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| [***Insert Customer***]  [***Insert Contractor***] |
| Agreement for Provision of Data Centre Services |
|  |
| Draft 23/06/21 | version 2.3 |
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|  |  |
| --- | --- |
| **This Agreement** is made on [***insert date***] | |
| **Parties** | |
|  | **[*Insert* *full name of the Customer***] (ABN [\*]) of [***Insert registered address***] (the ***Customer***). |
|  | **[*Insert Company Name*]** (ABN [\*]) of [***Insert registered address***] (***Contractor***). |
| **Recitals** | |
|  | The Contractor is a member of the Data Centre Facilities Panel and has entered into a Head Agreement (**Head Agreement**) with the Contract Authority for the provision of ICT related goods and services to Eligible Customers. |
|  | This Agreement contains the terms and conditions on which the Contractor agrees to supply the ICT related goods and services specified in this Agreement to the Customer. |
|  | The Contractor has represented to the Customer in respect of this Agreement that it has the ability to provide the Deliverables for each Module to which the Contractor has been enrolled under the Head Agreement. |
|  | The Customer has agreed to enter into this Agreement with the Contractor, and the Contractor has agreed to enter into this Agreement with the Customer, by which the Contractor offers to provide Deliverables on the terms and conditions contained in this Agreement. |

**It is agreed** as follows.

1. Definitions and Interpretation
   1. Definitions

In this Agreement and any Order, except where the contrary intention is expressed, the definitions in Schedule 1(***Definitions***) apply.

* 1. Interpretation

In this Agreement and any Order, except where the contrary intention is expressed:

* + 1. a reference to a Module is to a Module to which the Contractor is enrolled as set out in the Head Agreement;
    2. a reference to an Order is to an Order formed in accordance with clause 3 and includes the terms of this Agreement;
    3. a reference to the Customer means the Customer as a party to the Agreement;
    4. a reference to an Agency or Eligible Customer, does not include the Customer;
    5. the singular includes the plural and vice versa, and a gender includes other genders;
    6. another grammatical form of a defined word or expression has a corresponding meaning;
    7. a reference to a clause, paragraph, Schedule or Attachment is to a clause or paragraph of, or Schedule or Attachment to, this Agreement or any Order and a reference to this Agreement or any Order includes any Schedule or Attachment to this Agreement or the Order, as the context requires;
    8. a reference to a clause, section or paragraph includes a reference to a subclause of that clause; subsection of that section or subparagraph of that paragraph;
    9. a reference to a Document, publication, Standard, Government policy or instrument is a reference to the Document, publication, Standard, Government policy or instrument as altered, supplemented or replaced from time to time;
    10. a reference to A$, $A, AUD, dollar or $ is to Australian currency unless stated otherwise;
    11. a reference to time is to the time in the place where the obligation is to be performed;
    12. a reference to a party is to a party to this Agreement or any Order as the context requires, and a reference to a party to a Document includes the party's executors, administrators, successors and permitted assigns and substitutes;
    13. a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or Agency or other entity;
    14. if the Contractor is a trustee, the Contractor enters this Agreement and any Order personally and in its capacity as trustee and warrants that it has the power to perform its obligations under this Agreement and any Order;
    15. a reference to a Statute, ordinance, code or other Law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
    16. a word or expression defined in the *Corporations Act* or GST Law has the meaning given to it in the *Corporations Act* or GST Law, as applicable;
    17. the meaning of general words is not limited by specific examples introduced by 'including', 'for example' or similar expressions;
    18. any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
    19. any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
    20. a rule of construction does not apply to the disadvantage of a party because the party was responsible for the preparation of this Agreement, the applicable Order or any part of those Documents;
    21. if a day on or by which an obligation must be performed or an event must occur is not a Business Day in the relevant location, the obligation must be performed or the event must occur on or by the next Business Day in that location;
    22. headings are for ease of reference only and do not affect interpretation; and
    23. a reference to a matter being to the knowledge of a person means that the matter is the best of the knowledge and belief of that person after proper inquiry including inquiry which a reasonable person would be prompted to make by reason of knowledge of a fact.

To the extent that the parties have not completed items in a Schedule or Attachment, unless otherwise stated in that Schedule or Attachment, that item will be taken to be 'not applicable' for the purpose of this Agreement and any applicable Order.

* 1. Order of precedence

To the extent that there is any conflict between the provisions contained in the body of this Agreement any provisions in the Schedules or Documents incorporated by reference, the following order of precedence will apply (with higher listed Documents taking precedence over lower listed Documents):

* + 1. the Order; then
    2. the body of this Agreement; then
    3. Schedule 1 (***Definitions***); then
    4. the other Schedules; then
    5. the Attachments (if any); then
    6. the Annexures (if any); and then
    7. Documents incorporated by reference.

1. Role of the Head Agreement
   * 1. The Contractor acknowledges that the Head Agreement with the Contract Authority is a standing offer under which the Contractor offers to supply the deliverables, services and/or activities specified in the Head Agreement to Eligible Customers, including the Customer:
        1. pursuant to the terms of the Head Agreement and this Agreement; and
        2. at rates and prices which are the same as or less than those set out in the Head Agreement.
     2. The Customer reserves the right to enter into agreements with additional contractors at any time.
2. Purchasing Services and/or Deliverables by Order
   1. Order Form

The Contractor must provide all Services and/or Deliverables specified in the Order Form and carry out all other Contractor's Activities on the terms of this Agreement.

* 1. Electronic Execution

Subject to applicable Laws, the parties may execute this Agreement and any document entered into under it, electronically and in one or more counterparts. Notwithstanding the manner in which a document under this Agreement is submitted or accepted, the terms of this Agreement will apply and any click-wrap, "pop-up" or other like terms and conditions of the Contractor appearing in the course of such submittal or acceptance will have no force or effect.

* 1. Additional Orders
     1. If, at any time during the Term, the Customer wishes to increase the volume or quantum of Services and/or Deliverables, the Customer may, in its sole discretion, do so by submitting a written notice to the Contractor for those increased Services and/or Deliverables. The written notice will be in the form required by the Customer and will include information relating to the Additional Order, including the number of additional Services and/or Deliverables required.
     2. Except to the extent agreed by the parties in writing, any increased Deliverables and/or Services will be supplied for the same rates and charges specified in the Order Form.
     3. The parties agree that each time the Customer submits an Additional Order to the Contractor:
        1. that Additional Order forms part of this Agreement, and will not constitute a separate contractual relationship between the parties; and
        2. the Contractor must increase the supply of the Deliverables and/or Services in accordance with that Additional Order, subject to any reasonable qualifications specified in the Order Form.
  2. No exclusivity or minimum commitment

The Contractor acknowledges and agrees that:

* + 1. except to the extent expressly set out in an Order Form, the Customer is under no obligation to acquire any minimum volumes of Services or Deliverables or to meet any minimum spend level under this Agreement; and
    2. the Contractor is not an exclusive provider of the Contractor's Activities (nor activities which are the same as or similar to them) to the Customer, and the Customer is not, by executing this Agreement, restricted in any way from engaging any other person to provide activities which are the same as or similar to the Contractor's Activities.
  1. Additional Terms

The parties agree to comply with any Additional Terms.

* 1. Reseller arrangements

Where specified in the Order Form, the parties agree that the Contractor may provide the Services and/or Deliverables in the Contractor's capacity as a reseller and subject to any Additional Terms relating to the reseller arrangement.

1. Term

This Agreement begins on the Commencement Date and continues until it is terminated in accordance with clause 38 or the last Order (including any Additional Orders) under the Agreement expires.

1. Order Period
   1. Order Period

An Order begins on the Order Start Date and continues for the initial Order period as specified in the Order Form (***Initial Order Period***) unless the Order is terminated in accordance with clause 38.

* 1. Extensions
     1. The Customer may extend the Initial Order Period by a further period or periods as specified in the Order Form (***Order Option Period***) on the terms and conditions then in effect (subject to clause 5.2(b)), by giving written Notice to the Contractor. Such Notice must be provided:
        1. at least 20 Business Days before the end of the then current Order Period; or
        2. within another period agreed in writing between the parties.
     2. Where an extension is exercised in accordance with clause 5.2(a), the Charges in the Order Option Period will be the Charges applicable immediately before the extension of the Initial Order Period unless otherwise agreed in accordance with clause 32. An extension exercised in accordance with clause 5.2(a) takes effect from the end of the then current Order Period.
     3. With the written Approval of the Customer, the Order Period may extend beyond the Term of the Agreement.

1. Relationship
   1. General obligations of the parties
      1. Each party must:
         1. diligently perform its obligations under this Agreement and any Order; and
         2. work together in a collaborative manner in good faith.
      2. The Contractor must:
         1. comply with any reasonable directions given by the Customer in respect of this Agreement;
         2. provide all reasonable assistance required by the Customer provided that the assistance requested is consistent with the Contractor's obligations under this Agreement; and
         3. subject to the terms of an Order, comply with any reasonable directions given by the Customer in respect of the provision of Deliverables under an Order,

and is responsible for all aspects of the provision of Deliverables under an Order, irrespective of whether it is a reseller or engages Subcontractors for its provision of the Deliverables.

* + 1. If requested by the Customer, the Contractor must participate in any forums or meetings, at the Contractor's own expense, in relation to the operation of this Agreement and any Order (including forums or meetings with other Panellists or with Agencies). The forums may, at the request of the Customer, be held remotely via videoconference.
    2. The Contractor must clearly identify itself as a contractor when communicating through telephone, email or any other method in relation to this Agreement and in the course of performing an Order.
  1. Limitation of relationship
     1. Neither this Agreement nor any Order creates a relationship of employment, agency or partnership between the parties or their respective Personnel.
     2. The parties must not represent themselves, and must ensure that their Personnel do not represent themselves, as being an officer, employee, partner or agent of the other party, or as otherwise able to bind or represent the other party.

1. Delivery
   1. Delivery

Upon entering into an Order, the Contractor must provide the Deliverables:

* + 1. as detailed in the relevant Module Terms those Deliverables, including to achieve or exceed the Minimum Requirements applicable to the Deliverables (if any):
       1. as detailed in the Order Form; and
       2. in accordance with the Order;
    2. with due skill and care and to the best of the Contractor's knowledge, expertise and ability; and
    3. in accordance with all relevant Laws.
  1. Implementation

The Contractor must undertake all implementation activities specified in the Order Form, including cooperating with the Customer and its other contractors for the purpose of facilitating the smooth transition of the provision of the Deliverables by the Contractor.

* 1. Additional Deliverables

The Customer may, at any time during the Order Period, place an Order Form in accordance with the Agreement (or vary an existing Order Form in accordance with 32) for the provision of Additional Deliverables.

1. Customer's obligations
   * 1. Subject to clause 9(a), the Customer must pay for Deliverables that are delivered in accordance with an Order.
     2. The Customer must use reasonable endeavours to ensure that its Personnel do not interfere with the operations, equipment, Material or Personnel of the Contractor's other customers.
2. Acceptance Testing
   * 1. The Deliverables under an Order are subject to Acceptance by the Customer and will not be Accepted until the Customer issues a certificate of Acceptance in accordance with clause 9(i)(i), unless specified otherwise in the Order Form.
     2. The Deliverables will be considered for Acceptance in accordance with the requirements set out in this clause 9 and in the Order Form.
     3. Deliverables such as Documentation and other data items, that by their nature do not require conduct of Acceptance Testing, will be considered for Acceptance on the basis of their compliance with the Specifications or other criteria specified in the Order Form.
     4. The Contractor must carry out Acceptance Testing as agreed in the Order Form, to ensure that the Deliverables comply with the Specifications and in particular the Acceptance Criteria in the Order Form.
     5. Unless specified to the contrary in clause 9(f), the costs of complying with this clause 9 will be borne by the Contractor.
     6. The Contractor agrees that the Customer, or any of its contractors, may also carry out the Acceptance Testing or any part of the Acceptance Testing. The direct costs of the Customer undertaking the Acceptance Testing will be borne by the Customer unless the testing shows that the Contractor failed to comply with the provisions of the Contract, in which case the cost of the testing must be borne by the Contractor.
     7. The Contractor must comply with any reasonable request by the Customer for further testing in relation to the Deliverables.
     8. The Contractor must allow the Customer or its authorised representative to observe the performance of the Acceptance Testing or other tests by the Contractor.
     9. If the Customer finds that the Contractor:
        1. has satisfied the Acceptance Criteria, the Customer must within the timeframe specified in an Order Form issue a certificate of Acceptance in respect of that Acceptance Criteria in accordance with the Order (and the relevant Deliverables will then be deemed to have been Accepted by the Customer); or
        2. has not satisfied the Acceptance Criteria, the Contractor must (at no cost to the Customer) do all things necessary to rectify any problems to ensure that the Acceptance Criteria is met. The Acceptance Testing must be repeated as soon as practicable or within the time period agreed by the parties after notification from the Contractor that it believes it meets the Acceptance Criteria, and this clause 9(i) will apply to the repeated Acceptance Testing.
     10. If the Contractor does not comply with the Acceptance Criteria for relevant Deliverables within:
         1. 15 Business Days after the commencement of Acceptance Testing for that Deliverable; or
         2. if further Acceptance Testing is required under clause 9(i)(ii), such further period as is notified by the Customer,

the Customer may treat the non-compliance as a failure by the Contractor to comply with the relevant obligation under the Order.

* + 1. The issuing of a certificate of Acceptance in accordance with clause 9(i)(i) is not a waiver of rights and the Customer, in issuing a certificate of Acceptance, may impose such conditions and qualifications as it reasonably requires.

1. Charges and GST
   1. Charges
      1. Charges for the Deliverables are specified in Annexure C (Schedule of Prices and Indexation) of the Head Agreement.
      2. The Charges applicable to any Order (including the total price payable in respect of an Order) will be the lesser of the amounts:
         1. calculated in accordance with Annexure C (Schedule of Prices and Indexation) of the Head Agreement and specified in an Order; or
         2. that are specified in an Order,

as amended from time-to-time to reflect any reductions to the Charges following a benchmarking conducted under the Head Agreement.

* + 1. Charges payable in respect of an Order will be payable by the Customer subject to the Contractor delivering the Deliverables as set out in the Order in accordance with the Order's terms and conditions, including meeting any Milestones and achieving Acceptance of Deliverables which are specified in that Order.
    2. Subject to this clause 10, the Customer will pay to the Contractor the Charges and Approved Pass-Through Expenses specified in Annexure C (Schedule of Prices and Indexation) of the Head Agreement and the Order Form for the Deliverables. Charges payable in respect of an Order will be payable by the Customer subject to the Contractor delivering the Deliverables as set out in the Order in accordance with the Order's terms and conditions, including meeting any Milestones and achieving Acceptance of Deliverables which are specified in that Order.
    3. The Customer will make payment within 20 Business Days after receipt of a correctly rendered Tax Invoice.
    4. In the event of a dispute as to whether an amount is payable pursuant to a Tax Invoice, the Customer may withhold the disputed portion pending resolution of that dispute in good faith but will, subject to clauses 10.3(a) to 10.3(c) pay the undisputed GST portion within the period specified in clause 10.1(e).
    5. The Charges include all costs and resources required by the Contractor to deliver the Deliverables as outlined in the Order.
    6. The Customer may set off against any amount due and payable under this Agreement, or any Order, any amount due and payable under this Agreement, or any Order, by the Contractor to the Customer.
    7. Unless otherwise approved by the Customer and only in exceptional circumstances, the Contractor must not render invoices for, and the Customer is not liable to pay, Charges more than 120 days after such Charges were due to be invoiced by the Contractor.
  1. Payment Not Evidence

The payment of moneys under an invoice is not to be taken as evidence against or an admission by the Customer:

* + 1. of the value of any Deliverables; or
    2. of any Deliverables having been performed in accordance with the Order.
  1. GST
     1. All consideration provided under an Order (if any) and any money payable (if any) under this Agreement is exclusive of GST, unless it is expressed to be GST inclusive.
     2. Where a party (***Supplier***) makes a taxable supply to another party (***Recipient***) under or in connection with this Agreement or an Order, the Recipient must pay to the Supplier an additional amount equal to the GST payable on the supply (unless the consideration for that taxable supply is expressed to be GST inclusive). The additional amount must be paid by the Recipient by the later of the following:
        1. the date when any consideration for the taxable supply is first paid or provided; and
        2. the date when the Supplier issues a Tax Invoice to the Recipient.
     3. If, under or in connection with this Agreement or an Order, the Supplier has an adjustment for a supply under the GST Law which varies the amount of GST payable by the Supplier, the Supplier will adjust the amount payable by the Recipient to take account of the varied GST amount. The Supplier must issue an adjustment note to the Recipient within 20 Business Days after becoming aware of the adjustment.
  2. Other GST Matters
     1. If a party is entitled to be reimbursed or indemnified under this Agreement or an Order, the amount to be reimbursed or indemnified is reduced by the amount of GST for which there is an entitlement to claim an input tax credit on an acquisition associated with the reimbursement or indemnity. The reduction is to be made before any increase under clause 10.3(b). An entity is assumed to be entitled to a full input tax credit on an acquisition associated with the reimbursement or indemnity unless it demonstrates otherwise before the date the reimbursement or indemnity is made.
     2. Any reference in this Agreement or in an Order to cost, expense, liability or similar amount (***Expense***) is a reference to that Expense exclusive of GST (unless that Expense is expressed to be GST inclusive).
  3. Changes in Government Taxes
     1. Subject to clause 10.5(e), if any new or existing government Tax (***Changed Tax***) levied in Australia in connection with the provision of the Deliverables is introduced, increases, decreases or is removed in its entirety and this affects:
        1. the cost of an item included in the Charges; or
        2. the cost to the Contractor of providing the Deliverables,

the Contractor:

* + - 1. in the case of an increase or introduction of a Tax, may apply to vary the applicable Charges to take account of the net effect of the change in the Changed Tax; or
      2. in the case of a decrease or a removal of a Tax, must give the Customer written notice of the decrease or removal together with evidence of the net effect of the decrease or removal on the Charges as soon as practicable after the change in the Changed Tax is announced or the Contractor becomes aware of the decrease or removal, and the applicable Charges will be varied to take account of the effect of such decrease or removal.
    1. The increase in the Charges under clause 10.5(a) will not take effect, and the Customer is not obliged to approve any variation to applicable Charges attributable to the Changed Tax, unless and until the Contractor provides the Customer with evidence of the net effect of the Changed Tax on the cost of an item or the costs of supplying the Deliverables and the Customer is satisfied that:
       1. the claimed increase is actually attributable to that Tax and takes into account reductions in any other government Tax; and
       2. the change in the Changed Tax has affected the Charges,

and the increase will take effect from the date on which the Customer responds to the Contractor confirming the increase in Charges.

* + 1. A decrease in the Charges under clause 10.5(a) will take effect from the date on which the change in the Changed Tax becomes effective.
    2. To avoid doubt, any change to applicable Charges will automatically apply to all current Orders or Additional Orders (as applicable) without the need to formally amend or vary those Orders or Additional Orders.
    3. Clauses 10.5(a) to 10.5(c) do not apply to income Tax, Taxes on turnover or revenue or similar Taxes imposed on or in respect of income, turnover or revenue, any employment-related Taxes (including, without limitation any Tax on or in respect of superannuation) or capital gains Taxes.

1. Performance Management Framework
   1. General
      1. The Contractor acknowledges and agrees that:
         1. the Customer has relied on the Contractor's representations, as reflected in any Order, and on the Contractor's ability to:
            1. meet each Milestone or Delivery Date for Deliverables as set out in the Order Form;
            2. comply in full with the quality, architectural, functional and performance requirements set out in the Order Form for the Deliverables; and
            3. meet any performance management framework specified in the Order Form (including any Service Levels), or other performance standards described in the Order Form; and
         2. the Customer's value for money assessment of the Contractor's representations depends on the Contractor complying in full with this Agreement and the Order.
      2. The parties agree that the Charges payable under an Order will be adjusted to reflect the application of Rebate Points or Service Credits in accordance with any performance management framework specified in the Order Form. The parties acknowledge that any adjustment on this basis is reasonable and represents the reduced level of service provided to the Customer*.*
      3. The parties will comply with the details in any performance management framework specified in the Order Form, including in relation to measuring and reporting on the Contractor's performance under any Order.
   2. Reductions in Charges – Service Credits or Rebate Points
      1. Where Service Credits/Rebate Points (if any) are incurred in accordance with clause11.1(b) and are notified by the Customer in writing as payable to the Customer, then:
         1. the Contractor must adjust the next Invoice, or, where there are no more Invoices, pay to the Customer on demand by the Customer, any Service Credit/Rebate Point that corresponds to the failure to meet that Service Level; or
         2. the Customer may deduct any Service Credit/Rebate Point that corresponds to the failure to meet that Service Level from Charges payable to the Contractor.
      2. The Contractor acknowledges that:
         1. its failure to meet a Service Level may have a material adverse impact on the business and operations of the Customer; and
         2. Service Credits/Rebate Points represent a reduction in Charges to reflect the provision by the Contractor of a lower level of service than is required of it under the Order and constitute an agreed amount by which the Charges may be reduced in accordance with the Order.
      3. Unless specified otherwise in an Order Form, the Customer's rights under clauses 11.2(a) and 11.2(b) are in addition to, and do not waive, the Customer's right to seek any other remedy under this Agreement, the Order, or at Law. However, any damages recovered by the Customer under or in connection with the Order will be reduced by the amount of any Service Credits/Rebate Points (if any) which the Customer has been paid in respect of the same event giving rise to the damage.
   3. Service Level Reporting
      1. The Contractor must report to the Customer's Representative at the frequency specified in the Order From in the form of a written or electronic report (***Service Level Performance Report***) which:
         1. provides an analysis of the performance of the Contractor in meeting the Service Levels in respect of the Order;
         2. identifies any non-compliances;
         3. proposes an action plan to remedy non-compliances and implement continuous improvements; and
         4. reports on whether the Contractor has implemented any previous action plan and, if not, the extent of the non-compliance.
      2. The Contractor acknowledges and agrees that the Customer may review each Service Level Performance Report to assess the level of compliance by the Contractor with the Service Levels.
      3. The Contractor acknowledges and agrees that the Customer may make available any Service Level Performance Report to the Contract Authority where the Customer has reasonable grounds for believing that the Contract Authority has a legitimate interest in receiving the Service Level Performance Report.
   4. Performance reviews
      1. If it is stated in the Order Form that the parties must conduct a service and performance review of the Contractor's performance under this Agreement, then the parties must conduct such reviews at the intervals and in accordance with any requirements in the Order (or as otherwise agreed between the parties).
      2. All reviews must be undertaken by representatives of both parties who have the authority, responsibility and relevant expertise in financial and operational matters appropriate to the nature of the review and either party may request the involvement of the Contract Authority in any review.
2. Personnel
   1. General
      1. The Contractor must, at its own cost, use such Personnel as are necessary to enable it to fulfil its obligations under this Agreement and any Order. The Contractor must ensure that any Contractor Personnel that it uses to perform an Order have the requisite skills, qualifications and experience for the tasks they are given.
      2. The Contractor must:
         1. provide, or procure the provision of, such information as can be lawfully provided and which is reasonably requested by the Customer concerning the Contractor Personnel it is using, or proposes to use, in performing its obligations under an Order;
         2. provide suitable replacement Contractor Personnel should the Customer, for security reasons, deny access to, or request removal of, any Contractor Personnel. If the Customer requests the removal of any Contractor Personnel for reasons not related to security, the Contractor must promptly address the matter, which may involve replacement of any Contractor Personnel approved by the Customer;
         3. ensure Contractor Personnel comply with the Contractor's obligations in the Order; and
         4. ensure Contractor Personnel, when on the Customer's premises or when accessing the Customer's facilities and information (as appropriate), comply as necessary with the reasonable requirements and directions of the Customer with regard to conduct, behaviour, safety and security (including submitting to security checks as required and complying with any obligation imposed on the Customer by Law).
   2. Contractor's responsibilities
      1. The Contractor is responsible for all wages, salaries and other payments to Contractor Personnel and must fully comply with all relevant Laws (including, in particular, any Laws applicable in the State of New South Wales) in relation to Contractor Personnel including labour and industrial relations Laws and those relating to working conditions, salary, wages, the payment of any relevant Tax, superannuation, 'pay as you go' or other income Tax remissions and any other amounts, remissions allowances including those under any industrial awards or agreements relevant to the Contract. Upon request, the Contractor must demonstrate that it has complied with these obligations.
      2. Without limiting clause 12.2(a), the Contractor must:
         1. comply with all applicable Laws and other requirements relating to the security of payments that are due to persons;
         2. ensure that payments made by the Contractor, including to Subcontractors, are made in a timely manner; and
         3. as far as practicable, ensure that disputes about any payments, whether to Subcontractors or Contractor Personnel, are resolved in a reasonable, timely and cooperative way.
   3. Key Personnel
      1. The Contractor must ensure that each Key Person named in the Order Form is appointed to the role nominated for that person by the dates (if any) specified in the Order Form.
      2. The Contractor must not remove any Key Person until agreed by the Customer in writing, except where the removal arises as a result of the Key Person's voluntary resignation, sickness or injury, internal promotion or involuntary termination of employment for cause.
      3. Where clause 12.3(b) applies, the Contractor must provide replacement Key Persons acceptable to the Customer at no additional cost to the Customer and at the earliest opportunity. Any replacement Key Person must be approved by the Customer.
3. Subcontracting
   * 1. Unless expressed otherwise in the Order Form, the Contractor must:
        1. not subcontract any aspect of the performance of the Contract without the prior written Approval of the Customer, which Approval will not be unreasonably withheld;
        2. not subcontract on terms that would permit the Subcontractor to do or omit to do something that would, if done or omitted to be done by the Contractor, constitute a breach of this Agreement or an Order;
        3. not subcontract with an entity that:
           1. has had a judicial decision against it (not including decisions under appeal) relating to employee entitlements in respect of which it has not paid any judgment amount; and
           2. the Contractor knows, or should reasonably know, will, or has the potential to, cause material reputational damage to the Customer as a result of the Customer's association with the Subcontractor.
        4. ensure that any Subcontractor that is Approved is bound by, and complies with, provisions to the effect of the following clauses of this Agreement as included in the Order:
           1. clause 15 (**Confidentiality**);
           2. clause 16 (**Privacy**);
           3. clause 18 (**Security**);
           4. clause 28 (**Conflict of Interest**);
           5. clause 31 (**Audit and Access**); and
           6. clause 38 (**Termination**).
     2. The Contractor must provide the Customer with details of the subcontract (excluding pricing) between the Contractor and the Subcontractor within five (5) Business Days after receiving a request from the Customer to provide the subcontract.
     3. At the Order Start Date, the Subcontractors identified in the Order Form are approved Subcontractors under the Order.
     4. The Contractor must inform its Subcontractors that the Subcontractor's provision of any Deliverables under the Order may be disclosed publicly.
     5. Approved Subcontractors will be specified in the Order Form.
4. Intellectual Property Rights
   1. Ownership
      1. All Intellectual Property Rights in:
         1. any Existing Material remain vested in the person that owns the Intellectual Property Rights as at the Commencement Date (***Owner***); and
         2. any adaptation, translation or derivative of that Existing Material, vests in, or, is hereby transferred or assigned to the Owner, immediately upon creation.
   2. Contractor Owned New Material
      1. The provisions of 14.2(b) to 14.2(d) apply to New Material, unless clause 14.4 applies.
      2. All Intellectual Property Rights in any New Material vest in, or, are hereby transferred or assigned to, the Contractor, immediately upon creation.
      3. The Contractor grants the Customer a non-exclusive, perpetual, irrevocable, royalty free, transferable, sublicensable licence to use, copy, adapt, translate, reproduce and in any way exploit that New Material in connection with, or for the operation, modification, support and / or use of, the Deliverable in which it is incorporated, subject to the restrictions set out in clause 14.2(d).
      4. The licence to New Material in clause 14.2(c):
         1. does not permit the Customer to disclose the New Material to any other person, except as stated in clauses 14.2(d)(iii) to 14.2(d)(v);
         2. does not permit the Customer to manufacture, sell, license, transfer, commercialise or otherwise exploit any of the New Material or any Existing Material except as stated in clauses 14.2(d)(iii) to 14.2(d)(v);
         3. permits the Customer to sublicense any of the rights in clause 14.2(c) without additional charge to any "Public Service agency" or other "government sector agency" (as defined in the *Government Sector Employment Act 2013* (NSW)), any NSW Government agency or statutory body representing the Crown (as referenced in section 13A of the *Interpretation Act* 1987 (NSW)), any other public authority that is constituted by or under an Act of the State of New South Wales or that exercises public functions, and any "public health organisation" (as defined in the *Health Services Act* 1997 (NSW));
         4. permits contractors of the Customer, and that entity's directors, officers, employees, contractors, agents and consultants (as relevant) to access the New Material, without additional charge, for the internal purposes of the Customer provided that, unless otherwise required by the Contractor, the contractor of the Customer first signs an agreement or undertaking in a form reasonably acceptable to the Contractor that protects the use and disclosure of the New Material in the same manner as contemplated in this Agreement or in any Order; and
         5. permits the Customer to sublicense any of the rights in clause 14.2(c), without additional charge, to a contractor that is providing outsource services to the Customer that include the operation of the New Material, provided that:
            1. the New Material is used solely for the internal business purposes of the Customer for the period of the outsource arrangement and the sublicence automatically terminates at the end of the period of the outsource arrangement; and
            2. unless otherwise required by the Contractor, the Contractor first signs an agreement or undertaking in a form reasonably acceptable to the Contractor that protects the use and disclosure of the New Material in the same manner as stated in the Order.
      5. On the expiration or termination of an Order, the Contractor must deliver to the Customer copies of all New Material and any data relevant to that New Material held by the Contractor or under its control, in a format that the Customer can use.
   3. Existing Material

To the extent any New Material incorporates or is delivered in conjunction with Existing Material:

* + 1. Intellectual Property Rights in that Existing Material are retained by the owner of those Intellectual Property Rights absolutely; and
    2. in respect of Intellectual Property Rights in the Existing Material as and to the extent incorporated in New Material, the Contractor grants to (or must acquire for where the Intellectual Property Rights in the Existing Material are owned by a third party) the Customer a non-exclusive, perpetual, irrevocable, royalty free, transferable, sublicensable that Existing Material as part of the relevant New Material, and to alter, enhance, and produce derivative works from that Existing Material as a whole for use by the Customer provided that the Customer must not exploit the Existing Material for commercial purposes.
  1. Customer Owned New Material

If it is stated in the Order Form that this clause applies to some or all of the New Materials, from the Order Start Date:

* + 1. any Intellectual Property Rights in the New Material vest in, or are hereby transferred or assigned by the Contractor to, the Customer; and
    2. the Customer may, in its sole discretion and only if stated in the Order Form, grant the Contractor a:
       1. non-exclusive, perpetual, irrevocable, royalty free, transferable licence in respect of the Intellectual Property Rights in the New Material to use, copy, adapt, translate, manufacture and in any other way exploit the Intellectual Property Rights in the New Material; or
       2. licence in respect of the Intellectual Property Rights in the New Material on such terms as are in the Order Form.
  1. Customer Material

The Customer grants the Contractor a non-exclusive, non-transferable licence for the Order Period for the Contractor and its Personnel to use the Customer's Material to the extent necessary for the Contractor to perform its obligations under the Order.

* 1. Intellectual Property warranty

Unless specified otherwise in an Order Form in a manner that provides protection to the Customer, the Contractor warrants that:

* + 1. the Deliverables, and use of those Deliverables, will not infringe the Intellectual Property Rights or Moral Rights of any person; and
    2. it has the necessary rights to grant the licences required by this clause 14.
  1. Remedy for breach of Intellectual Property warranty

If someone claims, or the Customer reasonably believes that someone is likely to claim, that all or part of the Deliverables infringe their Intellectual Property Rights or that use of the Deliverables infringes their Moral Rights, the Contractor must, in addition to the indemnity under clause 24.1(a)(v) and to any other rights that the Customer may have against it, promptly, at the Contractor's expense:

* + 1. secure the rights for the Customer to continue to use the affected Deliverables free of any claim or liability for infringement; or
    2. replace or modify the affected Deliverables so that the Deliverables or the use of them does not infringe the Intellectual Property Rights or Moral Rights of any person in a way that does not degrade the performance or quality of the affected Deliverables.
  1. Moral Rights

To the extent permitted by applicable Laws, the Contractor must ensure that each of the Personnel used by the Contractor in the production or creation of the New Material gives a genuine consent in writing, in a form acceptable to the Customer, to the use of the New Material for the Specified Acts, even if such use would otherwise be an infringement of their Moral Rights.

* 1. Specified Acts

In this clause 14, Specified Acts means:

* + 1. not attributing the authorship, or falsely attributing the authorship, of any New Material, or any content in the New Material (including without limitation literary, dramatic, artistic works and cinematograph films within the meaning of the *Copyright Act 1968* (Cth));
    2. materially altering the style, format, colours, content or layout of the New Material and dealing in any way with the altered New Material;
    3. reproducing, communicating, adapting, publishing or exhibiting any New Material; and
    4. adding any additional content or information to the New Material.

1. Confidentiality
   1. General
      1. Except to the extent necessary to comply with any requirement of a Statute, the Parliament 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 an Order, unless the other party gives its prior written consent.
      2. Each party may disclose the Confidential Information of the other party:
         1. to its Personnel where the disclosure is essential to enable them to carry out their duties in connection with this Agreement or an Order;
         2. to its Personnel, Related Bodies Corporate and their directors, officers, employees, agents, contractors, lawyers, accountants, insurers, financiers and other professional advisers where the disclosure is in connection with advising on, reporting on, or facilitating the party's performance under, this Agreement or an Order in circumstances where such persons have a need to know (and only to the extent that each has a need to know and has been directed and agrees to keep confidential the Confidential Information on terms no inconsistent with this Agreement);
         3. where required by the *Government Information (Public Access) Act 2009* (NSW) (or other similar Laws) which the Contractor acknowledges may require the Customer to publish or disclose certain information concerning this Agreement;
         4. if the receiving party is required to disclose such Confidential Information by law, order of a court or tribunal of competent jurisdiction, the listing rules of an applicable securities exchange or requirement of Parliament, provided that the disclosing party provides the other party reasonable notice (to the extent reasonably practicable or permitted) of any such legal requirement in order to enable the other party to seek a protective order or other appropriate remedy; or
         5. in the case of the Customer, to:
            1. the Contract Authority or a responsible Minister; or
            2. any Agency or Eligible Customer or responsible Minister for an Agency or Eligible Customer.
      3. Each party must ensure that any Confidential Information of the other party is used solely for the purposes permitted under clause 15.1(b).
      4. The Customer may at any time require the Contractor to arrange for its Subcontractors to execute without delay a Deed of Confidentiality between the Customer and the Subcontractor substantially in the form of Schedule 2– Deed of Confidentiality.
   2. No reduction in privacy obligations

Nothing in clauses 15.1(a) to 15.1(d), limits any obligation which either party may have under Statute including the Privacy Act, Part 13 of the *Telecommunications Act 1997* (Cth), any applicable State or Territory privacy legislation, or under an Order, in relation to the protection of Personal Information.

* 1. Announcements
     1. Subject to clause 15.3(b), the Contractor must not make a Public Announcement unless it has the Customer's written agreement.
     2. The Contractor is not required to obtain the Customer's written consent to make a Public Announcement if the Public Announcement is required by Law or a regulatory body (including a relevant stock exchange).
     3. If the Contractor is required by Law or a regulatory body to make a Public Announcement, the Contractor must:
        1. limit the Public Announcement to the extent required by the relevant Law or regulatory body; and
        2. to the extent practicable, first consult with and take into account the reasonable requirements of the Customer.

1. Customer Data
   1. Obligations in relation to Customer Data
      1. This clause 16 applies where the Contractor or its Personnel obtains access to, or collects, uses, holds, controls, manages or otherwise processes, any Customer Data in connection with this Agreement.
      2. The Contractor acknowledges and agrees that it obtains no right, title or interest with respect to any Customer Data, other than a right to use Customer Data for the sole purpose of, and only to the extent required for, the carrying out of the Contractor's Activities in accordance with this Agreement.
      3. As between the Contractor and Customer, all rights in and in relation to Customer Data remain with the Customer at all times and the Contractor assigns all rights, title and interest in the Customer Data to the Customer on creation. The Contractor agrees to do all things necessary to assign or vest ownership of all rights in Customer Data to the Customer on creation.
      4. The Contractor must, and must procure that its Personnel:
         1. do not use any Customer Data for any purpose other than for the sole purpose of, and only to the extent required for, carrying out the Contractor's Activities in accordance with this Agreement;
         2. do not sell, assign, lease or commercially transfer or exploit any Customer Data;
         3. do not perform any data analytics on Customer Data, except to the sole extent permitted by this Agreement;
         4. ensure that all of its Personnel who access, or have the ability to access, Customer Data are fit and appropriate to do so, including passing any background or security checks as required by this Agreement;
         5. apply to the Customer Data the level of security and (if applicable) encryption that is required under this Agreement;
         6. apply technical and organisational controls which are appropriate to ensure that all Customer Data is at all times protected from any unauthorised access, modification or disclosure and only handled and processed in accordance with the terms of this Agreement and any other security requirements reasonably specified by the Customer; and
         7. ensure that Customer Data is at all times managed in accordance with the *State Records Act 1998* (NSW) (to the extent applicable).
   2. Security of Customer Data
      1. The Contractor must comply with the security requirements set out in this Agreement, including in the Order Form (***Information Security Requirements***) in carrying out the Contractor's Activities.
      2. The Contractor must establish, maintain, enforce and continuously improve its safeguard and security measures, and take all reasonable steps, to ensure that Customer Data is protected against misuse, interference and loss, and from unauthorised access, modification or disclosure.
      3. The Contractor must immediately notify the Customer where it is or may be required by Law to disclose any Customer Data to any third party contrary to the terms of this Agreement.
   3. Backup of Customer Data
      1. If specified in the Order Form that the Contractor is required to make and store backup copies of Customer Data as part of the Services, the Contractor must make and store backup copies of the Customer Data in accordance with all requirements (including as to frequency, maturity of backup and approved locations) set out or referenced in this Agreement (including the Order Form) or as otherwise reasonably required by the Customer by notice to the Contractor.
      2. Where clause 16.3(a) applies, the Contractor must check the integrity of all backup Customer Data annually (or at such other time required by the Order Form).
   4. Restoration of lost Customer Data

Notwithstanding any other rights the Customer may have under this Agreement, if as a result of any act or omission of the Contractor or its Personnel in the carrying out the Contractor’s Activities or in discharging their privacy or security obligations under this Agreement:

* + 1. any Customer Data is lost; or
    2. there is any unauthorised destruction or alteration of Customer Data,

the Contractor must take all practicable measures to immediately restore the Customer Data (including, where applicable, in accordance with any requirements specified in the Order Form). Any such measures will be at the Contractor’s sole cost where and to the extent such loss, destruction or alteration to the Customer Data was caused or contributed to by an act or omission of the Contractor or any of its Personnel.

* 1. Rights to access, use, extract and retrieve Customer Data

Where Customer Data is in the Contractor’s possession or control, the Contractor must enable the Customer to:

* + 1. access, use and interact with the Customer Data (which may be through access controls identified in the Order Form); and
    2. extract, retrieve and/or permanently and irreversibly delete those copies of the Customer Data which are in the Contractor’s possession or control (which may be performed by self-service tools), or otherwise provide the Customer Data to the Customer:
       1. in accordance with all applicable timeframes and requirements under this Agreement;
       2. at no additional charge to the Customer;
       3. in a human readable, commonly accepted format which does not require the Customer to purchase additional licences it does not already hold, or in the same format as the Customer Data was uploaded (for example, a semi-structured format); and
       4. in order to maintain the relationships and integrity of those copies of the Customer Data.
  1. Record, retention, return and destruction of Customer Data
     1. If specified in the Order Form, the Contractor must:
        1. establish, keep and maintain complete, accurate and up-to-date records of all Customer Data accessed, collected or changed by it; and
        2. make copies of the records referred to in clause 16.6(a)(i) available to the Customer immediately upon request.
     2. On the date that any Customer Data is no longer needed for the purposes of the Contractor carrying out the Contractor's Activities (or should the Customer notify the Contractor that the Customer Data is no longer needed), the Contractor must at its sole cost:
        1. immediately stop using the relevant Customer Data (except as permitted under this Agreement); and
        2. at the Customer's direction (subject to clause 16.6(c)):
           1. securely and permanently destroy all records and backups of the Customer Data in accordance with the timeframes under this Agreement and supply the Customer's Representative with a certificate of destruction that confirms that this has occurred; or
           2. securely return all records of Customer Data to the Customer in accordance with the timeframes under this Agreement.
     3. The Contractor will be entitled to retain copies of the records of Customer Data to the extent, and only for the period, that such retention is mandated by any Laws to which the Contractor is subject.
     4. The Contractor acknowledges and agrees that where the Order Form specifies additional requirements for the capture and retention of audit log data, including categories of data and periods of retention, the Contractor must comply with those requirements.
  2. General
     1. If requested by the Customer, the Contractor must provide the Customer with a report setting out how it will comply, and has complied, with its obligations under this clause 16.
     2. Where applicable, the Contractor must comply with any additional obligations relating to Customer Data as may be specified in the Order Form.
     3. For clarity, nothing in this clause 16 relieves the Contractor of its obligations under clause 17.

1. Privacy
   1. Personal Information
      1. This clause 16 applies to the extent the Contractor obtains access to, or collects, uses, holds, controls, manages or otherwise processes, any Personal Information in connection with this Agreement and any Order. Nothing in this clause 16 derogates from clauses 15, 16 or 18.
      2. The Contractor must when it collects, uses, discloses or holds such Personal Information in the course of performing its obligations under this Agreement or an Order:
         1. collect, use, access, disclose or hold such Personal Information obtained in connection with this Agreement or an Order only for the purposes of performing its obligations under this Agreement or the relevant Order;
         2. comply with all applicable Privacy Laws as if it were a person subject to the Privacy Laws;
         3. not do any act or engage in any practice that would breach the Privacy Laws, or which if done or engaged in by the Customer, would be a breach of any Privacy Laws;
         4. not disclose Personal Information to any other person without the prior written consent of the Customer or as expressly required by any Statute;
         5. notify the Customer immediately upon becoming aware of a breach or possible breach of any of the obligations in this clause 17.1(b), whether by the Contractor, its Subcontractors or their Personnel, and comply with any reasonable direction from the Customer with respect to remedying that breach;
         6. notify any individual that makes a complaint to the Contractor regarding the Contractor's acts or practices in relation to individual's Personal Information, that the complaint may be investigated by the NSW Information and Privacy Commissioner and/or the Australian Information and Privacy Commissioner;
         7. comply with all reasonable directions of the Customer in relation to the care and protection of Personal Information held in connection with this Agreement, or an Order, or the rights of individuals to access and correct such Personal Information, and take all technical, organisational and other security measures reasonably within the Contractor's power to protect the Personal Information from misuse, interference and Loss from unauthorised access or use, modification or disclosure;
         8. not transfer the Personal Information outside New South Wales, Australia or access it, or allow it to be accessed, from outside New South Wales, Australia unless permitted in the Order Form or relevant Module Terms and subject to the Contractor's and its Personnel's compliance with the Data Location Conditions;
         9. ensure that any of the Contractor's Personnel who are required to deal with the Personal Information for the purposes of this Agreement, or an Order, are made aware of the obligations of the Contractor under this clause 17.1(b); and
         10. ensure that any agreement with any Subcontractor who may be fulfilling a requirement in relation to this Agreement, or any Order, which includes the handling of Personal Information contains substantially the same or equivalent obligations to this clause 17.1(b) which are enforceable by the Contractor against the Subcontractor, as applicable.
   2. Data Management and Protection Plan
      1. For as long as the Contractor or its Personnel collects, uses, discloses, holds or otherwise processes any Personal Information in connection with this Agreement, the Contractor must have in place (and prepare and implement, if not already in existence) a Data Management and Protection Plan that caters for the handling of that Personal Information.
      2. The Data Management and Protection Plan must be provided to the Customer's Representative within five Business Days following the Commencement Date or such other time as agreed between the parties in writing.
      3. The Data Management and Protection Plan must:
         1. set out measures for how the Contractor and its Personnel will:
            1. comply with the Privacy Laws; and
            2. protect Personal Information;
         2. be consistent with the Privacy Laws and the security and privacy requirements under this Agreement, provided that, where the Privacy Laws and the security and privacy requirements under this Agreement both address standards in respect of same subject matter, the Data Management and Protection Plan must reflect the higher standard; and
         3. cover such other matters as reasonably required by the Customer.
      4. The Contractor must review and update the Data Management and Protection Plan annually or at such other times as reasonably required by the Customer to address a Security Incident or breach of this Agreement.
      5. The Contractor must comply with its latest Data Management and Protection Plan and provide the latest copy of that plan to the Customer's Representative on request.
   3. No limitation of obligations

Nothing in this clause 17 is intended to limit any obligations that the Contractor has at Law with respect to privacy and the protection of Personal Information.

1. Security
   1. Scope of the Contractor's security obligations
      1. Without limiting any other security obligation under this Agreement, the Contractor's security obligations under this clause apply to:
         1. the Contractor's Activities; and
         2. Customer Data and Personal Information, where and to the extent that the Contractor or its Personnel is in the possession of, controls, or is able to control, such data and information.
      2. For the purposes of this clause 18, "control" includes controlling, managing, processing, generating, capturing, collecting, transferring, transmitting, deleting and destroying.
   2. Contractor's security obligations
      1. The Contractor must implement, maintain and enforce a formal program of technical and organisational security measures (including an audit and compliance program) relating to ICT security and cyber security that is in accordance with:
         1. this clause 18; and
         2. the standards or requirements specified in of the Order Form,

(***Security Program***), provided that where this clause 18 and the standards or requirements specified in the Order Form both address standards in respect of the same subject matter, the Security Program must reflect the higher standard.

* + 1. The Security Program must be designed to:
       1. monitor, audit, detect, identify, report and protect against Security Incidents, Viruses, and any other threats or hazards to the security or integrity of the Customer's operations or the Deliverables in carrying out the Contractor's Activities;
       2. ensure the security (including the confidentiality, availability and integrity) of the Deliverables in accordance with the requirements of this Agreement;
       3. ensure the continuity of the Customer’s access to, and use of, the Deliverables and in a manner that achieves any applicable Service Levels. This includes continuity of access and use during any business continuity event, disaster recovery event, scheduled or unscheduled maintenance and similar events;
       4. manage any potential security risks in the Contractor's supply chains that bear upon the Contractor's Activities;
       5. monitor, detect, identify and protect against fraud and corruption by the Contractor’s organisation and the Contractor’s Personnel; and
       6. ensure that the Security Program is comprehensive in covering all components of the Contractor's Activities and protects data in accordance with this Agreement.
    2. The Contractor must regularly review and continuously improve the Security Program to ensure it remains current and up-to-date and continues to satisfy the requirements of this clause 18 and is in accordance with Best Industry Practice.
    3. If specified in the Order Form, the Contractor must have, obtain and maintain from the Commencement Date and for the duration of the Contractor's Activities the security certifications specified or referenced in the Order Form from an accredited, independent, third party register or accredited, independent third party certification body. Unless otherwise specified in the Order Form, the certifications must be updated at least annually and must comply with any specific certification requirements set out in the Order Form.
    4. Without limiting this clause 18, the Contractor must comply with any additional security obligations or standards specified in the Order Form.
  1. Audits and compliance
     1. The Contractor must audit its compliance with its Security Program and security obligations under this Agreement in accordance with any timeframes specified in the Order Form and, where no such timeframes are specified, on an annual basis.
     2. The Contractor must provide the Customer, at the Customer's request, with electronic copies of:
        1. any security certifications required by this clause 18 and a copy of each renewal of these certifications;
        2. a description of the Contractor's information security management system and cyber security management system;
        3. all reports relating to any external or internal audits of the Contractor's security systems (to be provided for the most recent period available), including follow-up reports on audit action items;
        4. evidence that a vulnerability and security management process is in place within its organisation that includes ongoing and routine vulnerability scanning, patching and coverage verification, with a frequency commensurate with any applicable security requirements specified in the Order Form, or where no requirements are specified, Best Industry Practice. This can include copies of relevant policies, scan results, vulnerability reports, registers of vulnerabilities and patch reports;
        5. evidence that (if applicable) penetration and security testing (including any Acceptance Tests set out in the Order Form) are carried out:
           1. prior to, and directly after, new systems are moved into production or in the event of a significant change to the configuration of any existing system; or
           2. at such other times specified in the Order Form; and
        6. evidence that high and extreme Inherent Risks identified in audits, vulnerability scans and tests have been remediated,

which must contain (at a minimum) full and complete details of information and reports insofar as they relate to the Contractor's Activities. Where the Contractor is not permitted to provide the Customer with any of the foregoing (due to confidentiality obligations to third parties or because to do so would cause the Contractor to breach any Law or relevant security certification that the Contractor is subject to), the Contractor may (acting reasonably) redact those components that it is not permitted to provide to the Customer but only to the fullest extent needed to prevent the Contractor's non-compliance.

* + 1. The Contractor must run initial and annual mandatory security awareness training for all of the Contractor’s Personnel involved in carrying out the Contractor's Activities under this Agreement and ensure that those Personnel have completed the initial training prior to carrying out the Contractor's Activities.
    2. At the Customer's request, the Contractor must implement any audit findings or recommendations arising from an audit conducted under clause 18.3(a) and reasonably demonstrate to the Customer the implementation of such findings and recommendations.

1. Security Incident Notification
   1. Notification of Security Incidents

If the Contractor becomes aware that there has been an actual, alleged or suspected Security Incident, the Contractor must immediately:

* + 1. notify the Customer and, for Security Incidents that are classified by the Customer as having a major or potentially major impact or where otherwise directed by the Customer, also notify the Contract Authority; and
    2. provide to the Customer, to the extent known at the time, the date of the Security Incident and a description of the Security Incident.
  1. Actions required in relation to a Security Incident
     1. Immediately after (and where that is not possible, as soon as practicable and in any event within the time required by Law or any time specified in the Order Form) the:
        1. Contractor becomes aware of any actual, alleged or suspected Security Incident; or
        2. Customer advises the Contractor that the Customer reasonably believes an actual, alleged or suspected Security Incident has occurred or is about to occur,

the Contractor must:

* + - 1. investigate and diagnose the Security Incident;
      2. take immediate action to manage and contain the Security Incident and mitigate the impact of the Security Incident (working on a 24 x 7 basis if required); and
      3. promptly investigate and identify the root cause of the Security Incident and seek to understand the risks posed by the Security Incident and identify how these risks can be addressed.
    1. The Contractor must:
       1. within 48 hours after the Contractor's initial notification in accordance with clause 19.1, provide to the Customer, to the extent known by the time:
          1. a list of actions taken by the Contractor to mitigate the impact of the Security Incident;
          2. a summary of the records impacted or which may be impacted, and Customer Data and/or other information that has been or may have been lost, accessed or disclosed, as a result of the Security Incident; and
          3. the estimated time to resolve the Security Incident;
       2. provide copies of the results of the Contractor’s analysis and the Contractor’s remediation plan to the Customer;
       3. provide any assistance reasonably required in relation to any criminal, regulatory or other investigation relating to the Security Incident;
       4. update the Contractor’s remediation plan to address any concerns reasonably raised by the Customer, following which the Contractor must implement the remediation plan in accordance with the timeframes agreed by the Customer;
       5. following implementation of the remediation plan, provide evidence to the Customer verifying that the remediation activities have successfully resolved the underlying cause of the Security Incident (for example, by sharing the results of relevant penetration tests or vulnerability scans); and
       6. review and learn from the Security Incident to improve security and data handling practices and prevent future Security Incidents from occurring.
    2. For clarity, nothing in this clause 19:
       1. requires the Contractor to provide the Customer with specific details that relate to the Contractor’s other customers or would breach any applicable Laws; and
       2. limits the Contractor's obligations at Law with respect to the notification and resolution of Security Incidents.

1. Warranties
   1. Application of general warranties

The general warranties provided under this clause 20:

* + 1. will survive the termination or expiry of this Agreement and any Order; and
    2. are in addition to, do not limit and are not limited by:
       1. any warranties specific to any Order or Deliverables;
       2. warranties associated with Intellectual Property Rights;
       3. any other warranties provided by either party under this Agreement or any Order; and
       4. the other warranties referred to in clause 20.
  1. Contractor warranty – Contractor has informed itself

The Contractor warrants, on the Commencement Date and each Module Commencement Date and Order Start Date (if any), that:

* + 1. it has and will be deemed to have done everything possible to inform itself fully and completely as to:
       1. the requirements in this Agreement and any Order;
       2. the Law and the conditions, risks, contingencies and all other factors which may affect the timing, scope, cost or effectiveness of performing this Agreement and any Order; and
       3. all things necessary for delivery and management of this Agreement and the performance of the Contractor's obligations under this Agreement and any Order;
    2. it enters into this Agreement and any Order based on its own investigations, interpretations, deductions, information and determinations;
    3. without limiting clause 20, it does not rely on any representation, warranty, condition or other conduct, information, statement or Document which may have been made by the Customer or any person purporting to act on behalf of the Customer in entering into this Agreement or any Order, other than an express warranty contained in this Agreement or any Order;
    4. it has the right to enter into this Agreement and any Order and:
       1. full corporate power and authority; and
       2. all rights, title, licences, interests and property necessary,

to lawfully enter into, perform and observe its obligations under this Agreement and any Order;

* + 1. the execution, delivery and performance of this Agreement and any Order has been or will be duly and validly authorised by all necessary corporate action;
    2. the Contractor's signing, delivery and performance of this Agreement and any Order does not constitute:
       1. a violation of any judgment, order or decree;
       2. a material default under any agreement which relates in any way to the provision of Deliverables; or
       3. an event that would, with notice or lapse of time, constitute such a default; and
    3. to the best of its knowledge no Conflict of Interest exists or is likely to arise in the performance of its obligations under this Agreement or any Order.
  1. Contractor warranty – disclosure of proceedings and matters

The Contractor warrants that it has disclosed in writing to the Customer prior to the Commencement Date and will disclose prior to each Module Commencement Date and Order Start Date any matter that may affect the Contractor's reputation or the Contractor's capacity or ability to perform and fulfil its obligations under this Agreement or any Order, including:

* + 1. any relevant litigation, arbitration, mediation, conciliation, proceeding or investigation that is taking place, pending or threatened (either in Australia or overseas); and
    2. any relevant matters relating to the commercial, technical or financial capacity of the Contractor or of any Subcontractor proposed to be engaged in respect of any Contract, including the existence of any breach, default or alleged breach or default of any agreement, order or award that is binding upon the Contractor.
  1. Contractor warranty – New South Wales Government policy

The Contractor warrants on the Commencement Date and each Module Commencement Date and Order Start Date that it will comply with the Statement of Business Ethics (<https://www.nsw.gov.au/customer-service/who-we-are/business-ethics-statement>) and any Laws and policies referred to therein.

* 1. Contractor warranty – skill and quality
     1. The Contractor represents and warrants that it has, and the Contractor Personnel have, and they will both continue to have and to use, the skills, qualifications and experience to provide the Deliverables in a skilful, diligent, responsive, professional, efficient and controlled manner, with a high degree of quality and to a standard that complies with the Order and meets the Customer's requirements as set out in the relevant Order Form in full.
     2. If the Contractor fails to perform any of the Services in compliance with an Order due to an oversight of the Contractor, or the Contractor's Personnel, the Contractor must:
        1. as soon as practicable and in any event no longer than five (5) Business Days following the failure to perform the Services in compliance with an Order, detect, minimise and promptly rectify such non-compliance, and
        2. certify to the Customer that all reasonable action has been taken to prevent any reoccurrence of such failure.
     3. Failure to remedy the non-compliance described in clause 20.5(b) will amount to a breach of a material provision of this Agreement.
  2. Contractor warranty – right to grant licences

The Contractor warrants that it has the right to grant all licences required to be granted under the Contract.

* 1. Third party warranties
     1. If the Contractor delivers any item that has been procured from a third party, the Contractor assigns to the Customer, to the extent permitted by Law, the benefits of the warranties given by the third party and will do all things requested by the Customer to enforce those warranties.
     2. Nothing in clause 20.7(a) relieves the Contractor of the obligation to comply with warranties offered directly by the Contractor.
  2. Customer warranty – right to enter this Agreement

The Customer warrants that it has the right and authority to enter into this Agreement.

* 1. Trustee Contractor

If the Contractor acts as trustee of a trust, in relation to this Agreement and any Order, it:

* + 1. is liable both personally, and in its capacity as trustee of that trust;
    2. must not assign, transfer, mortgage, charge, release, waive, encumber or compromise its right of indemnity out of the assets of that trust, but retain and apply such indemnity only towards meeting its obligations under this Agreement or any Order;
    3. must not retire, resign nor by act or omission effect or facilitate a change to its status as the sole trustee of that trust; and
    4. represents and warrants that:
       1. such trust has been duly established and currently exists;
       2. it is the duly appointed, current and only trustee of that trust;
       3. as such trustee it has the power to enter into and perform its obligations under this Agreement and any Order;
       4. it has an unqualified right of indemnity out of the assets of that trust in respect of its obligations;
       5. Conflict of Interest and duty affecting it as such trustee (and/or its directors, if any) does not arise, or otherwise is overcome by the terms of the relevant trust deed; and
       6. no breach of the relevant trust deed exists or would arise.
  1. Effect of warranties
     1. Nothing in this clause 20:
        1. restricts the effect of any guarantees, conditions or warranties which may be implied by the *Competition and Consumer Act 2010* (Cth) or any sale of goods or fair trading legislation; or
        2. limits the Customer's right to take action on the basis of:
           1. the Law in respect of a breach of this Agreement, or any Order;
           2. tort; or
           3. any Statutory cause of action.
     2. The Contractor acknowledges that the Customer is entering into this Agreement, in reliance on the warranties given by the Contractor in this clause 20 and any response by the Contractor to an Order Form.

1. Insurance
   * 1. The Contractor must hold and maintain, or be an insured under, one or more insurance policies, that provide the following cover (unless alternative coverage is expressly specified in the Order Form):
        1. public liability insurance with a limit cover of at least $20 million in respect of each occurrence, to be held for the duration of the Contractor's Activities;
        2. product liability insurance with a limit cover of at least $20,000,000 in respect of each occurrence and in the aggregate, to be held for the duration of the Contractor's Activities and at least seven years thereafter;
        3. workers' compensation insurance in accordance with applicable legislation;
        4. professional indemnity insurance with a limit of cover of at least $20 million in respect of each occurrence and in the aggregate, to be held for the duration of the Contractor's Activities and for at least seven years thereafter;
        5. cyber insurance of at least $20,000,000 in respect of each claim for the period of cover, or in such other the amount notified by the Customer to the Contractor if required by the Customer from time to time, to be held for the duration of the Contractor's Activities;
        6. insurance that covers Losses that may be suffered as a result of a data security breach or the wrongful disclosure and use of Personal Information by the Contractor or its Personnel, to be held for the duration of the Contractor's Activities; and
        7. such other insurances as specified in the Order.
     2. The insurance policies in clauses 21(a)(i), 21(a)(ii) and 21(a)(iii) must include cover for the Contractor's liability for the acts and omissions of the Contractor's Subcontractors to the same extent as if they were the acts and omissions of the Contractor.
     3. All policies of insurance must be entered into with an insurer which has a rating of A- or better by AM Best or an equivalent rating organisation at the date when cover is commenced, or for workers' compensation insurance the insurer (including any self-insurance) must be authorised by Law.
     4. The Contractor must, on request by the Customer and within 30 days of the request, provide the Customer with a certificate of currency issued by its insurer or insurance broker (or other form of evidence acceptable to the Customer) confirming that all the insurance policies required under this Agreement, or an Order, are current and that the insurance has the required limits of cover. Where the Contractor is insured under a Related Body Corporate's insurance policy, the certificate of currency must also show that the insurance policy includes the Contractor as an insured.
     5. The Contractor agrees to hold, maintain or be an insured under, any additional insurance stated in an Order Form.
2. Performance Guarantee and Financial Security
   1. Performance Guarantee

If specified in the Order Form, the Contractor must arrange for a guarantor approved in writing by the Customer to enter into an agreement with the Customer in substantially the same form as the document in Schedule 6 or such other document reasonably acceptable to the Customer. This Performance Guarantee must be provided to the Customer within 15 Business Days following the Commencement Date or at such other time as specified in the Order Form.

* 1. Financial Security
     1. If specified in the Order Form, the Contractor must provide a financial security in the amount stated in the Order Form and in substantially the same form as the document in Schedule 7 or such other document reasonably acceptable to the Customer (***Financial Security***). The Financial Security must be provided to the Customer within 15 Business Days following the Commencement Date or at such other time as specified in the Order Form.
     2. If the Charges payable for the Contractor's Activities are increased pursuant to this Agreement (including due to a Change Request approved under clause 32.2), the Customer may, acting reasonably, direct the Contractor to provide additional security in an amount that is proportionate to the increase in the Charges, and the Contractor must promptly comply with such a direction.
     3. Subject to its rights to have recourse to the Financial Security, the Customer must release the Financial Security on the sooner of:
        1. one year from the date of issue of the Acceptance Certificate for the last Deliverable under the Order Form, or if no Acceptance Tests were required, one year following the termination or expiry of this Agreement (or such other period specified in the Order);
        2. the date the Customer and the Contractor agree in writing to release the issuer of the Financial Security; and
        3. the date the Customer notifies the issuer of the Financial Security in writing that the Financial Security is no longer required.
  2. Costs

Unless otherwise specified in the Order, the Contractor will be responsible for the costs that it incurs in complying with its obligations under this clause 22.

1. Liability
   1. Liability Cap
      1. Subject to clauses 23.1(c), 23.1(d) and 23.2, to the extent permitted by Law, the aggregate liability of the Contractor for Loss sustained by the Customer in connection with this Agreement and all Orders (whether under Statute, in contract or in tort, including negligence or otherwise) during any Contract Year is as specified in the Order, which may be:
         1. a fixed amount;
         2. a multiple of the total amounts paid or payable by the Customer under this Agreement; or
         3. an amount determined by reference to another mechanism,

provided that where no such amount is specified or is left blank, the limitation amount will be the default amount as determined in accordance with the table below:

| **Total Fees Paid or Payable** | **Default Amount** |
| --- | --- |
| Under $1,000,000 (including GST) | $2,000,000 |
| $1,000,000 and above (including GST) | Two times the total fees paid or payable by the Customer under this Agreement.  For clarity, "paid or payable" includes amounts that at the relevant time have not been paid but which would have become payable if the parties performed all of their obligations under this Agreement. It is not limited to amounts that at the relevant time have become due and payable. |

* + 1. Subject to clauses 23.1(c), 23.1(d) and 23.2, to the extent permitted by Law, the aggregate liability of the Customer for Loss sustained by the Contractor and its Related Body Corporates in connection with this Agreement (whether under Statute, in contract or in tort, including for negligence, or otherwise) during any Contract Year is limited:
       1. where the Loss arises under or relates to a particular Order only, to the Charges paid or payable by the Customer under that Order during the relevant Contract Year; or
       2. otherwise, to the Charges paid or payable by the Customer under this Agreement and any Orders during the relevant Contract Year.
    2. Each party's liability is uncapped, and the limitations of liability set out in clauses 23.1(a) and 23.1(b) do not apply to any Loss arising out of:
       1. personal injury (including sickness or death of a person);
       2. loss of, or damage to, tangible property;
       3. any breach of Intellectual Property Rights, confidentiality, privacy, or breach of any personnel or data security obligations in the Order or at Law including the indemnities provided in clauses 24.1(a)(ii) and 24.1(a)(v);
       4. any breach of any Statute, fraud or any unlawful act or omission; or
       5. liability for Taxes (and any related penalties or interest) in respect of the Orders payable by the Contractor or payable by the Customer but recoverable from the Contractor.
    3. The liability of a party for Loss sustained by the other party will be reduced proportionately to the extent that such Loss has been caused by:
       1. the other party's failure to comply with its obligations and responsibilities under this Agreement or an Order; or
       2. the negligent act or omission of the other party,

regardless of whether a claim is made by the other party for breach of contract or for negligence.

* 1. Exclusions of liability
     1. In no event will either party's liability to the other party, howsoever arising and whether for breach, in tort (including negligence) or for any other common law or statutory cause of action, include any liability for special, indirect, incidental or consequential loss or damage.
     2. Nothing in clause 23.2(a) will preclude a party from recovering:
        1. Loss which may fairly and reasonably be considered to arise naturally, in the usual course of things, from the breach or other act or omission giving rise to the relevant liability;
        2. any kinds of Loss which the parties expressly agree in the Order Form will be treated as Loss of the kind referred to in clause 23.2(b)(i); and
        3. where the Customer is the recovering party:
           1. any Loss against which the Contractor is required to indemnify the Indemnified Persons under clause 24.1(a), to the extent such Loss relates to monies, amounts or liabilities owed, due, paid or payable, or obligations owed, to a third party; and
           2. subject to applicable common law tests in respect of the recovery of Loss, any costs and expenses relating to any of the following activities (which, for clarity, will be treated as loss of the kind referred to in clause 23.2(b)(i)):

repairing or replacing the relevant Deliverable or re-supplying any Services, including the cost of procuring replacement deliverables or services of equivalent functionality and performance internally or from a third party;

implementing any reasonably necessary temporary workaround in relation to the Services or Deliverables;

engaging labour resources to reload any lost or corrupt data to the extent caused or contributed by the Contractor, from the last back-up made of such data (regardless of whether the Contractor is responsible for back-up of that data as part of the Contractor's Activities); and

activities undertaken by, or on behalf of, the Customer in connection with the mitigation of Loss.

1. Indemnity
   1. Contractor's Indemnity
      1. Subject to clause 24.1(b), the Contractor must indemnify and hold harmless the Customer and the Customer Personnel (each being ***Indemnified Persons***) in respect of any direct Loss suffered or incurred by an Indemnified Person which is caused by or arises from:
         1. any breach of this Agreement or an Order by the Contractor or Contractor Personnel, including a breach in respect of which the Customer exercises an express right to terminate this Agreement or an Order;
         2. without limiting clause 24.1(a)(i), any breach of any of the obligations of the Contractor or a Subcontractor under or in respect of clauses 15, 16, 17 and 18;
         3. any breach of any Statute by the Contractor or Subcontractor in the performance of this Agreement or any Order;
         4. any negligent or unlawful act or omission of the Contractor or Contractor Personnel in relation to this Agreement or an Order; or
         5. a claim made by a third party arising out of or in connection with an allegation that any Deliverables (including the use of any Deliverables by the Indemnified Persons) infringes the Intellectual Property Rights or Moral Rights of the third party.
      2. The indemnity for Loss suffered or incurred by an Indemnified Person will be reduced proportionately to the extent that such Loss has been caused by:
         1. the Indemnified Person's failure to comply with its obligations and responsibilities under this Agreement or the relevant Order; or
         2. the negligent or unlawful act or omission of the Indemnified Person,

regardless of whether a claim is made by the Indemnified Person for breach of this Agreement or the relevant Order or for negligence.

* + 1. For the purposes of clause 24.1(a)(v), an infringement of Intellectual Property Rights includes unauthorised acts which would, but for the operation of section 163 of the *Patents Act 1990* (Cth)*,* section 100 of the *Designs Act 2003* (Cth), section 183 of the *Copyright Act 1968* (Cth) and section 25 of the *Circuit Layouts Act 1989* (Cth), constitute an infringement.
  1. Rights not exclusive

The rights of the Indemnified Persons pursuant to the indemnity in this clause 24 are in addition to, and not exclusive of, any other right, power, or remedy provided by Law, but the Indemnified Persons are not entitled to be compensated in excess of the amount of the relevant Loss they have incurred.

* 1. Indemnified Person's obligations
     1. The Customer must promptly, and in any event within 5 Business Days of being notified of a claim for which it is seeking an indemnity under clauses 24.1(a)(iv) and 24.1(a)(v), provide the Contractor with written Notice of the details of the claim.
     2. If Customer wishes to enforce an indemnity, in its own right or on behalf of an Indemnified Person, it must:
        1. unless there is any government policy that prohibits the Contractor from handling the process for the settlement of the claim, permit the Contractor, at the Contractor's expense, to handle all negotiations for settlement and, as permitted by Law, to control and direct any settlement negotiation or litigation that may follow a claim under clauses 24.1(a)(iv) and 24.1(a)(v) (including selecting solicitors and counsel), subject to the Contractor agreeing to comply at all times with the government policy relevant to the conduct of the litigation; and
        2. in the event that the Contractor is permitted to handle negotiations or conduct litigation on behalf of an Indemnified Person under clause 24.3(b)(i), only after the Contactor confirms its obligations under the indemnity in clause 24.1(a), and at the Contractor's cost, provide all reasonable assistance to the Contractor in the handling of any negotiations and litigation.
     3. If the Customer does not permit the Contractor to handle the process for the settlement of such claim under clause 24.3(b) or, as permitted by Law, to control and direct any litigation that may follow a claim under clauses 24.1(a)(iv) and 24.1(a)(v), then the Customer must promptly and fully defend the claim (whilst complying with government policy), and not settle the claim without the Contractor's prior written consent, such consent not to be unreasonably withheld. The Customer must keep the Contractor fully informed throughout the period of the claim, including providing copies of all relevant documents.
  2. Contractor's obligations

If the Contractor is permitted by the Customer to handle negotiations or conduct litigation on behalf of an Indemnified Person, the Contractor must:

* + 1. keep the Customer at the Customer's request, informed of any significant developments relating to the conduct of the defence or settlement of any claim;
    2. provide to the Customer, at the Customer's request, all information and Documents reasonably requested by the Customer, to enable the Customer to ascertain whether the defence or settlement by the Contractor of any claim is being conducted in accordance with applicable government policy (including any requirements relating to legal professional privilege and confidentiality); and
    3. comply with any reasonable conditions imposed by the Customer which are notified in writing.
  1. Rights held on trust

Where an indemnity in this clause 24 provides a benefit to a person who is not a party to this Agreement or any Order, that benefit will be held on trust for that person by the Customer (in relation to this Agreement or any Order), through whom those rights are obtained and that benefit may be exercised by the person as beneficiary under the trust or on their behalf by the Customer as trustee.

* 1. Mitigation

Each party must use all reasonable endeavours to mitigate its Loss, arising under or in connection with a breach of this Agreement and any Order.

1. Continuous Improvements and Efficiencies
   * 1. The Contractor must provide continuous quality assurance and quality improvement relevant to its Enrolled Module Deliverables during the relevant Module Period, including by:
        1. Identifying and applying proven techniques and tools utilised by the Contractor or industry that would benefit the Customer either operationally or financially; and
        2. Implementing programs, practices and measures designed to improve the Contractor's levels of performance, including any programs, practices and measures as specified in an Order.
     2. Without limiting clauses 25(a) and 26, the Contractor must:
        1. proactively and promptly advise the Customer of all new trends in methodology related to the Deliverables; and
        2. continually plan for the evolution of the Deliverables and modify the manner in which the Deliverables are supplied (subject to any variations to an Order required to implement any change) to improve the quality, effectiveness and efficiency of the Deliverables and their delivery, without increasing the Charges.
     3. The Contractor must not charge the Customer any Charges to modify the manner in which the Deliverables are supplied unless the modification and any Charges are approved by the Customer prior to the work being undertaken.
     4. Nothing in this clause 25 requires the Customer to:
        1. request;
        2. approve; or
        3. if the modification is approved, to fund,

modifications to the manner in which the Deliverables are provided.

1. Reporting
   1. Reporting to the Customer
      1. The Contractor must promptly provide additional information in respect of this Agreement and any Order (including any relevant Module) as the Customer may reasonably request from time to time.
      2. Except for Intellectual Property Rights that have vested in the Customer under an Order (if any), Intellectual Property Rights in all reports provided under this Agreement will vest in the Customer absolutely upon creation.
      3. Subject to the Contractor complying with confidentiality obligations to the Customer, the Customer grants to the Contractor an irrevocable, non-exclusive, world-wide, paid-up licence to hold, use, reproduce, modify, display and sublicence the Intellectual Property Rights in the reports provided under this Agreement for its own purposes at the Contractor's own risk. The Customer is not liable in respect of any Loss caused by the Contractor's exercise of the licence in this clause 26.1(c) and the Contractor releases and indemnifies the Customer in respect of any such Loss.
2. Policies and Procedures Manual
   1. Policies and Procedures Manual
      1. For each Order, the Contractor must develop and maintain a Policies and Procedures Manual, which details all aspects of the Contractor's provision of the Deliverables to the Customer and such other information specified in the Order Form.
      2. Subject to the terms of an Order, the Contractor must provide the Policies and Procedures Manual to the Customer and for the Customer's Acceptance within 60 Business Days after the Order Start Date and each anniversary of the Order Start Date during the Order Period.
3. Conflict of Interest
   1. Notification of a Conflict of Interest

If, during the performance of this Agreement or any Order, a Conflict of Interest arises, or appears likely to arise, the Contractor must:

* + 1. notify the Customer immediately in writing;
    2. make full disclosure of all relevant information relating to the Conflict of Interest; and
    3. take all steps that the Customer reasonably requires the Contractor to take in order to resolve or otherwise deal with the Conflict of Interest.

1. Annual Review
   1. Conducting Annual Reviews
      1. The parties will, following each anniversary of the Commencement Date of this Agreement, conduct an Annual Review to comprehensively review the operation of this Agreement and all Orders (if any).
      2. The Contractor must participate in the Annual Review as required by the Customer. This may include provision of data and participation in meetings. At the Customer's request, the Annual Review may be conducted remotely via videoconference.
   2. Cost of Annual Reviews

Each party must bear its own costs of any Annual Review conducted under this clause 29.

1. Books and Records
   1. Maintenance of records

The Contractor must at all times maintain full, true, accurate and up-to-date accounts and records relating to this Agreement and each Order. Such accounts and records must:

* + 1. include appropriate audit trails for transactions performed, including details of Orders entered into (if any);
    2. record all receipts and expenses in relation to the provision of Deliverables under an Order;
    3. record all other matters on which the Contractor is required to report by this Agreement or any Order;
    4. be kept in a manner that permits them to be conveniently and properly audited, and enables the Charges and Approved Pass-Through Expenses to be determined;
    5. comply at an individual, corporation, or group level with any applicable Australian Accounting Standards; and
    6. be made available to the Customer and/or the Contract Authority as required for monitoring and reviewing the performance of the Contractor's obligations under this Agreement or any Order including being available for audit and access in accordance with clause 31.
  1. Subcontractor requirements

The Contractor must retain, and require its Subcontractors to retain, securely for a period of seven years after termination or expiration of the Agreement or an Order, whichever is later, all accounts and records referred to in clause 30.1.

* 1. Survival

This clause 30 applies for the Term and for a period of seven years after the termination or expiry of this Agreement or all Orders, whichever is later.

* 1. Archival requirements

The Contractor agrees to comply with any reasonable directions from the Customer with respect to any applicable Commonwealth, State or Territory Laws relating to archival requirements.

* 1. Costs

The Contractor must bear its own costs of complying with clauses 0 to 0.

1. Audit and Access
   1. Right to conduct audits

The Customer, or a person or organisation nominated by the Customer (an ***Authorised Investigator***) may, during Business Hours, on reasonable Notice, conduct audits relevant to the performance of the Contractor's obligations under this Agreement and any Contract. Audits may be conducted of:

* + 1. the Contractor's operational practices and procedures as they relate to this Agreement and any Order (including security procedures);
    2. the Charges and the accuracy of the Contractor's invoices and reports in relation to the provision of Deliverables under this Agreement and any Order;
    3. the Contractor's compliance with its confidentiality, privacy, security and other obligations under this Agreement and any Order;
    4. Material (including accounts and records) in the possession of the Contractor relevant to the Deliverables or this Agreement or any Order;
    5. the Customer's equipment and hardware relevant to the Deliverables or this Agreement or any Order; and
    6. any other matters determined by the Customer to be relevant to the operations and the performance of the Deliverables or this Agreement or any Order.
  1. Access by the Customer
     1. An Authorised Investigator may during Business Hours and on giving reasonable Notice to the Contractor:
        1. access the premises of the Contractor (including any Location from which work under an Order is performed) from which Deliverables are provided; and
        2. inspect and copy relevant Documents, books and records, however stored, in the possession, custody or control of the Contractor or its Personnel,

for the purposes of this clause 31.

* + 1. The Authorised Investigator must comply with the Contractor's security plan whilst on the Contractor's premises.
    2. An Authorised Investigator must comply with the Contractor's security requirements whilst on the Contractor's premises. This includes for an Authorised Investigator who is not employed under the *Government Sector Employment Act 2013* (NSW) entering into a confidentiality agreement in a form which is acceptable to the Customer.
    3. The Contractor must comply with any request from the Customer, as applicable, for the Contractor to:
       1. give the Authorised Investigator copies of Documents, books, records and information in a data format and storage medium accessible by the Authorised Investigator; and
       2. provide assistance in respect of any inquiry into or concerning this Agreement or any Order. For this purpose, an inquiry includes any administrative or Statutory review, audit or inquiry (whether within or external to the Customer), any request for information directed to the Customer, and any inquiry conducted by Parliament or any Parliamentary Committee, the Australian Information and Privacy Commissioner, or the NSW Information and Privacy Commissioner.
  1. Conduct of audit and access
     1. The Contractor must provide:
        1. access to its computer hardware, software and Materials (including accounts and records) used in providing the Deliverables under Orders or on which it stores information about the performance of Orders to the extent necessary for the Authorised Investigator to exercise its rights under this clause 31; and
        2. the Authorised Investigator with any reasonable assistance requested by the Authorised Investigator to use that hardware and software.
     2. The Authorised Investigator must use reasonable endeavours to ensure that:
        1. audits performed pursuant to clause 31; and
        2. the exercise of the rights granted by this clause 31,

do not unreasonably delay or disrupt in any material respect the Contractor's performance of its obligations under this Agreement or any Order.

* 1. Costs
     1. Subject to clause 31.4(b), each party must bear its own costs of all inspections, access and audits.
     2. If the Contractor is able to substantiate that it has incurred direct expenses in the exercise by the Customer of the rights granted under this clause 31 which, having regard to the value of this Agreement and any Order, are substantial, the Customer may agree (in its sole discretion) to an appropriate and reasonable reimbursement. Any reimbursement must not be greater than the direct expenses incurred and substantiated and will not be payable if the audit reveals failures by the Contractor to comply with this Agreement or any Order.
  2. Contractor to comply with Authorised Investigator's requirements

The Contractor must do all things necessary to comply with the requirements of an Authorised Investigator, notified under clause 31.2(a), provided such requirements are legally enforceable and within the power of the Authorised Investigator.

* 1. No restriction

Nothing in this Agreement or any Order reduces, limits or restricts in any way any Statutory function, power, right or entitlement of an Authorised Investigator. The rights of the Customer under this clause 31.6 are in addition to any other Statutory power, right or entitlement of an Authorised Investigator.

* 1. No reduction in responsibility

The requirement for, and participation in, audits does not in any way reduce the Contractor's responsibility to perform its obligations in accordance with this Agreement or any Order.

* 1. Consequences of audit
     1. The Contractor must promptly take, at no additional cost to the Customer, corrective action to rectify any error, non–compliance or inaccuracy identified in any audit relating to the way the Contractor has performed its obligations under this Agreement or any Order.
     2. If an audit reveals any overcharging, the Contractor must:
        1. refund any amounts overcharged to the Customer; and
        2. pay to the Customer, as applicable, the cost of any auditor fees that the Customer has incurred.
  2. Survival

This clause 31 applies for the Term and for a period of seven years after the termination or expiry of this Agreement or all Orders, whichever is the later.

1. Variation
   1. Variation to this Agreement
      1. The parties must follow the process outlined in clauses 32.1(b) and 32.1(c) with respect to the variation of the terms and conditions of this Agreement (clauses 1 to 41). This Agreement will only be varied where a formal instrument is duly executed by the parties.
      2. The party seeking to vary the terms and conditions of this Agreement must provide the other party a draft variation setting out the proposed variations (a ***Draft Variation***).
      3. Within 10 Business Days or such other time period agreed between the parties, after receiving a Draft Variation, or within another period agreed between the parties, the receiving party must approve or reject the response in writing.
      4. If this Agreement is varied, that variation (including any changes to the Deliverables) will apply to all future Orders and to Orders in effect (but only to undelivered Deliverables) at the time of the variation, unless agreed in writing between the parties.
   2. Change Request
      1. Either party may submit a Change Request in respect of a proposed variation to:
         1. the Charges;
         2. the Deliverables;
         3. an existing Order (to the extent the Change Request does not deal with varying the terms of this Agreement); or
         4. any other operational or service delivery matter as agreed between the parties.
      2. The parties agree to follow the process specified in Schedule 3 with respect to the proposed Change Request.
      3. Subject to any other rights given under this Agreement to vary its terms, a Change Request shall be valid unless agreed in writing and signed by both the Customer and the Contractor.
2. Agreement Administration
   1. Representatives
      1. The Contractor Representative is identified in the Order Form and is responsible for administration of this Agreement and any Order on behalf of the Contractor and must:
         1. be able to answer enquiries, queries or requests for quotation for Deliverables;
         2. be contactable by the Customer Representative within Business Hours; and
         3. ensure that his or her contact details are accurate and up to date at all times.
      2. The Contractor Representative must have sufficient authority to be able to resolve any issues that arise, in a prompt and effective manner.
      3. The Customer Representative is responsible for administration of this Agreement on behalf of the Customer.
      4. The Customer Representative will be nominated by Notice to the Contractor from time to time and at the Commencement Date is specified in the Order Form.
   2. Delegation

The Contractor Representative and the Customer Representative may each delegate their functions or authorise that their functions be carried out on their behalf (including by a third party). The Contractor or the Customer, as appropriate, will notify the other party of any such delegation or authorisation.

1. Notices and other Communications
   1. Service of Notices

Any Notice is regarded as given and received:

* + 1. if sent by mail; 3 Business Days after it is posted; and
    2. if sent by email; when the sender's system registers that the email has passed the internet gateway of the sender's system (and no delivery failure or out of office message is received by the sender within 24 hours of sending).
  1. Address for Notices
     1. The Customer's address for Notices is:

|  |  |  |
| --- | --- | --- |
| Method | Address | Delivery Instructions |
| By registered post | **[*INSERT physical address*]** | **[*INSERT any delivery instructions*]** |
| By email | **[*INSERT email address*]** | **[*INSERT any delivery instructions*]** |

* + 1. The Contractor's address for Notices is:

|  |  |  |
| --- | --- | --- |
| Method | Address | Delivery Instructions |
| By registered post | **[*INSERT physical address*]** | **[*INSERT any delivery instructions*]** |
| By email | **[*INSERT email address*]** | **[*INSERT any delivery instructions*]** |

* 1. Change of address

Each party must notify the other of any change in its address or any delivery instructions for Notices, or in the identity of its Representative, including through delegation or authorisation under clause 33.2.

1. Dispute resolution
   * 1. The parties agree to resolve any dispute between them that arises during the Term out of, or in connection with, this Agreement or an Order, in accordance with this clause 35.
     2. If a dispute arises out of, or in connection with, this Agreement and / or Order during the Term, then, subject to clause 35(l), the aggrieved party must submit a Notice to the other party of the issue, and if the issue relates to an allegation of breach of contract or any damages the notice must include details of the breach, including the relevant clauses of the Agreement and / or Order which are alleged to have been breached, and (if applicable) the damages claimed and how the damages are calculated (***Issue Notice***). The Issue Notice must be submitted within a reasonable time of the party becoming aware of the issue.
     3. If a party submits an Issue Notice under clause 35(b), each party must nominate in writing, within 7 days, a senior executive who will attempt to resolve the dispute. The nominated senior executives will promptly meet at a time and place that is mutually convenient with the objective of resolving the issue. The nominated senior executives may invite other Personnel to attend the conference subject to a list of additional invited Personnel being provided to the other nominated senior executive at least 24 hours prior to the conference.
     4. If the parties are able to agree upon a resolution to the dispute, the terms of the agreement are to be documented and signed by both the nominated senior executives. Such an agreement will be binding on both parties.
     5. Each party will bear its own costs under clauses 35(a) to 35(d).
     6. If the dispute is not resolved within 21 days of the date that the Issue Notice was received by the other party, either party may then refer the dispute to expert determination in accordance with clauses 35(g) and 35(h).
     7. The Party that requires that the dispute is resolved by expert determination must submit a Notice to the other party specifying the issue to be decided by expert determination, and if the issue relates to an allegation of breach of contract or any damages, the notice must include details of the breach, including the relevant clauses of the agreement which are alleged to have been breached, and (if applicable) the damages claimed and how the damages are calculated (***Referral Notice***).
     8. If the dispute is to be resolved by expert determination, the parties will be bound by the provisions and procedures contained in Schedule 4 – *Dispute Resolution Procedure*, unless agree otherwise in writing.
     9. Subject to clause 35(l), if a Referral Notice has not been submitted within 20 Business Days of becoming entitled under clause 35(f), then the issue is barred from expert determination or any other action or Proceedings. The Customer and the Contractor may, in writing, agree to extend this 20 Business Days period for the purposes of continuing to negotiate a resolution of a particular dispute for up to another 20 Business Days.
     10. Notwithstanding the existence of a dispute, each party must continue to perform its obligations under this Agreement during the period of the attempt to resolve the dispute.
     11. Unless the parties otherwise agree in writing, clauses 35(g) to 35(h) do not apply to any dispute:
         1. for which either party's claim exceeds $250,000; or
         2. that involves a party claiming that a statutory guarantee under the CCA is involved in the dispute.

In this case if the dispute is not resolved within 15 Business Days of the date that the Issue Notice was received by the other party, either party may commence any other form of resolution, including court Proceedings.

* + 1. The provisions of clauses 35(b) to 35(k) do not apply where a party seeks urgent interlocutory relief or where a party has terminated the Agreement for a Substantial Breach or Fundamental Breach of the Agreement.

1. Circumstances Beyond Control
   * 1. If the Contractor is prevented from performing its obligations under this Agreement due to circumstances beyond the Contractor's reasonable control (for example acts of God, natural disasters, acts of war, riots and strikes outside that party's organisation), the Contractor must give Notice of such circumstances to the Customer Representative as soon as possible, identifying the specific effect those circumstances will have on its performance of this Agreement.
     2. The Contractor must take all action reasonably practicable to mitigate any Loss suffered by the Customer as a result of the Contractor's failure to carry out its obligations under this Agreement as a result of circumstances beyond the Contractor's reasonable control.
     3. If the Contractor is prevented from performing its obligations under this Agreement due to circumstances beyond the Contractor's reasonable control, the Customer may approve (such approval not to be unreasonably withheld or delayed) an extension of time for the Contractor to perform the affected obligations, provided that the Contractor has given the Customer all information or evidence required to demonstrate that the Contractor's performance under this Agreement is affected and the Contractor has otherwise complied with this clause 36.
     4. The Contractor must remedy circumstances beyond the Contractor's reasonable control to the extent reasonably practicable and resume performance of its obligations as soon as reasonably possible.
     5. Notwithstanding any other provision in this Agreement, the Contractor must bear all costs of complying with its obligations under clause 36, including all costs associated with any workaround or other temporary measures it implements in connection with the circumstances described in clause 36(a) (including any voluntary measures, or actions taken in response to any government directions of changes in Law).
     6. In no event shall the Customer be required to pay the Contractor for any Deliverables not provided as a result of the circumstances described in clause 36(a). To the extent the Customer has paid for any Deliverables in advance which are not provided as a result of the circumstances described in clause 36(a), the Contractor must promptly refund such payments to the Customer.
     7. The Contractor must ensure that the Customer is at all times treated no less favourably and with no less priority than the Contractor's other customers for the duration of the circumstances described in clause 36(a), including in the event the Contractor suffers a shortage or personnel or other resources.
     8. If, notwithstanding that the Contractor has complied with all of its obligations under clauses 36(a) to 36(h), the Contractor is prevented from performing its obligations under this Agreement, or any Order, the Contractor must comply with the process set out in the Contractor's disaster recovery and business continuity plans to ensure continuity of performance of this Agreement, or any relevant Order.
     9. The Term of this Agreement, or any Order Period, will not be extended by the period of the circumstances described in clause 36(a).
     10. If the Contractor is prevented from carrying out its obligations under this Agreement as a result of the circumstances described in clause 36(a) for a period of 30 days, the Customer may terminate this Agreement immediately by giving notice to the Contractor, without prejudice to any of the rights of either party accrued prior to the date of termination.
2. Step–In Rights
   1. Issue of Step–In Notice
      1. Without prejudice to any other right or remedy which the Customer may have under an Order or under any Law, if a Trigger Event occurs a Customer may, at its option, give a Notice (***Step–In Notice****)* to the Contractor.
      2. For the purposes of this clause 37, a Trigger Event occurs if:
         1. there is any default or non–performance by the Contractor under an Order which substantially prevents, hinders, degrades or delays the performance of any critical function of the Customer;
         2. in the Customer's reasonable opinion, there has been substantial non–performance by the Contractor of its obligations under the Contract;
         3. the Contractor does not commence to remedy the relevant event immediately after being given notice by the Customer requiring the Contractor to remedy the relevant event or fails to remedy the relevant event within 20 Business Days (or such longer period as agreed by the Customer) after being given that Step-In Notice;
         4. the Contractor seeks to terminate an Order other than in accordance with its legal rights under the Order or at Law, or otherwise repudiates or abandons an Order; or
         5. an event referred to in clause 38.1(b) or clause 38.1(c) occurs in respect of the Contractor.
   2. Upon issue of Step–In Notice
      1. Upon the issue of a Step–In Notice to the Contractor:
         1. the Customer may take control of that part or the whole of the provision of Deliverables under the affected Order as is necessary to exercise the Step–In Rights under this clause and to remedy the Trigger Event;
         2. the Customer may procure Similar Deliverables elsewhere or make any other arrangements considered necessary by the Customer to maintain continuity of operations;
         3. the Contractor agrees to provide all reasonable assistance to the Customer or the Customer's nominee wherever and however reasonably possible to ensure that the Customer is able to take the steps permitted under this clause 37, including by:
            1. the grant of royalty-free licences to the Customer to:

access the relevant part of the Contractor facilities and use the Contractor's equipment, furnishings and fittings; and

use any Documentation and software, including Intellectual Property Rights in that Documentation and software, or other Material or intellectual property in respect of which the Contractor has the necessary ownership or usage rights, needed for the exercise of the Customer's rights under this clause 37;

* + - * 1. providing the Customer or its nominee with access to, and the use of, relevant Contractor Personnel for no additional Charges; and
        2. ensuring that the Customer or its nominee is able to assist the Contractor to continue to meet the Contractor's ongoing contractual or other obligations (other than obligations arising under the Order) that relate to the Contractor's Activities affected by the Step–In Notice, without any liability accruing to the Customer or its nominee in respect of those obligations (but without limitation to clause 37.7(b)).
    1. The steps which the Customer will be entitled to take in assuming control of the provision of the part or the whole of the Deliverables, pursuant to this clause 37 include:
       1. temporarily assuming total or partial possession, management and operation of those parts of the Contractor's facilities which may be relevant to ensure the provision of the Deliverables, or to remedy the Trigger Event;
       2. such other steps as are, in the reasonable opinion of the Customer, necessary to safeguard the provision of the Deliverables as required by the relevant Order(s), or to remedy the Trigger Event; and
       3. ceasing the exercise of any of its rights referred to above, to the extent and for the period reasonably necessary as determined by the Customer having regard to the Trigger Event giving rise to the relevant Step–In Notice.
    2. Upon the Customer or its nominee exercising any of its rights under this clause 37, the Contractor's obligations under the relevant Order to provide the Deliverables, or in respect of which the Customer is exercising its rights under this clause 37, are suspended to the extent and for such period as is necessary to permit the Customer to exercise those rights.
  1. Cost of exercising Step–In Rights
     1. If the Customer exercises its rights under this clause 37, the Customer will be entitled to retain from the Charges an amount equal to its or its nominee's reasonable costs and any necessary capital expenditure (***Reasonable Costs***) required in exercising those rights and, where appropriate, providing the relevant Deliverables.
     2. If the Reasonable Costs calculated in accordance with clause 37.3(a) exceed the Charges payable under the affected Contract(s), the Customer or its nominee may recover from the Contractor the difference between the Reasonable Costs and the Charges that would otherwise have been payable to the Contractor for those Deliverables.
     3. The Charges payable by the Customer to the Contractor during the period in which the Customer exercises its rights under this clause 37 will be the amount payable under the relevant Order(s), after taking into account any rights the Customer may have to set off, retain or recover the Charges including under clauses 37.3(a) and 37.3(b).
  2. Cessation of Step–In Rights

The Customer must cease to exercise its rights under this clause 37 if:

* + 1. in its reasonable opinion, the Trigger Event is satisfactorily remedied or resolved; and
    2. the Customer is reasonably satisfied that there is no longer a material risk to the provision of the Deliverables under the affected Order.
  1. Termination by the Customer
     1. If the event giving rise to the Trigger Event has not been remedied or resolved within a period of 20 Business Days from the date that the Step–In Notice was issued, or such later date for remedy or resolution agreed to by the Customer and the Contractor, the Customer may terminate the Order in accordance with clause 38.
     2. Subject to the Contractor's right to receive any payments to be made under clause 37.3(c), if the Order is terminated in the circumstances referred to in clause 37.5(a), the Contractor is not entitled to any termination compensation or payment whatsoever, including any payment in relation to the remaining period of the Order.
  2. Indemnity

Subject to clause 37.3(a), the Contractor indemnifies the Customer against any Loss that the Customer incur or suffer as a result of exercising Step-In Rights in accordance with this clause 37.

* 1. Other matters
     1. No action of the Customer or its nominee under this clause 37 limits or otherwise affects the Contractor's liability to the Customer with respect to any default or non–performance by, or other liability of, the Contractor under the relevant Order(s).
     2. Subject to clause 37.3(a), the Contractor's liability under clauses 37.6 and 37.7(a) will be reduced proportionately to the extent that any tortious (including negligent), unlawful act or omission of the Customer (or their nominees) caused or contributed to the Loss.

1. Termination
   1. Termination for default
      1. Without limiting any other rights or remedies the Customer may have against the Contractor arising out of or in connection with this Agreement or an Order as the case may be, the Customer may terminate this Agreement or an Order (in either case, in whole or in part) effective immediately, by giving Notice to the Contractor if:
         1. the Contractor breaches a material provision of this Agreement or an Order, where that breach is not capable of remedy;
         2. the Contractor breaches any provision of this Agreement or an Order that is capable of remedy, and fails to remedy the breach within 20 Business Days, or such other timeframe as is agreed in writing between the parties, after receiving Notice requiring it to remedy the breach;
         3. the Contractor fails to comply with the New South Wales Department of Customer Service (DCS) Statement of Business Ethics (<https://www.nsw.gov.au/customer-service/who-we-are/business-ethics-statement>) including by failing to:
            1. comply with applicable NSW Government Code of Practice and DCS's procurement policies and procedures;
            2. provide accurate and reliable advice and information when required;
            3. declare actual or perceived conflicts of interest as soon as the Contractor becomes aware of the conflict;
            4. act ethically, fairly and honestly in all dealings with the Customer;
            5. take all reasonable measures to prevent the disclosure of Confidential Information of the Customer;
            6. assist the Customer to prevent the unethical practices in the business relationship; or

otherwise engaging in any form of collusive or unethical practices, including offering staff of the Customer inducements or incentives designed to improperly influence the conduct of their duties; or

* + - 1. an event listed in clause 38.1(c) happens to the Contractor and the Customer reasonably considers that such an event will adversely impact on the Contractor's ability to provide Deliverables.
    1. Without limitation, for the purposes of clause 38.1(a)(i), each of the following constitutes a breach of a material provision:
       1. breach of a warranty in clause 20 except clauses 20.2(b) and 20.2(c) (***Warranties***);
       2. a failure to comply with clause 15 (***Confidentiality***);
       3. a failure to notify the Customer of a Conflict of Interest under clause 28 (***Conflict of Interest***) or an inability to resolve a Conflict of Interest to the reasonable satisfaction of the Customer; and
       4. for termination of an Order:
          1. failure to comply with clause 14 (***Intellectual Property Rights***);
          2. failure to comply with clause 16 (***Customer Data***)
          3. failure to comply with clause 17 (***Privacy***);
          4. failure to comply with clause 18 (***Security***);
          5. a failure to notify the Customer of a Conflict of Interest under clause 28 (***Conflict of Interest***) or an inability to resolve a Conflict of Interest to the reasonable satisfaction of the Customer; and
          6. a failure to meet any other material provision which may be specified in an Order Form.
    2. The Contractor must notify the Customer in writing immediately if one or more of the following occurs:
       1. the Contractor disposes of the whole or any substantial part of its assets, operations or business other than in the ordinary course of business;
       2. the Contractor ceases to carry on business;
       3. the Contractor ceases to be able to pay its debts as they become due;
       4. the Contractor is a corporation and there is any change in the direct or indirect beneficial ownership or control of the Contractor which may have an adverse effect on the ability of the Contractor to perform its obligations under this Agreement or an Order;
       5. the Contractor is the subject of Insolvency Proceedings;
       6. the Contractor becomes an Insolvent Under Management; or
       7. the Contractor is a trustee and the trust is terminated or an event occurs for vesting the trust property.
    3. Without limiting clause 38.1(a), the Customer may terminate this Agreement at any time if, in its absolute discretion, it considers that the Contractor has failed to maintain a high standard of quality in its provision of Deliverables it has been contracted to provide (based on information considered as part of the Annual Review).
  1. Termination and reduction for convenience
     1. The Customer may by Notice, at its absolute discretion, terminate or reduce the scope of this Agreement or any Order, for any reason including as a result of a machinery of government change.
     2. If this Agreement is terminated or reduced in scope pursuant to clause 38.2(a), the Contractor is not entitled to compensation for any Loss.
     3. If an Order is terminated or reduced in scope pursuant to clause 38.2(a):
        1. the Contractor must comply with reasonable directions given by the Customer;
        2. the Contractor must do everything reasonably possible to mitigate its Loss including by redeploying infrastructure, equipment and Personnel;
        3. the Customer will only be liable for:
           1. payments under the payment terms specified in the Order Form for work conducted before the effective date of termination or reduction; and
           2. any other unavoidable costs suffered by the Contractor in direct consequence of a termination or reduction under clause 38.2(a) (with unavoidable costs including amortised start–up costs and reasonable wind–down expenses directly related to the Order if the Contractor substantiates all amounts claimed to the reasonable satisfaction of the Customer) including but not limited to any termination costs set out in the relevant Order Form; and
        4. except for payments in respect of work conducted to which clause 38.2(c)(iii)(A) applies, the Contractor will not be entitled to compensation for Loss, including of prospective profits or any other liability for special, indirect, incidental or consequential loss or damage.
  2. After termination

On termination (in whole or part) of:

* + 1. this Agreement, the Contractor must:
       1. except in respect of Orders that have been placed prior to the termination of the Agreement, stop accepting any Orders for the relevant Deliverables under this Agreement;
       2. take all available steps to protect Material in which Intellectual Property Rights, Confidential Information or Personal Information subsists;
       3. return to the Customer all of the Customer's Confidential Information except in respect of Orders that have been formed prior to the termination of the Agreement and which have not been terminated or expired;
       4. follow any reasonable direction of the Customer; and
       5. continue to perform any part of this Agreement (and any Order) not affected by the Notice; and
    2. an Order, the Contractor must:
       1. take all available steps to protect Material in which Intellectual Property Rights, Confidential Information or Personal Information subsists;
       2. return to the Customer all of the Customer's Confidential Information in respect of the Order, unless otherwise agreed in writing with the Customer;
       3. follow any reasonable direction of the Customer; and
       4. continue to perform any part of the Order not affected by the Notice.
  1. Consequences of termination
     1. If this Agreement or an Order is terminated in whole or in part under this clause 38:
        1. subject to the terms of this Agreement or the Order (including any Transition Out Plan), the parties are relieved from future performance of the terminated Agreement or the Order or relevant part of it;
        2. subject to this Agreement or the Order (including any Transition Out Plan), all licences and authorisations relating to or concerning this Agreement or the Order (including any Transition Out Plan) granted to the Contractor by the Customer terminate immediately despite anything to the contrary contained in the licence or authorisation;
        3. each party must comply with all surviving terms of this Agreement or an Order and any Transition Out Plan;
        4. Orders placed before termination of this Agreement remain on foot unless the Customer terminates the Order in accordance with the terms of the Order; and
        5. the accrued rights of either party are not affected.
     2. Unless specifically stated in the Notice of termination, termination of this Agreement does not automatically terminate Orders current at that time. However, no new Orders may be formed after termination of this Agreement.
  2. Termination by Contractor
     1. The Contractor may only terminate an Order by issuing a Notice to Terminate in writing where the Customer has:
        1. not paid a properly rendered invoice within the period specified in the Order Form or 120 Business Days after payment was due and payable and the Contractor has notified the Customer in writing of its claim for payment at least 40 Business Days and then 60 Business Days after payment was due; or
        2. breached a material obligation provision (as specified in clause 38.1(b)or inthe Order Form) in the Order and has failed to remedy the breach within 40 Business Days or such other period agreed by the parties after receiving a Notice requiring it to remedy the breach.
     2. The Contractor has no right and, to the extent permitted by Law, waives any right which it may otherwise have had to terminate the Order.

1. Knowledge Transfer
   * 1. The Contractor must, at no additional cost to the Customer (or any person nominated by the Customer), after receipt of a request by the Customer (which may be provided at any time during the Term), provide all reasonable assistance, information, data and Documents relating to the Contractor's provision of Deliverables under an Order which may be required by the Customer to undertake a procurement process related to the Agreement or any Module (including any refresh of the Agreement).
     2. Without limiting clause 39(a), the Contractor must, at no additional cost to the Customer, provide the following assistance to the Customer on termination or expiration of an Order:
        1. transferring or providing access to the Customer to all information, stored by whatever means, held by the Contractor or under the control of the Contractor in connection with the relevant Order excluding Contractor Personnel Information; and
        2. making Contractor Personnel involved in the Contractor's provision of Deliverables under the terminating or expiring Order available for discussions with the Customer in relation to those Deliverables as required.
2. Transition Out
   * 1. The Contractor must perform Transition Out Services in accordance with this clause 40, the Order and the Transition Out Plan approved by the Customer to ensure the orderly transition out of the Deliverables provided under an Order. Transition Out Charges will be agreed as part of the agreement of the Transition Out Plan but will be based on the Charges applicable to the relevant Order. For clarity, no Transition Out Charges will be chargeable by the Contractor to the Customer for undertaking any of the activities expressly outlined in clauses 39(a) and 39(b).
     2. The Contractor agrees that:
        1. upon the expiration or earlier termination of an Order or a reduction in the scope of the Deliverables, the Contractor may be replaced by the Customer or another contractor appointed by the Customer to provide deliverables the same as or similar to the Deliverables;
        2. it is essential for the continuing operation of the Customer and its functions that there be no interruption to the provision of the Deliverables to the Customer as a result of the transition from the Contractor to the Customer or an incoming contractor (as appropriate); and
        3. the Contractor will be required to provide relevant Deliverables in accordance with the Order until the expiration or earlier termination of the Order (unless the Customer directs or agrees otherwise).
     3. If requested in the Order Form, the Contractor must develop and submit to the Customer for Approval, a Transition Out Plan in accordance with the Order Form.
     4. The Contractor must:
        1. perform all activities described in the approved Transition Out Plan;
        2. fully co–operate with the Customer and any incoming contractor and do all tasks and things as may be reasonably necessary to ensure the smooth transition of the provision of the Deliverables from the Contractor to the incoming contractor or the Customer (as the case may be) in a manner which ensures no interruption to the provision of the Deliverables;
        3. work in good faith to resolve any issues arising with the transition from the Contractor to the incoming contractor or the Customer (as the case may be);
        4. comply with all reasonable directions from the Customer, having regard to the requirements of the Customer or the incoming contractor;
        5. take all available steps to protect Material in which Intellectual Property Rights, Confidential Information or Personal Information of the Customer or its Personnel subsists;
        6. return to the Customer (or such other person as directed by the Customer Representative) all of the Customer's Material, other property or information provided by the Customer to the Contractor under or in connection with the Order in the condition required by the Order and to the satisfaction of the Customer;
        7. engage in briefings as required by the Customer and the incoming contractor with a view to ensuring that the Customer or incoming contractor have sufficient information to provide the Deliverables or products or services of a similar nature to the Deliverables;
        8. use reasonable endeavours to novate to the Customer or to any person directed by the Customer, any subcontract as required by the Customer on the terms of a novation deed that are reasonably satisfactory to the Customer; and
        9. if any subcontract is not specific to the Order, use reasonable endeavours to procure the Subcontractor to enter into a contract with the Customer, or any person nominated by the Customer, as required by the Customer on terms reasonably satisfactory to the Customer.
3. General
   1. Approvals and consents

Except where this Agreement or an Order states otherwise, a party may, in its discretion, give conditionally or unconditionally or withhold any approval or consent under this Agreement.

* 1. Costs

Each party must pay its own costs of negotiating, preparing and executing this Agreement and any Order.

* 1. Further action

Each party must do, at its own expense, everything reasonably necessary (including executing Documents) to give full effect to this Agreement and any Order and any transaction contemplated by those Documents.

* 1. Assignment and novation

A party may only assign its rights or novate its rights and obligations under this Agreement or any Order (in whole or part) with the prior written consent of the other party, and this consent must not be unreasonably withheld, except that the Customer may assign its rights or novate its rights and obligations under this Agreement or any Order to another Agency without obtaining the Contractor's consent if all, or substantially all, of its functions are transferred to another Agency as part of a machinery of government change.

* 1. Waiver
     1. Waiver of any provision of, or right under, this Agreement or an Order:
        1. must be by Notice from the party entitled to the benefit of that provision or right; and
        2. is effective only to the extent set out in such Notice.
     2. The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Agreement or an Order, does not amount to a waiver of any obligation of, or breach of obligation by, the other party.
  2. Severability

A term or part of a term of this Agreement or any Order that is illegal or unenforceable may be severed from this Agreement or the Order and the remaining terms or parts of the terms of that Document will continue in force.

* 1. Entire agreement

This Agreement and any Order constitutes the entire agreement between the parties in connection with its subject matter and supersedes all previous agreements or understandings between the parties in connection with its subject matter.

* 1. Rights are cumulative

The rights, powers and remedies provided in this Agreement and any Order are cumulative and are not exclusive of the rights, powers or remedies provided by Law independently of this Agreement.

* 1. No merger

The rights and obligations of the parties under this Agreement and any Order do not merge on completion of any transaction contemplated by this Agreement.

* 1. Survival

The following clauses survive the termination and expiry of this Agreement and any Contract:

* + 1. clause 10 (***Charges and GST***);
    2. clause 14 (***Intellectual Property Rights***);
    3. clause 15 (***Confidentiality***);
    4. clause 16 (***Customer Data***)
    5. clause 17 (***Privacy***);
    6. clause 18 (***Security***);
    7. clause 20 (***Warranties***);
    8. clause 22 (***Liability***);
    9. clause 24 (***Indemnity***);
    10. clause 26 (***Reporting***);
    11. clause 30 (***Books and Records***);
    12. clause 31 (***Audit and Access***);
    13. clause 38 (***Termination***) in respect of the rights and obligations arising on termination;
    14. clause 40 (***Transition Out***);
    15. any clauses that are expressed to or which by their nature survive termination or expiry; and
    16. all clauses required to give effect to this clause 41.10 including definitions and interpretation.
  1. Counterparts

This Agreement and any Order may be executed in counterparts. All executed counterparts constitute one Document.

* 1. Governing Law and jurisdiction
     1. This Agreement and any Order is governed by the Laws of the State of New South Wales.
     2. Each party irrevocably and unconditionally submits to the non–exclusive jurisdiction of the courts of the State of New South Wales.
  2. Compliance with Laws
     1. Each party must in carrying out its obligations under this Agreement and any Order comply with all applicable Laws.
     2. The Contractor must, in carrying out its obligations under this Agreement and any Order, comply with publicly available policies and standards and other policies and standards as notified by the Customer from time to time.

1. - Definitions

| Term | Definition |
| --- | --- |
| 1. Acceptance | Signature, by the Customer, of an Acceptance certificate in accordance with clause 9 of the Agreement; and 'Accept' and 'Accepted' have a corresponding meaning. |
| 1. Acceptance Criteria | A list of criteria that the Deliverables must meet before the Customer will Accept them, as set out in the Order Form. |
| 1. Acceptance Testing | The testing of Deliverables against the Acceptance Criteria for the purpose of Acceptance. |
| 1. Additional Deliverables | Any additional Deliverables requested by the Customer from time to time in accordance with the provisions of the Agreement or an Offer that do not, at the time of the request, form part of the Deliverables. |
| 1. Additional Order | An Additional Order for Services and/or Deliverables that is placed in accordance with clause 3. |
| 1. Additional Terms | The additional terms (if any) that apply to an Order, as specified in an Order Form. |
| 1. Agency | means any of the following:   * 1. a government sector agency (within the meaning of the *Government Sector Employment Act 2013* (NSW));   2. a NSW Government agency;   3. any other public authority that is constituted by or under an Act that exercises public functions (other than a State owned corporation); or   4. any State owned corporation prescribed under the PWP Act. |
| 1. Annual Review | An annual review conducted in accordance with clause 29 of the Agreement. |
| 1. Approval | * 1. any approval, authorisation, consent, declaration, exemption, permit, notarisation, licence, certificate, registration, filing, agreement, notification, permission or waiver however described including any condition attached to it required under the Agreement or an Order or for the purposes of providing the Deliverables; and   2. in relation to anything that could be prohibited or restricted by Law if an Authority acts in a way within a specified period, the expiry of that period without that action being taken, including any renewal or amendment. |
| 1. Approved Pass–Through Expense | An expense the Contractor incurs in providing the Deliverables for which the Customer has agreed in writing it will reimburse (without application of any margin) the Contractor, as specified in an Order Form. |
| 1. Australian Accounting Standards | Any accounting standards issued by the Australian Accounting Standards Board. |
| 1. Australian Information and Privacy Commissioner | The Commonwealth Information and Privacy Commissioner. |
| 1. Authorised Investigator | Has the meaning given in clause 31.1 of the Agreement. |
| 1. Authority | Any legal entity with legislative authority including any ministry, department, government, governmental or semi–governmental authority, agency, instrumentality, council or corporation. |
| 1. Best Industry Practice | A standard of service or deliverable, in terms of quality, productivity, performance, cost and timeliness of delivery, that, when considered collectively, is equal to or better than the commonly accepted best practice being provided at the relevant time by a supplier of like or similar services, deliverables or activities to the Contractor's Activities throughout the world. |
| 1. Business Day | Means any day that is not Saturday, Sunday or a public holiday in New South Wales. |
| 1. Change Request | Means a change requested submitted by either party which, if signed by the parties, will result in a variation to any part of the Agreement or an Order. |
| 1. Changed Tax | Has the meaning given in clause 10.5 of the Agreement. |
| 1. Charges | The amount or amounts (excluding GST) payable by the Customer as set out in item 27 of the Order Form. |
| 1. Commencement Date | The Commencement Date is the date on which the Agreement is executed by both parties (or if executed on different days, the date on which it has been executed by both parties). |
| 1. Confidential Information | means information that:   * 1. is by its nature confidential;   2. is communicated by the disclosing party to the confidant as confidential;   3. the confidant knows or ought to know is confidential; or   4. relates to:      1. the Deliverables;      2. the financial, corporate and commercial information of any party;      3. Security Classified Information;      4. the affairs of a third party (provided the information is non-public); or      5. the strategies, practices and procedures of the State and any information in the Contractor's possession relating to the Contract Authority, the Customer or any Agency,   but excludes any information which the confidant can establish was:   * 1. in the public domain, unless it came into the public domain due to a breach of confidentiality by the confidant or another person;   2. independently developed by the confidant; or   3. in the possession of the confidant without breach of confidentiality by the confidant or other person. |
| 1. Conflict of Interest | Any known actual, potential or perceived matter which, in the determination of the Customer, constitutes a conflict between:   * 1. the duty that the Contractor, Contractor Personnel and any Related Body Corporate will have to the Customer under the proposed contractual arrangements; and   2. either:      1. the personal interests of the Contractor, Contractor Personnel or a Related Body Corporate; or      2. the duty of the Contractor, Contractor Personnel or a Related Body Corporate to another person or entity.   A Conflict of Interest includes a financial or corporate relationship between a Contractor, Contractor Personnel or a Related Body Corporate which may influence or appear to influence, a decision made by a Contractor, or their capacity to make independent decisions, in the best interest of the Customer or the State of New South Wales. |
| 1. Contract Authority | The Crown in the right of the State of New South Wales as represented by the Department of Customer Service (ABN 81 913 830 179) |
| 1. Contract Year | Means each twelve month period of the Term. |
| 1. Contractor Personnel | Any individual who is an employee, director, officer, agent, professional adviser of the:   * 1. Contractor;   2. a Subcontractor; or   3. any other persons performing activities under this Agreement on the Contractor’s behalf. |
| 1. Contractor Representative | The person identified in the Order Form. |
| 1. Contractor's Activities | All things or tasks which the Contractor is, or may be, required to do to comply with its obligations under this Agreement and includes the supply of the Deliverables and Services and, where applicable, the carrying out of any Transition Out Services. |
| 1. Corporations Act | Corporations Act 2001 (Cth). |
| 1. Customer Data | All data (including metadata) and information relating to the Customer or any Agency and the operations, facilities, customers, clients, personnel, assets and programs of the Customer and any Agency, including Personal Information, in whatever form that information may exist and whether created, captured, collected, entered into, stored in, generated by, controlled, managed, retrieved, transferred, transmitted, printed, processed or produced as part of carrying out the Contractor's Activities but excluding Performance Data. |
| 1. Customer Personnel | Any natural person who is an employee, director, officer, agent or professional adviser of the Customer (not including Contractor Personnel) and includes:   * 1. the Ministers having responsibility for the Customer, and all staff of such Minister's offices;   2. officers and employees within the Customer, including public servants at all levels employed on a full–time, part–time, permanent, casual or temporary basis;   3. contractors (including contractors providing outsourcing services to the Customer) and agents which perform services for or on behalf of the Customer; and   4. other personnel as agreed between the Customer and the Contractor. |
| 1. Customer Representative | The person nominated by the Customer in accordance with clause 33.1(d) of the Agreement. |
| 1. Data Location Conditions | * 1. Compliance with the Information Security Requirements;   2. ensuring that Customer Data and Personal Information is at all times handled and processed in accordance with all applicable Laws, including the Privacy Laws and the *State Records Act 1998* (NSW) (to the extent applicable);   3. not transferring any Customer Data and Personal Information to a jurisdiction that is the subject of any sanction, embargo, export control or similar Laws;   4. ensuring that Customer Data and Personal Information is at all times protected in accordance with the terms of this Agreement including clauses 15, 16 and 18; and   5. compliance with any other requirements or conditions with respect to the location of Customer Data and Personal Information as specified in the Order Form. |
| 1. Data Management and Protection Plan | The Contractor's written plan with respect to data management and protection that complies with clause 17.2(c). |
| 1. Deliverables | For the purposes of the Agreement, the products and services or any part of them described in Annexure F of the Head Agreement or an Order. |
| 1. Delivery Date | The date for delivery of the Deliverables specified in an Order Form. |
| 1. Document | Includes:   * 1. any paper or other Material on which there is words, figures, symbols or perforations having a meaning for persons qualified to interpret them; and   2. any article or Material from which sounds, images or writing are capable of being reproduced with or without the aid of any other article or device. |
| 1. Documentation | The Documents to be provided by the Contractor under the Agreement or any Order. |
| 1. Draft Variation | Has the meaning given in clause 32.1 of the Agreement. |
| 1. Eligible Customer | Any Agency or the following public bodies that are not Agencies (as identified under clause 6 of the *Public Works and Procurement Regulation 2019* (NSW)):   * 1. a private hospital;   2. a local council or other local authority;   3. a charity or other community non-profit organisation;   4. a private school or a college;   5. a university;   6. a public authority of the Commonwealth, any other State or Territory;   7. a public authority or of any other jurisdiction (but only if it carries on activities in the State of New South Wales); or   8. any contractor to a public authority (but only in respect of things done as such a contractor). |
| 1. Enrolled Module | A Module to which the Contractor is enrolled as set out in Attachment 1 to Annexure F of the Head Agreement. |
| 1. Existing Material | Material that:   * 1. is in existence prior to the relevant Module Commencement Date or Order Start Date; or   2. is brought into existence after the relevant Module Commencement Date or Order Start Date other than as a result of the performance of obligations under the Agreement or any Order,   and is related to the provision of the Deliverables and includes Material that is a modification of Existing Material. |
| 1. Expense | Has the meaning given in clause 10.4(b) of the Agreement. |
| 1. Financial Security | Has the meaning given in clause 22.2 of the Agreement. |
| 1. GST | Has the meaning defined in the GST Act. |
| 1. GST Act | A New Tax System (Goods and Services Tax) Act 1999 (Cth). |
| 1. Head Agreement | The agreement referred to in Recital A. |
| 1. ICT | Information and Communication Technology. |
| 1. Indemnified Persons | Has the meaning given in clause 24.1 of the Agreement. |
| 1. Information Security Requirements | Has the meaning given in clause 16.2 of the Agreement. |
| 1. Inherent Risks | The level of risks that exists in an organisation prior to the adoption or implementation of internal security controls or measures designed to avoid or mitigate them |
| 1. Initial Order Period | The period specified as such in the Order Form and which commences on the Order Start Date. |
| 1. Insolvency Proceeding | Any application or proceedings before a court or tribunal, or an action by a creditor or other person, in Australia or overseas which may result in the Contractor becoming Insolvent Under Management. |
| 1. Insolvent Under Management | Any of the following circumstances, where the Contractor:   * 1. becomes bankrupt or insolvent;   2. becomes subject to one of the forms of external administration provided for in Chapter 5 of the Corporations Act 2001 (Cth);   3. the appointment of a person to administer a scheme or compromise in relation to the body in accordance with Part 5.1 of the Corporations Act 2001 (Cth);   4. the appointment of a controller or managing controller to the whole or any part of its assets or undertakings in accordance with Part 5.2 of the Corporations Act 2001 (Cth);   5. the appointment of an administrator under Part 5.3A of the Corporations Act 2001 (Cth);   6. the appointment of a liquidator in relation to the body;   7. is wound up by resolution or an order of the court;   8. suffers execution against any of its assets which has an adverse effect on the Contractor's ability to perform its obligations under the Agreement or Order;   9. makes an assignment of its estate for the benefit of creditors or enters into any arrangement or composition with its creditors;   10. becomes insolvent under administration; or   11. becomes subject to any form of administration under the Laws of a non–Australian jurisdiction, which is the same as, or substantially equivalent to, one of those referred to in paragraphs (a) to (j) above. |
| 1. Intellectual Property Rights | means all intellectual property rights including:   * 1. copyright, patent, trademark, design, semi-conductor or circuit layout rights, registered design, trademarks or trade names and other protected rights, or related rights, existing worldwide; and   2. any licence, consent, application or right, to use or grant the use of, or apply for the registration of, any of the rights referred to in paragraph (a),   but does not include the right to keep confidential information confidential, Moral Rights, business names, company names or domain names. |
| 1. ISM | Australian Government Information Security Manual. |
| 1. Issue Notice | Has the meaning given in clause 35 of the Agreement. |
| 1. Key Person | A person filling a position that requires highly specialised skills or such capabilities that are crucial to the provision of the Deliverables, as specified in any Order. |
| 1. Law | Any applicable law, without limitation, including common or customary law, equity, judgment, legislation, orders, regulations, Statutes, by–laws, ordinances or any other legislative or regulatory measures (including any amendment, modification or re–enactment of them). |
| 1. Loss | All losses, liabilities, damages, fines, costs and expenses (including reasonable legal fees on a solicitor/client basis and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties). |
| 1. Material | Any tangible thing in which Intellectual Property Rights can subsist, including without limitation software, firmware, Documents, reports, specifications, business rules or requirements, user manuals, user guides, operations manuals, training materials and instructions or other material. |
| 1. Milestone | The event or series of events for which the Contractor is responsible and for which Charges are payable as specified in the Order that is to be achieved to the satisfaction of the Customer and Accepted by the Customer. |
| 1. Module | A module of ICT Deliverables available for provision under the Head Agreement. |
| 1. Module Commencement Date | The date specified in Attachment 1 to Annexure F of the Head Agreement. |
| 1. Module Period | The Initial Module Period for a Module plus any extension in accordance with Annexure F of the Head Agreement. |
| 1. Module Terms | The specific terms of a Module as set out in that relevant Module in Annexure F of the Head Agreement. |
| 1. Moral Rights | The right of integrity of authorship (that is, not to have a work subjected to derogatory treatment), the right of attribution of authorship of a work and the right not to have authorship of a work falsely attributed, as defined in the *Copyright Act 1968* (Cth). |
| 1. New Material | Material created by the Contractor on or after the Commencement Date, for the purpose of or as a result of performing its obligations under the Agreement or any Order other than reports for the Customer, and includes any modifications that may be required for that purpose but excludes any Confidential Information of the Customer. |
| 1. Business Hours | * 1. For an Order, has the meaning set out in the Order; and   2. for this Agreement, means 9 am to 5 pm on Business Days. |
| 1. Notice | A Notice under the Agreement or an Order that is sent in accordance with clause 34 of the Agreement. |
| 1. NSW Information and Privacy Commissioner | the Privacy Commissioner for New South Wales. |
| 1. Order | An order entered into under the Agreement for the provision of Deliverables and includes all schedules, attachments and plans to that Order and Documents incorporated into that Order. |
| 1. Order Form | The document set out in Schedule 5 (*Order Form*), any Additional Order, and any schedules, annexures or attachments expressly incorporated into any of the above artefacts. |
| 1. Order Option Period | Has the meaning given in clause 5.2 of the Agreement. |
| 1. Order Period | The Initial OrderPeriod for an Orderplus any extension in accordance with the relevant *Order*. |
| 1. Order Start Date | The date:   * 1. on which an Order Form is agreed by the parties; or   2. a date agreed by the parties and included in the Order Form.   The Order Period commences on the Order Start Date. |
| 1. Panellist | A contractor who has entered into an Agreement with the Customer. |
| 1. Parliament | The parliament of New South Wales. |
| 1. Parliamentary Committee | A committee of Parliament. |
| 1. Performance Data | Automatically generated metadata, not including any Personal Information or Confidential Information of the Customer or an Agency that:   * 1. is incidentally generated by a computer system in the course of its normal operation;   2. relates to the performance or operation of that computer system; and   3. arises in the course of the performance of the Contractor's Activities. |
| 1. Personal Information | 1. Has the meaning given to it in the Privacy Act. |
| 1. Personnel | * 1. In relation to the Customer, means the Customer Personnel; and   2. in relation to the Contractor, means Contractor Personnel. |
| 1. Policies and Procedures Manual | The manual of that name to be provided by the Contractor under clause 27 of the Agreement. |
| 1. Privacy Act | *Privacy Act 1988* (Cth). |
| 1. Privacy Laws | means:   * 1. the Privacy Act;   2. the *Privacy and Personal Information Protection Act 1988* (NSW);   3. the *Health Records and Information Privacy Act 2002* (NSW);   4. any legislation (to the extent that such legislation applies to the Customer or the Contractor or any other recipient of Personal Information) from time to time in force in:      1. any Australian jurisdiction (which includes the Commonwealth of Australia and any State or Territory of Australia); and      2. any other jurisdiction (to the extent that the Customer or any Personal Information or the Contractor is subject to the laws of that jurisdiction),   affecting privacy or Personal Information, provided that the Contractor ensures that it complies at all times with the Privacy Laws applicable in New South Wales; and   * 1. any ancillary rules, guidelines, orders, directions, directives, codes of conduct or other instruments made or issued under any of the legislation referred to in paragraphs (a), (b), (c) and (d), as amended from time to time. |
| 1. Proceedings | Any litigation, arbitration, mediation, conciliation or proceeding, including any investigations and any Insolvency Proceedings. |
| 1. PSPF | Australian Government Protective Security Policy Framework (PSPF) which, amongst other things, directs Agencies to consider the security implications of their electronic information systems and to devise policy and plans to ensure the systems are appropriately protected. |
| 1. Public Announcement | A public announcement in connection with the Agreement or any Order or any transaction contemplated by those Documents. |
| 1. PWP Act | means the *Public Works and Procurement Act 1912* (NSW). |
| 1. Rebate Point | See definition for Service Credit. |
| 1. Reasonable Costs | Has the meaning given in clause 37.3 of the Agreement. |
| 1. Recipient | Has the meaning given in clause 10.3 of the Agreement. |
| 1. Referral Notice | Has the meaning given in clause 35 of the Agreement. |
| 1. Regulatory Agency | Any government or any public, Statutory, governmental, semi–governmental, local governmental or judicial body, entity, ombudsman or authority that has a regulatory, supervisory or prudential power or function under any Statute, or can issue any licence or permit or authorise or approve or forbid any act or conduct or other matter or impose conditions in respect of any act or conduct or other matter, or that has a power to investigate, review, make any determination or finding, or prosecute, or commence or recommend any civil, criminal or administrative proceeding or process. |
| 1. Related Body Corporate | In relation to the Contractor, any person which is a related body corporate of the Contractor (as that term is defined in section 50 of the Corporations Act). |
| 1. Schedule | Each of the schedules to the Agreement or an Order. |
| 1. Security Classified Information | Information defined as Security Classified Information in accordance with the ISM and PSPF. |
| 1. Security Incident | 1. In relation to this Agreement:    1. any unauthorised or unlawful use of, loss of, access to, alteration of, or disclosure of Customer Data or Personal Information within the Contractor's or its Personnel's possession or control (including any data and information stored on the Contractor’s equipment or in the facilities used by the Contractor to carry out the Contractor's Activities, or any unauthorised or unlawful access to such equipment or facilities);    2. any notifiable data breach under the Privacy Laws;    3. any attack that shuts down or substantially degrades the Deliverables and/or Services, resulting in the Deliverables and/or Services (or any functionality forming part of the Deliverables and/or Services) being unable to be used by the Customer, the Customer's Personnel or any other person that the Customer authorises to use the Deliverables and/or Services, in the manner intended to be used under this Agreement, including as to any Service Levels or key performance indicators;    4. the occurrence of circumstances indicating it is reasonably likely that any of the circumstances under paragraphs (a) or (b) have occurred; or    5. any similar events relating to Customer Data or Personal Information which trigger, or are likely to trigger, contractual reporting obligations or legal reporting obligations to a Regulatory Agency or which would require a response or action under this Agreement or at Law. |
| 1. Security Program | 1. Has the meaning given to that term in clause 18.2(a)(i). |
| 1. Service | * 1. Any services the Contractor is required to perform or provide under this Agreement as described in the Order; and   2. any related or ancillary services which are required or reasonably incidental for the proper performance of the services, functions, process and responsibilities referred to in paragraph (a). |
| 1. Service Credit or Rebate Point | An amount (if any) credited to the Customer as a result of a failure to achieve a Service Level as specified in clause 11 of this Agreement. |
| 1. Service Level | A metric used to measure and report performance of the Deliverables under an Order as specified in an Order Form. |
| 1. Service Level Performance Report | Has the meaning given in clause 11.3 of the Agreement. |
| 1. Similar Deliverables | Products and services supplied by the Contractor:   * 1. having substantially similar functional and performance outcomes as the Deliverables;   2. having comparable scope and scale; and   3. being provided by IT service providers. |
| 1. Specifications | In order of priority:   * 1. any relevant specifications contained in any Product and Service Catalogue established for the purposes of an Order;   2. the Customer's functional and technical requirements for a Deliverable or for a group of Deliverables as described or incorporated by reference in the Order Form including as updated from time to time in accordance with the applicable Order Form; and   3. all applicable manufacturers' or suppliers' (including any resellers') specifications and applicable standards including as updated from time to time in accordance with the applicable Order. |
| 1. Specified Acts | Has the meaning given in clause 14.9 of the Agreement. |
| 1. Standard | Any standard that applies to an Order, as advised in writing by The Customer from time to time. |
| 1. State or Territory Agencies | All bodies governed by a State Governor or by a Minister of a State or Territory or over which a State or Territory exercises control (including departments in State or Territory governments). |
| 1. Statute | Includes any statute, regulation, by-law, ordinance or subordinate legislation in force from time to time in Australia or overseas (whether made by a State, Territory, the Commonwealth, or a local government). |
| 1. Step–In Notice | Has the meaning given in clause 37.1 of the Agreement. |
| 1. Step–In Rights | The rights of the Customer to step in and take over the Contractor's responsibilities to ensure the continued delivery of the Deliverables until such time as:   * 1. the requirements under clause 37.4 of the Agreement are met; or   2. the Customer decides to terminate the Order in accordance with clause 37.5 of the Agreement. |
| 1. Subcontractor | An entity engaged under a subcontract to perform any part of the work under the Agreement or any Order and that entity's directors, officers, employees, subcontractors, agents and consultants (as relevant). |
| 1. Supplier | Has the meaning given in clause 10.3 of the Agreement. |
| 1. Tax | A tax, levy, duty, charge, deduction or withholding, however it is described, that is imposed by a Regulatory Agency, together with any related interest, penalty, fine or other charge. |
| 1. Tax Invoice | A tax invoice as defined in the GST Act. |
| 1. Term | The term of the Agreement (see clause 4 of the Agreement). |
| 1. Transition Out Plan | The plan that details the Transition Out Services to be provided under any Order. The Transition Out Plan is a document put in place to facilitate the smooth handing over of Products, systems, services and data at the end of an Order, as Approved by the Customer in accordance with clause 40. The Transition Out Plan describes the Contractor's and the Customer's transition out responsibilities. |
| 1. Transition Out Services | The services relating to transition out activities to be provided by the Contractor in accordance with an Order Form and clause 40 of the Agreement to facilitate the end of an Order, and the transference of the Customer's products, systems, services and data. |
| 1. Trigger Event | An event set out in clause 37.1(b). |
| 1. Virus | A computer program, code, device, product or component that is designed to threaten the security or integrity of the Customer's operations or the Deliverables and/or Services, prevent, inhibit or impair the performance of the Customer's operations or the Deliverables and/or Services or pose a threat or hazard to the security or integrity of the Customer's operations, but does not include any code, mechanism or device that is included in software by the Contractor for the purpose of managing the licensed use of software. |

1. - Deed of Confidentiality

|  |  |
| --- | --- |
| This Deed is made on | |
| **Parties** | |
|  | **[Name of Customer]** of [\*] (***Customer***). |
|  | **[Name of Subcontractor]** [ (ACN [\*])][ registered in [\*]**|** incorporated in [\*]] of [\*] (the ***Subcontractor***). |
| **Recitals** | |
|  | In the course of the Subcontractor assisting in the supply by the Contractor of certain Deliverables for the Customer under a subcontract agreement between the Subcontractor and the Contractor, the Subcontractor will have access to, and may become aware of, Confidential Information belonging to, or in the possession of, the Customer. |
|  | Improper use or disclosure of the Confidential Information would severely damage the Customer’s ability to perform its governmental/statutory functions and would severely damage the commercial interests of the Customer. |
|  | The Customer requires, and the Subcontractor agrees, that it is necessary to take all reasonable steps (including the execution of this Deed) to ensure that the Customer’s Confidential Information is kept confidential. |
|  | This Deed sets out the terms on which the Subcontractor will have access to the Confidential Information. |

**It is agreed** as follows

* + 1. Recitals

The parties acknowledge the truth and accuracy of the Recitals.

* + 1. Interpretation
    2. Definitions

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

***Agreement*** means the Agreement for the provision of Data Centre Facilities entered into between the Contractor and the Customer under which the Contractor will supply Deliverables to the Customer dated [insert date].

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

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

* + - * 1. is by its nature confidential; or
        2. is communicated by the Customer to the Subcontractor as confidential; or
        3. the Subcontractor knows or ought to know is confidential; or
        4. relates to:

the Products and Services;

the financial, the corporate and the commercial information of the Customer;

the affairs of a third party (provided the information is non-public); and

the strategies, practices and procedures of the State and any information in the Subcontractor’s possession relating to the State public service,

but excludes any information which the Subcontractor can establish was:

in the public domain, unless it came into the public domain due to a breach of confidentiality by the Subcontractor or another person;

independently developed by the Subcontractor; or

in the possession of the Subcontractor without breach of confidentiality by the confidant or other person.

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

***Deliverables*** means any product or service and any associated material offered for supply or provided by the Contractor in accordance in the Agreement.

***Express Purpose*** means the Subcontractor performing the obligations under its subcontract agreement with the Contractor.

***Intellectual Property Rights*** means all intellectual property rights including:

* + - * 1. copyright, patent, trademark, design, semi-conductor or circuit layout rights, registered design, trademarks or trade name and other protected rights, or related rights, existing worldwide; and
        2. any licence, consent, application or right, to use or grant the use of, or apply for the registration of, any of the rights referred to in (a),

but does not include the right to keep Confidential Information confidential, Moral Rights, business names, company names or domain names.

***Notice*** means notice in writing given in accordance with this Deed.

***State*** means the State of New South Wales.

* + 1. General
       - 1. Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this Deed, except where the context makes it clear that a rule is not intended to apply.
         2. A reference to:

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

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;

a person includes any type of entity or body of persons whether or not it is incorporated or has a separate legal entity;

anything (including a right, obligation or concept) includes each part of it.

* + - * 1. If this Deed expressly or impliedly binds more than one person then it shall bind each such person separately and all such persons jointly.
        2. A singular word includes the plural, and vice versa.
        3. A word which suggests one gender includes the other gender.
        4. The words “include(s)” and “including” are not words of limitation.
        5. If a word is defined, another part of speech of that word has a corresponding meaning.
    1. Non-disclosure
       - 1. The Subcontractor must not disclose the Confidential Information to any person without the prior written consent of the Customer.
         2. The Customer may grant or withhold its consent in its discretion.
         3. If the Customer grants its consent, it may impose conditions on that consent, including a condition that the Subcontractor procures the execution of a Deed in these terms by the person to whom the Subcontractor proposes to disclose the Confidential Information.
         4. If the Customer grants consent subject to conditions, the Subcontractor must comply with those conditions.
         5. Despite clause Schedule 25(a), the Subcontractor may disclose the Confidential Information:

to its directors, officers, employees and contractors;

to the Contractor and its directors, officers, employees and the Contractor’s other contractors who are engaged in the supply of the Deliverables and their directors, officers, employees,

each referred to as permitted recipients, where such disclosure is essential to carrying out their duties in respect of the Express Purpose.

* + - * 1. Despite clause Schedule 25(a), the Subcontractor may disclose the Confidential Information:

to its lawyers, accountants, insurers, financiers and other professional advisers where the disclosure is in connection with advising on, reporting on, or facilitating the performance under this Deed; or

if the Subcontractor is required to disclose by law, order of a court or tribunal of competent jurisdiction or the listing rules of an applicable securities exchange.

* + - * 1. Before disclosing the Confidential Information to a permitted recipient, the Subcontractor 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.
        2. The Confidential Information must not be copied or reproduced by the Subcontractor or the permitted recipients without the expressed prior written permission of the Customer, except as for such copies as may be reasonably required for the Express Purpose.
        3. If any person, being any director, officer, contractor or employee of the Subcontractor, who has had access to the Confidential Information in accordance with this clause 25 leaves the service or employ of the Subcontractor then the Subcontractor will procure that that person does not do or permit to be done anything which, if done or permitted to be done by the Subcontractor, would be a breach of the obligations of the Subcontractor under this Deed.
    1. Restriction on use
       - 1. The Subcontractor must use the Confidential Information only for the Express Purpose and must not without the prior written consent of the Customer use the Confidential Information for any purpose other than the Express Purpose.
         2. The Subcontractor must, unless otherwise authorised by the prior written consent of the Customer:

treat as confidential and secret all of the Confidential Information which the Subcontractor has already acquired or will acquire from the Customer;

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;

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;

not copy or disclose to any person in any manner any of the Confidential Information other than in accordance with this Deed; and

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.

* + 1. Survival

This Deed will survive the termination or expiry of the Agreement for a period of 6 years.

* + 1. Rights of the Customer
       1. Production of documents
          1. The Customer may demand the delivery up to the Customer of all documents in the possession or control of the Subcontractor containing the Confidential Information.
          2. The Subcontractor must immediately comply with a demand under this clause Schedule 28.
          3. If the Customer makes a demand under this clause Schedule 28, and documents containing the Confidential Information are beyond the Subcontractor’s possession or control, then the Subcontractor 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.
          4. In this clause Schedule 28, “documents” includes any form of storage of information, whether visible to the eye or not.
       2. Legal Proceedings

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

* + 1. Indemnity and release

The Subcontractor is liable for, and agrees to indemnify and keep indemnified the Customer in respect of, any claim, damage, loss, liability, cost, expense, or payment which the Customer suffers or incurs as a result of:

* + - * 1. a breach of this Deed (including a breach of this Deed which results in the infringement of the rights of any third party); or
        2. the disclosure or use of the Confidential Information by the Subcontractor or the permitted recipients other than in accordance with this Deed.
    1. 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.

* + 1. Waiver
       - 1. No waiver by the Customer 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.
         2. None of the provisions of this Deed will be taken to have been varied waived discharged or released by the Customer unless by its express consent in writing.
    2. Remedies cumulative
       1. Cumulative

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

* + - 1. 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.

* + 1. 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.

* + 1. Applicable Law

This Deed will be governed and construed in accordance with the Laws of the State.

* + 1. Notices
       - 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 Subcontractor, at the Subcontractor’s registered office.
         2. All notices must be in writing and signed by the relevant party and must be given either by hand delivery, post or email.
         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.
         4. If delivery of a notice is made by email, the notice will be taken to have been received when the sender's system registers that the email has passed the internet gateway of the sender's system (and no delivery failure or out of office message is received by the sender within 24 hours of sending).

**Executed** as a deed

Each attorney executing this Deed states that he or she has no notice of revocation or suspension of his or her power of attorney.

|  |
| --- |
| **Signed Sealed and Delivered** by **[Name of Customer]** by [**Name of Customer Representative**] but not so as to incur personal liability in the presence of: |
|  |
| Witness Signature |  | Customer Signature |
|  |  |
| Print Name | Print Name |
|  |  |  |
| Witness Signature |  | Customer Representative Signature |
|  |  |  |
| Print Name |  | Print Name |

|  |
| --- |
| **Signed Sealed and Delivered** by **[Name of Subcontractor]** [**ACN/ABN of Subcontractor**] in accordance with s127 of the *Corporations Act 2001* (Cth) by: |
|  |
| Witness Signature |  | Director Signature |
|  |  |
| Print Name | Print Name |
|  |  |  |

1. – Change Request Form
   * 1. Procedures
        + 1. Each request or recommendation for a change to any part of an Order must be submitted in a form substantially similar to the Change Request form attached to this Schedule.
          2. For each draft Change Request submitted:

the Customer must allocate it with a sequential number; and

the draft Change Request must be logged and its progress documented by recording its status from time to time by the Contractor as follows:

* + - * 1. requested;
        2. under evaluation;
        3. awaiting authorisation;
        4. cancelled;
        5. pending
        6. approved/authorised;
        7. expired;
        8. in progress;
        9. applied;
        10. delivered;
        11. accepted.
    1. The party receiving the draft Change Request must within 5 Business Days of receipt (or such longer period set out in the Change Request):
       1. request further information; or
       2. provide written notification to the other party of its approval or rejection of the Change Request.
    2. If the Customer submits a draft Change Request to the Contractor, and the Contractor believes that there is more than 1 Business Day’s work involved in the evaluation of the Change Request, then prior to commencing work on evaluating the draft Change Request the Contractor may request that the Customer pays for the work involved to evaluate the draft Change Request. The Customer may then either revise the draft Change Request to require less than 1 Business Day’s work to evaluate it, or agree to pay for the Contractor’s work to evaluate the Change Request in an amount agreed by the parties, or in absence of agreement, at the Contractor’s then current commercial rates.
    3. Status

A Change Request is binding on the parties only when both parties have signed it. Once signed by both parties the Change Request updates the Agreement or an Order in accordance with the terms of the Change Request. The Contractor must not implement any draft Change Request until the Customer has signed the Change Request form.

* + 1. Change Request Form
       1. Change request brief details

|  |  |  |
| --- | --- | --- |
| **Change Request Number** |  | *Insert Change Request Number (supplied by the Customer)* |
| **Date of Change Request** |  | *Insert date of draft Change Request* |
| **Originator of need for Change Request** |  | *Customer or Contractor* |
| **Proposed Implementation Date of Change** |  | *Insert proposed date of implementation* |
| **Date of expiry of validity of Change Request** |  | *Insert validity expiry date. The Change Request is invalid after this date.* |
| **Contractor’s estimated time and cost of evaluation** |  | *Insert estimated time and cost of evaluation* |
| **Amount agreed to be paid to the Contractor for evaluating the draft Change Request, if any**  **(This applies only if the Customer is the party that originated the need for a Change Request; and the Contractor estimates the cost of evaluating and drafting the Change Request exceeds 2 Business Days)** |  | *Insert amount to be paid to the Contractor for evaluating the draft Change Request* |

* + - 1. Change request history log

|  |  |  |  |
| --- | --- | --- | --- |
| **Change Request Version History** | | | |
| **Date** | **Issue Version** | **Status/Reason for New Issue** | **Author** |
| *Insert date* | *Insert version* | *Insert status/reason* | *Insert author* |
|  |  |  |  |
|  |  |  |  |

* + - 1. Details of Change Request
         1. Summary

[Insert a summary of the changes, if required]

* + - 1. Scope

[Insert changes to the scope of products to be provided and/or any services, including any extensions to the Term or Order Period.]

* + - 1. Effect of change on contract specification

[Insert any changes to the specifications]

* + - 1. Effect of change on project timetable

[Insert changes to the project timetable]

* + - 1. Effect of change on charges and timing of payment

[Insert new charges and the timing of payment]

* + - 1. Changes to Customer Personnel

[Insert any changes to the Customer’s Personnel]

* + - 1. Changes to customer assistance

[Insert any changes to the Customer’s Assistance]

* + - 1. Plan for implementing the change

[insert the plan for implementing the change – if any.]

* + - 1. The responsibilities of the parties for implementing the change

[Insert the responsibilities of the respective parties for implementing the change – if any.]

* + 1. Responsibilities of the Contractor

[Insert the responsibilities of the Contractor for implementing the change – if any.]

* + 1. Responsibilities of the Customer

[insert the responsibilities of the Customer for implementing the change – if any.]

* + - 1. Effect on Acceptance Testing of any deliverable

[Insert if there will be any effect on the Acceptance Testing of any Deliverable – or alternatively insert None.]

* + - 1. Effect of change on performance of any deliverable

[Insert if there will be any effect on performance of any Deliverable – or alternatively insert None.]

* + - 1. Effect on users of the system/solution

[Insert if there will be any effect on users of the system/solution – or alternatively insert None.]

* + - 1. Effect of change on Documentation Deliverables

Changes will be required to the following documents:

[Add any other documents which may be affected.]

* + - 1. Effect on training

[Insert if there will an effect on training or alternatively insert None.]

* + - 1. Any other matters which the parties consider important

[insert if there are any other matters.]

* + - 1. Assumptions

The plan for implementing the changes outlined in this Change Request is based on the assumptions listed below:

[Insert any assumptions. If none then this section will be deleted].

If the assumptions are or become untrue, the parties will address the effect of this through a subsequent Change Request.

* + - 1. List of documents that form part of this Change Request

[Insert a list of the documents that form part of this Change Request]

* + - 1. Agreement clauses, schedules affected by the proposal are as follows:

[Insert amendments to clauses in the Agreement]

* + - 1. Authorisation

The Contractor must not commence work on the Change Request until is signed by both parties. Once signed by both parties, the Agreement is updated by this Change Request and any provisions of the Agreement that conflict with this Change Request are superseded.

|  |
| --- |
| **Signed** for and on behalf of the **Department of Customer Service** |
|  |
| Witness Signature |  | Customer Representative Signature (but not so as to incur personal liability) |
|  |  |
| Print Name |

|  |
| --- |
| **Signed** for and on behalf of **[insert Contractor's name and ACN/ABN**] |
|  |
| Witness Signature |  | Contractor Signature |
|  |  |
| Print Name |

1. - Dispute Resolution Procedure
   * 1. Expert Determination
        + 1. If a Referral Notice is submitted under clause 35(g) of the Agreement, the expert is to be agreed between the parties. If they cannot agree within 28 days of the Referral Notice, the expert is to be nominated on the application of either party by the Chief Executive Officer, Australian Disputes Centre of NSW.
          2. The expert nominated must be a person who is an experienced Australian legal practitioner or a person with practical experience in the technology that is the subject matter of the dispute, unless otherwise agreed. The expert must not be:

an employee of the parties;

a person who has been connected with this Agreement or has a Conflict of Interest, as the case maybe; or

a person who the parties have not been able to agree on.

* + - * 1. The expert may appoint any person that the expert believes will be able to provide the specialists skills that are necessary to make a determination, including an Australian legal practitioner. The expert must consult with both parties prior to appointing such person.
        2. When the person to be the expert has been agreed or nominated, the Customer, on behalf of both parties, must engage the expert by letter of engagement (and provide a copy to the Contractor) setting out:

the issue referred to the expert for determination;

the expert’s fees;

the procedure for the determination set out in this Schedule; and

any other matter which is relevant to the engagement.

* + 1. Submissions

The procedure for submissions to the expert is as follows:

* + - * 1. The party that has referred the issue to expert determination must make a submission in respect of the issue, within 30 Business Days after the date of the letter of engagement referred to in clause Schedule 41(d).
        2. The other party must respond within 30 Business Days after receiving a copy of that submission. That response may include cross-claims.
        3. The party referred to in clause Schedule 42(a) may reply to the response, but must do so within 20 Business Days after receiving the response, and must not raise new matters.
        4. The other party may comment on the reply, but must do so within 20 Business Days after receiving the reply, and must not raise new matters.
        5. The expert must ignore any submission, response, reply, or comment not made within the time given in this clause Schedule 42, unless the Customer and the Contractor agree otherwise.
        6. 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 request and response to the other party, and give the other party a reasonable opportunity to comment on the response.
        7. All submissions, responses, replies, requests and comments must be in writing. If a party gives information to the expert, it must at the same time give a copy to the other party.
    1. Conference
       - 1. The expert must arrange at least one conference with both parties. The request must be in writing, setting out the matters to be discussed.
         2. Each party is entitled to be represented at any preliminary conference before the expert by its legal representatives and other authorised representatives, with information and knowledge of the issues.
         3. The expert is not bound by the rules of evidence and may receive information in any manner the expert sees fit, but must observe the requirements of procedural fairness. Consultation between the expert and a party must only take place in the presence of the other party, unless a party fails to attend a conference or meeting which has been convened by the expert and of which prior notice has been given. Any party providing information to the expert must provide that information to the other party.
         4. The parties agree that such a conference is considered not to be a hearing that would give anything under this Schedule the character of arbitration.
         5. In answer to any issue referred to the expert by a party, the other party can raise any defence, set-off or counter-claim.
    2. Questions to be determined by the Expert
       - 1. The expert must determine for each issue the following questions (to the extent that they are applicable to the issue):

is there an event, act or omission that gives the claimant a right to compensation under the Agreement or Order:

for damages for breach of the Agreement or Order, or

otherwise in Law?

if so:

what is the event, act or omission?

on what date did the event, act or omission occur?

what is the legal right which gives rise to the compensation?

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?

in the light of the answers to clause Schedule 41(d):

What compensation, if any, is due from one party to the other and when did it fall due?

What interest, if any, is due when the expert determines that compensation?

* + - * 1. The expert must determine for each issue any other questions required by the parties, having regard to the nature of the issue.
        2. The parties must share equally the fees of the expert, any other costs associated with the process, including room hire expenses, transcript expenses and the like and the fees of any person appointed by the expert under clause Schedule 41(c) for the determination, and bear their own expenses.
        3. Unless a party has a right to commence litigation or otherwise resolve the dispute under the Agreement:

in the absence of a manifest error the parties must treat each determination of the expert as final and binding and give effect to it; and

if the expert determines that one party owes the other money, that party must pay the money within 20 Business Days.

* + 1. Role of Expert
       - 1. The expert must:

act as an expert and not as an arbitrator, adjudicator or as expert witness;

make its determination on the basis of the submissions of the parties, including documents and witness statements, and the expert’s own expertise;

act impartially, free of bias and with no vested interest in the outcome of the dispute;

adopt procedures for the Expert Determination suitable to the circumstances of the dispute so as to provide for an expeditious cost effective and fair means for the determination of the dispute; and

issue a certificate in a form the expert considers appropriate, stating the expert’s determination and giving reasons, within 45 Business Days after the receipt of the information in clause Schedule 42(d).

* + - * 1. 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 and give notice to the parties of such correction.
    1. Confidentiality

Each party involved in the expert determination process, including the expert, the parties, their advisors and representatives shall maintain the confidentiality of the expert determination process and may not use or disclose to anyone outside of the expert determination process, the expert’s determination, or any information received or obtained, in the course of the expert determination process, including the existence of that information, except to the extent:

* + - * 1. the parties have otherwise agreed in writing;
        2. the information is already in the public domain;
        3. disclosure is required to a party’s insurers, auditors, accountants or other professional advisers;
        4. disclosure is required for the purposes of any legal Proceedings relating to the dispute or the expert’s determination; or
        5. disclosure is otherwise required by Law.

1. – Order Form

In accordance with the Head Agreement between the Crown in the right of the State of New South Wales as represented by the Department of Customer Service (ABN 81 913 830 179) and [***INSERT*** (***ABN INSERT***]) (***Contractor***), the Customer places this Order Form to enter into an Order for the Deliverables described below in accordance with the terms and conditions described in the Agreement.

**Table 1 - Contract Order**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Order Number:** | [*to be supplied by the Customer*] | |
|  | **Contractor:** | [*insert*] | |
|  | **Customer name:** | [i*nsert*] | |
|  | **Order Start Date:** | [*insert*] | |
|  | **Initial Order Period (clause 5.1 of the Agreement):** | [*insert*] | |
|  | **Order Extension Period (clauses 5.2(a) to 5.2(c) of the Agreement):** | [*insert the extension period and extension options*] | |
|  | **Modules (Annexure F of the Head Agreement)** | [*tick the box next to the relevant Module(s) for this Order*]  Module 1: Zone 3 Colocation Services (Data Centre Facilities) | |
|  | **Deliverables (clause 7 of the Agreement, Annexure F, Module 1 Part B (Deliverables) and Part C (Standard Offering) of the Head Agreement):** | [i*nsert, including delivery date and place*]  [*Deliverables description should include:*  * No. of racks (raised / solid floor)*  * Power per rack*  * Total space in m2*  * Total power in kW*  *Resilience of the Data Centre Facility (Concurrently Maintainable/Requires Scheduled Outages).*] | |
|  | **Reseller Arrangements (clause 3.6 of the Agreement)** | *[Identify if the Contractor may provide the any Services and/or Deliverables in the Contractor's capacity as a reseller and, if so, which Services and/or Deliverables may be provided in the Contractor's capacity as a reseller.*  *Note: Where the Contractor is acting as a reseller, consideration should be given to whether any relevant Additional Terms are required to reflect the arrangement. If so, any such Additional Terms should be included in item 56.]* | |
|  | **Location of Deliverables:** | [*Insert Data Centre Protected Location Facility, Rack/Pod reference no(s) etc*] | |
|  | **Secure Area Plan:** | [*Attach to this Order Form*] | |
|  | **Information Security requirements (clauses 16.2, 18.2, 18.3 and 19.2 of the Agreement):** | [*Insert security requirements such as:*  * Security Zone as defined by the PSPF and ISM*  * Cabinet Classification (Class C, Commercial Cabinet)*  * Cages / locked room / bunker*  * Whether Data Centre Personnel will require security clearances*  * audit timeframes*  * security incident response timeframes*] | |
|  | **Backup, access controls and records and additional data obligations (clause 16.3 of the Agreement):** | [*Insert requirements such as:*  * whether the Contractor is required to make and store backup copies of Customer Data as part of the Services*  * access controls for the Customer to access, use and interact with the Customer Data*  * whether the Contractor must establish, keep and maintain complete, accurate and up-to-date records of all Customer Date*  * any additional data requirements*] | |
|  | **Service Management:** | [i*nsert*]  [*Is the Contractor offering a fully managed service, or is the Customer maintaining their own equipment*] | |
|  | **Implementation (clause 7.2 of the Agreement):** | [*insert*] | |
|  | **Future growth / reductions:** | [i*nsert expected increases or decreases in space and how this will affect cost*] | |
|  | **Acceptance Testing and Acceptance Criteria (clause 9 of the Agreement):** | [*insert agreed Acceptance arrangements*] | |
|  | **Milestones (clause 10 of the Agreement):** | [*insert agreed event or series of events for which the Contractor is responsible and for which Charges are payable that is to be achieved to the satisfaction of the Customer and Accepted by the Customer and to be Accepted by the Customer*] | |
|  | **Quality, architectural, functional and performance requirements (clause 11 of the Agreement):** | [*insert quality, architectural, functional and performance requirements*] | |
|  | **Performance Framework and/or Service Levels (clause 11 of the Agreement):** | [*insert details of Performance Framework and/or Service Levels*] | |
|  | **Service Credits (clause 11 of the Agreement):** | [*insert details of Service Credits required by the Customer*] | |
|  | **Performance Reviews (clause 11.4)** | [*insert requirements for performance reviews (if any)*] | |
|  | **Reporting (clause 26 of the Agreement and Part F (Reporting Requirements)):** | [*insert Reports required by the Customer*] | |
|  | **Key Persons (clause 12 of the Agreement):** | [*insert*] | |
|  | **Subcontractors (clause 13 of the Agreement):** | [*insert Approved Subcontractors that are subject to clause 13 of the Agreement.*] | |
|  | **Charges (clause 10 of the Agreement and Part D (Charges)):** | [*insert Charges calculated in accordance with Annexure C (Schedule of Prices and Indexation) of the Head Agreement or a lower amount than the amount calculated under Annexure C.*] | |
|  | **Approved Pass-Through Expenses (Agreement Glossary and Part D (Charges)):** | Electricity consumed at the rack level (i.e. by the Customer’s ICT equipment) only. | |
|  | **Payment of Charges (clause 10 of the Agreement):** | Attention:  [*insert*]  Address:  [*insert*]  [*Specify preferred method for payment of Charges – eg, electronic transfer and include bank details*] | |
|  | **Warranties (clause 20 of the Agreement):** | [*insert any other warranties*] | |
|  | **Insurance coverage (clause 21(a) of the Agreement):** | If blank, clause 21 applies.  [*Specify if alternative insurance coverage amounts apply.*] | |
|  | **Additional insurance (clause 21(e))** | [*Insert any additional insurances required.*] | |
|  | **Performance guarantee (clause 22):** | *[State whether a Performance Guarantee is required, and if so, specify the timeframe for provision of the Performance Guarantee if different from the default period of within 15 Business Days following the Commencement Date.]* | |
|  | **Financial security (clause 22.2):** | *[State whether the Contractor is required to provide financial security. If so, state the amount and the timeframe for provision of the Financial Security if different from the default period of within 15 Business Days following the Commencement Date.]* | |
|  | **Liability cap (clause 23.1(a) of the Agreement):** | [*insert*] | |
|  | **Non-excluded losses (clause 23.2(b)(ii) of the Agreement)** | *[Specify any additional types of Losses which the parties agree will also be treated as Loss of the kind referred to in clause 23.2(b)(ii) (that is, recoverable).]* | |
|  | **Performance improvements and efficiencies (clause 25(a)(ii) of the Agreement)** | *[Insert any required programs, practices and measures to improve the Contractor's performance.]* | |
|  | **Governance (clauses 6 of the Agreement):** | [*insert*] | |
|  | **Customer Representative and address for service of Notices (clauses 33 and 34 of the Agreement):** | [*insert contact name*] [*insert address, including postcode*]  [i*nsert email address*]  Facsimile: [*insert facsimile number, including area code*] | |
|  | **Contractor Representative and address for service of Notices (clauses 33 and 34 of the Agreement):** | [i*nsert contact name*] [*insert address, including postcode*]  [i*nsert email address*] | |
|  | **Policies and Procedures Manual (clause 27 of the Agreement):** | [*insert*] | |
|  | **Intellectual Property Rights (clause 14 of the Agreement):** | [*insert details of IPR and ownership including any additional clauses*] | |
|  | **Deed of Confidentiality (clause 15 of the Agreement):** | [*address need for Deed of Confidentiality and Privacy*] | |
|  | **Transfer of personal information (clause 17.1(b)(viii) of the Agreement)** | [*To specify whether consent is provided to transfer Personal Information outside the jurisdiction of New South Wales.*  *If consent is granted, Customer to specify:*   * *the jurisdiction(s) for which consent is granted* * *the conditions on which such consent is granted.*] | |
|  | **Termination for failure to meet a material provision (clause 38.1(b)(iv)(F))** | In addition to the provisions identified in clause 38.1(b)(iv)(F), the following provisions are material for the purposes of this Order:  [*insert any additional material provisions or "Not applicable.*] | |
|  | **Termination for convenience (clause 38.2(a) of the Agreement)** | [*insert agreed notice period*] | |
|  | **Transition Out (clause 40 of the Agreement):** | [*insert*] | |
|  | **Transition Out Plan (clause 40 of the Agreement):** | [*insert details relevant to preparation of Transition Out Plan and Transition Out Charges*] | |
|  | **Plans:** | [*List required Plans, e.g. Security Plan, Implementation Plan, Acceptance Test Plan etc*]  [*These should be attached to this Order Form*] | |
|  | **Service hours:** | 24 x 7 x 365 | |
|  | **Additional Deliverables (clause 7.3):** | | [*Define Additional Services required. E.g. cabling, set up of racks, Project Management, Cage, etc*] | |
|  | **Additional Deliverables Acceptance Criteria:** | | [*Insert*] | |
|  | **Additional Deliverables Security Requirements:** | | [*Insert*] | |
|  | **Additional Deliverables Approved Contractor Personnel:** | | [*Insert*] | |
|  | **Additional Deliverables Approved Subcontractors:** | | [*Insert*] | |
|  | **Additional Deliverables Service Charges:** | | [*Insert*] | |
|  | **Other (clauses 3.5 and 3.6):** | | [*insert details of any Additional Terms (including reseller terms), special conditions or amendments approved by the Customer*] | |

1. – Performance Guarantee

|  |  |
| --- | --- |
| **This Deed** is made on | |
| **Parties** | |
|  | **[Name of Customer (full legal name)]** of [\*] (***Customer***). |
|  | **[Name of Guarantor (full legal name)]** of [\*] (***Guarantor***). |
| **Recitals** | |
|  | Purpose [*insert full legal name and ACN/ABN of the Contractor*] (***Contractor***) has agreed to offer to supply Data Centre Facilities to the Customer under a contract dated [*insert date of Agreement*] (***Agreement***). |

* + 1. Definitions

***Business Day*** means any weekday that is not a public holiday in New South Wales.

***Agreement*** means [insert date and parties to the Agreement].

***Insolvency Event*** means where the Contractor:

* + - * 1. stops or suspends or threatens to stop or suspend payment of all or a class of its debts;
        2. is insolvent with the meaning of section 95A of the *Corporations Act* 2001 (Cth);
        3. must be presumed by a court to be insolvent by reason of an event set out in section 459C(2) of the *Corporations Act* 2001 (Cth);
        4. fails to comply with a statutory demand within the meaning of section 459F(1) of the *Corporations Act* 2001 (Cth);
        5. has an administrator appointed or any step preliminary to the appointment of an administrator is taken;
        6. has a mortgagee enter into possession of any property of that party;
        7. has a controller within the meaning of the section 9 of the *Corporations Act* 2001 (Cth) or similar officer appointed to all or any of its property; or
        8. has Proceedings commenced, a resolution passed or proposed in a notice of meeting, an application to, or order of, a court made or other steps taken against or in respect of it (other than frivolous or vexatious applications, Proceedings, notices or steps) for its winding up, deregistration or dissolution or for it to enter an arrangement, compromise or composition with or assignment for the benefit of its creditors, a class of them or any of them.

***Notice in Writing*** means a notice signed by a party’s authorised representative or his/her delegate or agent.

* + 1. By this Deed

By this Deed, the Guarantor guarantees to the Customer the performance of the obligations undertaken by the Contractor under the Agreement on the following terms and conditions:

* + - * 1. If the Contractor (unless relieved from the performance of the Agreement by the Customer or by statute or by a decision of a tribunal of competent jurisdiction) fails to execute and perform its undertakings under the Agreement, the Guarantor will, if required to do so by the Customer, complete or cause to be completed the undertakings contained in the Agreement.
        2. Where the Guarantor consists of more than one legal person each of those persons agree to be bound jointly and severally by this Deed of Guarantee and the Customer may enforce this Deed of Guarantee against all or any of the persons who constitute the Guarantor. [amend this clause as applicable].
        3. The Guarantor will not be discharged, released or excused from this Deed of Guarantee by an arrangement made between the Contractor and Customer with or without the consent of the Guarantor, or by any alteration, amendment or variation in the obligations assumed by the Contractor or by any forbearance whether as to payment, time, performance or otherwise.
        4. The obligations of the Contractor will continue in force and effect until the completion of the undertakings of this Deed of Guarantee by the Guarantor.
        5. The obligations and liabilities of the Guarantor under this Deed of Guarantee will not exceed:

the obligations and liabilities of the Contractor under the Agreement; and

$ [insert dollar amount].

* + - * 1. Where the Contractor has failed to perform under the Agreement, the obligations of the Guarantor will continue even though the Contractor has been the subject of an Insolvency Event.
        2. The rights and obligations under this Deed of Guarantee will continue until all obligations of the Contractor under the Agreement have been performed, observed and discharged.
        3. A notice under this Deed of Guarantee must be a Notice in Writing.
        4. The address for services of Notices in Writing under this Deed of Guarantee for a party is, in the case of the:

**Guarantor**

Physical address

Postal address

Email address

**Contractor**

Physical address

Postal address

Email address

**Customer**

Physical address

Postal address

Email address

Or such other address as a party may notify to the other party in writing from time to time.

* + - * 1. A Notice in Writing is deemed to be received if:

delivered by hand, when the party who sent the notice holds a receipt for the notice signed by a person employed at the physical address for service;

sent by post from and to an address within Australia, after 3 Business Days;

sent by post from or to an address outside Australia, after 10 Business Days; or

sent by email; when the sender's system registers that the email has passed the internet gateway of the sender's system (and no delivery failure or out of office message is received by the sender within 24 hours of sending).

* + - * 1. The Laws of New South Wales govern this Deed of Guarantee and the parties submit to the exclusive jurisdiction of the courts of New South Wales.

**Executed** as a deed

Each attorney executing this Deed states that he or she has no notice of revocation or suspension of his or her power of attorney.

|  |
| --- |
| **Signed Sealed and Delivered** by **[Name of Customer]** by in the presence of: |
|  |
| Witness Signature |  | Customer Signature |
|  |  |
| Print Name | Print Name |

|  |
| --- |
| **Signed Sealed and Delivered** by **[Name of Contractor]** [**ACN/ABN of Subcontractor**] in accordance with s127 of the *Corporations Act 2001* (Cth) by: |
|  |
| Witness Signature |  | Director Signature |
|  |  |
| Print Name | Print Name |
|  |  |  |

1. – Financial Security

|  |  |
| --- | --- |
| **This Deed** is made on | |
| **Parties** | |
|  | **[Name of Customer]** of [\*] (***Customer***). |
|  | **[Name of Guarantor]** of [\*] (***Guarantor***). |
| **Recitals** | |
|  | Purpose [*insert full legal name and ACN/ABN of the Contractor*] (***Contractor***) has agreed to offer to supply Data Centre Facilities to the Customer under a contract dated [*insert date of Agreement*] (***the Agreement***). |

* + 1. Definitions

***Business Day*** means any weekday that is not a public holiday in New South Wales.

* + 1. By this Deed
       - 1. The \_\_\_\_\_\_\_\_\_\_\_\_\_\_[insert name of the Contractor and the ACN/ABN] (**Contractor**) has agreed to supply Deliverables to the Customer under a contract [insert date and name of parties to the Agreement] (the **Agreement**).
         2. The Guarantor unconditionally agrees to pay to the Customer on demand without reference to the Contractor and separate from any notice given by the Contractor to the Guarantor not to pay the same, any sum or sums which may from time to time be demanded in writing by the Customer to a maximum aggregate sum of $ [*insert dollar amount*].
         3. The Guarantor’s liability under this Financial Security will be a continuing liability until the sooner of:

payment is made up to the maximum aggregate sum;

the Customer notifies the Guarantor that this Financial Security is no longer required;

[*insert date*]; and [Note: This date should be the date that is one year from the date that the last Deliverable under the Agreement is scheduled to pass its Acceptance Testing, or if no Acceptance Testing was required, the date that is scheduled to be 180 days from the date of delivery of the last Deliverable or performance of the last Service under the Agreement.]

the date the Customer and Contractor agree in writing to release the Guarantor.

* + - * 1. No provision of this Financial Security may be waived, amended, supplemented or otherwise modified except by written instrument signed by the Guarantor and the Customer.
        2. The Laws of New South Wales govern this Guarantee and the parties submit to the exclusive jurisdiction of the courts of New South Wales.
        3. A notice or other communication is properly given or served if the party delivers it by hand, posts it or transmits a copy by email to the address last advised by one of them to the other.
        4. The address for services of notice for a party is, in the case of the:

**Guarantor**

Physical address

Postal address

Phone number

Email address

**Contractor**

Postal address

Phone number

Email address

**Customer**

Postal address

Phone number

Email address

or such other address as a party may notify to the other party in writing from time to time.

* + - * 1. A notice or other communication under this Financial Security is deemed to be received if:

delivered by hand, when the party who sent the notice holds a receipt for the notice signed by a person employed at the physical address for service;

sent by post from and to an address within Australia, after 3 Business Days;

sent by post from or to an address outside Australia, after 10 Business Days; or

sent by email; when the sender's system registers that the email has passed the internet gateway of the sender's system (and no delivery failure or out of office message is received by the sender within 24 hours of sending).

**Executed** as a deed

Each attorney executing this Deed states that he or she has no notice of revocation or suspension of his or her power of attorney.

|  |
| --- |
| **Signed Sealed and Delivered** by **[Name of Customer]** by [**Name of Customer Representative**] (but not so as to incur personal liability) in the presence of: |
|  |
| Witness Signature |  | Customer Signature |
|  |  |
| Print Name | Print Name |

|  |  |  |
| --- | --- | --- |
| Witness Signature |  | Customer Representative Signature |
|  |  |
| Print Name | Print Name |

|  |
| --- |
| **The Common Seal** of **[Name of Guarantor]** [**ACN/ABN of Guarantor**] was affixed by [authority of the Board of Directors] in the presence of: |
|  |
| Witness Signature |  | Director/Secretary Signature |
|  |  |
| Print Name | Print Name |

**EXECUTED AS AN AGREEMENT**

|  |  |
| --- | --- |
| **Executed as an agreement** for and on behalf of [***Insert name of Customer***] (ABN [***Insert ABN of Contractor***] by its duly authorised delegate: | In the presence of: |
| . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Signature of delegate | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .  Signature of witness |
| . . . . . . . . . . . . . . . . . . . . .  Name of delegate (print) | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Name of witness (print) |
| . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .  Date | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Date |

|  |  |
| --- | --- |
| **Executed as an agreement** by [***INSERT NAME of Contractor***] (ABN [***INSERT ABN of Contractor***]) by the following persons in accordance with section 127 of the *Corporations Act 2001* (Cth): | In the presence of: |
| . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Signature of Director | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .  Signature of Director/Company Secretary |
| . . . . . . . . . . . . . . . . . . . . . . .  Name of Director (print) | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .  Name of Director/Company Secretary (print) |
| . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .  Date | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Date |