



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

Dated: <Insert Date>

<Insert Principal Name>

and

<Insert Contractor name>

AGREEMENT (REQUEST FOR TENDER, PART D) FOR

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

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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 Term Agreement for the Procurement of Goods

Coverage – This template applies to the establishment of agency specific term procurement arrangements for goods which may be handled by the agency without reference to the Board, or by the Board on behalf of the agency.

The Agreement does not guarantee the purchase of a specific volume of goods, even though there may be only one Contractor.

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

Contract 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.

If the “Benchmark” in clause 5.5 is to be used, the Benchmark (and its rates) will need agreement with the Contractor during the Term of the Agreement. NSW Procurement or the agency will also need to make budget provision to meet the Benchmark’s fees.

Price variation formula, where applicable, as well as details of fixed price periods should be dealt with in Schedule 3, Pricing, in addition to the Prices for the Deliverables.

Execution Requirements – This document is executed by way of a deed between the Principal (which may also be the Board), and the successful tenderer/s.

Clause Changes – Clauses can be changed or deleted in consultation with Legal Services in executable contracts.

Any Definitions in the Interpretation clause which are not required as a result of not being 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 executed by DEED is made on the _____ day of _____ 20__

BETWEEN

.....(insert name of Principal), of (insert address of Principal), 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 eg 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

- A. The Principal issued the Request for Tender for the supply of the Deliverables.
- B. The Contractor submitted a tender that was accepted by the Principal.
- C. The Principal and the Contractor have agreed to enter into an Agreement for the supply of the Deliverables in the form of this Agreement.

NOW THE PARTIES AGREE:

1 Interpretation

1.1 Definitions

"**Agreement**" means this Deed of Agreement including the Schedules and Part E, Special Conditions of Agreement, where applicable.

"**Applicable Discount**" means an applicable discount in Schedule 3 Pricing, as varied from time to time in accordance with this Agreement, or any other Applicable Discount which may be offered by the Contractor from time to time.

"**Approved Sub-Contractors**" means the sub-contractors approved by the Principal and indicated in Schedule 7.

“**Benchmarker**” means the independent company providing price benchmarking services in accordance with clause 5.5 and whose details are indicated in Schedule 1 item 3.

“**Category**” means generic categories of Deliverables comprising of multiple Products inclusive of the associated services for their supply.

“**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**” includes:

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

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

“**Contractor’s Cost Structure**” means the Contractor’s overall cost structure comprising of individual cost components for each Product listed in Schedule 3.

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

“**Contract Price**” means the total amount payable by the Principal to the Contractor for the Deliverables ordered under this Agreement and calculated in accordance with clause 5.2.

“**Contractor Information**” means the information provided by the Contractor in Schedule 1 and includes information on Approved Subcontractors.

“**Contractor’s Insolvency**” means any of the following events occurring in connection with the Contractor:

- (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.

“Customer Contract” means the contract that is made between the Contractor and the Principal under clause 3.3 of this Agreement.

“Deed” means a form in which a contract can be recorded which requires execution under the parties’ seal.

“Deliverables” means the goods and associated services or the goods only to be supplied by the Contractor and itemised in Schedule 3.

“Existing Contract Material” means any material which is existing at the date of this Agreement and which may be incorporated in to the New Contract Material.

“Expert Determination” means the process set out in clause 14.5.

“Financial Security” means the security in the amount and form specified by the Principal set out in Schedule 1 item 6 and in accordance with the pro-forma in Schedule 5.

“Free to Desktop” means free delivery to individual floors, departments and sections of a department and is the basis for purchase of products under which the Contractor is responsible for supply, delivery, insurance and off loading of products at the Principal’s individual points of acceptance within a building, location, or site.

“FREE-INTO-STORE (FIS)” means free into store and is the basis for purchase of products under which the Contractor is responsible for supply, delivery, insurance and off loading of products at the Principal’s premises at the point of acceptance.

“Guaranteed Delivery Time” means the guaranteed time for the supply of the Deliverables as specified in Schedule 2 and/or Schedule 9 of this Agreement, or such earlier time as may be agreed by the Principal and the Contractor in respect of a particular Customer Contract.

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

“Intellectual Property” includes copyright, patent, trademark, design, semi-conductor or circuit layout rights, trade, business or company names, or other proprietary rights, or any rights to registration of such rights existing in Australia, whether created before or after the date of this Agreement.

“Key Performance Indicators” means performance indicators in respect of the Contractor’s performance of this Agreement.

“Key Personnel” means the personnel of the Contractor specified in Schedule 1 item 5.

“Minimum Order Quantity” means the minimum quantity of each Deliverable ordered by the Principal, given in Order Units.

“New Contract Material” means any material brought into existence as part of, or for the purpose of providing the Deliverables including records, documents and Information stored by any means.

“NON FREE-INTO-STORE (NFIS)” or **“Ex Factory”** or **“Ex Works”** is the basis for purchase of Deliverables under which the Contractor is responsible only for providing the products in a suitable condition for transport to a single delivery point within the Greater Sydney Metropolitan Area. The Principal is responsible for transport, insurance, unloading and assembly if necessary.

“**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, and the Key Personnel in Schedule 1 item 5.

“**Price**” means the price payable for a Deliverable as set out in Schedule 3 and, where relevant, means the price inclusive of any Applicable Discount specified in Schedule 3.

“**Price Schedule**” means Schedule 3 to this Agreement and/or variations made to it in accordance with this Agreement.

“**Principal’s Material**” means any material, document, or Information supplied by the Principal to the Contractor by whatever means.

“**Principal’s Delegate**” means the Principal’s employee named in Schedule 1 item 8 responsible for the overall administration of this Agreement on behalf of the Principal.

“**Product**” means an individual line item within a generic Category of products inclusive of associated services for its supply and delivery.

“**Public Service**” has the same meaning as that given to it in the *Public Sector Employment and Management Act 2002* (NSW).

“**Public Sector Service**” has the same meaning as that given to it in the *Public Sector Employment and Management Act 2002* (NSW).

“**Relationship Manager**” means the Contractor’s employee named in Schedule 1 item 5.

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

“**Schedule**” means a schedule to this Agreement.

“**Service Levels**” means the service levels which need to be met by the Contractor under this Agreement in accordance with Schedule 6.

“**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.

“**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 the lack of an applicable Australian Standard.

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

“**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:

- (a) in the case of this Agreement, a substantial breach of a term of this Agreement by the Contractor and includes but is not limited to, any breach of the following clauses:
 - (i) clauses 5.1 to 5.9 (Pricing),
 - (ii) clause 8.1 (Punctual Delivery) without being granted an extension of time under clause 8.2,
 - (iii) clause 9 (Confidentiality),
 - (iv) clause 11.4 (Compliance with Laws and Standards),
 - (v) clause 11.5 (Minimum Insurance Requirements),
 - (vi) clause 11.11 (Financial Security)
 - (vii) clause 12.1 (Service Levels),
 - (viii) clause 16.1 (No Assignment or Novation); and
 - (ix) clause 16.2 (Conflicts of Interests).

“Term” means the period of this Agreement, set out in item 2 Schedule 1 and any extension of the Term in accordance with clause 2.2.

“Transition Plan” means the Contractor’s plan in Schedule 2 and/or Schedule 9 for ensuring successful transition to and from this Agreement.

“UNSPSC” means United Nations Standards Products & Services Code, being a coding system which classifies both products and services for use on a global basis.

“Warranty Period” means, in relation to a particular Product, the period of warranty of that Product specified in Schedule 2 and/or Schedule 8.

1.2 Rules for interpreting this Agreement

1.2.1 Headings are for convenience only, and do not affect the interpretation of this Agreement. 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) software, 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) Part E, Special Conditions to this Agreement, if applicable;
 - (b) Schedule 9
 - (c) The terms and conditions of this Agreement;
 - (d) Schedules 1 and 2 to this Agreement;
 - (e) Any other Schedules to this Agreement;
 - (f) The Customer Contract.

2 Term

2.1 Duration

- 2.1.1 This Agreement commences on the commencement date specified in item 2 of Schedule 1 and expires on the expiry date specified in the same item 2, unless sooner terminated in accordance with this Agreement.

2.2 Extension

- 2.2.1 The Principal may in its sole discretion extend this Agreement for the period or periods specified in item 2 of Schedule 1.

3 Formation

3.1 Nature of the Agreement between the Principal and the Contractor

- 3.1.1 This Agreement describes the terms and conditions between the Principal and the Contractor under which the Contractor agrees with the Principal that it will supply the Deliverables.
- 3.1.2 This Agreement together with Part E, Special Conditions ([Guide Note: delete if no Part E](#)) constitutes the entire Agreement between the Parties. Any prior arrangements, Agreements, representations or undertakings are superseded.

3.2 No Assurance of Volumes and Non-Exclusive Supply

- 3.2.1 This Agreement does not:
- (a) imply that the Contractor will receive any specific volume of orders for the Deliverables,
 - (b) imply that the Contractor is the exclusive provider of the Deliverables to the Principal; or
 - (c) oblige the Principal to place Customer Contracts for the Deliverables with the Contractor.
- 3.2.2 The Contractor acknowledges that the Principal may, from time to time, in its discretion, appoint other suppliers under an agreement to supply the Deliverables and that the Contractor will make no objection to such appointment.

3.3 Customer Contract

3.3.1 The Contractor agrees that each time the Principal places an order, a separate Customer Contract is formed. The terms and conditions of the Customer Contract are those appearing in:

- (a) This Agreement, any variations thereto, including any Schedules; and
- (b) The order.

3.4 Provisions of Agreement to apply to the Customer Contract

3.4.1 The provisions of this Agreement apply to the Customer Contract as if they were repeated in the Customer Contract, provided that in respect of the Customer Contract, "Agreement" and "Principal" wherever appearing in this Agreement shall be read as "Customer Contract" and "Customer" respectively.

3.5 Approved Sub-Contractors

(Guide Note: Delete clause 3.5, the Definition and Schedule 7 if there is no intention of having Approved Sub-contractors).

3.5.1 The Contractor may with the written consent of the Principal, sub-contract any part of this Agreement to an Approved Sub-Contractor in Schedule 7.

3.5.2 The Contractor must make the Approved Sub-contractor aware of the terms and conditions of this Agreement and this clause;

3.5.3 The terms and conditions of the sub-contract must be consistent with this Agreement.

3.5.4 The Contractor will continue to be bound by, and responsible for performance of this Agreement notwithstanding that part or all of it may have been sub-contracted.

3.5.5 The Principal may, without incurring liability, withdraw its approval of an Approved Sub-contractor if in its reasonable opinion the sub-contractor is not meeting the requirements of this Agreement. The Principal will notify the Contractor in writing that its approval is withdrawn and the Contractor will immediately terminate its arrangement with the sub-contractor.

3.5.6 To the extent that loss is not attributable to the Principal's withdrawal of approval of a sub-contractor:

- (a) the Contractor will be liable for any acts or omissions of any sub-contractor or any employee or agent of the sub-contractor as fully as if they were the acts or omissions of the Contractor, and
- (b) the Contractor will indemnify and release the Principal from any liability or loss resulting from the acts or omissions of any sub-contractor.

4 The Deliverables

4.1 Customer Contracts

(Guide Note: Attention is drawn to government requirements of having an audit trail on Customer Contracts and what is not acceptable, eg. verbal orders).

4.1.1 The Contractor must not supply the Deliverables unless the Principal issues a Customer Contract. Such Customer Contracts may be made by:

- (a) Written request to the Contractor by facsimile, email or by hand, containing the details outlined in clause 4.1.2;
- (b) Electronic issue in accordance with the Customer's and/or the Contractor's ordering system and this Agreement;
- (c) Any other method required by the Principal which is in keeping with the NSW Government's financial and audit policies.

- 4.1.2 A Customer Contract in whichever form it is issued, must provide the following details:
- (a) a description of the Deliverables;
 - (b) the Price for the Deliverables;
 - (c) this Agreement reference number;
 - (d) delivery date;
 - (e) delivery site;
 - (f) name of officer placing the Customer Contract; and
 - (g) address to which the Contractor's invoice is to be sent for payment.

- 4.1.3 If the Customer Contract is issued in incomplete form, the Contractor must notify the officer placing the Customer Contract of the details required under clause 8.1.2 that have not been provided prior to supply of the Deliverables which are the subject of the Customer Contract.

4.2 Contractor to Fulfil all Customer Contracts

- 4.2.1 The Contractor must fulfil all Customer Contracts placed by the Principal during the Term in accordance with this Agreement and the Customer Contract.
- 4.2.2 The Principal may place a single Customer Contract for the Deliverables to be supplied in a single delivery, or a single Customer Contract to be supplied in multiple deliveries, ie. "Blanket Orders".

4.3 List of Products and Categories

- 4.3.1 The Deliverables are the Products and overall Categories to be supplied by the Contractor under this Agreement and listed in Schedule 3.

4.4 Variation of Product Description

- 4.4.1 The Contractor must notify the Principal in writing as soon as practicable of any variation to the description of a Product offered in Schedule 3.
- 4.4.2 A variation under clause 4.4.1 may include a variation to the description of the number or name of the Product but excludes a variation:
- (a) to the Price of the Product;
 - (b) that modifies or upgrades the Product; or
 - (c) that introduces a new Product to the Price Schedule.
- 4.4.3 The Principal will notify the Contractor of its acceptance or rejection of the variation to the description of a Product. If the variation is accepted, it shall be taken to be incorporated into Schedule 3.

4.5 Improvements to Products

- 4.5.1 If during the Term the Contractor makes available on a general commercial basis Products that:
- (a) are modified versions or upgrades of a Product; or
 - (b) have a function or purpose similar to that performed by a Product; or
 - (c) have a new function or purpose consistent with the nature of the Product,
- then the Contractor must offer the Principal the same Product under this Agreement within 30 days of such Product being available on a general commercial basis.
- 4.5.2 The Product offered by the Contractor under clause 4.5.1 will form part of Schedule 3 when the Principal notifies its acceptance of the offer. Prior to accepting or rejecting the Contractor's offer, the Principal may request the Contractor to provide any further data reasonably required within 14 days to enable the making of an informed decision on the offer, and the Contractor must supply the same.

- 4.5.3 In the event that the Principal 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 by the Principal.

5 Pricing

5.1 Contractor's Obligations

- 5.1.1 The Contractor must supply the Products on the basis of the Prices in Schedule 3, except where provided in this Agreement.

5.2 Calculating the Contract Price

- 5.2.1 The Pricing for the Products in Schedule 3, which are fixed for the periods indicated therein, includes all applicable levies, duties, taxes, insurances, packaging, imposts, overheads and profits, any Applicable Discounts as well as all costs and expenses that the Contractor incurs in their supply, but is exclusive of GST.

5.3 Price Variation

[\(Guide Note: Use only where there is a Price Variation mechanism in Schedule 3\).](#)

- 5.3.1 The Contractor may not seek to vary the Price of a Product and/or Category listed in Schedule 3 except in accordance with the frequencies and methodology indicated in Schedules 3. Subject to the Contractor having provided the Principal with sufficient documentation to justify the application, and subject to clause 12.1.2(a), the Principal may in writing, approve the application within 30 days of lodgement. *[\(Guide Note: Ensure frequency and formula for price variation is injected into Schedule 3. Modify this clause if price is fixed\).](#)*
- 5.3.2 Where the Price variation is accepted, Schedule 3 will be updated to include the varied Price. The varied Price becomes the basis from which any future applications for Price variations will be calculated.
- 5.3.3 The Principal reserves the right to delete a Product and/or Category from Schedule 3 if it considers a Price variation application to be unreasonable.
- 5.3.4 Notwithstanding any other provision in this Agreement, the Contractor may apply in writing to the Principal to decrease its Prices at any time without any supporting documentation.

5.4 Benchmarking

[\(Guide Note: Modify clause where a Benchmarking is not to be appointed\).](#)

- 5.4.1 Throughout the Term of this Agreement the Contractor must ensure that the Price of each Product remains competitive to the prices of the same or similar products available in the market place.
- 5.4.2 For the purposes of determining whether the Prices under this Agreement are competitive, the Principal may at any time after the first anniversary of the Agreement commencement date indicated in Schedule 1 item 2, and at 12 monthly intervals thereafter, engage the services of the Benchmarking indicated in Schedule 1 item 3. The Benchmarking will review whether the Price of those Categories and/or Products in Schedule 3 as nominated by the Principal, are competitive when compared to Prices of such Categories and/or Products supplied under comparable arrangements including arrangements for the supply to the private sector.
- 5.4.3 The Contractor must give proper and considered weight to any recommendation that the Benchmarking may make with respect to whether the Prices are competitive and take prompt appropriate action to vary its Prices.
- 5.4.4 The costs of the Benchmarking will be based on the rates specified in Schedule 1 item 3 and will be paid for as follows:
- (a) Where the Prices of any Services (as nominated by the Board), are higher than the average industry price, the full costs of the Benchmarking must be met by the Contractor;

- (b) Where the Prices of any Services (as nominated by the Board), are lower than the average industry price, the full costs of the Benchmarker will be met by the Board.

5.5 Rebates

- 5.5.1 The Contractor warrants that if at any time during the Term of this Agreement, it receives any rebate, discount, commission or other subsidy on any Product that it purchases from its subcontractors or other third party suppliers, the benefit of such rebate, discount, commission or subsidy will be directly passed on to the Principal under this Agreement.

5.6 Bulk Purchase Discounts

- 5.6.1 If the volume to be purchased by the Principal of any Category or Product under this Agreement increases or is anticipated to increase, the Principal and the Contractor may negotiate a Price reduction or an increase in the Applicable Discount from the Contractor.
- 5.6.2 The Parties agree that the new Price or the new Applicable Discount under clause 5.7.1 shall be taken to be a variation of the Agreement in accordance with clause 7.

5.7 Continuous Best Price

- 5.7.1 Notwithstanding any other clause in this Agreement, where the Principal has been able to confirm that the external market pricing for any Product or Category in Schedule 3 is consistently more competitive than under this Agreement, the Principal will provide the Contractor with reasonable evidence of such market situation and request the Contractor vary its Prices to align with the market.
- 5.7.2 Where the Contractor offers more favourable prices to any other purchaser of similar Deliverables in NSW purchased in similar circumstances, including volumes (where Price is volume dependent), timing and terms and conditions where they have a substantial impact on price, it must promptly make the more favourable price available to the Principal under this Agreement.

5.8 Goods and Services Tax

- 5.8.1 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.
- 5.8.2 The Contractor must hold an Australian Business Number (ABN) and be registered for GST.
- 5.8.3 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 is received.
- 5.8.4 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.
- 5.8.5 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 5.9.4.

6 Payment

6.1 Payment of Contract Price

- 6.1.1 Subject to clause 6.2 and in consideration of the Contractor providing the Deliverables under this Agreement, the Principal shall, subject to the terms and conditions of this Agreement, pay the Contractor the Contract Price in accordance with this clause 6.
- 6.1.2 Failure by the Principal to pay the Contract Price at the due time will not be grounds to avoid performance of this Agreement.

6.2 Invoices and Time for Payment

(Guide Note: Clause 6.2.2 can be modified where a different payment period is agreed). Clauses 6.2.6 to 6.2.8 are in accordance with Treasury Circular 11/12.

- 6.2.1 All claims for payment made by the Contractor shall be in the form of a Tax Invoice and the tax invoice shall include and be substantiated by an itemised details of the account and the Contractor shall provide any further details in regard to the account that are reasonably requested by the Principal, including but not limited to consolidated monthly invoicing on behalf of its branches/business units.
- 6.2.2 Subject to this clause 6.2, 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.
- 6.2.3 The parties agree the making of a payment is not intended to be an acknowledgement that the Deliverables have been supplied in accordance with this Agreement.
- 6.2.4 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.
- 6.2.5 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.
- 6.2.6 Notwithstanding clauses 6.2.2, 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 6.2.6, 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.
- 6.2.7 Where payment is not made within the period specified in clause 6.2.6, 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/>.
- 6.2.8 For the purposes of this clause 6.2:
- “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.

6.3 Set-Off/Money Recoverable by the Principal

6.3.1 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.

6.3.2 Without limiting clause 6.3.1, 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. 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.

6.4 Suspension of Payments

(Guide Note: May be used as an incentive to ensure compliance by the Contractor with the instructions of the Principal).

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.

7 Variations

7.1 Variations to Agreement

7.1.1 This Agreement may not be varied except in writing signed by both the Principal and the Contractor.

8 Delivery

8.1 Punctual Delivery

8.1.1 The Contractor must deliver the Deliverables within the specified Guaranteed Delivery Times in Schedule 2 or Schedule 9, or by the delivery times specified in the Agreement.

8.1.2 As soon as practicable after becoming aware of any matter which is likely to change or which has changed the time for delivery, the Contractor must 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 whether the Contractor will be requesting a reasonable extension of time in accordance with clause 8.2.

8.2 Extension of Time

8.2.1 Where there is likely to be a 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 3 days of becoming aware of the possibility of such a 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.

- 8.2.2 The Principal may consent to a request for extension of time under this clause 8.2.2 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 the Control of the Contractor.
- 8.2.3 The Contractor will not be entitled to any increase in the Contract Price or damages, costs or expenses in connection with the delay.
- 8.3 Packaging**
- 8.3.1 The Contractor must ensure that all Deliverables are properly, safely and securely packaged and accurately labelled for identification and country of origin.
- 8.4 Expenses of Delivery**
- (Guide Note: Use where the delivery is FIS. Modify where NFIS is used).*
- 8.4.1 The Contractor must pay for all packaging, freight, insurance, and other charges, in connection with the delivery of Deliverables, and the return of Deliverables wrongly supplied except where it is otherwise expressly provided in this Agreement.
- 8.5 Delivery and Acceptance**
- 8.5.1 The Contractor must deliver the Deliverables to the place or places and within the Guaranteed Delivery Time and shall obtain a receipt of their delivery.
- 8.5.2 Delivery and receipt of the Deliverables shall not be taken to be an acceptance of the Products by the Principal.
- 8.5.3 The Principal may reject Products which are not in accordance with this Agreement.
- 8.5.4 Delivery may be either Free to Desktop, Free-Into-Store (FIS) throughout NSW and the ACT or Non-Free-Into-Store (NFIS) in accordance with Schedule 2 and in accordance with the Minimum Order Quantity specified by the Principal. Where the contract is awarded on the basis of NFIS pricing, the Contractor must hand over Products to the third party for delivery, as arranged by the Principal.
- 8.5.5 If the Contractor is unable to provide the Deliverables for any reason, the Contractor must arrange for the supply of equivalent items from an alternative supplier within the Guaranteed Delivery Time. The Contractor is to liaise with the Principal to ensure that the alternative item is acceptable and meets the Principal's needs. Any additional cost in arranging an alternative supply is to be borne by the Contractor.
- 8.5.6 The Contractor will replace Deliverables at no cost (including freight and handling charges) where stocks are delivered with unreasonably short use-by dates.
- 8.6 Rejection of Deliverables**
- 8.6.1 The Principal may reject Deliverables which are not in accordance with this Agreement.
- 8.6.2 Upon rejection of any Deliverables the Principal shall notify the Contractor and may direct that the rejected Deliverables be removed and replaced or rectified at the Contractor's risk and expense within such reasonable time as the Principal may direct.
- 8.6.3 If the Contractor fails to remove or rectify the rejected Deliverables within the time directed, the Principal may have the rejected Deliverables re-delivered at the Contractor's risk and expense.
- 8.6.4 Where the Contractor fails to deliver the Deliverables by the Guaranteed Delivery Time, or such other time agreed by the Principal, or where Deliverables are rejected and the Contractor fails to replace the rejected Deliverables in conformity with the Agreement, the Principal may:

- (a) purchase from another supplier substitute Deliverables of the kind and quality ordered; or
 - (b) where it is not possible or practicable to purchase from another supplier substitute Deliverables of the kind or quality ordered, purchase Deliverables of a superior kind and quality to the Deliverables under this Agreement.
- 8.6.5 In both cases listed in clause 8.6.4 any extra cost or expense incurred over and above the Contract Price, shall be a debt due from the Contractor to the Principal.

8.7 Risk and Title

- 8.7.1 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. Such signature is not an acknowledgement of the acceptability of the Deliverables. Notwithstanding that the Principal has taken delivery, the Contractor will remain liable for any loss or damage to the Deliverables, which may have occurred prior to delivery, and for any non-compliance of the Deliverables with the Customer Contract.

9 Confidentiality

9.1 Obligations of Parties

- 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, unless the other Party gives its prior written consent.
- 9.1.2 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.
- 9.1.3 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.
- 9.1.4 The Principal may at any time require the Contractor to arrange for its Personnel engaged in the performance of this Agreement to execute without delay a Deed of Confidentiality, substantially in the form of Schedule 4.
- 9.1.5 This clause will survive the termination of this Agreement.

10 Intellectual Property

(Guide Note: If it is a requirement that ownership of intellectual property in New Contract Material must vest with the Principal upon their creation, this clause must be re-drafted with a relevant clause from the Clause Bank. Such a scenario is unlikely in relation to goods).

10.1 Ownership

- 10.1.1 Intellectual Property created in relation to New Contract Material will be owned by the Contractor upon their creation.
- 10.1.2 The Contractor irrevocably grants to the Principal an exclusive royalty free transferable licence to use the Intellectual Property in the New Contract Material for so long as the Principal may require.
- 10.1.3 The Parties acknowledge and agree that the Parties or, where applicable, particular third parties, are the sole owners of their Intellectual Property rights in or in relation to the Existing Contract Material.
- 10.1.4 The Contractor must ensure all licence fees and/or consents required under law are paid and/or obtained as a result of any reproduction, adaptation or use of any

Intellectual Property or Contract Material necessary for the provision of the Deliverables.

- 10.1.5 Upon completion of the Agreement, or at such other time as the Agreement or the Principal may require, the Contractor must fully and promptly disclose to the Principal all New Contract Material created or developed under or in connection with this Agreement.

11 Specific Obligations of Contractor

11.1 Contract Transition Requirements

- 11.1.1 The Contractor must ensure that it has complied with the requirements of the Transition Plan in Schedule 9 of this Agreement in accordance with the dates indicated therein.

11.2 Marketing by the Contractor

- 11.2.1 The Contractor is responsible for the proactive marketing of its organisation's capability to the Principal.

11.3 Licences and Approvals

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

11.4 Compliance with Laws and Standards

- 11.4.1 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 NSW Government codes, policies, guidelines and Standards listed in item 4 of Schedule 1 or any other codes, policies, guidelines and Standards specified in writing by the Principal to the Contractor, as revised, amended, supplemented, altered or reissued from time to time; and
- (c) any particular Standard which 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.
- (d) 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)').*

- 11.4.2 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).

11.4.3 Local Jobs First Plan

- (a) Contractors that are required to provide competitive quotes under this agreement must comply with the requirements of 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).

- (b) The Contractor acknowledges that, where SME participation questions are required to be addressed or a SMEPP is required in competitive quotes, reliance will be placed on the responses to the SME participation questions or SMEPP in the evaluation of the quotation submitted by the Contractor and in the Board entering into any agreement with the Contractor.
- (c) The Contractor agrees to comply with the requirements and commitments provided for in any future responses to the SME participation questions or any future SMEPP tendered by the Contractor and to take all steps reasonably required to enable the Board to monitor compliance by the Contractor with any future responses to the SME participation questions or any future SMEPP.
- (d) The Contractor and the Board agree that the Board may establish mechanisms to monitor compliance by the Contractor with the requirements and its commitments under any future responses to the SME participation questions or any future SMEPP. The Contractor and the Board agree that non-compliance by the Contractor of any future commitments in the responses to the SME participation questions or any future SMEPP commitments will constitute a breach of contract and entitle the Board to terminate the contract for cause. Further, the Contractor agrees that the Board may take into consideration non-compliance by the Contractor with any tendered responses to the SME participation questions or future tendered SMEPP when evaluating tenders submitted by the Contractor in the future for other agreements.

11.5 Minimum Insurance Requirements

- 11.5.1 The Contractor must hold and maintain, and must ensure that all subcontractors are beneficiaries under or otherwise hold and maintain, the following insurances for the Term, or for such other period as may be specifically required by this Agreement for the particular policy:
 - (a) a broad form liability policy of insurance which includes public liability insurance for at least the amount specified in item 7(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 7 of the Agreement Details.
- 11.5.2 All policies of insurance must be effected with an insurer rated A – or better by AM Best or an equivalent rating organisation.
- 11.5.3 The Contractor must ensure that each policy is in effect for the Term of this Agreement or such other period as required by the Principal.
- 11.5.4 The Contractor shall, and shall ensure sub-contractors, 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.

- 11.5.5 The Contractor must, when requested in writing by the Principal, arrange for its insurer to complete a "Certificate of Currency of Insurance Obtained".
- 11.5.6 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.
- 11.5.7 The effecting of insurance shall not limit the liabilities or obligations of the Contractor under other provisions of this Agreement.

11.6 General Indemnity

- 11.6.1 The Contractor will be liable in respect of, and indemnifies, and shall keep indemnified, the Principal and their 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 employees, agents or subcontractors or their employees) in the performance of this Agreement.
- 11.6.2 The Contractor's liability in respect of, and indemnity given in, clause 11.6.1 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.

11.7 Contractor's Warranties for the Deliverables

- 11.7.1 In relation to the Deliverables, the Contractor warrants that:
- (a) at the time title to a Deliverable passes to the Principal, the Deliverable will be free from any charge or liability;
 - (b) during the Warranty Period, each Deliverable:
 - (i) shall be new and shall conform with the Statement of Requirements;
 - (ii) shall conform to the description, and sample (if any) approved by the Principal in Schedules 2 and/or 9 (except that if a sample is inconsistent with the Statement of Requirements, the latter must prevail);
 - (iii) shall be free from defects; and
 - (c) it will provide the associated services in accordance with the requirements of Schedule 2 and with due care and skill.

11.8 Contractor's Warranties (General)

- 11.8.1 The Contractor warrants:
- (a) that the Deliverables do not infringe the Intellectual Property rights of a third party; and
 - (b) the Deliverables shall conform to any legally applicable Australian Standards;
 - (c) it has capacity to enter into this Agreement and perform the obligations imposed on the Contractor; and
 - (d) the Contractor has not entered into any arrangement, whether a trust arrangement or otherwise, that impedes or is likely to impede the performance of this Agreement by the Contractor.

11.9 Warranty Period

- 11.9.1 The Contractor shall rectify any error or defect in a warranted Deliverable that has been notified to it by the Principal during the Warranty Period in Schedule 2 or Schedule 9 at the Contractor's sole cost and expense.

- 11.9.2 If the Contractor fails to rectify an error or defect in a Deliverable 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.

11.10 Third Party Warranties

- 11.10.1 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.
- 11.10.2 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.

11.11 Financial Security

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

- 11.11.1 If requested by the Principal, the Contractor must provide Financial Security within 7 days of such request. The Financial Security must be substantially in the form set out in Schedule 5 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.
- 11.11.2 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.
- 11.11.3 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.
- 11.11.4 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.
- 11.11.5 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.

11.12 Mistakes in Information

- 11.12.1 The Contractor must pay for any additional costs 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.

11.13 Notification of Change in Control or Transfer of Ownership

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

11.14 Notification of Contractor's Insolvency

- 11.14.1 The Contractor must immediately notify the Principal 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;

- (b) Existing orders which the Contractor has entered into under this Agreement.

12 Performance Management

(Guide Note: Clause 12.1.2 may meet with Contractor resistance and would need careful review in price volatile Products, eg.12.1.2(a); where there is one Contractor only eg.13.1.2(b), or where more frequent reporting is unlikely to add value eg. 12.1.2(c).

12.1 Service Levels

12.1.1 The Contractor must meet the specified Service Levels in Schedule 6 during the Term of this Agreement. Performance against the Service Levels must be tracked by the Contractor and reported to the Principal's Delegate in accordance with the frequencies and formats in Schedule 6.

12.1.2 Where the Contractor does not meet the Service Levels in Schedule 8, the Principal may, at its discretion, take one or more of the following actions in relation to the Contractor:

- (a) refuse to agree to all or a portion of the price variation requested by the Contractor under clause 5.3.1,
- (b) temporarily suspend the use of all or parts of this Agreement by the Principal, for a period not exceeding 12 months; and
- (c) require the Contractor to undertake more frequent performance reporting in addition to those specified in Schedule 6, to ensure performance is improved; until such time as the Contractor has demonstrated its ability to meet the Service Levels in accordance with Schedule 6.

12.1.3 The remedies in clause 12.1.2 are in addition to any other provisions available to the Principal to deal with the inability of the Contractor to meet its Service Level obligations under this Agreement and at law.

12.1.4 The measurements and tolerances in the Service Levels specified in Schedule 6 may be amended, added to, or deleted by the Principal and the Contractor in writing during the Term of this Agreement.

12.2 Principal's Delegate

12.2.1 The Principal has nominated the Principal's Delegate in Schedule 1 item 8 to oversee the performance of this Agreement. The Principal may, by notice in writing to the Contractor, nominate a replacement Principal's Delegate.

12.3 Contractor's Relationship Manager

12.3.1 For the purpose of ensuring an efficient relationship with the Principal the Contractor has appointed the Relationship Manager indicated in Schedule 1 item 5. 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 principal 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 of directives through the Contractor's organisation), as may be required for the Contractor to comply with this Agreement;
- (d) meet with the Principal's Delegate at least once each month to provide information regarding the Contractor's performance under this Agreement, with particular reference to the Service Levels in clause 12.1.1; and

- (e) answer the Principal's queries and work with the Principal to address issues relating to matters deemed urgent by the Principal arising out of this Agreement.
- 12.3.2 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.
- 12.3.3 The Relationship Manager must be supported by the Key Personnel in Schedule 1 item 5 in respect of the Principal. The Relationship Manager and/or the Key Personnel named in Schedule 1 item 5 must be available to attend periodic meetings as required by the Principal or the Principal's Delegate.

12.4 Innovation and Continuous Improvement

(Guide Note: Modify where the KPIs are not used or continuous improvement/savings are not required).

- 12.4.1 The Contractor must identify innovative solutions for mutual value enhancement in connection with this Agreement, with a view to achieving continuous improvement.
- 12.4.2 The Contractor must submit in writing to the Principal, at its own cost, detailed proposals for changes to the Products and associated supply chain solutions which are likely to offer significant (including repeated and long term) benefits to the Principal in accordance with the requirements of Schedule 2.
- 12.4.3 The Contractor must ensure that such solutions do not include anything which might adversely affect the quality of the Products and that any proposed changes are consistent with the purpose and intent of this Agreement.
- 12.4.4 The Principal must consider the Contractor's proposals, but is not bound to accept any proposal. The Principal may also accept the proposed changes subject to conditions. The Contractor shall have no claim arising out of the Principal's failure to accept any proposal or proposed changes.
- 12.4.5 If the Principal accepts any changes proposed by the Contractor, any direct savings in the cost to the Contractor of supplying the Products will be for the benefit of the Principal.
- 12.4.6 For the purposes of monitoring performance and providing incentives for the Contractor to improve its performance level, the Principal will construct and maintain a performance management system.
- 12.4.7 The performance framework and the performance indicators are set out in Schedule 6.
- 12.4.8 Where the Contractor has consistently met the levels set out in Schedule 6, the Principal, may in its absolute discretion:
- (a) extend the period of the Agreement with the Contractor subject to the original term and any relevant policy consideration, and/or
 - (b) reduce the level and frequency of the Principal's reporting requirements.

12.5 Exchange of Information Between Government Agencies

- 12.5.1 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.
- 12.5.2 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.

- 12.5.3 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).
- 12.5.4 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.

13 Personnel

[\(Guide Note: Modify where the Principal does not need to approve Key Personnel and their replacement\).](#)

13.1 The Contractor's Personnel

- 13.1.1 The Contractor warrants that all Personnel engaged in the provision of the Deliverables are appropriately qualified, competent and experienced including the Contractor's Relationship Manager and the Key Personnel nominated in Schedule 1 item 5.
- 13.1.2 The Contractor must:
- (a) employ only such persons as are careful, skilled and experienced in the provision of the Deliverables or similar Deliverables; and
 - (b) (where applicable) hold, or ensure appropriate personnel hold, all necessary licences, permits and authorities.
- 13.1.3 The Principal may object to and direct the Contractor to remove any of its Personnel (including the Relationship Manager and Key Personnel) 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 by the Contractor under this Agreement.
- 13.1.4 Any replacement Key Personnel provided by the Contractor must be approved by the Principal.

14 Conduct and Dispute Management

14.1 Co-operation

- 14.1.1 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.

14.2 Duty not to Hinder Performance

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

14.3 General

- 14.3.1 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 is to be followed:
- (a) Amicable Resolution (clause 14.4.);
 - (b) Expert Determination (clause 14.5)

14.4 Amicable Resolution

- 14.4.1 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, or

about any matter arising under or out of this Agreement. The Issue Notice must be given within a reasonable time of the Party becoming aware of the issue.

- 14.4.2 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.
- 14.4.3 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.
- 14.4.4 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.
- 14.4.5 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.
- 14.4.6 A Party may only refer an issue to Expert Determination by giving notice in writing specifying the issue to be decided ("the Referral Notice").
- 14.4.7 If the Party giving the Referral Notice is the Contractor it must give the Referral Notice to the Principal and the Board.
- 14.4.8 If the Party giving the Referral Notice is the Principal, it must give the Referral Notice to the Contractor.
- 14.4.9 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).

14.5 Expert Determination

- 14.5.1 If a Referral Notice is given under clause 14.4, the expert is to be agreed between the Principal 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.
- 14.5.2 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.
- 14.5.3 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 8;
 - (d) any other matter which is relevant to the engagement.
- 14.5.4 The Parties must share equally the fees and out-of-pocket expenses of the expert for the determination, and bear their own expenses.
- 14.5.5 If the expert determines that one Party must pay the other an amount exceeding the amount shown in Schedule 1 item 9 (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.
- 14.5.6 Unless a party has a right to commence litigation under clause 14.5.5:
 - (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.

15 Termination by the Principal

15.1 Termination for Cause

- 15.1.1 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 the Tender 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 or subcontracts Agreement except in accordance with this Agreement;
 - (f) in the case of the Contractor's Insolvency;
 - (g) if in the Principal's view a conflict of interest exists for the Contractor which prevents the proper performance of this Agreement.

15.2 Effect of Termination for Cause

- 15.2.1 If the Principal terminates this Agreement for cause the Principal may:
- (a) contract with any other person to complete the provision of the Deliverables including but not limited to any order remaining to be filled;
 - (b) deduct loss or damages arising from or in connection with the termination, including any loss or damages incurred by the Principal Contract from any money due, or which may become due to the Contractor 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.

15.3 Termination for the Principal's Convenience

- 15.3.1 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.

15.4 Effect of Termination for Convenience

- 15.4.1 The Principal's termination under clause 15.3 will not affect any outstanding Customer Contracts under this Agreement unless the context requires it.
- 15.4.2 The Principal shall reimburse the Contractor its unavoidable costs directly incurred as a result of termination under clause 15.3 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.
- 15.4.3 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 under clause 15.3.

16 General

16.1 No Assignment or Novation

- 16.1.1 The Contractor must not assign or novate this Agreement without first obtaining the prior written consent of the Principal as applicable, which consent may be withheld in the Principal's absolute discretion.
- 16.1.2 The Contractor acknowledges that the Principal may make financial checks and due diligence checks on the entity proposing to take over this Agreement before determining whether or not to give consent to the assignment or novation.

16.2 Conflicts of Interest

- 16.2.1 The Contractor promises that, to the best of its knowledge, no conflict of interest of the Contractor, its employees, agents or sub-contractors exists or is likely to arise in the performance of its obligations under the Agreement.
- 16.2.2 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.
- 16.2.3 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.

16.3 Records and Access to Records

- 16.3.1 The Contractor must keep proper accounts and records in accordance with the accounting principles generally applied in commercial practice.
- 16.3.2 During the Term, 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.

16.4 Waiver

- 16.4.1 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.

16.5 Severability

- 16.5.1 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.

16.6 Notices

- 16.6.1 Notices must be sent to the other Party at the address shown in Schedule 1 items 10 and 11, or the address last notified to the other Party in writing, or in the case of the Contractor, at the Contractor's registered office.
- 16.6.2 All notices must be in writing and signed by the relevant Party and must be given either by hand delivery, post or facsimile transmission.

16.6.3 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.

16.7 Counterparts

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

16.8 Applicable Law

16.8.1 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.

16.9 No agency/no employment/no partnership

16.9.1 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.

16.10 Disengagement Period

16.10.1 For 6 months following the expiry or termination of this Agreement (or part thereof) the Contractor will provide such assistance as is reasonably requested by the Principal for the supply of the Deliverables to continue without interruption to facilitate an orderly, prompt and efficient transition to an alternative service provider to the Principal. Such assistance includes (without limitation):

- (a) providing reasonable co-operation with a third party supplier nominated by the Principal, and
- (b) providing the Principal's data, information and materials that may be required to enable transacting with a new provider as requested by the Principal.

16.11 Pricing Information

The Contractor agrees that, subject to clause 9 (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.

16.12 Government Information (Public Access)

16.12.1 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").

Schedule 1 Agreement Details

Item 1	Contractor's Name
Item 2	<p>Term: (clause 2.1.1) Commencement Date: Expiry Date:</p> <p>Period of extended term (if any): (clause 2.2.1) Commencement Date: Expiry Date:</p>
Item 3	<p>Benchmark (clause 5.5)</p> <p>Name:</p> <p>Address:</p> <p>Telephone:</p> <p>Facsimile</p> <p>Hourly Rate:</p>
Item 4	<p>Codes and Standards (clause 11.4.1) <u>Guide Note: Standard Codes and Guidelines have been inserted here. Insert any other codes, policies, guidelines, and Standards which the Contractor must comply with.</u></p> <ol style="list-style-type: none"> 1. Code of Practice for Procurement 2. Implementation Guidelines NSW Government Procurement 1999 3. Environmental Management Procurement Guidelines 4. Occupational Health and Safety Procurement Guidelines 5. 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) <u>Guide Note: Delete reference to Code of Behaviour for the Protection of Children and other Vulnerable People if not applicable</u> 6. Local Jobs First Plan
Item 5	<p>Key Personnel (clause 13.1.1) <u>Guide Note: List any Key Personnel of the Contractor</u></p> <p>Relationship Manager (clause 12.3.1)</p> <p>Name:</p> <p>Address:</p> <p>Position:</p> <p>Telephone:</p> <p>Facsimile</p>
Item 6	<p>Financial Security (clause 11.11): <u>Guide Note: If clause 11.11 (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.</u></p>

	Amount: Form:
Item 7	Insurances (clause 11.5) a) Public Liability Insurance Limit of Indemnity: \$AUS_M b) Products Liability Insurance Limit of Indemnity: \$AUS_M
Item 8	Principal's Delegate (clause 12.2) Name: Address: Position: Telephone: Facsimile:
Item 9	Expert Determination Amount (clause 14.5.5): <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> AUD:
Item 10	Notices to: (clause 16.6) The Contractor's contact name and address: Name: Address: Position: Telephone: Facsimile:
Item 11	The Principal's contact name and address: Name: Address: Telephone: Facsimile:

Schedule 2 Statement of Requirements

Schedule 3 Pricing, Price Variation Mechanism, and List of Products

Pricing and List of Products

Price Variation Mechanism

If Price variation is based on foreign exchange, the following formula will apply:

Exchange Rates

- (i) If the Prices are variable only in respect of rates of exchange, the actual difference between rates paid and the rates upon which the Tender was based will be allowed subject to production of satisfactory documentary evidence.
- (ii) The nominated foreign currency and associated exchange rate will be based on the Westpac Bank's relevant selling rate as published in the *Sydney Morning Herald* seven days prior to the RFT closing date and time.
- (iii) The nominated exchange rate will be used as the basis for any future price variation request.

If Price variation is based on labour and material factors, the following formula will apply:

Labour and Material Factors

$$CP = CPo \times \left(0.1 + \frac{Y(L)}{Lo}\right) + \frac{Z(M)}{Mo}$$

Where:

- CP = Current Contract Price.
- CPo = Contract Price at start date.
- Y = The labour factor, expressed as a decimal, being the proportion of the Contract Price subject to variation by labour costs.
- L = The weekly award rate of pay, or the effective award hourly rate (EAHR) calculated in accordance with the EAHR formula detailed hereunder, for the category of labour primarily employed on the Agreement, most recently published at the date of application for price variation.
- Lo = The weekly award rate of pay, or the EAHR calculated in accordance with the EAHR formula detailed hereunder, for the category of labour primarily employed on the Agreement, most recently published at twenty-one days before tender closing.
- Z = The materials factor, expressed as a decimal, being the proportion of the Agreement price subject to price variation by materials costs.

M = Materials cost index most recently available at the date of application of price variation.

Mo = Materials cost index, corresponding to the index used for "M", most recently available twenty-one days before tender closing date.

Note: Y (Labour Factor) and Z (Material Factor) must be expressed as a decimal and together, must total 0.9.

EAHR Formula:

If this formula is elected instead of the weekly award rate of pay in the above formula, an "Effective Award Hourly Rate" (EAHR) which is determined by the following formula. If the award rate of pay is nominated for L and Lo, then this formula does not apply.

$$EAHR = \frac{AW}{HW} \times \frac{(52 + LL)}{(52 - LA)} \times (1 + WC + PT + S)$$

Where:

AW = Weekly award rate of pay for the labour primarily engaged in the Agreement, including industry allowances and site-specific allowances approved by the appropriate State or Commonwealth Authority.

HW = Award hours per week.

LL = Award annual leave loading (expressed as a decimal) multiplied by the number of days paid recreation leave covered by the award divided by 5.

LA = Award leave allowance divided by 5.

WC = The recommended rate (expressed as a decimal) of contribution of Workers Compensation in accordance with the relevant legislation.

PT = Payroll tax percentage (expressed as a decimal).

S = Rate of employer's superannuation as a percentage of the employees' wages in accordance with the relevant award (expressed as a decimal).

If Price variation is based on Publish Price List, the following formula will apply:

Publish Price List Formula

$$RP = \left[\frac{TP * (PLP)}{(PLPo)} \right]$$

(Note: * = means multiplication)

Where:

RP = Revised contract price.

TP	=	Tendered price (or latest revised price)
PLPo	=	Published list price effective on the date 7 days before tender closing (the "Base Date"), or the published list price upon which the latest revised contract price is based.
PLP	=	Published list price effective at date price variation application is lodged.

Where the supplies are imported, and the published price list is in an overseas currency, the above formula shall be modified as follows:-

$$RP = \left[\frac{TP * (PLP)}{(PLPo)} * \frac{Eo}{E} \right]$$

(Note: * = means multiplication)

Where:

Eo	=	The exchange rate as published in the Sydney Morning Herald on the Base Date, expressed as selling price A\$=
E	=	The exchange rate most recently published in the Sydney Morning Herald at an exact monthly interval from the Base Date, expressed as selling price A\$=

If Price variation is based on CPI, the following formula will apply:

CPI Option

$$RP = OP * \frac{L}{Lo}$$

(Note: * = means multiplication)

Where:

RP	=	Revised Contract Price.
OP	=	Original Contract Prices.
L	=	CPI at price variation date.
Lo	=	CPI at the Base Date.

Schedule 4 Deed of Confidentiality

THIS DEED DATED THE _____ day of _____ 200__

BETWEEN [Name and address of Principal] ("the Principal")

AND [Name and address of Contractor] ("the Contractor ")

RECITALS:

- A. In the course of the Contractor supplying certain Deliverables for the Principal (whether directly or indirectly) pursuant to the Agreement, the Contractor will have access to and may become aware of Confidential Information belonging to or in the possession of the Principal.
- B. Improper use or disclosure of the Confidential Information would severely damage the Principal's ability to perform its governmental/statutory functions and would severely damage the commercial interests of the Principal.
- C. The Principal requires, and the Contractor agrees, that it is necessary to take all reasonable steps (including the execution of this Deed) to ensure that the Principal's Confidential Information is kept confidential and that the Contractor provides the Deliverables faithfully and without any conflicting interest.
- D. This Deed sets out the terms on which the Contractor will have access to the Confidential Information

OPERATIVE PROVISIONS:

1. Recitals

The Parties acknowledge the truth and accuracy of the Recitals in every particular.

2. Interpretation

2.1 Definitions

In the interpretation of this Deed unless a contrary intention appears requires the following expressions will have the following meanings:

"**Agreement**" means the Agreement between the Principal and the Contractor dated [*insert date*] for the supply of the Deliverables.

"**Confidential Information**" means information that:

- (a) is by its nature confidential;
 - (b) is designated by the Principal as confidential; or
 - (c) the Contractor knows or ought to know is confidential;
- and includes but is in no way limited to:
- (d) the Contract Material;

- (e) The Principal's Material including the financial information, the corporate information and the commercial information of the Principal;
- (f) any material which relates to the affairs of a third party;
- (g) information relating to the policies, strategies, practices and procedures of the NSW Government and any information in the Contractor's possession relating to the NSW Public Service.

"Contractor" means *[insert name of Contractor]*

"Contract Material" means:

- (a) any material created, written or otherwise brought into existence as part of, or for the purpose of performing the Deliverables including but not in any way limited to all Records, working papers, programs, flow charts, reports, including documents, equipment and information and data stored by any means ("New Contract Material");
- (b) any material which is existing at the date of this Agreement and which is incorporated with the New Contract Material ("Existing Contract Material").

"Express Purpose" means the Contractor performing the obligations under the Agreement.

"Intellectual Property Rights" includes copyright, patent, trademark, design, semi-conductor or circuit layout rights, trade, business or company names, or other proprietary rights, or any rights to registration of such rights existing in Australia, whether created before or after the date of this Agreement;

"Notice" means notice in writing given in accordance with this Deed;

"Principal's Material" means any documentation, information or material supplied by or on behalf of the Principal to the Contractor; and

"Records" includes the Contract Material and any other information, documents or data brought into existence by any means and stored by any means in connection with the performance of the Agreement;

2.2 General

- 2.2.1 Headings are for convenience only, and do not affect 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.

- 2.2.2 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) anything (including a right, obligation or concept) includes each part of it.
- 2.2.3 If this Agreement expressly or impliedly binds more than one person then it shall bind each such person separately and all such persons jointly.
- 2.2.4 A singular word includes the plural, and vice versa.
- 2.2.5 A word which suggests one gender includes the other genders.
- 2.2.6 If a word is defined, another part of speech of that word has a corresponding meaning.

3. Non disclosure

- 3.1.1 The Contractor must not disclose the Confidential Information to any person without the prior written consent of the Principal.
- 3.1.2 The Principal may grant or withhold its consent in its discretion.
- 3.1.3 If the Principal grants its consent, it may impose conditions on that consent, including a condition that the Contractor procure the execution of a Deed in these terms by the person to whom the Contractor proposes to disclose the Confidential Information.
- 3.1.4 If the Principal grants consent subject to conditions, the Contractor must comply with those conditions.
- 3.1.5 Despite cl.3.1.1, the Contractor may disclose the Confidential Information to its directors, officers, employees, and contractors ("permitted recipients") where such disclosure is essential to carrying out their duties owed to the Contractor or in accordance with this Deed.
- 3.1.6 Before disclosing the Confidential Information to a permitted recipient, the Contractor will ensure that the permitted recipient is aware of the confidentiality requirements of this Deed and is advised that it is strictly forbidden from disclosing the Confidential Information or from using the confidential information other than as permitted by this Deed.
- 3.1.7 The Confidential Information must not be copied or reproduced by the Confidant or the permitted recipients without the expressed prior

written permission of the Principal, except as for such copies as may be reasonably required for the purposes of this Deed.

- 3.1.8 The Principal may at any time require the Contractor to promptly arrange for the permitted recipients to execute a Deed of Confidentiality substantially in the form of this Deed.
- 3.1.9 If any person being any director, officer, contractor or employee of the Contractor, who has had access to the Confidential Information in accordance with this clause leaves the service or employ of the Contractor then the Contractor will ensure that that person does not do or permit to be done anything which, if done or permitted to be done by the Contractor, would be a breach of the obligations of the Contractor under this Deed.
- 3.1.10 The requirements of this Deed do not affect the obligation of the Contractor to disclose any Confidential Information where it is required to be disclosed at law.

4. Restriction on use

- 4.1 The Contractor must use the Confidential Information only for the Express Purpose and must not without the prior written consent of the Principal use the Confidential Information for any purpose other than the Express Purpose.
- 4.2 The Contractor must, unless otherwise authorised by the prior written consent of the Principal:
- (a) treat as confidential and secret all of the Confidential Information which the Contractor has already acquired or will acquire from the Principal;
 - (b) take proper and adequate precautions at all times and enforce such precautions to preserve the confidentiality of the Confidential Information and take all necessary action to prevent any person obtaining access to the Confidential Information other than in accordance with this Deed;
 - (c) not directly or indirectly use, disclose, publish or communicate or permit the use disclosure, publication or communication of the Confidential Information to any person other than in accordance with this Deed;
 - (d) not copy or disclose to any person in any manner any of the Confidential Information other than in accordance with this Deed; and
 - (e) ensure that the permitted recipients comply with the terms of this Deed and keep the Confidential Information confidential and not use or disclose the Confidential Information other than as permitted by this Deed.

5. Survival

This Deed will survive the termination or expiry of the Agreement.

6. Rights of the Disclosing Party

6.1 Production of Documents

- 6.1.1 The Principal may demand the delivery up to the Principal of all documents in the possession or control of the Contractor containing the Confidential Information.
- 6.1.2 The Contractor must immediately comply with a demand under this Clause 6.
- 6.1.3 If the Principal makes a demand under this clause 6, and the Contractor has placed or is aware that documents containing the Confidential Information are beyond his or her possession or control, then the Contractor must provide full particulars of the whereabouts of the documents containing the Confidential Information, and the identity of the person in whose possession or control they lie.
- 6.1.4 In this clause 6, "documents" includes any form of storage of information, whether visible to the eye or not.

6.2 Legal Proceedings

The Principal may take legal proceeding against the Contractor or third parties if there is any actual, threatened or suspected breach of this Deed, including proceedings for an injunction to restrain such breach.

7. Indemnity and release

- 7.1 The Contractor is liable for and agrees to indemnify and keep indemnified the Principal in respect of any claim, damage, loss, liability, cost, expense, or payment which the Principal suffers or incurs as a result of:
- (a) a breach of this Deed (including a breach of this Deed which results in the infringement of the rights of any third party); or
 - (b) the disclosure or use of the Confidential Information by the Contractor or the permitted recipients other than in accordance with this Deed.

8. No exclusion of law or equity

This Deed does not exclude the operation of any principle of law or equity intended to protect and preserve the confidentiality of the Confidential Information.

9. Waiver

- 9.1 No waiver by the Principal of one breach of any obligation or provision of this Deed will operate as a waiver of another breach of any other obligation or provision of this Deed.
- 9.2 None of the provisions of this Deed will be taken to have been varied, waived, discharged or released by the Principal unless by its express consent in writing.

10. Remedies Cumulative

- 10.1 **Cumulative**
The rights and remedies provided under this Deed are cumulative and not exclusive of any other rights or remedies.

10.2 Other Instruments

Subject to the other covenants of this Deed, the rights and obligations of the parties pursuant to this Deed are in addition to and do not derogate from any other right or obligation between the parties under any other deed or agreement to which they are parties.

11. Variations and amendments

No term or provision of this Deed may be amended or varied unless reduced to writing and signed by the parties in the same manner as this instrument.

12. Applicable law

This Deed will be governed and construed in accordance with the laws of New South Wales and the Commonwealth of Australia.

13. Notices

13.1 Notices must be sent to the other party at the address shown in this Deed, or the address last notified to the other party in writing, or in the case of the Contractor, at the Contractor's registered office.

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

13.3 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.

Executed as a Deed

SIGNED, SEALED AND DELIVERED)
)
 by [***name and position of person signing***]) _____
 for and on behalf of the 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:)
 _____)
 [insert name of Witness]) (signature of Witness)

SIGNED, SEALED AND DELIVERED)
)
 by _____)
 [insert name of Contractor]) (signature of Contractor)
)
 in the presence of _____)
 [insert name of Witness]) (signature of Witness)

Schedule 5 Financial Security

Guide Note: It is recommended that the Principal only accepts Financial Security from financial institutions supervised by the Australian Prudential Regulation Authority (APRA). For approved financial institutions, please visit the APRA website: <http://www.apra.gov.au/adi/ADIList.cfm>. The list of Authorized Deposit-Taking Institutions indicates acceptable institutions. If you receive an Undertaking from an organization not on the list, please bring it to your Unit Manager's attention.

THIS DEED is made the day of20...

BY [Name, ACN and address of financial institution] (“**Provider**”)

For the benefit of [insert name of Principal] for and on behalf of the Crown in the right of the State of New South Wales (“**Beneficiary**”)

IT IS AGREED

At the request of *Insert name of the Contractor's Company Name*, trading as “*Insert Contractor's Trading Name*,” ACN Number (*Insert ACN Number*) (“**Customer**”) in connection with *[describe contract]*, the Provider unconditionally undertakes to pay to the Beneficiary on demand in writing any sum or sums from time to time up to a maximum aggregate sum of *[amount in words]* (\$[]) (“**Sum**”). The Provider unconditionally and irrevocably agrees to pay such moneys to the Beneficiary immediately without reference to the Customer and regardless of any notice given by the Customer to the Provider not to pay.

This undertaking is to continue until a notification has been received from the Beneficiary that the Sum is no longer required by the Beneficiary or until this undertaking is returned to the Provider or until payment to the Beneficiary by the Provider of the whole of the Sum or such part as the Beneficiary may require.

The Provider may at any time without being required to do so pay to the Beneficiary the Sum less any amount or amounts it may previously have paid under this undertaking or such lesser sum as may be required by the Beneficiary and thereupon the Provider shall cease to be liable.

This deed is governed by and must be construed in accordance with the laws of (*insert applicable State or Territory*).

EXECUTED AS A DEED

Guide Note: For the Form of Undertaking to be effective, it must be executed as a deed by the financial institution providing the undertaking.

Financial Institution/Company

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>, ACN)
<insert ACN number>, a prudentially supervised)
institution by the Australian Prudential)
Regulation Authority (APRA), and in accordance
with section 127 of the Corporations Act and in
the presence of:

<Director/Secretary>

Director

Print Name

Print Name

Schedule 6 Performance Management

(Guide Note: Include Service Levels and KPIs here which the Contractor must meet.)

Schedule 7 List of Approved Sub-Contractors

Schedule 8 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 right to compensation:
under the Agreement:
(a) for damages for breach of the Agreement, or
(b) otherwise in law?
- 1.1.2 If so:
what is the event, act or omission?
(a) on what date did the event, act or omission occur?
(b) what is the legal right which gives rise to the liability to compensation?
(c) 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 clauses 1.1.1 and 1.1.2 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 must make a submission in respect of the issue, within 15 business days after the date of the letter of engagement referred to in clause 15.5.3 of the Agreement.
- 2.3 The other party must respond within 15 business days after receiving a copy of that submission. That response may include cross-claims.
- 2.4 The Party referred to in clause 2.2 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 other 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 clauses 2.2 to 2.5 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 which 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 in clause 15.5.3 of the Agreement.
 - 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 9 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®. 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 a smartbuy® 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) FTP: 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 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 an electronic copy of each invoice 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.

15 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.

“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 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.

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

“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.

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

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

“**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.

“**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.

Schedule 10 Outworker's Code Declaration

(Must be printed, completed and signed)
Statutory Declaration
 Oaths Act, 1900 Ninth Schedule

The wording in this Statutory Declaration must not be altered in any way or form.

I/We the undersigned (1)	(1) insert full name
Of (2)	(2) insert business address
In the State of New South Wales (3)	(3) insert occupation
..... do hereby solemnly declare and affirm that; (4)	(4) the facts to be stated according to the Declarant's knowledge, belief or information, severally
1 (5)	(5) insert name of Contractor
Of (6)	(6) insert business address of Contractor
.....has a Contract in respect of (7)	(7) insert name and identifying number of Contract
.....(Contract)	
2 I make this statutory declaration in my following official capacity with the Contractor (8)	(8) insert official relationship with Contractor
3 My authority to make this declaration on behalf of the Contractor is (9)	(9) insert details of authority to make this declaration
4 I am personally aware of the business activities of the Contractor from (10)	(10) insert details to demonstrate knowledge of business of Contractor
5 I have read the Contract and I understand the obligations of a Contractor particularly with regard to the NSW Government Code of Practice on Employment and Outwork Obligations for	

<p>Textile Clothing and Footwear Suppliers (Code).</p> <p>6 I am aware that the Contractor has complied with the Code in the following manner (11)</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>7 I am aware that the Contractor, subcontractors and suppliers have Complied with the Code in the following manner: (12)</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>.....</p> <p>And I/We make this solemn declaration, as to the matter aforesaid, according to the law in this behalf made, and subject to the punishment by law provided for any wilfully false statement in any such declaration.</p> <p>TAKEN and declared atin the said State thisday of200 ... before me/us:</p>	<p>(11)</p> <p>(i) insert full details of Compliance with the Code Including name of relevant Federal or State Awards</p> <p>(ii) attach relevant 3 monthly report of all records and work list returns required to be maintained in relation to contract work or outwork</p> <p>(12) statements of Compliance with the Code should be supported by Annex Documents</p>
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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

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

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

Witness

Signatory

Print Name

Print Name