tests as were reasonably required to establish non-compliance shall be borne by the Contractor.
- 14.5.11** Where a Deliverable fails an Acceptance Test or part thereof, the Customer may:
- (a) waive the requirement for the Acceptance Test to be satisfactorily completed;
  - (b) require that further reasonable Acceptance Tests be conducted at the Contractor's expense, such tests to be satisfactorily completed in accordance with this clause 14.5 within the period agreed by the Parties;
  - (c) conditionally accept the Deliverable, subject to the Contractor agreeing at its own cost to deliver a work-around or to otherwise rectify any outstanding deficiency, acceptable to the Customer;
  - (d) accept the Deliverable subject to an agreed reduction in the Contract Price; or
  - (e) subject to the Customer having provided the Contractor with at least one opportunity to conduct further Acceptance Tests, the Customer may without limiting any other remedy, reject and require the removal of the Deliverable, or any materials associated with the rejected Deliverable, and the restoration of anything affected by the Deliverable to its pre Contract state.
- 14.5.12** The Customer shall be treated as having accepted any Deliverables in the event that the Customer:
- (a) notifies the Contractor that the Customer has accepted the Deliverables in compliance with this provision;
  - (b) notifies the Contractor that the Customer has accepted any previously rejected Deliverables following replacement, modification, rectification and/or redelivery by the Contractor in compliance with any instruction by the Customer;

- (c) fails to perform any Acceptance Test within the Acceptance Period for any reason, except for any delay resulting from any action of the Contractor unless otherwise agreed;
- (d) fails to notify the Contractor of the rejection of the Deliverables within the Acceptance Notification Period unless otherwise agreed; or
- (e) uses the Deliverable for its business purposes without the written consent of the Contractor.

## 14.6 DOCUMENTATION

- 14.6.1** The Contractor must provide, at no additional cost to the Customer, at least one copy of the Documentation and such material as the Contractor usually makes available free to its other customers, upon supply of the Deliverable to the Customer.
- 14.6.2** Additional copies of the Documentation must, if requested by the Customer, be provided by the Contractor at the Price specified in the Order or if the Price is not specified, at a pre advised commercial price.
- 14.6.3** The Contractor must amend inaccurate Documentation and must promptly supply to the Customer a duly amended version of the Documentation (or part thereof) at no additional cost to the Customer.
- 14.6.4** The Customer may use the Documentation for any training purposes associated with the Deliverables.

## 14.7 EXTENSION OF TIME

- 14.7.1** Each Party must do all it reasonably can to promptly inform the other of anything that it becomes aware of which is likely to affect the timing, cost or quality of the Deliverables, and the Parties must then investigate how to avoid or minimise any adverse effect on the Contract.
- 14.7.2** The Customer may consent to a request for extension of time provided that the Contractor provides the Customer with a plan indicating in detail the steps the Contractor proposes to take to minimise the impact of any delay.
- 14.7.3** Unless the delay has occurred substantially because of the Customer's failure to perform its obligations in accordance with the Contract, the Contractor will not be entitled to any increase in the Contract Price or any damages, costs or expenses incurred in connection with any delay.

## 14.8 ESCROW OF SOURCE CODE

- 14.8.1** If specified in the Order the Contractor must arrange:
  - (a) for itself, the Customer and an escrow agent approved by the Customer to enter into an Escrow Agreement in relation to the Escrow Materials; or
  - (b) for the Customer to become a party to an escrow arrangement which already covers the Escrow Materials which the Customer regards as a satisfactory arrangement.
- 14.8.2** Any escrow arrangements to which the Customer becomes a Party under this clause 14.8 must endure for at least the period specified in the Order unless otherwise agreed. The Parties will bear the costs connected with such escrow arrangements in the proportions agreed by them in writing.
- 14.8.3** The Contractor must consult with and comply with the reasonable directions of the Customer in any negotiations with the escrow agent arising under this clause 14.8.

## 15. Project Management

### 15.1 APPLICATION OF PROJECT MANAGEMENT CLAUSES

The following clauses 15.1 to 15.12 inclusive apply only if and to the extent specified in the Order.

### 15.2 MANAGEMENT COMMITTEE

**15.2.1** By the date specified in the Order, the Parties must mutually agree and establish a management committee and a process for the conduct of the committee's business.

**15.2.2** The management committee must, unless the Parties agree otherwise in writing, consist of the persons specified as its members in the Order.

**15.2.3** The management committee must:

- (a) review and monitor progress under the Contract and report to the Customer's project officer or other person nominated by the Customer from time to time; and
- (b) carry out such other functions as set out in the Order.

**15.2.4** The members of the management committee or their authorised representatives must meet weekly at the Customer's offices (unless the Parties agree otherwise) at a time agreed between the Parties.

**15.2.5** All members of the management committee must be duly authorised and properly qualified, informed and instructed to enable the committee to properly assess progress under the Contract.

### 15.3 PROGRESS REPORTING

**15.3.1** The Parties must each nominate their respective project managers or officers in the Order or the Project Implementation and Payment Plan.

**15.3.2** At least 24 hours prior to a management committee meeting, the Contractor's project manager must submit to the Customer's project officer a report of progress under the Contract, including:

- (a) details (including dates) of Deliverables and Milestones commenced, completed or accepted;
- (b) any delays or defaults, including reasons and plans for the management of such delays and defaults in respect of the supply of the Deliverables;
- (c) draft updates of relevant parts of the Contract Specifications;
- (d) any proposed Contract Variations;
- (e) reviewing progress of any change request; and
- (f) reviewing the risk register.

**15.3.3** If the Customer disagrees with the details recorded in the report, then the Customer may place on the record its version of the details.

### 15.4 CONTRACT REVIEW PROCEDURES

**15.4.1** The Parties must at regular intervals, unless otherwise specified in the Order, conduct a service and performance review of the Contractor's performance of the Contract including its

obligations under any Service Level Agreement;

- 15.4.2** All reviews must be undertaken by representatives of both Parties who have the authority, responsibility and relevant expertise in financial and operational matters appropriate to the nature of the review. Either Party may request the involvement of the Contract Authority in any review.

## **15.5 SITE SPECIFICATION**

- 15.5.1** The Contractor or an Approved Party must inspect the Site and provide the Customer with a Site Specification for approval.

- 15.5.2** The Contractor or the Approved Party must make any amendment to the Site Specification that is reasonably required by the Customer following approval providing such amendments are requested prior to the delivery of the Deliverables.

## **15.6 IMPLEMENTATION PLANNING STUDY**

- 15.6.1** Within the time specified in the Order and prior to the commencement of a project to be implemented under a Contract, the Contractor must complete an implementation planning study.

- 15.6.2** The implementation planning study must meet the objectives specified in the Order which may include:

- (a) the Contractor's assessment of the scope and complexity of the project;
- (b) required Deliverables;
- (c) resources required (including any resources to be made available by the Customer);
- (d) development of a Project Implementation and Payment Plan or a Service Level Agreement as relevant; or
- (e) any other requirements specified in the Order.

## **15.7 PROJECT IMPLEMENTATION AND PAYMENT PLAN (PIPP)**

- 15.7.1** The Contractor must prepare the PIPP which will include the information specified in the Order, and which will, when approved by the Customer, form part of the Contract Specifications.

- 15.7.2** The Parties must perform their obligations at the times and in the manner set out in the PIPP.

- 15.7.3** Subject to clause 17.2, either Party may periodically review the PIPP and may recommend or request a change to the PIPP. Any change to the PIPP may be implemented as a Change Request in accordance with the variation procedures set out in Schedule 12.

## **15.8 STAGED IMPLEMENTATION AND THE RIGHT TO TERMINATE**

- 15.8.1** The Parties agree to perform the Contract in accordance with the Stages set out in the PIPP.

- 15.8.2** The formation of the Contract is deemed to be sufficient notification for the purposes of this clause 15.8 to proceed with work in Stage one. The Contractor must not commence any work on Stage two or any subsequent Stage until it receives prior written notification from the Customer to proceed with the work in that Stage.

- 15.8.3** Nothing in the Contract shall be construed as obliging the Customer to give the notification referred to in clause 15.8.2 in respect of Stage two or any other subsequent Stage.

- 15.8.4** The Customer's liability to the Contractor for not proceeding to a subsequent Stage shall be

limited to those costs that have been identified in the Order.

## 15.9 SERVICE LEVEL AGREEMENT

- 15.9.1** The Parties must perform their obligations in accordance with any Service Level Agreement.
- 15.9.2** The Parties may in consultation with each other prepare and mutually agree any relevant Service Level Agreement that must be signed by the authorised representatives of each party nominated in the Order.
- 15.9.3** Subject to clause 17.2, either Party may periodically review the Service Level Agreement and may recommend or request a change to a Service Level Agreement. Any change to a Service Level Agreement may be implemented as a Change Request in accordance with the procedures set out in Schedule 12.

## 15.10 TIME OF THE ESSENCE / LIQUIDATED DAMAGES

- 15.10.1** The Contractor acknowledges that time is of the essence in completing any obligations under the Contract where the due date for their performance has been specified in the Order or the PIPP as being an obligation subject to this clause 15.10 ("Due Date").
- 15.10.2** Where the Contractor has not completed obligations by the Due Date, the Contractor must, if notified by the Customer, pay the Customer liquidated damages except where the delay is caused by:
- (a) an Event,
  - (b) the Customer, or
  - (c) the delay is permitted by an extension of time granted under clause 14.7, 10.1 or 10.3.
- 15.10.3** Liquidated damages must be calculated in accordance with the method set out in the Order. Each Party acknowledges that liquidated damages are a genuine pre-estimate of the loss and damage a Customer will suffer as a result of a delay in meeting a Due Date.
- 15.10.4** The Contractor must pay the liquidated damages from the Due Date until:
- (a) the Contractor successfully completes the obligations in relation to which liquidated damages have been applied; or
  - (b) the Customer terminates the Contract;
- whichever first occurs but always to a maximum number of days specified in the Order.
- 15.10.5** Liquidated damages paid under this clause 15.10:
- (a) will be the Customer's sole remedy for any liability arising out of the delay in respect of which liquidated damages were paid; but
  - (b) will not relieve the Contractor from any other liability or from meeting any other obligation under a Contract.

## 15.11 BUSINESS CONTINGENCY ARRANGEMENTS

- 15.11.1** The Contractor must within the time specified in the Order or as otherwise agreed in writing between the Parties, prepare a Business Contingency Plan for the approval of the Customer.
- 15.11.2** The Business Contingency Plan must be documented in a form acceptable to the Customer and must be available at all reasonable times for review by the Customer.
- 15.11.3** The Business Contingency Plan must be reviewed, updated and tested by the Contractor at

the intervals specified in the Order to ensure its relevance and effectiveness.

**15.11.4** All affected Deliverables must be reinstated by the Contractor in accordance with the Business Contingency Plan in the event of an interruption to the Customer's business that is contemplated by the plan. The Customer must provide the Contractor with any assistance reasonably required by the Contractor to implement the Business Contingency Plan.

## 16. Payment

### 16.1 PAYMENT OF CONTRACT PRICE

**16.1.1** In consideration for the Contractor providing a Deliverable in accordance with the Contract, the Customer must pay the Contractor the Contract Price in the amounts and at the times specified in the Order.

**16.1.2** The Contract Price shall be fixed for the Contract Period, unless otherwise specified in the Order.

**16.1.3** A Customer may pay any amount due under the Contract by credit/debit card or electronic facility as stated in the item 10 of the Agreement Detail or the Order.

### 16.2 INVOICES AND TIME FOR PAYMENT

**16.2.1** The Parties agree subject to the further provisions of this clause 16.2, that payment for the Deliverables must be made within 30 days after receipt of a Correctly Rendered Invoice.

**16.2.2** The Contractor must provide any further details in regard to an invoice that are reasonably requested by the Customer.

**16.2.3** The making of a payment is not an acknowledgment that the Deliverables have been supplied or accepted in accordance with the Contract.

**16.2.4** If the Customer disputes the invoiced amount the Customer must:

- (a) certify the amount it believes is due for payment; and
- (b) pay that amount; and
- (c) if the amount paid under paragraph (b) is less than the amount claimed in the invoice, provide reasons for not paying the unpaid portion.

### 16.3 SET-OFF/MONEY RECOVERABLE BY THE CUSTOMER

**16.3.1** Any rebates, fees and liquidated damages, or other damages, losses, and expenses awarded or agreed upon pursuant to clause 7 ('Loss') recoverable by the Customer from the Contractor may be deducted from any money then due to the Contractor under the Contract or Financial Security. If that money is insufficient for that purpose, the balance remaining unpaid will be a debt due by the Contractor to the Customer and may be recovered from the Contractor by the Customer in any court of competent jurisdiction.

**16.3.2** For the purposes of this clause 16.3, the Contract Authority may act for and on behalf of any Customer for the purpose of assessing and certifying any Loss sustained or incurred by the Customer as a result of the breach of the Contract by the Contractor.

### 16.4 SUSPENSION OF PAYMENTS

A Customer may by Notice in Writing to the Contractor hold back payments to the Contractor without penalty if the Contractor refuses, neglects or fails to perform its obligations under the Contract until such obligations are completed in accordance with the Contract.

## 16.5 RETENTION OF MONEYS

- 16.5.1** The Customer may retain a proportion of the payment for any Milestones in the amount and for the period identified in a PIPP for the due and proper performance and completion of the Contractor's entire obligations under a Contract incurred prior to the end of the Warranty Period or a period otherwise nominated in the PIPP.
- 16.5.2** The Customer must upon the completion of the Contractor's entire obligations in accordance with the Contract (incurred prior to the end of the Warranty Period or a period otherwise nominated in the PIPP) pay to the Contractor any amount retained under clause 16.5.1.

## 17. Variations

### 17.1 AGREEMENT VARIATIONS

Subject to any other rights given under this Agreement to vary its terms, a variation to this Agreement shall not be valid unless effected by agreement in writing signed by both the Contract Authority and the Contractor.

### 17.2 CONTRACT VARIATIONS

- 17.2.1** Subject to any other rights given under this Agreement to vary the terms of a Contract and the following provisions of this clause 17.2, a Contract Variation shall not be valid unless agreed in writing and signed by both the Customer and the Contractor.

- 17.2.2** A Contract Variation to:

- (a) Notification of Change in Control (clause 3.4);
- (b) Additional Conditions (clause 6.3);
- (c) Issue Resolution (clauses 7.3 to 7.5 inclusive and Schedule 5);
- (d) Insurance and Liability (clause 8);
- (e) Intellectual Property (clause 9.2);
- (f) Privacy (clause 10.2 and Schedule 10);
- (g) Third Party Indemnity (clause 11.2);
- (h) Termination (clauses 18.1 to 18.5 inclusive);
- (i) Conflict of Interest (clause 19.1);
- (j) No assignment or novation (clause 19.3); and
- (k) Applicable Law (clause 19.7);

shall be void and of no legal effect unless the Contract Authority's prior written consent to such Contract Variation has been obtained by the Customer and the Contractor.

- 17.2.2** If specified in the Order, the Parties must effect a Contract Variation in accordance with the procedures set out in Schedule 12.

## 18. Termination

### 18.1 TERMINATION OF THE AGREEMENT

- 18.1.1** The Contract Authority or the Contractor may by giving at least 60 days' Notice in Writing to the other Party, terminate this Agreement in whole or in part and upon such termination neither Party shall bear any further liability to the other arising out of the termination of this Agreement.
- 18.1.2** If this Agreement is terminated, discharged or in any other way comes to an end, in whole or in part, whether pursuant to this clause or otherwise, no Contract will be affected in any way, unless the context necessarily requires it.

### 18.2 TERMINATION OF CONTRACT/AGREEMENT FOR BREACH BY CONTRACTOR

- 18.2.1** The Customer/Contract Authority may terminate the respective Contract/Agreement for Substantial Breach or the Contractor's Insolvency by Notice in Writing without prejudice to any other right of action or remedy that has accrued or may accrue to either Party.
- 18.2.2** In the case of Substantial Breach the Customer/Contract Authority must first provide Notice in Writing to the Contractor that it has 14 days to remedy the Substantial Breach or such other longer period specified in the notice.
- 18.2.3** If the Contractor fails to give the Customer/Contract Authority a notice containing clear evidence that it has remedied a Substantial Breach, or fails to propose steps reasonably acceptable to the Customer/Contract Authority to remedy the Substantial Breach, the Customer/Contract Authority may terminate the Contract/Agreement by Notice in Writing to the Contractor.

### 18.3 EFFECT OF TERMINATION OF CONTRACT / AGREEMENT

In the event of termination under clause 18.2, the Customer/Contract Authority may:

- (a) obtain from any other source a reasonably similar alternative to the Deliverable in which case the Contractor shall be liable to the Customer/Contract Authority for any reasonable expenses incurred and any losses sustained (including any price difference between the Deliverable and the similar alternative) by the Customer/Contract Authority; and/or
- (b) by Notice in Writing to the Contractor, require the Contractor at its expense to remove Deliverables or to dismantle or remove work from the Customer's premises by a date specified in that notice.

### 18.4 TERMINATION OF CONTRACT FOR CONVENIENCE

- 18.4.1** The Customer may by Notice in Writing at any time terminate the Contract in whole or in part. The Contractor must immediately comply with any directions given in the notice and must do everything possible to mitigate its losses arising in consequence of termination or suspension of the Contract under this clause 18.4.
- 18.4.2** The Customer shall indemnify the Contractor against any liabilities or expenses, which are reasonably and properly incurred by the Contractor in connection with the Contract to the extent that those liabilities or expenses were incurred as a result of termination or suspension of the Contract in accordance with this clause 18.4. Unless otherwise specified in the Order, no further compensation will be payable to the Contractor in respect of a termination or suspension under this clause 18.4.
- 18.4.3** This clause 18.4 does not apply to termination or suspension in accordance with clause 19.2 or termination occurring because of a default by the Contractor as specified in clause 18.2, unless the Customer in its absolute discretion elects to apply this clause 18.4.

**18.4.4** The Contractor must, in each sub-contract or Order placed with any subcontractor for the purposes of the Contract, reserve a right of termination or suspension to take account of the Customer's right of termination or suspension under this clause.

## **18.5 TERMINATION FOR BREACH BY THE CUSTOMER**

**18.5.1** If the Customer fails to pay the Contractor any amount in accordance with the Contract which is not in dispute, or commits any Fundamental Breach of the Contract, then the Contractor may by Notice in writing require the Customer to remedy the default within 28 days after receiving the notice.

**18.5.2** If the Customer fails to remedy the breach, or fails to propose steps reasonably acceptable to the Contractor to do so, the Contractor may by Notice in Writing terminate the Contract without prejudice to any other right of action or remedy which has accrued or might accrue to either Party.

## **19. General**

### **19.1 DISCLOSURE OF CONFLICT OF INTEREST**

The Contractor must:

- (a) notify the Contract Authority or the Customer in writing immediately upon becoming aware of the existence or possibility of a Conflict of Interest; and
- (b) comply with any reasonable direction given by Contract Authority or the Customer in relation to managing that Conflict of Interest.

### **19.2 EVENTS**

**19.2.1** A Party is excused from performing its obligations to the extent it is prevented by an Event, except an Event that is the subject of a Business Contingency Plan. The Contractor must immediately notify the Customer of the occurrence of the Event when the Contractor becomes aware of it or when the Contractor ought reasonably to be aware of it.

**19.2.2** Each Party must make all reasonable efforts to minimise the effects of the Event. If the affected Party is prevented by the Event from performing its obligations under the Contract for 60 days or such other period as the Parties agree in writing, then the other Party may in its sole discretion immediately terminate the Contract by giving Notice in Writing of termination to the other Party.

**19.2.3** Where the Contract is terminated by the Customer in accordance with clause 19.2.2:

- (a) the Contractor shall be entitled to payment for work completed in accordance with the Contract up to the date of termination; and
- (b) the Parties must otherwise bear their own costs and will be under no further liability to perform the Contract.

### **19.3 ASSIGNMENT OR NOVATION**

**19.3.1** The Contractor must not assign in whole or in part or novate this Agreement or a Contract without obtaining the prior written consent of the Contract Authority or the Customer as applicable which consent may be withheld at their absolute discretion.

**19.3.2** The Contractor acknowledges that the Contract Authority or the Customer may conduct financial and other inquiries or checks on the entity proposing to take over the Contract before determining whether or not to give consent to the assignment or novation.

**19.3.3** The Contract Authority or the Customer at its own cost, may assign or novate, this Agreement or a Contract, where by operation of statute the Contract Authority or Customer is reconstituted into a new legal entity, to that new legal entity. If the assignment or novation

changes the scope of the obligations or Deliverables to be provided by a Contractor under a Contract, a Contract Variation must be effected.

#### **19.4 WAIVER**

A waiver in respect of a breach of a term of this Agreement or a Contract by the other Party shall not be taken to be a waiver in respect of any other breach. The failure of either Party to enforce a term of this Agreement or a Contract will not be interpreted as a waiver of that term.

#### **19.5 SEVERABILITY**

If any part of this Agreement or a Contract is void or voidable, then that part is severed from this Agreement or the Contract without affecting the continued operation of the remainder of this Agreement or the Contract.

#### **19.6 COUNTERPARTS**

If there are a number of counterparts of this Agreement or a Contract, the counterparts taken together constitute one and the same instrument.

#### **19.7 APPLICABLE LAW**

The laws of the State govern this Agreement and any Contract and the Parties submit to the non-exclusive jurisdiction of the courts of the Commonwealth or the State.

#### **19.8 RIGHTS CUMULATIVE**

Subject to clause 15.10.5, the rights and remedies provided under this Agreement or a Contract are cumulative and not exclusive of any rights or remedies provided by law or any other right or remedy.

#### **19.9 NO AGENCY, EMPLOYEE OR PARTNERSHIP RELATIONSHIP**

The Contractor agrees that it will not be taken to be, nor will it represent that it is the employee, partner, officer and/or agent of the Contract Authority, or the Customer.

#### **19.10 LOCAL JOBS FIRST PLAN**

- (a) If the Contractor is required to provide a competitive quote under this agreement it must comply with the Local Jobs First Plan. Depending on the threshold value of the procurement to be made via competitive quotes, the Contractor acknowledges that it is required to submit the value of ANZ-SME content of the goods and services offered and it may be required to respond to SME participation questions or complete a SME Participation Plan (SMEPP) (a plan submitted by tenderers in response to a tender. A SMEPP describes the nature of, or proposed nature of, tenderer's engagement with ANZ-SMEs. An important aspect of SMEPPs is SME capability development)
- (b) The Contractor acknowledges that, where a SMEPP is required in competitive quotes, reliance will be placed on the SMEPP in the evaluation of the quotation submitted by the Contractor and in the Contract Authority entering into any agreement with the Contractor.
- (c) The Contractor agrees to comply with the requirements and commitments provided for in any future SMEPP tendered by the Contractor and to take all steps reasonably required to enable the Contract Authority to monitor compliance by the Contractor with any future SMEPP.
- (d) The Contractor and the Contract Authority agree that the Contract Authority may establish mechanisms to monitor compliance by the Contractor with the requirements and its commitments under any future SMEPP. The Contractor and the Contract Authority agree that non-compliance by the Contractor of any future SMEPP

commitments will constitute a breach of contract and entitle the Contract Authority to terminate the contract for cause. Further, the Contractor agrees that the Contract Authority may take into consideration non-compliance by the Contractor with any future tendered SMEPP when evaluating tenders submitted by the Contractor in the future for other agreements and consents to the Contract Authority using information about its non-compliance with any future tendered SMEPP in connection with other tenders and agreements.

## EXECUTED AS A DEED

Signed for and on behalf of [insert name of Contract Authority]

By [insert name of Contract Authority Representative] but not so as to incur personal liability

In the presence of: [insert name of witness]

**Signature of Contract Authority Representative**

**Print name**

**Signature of Witness**

**Print name**

Signed by [insert Contractor's name and ACN/ABN]

in accordance with s127 of the Corporations Act 2001 by:

**Signature Director**

**Print name**

**Signature of Director/Secretary**

**Print name**