



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

Dated: <Insert Date>

NSW STATE CONTRACTS CONTROL BOARD

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:

Director Contracts
NSW Procurement
Government Services Division
NSW Department of Finance and Services
McKell Building
2-24 Rawson Place
Sydney NSW 2000
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Instructions for Use – Agreement for the Procurement of Goods

Coverage – This template applies to the establishment of whole of government procurement arrangements for goods.

The template requires the Contractor to exhaustively designate its subcontractors, resellers, distributors etc. for purposes of the Board obtaining its Management Fee from transactions made through them. If there is no subcontracting, these provisions must be deleted.

It further allows the Board to mandate the use of subcontractors that it wants the Contractor to use, such as for e.g. distribution and provision of smartbuy® content, i.e. Nominated Subcontractors.

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 5.6 is to be used, the Benchmark (and its rates) will need agreement with the Contractor during the Term of the Agreement. NSW Procurement 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, in addition to the Prices for the Deliverables.

Execution Requirements – This document is executed by way of a Deed in accordance with the step by step instructions for executing a Deed in Support Point, NSWP Quality Management System, Contract Process, Section 6, Concluding an Agreement.

Clause Changes – Clauses can be only changed or deleted in consultation with Legal Services in executable contracts unless provided for in guide notes.

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

NEW SOUTH WALES STATE CONTRACTS CONTROL BOARD for and on behalf of the Crown in right of the State of New South Wales, of McKell Building, 2-24 Rawson Place, Sydney, in the State of New South Wales ("the Board").

AND

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

BACKGROUND

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

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.

Agency Performance Indicator (API) means performance indicators in respect of the Contractor's performance of this Agreement and which are scored by the Customers.

"Applicable Discount" means the discounts set out in Schedule 3, as varied from time to time in accordance with this Agreement and includes any other discount which is offered by the Contractor from time to time (and which must be added to Schedule 3.

"Benchmarker" means the independent company providing price benchmarking services in accordance with clause 5.6 and whose details are indicated in Schedule 1 item 4.

"Board's Material" means any material, document, or Information supplied by the Board, a Customer or any department or agency of the Crown to the Contractor by whatever means.

"Board's Representative" means the officer named in Schedule 1 item 11 responsible for the overall administration of this Agreement on behalf of the Board.

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

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

"Circumstances Beyond the Control of the Contractor" include:

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

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

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

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

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

and any costs or expenses in connection with the foregoing.

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

“Contractor Information” means the information that must be provided by the Contractor covering its own organisation and that of its subcontractors, agents, resellers and distributors and includes names, addresses and contact details.

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

- (a) insolvency;
- (b) the Contractor indicates that it does not have the resources to perform the Agreement or any Customer Contract;
- (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” means the Eligible Customer that places the order with the Contractor under the Agreement.

“Customer Contract” means the contract that is made between the Contractor and a Customer when that Customer places an order.

“Customer Price” means the total amount payable by the Customer to the Contractor for the Deliverables ordered under a Customer Contract and calculated in accordance with clause 5.2 and, if applicable 5.6 and 5.7.

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

“Deliverables” means the goods/products (and associated services, if any) to be supplied by the Contractor and listed in Schedule 3.

“Eligible Customer” means

- (a) a public sector agency as defined in the *Public Sector Employment and Management (Goods and Services) Regulation 2010 (NSW)*;
- (b) a public body as defined by clause 9(5) of the *Public Sector Employment and Management (Goods and Services) Regulation 2010 (NSW)* being:
 - (i) a government trading enterprise (including a State owned corporation);

- (ii) a public or private hospital (including an area health service);
 - (iii) a local government agency;
 - (iv) a charity or other community non-profit organisation;
 - (v) a public or private school or a college or university;
 - (vi) a public authority of this State, the Commonwealth or of any other State or Territory;
 - (vii) a public authority of any other jurisdiction (but only if it carries on activities in this State);
 - (i) a contractor to a public authority (but only in respect of things done as such a contractor);
- (c) a Nominee Purchaser provided that it satisfies the requirements of clause 3.6; and
- (d) such other persons or entities, which the Board may from time to time in its discretion, determine through a customer registration process.

“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.

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

“Free to Desktop” means free delivery to individual floors, departments and sections of a department and is the basis for purchase of Deliverables under which the Contractor is responsible for supply, delivery, insurance and off loading of Deliverables at the Customer’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 Deliverables under which the Contractor is responsible for supply, delivery, insurance and off loading of Deliverables at the Customer’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 of this Agreement, or such earlier time as may be agreed by the Customer 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, and which are scored by the Board’s Representative.

“Key Personnel” means the personnel of the Contractor specified in Schedule 1 item 13.

“Management Fee” means the fee payable by the Contractor to the Board in accordance with clause 9.

“Minimum Order Quantity” means the minimum quantity of each Deliverable ordered by a Customer, 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.

“Nominee Purchaser” means a contractor to a Public Sector Service agency, nominated by the Public Sector Service agency authorised to place Customer Contracts under Agreements for things done as such a contractor and registered by NSW Procurement.

“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 Deliverables in a suitable condition for transport to a single delivery point within the Greater Sydney Metropolitan Area. The Customer is responsible for transport, insurance, unloading and assembly if necessary from the on-line delivery point.

“NSW Procurement” means a business unit of the NSW Department of Finance and Services, authorised to arrange and administer contracts on behalf of the Board.

“Order Units” means the unit(s) used when ordering Deliverables from the Contractor. An Order Unit may be “each”, “per box”, “per carton” or some other unit.

“Overall Performance Indicators” means the holistic performance indicators used by the Board to measure the performance of the Contractor under this Agreement and comprise indicators scored by the Customers (i.e. API) and the Board’s Representative (KPI).

“Payment Period” means each period nominated in item 6 of Schedule 1 commencing from the first Customer Contract formed and continuing until the expiration or termination of all Customer Contracts.

“Parties” means the Board, Contractor, and the Customer.

“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 the Customer and officers assisting the Board,
- (b) in the case of the Contractor, includes subcontractors, resellers, distributors. i

“Price” means the GST exclusive, maximum price payable for a Deliverable including all applicable levies, duties, taxes, insurances, packaging, imposts, overheads and profits and any Applicable Discounts as set out in Schedule 3 (as varied from time to time in accordance with this Agreement).

“Relationship Manager” means the Contractor’s employee named in Schedule 1 item 13.

“Request for Tender” means the request for tender issued by the Board, 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 8.

“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**” 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.

“**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 and a Customer Contract, a substantial breach of a condition of this Agreement or a Customer Contract by the Contractor and includes any breach of the following clauses:
 - (i) clause 3.6.3 (Nominee Purchaser),
 - (ii) clauses 5.1 to 5.9 (Pricing),
 - (iii) clause 8.3 (Punctual Delivery) without being granted an extension of time under clause 8.4,
 - (iv) clause 9 (Management Fee),
 - (v) clause 10 (Confidentiality),
 - (vi) clause 12.5 (Compliance with Laws and Standards),
 - (vii) clause 12.6 (Minimum Insurance Requirements),
 - (viii) clause 12.12 (Financial Security)
 - (ix) clause 13.1 (Service Levels),
 - (x) clause 13.5.1 (minimal or nil sales returns),
 - (xi) clause 18.1 (No Assignment or Novation); and
 - (xii) clause 18.2 (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 for ensuring successful transition to 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.

1.2 Rules for interpreting this Agreement

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

1.2.2 A reference to:

- (a) legislation (including subordinate legislation) is a reference to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;

- (b) 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) anything (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,
 - (b) Schedule 6 to this Agreement;
 - (c) The terms and conditions of this Agreement;
 - (d) Schedule 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 Board 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 Board and the Contractor

- 3.1.1 This Agreement describes the terms and conditions between the Board and the Contractor under which the Contractor agrees with the Board that it will supply the Deliverables to Customers.

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.

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

3.2 No Assurance of Orders and Non-Exclusive Supply

3.2.1 This Agreement does not:

- (a) imply that the Contractor will receive any orders for the Deliverables,
- (b) imply that the Contractor is the exclusive provider of the Deliverables to the Customer; or
- (c) oblige any Customer to place a Customer Contract for the Deliverables with the Contractor.

3.2.2 The Contractor acknowledges that the Board 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 and supply

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

- (a) this Agreement (as varied from time to time) including the Schedules; and
- (b) the order.

3.3.2 The Contractor agrees that it will use smartbuy in connection with the supply of the Deliverables in connection with any Customer Contract and will comply with the requirements imposed on the Contractor in relation to the use of smartbuy set out in Schedule 6, at its own expense.

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.

3.4.2 Provided that in respect of the Customer Contract, "Agreement" and "Board" wherever appearing in the clauses described above shall be read as "Customer Contract" and "Customer" respectively.

3.5 Contractor must supply to all Customers

3.5.1 If a Customer enters into a Customer Contract with the Contractor during the Term, the Contractor must supply the required Deliverables to the Customer on the terms and conditions of the Customer Contract and in accordance with this Agreement.

3.6 Nominee Purchasers

3.6.1 Subject to clause 3.6.3, the Contractor must satisfy any Customer Contract placed under this Agreement by a Nominee Purchaser, provided that the Nominee Purchaser provides in its Customer Contract:

- (a) its NSW Procurement Registration Number;
- (b) the identity of the Eligible Customer nominating it;
- (c) the Agreement Number, name and location of the contract in respect of which the purchase is being made;
- (d) a statement that the Deliverables ordered are related to carrying out its obligations with the Eligible Customer; and
- (e) any other requirements in clause 8.1.2 of this Agreement applicable to Nominee Purchasers as determined by the Eligible Customer.

- 3.6.2 If at any time during the Term of this Agreement, the Contractor wishes to restrict its dealings with a Nominee Purchaser, the Contractor shall so request in writing to the Board's Representative. The Board's Representative may approve the request if there are genuine commercial reasons for the Contractor's request. If approved by the Board's representative, the details of the restrictions will be included in item 3, Schedule 1.
- 3.6.3 Where the Board's Representative does not approve a request of the Contractor under clause 3.6.2 and the Contractor refuses to deal with a Nominee Purchaser, the Board's Representative may consider it a Substantial Breach of this Agreement.
- 3.6.4 The Contractor may at any time lift the restrictions it has sought to be placed on its dealings with a Nominee Purchaser and shall notify the Board's Representative accordingly.
- 3.6.5 If the Contractor makes a supply under the Agreement to an entity purporting to be a Nominee Purchaser, the Contractor is taken to be satisfied that the supply is properly made under this Agreement.

3.7 Supply through Contractor's Personnel

Guide Note: A Contractor's Personnel situation may arise where a Contractor for a specific category of Deliverables is unable to meet the SCCB distribution and/or smartbuy® requirements, prompting the SCCB to nominate another contractor to perform these functions. Care should be taken to change any other clauses as needed.

- 3.7.1 The Contractor must supply the Deliverables directly to Eligible Customers but if the Contractor lists its Personnel in smartbuy® in accordance with Schedule 6, the Contractor may supply through one of the Personnel.
- 3.7.2 If an order is placed by a Customer on Contractor's Personnel, the Contractor is deemed to have entered into a Contract with the Customer.
- 3.7.3 The Contractor must ensure that its Personnel supply the Deliverables in accordance with the terms of this Agreement.
- 3.7.4 The Contractor must ensure that list of its Personnel in smartbuy® are current and up to date. In the event of a change being required to smartbuy®, , the Contractor must give notice to NSW Procurement within 7 days of any addition or deletion of Personnel, in order that smartbuy® can be updated in a manner and format as required by NSW Procurement.
- 3.7.5 The Contractor's obligations under this Agreement are not affected in any way by the supply through its Personnel.

4 The Deliverables

4.1 List of Deliverables

- 4.1.1 The Deliverables to be supplied by the Contractor under this Agreement are listed in Schedule 3.

4.2 Variation of Deliverable Description

- 4.2.1 The Contractor must notify NSW Procurement in writing as soon as practicable of any variation to the description of a Deliverable offered in Schedule 3.
- 4.2.2 A variation under clause 4.2.1 may include a variation to the description of the number or name of the Deliverable but excludes a variation:
- (a) to the Price of the Deliverable;
 - (b) that modifies or upgrades the Deliverable; or
 - (c) that introduces a new Deliverable to the Schedule 3.

4.2.3 NSW Procurement will notify the Contractor of its acceptance or rejection of the variation to the description of a Deliverable. If the variation is accepted, it shall be taken to be incorporated into Schedule 3.

4.3 Improvements to Deliverable

4.3.1 If during the Term the Contractor makes Deliverables available on a general commercial basis that:

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

then the Contractor must offer the Board the same Deliverable under this Agreement within 30 days of such Deliverable being available on a general commercial basis.

4.3.2 The Deliverable offered by the Contractor under clause 4.3.1 will form part of Schedule 3 when the Board's Representative notifies its acceptance of the offer. Prior to accepting or rejecting the Contractor's offer, the Board's Representative 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. The Contractor must supply the data within the nominated time frame.

4.3.3 In the event that the Board's Representative 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 Board's Representative.

5 Pricing

5.1 Contractor's Obligations

5.1.1 The Contractor must supply the Deliverables on the basis of the Prices in Schedule 3.

5.2 Calculating the Customer Price

5.2.1 The Customer Price is to be calculated as the total amount payable by the Customer to the Contractor for the Deliverables ordered under a Customer Contract and calculated on the basis of the Price in Schedule 3, less any Applicable Discount and adjusted in accordance with clauses 5.6 and 5.7, if applicable.

5.3 Conduct of Price Negotiations

Guide note: Use the clause below unless the Procurement Strategy requires that all negotiations with the Contractor relating to Prices under the Agreement will be conducted by the Board's Representative.

5.3.1 Subject to clause 5.2, the Board or the Customer may conduct a request for quotations or participate in price negotiations with the Contractor to supply the Deliverables at a price more favourable than the Price in this Agreement.

Guide note: Use the clause below if the Procurement Strategy requires that all negotiations with the Contractor relating to Prices under the Agreement will be conducted by the Board's Representative.

5.3.1 The Contractor will not submit quotations or participate in price negotiations with any Customer to supply the Deliverables at a price different from the Price in this Agreement. All negotiations with the Contractor relating to Price and request for quotations undertaken under this Agreement will be conducted by the Board's Representative.

5.4 Price Variation

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

- 5.4.1 The Contractor may only seek to vary the Price of a Deliverable listed in Schedule 3 in accordance with the frequencies and methodology indicated in Schedule 3. Subject to the Contractor having provided the Board's Representative with sufficient documentation to justify the application and subject to clause 13.1.2(a), the Board's Representative 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).*
- 5.4.2 Price variations approved by the Board's Representative shall apply to all Customer Contracts made on or after the date upon which the Board publishes the varied price on smartbuy®.
- 5.4.3 Where the Price variation is accepted, Schedule 3 will include the varied Price. The varied Price becomes the basis from which any future applications for Price variations will be calculated.
- 5.4.4 The Board's Representative reserves the right to delete a Deliverable from Schedule 3 if it considers a Price variation application to be unreasonable.
- 5.4.5 Notwithstanding any other provision in this Agreement, the Contractor may apply in writing to the Board's Representative to decrease its Prices at any time without any supporting documentation.

5.5 Benchmarking

(Guide Note: Modify clause where a Benchmarker is not to be appointed).

- 5.5.1 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.
- 5.5.2 For the purposes of determining whether the Prices under this Agreement are competitive, the Board's Representative 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 Benchmarker indicated in Schedule 1 item 4. The Benchmarker will review whether the Price of those Categories and/or Products in Schedule 3 as nominated by the Board's Representative, 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.
- 5.5.3 The Contractor must give proper and considered weight to any recommendation that the Benchmarker may make with respect to whether the Prices are competitive and take prompt appropriate action to vary its Prices.
- 5.5.4 The costs of the Benchmarker will be based on the rates specified in Schedule 1 item 4 and will be paid for as follows:
- (a) Where the Prices of any Services (as nominated by the Board's Representative), are higher than the average industry price, the full costs of the Benchmarker must be met by the Contractor;
 - (b) Where the Prices of any Services (as nominated by the Board's Representative), are lower than the average industry price, the full costs of the Benchmarker will be met by the Board.

5.6 Rebates

- 5.6.1 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 Deliverable 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 Customers under this Agreement.

5.7 Bulk Purchase Discounts

(Guide Note: Use the clause below unless the Procurement Strategy requires that all negotiations with the Contractor relating to Prices under the Agreement will be conducted by the Board's Representative).

5.7.1 If the volume to be purchased by Customers of any Deliverable under this Agreement increases or is anticipated to increase, the Board's Representative or the Customer may negotiate a Price reduction (whether expressed as an increase in the Applicable Discount to account for the bulk purchase or otherwise) from the Contractor.

5.7.2 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.

(Guide Note: Use the clause below if the Procurement Strategy requires that all negotiations with the Contractor relating to Prices under the Agreement will be conducted by the Board).

5.7.1 If the volume to be purchased by Customers of any Deliverable under this Agreement increases or is anticipated to increase, the Board may negotiate a Price reduction or an increase in the Applicable Discount from the Contractor.

5.7.2 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.

5.8 Continuous Best Price

(Guide Note: Clause 5.8.2 may only be removed if the approved Procurement Strategy allows for this clause to be deleted)

5.8.1 Notwithstanding any other clause in this Agreement, where the Board's Representative has been able to confirm that the market pricing for any Deliverable in Schedule 3 is consistently more competitive than under this Agreement, the Board's Representative will provide the Contractor with reasonable evidence of such market situation and request the Contractor vary its Prices to align with the market.

5.8.2 Where the Contractor offers more favourable prices to any other purchaser of similar Deliverables in NSW purchased in similar circumstances by a Customer, 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 all comparable Customers entitled to the benefit of this Agreement for future orders, and amend Schedule 3 accordingly. The Contractor must further update its catalogue in smartbuy® to reflect the favourable price.

5.9 Goods and Services Tax

5.9.1 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.

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

5.9.3 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.

5.9.4 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.

5.9.5 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.

5.9.6 The Parties agree that this clause will apply to the Management Fee payable by the Contractor to the Board.

6 Payment

6.1 Payment of Customer Price

6.1.1 Subject to clause 6.2 and in consideration of the Contractor providing the Deliverables under this Agreement, the Customer shall, subject to the terms and conditions of the Customer Contract, pay the Contractor the Customer Price in the amounts set out in the Customer Contract in accordance with this clause 6.

6.1.2 Failure by any Customer to pay the Customer Price at the due time will not be grounds to avoid performance of the Customer Contract and will not be grounds to avoid performance of this Agreement (including without limitation, the obligations to pay management fee to the Board).

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 Customer, 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 Customer 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 Customer.

6.2.3 The parties agree the making of a payment is not intended to be an acknowledgment that the Deliverables have been supplied in accordance with the Customer Contract.

6.2.4 If the Customer disputes an invoice amount the Customer 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 the Customer Contract.

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 any Customer 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 Customer

6.3.1 The Customer may deduct from amounts which may be payable or which may become payable to the Contractor, any amount due from the Contractor to the Customer 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 Customer from the Contractor in consequence of the Contractor’s breach of the Customer Contract may be deducted from money then due to the Contractor under the Customer Contract. If that money is insufficient for that purpose, the balance remaining unpaid will be a debt due by the Contractor to the Customer and may be:

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

6.3.3 For the purposes of this clause, the Board may act for and on behalf of any Customer for the purpose of assessing and certifying any damages, losses, costs and expenses sustained or incurred by the Customer as a result of the breach of the Customer Contract.

6.4 Suspension of Payments

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

6.4.1 Should the Contractor refuse or neglect to carry out the instructions or requirements of the Board’s Representative in regard to any matter connected with this Agreement, a Customer may, when directed by the Board, suspend all payments to the Contractor until such instructions or requirements have been complied with by the Contractor and in complying with a direction of the Board, the Customer shall not be in breach of this Agreement or any Customer Contract.

7 Variations

7.1 Variations to Agreement

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

7.1.2 At any time during the Term of this Agreement, the Board may, as variations to this Agreement, negotiate with the Contractor to include new items as Deliverables in Schedule 3, being items which are logical inclusions to a category of Deliverables covered by this Agreement but the new items were not included as Deliverables in the Board’s Request for Tender.

7.2 Restricted Tenders to Increase Contractors

(Guide Note: May be deleted clause 7.1.2 to 7.2.1 where the scenarios contemplated are unlikely and open tenders can be called)

- 7.2.1 The Board may at any time during the Term of this Agreement, conduct a restricted tender for the purpose of increasing the number of Contractors for categories of Deliverables covered by the Request for Tender, but not included in this Agreement. Evaluation criteria for such restricted tender will be similar to those used to evaluate the Request for Tender. Should the Contractor be successful in being awarded additional categories of Deliverables, it will be treated as a variation to this Agreement.

8 Delivery

8.1 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).

- 8.1.1 The Contractor must not supply the Deliverables unless the Customer 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 8.1.2;
- (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 Customer which is in keeping with the NSW Government's financial and audit policies.

- 8.1.2 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;
- (g) NSW Department of Finance and Services Customer Number; and
- (h) address to which the Contractor's invoice is to be sent for payment.

- 8.1.3 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.

8.2 Contractor to Fulfil all Customer Contracts

- 8.2.1 The Contractor must fulfil all Customer Contracts placed by Eligible Customers during the Term in accordance with this Agreement and the Customer Contract.

- 8.2.2 A Customer 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, i.e. "Blanket Orders".

8.3 Punctual Delivery

- 8.3.1 The Contractor must deliver the Deliverables within the specified Guaranteed Delivery Times in Schedule 2, or by the delivery times specified in the Customer Contract.

8.3.2 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 Customer in writing of the circumstances which the Contractor considers will give rise to the delay, and the extent or likely extent of the delay.

8.4 Extension of Time

8.4.1 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 Customer, 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.

8.4.2 The Customer may consent to a request for extension of time under this clause 8.4.2 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 Customer with a plan indicating in detail the steps the Contractor proposes to take to minimise the impact of the Circumstance Beyond its Control.

8.4.3 The Customer may terminate the Customer Contract in accordance with clause 17.1 if the delay continues beyond the time consented to in this clause 8.4.

8.4.4 The Contractor will not be entitled to any increase in the Customer Price or damages, costs or expenses in connection with the delay.

8.5 Packaging

8.5.1 The Contractor must ensure that all Deliverables are properly, safely and securely packaged and labelled for identification and country of origin.

8.6 Expenses of Delivery

[\(Guide Note: Use where the delivery is FIS. Modify where NFIS is used\).](#)

8.6.1 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 expressly provided in this Agreement.

8.7 Delivery and Acceptance

8.7.1 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.

8.7.2 Delivery and receipt of the Deliverables shall not be taken to be an acceptance of the Deliverables by the Customer.

8.7.3 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 Customer. Where the contract is awarded on the basis of NFIS pricing, the Contractor must hand over Deliverables to the third party for delivery, as arranged by the Customer.

8.7.4 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 Customer to ensure that the alternative item is acceptable and meets the Customer's needs. Any additional cost in arranging an alternative supply is to be borne by the Contractor.

8.7.5 The Contractor will replace Deliverables at no cost (including freight and handling charges) where stocks are delivered with unreasonably short use-by dates.

8.8 Rejection of Deliverables

8.8.1 The Customer may reject Deliverables which are not in accordance with the Customer Contract.

8.8.2 Upon rejection of any Deliverables the Customer 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 Customer may direct.

8.8.3 If the Contractor fails to remove or rectify the rejected Deliverables within the time directed, the Customer may have the rejected Deliverables re-delivered at the Contractor's risk and expense.

8.8.4 Where the Contractor fails to deliver the Deliverables within the Guaranteed Delivery Time, or such other time agreed by the Customer, or where Deliverables are rejected and the Contractor fails to replace the rejected Deliverables in conformity with the Agreement, the Customer 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 and quality ordered, the Customer may purchase Deliverables of a superior kind and quality to the Deliverables under this Agreement.

8.8.5 In both cases listed in clause 8.8.4 any extra cost or expense incurred over and above the Customer Price, shall be a debt due from the Contractor to the Customer.

8.9 Risk and Title

8.9.1 Title in the Deliverables shall pass to the Customer on satisfactory delivery to the Customer, as evidenced by the signature on the delivery docket of a duly authorised representative of the Customer. Such signature is not an acknowledgement of the acceptability of the Deliverables. Notwithstanding that the Customer 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 Management Fee

9.1 Administration of Management Fee

9.1.1 The Contractor must pay to the Board a Management Fee in accordance with this clause.

9.1.2 The Contractor shall act in good faith in respect of all its obligations under this clause 9.1 and shall use its best endeavours to ensure that the obligations imposed on it in relation to the Management Fee are met including ensuring that:

- (i) all Eligible Customers use an Order for placing orders for Deliverables;
- (ii) the Contractor, its Personnel sell the Deliverables to Eligible Customers on the terms and conditions of this Agreement.

9.1.3 The Management Fee is the GST-exclusive cost of the Deliverables supplied to a Customer, multiplied by the percentage shown in Item 5 of Schedule 1 (the Management Fee Rate), plus the GST payable on this amount. The Management Fee is payable where the supply of Deliverables to the Customer was made under this Agreement.

9.1.4 The amount of the Management Fee will not under any circumstances be shown as a separate charge in any quote or invoice to a Customer.

- 9.1.5 The Parties agree that for the purpose of determining if an Order has been placed under this Agreement the following criteria shall apply, whether or not a customer number is quoted:
- (i) All New South Wales government departments and agencies are Eligible Customers and are required to place their Orders under this Agreement;
 - (ii) All other Eligible Customers located in or affiliated with New South Wales, including State owned corporations, councils established under the Local Government Act 1993 and not for profit organisations, will be treated as having placed their Orders under this Agreement unless the Contractor can provide evidence to the satisfaction of the Board that the purchase was made under another contract between the Eligible Customer and the Contractor;
 - (iii) All Eligible Customers not located in or affiliated with New South Wales, including other State and Territory governments and the Commonwealth, will be treated as having placed their Orders under this Agreement only where they have so advised the Contractor at the time of placing their Order. The Board otherwise bears the onus of establishing that any such orders were placed under this Agreement.
- 9.1.6 All orders placed by an Eligible Customer (as described in clause 9.1.5(i) and (ii)) for Deliverables, howsoever placed, shall be treated as Orders placed under this Agreement, unless the Contractor can provide evidence to the reasonable satisfaction of the Board that the order was placed under another contract between that Eligible Customer and the Contractor. Further, the Contractor agrees to ensure that all Eligible Customers (as described in clauses 9.1.5(i), (ii), or (iii)) submit an Order in the required form in respect of all Deliverables acquired in accordance with this Agreement.
- 9.1.7 The Contractor agrees that the Management Fee payable has been allowed for in the Prices specified in the Price Schedule together with all costs associated with its calculation and proof of payment of the Management Fee and compliance with this clause 9.1.
- 9.1.8 Within 30 days of the end of each Payment Period, the Contractor shall provide electronically through smartbuy® to the Board a sales report ("the Report") which relates to the relevant Payment Period reporting the:
- (a) total amount, exclusive of GST, all Customers are liable to pay in respect of all Deliverables invoiced by or on behalf of the Contractor, to Customers under the Agreement;
 - (b) the sales information as set out in Item 7 of Schedule 1 ("the Sales Information"); and
 - (c) such other relevant information as the Board may, by notice in writing to the Contractor, reasonably require.
- 9.1.9 In the event that the Contractor does not complete a Report within 30 days of the end of a Payment Period, the Contractor will be liable for interest, at the rate specified in item 8 of Schedule 1, on the outstanding Management Fee for the relevant Payment Period, calculated from 30 days after the end of the relevant Payment Period until the Management Fee is paid.
- 9.1.10
- (a) After receipt of the completed Report from the Contractor, the Board shall then compile a Tax Invoice for the Management Fee payable based on the Report and forward that Tax Invoice to the Contractor.
 - (b) The Contractor shall then forward payment to the Board in accordance with the Tax Invoice compiled by the Board within thirty [30] days of the date of the Tax Invoice;
 - (c) In the event that the Contractor does not provide payment within thirty [30] days of the date of the Tax Invoice it will be liable for interest at the rate

specified in item 8 of Schedule 1 on the invoiced amount, calculated from thirty [30] days after the date of the Tax Invoice

- 9.1.11 The Tax Invoice referred to in clause 9.1.10 will set out the Management Fee payable by the Contractor to the Board and the GST payable on the Management Fee.
- 9.1.12 The Board may alter the above procedure for the collection of the Management Fee as advised in writing from time to time during the Term.
- 9.1.13 Where the Contractor considers that an accounting adjustment to the amount of the Management Fee paid or payable during a Payment Period is required, it should advise the Board in writing. The Parties may then agree on the amount of any adjustment.
- 9.1.14 Where the Contractor has not issued an invoice to any Eligible Customer during a relevant Payment Period the Contractor must provide, within 30 days of the end of that Payment Period, a report stating that no Deliverables were provided by the Contractor to any Eligible Customer during that Payment Period.
- 9.1.15 The Contractor must set up and maintain a system which:
- (a) to the reasonable satisfaction of the Board is suitable for identifying all purchasers of the Deliverables under the Agreement that are Eligible Customers whether pursuant to Customer Contracts or otherwise;
 - (b) enables monitoring by the Board of Customer Contracts placed with, and invoices issued, by the Contractor, on behalf of the Contractor, or by its Personnel ;
 - (c) enables the provision of Sales Information; and
 - (d) accommodates the use of the Customer's corporate credit card if the Parties have agreed to use that card for the purchase of Deliverables, and failure to establish such a system to the reasonable satisfaction of the Board shall constitute a breach of this Agreement and the Board may, in its discretion, terminate the Agreement.
- 9.1.16
- (a) The Board may, at its own cost, take such measures as it considers reasonable in the circumstances (including the appointment of an auditor) to verify the Contractor has paid the correct amount of Management Fee due to the Board and the Contractor agrees to cooperate with the Board.
 - (b) If the Board appoints an auditor, the Board will inform the Contractor in writing of the appointment. The Contractor agrees to cooperate with any auditor appointed by the Board, including providing, or providing access to, within 10 working days of the written notification from the Board that an audit will take place, information about all sales of Deliverables made to Eligible Customers (whether pursuant to an Order or otherwise), copies of all contracts, orders and invoices between the Contractor and any Eligible Customers. The Contractor agrees to provide the auditor appointed by the Board access for the purpose of this clause 9.1.16 on the basis of the appointed auditor entering into an Auditor Confidentiality Agreement in the form set out in Schedule 5.
- 9.1.17 If the measures taken in clause 9.1.16 verify that the Contractor has not paid in full the Management Fee that is actually due to the Board, the Contractor:
- (a) must pay the difference between the Management Fee paid to the Board and the Management Fee actually due to the Board within 30 days of a written direction from the Board;
 - (b) will be liable for interest at the rate specified in item 8 of Schedule 1, on the additional amount calculated from 30 days after the expiry of the relevant Payment Period, and

- (c) will, at the discretion of the Board, reimburse the Board's costs and expenses of the measures taken (including any auditor's fees) under clause 9.1.16 to the Board in accordance with the sliding scale set out below to compensate the Board for the cost incurred in ensuring the correct Management Fee is paid:

Difference between Management Fee paid and payable:

- (a) 99% or more of Management Fee was paid
- (b) 90-98% of Management Fee paid
- (c) 75-89% of Management Fee paid
- (d) 50-74% of Management Fee paid
- (e) less than 50% of payable Management Fee paid

Portion of Audit costs to be borne by Contractor:

- (a) \$0
- (b) 25% of Audit and other costs
- (c) 50% of Audit and other costs
- (d) 75% of Audit and other costs
- (e) 100% of Audit and other costs.

- 9.1.18 The Contractor shall during the Term of this Agreement and for a 12 month period after the Agreement has expired or is terminated, keep secure all relevant documents and information for the purposes of this clause and give any auditor appointed by the Board access to those documents and information at all reasonable times.
- 9.1.19 The Parties agree that a breach of this clause 9.1 (including without limitation, a failure by the Contractor to cooperate satisfactorily with the audit referred to in clause 9.1.17) shall be a Substantial Breach of this Agreement which will entitle the Board to terminate this Agreement pursuant to clause 16.1.1 and this right of termination shall be in addition to the right of the Board to recover from the Contractor any sums payable to the Board under this Agreement or otherwise, or the right of the Board to deduct those sums from any money that may be or become payable by the Board to the Contractor on any other account.
- 9.1.20 This clause 9 (Management Fee) will survive the termination of this Agreement in respect of Deliverables supplied pursuant to Customer Contracts that continue beyond the expiry of this Agreement.

10 Confidentiality

10.1 Obligations of Parties

- 10.1.1 Except to the extent necessary to comply with any statutory requirements or government policy relating to the public disclosure of Confidential Information, neither Party will make public, disclose or use any Confidential Information of the other Party except in accordance with this Agreement or a Customer Contract, unless the other Party gives its prior written consent.
- 10.1.2 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 or a Customer Contract.
- 10.1.3 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 or a Customer Contract.
- 10.1.4 The Board's Representative or the Customer may at any time require the Contractor to arrange for its Personnel engaged in the performance of this

Agreement or a Customer Contract to execute without delay a Deed of Confidentiality, substantially in the form of Schedule 4.

10.1.5 This clause will survive the termination of this Agreement.

11 Intellectual Property

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

11.1 Ownership

11.1.1 Intellectual Property created in relation to New Contract Material will be owned by the Contractor upon their creation.

11.1.2 The Contractor irrevocably grants to the Customer a non-exclusive royalty free transferable licence to use the Intellectual Property in the New Contract Material for so long as the Customer may require.

11.1.3 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.

11.1.4 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.

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

12 Specific Obligations of Contractor

12.1 Contract Transition Requirements

12.1.1 The Contractor must ensure that it has complied with the requirements of the Transition Plan in Schedule 2 of this Agreement in accordance with the dates indicated therein.

12.2 Marketing by the Contractor

12.2.1 The Contractor is responsible for the proactive marketing of its organisation's capability to Customers.

12.3 Provision of Catalogue Information for E-commerce Initiatives

12.3.1 From time to time the Board's Representative may request the Contractor to supply information in the nature of catalogue information for use in e-commerce initiatives in NSW Government contracting.

12.3.2 The Contractor must promptly supply any such information that is reasonably requested by the Board's Representative in the format, and using the method of delivery, specified by the Board at the time of the request.

12.3.3 The Contractor consents to the use of such information, including any personal information, in any catalogue created by the NSW Department of Finance and Services to facilitate e-commerce in NSW Government contracting.

12.4 Licences and Approvals

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

12.5 Compliance with Laws and Standards

12.5.1 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 9 of Schedule 1 or any other codes, policies, guidelines and Standards specified in writing by the Board to the Contractor; and
- (c) a particular Standard which has been agreed between the Contractor and the Board, 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 Board 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 Board by the Privacy and Personal Information Protection Act as though the Contractor were, as far as reasonably practicable, the Board in relation to any such Personal Information. The Contractor will comply with any request of the Board's Representative in relation to Personal Information and will not do anything that would cause the Board 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)')*

12.5.2 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).

12.5.3 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's Representative 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.

12.6 Minimum Insurance Requirements

12.6.1 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 12(a) of Schedule 1 in respect of each claim; and
- (b) products liability insurance for at least the amount specified in item 12(b) of Schedule 1 for the total aggregate liability for all claims arising out of the Contractor's deliverables 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 12 of the Agreement Details.

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

12.6.3 The Contractor must ensure that each policy is in effect for the Term of this Agreement or such other period as required by the Board.

12.6.4 The Contractor shall, and shall ensure sub-contractors, as soon as practicable, inform the Board 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 Board is kept fully informed of subsequent action and developments concerning the claim.

12.6.5 The Contractor must, when requested in writing by the Board, arrange for its insurer to complete a "Certificate of Currency of Insurance Obtained".

12.6.6 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.

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

12.7 General Indemnity

12.7.1 The Contractor will be liable in respect of, and indemnifies, and shall keep indemnified, the Board and the Customers 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.

12.7.2 The Contractor's liability in respect of, and indemnity given in, clause 12.7.1 shall be reduced proportionally to the extent that any unlawful, negligent, or deliberately wrongful act or omission of the Board, its officers, employees or agents caused or contributed to the loss.

12.8 Contractor's Warranties for the Deliverables

12.8.1 In relation to the Deliverables, the Contractor warrants that:

- (a) at the time title to a Deliverable passes to the Customer, 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 Board or Customer in Schedules 2 and 3 (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 the Customer Contract and with due care and skill.

12.9 Contractor's Warranties (General)

12.9.1 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 Customer Contract 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 the Customer Contract by the Contractor.

12.10 Warranty Period

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

12.10.2 If the Contractor fails to rectify an error or defect in a Deliverable within 30 days after notification by the Customer, the Customer may arrange for performance of the necessary remedial work by a third party at the Contractor's expense.

12.11 Third Party Warranties

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

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

12.12 Financial Security

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

12.12.1 If requested by the Board, 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 7 and must be issued by a financial institution acceptable to the Board. The Board will hold the Financial Security as security for the due and proper performance of all the obligations of the Contractor under this Agreement and any Customer Contract.

- 12.12.2 If the Financial Security is not sufficient to meet payment of all the loss or damage suffered by the Board and any Customer, the balance remaining will be a debt due and owing from the Contractor to the Board or Customer and may be recovered in any appropriate court.
- 12.12.3 The Contractor agrees that the Board will have no liability to the Contractor for any loss or damage suffered or incurred by the Contractor where the Board exercises its rights under this clause in good faith.
- 12.12.4 The Contractor must not take any action to injunct or otherwise prevent the Board 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 Board any amount invalidly received by the Board under any such Financial Security.
- 12.12.5 The Board must release the Financial Security to the Contractor (or to whom the Contractor directs) if in the reasonable opinion of the Board;
- (a) there is no prospect that money or damages will become owing (whether actually or contingent) to the Board or any Customer; 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.

12.13 Mistakes in Information

- 12.13.1 The Contractor must pay for any additional costs incurred by the Board or any Customer for errors or omissions in material or other Information supplied by it, even though that material or Information may have been approved by the Board.

12.14 Notification of Change in Control or Transfer of Ownership

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

12.15 Notification of Contractor's Insolvency

- 12.15.1 The Contractor must immediately notify the Board 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 and any Customer Contracts;
 - (b) Existing Customer Contracts which the Contractor has entered into under this Agreement.
- 12.15.2 The Contractor must immediately notify all Customers under an existing Customer Contract of the Contractor's Insolvency.

13 Performance Management

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

13.1 Service Levels

- 13.1.1 The Contractor must meet the specified Service Levels in Schedule 8 during the Term of this Agreement. Performance against the Service Levels must be tracked by the Contractor and reported to the Board's Representative in accordance with the frequencies and formats in Schedule 8.
- 13.1.2 Where the Contractor does not meet the Service Levels in Schedule 8, the Board 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 5.4.1,
- (b) temporarily suspend the use of all or parts of this Agreement by all Customers, 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 8, to ensure performance is improved;

until such time as the Contractor has demonstrated its ability to meet the Service Levels in accordance with Schedule 8.

13.1.3 The remedies in clause 13.1.2 are in addition to any other provisions available to the Board to deal with the inability of the Contractor to meet its Service Level obligations under this Agreement and at law.

13.1.4 The measurements and tolerances in the Service Levels specified in Schedule 8 may be amended, added to, or deleted by the Board and the Contractor in writing during the Term of this Agreement.

13.2 Board's Representative

13.2.1 The Board has nominated the Board's Representative in Schedule 1 item 11 to oversee the performance of this Agreement. The Board may, by notice in writing to the Contractor, nominate a replacement Board's Representative.

13.3 Contractor's Relationship Manager

13.3.1 For the purpose of ensuring an efficient relationship with the Board's Representative the Contractor has appointed the Relationship Manager indicated in Schedule 1 item 13. 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 Board's Representative 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 13.1.1; and
- (e) answer the Board's Representative queries and work with the Board's Representative to address issues relating to matters deemed urgent by the Board arising out of this Agreement.

13.3.2 The Relationship Manager must be available at all times during business hours and at all other times on reasonable notice by the Board's Representative to meet with the Board's Representative to discuss any queries, concerns or issues arising in connection with this Agreement or a Customer Contract.

13.3.3 The Relationship Manager must be supported by the Key Personnel in Schedule 1 item 13 in respect of Customers. The Relationship Manager and/or the Key Personnel named in Schedule 1 item 13 must be available to attend periodic meetings as required by Customers.

13.4 Innovation and Continuous Improvement

(Guide Note: Modify where the OPs/KPIs/APIs are not used for a particular Agreement or continuous improvement/savings are not required).

13.4.1 The Contractor must identify innovative solutions for mutual value enhancement in connection with this Agreement, with a view to achieving continuous improvement.

- 13.4.2 The Contractor must submit in writing to the Board's Representative, at its own cost, detailed proposals for changes to the Deliverables and associated supply chain solutions which are likely to offer significant (including repeated and long term) benefits to the Board in accordance with the requirements of Schedule 2.
- 13.4.3 The Contractor must ensure that such solutions do not include anything which might adversely affect the quality of the Deliverables and that any proposed changes are consistent with the purpose and intent of this Agreement.
- 13.4.4 The Board's Representative must consider the Contractor's proposals, but is not bound to accept any proposal. The Board's Representative may also accept the proposed changes subject to conditions. The Contractor shall have no claim arising out of the Board's Representative's failure to accept any proposal or proposed changes.
- 13.4.5 If the Board's Representative accepts any changes proposed by the Contractor, any direct savings in the cost to the Contractor of supplying the Deliverables will be for the benefit of the Customer.
- 13.4.6 For the purposes of monitoring performance and providing incentives for the Contractor to improve its performance level, the Board's Representative will construct and maintain an Overall Performance Indicator (OPI).
- 13.4.7 Data input into the OPI will be provided by the Board's Representative which will monitor the Key Performance Indicators (KPI) and by the Customer which will monitor the Agency Performance Indicator (API).
- 13.4.8 The performance framework and the performance indicators are set out in Schedule 8.
- 13.4.9 Where the Contractor has consistently met the levels set out in Schedule 8, the Board's Representative, 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 Board's reporting requirements.

13.5 Contractor Performance Monitoring

(Guide note: Liaise with Vendor Management regarding the data collection requirements for this project. Include any specific requirements in Part E Special Conditions. If detailed sales data not required insert "13.5 not used" in Special Conditions)

- 13.5.1 The Board's Representative will monitor the sales performance of the Contractor under this Agreement. Where after 12 months of operation of this Agreement the:
- (a) sales of the Contractor are minimal, or
 - (b) the Contractor consistently has nil returns,
- it may be treated as unacceptable performance of this Agreement by the Board.
- 13.5.2 The Contractor agrees to provide to the Board, on a monthly basis, detailed sales data of all sales to Eligible Customers made by the Contractor or on its behalf under this Agreement. This data shall be provided electronically and a sample of the format in which the data is to be provided is set out in Schedule 10 to this Agreement.
- 13.5.3 The Contractor shall act in good faith in respect of its obligations under this clause 13.5 and shall use its best endeavours to ensure that the obligations imposed on it in relation to the detailed sales data are met whether sales are made by or on behalf of the Contractor.
- 13.5.4 Within 7 days of the end of each month, the Contractor shall provide the detailed sales data electronically to the Board's Representative using one of the following means:
- (a) FTP

- (b) Email
 - (c) Web portal
 - (d) Supplier hubs
- 13.5.5 The Board may vary the procedure for the provision of the detailed sales data by advising the Contractor in writing from time to time during the Term.
- 13.5.6 The Contractor must set up and maintain a system which:
- (a) to the reasonable satisfaction of the Board's Representative is suitable for identifying all purchasers of the Deliverables under the Agreement that are Eligible Customers whether pursuant to Customer Contracts or otherwise;
 - (b) enables monitoring by the Board's Representative of Customer Contracts placed with, and invoices issued, by the Contractor, on behalf of the Contractor, or by its Personnel;
 - (c) enables the provision of Sales Information; and
 - (d) accommodates the use of the Customers corporate credit card if the Parties have agreed to use corporate credit cards for the purchase of Deliverables
- 13.5.7
- (a) The Board's Representative may, at its own cost, take such measures as it considers reasonable in the circumstances (including the appointment of an auditor) to validate the accuracy of the reported detailed sales data.
 - (b) If the Board's Representative appoints an auditor, the Board's Representative will inform the Contractor in writing of the appointment. The Contractor agrees to cooperate with any auditor appointed by the Board's Representative, including providing, or providing access to, within 10 working days of the written notification from the Board's Representative that an audit will take place, information about all sales of Deliverables made to Eligible Customers (whether pursuant to an Order or otherwise), copies of all contracts, orders and invoices between the Contractor and any Eligible Customers. The Contractor agrees to provide the auditor appointed by the Board's Representative access for the purpose of this clause 13.5.7 on the basis of the appointed auditor entering into an Auditor Confidentiality Agreement in the form set out in Schedule 5.
- 13.5.8 The Contractor agrees that the Board's Representative will use the detailed sales data provided by the Contractor or on its behalf:
- (a) for the purposes of analysing expenditure by Eligible Customers and preparing reports about that expenditure;
 - (b) as a part of benchmarking under this Agreement;
 - (c) for the monitoring of the performance of the Contractor;
 - (d) for the preparation of other reports related to the Board's functions.
- 13.5.9 A sample of detailed sales data template is contained in Schedule 10.
- 13.6 Exchange of Information Between Government Agencies**
- 13.6.1 The Contractor authorises the Board and its officers or contractors and agents to make available to NSW Government departments or agencies Information concerning the Contractor, including any Information provided by the Contractor to the Board and any Information relating to the Contractor's performance under the Agreement, or the Contractor's financial position.
- 13.6.2 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.

- 13.6.3 The Board 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).
- 13.6.4 The Contractor releases and indemnifies the Board 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 Board and the State of New South Wales from any claim it may have for any loss to the Contractor arising out of the provision of Information relating to the use of such Information by the recipient of the Information.

14 Personnel

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

14.1 The Contractor's Personnel

- 14.1.1 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.
- 14.1.2 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.
- 14.1.3 The Board's Representative 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.
- 14.1.4 Any replacement Key Personnel provided by the Contractor must be approved by the Board.

15 Conduct and Dispute Management

15.1 Co-operation

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

15.2 Duty not to Hinder Performance

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

15.3 General

- 15.3.1 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 15.4.);
 - (b) Expert Determination (clause 15.5)

15.4 Amicable Resolution

- 15.4.1 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 the Agreement, Customer Contract or about any matter arising under or out of the Customer

Contract. The Issue Notice must be given within a reasonable time of the Party becoming aware of the issue.

- 15.4.2 The Party submitting the Issue Notice must submit it to the other Party's authorised representative, which in the case of the Board is to the Board's Representative, and in the case of the Contractor is the Relationship Manager.
- 15.4.3 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.
- 15.4.4 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.
- 15.4.5 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.
- 15.4.6 A Party may only refer an issue to Expert Determination by giving notice in writing specifying the issue to be decided ("the Referral Notice").
- 15.4.7 If the Party giving the Referral Notice is the Contractor it must give the Referral Notice to the Customer and the Board's Representative.
- 15.4.8 If the Party giving the Referral Notice is the Customer, it must give the Referral Notice to the Contractor and the Board's Representative.
- 15.4.9 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).

15.5 Expert Determination

- 15.5.1 If a Referral Notice is given under clause 15.4, the expert is to be agreed between the Board's Representative 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.
- 15.5.2 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 the Customer Contract as the case may be; or
 - (c) a person who the Parties have been unable to agree on.
- 15.5.3 When the person to be the expert has been agreed or nominated, the Board's Representative, 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 9;
 - (d) any other matter which is relevant to the engagement.
- 15.5.4 The Parties must share equally the fees and out-of-pocket expenses of the expert for the determination, and bear their own expenses.
- 15.5.5 If the expert determines that one Party must pay the other an amount exceeding the amount shown in Item 14 Schedule 1 (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.
- 15.5.6 Unless a party has a right to commence litigation under clause 15.5.5:
 - (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.

16 Termination by the Board

16.1 Termination for Cause

16.1.1 Without prejudice to its rights at common law, the Board 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 Board 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 Board may reasonably allow;
- (e) where the Contractor assigns its rights and/or obligations, or novates this Agreement or subcontracts the Customer Contract except in accordance with this Agreement;
- (f) in the case of the Contractor’s Insolvency;
- (g) where the Contractor has not for three consecutive Payment Periods issued any invoice to a Customer or received any order; or
- (h) if in the Board’s view a conflict of interest exists for the Contractor which prevents the proper performance of this Agreement.

16.2 Effect of Termination for Cause

16.2.1 If the Board terminates this Agreement for cause the Board 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 a Customer under any Customer Contract (which may be ascertained and certified by the Board), from any money due, or which may become due to the Contractor (whether under this Agreement or any Customer Contract) and/or from the Financial Security (if any); and
- (c) recover from the Contractor in an appropriate court the balance of any monies remaining unpaid as a debt due and payable by the Contractor to the Board.

16.2.2 The Board’s termination under this clause will not affect any Customer Contract unless the context requires it.

16.3 Termination for the Board’s Convenience

16.3.1 The Board 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.

16.4 Effect of Termination for Convenience

- 16.4.1 The Board's termination under this clause will not affect any Customer Contract unless the context requires it.
- 16.4.2 The Board shall reimburse the Contractor its unavoidable costs directly incurred as a result of termination provided that any claim by the Contractor:
- (a) must be supported by written evidence of the costs claimed;
 - (b) will be in total satisfaction of the liability of the Board to the Contractor in respect of this Agreement and its termination.
- 16.4.3 The Board 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 Board.

17 Termination by Customer

17.1 Termination of Customer Contract

- 17.1.1 Without prejudice to its rights at common law, the Customer may immediately terminate the Customer Contract, by written notice to the Contractor ("Notice of Termination"):
- (a) 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;
 - (b) where the Contractor commits a Substantial Breach of the Customer Contract that is not capable of remedy;
 - (c) where the Contractor commits a Substantial Breach of the Customer Contract in a manner that is capable of remedy and does not remedy the breach within 7 days of receiving a notice from the Customer requiring it to do so ("Notice of Breach"), or such further time as the Customer may reasonably allow;
 - (d) where the Contractor assigns its rights and/or obligations, or subcontracts the Customer Contract otherwise than in accordance with the Customer Contract; or
 - (e) in the case of the Contractor's Insolvency.

17.2 Effect of Termination of Customer Contract

- 17.2.1 In the event of termination, the Customer:
- (a) may procure from any other source a reasonably similar alternative to the Deliverables suitable to the Customer and the Contractor shall be liable to the Customer for any reasonable extra expense incurred together with any loss sustained by the Customer;
 - (b) may, by notice in writing to the Contractor, require the Contractor at its expense to remove the specified Deliverables not accepted by the Customer and to dismantle or remove specified work from the Customer's premises by a date specified in the notice;
 - (c) shall be liable under the Customer Contract to pay only for the Deliverables delivered and accepted by the Customer or performed to the satisfaction of the Customer, in accordance with the Customer Contract; and
 - (d) may recover from the Contractor the amount of any loss or damage suffered by the Customer as a result of the termination.
- 17.2.2 This clause will survive the termination of the Customer Contract.
- 17.2.3 If the Customer terminates this Customer Contract the Customer may:

- (a) deduct any loss or damages arising from or in connection with the termination, from any money due, or which may become due to the Contractor and/or from the Financial Security (if any); and
 - (b) 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 Customer.
- 17.2.4 The Customer's termination under this clause will not affect the Agreement, unless the context requires it.
- 17.2.5 Any termination by the Customer is without prejudice to any accrued rights or remedies of the Customer under the Customer Contract.

18 General

18.1 No Assignment or Novation

- 18.1.1 The Contractor must not assign or novate this Agreement or a Customer Contract without first obtaining the prior written consent of the Board or the Customer as applicable, which consent may be withheld at their absolute discretion.
- 18.1.2 The Contractor acknowledges that the Board 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.

18.2 Conflicts of Interest

- 18.2.1 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.
- 18.2.2 The Contractor must:
- (a) notify in writing, and consult with, the Board immediately upon becoming aware of the existence, or possibility, of a conflict of interest; and
 - (b) comply with any direction given by the Board in relation to those circumstances designed to manage that conflict of interest.
- 18.2.3 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.

18.3 Records and Access to Records

- 18.3.1 The Contractor must keep proper accounts and records in accordance with the accounting principles generally applied in commercial practice.
- 18.3.2 During the Term, the Contractor must, within a reasonable time of a request from the Board's Representative, give the Board's Representative 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 Board's Representative reasonably requires.

18.4 Waiver

- 18.4.1 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.

18.5 Severability

- 18.5.1 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.

18.6 Notices

- 18.6.1 Notices must be sent to the other Party at the address shown in items 15 or 16 of Schedule 1, or the address last notified to the other Party in writing, or in the case of the Contractor, at the Contractor's registered office.
- 18.6.2 All notices must be in writing and signed by the relevant Party and must be given either by hand delivery, post or facsimile transmission.
- 18.6.3 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.

18.7 Counterparts

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

18.8 Applicable Law

- 18.8.1 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.

18.9 No agency/no employment/no partnership

- 18.9.1 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 Board.

18.10 Disengagement Period

- 18.10.1 For 6 months following the expiry or termination of a Customer Contract (or part thereof) the Contractor will provide such assistance as is reasonably requested by the Customer for the supply of the Deliverables to continue without interruption to facilitate an orderly, prompt and efficient transition to an alternative service provider or to the Customer. Such assistance includes (without limitation):
 - (a) providing reasonable co-operation with a third party supplier nominated by the Customer, and
 - (b) providing the Customer data, information and materials that may be required to enable transacting with a new provider as requested by the Board's Representative or Customer.

18.11 Pricing Information

The Contractor agrees that, subject to clause 10 (Confidentiality), pricing information (including discounts, commissions and rebates as appropriate) about Deliverables may be disclosed to any person by the Board's Representative at its sole discretion in the form of a Contract Guide or in any medium of communication it deems appropriate.

18.12 Government Information (Public Access)

- 18.12.1 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>Restrictions on Nominee Purchasers (clause 3.6)</p> <p><i><u>Guide note: If there are any restrictions agreed in accordance with clause 3.6, detail here.</u></i></p>
Item 4	<p>Benchmark (clause 5.6)</p> <p>Name:</p> <p>Address:</p> <p>Telephone:</p> <p>Facsimile</p> <p>Hourly Rate:</p>
Item 5	<p>Management Fee Rate (clause 9.1.3)</p> <p><i><u>Guide Note: Amend the Management Fee percentage quoted below if this Agreement will deviate from the standard Management Fee rate of 2.5%.</u></i></p> <p>2.5%</p>
Item 6	<p>Payment Period of Management Fee (clause 9.1.8)</p> <p><i><u>Guide Note: Management Fee be paid by our contractors monthly where the contract value is MORE than \$10million Management Fee be paid by our contractors quarterly where the contract value is LESS than \$10million.</u></i></p>
Item 7	<p>Sales Information (clause 9.1.8)</p> <p><i><u>Guide Note: Modify or add any other information that might be required to the below minimum requirements.</u></i></p> <p><i><u>1. The names of the ten largest Customers listed by dollar value invoiced by the Contractor in the relevant Payment Period.</u></i></p>
Item 8	<p>Interest for Late Payment of Management Fee (clause 9.1.9, 9.1.10 and 9.1.17)</p> <p>Interest of 5% per annum shall be payable by the Contractor on any Management Fee not remitted to the Board in accordance with the clause 9.1.8, 9.1.9 and 9.1.17.</p>
Item 9	<p>Codes and Standards (clause 12.5.1)</p> <p><i><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></i></p> <p>1. Code of Practice for Procurement</p>

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	<p>2. Implementation Guidelines NSW Government Procurement 1999</p> <p>3. Environmental Management Procurement Guidelines</p> <p>4. Occupational Health and Safety Procurement Guidelines</p> <p>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) <i>(Guide Note: Delete reference to Code of Behaviour for the Protection of Children and Other Vulnerable People if not applicable)</i></p> <p>6. Local Jobs First Plan</p>
Item 10	<p>Financial Security (clause 12.12): <u><i>Guide Note: If clause 12.12 (Financial Security), is NOT USED, retain the heading of this Item and write the words NOT USED next to the words "Amount" and "Form" below.</i></u></p> <p>Amount: Form:</p>
Item 11	Board's Representative (clause 13.2)
Item 12	<p>Insurances (clause 12.6)</p> <p>a) Public Liability Insurance Limit of Indemnity: \$AUS_M:</p> <p>b) Products Liability Insurance Limit of Indemnity \$AUS_M:</p> <p>c) <u><i>(Insert any amounts for other type of insurance requirements and specify the type of insurance required in accordance with clause 12.6.1 (d))</i></u></p>
Item 13	<p>Key Personnel (clause 14.1.1) <u><i>Guide Note: List any Key Personnel nominated by the Contractor e.g. agency-specific customer service managers</i></u></p> <p>Relationship Manager (clause 13.3.1)</p> <p>Name:</p> <p>Address:</p> <p>Position:</p> <p>Telephone:</p> <p>Facsimile:</p>
Item 14	<p>Expert Determination Amount (clause 15.5.5): <u><i>Guide Note: If this Agreement is worth more than \$50M annually, the Expert Determination Amount should be \$1.0M. If it is worth less than this, the Expert Determination Amount should be \$100,000.</i></u></p> <p>AUD:</p>
Item 15	<p>Notices to: (clause 18.6)</p> <p>The Contractor's contact name and address:</p> <p>Name:</p> <p>Address:</p> <p>Position:</p>

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	Telephone: Facsimile:
Item 16	The Board's Representative contact name and address: Name: [] Address: Level [] McKell Building, 2-24 Rawson Place, SYDNEY, NSW 2000 Telephone: 9372 [] Facsimile: 9372 []

Schedule 2 Statement of Requirements

Schedule 3 Pricing, Price Variation Mechanism, List of Deliverables, Warranty and any other benefits

Pricing and List of Deliverables

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 found in Schedule 3, which is 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

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

Where:

- CP = Current Customer Price.
- CPo = Customer Price at start date.
- Y = The labour factor, expressed as a decimal, being the proportion of the Customer 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:

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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 customer 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 customer 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)

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Where:

- E_o = 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 Customer Price.
OP = Original Customer 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 (insert name of Principal) of (insert address of Principal), in the State of New South Wales ("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 NSW Government.
- 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 Board and the Contractor dated [insert date] for the supply of the Deliverables as defined in the Agreement.

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

“**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 or any Customer;
- (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").

"Customer" has the same meaning as in the Agreement;

"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; and

"Principal" means *[insert name of Principal]*.

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

"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 Contractor 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 Board

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 or a Customer in respect of any claim, damage, loss, liability, cost, expense, or payment which the Principal or a Customer 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 law 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 _____)
for and behalf of the [insert name of Principal]) (signature of the Principal)

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 Management Fee Audit Confidential Disclosure Deed of Agreement

Effective Date:

Auditor (Company):

This Confidential Disclosure Deed of Agreement is entered into by and between the Contractor ("Contractor") ABN and the "Auditor", which has been engaged by the State Contracts Control Board ("Board") under an Agreement with the Contractor to carry out a review of the Contractor's records and systems in connection with the Agreement dated.....for the supply of.....

1. In accordance with the clause 9 of the Agreement the Contractor will disclose to the Auditor all information that the Auditor may reasonably require to enable the Auditor to determine the amount of the Management Fee payable by the Contractor.
2. **Representatives.** The officer(s) responsible for disclosing or receiving Confidential Information are:
On behalf of the Contractor:
Name:
Title:
The Contractor's address:
Other officer:
On behalf of Auditor:
Name: -----and any other partner or employee of the Auditor who is involved in the Audit or has a need to know in connection with the Audit.
Title:
Work Address of Auditor's representative above:
3. **Definition of Confidential Information.** The "Confidential Information" disclosed under this Agreement is all information in any form received in connection with the Audit. A recipient of Confidential Information under this Agreement shall have a duty to protect all such Confidential Information whether expressly disclosed as Confidential Information or not.
4. **Disclosure Period and Term.** The information disclosed by the Contractor to the Auditor will remain confidential for a period of 2 years from the date of this Deed.
5. **Use of Confidential Information.** The Auditor shall use, and shall ensure that any of its employees or contractors use, the Confidential Information for the sole purpose of fulfilling the Auditor's obligations to the Board in relation to the Audit.
6. **Protection of Confidential Information.** The Auditor shall not disclose the Confidential Information to a third party other than the Board, and solely for the purposes for which the Confidential Information was disclosed. The Auditor shall take all reasonable steps to prevent the unauthorised use, dissemination or publication of the Confidential Information. For the avoidance of doubt, the Auditor's partners and employees referred to in clause 2 are not third parties for the purposes of this clause.
7. **Exclusions.** This Agreement imposes no obligation upon a Recipient of the Auditor with respect to the Confidential Information which:
 - (b) is or becomes a matter of public knowledge through no fault of the Recipient;
 - (c) is required to be disclosed under operation of law; or
 - (d) is disclosed by the Recipient with the Discloser's prior written approval; or
 - (e) is disclosed to a party's legal adviser in connection with the Audit or this Deed of Agreement.

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8. **Proprietary Rights.** Neither party to this Deed of Agreement acquires any intellectual property rights or any other rights under this Deed of Agreement except the limited right to use set out in paragraph 5 above.
9. **General.** The parties do not intend that any agency or partnership relationship be created between them by this Deed of Agreement. This Agreement sets forth the entire agreement with respect to the Confidential Information disclosed herein and supersedes all prior or contemporaneous agreements concerning such Confidential Information, whether written or oral. All additions or modifications to this Deed of Agreement must be made in writing and must be signed by both parties.

This Deed of Agreement shall be governed by the laws of the State of New South Wales and shall be subject to the jurisdiction of the Courts in Sydney, Australia.

Signed sealed and delivered by the parties:

CONTRACTOR:	AUDITOR:
ABN/ACN:	ABN/ACN:
Authorised Signature: _____	Authorised Signature: _____
Name: _____	Name: _____
Title : _____	Title : _____
Date: _____	Date: _____

Schedule 6 smartbuy® Requirements

1. smartbuy® Licence

- 1.1 The Board grants to the Contractor a non-exclusive, non-transferable, revocable licence to use smartbuy® for the performance of its obligations under this Agreement.

2. Authorised User

- 2.1 The Board may approve a person nominated by the Contractor and allow such person to access or use smartbuy® and become an Authorised User or an Administrator.
- 2.2 The Board may in its discretion decline to accept a person nominated by the Contractor as an Authorised User or an Administrator, without stating its reasons.

3. Contractor Obligations

- 3.1 The Contractor must provide any information that is reasonably required by the Board for use by smartbuy® including Contractor Information. The Contractor must ensure that all information provided to the Board (including maintaining information in the smartbuy® system) is current, correct, and complete at all times. The Contractor must immediately notify the Board of any changes required to the Contractor Information.
- 3.2 The Contractor agrees that Contractor Information will be published on smartbuy® by the Board. Contractors are responsible to ensure that Designated and Nominated Sub-Contractors are aware that their information will be published by the Board on smartbuy® as a 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 all Eligible Customers can access Catalogue Information.
- 4.10 Externally Hosted Catalogues shall not provide functionality that allows Eligible Customers to directly place orders for Deliverables. The Contractor agrees that, after an Eligible Customer has finished its browse activities, the Customer Contract 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 including that pertaining to particular Eligible Customers must be updated in strict accordance with the frequency and conditions outlined in this document from the date on which the Catalogue Information is initially hosted on smartbuy® as per clause 4 above.

6. Availability

- 6.1 The Board may in its discretion limit or suspend the Contractor's access or use of smartbuy® during the Term of this Agreement.
- 6.2 Unless otherwise notified by the Board, smartbuy® will be accessible 7 days a week except during any necessary scheduled maintenance, unscheduled maintenance or unavailability caused by a circumstance beyond the reasonable control of the Board or its third party suppliers.
- 6.3 The Board will endeavour where reasonably practicable to notify the Contractor of any:
 - a) changes or upgrades to smartbuy®'s functionality that materially affect the Contractor's use of smartbuy®;

- b) changes in equipment or configuration requirements of smartbuy® that materially affects the Contractor's ability to access and use smartbuy®.
- 6.4 The Board agrees to make available the NSW Procurement Client Support Centre to assist the Contractor in relation to any defects it experiences in the operation or functionality of smartbuy®. The Contractor agrees to report any issues or defects to the Client Support Centre on 1800 NSW BUY (679 289) or NSWP_Support@services.nsw.gov.au. Unless the Contractor is otherwise notified by the Board, the Client Support Centre will be available from 8.30 am to 5.00 pm Monday to Friday, excluding public holidays. The Board may change the times during which the Client Support Centre is available from time to time.

7. smartbuy® Security

- 7.1 smartbuy® security systems have been created to protect buyers, suppliers and information maintained on or transmitted from or to smartbuy®.
- 7.2 Key elements of the security regime include:
- a) Data Centre certified to BS7799, ASIO T4 rating and Suntone 2 Accreditation;
 - b) Robust firewalls;
 - c) Multi level system design;
 - d) Virus protection;
 - e) Password protection and restricted access permissions;
 - f) Intrusion detection systems;
 - g) Audit trails of user activities;
 - h) Where encryption is used, HTTPS protocol with 128 bit technology has been selected;
 - i) Programme of system upgrades to ensure security compliance.
- 7.3 The Contractor must:
- a) have in place procedures to prevent any unauthorised use of smartbuy® by any person on its behalf (including Administrators, Authorised Users or an unauthorised third party) and these procedures must include provision to ensure its Administrators and Authorised Users are prevented from accessing or using smartbuy® upon them ceasing to be authorised to do so;
 - b) make all reasonable efforts to ensure that any information (including documents) that it transmits via smartbuy® will be free from viruses, worms or trojan horses or any other malicious program that is capable of causing damage to smartbuy® or smartbuy®'s users;
 - c) make all reasonable efforts to ensure that its systems are secure and are kept up to date with adequate anti-virus software;
 - d) notify the Board immediately of any significant security breaches that it suffers or threats that it is aware of.
- 7.4 The Contractor acknowledges that user logins and passwords used to access smartbuy® are transmitted using HTTPS protocol. Delivery of business documents (such as purchase orders and/or Invoices) is done through the following mechanisms, depending on the election of the Contractor:
- a) Facsimile;
 - b) Unencrypted emails;
 - c) SFTP: File Transfer Protocol over Secure Sockets Layer (SSL) (Secure Shell (SSH) available on request);
 - d) HTTPS protocol: Hypertext Transport Protocol over Secure Sockets Layer (SSL).

- 7.5 While the Board will make reasonable endeavours at all times to make smartbuy® secure, the Board does not guarantee:
- a) the security of smartbuy®, the internet, and any other system, including the system used by the Board to access or use smartbuy®;
 - b) that the delivery of business documents will be uninterrupted or secure;
 - c) that smartbuy® will be uninterrupted, timely, secure or error-free;
 - d) that smartbuy®, the internet, and any other system, including the system used by the Contractor, will be free of viruses or errors.

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

- 7.6 The Board may provide access and password details (“Passwords”):
- a) to Administrators to be supplied to Authorised Users; and/or
 - b) directly to the e-mail addresses of Authorised Users who are acceptable to the Board.
- 7.7 The Contractor must take all reasonable steps to protect and keep secret any Passwords that the Board provides to it as per clause 7.6. The Contractor acknowledges and agrees that Board will rely on their use of a Password as conclusive evidence of their identity and authority, without further investigation. The Contractor must immediately notify the Board if it suspects, knows about or has knowledge that a Password has become compromised or known to another person and/or of any unauthorised use of a Password by another person has occurred, as per clause 7.5.

8. Minimum Configuration

- 8.1 To access and use smartbuy® TRADE the Contractor must have the following minimum configuration and the Contractor warrants that it has:
- a) Windows 95, 98, 2000 or XP, IE 5.5 or later, a recommended video resolution of 1024X768; and
 - b) will configure its web browser to use SSL3.0 and ensure that the auto-complete or similar function is switched off for “Contractor name and passwords on forms”.
- 8.2 These configurations may be varied by the Board due to changes or upgrades to smartbuy® from time to time. The Board will, wherever practicable, notify the Contractor of any variations to the configurations. The Contractor acknowledges that any access speed to smartbuy® and the performance of smartbuy® is limited by the Contractor’s Internet service or other infrastructure and equipment.
- 8.3 If the Contractor has any queries in relation to these configuration requirements it may contact the Client Support Centre.

9. Improper Use of smartbuy®

- 9.1 The Contractor must not intentionally, recklessly or negligently interfere with any other parties’ use of smartbuy®. The Contractor must not use smartbuy® or any service provided by the Board to post or transmit any information or provide a link to any third party website that:
- a) defames, threatens or menaces any person;
 - b) breaches any law or regulation or infringes a third party’s rights;
 - c) is indecent, pornographic or obscene;
 - d) knowingly transmits any virus, computer programme, code, device, product, components or other disabling feature that prevents, inhibits or impairs the performance of smartbuy®;
 - e) is an unsolicited commercial electronic message promoting the supply of goods or services.

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

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

10. Disclaimer

10.1 The Board makes no warranties in relation to the condition, fitness, merchantability, quality and title of the Deliverables purchased by the Customer 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 Eligible Customers for those purposes;
- c) whether the supply of the information by the individual is required by law or is voluntary, and any consequences for the individual if the information (or any part of it) is not provided; and
- d) of the existence of any right of access to, and correction of, the information.

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

12. Integration with smartbuy® CONNECT

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

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

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

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

- a) PO
- b) PO Change

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

- 12.4 Contractors must adhere to the smartbuy® Transmission specifications and smartbuy® Document specifications for the Trading Channel selected (specifications available on request. If you require more information contact the NSW Procurement Client Support Centre on 1800 NSW BUY (679 289) or NSWP_Support@services.nsw.gov.au). For all documents implemented, Contractors must be capable of reading and actioning all mandatory and optional fields as defined in the document specifications.
- 12.5 The Board may assist in the development of an estimate of the costs of any integration to smartbuy® CONNECT. Firm pricing cannot be determined until the conclusion of a specific implementation planning study. Costs will vary depending upon the level of integration and their capability. Any integration of their systems with smartbuy®, including any Externally Hosted Catalogues may only take place with the Board's prior consent. The Contractor acknowledges that they will support and fund the establishment, maintenance and regular content update costs associated with integrating their systems with smartbuy® CONNECT. The Contractor is responsible and liable for any damage or claim that the Board suffers or incurs resulting from or in connection with the integration or interoperation of their systems with smartbuy®.

13 Invoices

- 13.1 It is a requirement that the Contractor provides electronic invoices to smartbuy® for all purchases by all NSW Government agencies against this Agreement - irrespective of how the purchase order is received (for example, via fax, telephone, mail, vendor online ordering system, etc). Contractors must send invoices via one of three channels:
- a). Via the HTTPS/xCBL3.0 Trading Channel adhering to the smartbuy® HTTPS Channel Specification and the smartbuy® xCBL3.0 Document Specification. Contractors are responsible for all costs associated with implementing and maintaining the channel.
 - b). Via the SFTP/CSV Trading Channel adhering to the smartbuy® SFTP Channel Specification and the smartbuy® CSV Invoice Document Specification. Contractors are responsible for all costs associated with implementing and maintaining the channel.
 - c). Via a hosted web-portal provided by smartbuy® that allows Contractors to enter invoices online.

14 Externally Hosted Catalogues

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

Definitions:

“Administrators” means Personnel of the Contractor who are responsible for managing Authorised Users within its organisation and receiving notices sent by NSW Procurement 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 NSW procurement.

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

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

“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 7 Financial Security

Guide Note: Procedures Circular 235 recommends that NSW Department of Services, Technology & Administration only accepts Undertakings 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, ABN and address of financial institution] (“**Provider**”)

For the benefit of [STATE CONTRACTS CONTROL BOARD 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,” ABN Number Insert ABN 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
-

SIGNED by <insert name of company>, ABN)
<insert ABN 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 8 Performance Management

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

Schedule 9 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 10 Sample Detailed Sales Data Template

Guide Note: Please double click the icon below to open the Sample Detailed Sales Data Template before printing out the document.



Sample Detailed
Sales Data Template '1

EXECUTED AS A DEED

Guide Note: The signature required for and on behalf of SCCB is, of course, a core clause. Please select from the Library options the relevant contractor (Company, Individual, or Power of Attorney) that will sign the Deed.

SIGNED, SEALED 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

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 SEALED AND DELIVERED by)
<insert name of company>, ABN <insert)
<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

Option 4: Power of Attorney

Guide Note: Contract officers do not have to require a registered Power of Attorney from the contractor. To prove legal authority, officers must obtain a certified copy of the letter conferring the Power of Attorney.

SIGNED by <insert name of individual> by)
<his/her/its> attorney, <insert name of)
<insert name of attorney> under power of attorney (who)
states that the attorney has no notice of
revocation of the attorney) in the presence
of:

Witness

Signatory

Print Name

Print Name