



NSW Procurement is a Business Unit of the NSW Department of Finance and Services

Dated: <Insert Date>

The Principal

and

<Insert Contractor name

[\[Guide Note: Insert name of Agreement\]](#)

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For the purposes of this RFT, inquiries should be directed to the Contact Officer nominated in Part B of this RFT.

Other matters should be directed to:

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Instructions for Use – Agency Specific One-Off Low (Goods)

Coverage – This template applies to the establishment of a one-off agency-specific procurement arrangement for goods (ie. Deliverables) which simple in nature. If the procurement is complex, the Agency-Specific One-Off (High) template should be considered for use.

For Agency Specific, One-Off low, the Deliverables would typically include “off- the-shelf” items as well as low-complexity items manufactured by the Contractor in accordance with the Principal’s requirements.

smartbuy® requirements have been included in this template. It will be necessary to check with eBusiness Solutions in each situation if smartbuy® provisions are not required.

Agreement Preparation – In order to prepare the contract for execution, all post-tender negotiations which varied the version of the agreement attached to the RFT must be incorporated rather than referred to in a schedule so that the Agreement executed by the Parties reflects the terms and conditions agreed through negotiation.

Execution Requirements – The RFT is called by the SCCB for an Agency. This Agreement which results from that rft can be executed either by the Board, acting as the Principal on behalf of the Agency, or by the NSW government agency; which approach is taken depends on what the Agency and SCCB have agreed.

Clause Changes – Clauses can be changed or deleted in consultation with Legal Services for Agreements that are to be executed.

Any Definitions in the Interpretation clause which are not required because they are not referred to in the Agreement and its Schedules must be deleted when the RFT is being prepared for issue.

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THIS AGREEMENT is made on the _____ day of _____ 20__

BETWEEN

.....(*insert name of Principal*), of (*insert address*) Sydney, in the State of New South Wales ("the Principal").

Guide Note:

1. If the client agency is to execute the Agreement

(1) Where the Agency is a statutory body corporate or corporation (and i.e. a separate legal entity):

- (a) insert the name and address of the client agency as Principal;
- (b) insert as Principal's Delegate in Schedule 1 either:
 - (i) the client agency's contract administrator, or
 - (ii) if the SCCB is requested to perform this role, the SCCB and its nominated officer.

(2) Where the Agency is a part of the Crown without separate corporate status e.g. a department:

- (i) describe the Principal as: "the Crown in right of the State of New South Wales, acting through the <Name of client agency> of McKell Building, 2-24 Rawson Place, Sydney in the State of New South Wales";
- (ii) insert the client agency and its contract administrator as Principal's Delegate in Schedule 1.

2. If the SCCB is executing the Agreement on behalf of the client agency as the Principal:

- (a) insert the name of the SCCB as principal; and
- (b) if the SCCB is requested to perform the role of Principal's Delegate, insert the SCCB and its nominated officer. Otherwise, insert the client agency and its contract administrator as Principal's Delegate in Schedule 1.

AND

[.....name of contractor.....] of [.....address.....] ABN [insert ABN number] in the State of [.....] ("the Contractor").

BACKGROUND

(Guide Note: select recital A that is applicable).

- A. The State Contracts Control Board, at the request of the Principal, issued the Request for Tender for the supply of the Deliverables. (Guide Note: Use if the Agency is to sign the Agreement).
- A. The State Contracts Control Board, issued the Request for Tender for the supply of the Deliverables. (Guide Note: use if the SCCB is to sign the Agreement).
- B. The Contractor submitted a tender that has been accepted.
- C. The Principal and the Contractor have agreed to enter into this Agreement for the supply of the Deliverables.

NOW THE PARTIES AGREE:

1 Interpretation

1.1 Definitions

“**Administrators**” means Personnel of the Contractor who are responsible for managing Authorised Users within its organisation and receiving notices sent by the Board for purposes of complying with the Contractor’s smartbuy® obligations.

“**Agreement**” means this Agreement including the Schedules and Part E, if applicable.

“**Authorised Users**” means Personnel who the Contractor authorises to access and use smartbuy® on its behalf and who are given access to do so by the Board.

“**Catalogue Information**” means details and images and information about the Deliverables and pricing contained in a catalogue placed on smartbuy® by the Contractor or provided by the Contractor to the Board for such placement.

“**Change in Control**” means a circumstance in which control is or may be exercised over the Contractor:

- (a) through removal or appointment of directors of the Contractor;
- (b) by virtue of the direct holding of at least 15% of the voting shares in the Contractor or a holding company of the Contractor; or
- (c) by any other means whatsoever.

“**Circumstances Beyond the Control of the Contractor**” include:

- (a) acts of God;
- (b) fire, flood, or earthquake;
- (c) national emergency (including terrorist acts) or war; or
- (d) a serious industrial dispute.

“**Confidential Information**” means, in relation to a Party, information that:

- (a) is by its nature confidential;
- (b) is designated by that Party as confidential; or
- (c) the other Party knows or ought to know is confidential.

“**Consequential Loss**” means any loss recoverable at law (other than loss arising in the usual course of things) which is:

- (a) consequential upon other loss;
- (b) a loss of opportunity or goodwill;
- (c) a loss of profits;
- (d) a loss of anticipated savings or business;
- (e) loss of value of any equipment,

and any costs or expenses in connection with the foregoing.

“**Contract Material**” means New Contract Material and Existing Contract Material.

“**Contractor**” means the Contractor under this Agreement and includes its subcontractors, re-sellers and distributors.

“**Contractor Information**” means the information that must be provided by the Contractor in smartbuy® covering its own organisation and that of its Designated and Nominated Subcontractors and includes names, addresses and contact details.

“**Contract Price**” means the price (which may be a fixed lump sum or a schedule of rates), stated in Schedule 3 (inclusive of any taxes, duties, levies, insurance, delivery) which is payable to the Contractor for the supply of the Deliverables by the

Contractor, and adjusted to include any Variations which may be required to be made under the terms of this Agreement.

“Contractor’s Insolvency” means any of the following:

- (a) insolvency;
- (b) the Contractor indicates that it does not have the resources to perform the Agreement;
- (c) an application for winding up is made and not stayed within 14 days;
- (d) a winding up order is made;
- (e) a controller, administrator, receiver and manager, provisional liquidator or liquidator is appointed;
- (f) a mortgagee enters the possession of any property of the Contractor;
- (g) notice is given of a meeting of creditors for the purposes of a deed of arrangement; or
- (h) any actions of a similar effect are taken.

“Deliverables” means the goods and their associated services to be executed and supplied by the Contractor and specified in Schedule 2, and includes any Variation to this Agreement in accordance with clause 7.

“Designated Subcontractors” means the comprehensive list of subcontractors, resellers and distributors that the Contractor will use for the purposes of this Agreement and named in smartbuy® as such.

“Due Date” means the date for delivery of the Deliverables by the Contractor in Schedule 1 item 2.

“Externally Hosted Catalogue” means Catalogue Information hosted in a system other than smartbuy®’s physical infrastructure which is accessible via smartbuy®.

“Financial Security” means the security in the amount and form specified by the Principal set out in item 10 of Schedule 1.

“Information” includes information in the form of data, text or images.

“Nominated Subcontractors” means a subcontractor nominated by the Board that must be used by the Contractor and indicated in smartbuy® as such.

“Parties” means the Principal and the Contractor.

“Personal Information” has the same meaning as in Privacy and Personal Information Protection Act 1998 (NSW). *(Guide Note: If Personal Information is within the meaning of the Health Records and Information Privacy Act, then add ‘Health Records and Information Privacy Act 2002 (NSW)’)*

“Personnel” of a Party means;

- (a) the officers, employees, agents and contractors of that Party,
- (b) in the case of the Contractor, includes subcontractors (whether approved or not), and the Key Personnel in Schedule 1 item 12.

“Principal’s Delegate” means the Principal’s employee named in item 11 Schedule 1, responsible for the overall administration of this Agreement on behalf of the Principal.

“Relationship Manager” means the Contractor’s employee named in Schedule 1 item 12.

“Request for Tender” means the request for tender issued by the Principal, consequent to which this Agreement was awarded to the Contractor for supply of the Deliverables.

“Schedule” means a schedule to this Agreement.

“**smartbuy®TRADE**” means an entry level product for organisations new to eProcurement. It delivers a single source, easy to use, electronic product and service ordering system.

“**smartbuy® CONNECT**” means the electronic document exchange providing the security, connectivity, transformation, and trading partner management services.

(Guide Note: insert the following definition of “SME Participation Plan (SMEPP)” where a procurement for goods and services is over \$4 million)

“**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.

“**State Contracts Control Board**” means the State Contracts Control Board established under the *Public Sector Employment and Management Act 2002* and includes the duly authorised delegates of the Board including officers of NSW Procurement – Contracting Services.

“**Statement of Requirements**” means the detailed description of the Deliverables to be provided under this Agreement in Schedule 2.

“**Standards**” means Australian Standards, where such exist and are applicable to the Deliverables, and includes international standards in the event of a lack of an applicable Australian Standard.

“**State of New South Wales**” means the Crown in right of the State of New South Wales.

“**Statutory Requirements**” means the laws relating to the performance of this Agreement or the lawful requirements of any authority with respect to the performance of this Agreement.

“**Substantial Breach**” means:

in the case of this Agreement, a substantial breach of a term of this Agreement by the Contractor and includes any breach of the following clauses:

- (a) Clause 9.2 (Compliance with Laws, Standards and NSW Government Requirements),
- (b) Clause 9.3 (Minimum Insurance Requirements);
- (c) Where a delay continues beyond the extension of time granted under clause 8.3;
- (d) Clause 14.1 (No Assignment or Novation);
- (i) clause 14.2 (Conflicts of Interests); and
- (ii) Where the Contractor breaches a time of the essence obligation imposed on the Contractor in accordance with clause 8.

“**Term**” means the term of this Agreement set out in Schedule 1 item 2 and any extension made under this Agreement by the Principal.

“**Transaction**” means any use of smartbuy® including sale or purchase of Deliverables available through smartbuy®.

“**Transaction Data**” means any data created or generated or derived from the use of smartbuy® by any participant in smartbuy® including any data about the purchase or sale of Deliverables that any participant in smartbuy® makes available or transmits to or through smartbuy® and includes any information which may identify the Customer from the smartbuy® database.

“**Variation**” means any change to the Deliverables including additions, increases, omissions and reductions to and from the Deliverables, (including a change in the quality of any material used in the supply of the Deliverables) which has been directed in writing by the Principal’s Delegate under clause 7.

“**Warranty Period**” means, in relation to particular Deliverables, the period of warranty of those Deliverables specified in Schedule 2.

1.2 Rules for interpreting this Agreement

1.2.1 Headings are for convenience only, and do not affect the interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.

1.2.2 A reference to:

- (a) legislation (including subordinate legislation) is a reference to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
- (b) a document or agreement, or a provision of a document or agreement, is a reference to that document, agreement or provision as amended, supplemented, replaced or novated;
- (c) a person includes any type of entity or body of persons whether or not it is incorporated or has a separate legal entity;
- (d) any thing (including a right, obligation or concept) includes each part of it.

1.2.3 Where:

- (a) the Contractor consists of more than one person or corporation, this Agreement binds each of them separately and any two or more of them jointly and severally;
- (b) an obligation, representation or warranty made by the Contractor in this Agreement shall bind each person or corporation separately and jointly and each person or corporation shall alone be responsible for the performance of every obligation, representation or warranty contained in this Agreement.

1.2.4 A singular word includes the plural, and vice versa.

1.2.5 A word which suggests one gender includes the other genders.

1.2.6 If a word is defined, another part of speech of that word has a corresponding meaning.

1.2.7 The Parties may undertake business by the electronic exchange of information and the provisions of this Agreement will be interpreted to give effect to undertaking business in this manner.

1.2.8 In the event of any ambiguity, discrepancy or inconsistency in interpreting any term or terms of this Agreement, the order of priority in the interpretation of such term or terms will be in the order of:

- (a) Schedule 3;
- (b) Part E, Special Conditions to this Agreement, if any;
- (c) The terms and conditions of this Agreement;
- (d) Schedules 1 and 2 to this Agreement;
- (e) Any other Schedules to this Agreement.

2 Nature of the Agreement between Principal and Contractor

2.1 The Due Date

2.1.1 This Agreement commences on the date in Schedule 1 item 2(a) and continues until the Due Date specified in Schedule 1 item 2(b) unless terminated earlier, in accordance with this Agreement.

2.1.2 The Principal may, at its sole discretion, extend the Due Date.

2.2 smartbuy® requirements

2.2.1 The Contractor is required to comply with the smartbuy® requirements in Schedule 5. *(Guide Note: delete if not applicable).*

2.3 The Contractor's General Obligations

(Guide Note: Modify the clauses below as needed).

2.3.1 The Contractor is solely responsible for the execution and delivery of the Deliverables:

- (a) in accordance with this Agreement and by the Due Date;
- (b) performing all things necessary for the execution and delivery of the Deliverables including without limitation, the engagement, supervision and direction of Personnel of the Contractor, the detailed coordination of all activities and the supply of all necessary equipment and administrative requirements.
- (c) in accordance with all approvals and requirements of all Authorities and any standards relevant to the Deliverables;
- (d) using materials described in this Agreement, if any, or if there is not any such specific description, then the best quality available and fit for their intended purpose; and
- (e) in accordance with the Contract Price in Schedule 3.

3 The Deliverables

3.1 Statement of Requirements

3.1.1 The Deliverables to be supplied by the Contractor under this Agreement are detailed in Schedule 2.

4 Contract Price

4.1 Contractor's Obligations

4.1.1 The Contractor must supply the Deliverables on the basis of the Contract Price in Schedule 3.

4.2 Calculating the Contract Price

4.2.1 The Contract Price in Schedule 3 includes all applicable levies, duties, taxes, insurances, imposts, overheads and profits but is exclusive of GST.

4.3 Goods and Services Tax

4.3.1 In this clause and Agreement:

“**Consideration**”, “**Tax Invoice**”, “**Taxable Supply**” and “**Supply**” have the same meaning as provided for in the GST Law.

“**GST**” is a goods and services tax and has the same meaning as in the GST Law.

“**GST Law**” means any law imposing a GST and includes *A New Tax System (Goods & Services Tax) Act 1999 (Cth)* or if that Act does not exist, means any Act imposing, or relating, to a GST and any regulation based on those Acts.

4.3.2 The Contractor must hold an Australian Business Number (ABN) and be registered for GST.

4.3.3 Every invoice issued by a person making a Supply must be in the form of, or be accompanied by, a valid Tax Invoice or statement. No amount is payable until a valid Tax Invoice or statement for the Price, or any instalment of the Price, is received.

- 4.3.4 If there is any abolition or reduction of any tax, duty, excise or statutory charge associated with the GST, or any change in the GST, the Consideration payable for the Supply must be varied so that the Contractor's net dollar margin for the Supply remains the same.
- 4.3.5 Any contract entered into by a Party to this Agreement 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, must include a clause in equivalent terms to clause 4.3.4.

5 Payment

5.1 Payment of Contract Price

- 5.1.1 Subject to clause 5.2 and in consideration for the Contractor providing the Deliverables under this Agreement, the Principal shall pay the Contractor the Contract Price in the amounts and in the Stages, if any, set out in Schedule 3 in accordance with this clause 5.
- 5.1.2 Failure by the Principal to pay the Contract Price at the due time will not be grounds for the Contractor to avoid performance of its obligations under this Agreement.

5.2 Invoices and Time for Payment

(Guide Note: Clause 5.2.2 can be modified where a different payment period is agreed). Clauses 5.2.6 to 5.2.8 are in accordance with Treasury Circular 11/12.

- 5.2.1 All claims for payment made by the Contractor must be in the form of a Tax Invoice and the tax invoice must include and be substantiated by documents necessary to provide evidence of acceptance of the Deliverables by the Principal. Such documents must include a statement that shows the value of the Deliverables provided by the Contractor, and any further details reasonably requested by the Principal.
- 5.2.2 Subject to this clause 5.2, the Principal shall make payment within 30 days from the end of the month after receipt of a Correctly Rendered Invoice or Statement and documents necessary to evidence delivery to the Principal.
- 5.2.3 The Parties agree the making of a payment is not intended to be an acknowledgment that the Deliverables have been supplied in accordance with this Agreement.
- 5.2.4 If the Principal disputes an invoice amount, the Principal shall certify the amount it believes is due for payment and shall pay that amount and the liability for the balance of payment shall be determined in accordance with this Agreement.
- 5.2.5 The Contractor will not be entitled to any credit charge, service fee or any other fee or charge for extending credit or allowing time for the payment by the Principal of money becoming due for the supply of the Deliverables.
- 5.2.6 Notwithstanding clauses 5.2.2, the Customer must pay the Contractor within 30 days from date of receipt of a Correctly Rendered Invoice or Statement if the Contractor is a Small Business. For the purposes of this clause 5.2.6, the Contractor will be taken to be a Small Business only if the Contractor has identified itself as a Small Business on making the relevant Correctly Rendered Invoice or Statement and provided the documentation which the Customer, if the Customer considers it necessary, reasonably requests to verify that the Contractor is a Small Business.
- 5.2.7 Where payment is not made within the period specified in clause 5.2.6, the Customer must pay simple interest on the unpaid amount calculated daily from the day after payment was due up to and including the day that payment is made, where interest exceeds A\$20. The interest rate is determined under section 22 of the *Taxation Administration Act 1996*. The appropriate interest rate is available from the NSW Office of State Revenue website at <http://www.osr.nsw.gov.au/taxes/other/taa/rates/>.

5.2.8 For the purposes of this clause 5.2:

“Correctly Rendered Invoice or Statement” means an invoice or statement which is:

- rendered in accordance with all of the requirements of the approved purchase order and this Agreement;
- for amounts correctly calculated; and
- for goods or services properly supplied in accordance with this Agreement.

“day that payment is made” means the day that funds are transferred into the banking system for payment to the Contractor or a cheque is sent.

“Small Business” means an Australian or New Zealand-based business that has an annual turnover of less than \$2 million in the latest financial year.

5.3 Set-Off/Money Recoverable by Customer

5.3.1 The Principal may deduct from amounts which may be payable or which may become payable to the Contractor, any amount due from the Contractor to the Principal in connection with the supply of the Deliverables.

5.3.2 Without limiting clause 5.3.1, any damages, costs and expenses recoverable by the Principal from the Contractor in consequence of the Contractor’s breach of this Agreement may be deducted from money then due to the Contractor under this Agreement. If that money is insufficient for that purpose, the balance remaining unpaid will be a debt due by the Contractor to the Principal and may be:

- (a) set off against any other money due to the Contractor by the Principal under this or any other agreement between the Principal and the Contractor; or
- (b) recovered from the Contractor by the Principal in an appropriate court.

5.4 Suspension of Payments

Should the Contractor refuse or neglect to carry out the instructions or requirements of the Principal in regard to any matter connected with this Agreement, the Principal may suspend all payments to the Contractor until such instructions or requirements have been complied with by the Contractor. In suspending payment in accordance with this clause the Principal shall not be in breach of this Agreement.

6 Personnel

6.1 Principal’s Delegate and Principal’s Personnel

[\(Guide Note: Modify this clause based on the circumstances, e.g. if the Principal does not need to deploy Personnel to work with the Contractor\).](#)

6.1.1 The Principal has nominated the Principal’s Delegate in Schedule 1 item 11 to administer this Agreement. The Contractor must comply with all reasonable directions given by the Principal’s Delegate in connection with the delivery of the Deliverables under this Agreement.

6.1.2 The Principal may make available Personnel to work with the Contractor.

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

6.2 Relationship Manager

6.2.1 For the purpose of ensuring an efficient relationship with the Principal, the Contractor has appointed the Relationship Manager indicated in Schedule 1 item 12. The Relationship Manager must:

- (a) act as the representative of the Contractor and have the legal power to bind the Contractor in all matters pertaining to this Agreement;

- (b) serve as the main point of contact for the Contractor with respect to the overall administration of the Agreement;
 - (c) have the authority to implement such actions (including issuing directions through the Contractor's organisation), as may be required for the Contractor to comply with this Agreement;
 - (d) meet with the Principal's Delegate as required by the Principal to provide information regarding the Contractor's performance under this Agreement; and
 - (e) answer the Principal's queries and work with the Principal to address issues arising out of this Agreement relating to matters considered urgent by the Principal.
- 6.2.2 The Relationship Manager must be available at all times during business hours and at all other times on reasonable notice by the Principal's Delegate to meet with the Principal's Delegate to discuss any queries, concerns or issues arising in connection with this Agreement.
- 6.2.3 The Principal's Delegate must be supported by the Key Personnel in Schedule 1 item 12.

6.3 The Contractor's Personnel

- 6.3.1 The Contractor warrants that all Personnel engaged in the provision of the Deliverables are appropriately qualified, competent and experienced including the Relationship Manager.
- 6.3.2 The Contractor must:
- (a) employ or engage only such Personnel as are careful, skilled and experienced in the provision of the Deliverables or similar Deliverables; and
 - (b) (where applicable) hold, or ensure Personnel hold, all necessary licences, permits and authorities.
- 6.3.3 The Principal may object to and direct the Contractor to remove any of its Personnel (including the Relationship Manager) who in its opinion are incompetent, unsuitable, or who has been guilty of neglect, or other improper behaviour. Such named Personnel so removed may not be re-employed or re-engaged by the Contractor under this Agreement.
- 6.3.4 Any replacement Personnel provided by the Contractor must be approved by the Principal.

7 Variations

7.1 Changes to the Statement of Requirements during the Term

- 7.1.1 This Agreement may not be varied except in writing signed by both the Principal and the Contractor.
- 7.1.2 The Principal's Delegate may direct the Contractor in writing and signed by the Principal's Delegate, to carry out a Variation at any time prior to the Actual Acceptance Date.
- 7.1.3 The Contractor may only proceed with a Variation after it has received a written direction from the Principal's Delegate or following a variation agreed in writing between the Contractor and the Principal's Delegate. The Contractor will not be entitled to payment in respect of a direction for Variation unless the provisions of this clause 7.1.3 are complied with.
- 7.1.4 The value of the Variation will be determined by the Principal's Delegate. If the Contractor disagrees with the value of the Variation as determined by the Principal's Delegate, the matter will be dealt with in accordance with clause 12, Conduct and Dispute Management, but only after the Variation has been executed by the Contractor and the Principal has paid the Contractor for the Variation.

8 Time

8.1 Time of Essence

8.1.1 The Contractor acknowledges that time is of the essence in delivering the Deliverables under this Agreement in accordance with the Due Date and the Statement of Requirements and other requirements of the Agreement.

8.2 Risk of Delay

8.2.1 The Contractor's entitlement to extensions of time are set out in clause 8.3, but apart from that entitlement, the Contractor accepts the risk and liability for the completion and delivery of the Deliverables in accordance with clause 8.1.

8.3 Extension of Time

8.3.1 Where there is likely to be a significant delay in the Contractor discharging an obligation under this Agreement because of a Circumstance Beyond the Contractor's Control (other than a circumstance arising out of any act or omission on the part of the Contractor), the Contractor will:

- (a) within 7 days of becoming aware of the possibility of such a significant delay, notify the Principal, in writing of the circumstances which the Contractor considers will give rise to the delay, and the extent or likely extent of the delay and strategies proposed to manage the consequences of the delay; and
- (b) request a reasonable extension of time.

8.3.2 The Principal may consent to a request for extension of time under this clause 8.3.2 provided that:

- (a) the Contractor uses its best endeavours to minimise the delay and recover lost time; and
- (b) where appropriate, the Contractor provides the Principal with a plan indicating in detail the steps the Contractor proposes to take to minimise the impact of the Circumstance Beyond its Control.

8.3.3 The Contractor will not be entitled to any increase in the Contract Price or damages, costs or expenses in connection with the delay unless the delay has occurred because of the Principal's failure to perform its obligations under with this Agreement.

9 Contractor's Specific Obligations

9.1 Licences and Approvals

9.1.1 The Contractor must obtain at its own cost all licences, approvals and consents necessary to perform this Agreement.

9.2 Compliance with Laws, Standards and NSW Government Requirements

9.2.1 The Contractor must, in carrying out this Agreement, comply with and ensure that any subcontractor or agent it engages in carrying out this Agreement complies with:

- (a) all applicable Statutory Requirements;
- (b) the obligations imposed on the Principal by the Privacy and Personal Information Protection Act 1998 (NSW) in relation to Personal Information that is disclosed to, or acquired by, or in possession of the Contractor in accordance, or in connection, with the Contract. The Contractor must, and must ensure that its officers, employees, agents and sub-contractors, comply with the obligations imposed on the Principal by the Privacy and Personal Information Protection Act as though the Contractor were, as far as reasonably practicable, the Principal in relation to any such Personal Information. The Contractor will comply with any request of the Principal in relation to Personal Information and will not do anything that would cause

the Principal to be in breach of its obligations under the Privacy and Personal Information Protection Act. *(Guide Note: If Personal Information is within the meaning of the Health Records and Information Privacy Act, then add 'Health Records and Information Privacy Act 2002 (NSW)' after Privacy and Personal Information Protection Act 1998 (NSW)).*

- (c) the NSW Government codes, policies, guidelines and Standards listed in Schedule 1 item 7 and any other codes, policies, guidelines and Standards specified in writing by the Principal to the Contractor; and
- (d) Where a particular Standard has been agreed between the Contractor and the Principal, and that Standard is revised, the Contractor must submit evidence of compliance with the revised Standard within a reasonable period of time.

9.2.2 The Contractor must ensure that the Deliverables have not been produced using the 'worst forms of child labour' as defined in the Worst Forms of Child Labour Convention, 1999 (ILO Convention 182).

9.3 Minimum Insurance Requirements

9.3.1 Before commencing work under this Agreement, the Contractor must hold and maintain, and must ensure that all subcontractors are beneficiaries under or otherwise hold and maintain, the following insurances until at least the Due Date, or for such other period as may be specifically required by the Principal under this Agreement:

- (a) a broad form liability policy of insurance which includes public liability insurance for at least the amount specified in item 9(a) of Schedule 1 in respect of each claim; and
- (b) products liability insurance for at least the amount specified in item 9(b) of Schedule 1 for the total aggregate liability for all claims arising out of the Contractor's products for the period of cover; and
- (c) workers' compensation insurance in accordance with applicable legislation for all the Contractor's employees; and
- (d) such other insurances as are specified in Schedule 1 item 9 of the Agreement Details.

9.3.2 All policies of insurance must be effected with an insurer rated A or better by AM Best or an equivalent rating organisation.

9.3.3 The Contractor shall, and shall ensure Personnel, as soon as practicable, inform the Principal 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 shall ensure that the Principal is kept fully informed of subsequent action and developments concerning the claim.

9.3.4 The Contractor must, when requested in writing by the Principal, supply proof that all insurance policies required by this Agreement are current.

- (a) The Contractor must, when requested in writing by the Principal, arrange for its insurer to complete a "Certificate of Currency of Insurances Obtained".

9.3.5 Where the Contractor is insured under its parent company's insurance policy, the parent company's insurance policy must clearly indicate that it applies and extends coverage to the Contractor.

9.3.6 The effecting of insurance shall not limit the liabilities or obligations of the Contractor under other provisions of this Agreement.

9.4 General Indemnity

9.4.1 The Contractor will be liable in respect of, and indemnifies, and shall keep indemnified, the Principal its officers, employees and agents 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 unlawful, negligent, reckless or deliberately wrongful act or omission of the Contractor (or its Personnel, its agents, or their employees) in the performance of this Agreement.

- 9.4.2 The Contractor's liability in respect of, and indemnity given in, clause 9.4.1 shall be reduced proportionally to the extent that any unlawful, negligent, or deliberately wrongful act or omission of the Principal, its officers, employees or agents caused or contributed to the loss.

9.5 Contractor's Warranties for Deliverables

- 9.5.1 The Contractor warrants that:

- (a) the Deliverables will be supplied in accordance with the requirements of this Agreement and all relevant Standards, applicable legislation, and industry codes;
- (b) the Deliverables will be free from any charge or liability;
- (c) the Deliverables will be new, free from defects in design, workmanship and materials
- (d) the Deliverables will conform to the description, and sample (if any) approved by the Principal in Schedule 2 (except that if a sample is inconsistent with the Statement of Requirements, that latter must prevail);
- (e) the Deliverables will be of good merchantable quality and fit for use by the Principal;
- (f) the Deliverables will be provided with due care and skill;
- (g) if specified in the Statement of Requirements that they are required, the Contractor has established quality assurance arrangements for the provision of the Deliverables and will comply with, and maintain, those quality assurance arrangements up to and including the Due Date; and
- (h) the Contractor will not enter into any arrangement that impedes or is likely to hinder its provision of the Deliverables in a manner, and to a standard, satisfactory to the Principal, without obtaining the Principal's prior written consent.

9.6 Contractor's Warranties (General)

- 9.6.1 The Contractor warrants that the Deliverables do not infringe the Intellectual Property rights of a third party.

9.7 Warranty Period

- 9.7.1 The Contractor shall remedy any error or defect in warranted Deliverables that has been notified to it by the Principal during the Warranty Period in Schedule 2 at the Contractor's cost and expense.

- 9.7.2 If the Contractor fails to remedy an error or defect in warranted Deliverables within 30 days after notification by the Principal, the Principal may arrange for performance of the necessary remedial work by a third party at the Contractor's expense.

9.8 Third Party Warranties

- 9.8.1 Where the Contractor supplies Deliverables that have been procured from third parties, the Contractor agrees to assign to the Principal, to the extent permitted by law, the benefits of any warranties given by the third parties.

- 9.8.2 The Parties agree that the assignment of any third party warranties is in addition to the warranties offered directly by the Contractor under this Agreement and does not relieve the Contractor from the obligation to comply with the Contractor's own warranties.

9.9 Financial Security

(Guide Note: Amount and form of the Financial Security are to be resolved prior to execution of the Agreement).

- 9.9.1 If requested by the Principal, the Contractor must provide Financial Security within 7 days of such request for the amount specified in Schedule 1 item 10. The Financial Security must be substantially in the form set out in Schedule 6 and must be issued by a financial institution acceptable to the Principal. The Principal will hold the Financial Security as security for the due and proper performance of all the obligations of the Contractor under this Agreement.
- 9.9.2 If the Financial Security is not sufficient to meet payment of all the loss or damage suffered by the Principal, the balance remaining will be a debt due and owing from the Contractor to the Principal and may be recovered in any appropriate court.
- 9.9.3 The Contractor agrees that the Principal will have no liability to the Contractor for any loss or damage suffered or incurred by the Contractor where the Principal exercises its rights under this clause in good faith.
- 9.9.4 The Contractor must not take any action to injunct or otherwise prevent the Principal from making a claim or receiving a payment under the Financial Security. This clause does not prevent the Contractor from taking action to recover from the Principal any amount invalidly received by the Principal under any such Financial Security.
- 9.9.5 The Principal must release the Financial Security to the Contractor (or to whom the Contractor directs) if in the reasonable opinion of the Principal:
- (a) there is no prospect that money or damages will become owing (whether actually or contingent) by the Principal; and
 - (b) no payment by the Contractor or the provider of the Financial Security is likely to be void, voidable or refundable under any law, including without limitation any law relating to insolvency.

9.10 Mistakes in Information

- 9.10.1 The Contractor must pay for the extra costs (if any) incurred by the Principal by errors or omissions in material or other Information supplied by it, even though that material or Information may have been approved by the Principal.

9.11 Notification of Change in Control or Transfer of Ownership

- 9.11.1 During the Term, the Contractor must immediately notify the Principal in writing of any Change in Control or other action to reconstruct or amalgamate itself.

9.12 Notification of Contractor's Insolvency

- 9.12.1 The Contractor must immediately notify the Principal in writing of Contractor's Insolvency and disclose the details of any action taken in relation to the Contractor's Insolvency in so far as it affects this Agreement.

10 Delivery and Acceptance

(Guide Note: Modify this clause where Acceptance does not require Acceptance Testing)

10.1 Delivery

- 10.1.1 The Contractor must deliver the Deliverables in accordance with the Statement of Requirements and must obtain an acknowledgement of their delivery:
- (a) in the required nature and volume;
 - (b) on the Due Date/s for delivery of the Deliverables indicated in Schedule 1; and
 - (c) the site for that delivery specified in the Statement of Requirements.

- 10.1.2 Delivery and acknowledgement of delivery of the Deliverables shall not be taken to be an acceptance by the Principal that the Deliverables meet the requirements of this Statement of Requirements.

10.2 Expenses of Delivery

- 10.2.1 The Contractor must pay for all costs associated with the delivery of the Deliverables to the Principal including freight, insurance and other charges, including the cost of the return of Deliverables wrongly supplied except where it is expressly provided in this Agreement.

10.3 Risk and Title

- 10.3.1 Title in the Deliverables shall pass to the Principal on satisfactory delivery to the Principal, as evidenced by the signature on the delivery docket of a duly authorised representative of the Principal. Notwithstanding that the Principal has taken delivery, the Contractor will remain liable for any loss or damage to the Deliverables and/or their components, which may have occurred prior to delivery, and for any non-compliance of the Deliverables with the Statement of Requirements.

11 Confidentiality

11.1 Obligations of Parties

- 11.1.1 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, unless the other Party gives its prior written consent:
- 11.1.2 Each Party may disclose Confidential Information to its officers, employees and sub-contractors where such disclosure is essential to carrying out their duties or in accordance with this Agreement.
- 11.1.3 Each Party must ensure the Confidential Information of the other Party is used solely in connection with or for the purposes of fulfilling its obligations under this Agreement.
- 11.1.4 This clause will survive the termination of this Agreement for a period of *(specify the number of years which applies to the confidential information referred to in this Agreement)* years.

12 Conduct and Dispute Management

12.1 Co-operation

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

12.2 Duty not to Hinder Performance

- 12.2.1 Each Party must do all it reasonably can to avoid hindering the performance of the other under this Agreement.

12.3 General

- 12.3.1 In order to resolve any conflicts or issues between the Parties promptly and to the satisfaction of the Parties, the issue resolution process stated below will be followed:
- (a) Amicable Resolution (clause 12.4);
 - (b) Expert Determination (clause 12.5)

12.4 Amicable Resolution

- 12.4.1 Either Party may give notice to the other Party of an issue, including a dispute or difference, (“the Issue Notice”) about the meaning or effect of this Agreement. The Issue Notice must be given within a reasonable time of the Party becoming aware of the issue.
- 12.4.2 The Party submitting the Issue Notice must submit it to the other Party’s authorised representative which in the case of the Principal is the Principal’s Delegate, and in the case of the Contractor is the Relationship Manager.
- 12.4.3 The Parties must follow the issue resolution process in this clause before either commences proceedings or takes similar action except to seek an urgent injunction or declaration.
- 12.4.4 If a Party gives an Issue Notice under this clause, each Party will nominate in writing a senior executive who will promptly confer to resolve the issue.
- 12.4.5 A Party is not entitled to refer an issue to Expert Determination until 21 days after the giving of the Issue Notice to the person or persons specified.
- 12.4.6 A Party may only refer an issue to Expert Determination by giving notice in writing specifying the issue to be decided (“the Referral Notice”).
- 12.4.7 If the Party giving the Referral Notice is the Contractor it must give the Referral Notice to the Principal.
- 12.4.8 If the Party giving the Referral Notice is the Principal, it must give the Referral Notice to the Contractor.
- 12.4.9 If a Referral Notice has not been given to the person or persons specified within 28 days, then the issue is barred from Expert Determination or any other action or proceedings (including court proceedings).

12.5 Expert Determination

- 12.5.1 If a Referral Notice is given under clause 12.4, the expert is to be agreed between the Board and the Contractor. If they cannot agree within 28 days of the Referral Notice, the expert is to be nominated by the Chief Executive Officer, Australian Commercial Disputes Centre, Sydney.
- 12.5.2 The expert nominated must be a lawyer unless otherwise agreed. The expert must not be:
 - (a) an employee of the parties;
 - (b) a person who has been connected with the Agreement; or
 - (c) a person who the Parties have been unable to agree on.
- 12.5.3 When the person to be the expert has been agreed or nominated, the Principal, on behalf of both Parties, must engage the expert by letter of engagement (and provide a copy to the Contractor) setting out:
 - (a) the issue referred to the expert for determination;
 - (b) the expert’s fees;
 - (c) the procedure for determination set out in Schedule 5;
 - (d) any other matter which is relevant to the engagement.
- 12.5.4 The Parties must share equally the fees and out-of-pocket expenses of the expert for the determination, and bear their own expenses.
- 12.5.5 If the expert determines that one Party must pay the other an amount exceeding the amount shown in Schedule 1 item 14 (calculating the amount without including interest on it, and after allowing for set offs), then either Party may commence litigation, but only within 56 days after receiving the determination.
- 12.5.6 Unless a party has a right to commence litigation under clause 12.5.5:

- (a) the Parties must treat each determination of the expert as final and binding and give effect to it; and
- (b) if the expert determines that one Party owes the other money, that Party must pay the money within 28 days.

13 Termination by the Principal

13.1 Termination for Cause

13.1.1 Without prejudice to its rights at common law, the Principal may immediately terminate this Agreement, in whole or in part, by written notice to the Contractor (“Notice of Termination for Cause”):

- (a) where the Contractor makes any statement, fact, information, representation or provides material in connection with the Statement of Requirements, the Prices or any aspect of this Agreement, which is false, untrue, or incorrect in a way which materially affects the Agreement;
- (b) where proceedings or investigations are commenced or threatened by the Independent Commission Against Corruption or similar public body against the Contractor including for corrupt conduct or for collusive pricing;
- (c) where the Contractor commits a Substantial Breach of the Agreement that is not capable of remedy;
- (d) where the Contractor commits a Substantial Breach of the Agreement in a manner that is capable of remedy and does not remedy the breach within 7 days of receiving a notice from the Principal requiring it to do so (“Notice of Breach”), or such further time, having regard to the nature of the breach and a reasonable time to remedy it, as the Principal may reasonably allow;
- (e) where the Contractor assigns its rights and/or obligations, or novates this Agreement except in accordance with this Agreement;
- (f) in the case of the Contractor’s Insolvency; or
- (g) if, in the Principal’s view, a conflict of interest exists for the Contractor which prevents the proper performance of this Agreement.

13.2 Effect of Termination of Agreement for Cause

13.2.1 If the Principal terminates this Agreement for cause, the Principal may:

- (a) at its option, for an appropriate part payment of the Contract Price, (as agreed by the Parties, or failing agreement as determined by an agreed expert), require the Contractor to deliver to the Principal any Deliverables or components in the possession or control of the Contractor as at the date of termination;
- (b) deduct any loss or damages arising from or in connection with the termination, from any money due, or which may become due to the Contractor and/or from the Financial Security (if any); and
- (c) recover from the Contractor in an appropriate court the balance of any monies remaining unpaid as a debt due and payable by the Contractor to the Principal.

13.3 Termination for the Principal’s Convenience

13.3.1 The Principal may terminate this Agreement in whole or in part for its convenience by giving 14 days’ written notice (“Notice of Termination for Convenience”) with effect from the date stated in the notice and without the need to provide reasons.

13.3.2 The Principal shall reimburse the Contractor its unavoidable costs directly incurred as a result of termination provided that any claim by the Contractor:

- (a) must be supported by written evidence of the costs claimed;

- (b) will be in total satisfaction of the liability of the Principal to the Contractor in respect of this Agreement and its termination.
- 13.3.3 The Principal shall not in any circumstances be liable for any Consequential Loss or loss of profits suffered by the Contractor as a result of the termination of this Agreement by the Principal.

14 General

14.1 No Assignment or Novation

- 14.1.1 The Contractor must not assign or novate this Agreement without first obtaining the prior written consent of the Principal, which consent may be withheld at their absolute discretion.
- 14.1.2 The Contractor acknowledges that the Principal may make financial checks on the entity proposing to take over this Agreement before determining whether or not to give consent to the assignment or novation.

14.2 Conflicts of Interest

- 14.2.1 The Contractor promises that, to the best of its knowledge, no conflict of interest of the Contractor, its Personnel (its employees or sub-contractors) or its agents exists or is likely to arise in the performance of its obligations under the Agreement.
- 14.2.2 The Contractor must:
 - (a) notify in writing, and consult with, the Principal immediately upon becoming aware of the existence, or possibility, of a conflict of interest; and
 - (b) comply with any direction given by the Principal in relation to those circumstances designed to manage that conflict of interest.
- 14.2.3 For the purposes of this clause, a “conflict of interest” includes engaging in any activity, or obtaining any interest, likely to conflict with the performance by the Contractor of, or to restrict the Contractor in performing, its obligations under the Agreement.

14.3 Records and Access to Records

- 14.3.1 The Contractor must keep proper accounts and records in accordance with the accounting principles generally applied in commercial practice and in accordance with Schedule 2.
- 14.3.2 The Contractor must, within a reasonable time of a request from the Principal, give the Principal access to, and copies of, any material relevant to the performance of the Contractor’s obligations under this Agreement, and any financial information, that the Principal reasonably requires.

14.4 Waiver

- 14.4.1 A waiver in respect of a breach of a term of this Agreement 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 will not be interpreted as a waiver of that term.

14.5 Severability

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

14.6 Notices

- 14.6.1 Notices must be sent to the other Party at the address shown in Schedule 1 item 15, or the address last notified to the other Party in writing, or in the case of the Contractor, at the Contractor’s registered office.

14.6.2 All notices must be in writing and signed by the relevant Party and must be given either by hand delivery, post or facsimile transmission.

14.6.3 If delivery or receipt of a notice is not made on a business day, then it will be taken to be made on the next business day.

14.7 Counterparts

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

14.8 Applicable Law

14.8.1 This Agreement is governed by the laws of the State of New South Wales and the Parties submit to the non-exclusive jurisdiction of the courts of the State of New South Wales and the Commonwealth of Australia.

14.9 No agency/no employment/no partnership

14.9.1 The Contractor agrees that the Contractor will not be taken to be, nor will it represent that it is, the employee, partner, officer and/or agent of the Principal or the State Contracts Control Board.

14.10 Exchange of Information Between Government Agencies

14.10.1 The Contractor authorises the Principal and its employees and agents to make available to NSW Government departments or agencies Information concerning the Contractor, including any Information provided by the Contractor to the Principal and any Information relating to the Contractor's performance under the Agreement, or the Contractor's financial position.

14.10.2 The Contractor acknowledges that Information about the Contractor from any source including any substantiated reports of unsatisfactory performance, may be taken into account by NSW Government agencies in considering whether or not to offer the Contractor future opportunities for NSW Government work.

14.10.3 The Principal regards the provision of Information about the Contractor to any New South Wales Government department or agency as privileged within section 30 of the *Defamation Act 2005* (NSW).

14.10.4 The Contractor releases and indemnifies the Principal and the State of New South Wales from any claim in respect of any matter arising out of the provision of Information. Without limiting the above, the Contractor releases the Principal and the State of New South Wales from any claim it may have for any loss to the Contractor arising out of the provision of Information relating to the use of such Information by the recipient of the Information.

14.11 Pricing Information

The Contractor agrees that, subject to clause 11 (Confidentiality), product pricing information (including discounts, commissions and rebates as appropriate) may be disclosed to any person by the Board at its sole discretion in the form of a User Guide or in any medium of communication it deems appropriate.

14.12 Government Information (Public Access)

14.12.1 The parties acknowledge that information relating to this Agreement including information provided by the Contractor to the Board may be disclosed in accordance with the Government Information (Public Access) Act ("GIPA Act").

14.13 Performance Monitoring

[Guide Note: Use clause only if a SMEPP is required to be completed by the tenderer in the tender response. Agencies are to ensure that the SMEPP responses prepared by the successful tenderer form part of the contract with the agency on the basis of impact on jobs, investments, skills development and technology transfer](#)

14.13.1 The Contractor acknowledges that it is aware that reliance was placed by the Principal on the responses to the SME participation questions or SMEPP in the

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evaluation of the tender submitted by the Contractor and in the Principal entering into this agreement with the Contractor. The Contractor agrees to comply with the requirements and commitments provided for in the responses to the SME participation questions or SMEPP tendered by the Contractor (copy at Schedule 7 of this agreement) and to take all steps reasonably required to enable the Principal to monitor compliance by the Contractor with the SMEPP.

- 14.13.2 The Contractor and the Principal agree that the Principal may establish mechanisms to monitor compliance by the Contractor with the requirements and its commitments under the responses to the SME participation questions or SMEPP. The Contractor and the Principal agree that non-compliance by the Contractor of its responses to the SME participation questions or SMEPP commitments will constitute a breach of contract and entitle the Principal to terminate the contract for cause. Further, the Contractor agrees that the Principal may take into consideration non-compliance by the Contractor with the tendered responses to the SME participation questions or tendered SMEPP when evaluating tenders submitted by the Contractor in the future for other agreements.

Schedule 1 Agreement Details

Item 1	Contractor's Name
Item 2(a) Item 2(b)	Commencement Date (clause 2.1.1) Due Date (clause 2.1.1)
Item 7	<p>Codes and Standards (clause 9.2) <i>(Guide Note: standard codes and guidelines have been inserted here. Insert any other codes, policies, guidelines, and standards which the Contractor must comply with).</i></p> <p>a) Code of Practice for NSW Government Procurement. b) Implementation Guidelines for NSW Government Procurement. c) Occupational Health & Safety Procurement Guidelines. d) Environmental Management Procurement Guidelines. e) Industrial Relations Systems Guidelines. f) Code of Behaviour for the Protection of Children and Other Vulnerable People (available at http://www.nswprocurement.com.au/PDF/Tenders/Child-Protection-Code-of-Behaviour-for-the-Protect.aspx) <i>(Guide Note: Delete reference to Code of Behaviour for the Protection of Children and Other Vulnerable People if not applicable)</i> g) Local Jobs First Plan</p>
Item 9	<p>Insurances (clause 9.3)</p> <p>a) Public Liability Insurance Limit of Indemnity: \$AUS_M</p> <p>b) Products Liability Insurance Limit of Indemnity: \$AUS_M</p> <p><i>(Guide Note: List any other insurances here)</i></p>
Item 10	<p>Financial Security (clause 9.9): <i>(Guide Note: If clause 9.9 (Financial Security), is NOT USED, retain the heading of this Item and write the words NOT USED next to the words "Amount" and "Form" below).</i></p> <p>Amount: Form:</p>
Item 11	Principal's Delegate (clause 6.1)
Item 12	<p>Personnel</p> <p>Principal's Personnel (clause 6.1) <i>(Guide Note: list names, designations and roles)</i></p> <p>Key Personnel (clause 6.1)</p> <p>Relationship Manager (clause 6.2)</p> <p>Name:</p> <p>Address:</p> <p>Position:</p> <p>Telephone:</p>

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	Facsimile
Item 14	<p>Expert Determination Amount (clause 12.5): <u><i>Guide Note: If this Agreement is worth more than \$50M annually, the Expert Determination Amount should be \$1.0M. If it is worth less than this, the Expert Determination Amount should be \$100,000.</i></u></p> <p>AUD:</p>
Item 15	<p>Notices to: (clause 14.6)</p> <p>The Contractor's contact name and address:</p> <p>Name:</p> <p>Address:</p> <p>Position:</p> <p>Telephone:</p> <p>Facsimile:</p> <p>The Board's contact name and address:</p> <p>Name: Chairman, SCCB</p> <p>Address: McKell Building, Level 22, 2-24 Rawson Place, SYDNEY, NSW 2000</p> <p>Telephone: 9372 8818</p> <p>Facsimile: 9372 8803</p>

Schedule 2 Statement of Requirements

Schedule 3 Pricing

Guide Note: Officer is required to insert pricing information

Schedule 4 Deed - smartbuy® Requirements

(Guide Note: This tri-partite deed must be executed between the Board, the Principal, and the Contractor where the Deliverables supplied by the Contractor are hosted on smartbuy®. Where the Agreement is between the Board and the Contractor, this deed may be made bi-partite).

If the Deed – smartbuy Requirements Agreement is bipartite (i.e. between the Board and the Contractor, then delete number 2). Also include the term (“or Principal”) after the Board in number 1.

This Deed made the _____ day of _____ 20__ between

1. State Contracts Control Board ("the Board") for and on behalf of the Crown in right of the State of New South Wales; and
2. (insert name of Principal) ("the Principal") for and on behalf of the Crown in right of the State of New South Wales; and
3. _____
Full name of company/sole trader or partners, including "trading as", if applicable ("the Contractor")

Address: _____

Telephone: _____

Background

- A. The Contractor has tendered to supply goods and/or services ("Deliverables") to[Insert name of Principal under the Agreement] ("the Principal") pursuant to and upon terms and conditions set out in Contract No..... [insert contract no.] ("the Agreement").
- B. It is a condition of the Agreement that the Contractor will use smartbuy® for certain specific purposes connected with this Agreement including hosting its Deliverables catalogue and (Guide note).

Agreement

- 1. smartbuy® Licence**
 - 1.1 The Board has granted to the Contractor a non-exclusive, non-transferable, revocable licence to use smartbuy® for the performance of its obligations under this Agreement.
- 2. Authorised User**
 - 2.1 The Board may approve a person nominated by the Contractor and allow such person to access or use smartbuy® and become an Authorised User or an Administrator.
 - 2.2 The Board may in its discretion decline to accept a person nominated by the Contractor as an Authorised User or an Administrator, without stating its reasons.
- 3. Contractor Obligations**
 - 3.1 The Contractor must provide any information that is reasonably required by the Board for use by smartbuy® including Contractor Information. The Contractor must ensure that all information provided to the Board (including maintaining information in the

smartbuy® system) is current, correct, and complete at all times. The Contractor must immediately notify the Board of any changes required to the Contractor Information.

- 3.2 The Contractor agrees that Contractor Information will be published on smartbuy® by the Board. Contractors are responsible to ensure that all subcontractors are aware that their information will be published by the Board on smartbuy® as part of Contractor Information.
- 3.3 The Contractor must:
- a) conform to the Board's current password policies;
 - b) comply with all directions given by the Board in relation to the Contractor's access and/or use of smartbuy®; and
 - c) ensure that Transactions are only made for and on behalf of the Contractor and in accordance with this Agreement
 - d) provide the Board with an appropriate number of dedicated personnel to ensure the appropriate use of smartbuy®.

4. Catalogues

- 4.1 The Board requires the Contractor (unless otherwise specified by the Board) to take responsibility to update and actively maintain Catalogue Information provided by the Contractor on smartbuy®, or its Externally Hosted Catalogue.
- 4.2 The Contractor is responsible for the accuracy and completeness of Catalogue Information including any images supplied by the Contractor.
- 4.3 The Contractor is required to provide Catalogue Information to an acceptable data standard, approved by the Board. Catalogue Information must include all required item attributes including United Nations Standards Products & Services Codes (UNSPSC). The Contractor may either provide developed Catalogue Information to the Board or may request the Board to provide it with assistance, at a fee.
- 4.4 The Board may transform data provided by the Contractor in order to load it into smartbuy® however the values and meaning of the data will not be modified without the prior agreement of the Contractor.
- 4.5 If the Board produces formatted Catalogue Information for the Contractor, then the Contractor must ensure that the formatted Catalogue Information is current, correct, and complies with its obligations under this Agreement.
- 4.6 The Board may review any Catalogue Information and require the Contractor from time to time to update or take off-line its existing Catalogue Information, add new Catalogue Information and/or verify that the Catalogue Information is accurate, current and in accordance with its obligations under this Agreement or applicable Codes and Standards.
- 4.7 The Board reserves the right to audit the Contractor's Externally Hosted Catalogue Information from time to time for compliance with this Agreement.
- 4.8 The Contractor may only make available information or data, including any Catalogue Information in an Externally Hosted Catalogue to NSW agencies with the Board's prior written consent. Where such approval is given the Contractor will provide the Board with administrator access to its Externally Hosted Catalogue to enable the Board to conduct audits as required.
- 4.9 When approved to connect an Externally Hosted Catalogue, the Contractor must set up accounts for Eligible Customers within two working days from receipt of lodgement of a completed request and ensure that the Principal can access Catalogue Information.
- 4.10 Externally Hosted Catalogues shall not provide functionality that allows the Principal to directly place orders for Deliverables. The Contractor agrees that, after the Principal has finished its browse activities, the order for the Deliverables in Externally Hosted Catalogues must be transmitted via smartbuy®.

- 4.11 The Contractor's Externally Hosted Catalogue(s) should be available 7 days a week excluding any scheduled maintenance. Contractors must, in relation to their Externally Hosted Catalogues, give the Board reasonable prior notice of any scheduled maintenance and the time it will occur. The Contractor agrees to monitor the performance of its system and notify the Board immediately of any outage of its Externally Hosted Catalogue, except for any scheduled maintenance that the Contractor has notified the Board about.
- 4.12 The Contractor agrees to nominate in writing to the Board within 2 days of entry into this Agreement a person who can be contacted between 9am and 5pm during normal business days to receive and respond to enquiries relating to its Externally Hosted Catalogues.
- 4.13 The Contractor agrees to include on its webpage a customised error message confirming that the error is with the Externally Hosted Catalogue and not with smartbuy®.

5. Provision and Updating of Catalogue Information

- 5.1 The Contractor is required to provide electronic Catalogue Information in an electronic format acceptable to the Board no later than 30 days from the commencement of this Agreement, inclusive of Catalogue Information specific to particular Eligible Customers.
- 5.2 All Catalogue Information must be updated in strict accordance with the frequency and conditions outlined in this document from the date on which the Catalogue Information is initially hosted on smartbuy® as per clause 4 above.

6. Availability

- 6.1 The Board may in its discretion limit or suspend the Contractor's access or use of smartbuy® during the Term of this Agreement.
- 6.2 Unless otherwise notified by the Board, smartbuy® will be accessible 7 days a week except during any necessary scheduled maintenance, unscheduled maintenance or unavailability caused by a circumstance beyond the reasonable control of the Board or its third party suppliers.
- 6.3 The Board will endeavour where reasonably practicable to notify the Contractor of any:
- a) changes or upgrades to smartbuy®'s functionality that materially affect the Contractor's use of smartbuy®;
 - b) changes in equipment or configuration requirements of smartbuy® that materially affects the Contractor's ability to access and use smartbuy®.
- 6.4 The Board agrees to make available the NSW Procurement Client Support Centre to assist the Contractor in relation to any defects it experiences in the operation or functionality of smartbuy®. The Contractor agrees to report any issues or defects to the Client Support Centre on 1800 NSW BUY (679 289) or NSWP_Support@services.nsw.gov.au. Unless the Contractor is otherwise notified by the Board, the Client Support Centre will be available from 8.30 am to 5.00 pm Monday to Friday, excluding public holidays. The Board may change the times during which the Client Support Centre is available from time to time.

7. smartbuy® Security

- 7.1 smartbuy® security systems have been created to protect buyers, suppliers and information maintained on or transmitted from or to smartbuy®.
- 7.2 Key elements of the security regime include:
- a) Data Centre certified to BS7799, ASIO T4 rating and Suntone 2 Accreditation;
 - b) Robust firewalls;

- c) Multi level system design;
- d) Virus protection;
- e) Password protection and restricted access permissions;
- f) Intrusion detection systems;
- g) Audit trails of user activities;
- h) Where encryption is used, HTTPS protocol with 128 bit technology has been selected;
- i) Programme of system upgrades to ensure security compliance.

7.3 The Contractor must:

- a) have in place procedures to prevent any unauthorised use of smartbuy® by any person on its behalf (including Administrators, Authorised Users or an unauthorised third party) and these procedures must include provision to ensure its Administrators and Authorised Users are prevented from accessing or using smartbuy® upon them ceasing to be authorised to do so;
- b) make all reasonable efforts to ensure that any information (including documents) that it transmits via smartbuy® will be free from viruses, worms or trojan horses or any other malicious program that is capable of causing damage to smartbuy® or smartbuy®'s users;
- c) make all reasonable efforts to ensure that its systems are secure and are kept up to date with adequate anti-virus software;
- d) notify the Board immediately of any significant security breaches that it suffers or threats that it is aware of.

7.4 The Contractor acknowledges that user logins and passwords used to access smartbuy® are transmitted using HTTPS protocol. Delivery of business documents (such as purchase orders and/or Invoices) is done through the following mechanisms, depending on the election of the Contractor:

- a) Facsimile;
- b) Unencrypted emails;
- c) SFTP: File Transfer Protocol over Secure Sockets Layer (SSL) (Secure Shell (SSH) available on request);
- d) HTTPS protocol: Hypertext Transport Protocol over Secure Sockets Layer (SSL).

7.5 While the Board will make reasonable endeavours at all times to make smartbuy® secure, the Board does not guarantee:

- a) the security of smartbuy®, the internet, and any other system, including the system used by the Board to access or use smartbuy®;
- b) that the delivery of business documents will be uninterrupted or secure;
- c) that smartbuy® will be uninterrupted, timely, secure or error-free;
- d) that smartbuy®, the internet, and any other system, including the system used by the Contractor, will be free of viruses or errors.

The Contractor must immediately notify the Board if it suspects, becomes aware, or has knowledge of any unauthorised use of smartbuy® by another person.

7.6 The Board may provide access and password details ("Passwords"):

- a) to Administrators to be supplied to Authorised Users; and/or
- b) directly to the e-mail addresses of Authorised Users who are acceptable to the Board.

7.7 The Contractor must take all reasonable steps to protect and keep secret any Passwords that the Board provides to it as per clause 7.6. The Contractor acknowledges and agrees that Board will rely on their use of a Password as conclusive evidence of their identity and authority, without further investigation. The Contractor must immediately notify the Board if it suspects, knows about or has

knowledge that a Password has become compromised or known to another person and/or of any unauthorised use of a Password by another person has occurred, as per clause 7.5.

8. Minimum Configuration

8.1 To access and use smartbuy® TRADE the Contractor must have the following minimum configuration and the Contractor warrants that it has:

- a) Windows 95, 98, 2000 or XP, IE 5.5 or later, a recommended video resolution of 1024X768; and
- b) will configure its web browser to use SSL3.0 and ensure that the auto-complete or similar function is switched off for “Contractor name and passwords on forms”.

8.2 These configurations may be varied by the Board due to changes or upgrades to smartbuy® from time to time. The Board will, wherever practicable, notify the Contractor of any variations to the configurations. The Contractor acknowledges that any access speed to smartbuy® and the performance of smartbuy® is limited by the Contractor’s Internet service or other infrastructure and equipment.

8.3 If the Contractor has any queries in relation to these configuration requirements it may contact the Client Support Centre .

9. Improper Use of smartbuy®

9.1 The Contractor must not intentionally, recklessly or negligently interfere with any other parties’ use of smartbuy®. The Contractor must not use smartbuy® or any service provided by the Board to post or transmit any information or provide a link to any third party website that:

- a) defames, threatens or menaces any person;
- b) breaches any law or regulation or infringes a third party’s rights;
- c) is indecent, pornographic or obscene;
- d) knowingly transmits any virus, computer programme, code, device, product, components or other disabling feature that prevents, inhibits or impairs the performance of smartbuy®;
- e) is an unsolicited commercial electronic message promoting the supply of goods or services.

9.2 The Contractor must ensure that its employees, officers and agents view or access any material published or made available on smartbuy® TRADE and/or smartbuy® CONNECT in accordance with this Agreement.

9.3 The Contractor must not use smartbuy® to sell, buy or dispose of, or attempt to sell, buy or dispose of any goods or services that are not specified by the Board under this contract, are unlawful or unauthorised.

10. Disclaimer

10.1 The Board makes no warranties in relation to the condition, fitness, merchantability, quality and title of the Deliverables purchased by the Principal using smartbuy®. To the extent permitted by law, the Board expressly excludes all conditions, warranties and terms whether express, implied, or statutory, which would otherwise be implied by law, conduct or otherwise into this Agreement.

11. Privacy

11.1 The Contractor warrants, in respect of any personal information provided in connection with the use of smartbuy®, that the information is accurate, up to date and complete, and that individuals to which the personal information refers authorise its collection and are aware:

- a) that personal information is being collected, and will be held by the Board at the address shown in smartbuy® or by its third party suppliers;

- b) that the information is being collected for the purpose of managing smartbuy®, and the administration of this Agreement, and may be made available to the Principal for those purposes;
- c) whether the supply of the information by the individual is required by law or is voluntary, and any consequences for the individual if the information (or any part of it) is not provided; and
- d) of the existence of any right of access to, and correction of, the information.

11.2 The Contractor acknowledges that its use of smartbuy® indicates its knowledge and acceptance of the privacy policy displayed on smartbuy®. smartbuy® may contain links to other websites. The Board is not responsible for the privacy practices or the content of such sites. The Board requires the Contractor to read the privacy statements in these linked sites, as their privacy policies may differ from those of the Board.

12. Integration with smartbuy® CONNECT

12.1 All electronic documents transmitted through smartbuy® TRADE are routed via smartbuy® CONNECT. smartbuy® CONNECT may also be used for document transmission directly between Eligible Customers and Contractors, without passing through the smartbuy® TRADE.

12.2 The following Transmission Types and Document Types are supported by smartbuy® CONNECT. The combination of Transmission Type and Document Type is termed a Trading Channel:

Transmission Type	Document Type	Trading Channel
HTTPS	xCBL3.0 (XML)	HTTPS/xCBL3.0
SFTP	CSV	SFTP/CSV
Email (SMTP)	PDF	Email/PDF
Fax	PDF	Fax/PDF

12.3 smartbuy® CONNECT supports the following business documents via the Trading Channels outlined above.

- a) PO
- b) PO Change
- c) PO Acknowledgement
- d) Receipt
- e) Receipt Change
- f) Advanced Shipping Notice
- g) Invoice
- h) Technical Message Acknowledgement

12.4 Contractors must adhere to the smartbuy® Transmission specifications and smartbuy® Document specifications for the Trading Channel selected (specifications available on request. If you require more information contact the NSW Procurement Client Support Centre on 1800 NSW BUY (679 289) or NSWP_Support@services.nsw.gov.au). For all documents implemented, Contractors must be capable of reading and actioning all mandatory and optional fields as defined in the document specifications.

12.5 The Board may assist in the development of an estimate of the costs of any integration to smartbuy® CONNECT. Firm pricing cannot be determined until the conclusion of a specific implementation planning study. Costs will vary depending upon the level of integration and their capability. Any integration of their systems with smartbuy®, including any Externally Hosted Catalogues may only take place with the Board’s prior consent. The Contractor acknowledges that they will support and fund

the establishment, maintenance and regular content update costs associated with integrating their systems with smartbuy® CONNECT. The Contractor is responsible and liable for any damage or claim that the Board suffers or incurs resulting from or in connection with the integration or interoperation of their systems with smartbuy®.

13 Invoices

13.1 It is a requirement that the Contractor provides electronic invoices to smartbuy® for all purchases by all NSW Government agencies against this Agreement - irrespective of how the purchase order is received (for example, via fax, telephone, mail, vendor online ordering system, etc). Contractors must send invoices via one of three channels:

a). Via the HTTPS/xCBL3.0 Trading Channel adhering to the smartbuy® HTTPS Channel Specification and the smartbuy® xCBL3.0 Document Specification. Contractors are responsible for all costs associated with implementing and maintaining the channel.

b). Via the SFTP/CSV Trading Channel adhering to the smartbuy® SFTP Channel Specification and the smartbuy® CSV Invoice Document Specification. Contractors are responsible for all costs associated with implementing and maintaining the channel.

c). Via a hosted web-portal provided by smartbuy® that allows Contractors to enter invoices online.

14 Externally Hosted Catalogues

14.1 Where Contractors are required to provide an Externally Hosted Catalogue the catalogue must utilise the OCI v3.0 protocol over HTTPS for both inbound and outbound requests.

Schedule 5 Expert Determination Procedure

1 Questions to be determined by the Expert

- 1.1 The expert must determine for each issue the following questions (to the extent that they are applicable to the issue):
- 1.1.1 Is there an event, act or omission which gives the claimant:
- a. a right to compensation under this Agreement
 - b. for damages for breach of this Agreement, or
 - c. otherwise in law?
- 1.1.2 If so:
- a. what is the event, act or omission?
 - b. on what date did the event, act or omission occur?
 - c. what is the legal right which gives rise to the liability to compensation?
 - d. is that right extinguished, barred or reduced by any provision of the Agreement, estoppel, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?
- 1.1.3 In the light of the answers to the above clauses of this Expert Determination Procedure:
- a. What compensation, if any, is due from one party to the other and when did it fall due?
 - b. What interest, if any, is due when the expert determines that compensation?
- 1.2 The expert must determine for each issue any other questions required by the parties, having regard to the nature of the issue.

2 Submissions

- 2.1 The procedure for submissions to the expert is as follows:
- 2.2 The Party to the Agreement which has referred the issue to Expert Determination (“Referring Party”) must make a submission in respect of the issue, within 15 business days after the date of the letter of engagement referred to in the issue resolution clause of the Agreement.
- 2.3 The other party (“Responding Party”) must respond within 15 business days after receiving a copy of that submission. That response may include cross-claims.
- 2.4 The Referring Party may reply to the response, but must do so within 10 business days after receiving the response, and must not raise new matters.
- 2.5 The Responding Party may comment on the reply, but must do so within 10 business days after receiving the reply, and must not raise new matters.
- 2.6 The expert must ignore any submission, response, reply, or comment not made within the time given in this clause 2 of this Expert Determination Procedure, unless the Principal and the Contractor agree otherwise.
- 2.7 The expert may request further information from either Party. The request must be in writing, with a time limit for the response. The expert must send a copy of the response to the other Party, and give the other Party a reasonable opportunity to comment on the response.

- 2.8 All submissions, responses, replies, requests and comments must be in writing. If a Party to the Agreement gives information to the expert, it must at the same time give a copy to the other Party.

3 Conference

- 3.1 The expert may request a conference with both parties to the Agreement. The request must be in writing, setting out the matters to be discussed.
- 3.2 The Parties agree that such a conference is considered not to be a hearing that would give anything under this Expert Determination Procedure the character of an arbitration.

4 Role of Expert

- 4.1 The Expert:
- 4.1.1 acts as an expert and not as an arbitrator
- 4.1.2 must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the Expert's own expertise; and
- 4.1.3 must issue a certificate in a form the expert considers appropriate, stating the expert's determination and giving reasons, within 12 weeks after the date of the letter of engagement referred to above.
- 4.1.4 If a certificate issued by the expert contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the expert must correct the certificate.

Schedule 6 Financial Security

Schedule 7 Response to SME Participation Questions or SMEPP

Guide Note: Insert here, if applicable, the successful tenderer's response to SME questions or the tendered SMEPP

EXECUTED AS AN AGREEMENT

*Guide Note: If the SCCB is executing the Agreement on behalf of the client agency as the Principal, please select the signatory box for the SCCB.
If Agency is executing the Agreement, please select the signatory box for Agency.
then select from the Library options the relevant contractor (Company or Individual) that will sign the Agreement.*

SIGNED AND DELIVERED by the)
signatory for and on behalf of the **NEW**)
SOUTH WALES STATE CONTRACTS)
CONTROL BOARD for and on behalf of
the Crown in right of the State of New
South Wales but not so as to incur any
personal liability in the presence of:

Witness

Signatory

Print Name

Print Name

Position

For Government Agency

SIGNED AND DELIVERED by the)
signatory for and on behalf of <insert name)
of Principal> for and on behalf of the)
Crown in right of the State of New South
Wales but not so as to incur any personal
liability in the presence of:

Witness

Signatory

Print Name

Print Name

Position

Option 1. Company

Agency Specific Part D one off – Goods - Low

Contract officers are no longer required to obtain the Company common seal when dealing with a company. However, you are required to obtain the signatures of one of two combinations:

- 1) the Corporate Secretary and a Director, or
- 2) two Directors, or

SIGNED by <insert name of)
company>, ABN <insert ABN number>in)
accordance with section 127 of the)
Corporations Act and in the presence of:

<Director/Secretary>

Director

Print Name

Print Name

Option 2. Company

Please use this clause when the sole director is also the sole secretary.

SIGNED AND DELIVERED by)
<insert name of company>, ABN <insert)
ABN number> in accordance with section)
127 of the Corporations Act and in the
presence of :

Witness

Signatory

Print Name

Print Name

Option 3. Individual

Agency Specific Part D one off – Goods - Low

SIGNED by <name of individual> in the)
presence of:)
)

Witness

Signatory

Print Name

Print Name