

IT Infrastructure Register

Purchase Order Terms and Conditions

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BACKGROUND:

The Purchaser requires the provision of certain information technology infrastructure Goods and Services.

The Purchaser agrees to engage the Supplier to provide, and the Supplier agrees to provide, the Goods and Services on the terms and conditions of the Contract.

IT IS AGREED:

1. DEFINITIONS AND INTERPRETATION

1.1. In the Contract, unless the context otherwise requires:

“Acceptance Certificate” has the meaning given to it in clause 12.4.1.

“Adverse Event” means, in respect of the Supplier:

- a. the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the Corporations Act 2001 (Cth)) over the Supplier, becomes an externally-administered body corporate for the purposes of the Corporations Act 2001 (Cth) or an external insolvency administrator is appointed to any such party under the provisions of any companies or securities legislation of another jurisdiction;
- b. a controller (as that term is defined in the Corporations Act 2001 (Cth)) or mortgagee in possession is appointed to the assets of the Supplier, any party having or exercising control over the Supplier, or such appointment is reasonably likely;
- c. the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the Corporations Act 2001 (Cth)) over the Supplier fails to comply with a statutory demand in the manner specified in section 459F of the Corporations Act 2001 (Cth), and has not made an application to set aside such demand under section 459G of the Corporations Act 2001 (Cth);
- d. the Supplier, or any party having or exercising control (as that term is defined in section 50AA of the Corporations Act 2001 (Cth)) over the Supplier enters into a composition or arrangement with its creditors, or any class of its creditors, with respect to the payment of amounts due to such creditors;
- e. if the Supplier is an unincorporated entity or trust:
 - i. an event of the kind referred to in paragraphs (a), (b), (c) or (d) above occurs in respect of any of the partners, joint venturers or proprietors of such entity; or
 - ii. a trustee in bankruptcy (or comparable person) is appointed to the assets and affairs of any of the partners, joint venturers or proprietors of such entity, whether under the laws of the Commonwealth of Australia or another jurisdiction, or any of those partners, joint venturers or proprietors enter into an arrangement or composition with its or their creditors for the payment of their debts; or
- f. the Supplier is unable to pay its debts as and when they fall due.

“Applicable Industrial Instruments” means an Award or Enterprise Contract that specifically applies to the employees of the Supplier and is binding on the Supplier.

“Applicable Legislation” means:

- a. Outworkers (Improved Protection) Act 2003 (Vic);
- b. Dangerous Goods Act 1985 (Vic);
- c. Equipment (Public Safety) Act 1994 (Vic);
- d. Occupational Health and Safety Act 2004 (Vic);
- e. Fair Work Act 2009 (Cth);
- f. Long Service Leave Act 1992 (Vic);
- g. equivalent legislation in States and Territories other than Victoria; and
- h. any other legislation designated by the Victorian Government as Applicable Legislation from time to time.

“Award” means any award of Fair Work Australia or any tribunal empowered to make industrial awards for Victorian employees or employees in any other State or Territory.

“Business Continuity Plan” means the business continuity plan produced by the Supplier for approval by the Purchaser under clause 3.1 of Schedule 1.

“Code of Conduct for Victorian Public Sector Employees” means the Code of Conduct for Victorian Public Sector Employees published by or on behalf of the State of Victoria, as amended from time to time.

“Code of Practice” means a code of practice as defined in, and approved under, the Privacy and Data Protection Act 2014 (Vic).

“Commencement Date” means the date specified in the Purchase Order for the commencement of the provision of the Goods and Services by the Supplier.

“Completion Date” means the date set out in the Purchase Order by which all of the Goods and Services must be provided by the Supplier.

“Confidential Information” means any technical, scientific, commercial, financial or other information of, about or in any way related to, the Purchaser which is by its nature confidential or is designated by the Purchaser as confidential, and which is disclosed, made available, communicated or delivered to the Supplier, but excludes information:

- a. which is in or which subsequently enters the public domain other than as a result of a breach of the Contract;
- b. which the Supplier can demonstrate was in its possession prior to the date of the Contract;
- c. which the Supplier can demonstrate was independently developed by the Supplier; or
- d. which is lawfully obtained by the Supplier from another person entitled to disclose such information.

“Contract” means the contract formed pursuant to clause 4.1 which details the Goods and Services to be provided by the Supplier;

“Contracts Publishing System” means the system used to publish details of contracts entered into by Victorian Government departments and some agencies.

“Control” means, in relation to any body corporate, the ability of any person directly or indirectly to exercise effective control over the body corporate (including the ability to determine the outcome of decisions about the financial and operating and other policies of that body corporate) by virtue of the holding of voting shares, units or other interests in that body corporate or by any other means.

“Defect” means a failure of a Service or Deliverable to comply with the specifications and requirements for that Service or Deliverable set out in the Contract.

“Deliverable” means any item other than the Goods specified in the Contract to be delivered to the Purchaser.

“Delivery Point” means the location or address to which the Goods are to be delivered, as specified in the Purchase Order (or such other location or address as may be agreed in writing by the Supplier and the Purchaser).

“Disaster” means a serious incident causing interruption of the Services, the severity of which is defined as a disaster by the Purchaser.

“Disaster Recovery Plan” means the business continuity plan produced by the Supplier for approval by the Purchaser under clause 4.1 of Schedule 1.

“Disengagement Plan” means the plan produced by the Supplier and approved by the Purchaser pursuant to Part 1 of the Schedule.

“Disengagement Services” mean the Services provided by the Supplier pursuant to the Disengagement Plan, or as otherwise requested by the Purchaser pursuant to Part 1 of Schedule.

“Document” has the meaning given to it in clause 13.1..

“Effective Date” has the meaning given to it in clause 4.1..

“Enterprise Contract” means any certified contract of Fair Work Australia or a State industrial department.

“Existing System” has the meaning given to in in clause 4.1.2 of Part 1 of Schedule.

“Fees” means the fees payable to the Supplier for the provision of the Goods and Services, as set out in the Purchase Order and calculated by multiplying the Unit Price for the applicable Goods and Services by the number of units delivered under the Contract.

“Goods” means the Infrastructure and any other goods specified and quantified in the Purchase Order.

“Goods and Services Catalogue” means the Supplier's catalogue of the Goods and Services which may be ordered by the Purchaser under the Contract, as that catalogue is updated by the Supplier from time to time and made available to the Purchaser on the Procurement website www.procurement.vic.gov.au

“GST Act” means the A New Tax System (Goods and Services Tax) Act 1999 (Cth).

“Information Privacy Principles” means the information privacy principles set out in the Privacy and Data Protection Act 2014 (Vic).

“Infrastructure” means the IT infrastructure and related hardware and software to be maintained and supported by the Supplier, as specified in the Contract.

“Infrastructure Services” mean the services to be provided by the Supplier to the Purchaser in relation to the Infrastructure, including implementation and integration services, as specified in the Contract.

“Intellectual Property Rights” includes all present and future copyright, all rights in relation to inventions (including patents), registered and unregistered trademarks, confidential information (including trade secrets and know how), registered designs, circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

“Key Personnel” has the meaning given to it in clause 17.2..

“Liquidated Damages” means the amount specified as such in the Purchase Order.

“Maintenance and Support Services” mean the maintenance and support services to be provided by the Supplier in respect of Goods, as specified in the Contract, which, to avoid doubt, do not include any Infrastructure Services.

“Managed Services” mean services whereby the Supplier agrees either to manage all or part of the Purchaser's Infrastructure or other information technology, as specified in the Contract.

“Milestone Date” means each date specified as such in the Transition In Plan and/or any other delivery date agreed between the parties, as the case may be.

“Moral Rights” means moral rights under and in accordance with the Copyright Act 1968 (Cth).

“New Provider” means the service provider(s) that the Purchaser may nominate to provide some or all of the New Services.

“New Goods and Services” mean the goods and services which replace in whole or in part the Goods and Services provided by the Supplier and which may be provided by the Purchaser or a third party.

“New System” has the meaning given to it in clause 1.5.1 of Part 2 of Schedule.

“Partial Termination” has the meaning given to that term in clause 27.5..

“Pre-Existing Intellectual Property” means any and all Intellectual Property Rights owned by or licensed to a party which existed prior to the commencement of the provision of the Goods and Services.

“Price List” has the meaning given to that term in clause 22.1..

“Proposed Plan” has the meaning given to that term in clause 1.1 of Part 2 of Schedule.

“Protective Data Security Standard” means a standard issued under Part 4 of the Privacy and Data Protection Act 2014 (Vic).

“Purchase Order” means the document issued by the Purchaser specifying the Goods and Services to be provided by the Supplier pursuant to the Contract and other information relating to the supply of the Goods and Services specified in these terms and conditions.

“Purchaser” means the person or entity specified as the purchaser in the Purchase Order.

“Purchaser Data” means all data created, generated, placed in, stored in, accessed or retrieved by using the Goods or receiving the Services.

“Purchaser's Requirements” means the business, technical and functional requirements of the Purchaser for the Goods and Services specified in the Purchase Order.

“Register” means the State's register to facilitate the procurement of various IT infrastructure and related services by Victorian government departments and agencies.

“Restore” has the meaning given to it in clause 5.7.1 of Schedule 1.

“Resolve” has the meaning given to it in clause 5.7.2 of Schedule 1.

“Service Credit” means the amount payable by the Supplier for failure to meet the Service Levels, as specified in the Contract.

“Service Levels” means the minimum standards of performance for one or more of the Services specified in the Contract.

“Service Management Plan” has the meaning given to it in clause 5.2 of Schedule 1.

“Services” mean the services (or any of them) specified in the Contract, which may include:

- a. Managed Services;
- b. Maintenance and Support Services;
- c. Professional Services; and/or
- d. Infrastructure Services.

“Specifications” means the specifications to which the Goods and Services must comply, including the Purchaser's Requirements and any relevant performance requirements, technical constraints and quality standards set out or referred to in the Goods and Services Catalogue.

“State” means the State of Victoria.

“Supplier” means the person or entity supplying the Goods and Services under the Contract, as specified in the Purchase Order.

“Supplier Code of Conduct” means the Supplier Code of Conduct issued by the Victorian Government for suppliers providing goods or services to the Victorian Government (as amended from time to time).

“Support Services” has the meaning given to in in clause 5.3 of Schedule 1.

“Term” means the period from the Effective Date until the Completion Date (or such later date as may be specified in the Purchase Order).

“Third Party Software” means the software specified as such in the Contract, which is owned by a third party and procured under the Contract by the Supplier for the Purchaser or any other software licensed to the Purchaser by a third party.

“Time for Delivery” means the date and, where relevant, the time specified in the Purchase Order (or such other date or time as may be agreed in writing) by or on which delivery of the Goods and Services must be effected by the Supplier.

“Transition In Plan” means a plan for Transition In Services developed by the Supplier in accordance with Schedule 5.

“Transition In Services” mean the Services to be provided by the Supplier pursuant to Schedule 5.

“Transition Out Plan” means a plan for Transition Out Services developed by the Supplier in accordance with Part 2 of Schedule.

“Transition Out Services” mean the Services to be provided pursuant to Part 2 of Schedule.

“Unit Price” means the price per item of each of the Goods and Services, as stated in the Goods and Services Catalogue.

“Victorian Public Entity” means:

each Victorian Government department (as defined in section 3 of the Financial Management Act 1994 (Vic));

- a. a “Government Owned Entity”, meaning a statutory corporation, a State owned company, a State body or a State business corporation as those terms are defined in the State Owned Enterprises Act 1992 (Vic);
- b. a “Council” as defined in the Local Government Act 1989 (Vic); or
- c. an entity which receives any funding from any of the entities listed in paragraphs (a) to (c) or any entity under the control of any of the entities listed in paragraphs (a) to (c).

“VIPP” means the Victorian Industry Participation Policy issued by the Victorian Government, as amended from time to time.

“VIPP Department” means the department of the Victorian Government that is responsible for monitoring compliance with the VIPP.

“VIPP Plan” means a plan submitted by the Supplier to the Purchaser in connection with a procurement process conducted prior to the entry into the Contract.

“VIPP Responsible Minister” means the Minister with responsibility for administering the *Victorian Industry Participation Policy Act 2003* (Vic) from time to time.

“Warranty Period” means a period of 90 business days following acceptance of Goods by the Purchaser, unless specified otherwise in the Purchase Order.

“Web Site” means the web site maintained by the Victorian Government Procurement Board and located at universal resource locator www.procurement.vic.gov.au , as amended from time to time.

1.2. In the interpretation of the Contract, the following provisions apply unless the context otherwise requires:

1.2.1. headings are inserted for convenience only and do not affect the interpretation of the Contract;

1.2.2. a reference in the Contract to a “business day” is a reference to a day other than a Saturday or Sunday on which banks are open for business generally in Melbourne, Victoria;

1.2.3. if the day on which any act, matter or thing is to be done under the Contract is not a business day, the act, matter or thing must be done on the next business day;

1.2.4. a reference in the Contract to “dollars” or “\$” means Australian dollars and all amounts payable under this Contract are payable in Australian dollars;

- 1.2.5. a reference in the Contract to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- 1.2.6. a reference in the Contract to any document or agreement is to that document or agreement as amended, novated, supplemented or replaced;
- 1.2.7. a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to the Contract;
- 1.2.8. an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- 1.2.9. where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 1.2.10. a word which indicates the singular also indicates the plural, a word which indicates the plural also indicates the singular, and a reference to any gender also indicates the other gender; and
- 1.2.11. a reference to the word “include” or “including” is to be interpreted without limitation.

2. TERM

- 2.1. Subject to clause 2.2, the Contract commences on the Effective Date and remains in force for the Term, unless terminated earlier in accordance with its terms.
- 2.2. The Purchaser may, at any time during the one (1) month period before the expiry of the Term, notify the Supplier in writing that it wishes to extend the duration of the Contract by a further period as specified in the notice or the Purchase Order. Upon notification by the Purchaser, the Term will be extended by the specified period.

3. NON EXCLUSIVE APPOINTMENT

- 3.1. Nothing in the Contract shall prevent the Purchaser from receiving services which are the same as or similar in nature to the Services from any other person.

4. FORMATION OF CONTRACT

- 4.1. The Contract is formed between that Purchaser and the Supplier on the date that the Purchase Order is signed on behalf of both parties (“**Effective Date**”).
- 4.2. The Contract will be comprised of the following documents (in descending order of precedence):
 - 4.2.1. these terms and conditions;
 - 4.2.2. Schedules 1 to 9 to these terms and conditions;
 - 4.2.3. if the Purchase Order specifies that:
 - a. Maintenance and Support are being provided, Schedule 1;

- b. Professional Services are being provided, Schedule 2; and/or
 - c. Installation and Training are being provided, Schedule 3;
- 4.2.4.the Purchase Order; and
- 4.2.5.the Goods and Services Catalogue.
- 4.3. In the event and to the extent of any inconsistency between the documents listed in clause 4.2, the provisions of the earlier mentioned document will prevail to the extent of the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions will be severed from the document lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that document.
- 4.4. A Purchase Order will not be binding on the Supplier or the Purchaser unless and until both parties sign the Purchase Order in accordance with clause 4.1..
- 4.5. Without limiting the Purchaser's right to terminate the Contract in accordance with clause 27.
- 4.5.1.a Purchaser may cancel any Purchase Order at any time prior to the delivery of the Goods or provision of Services by the Supplier and the Supplier must comply with any direction of the Purchaser; and
 - 4.5.2.upon receipt of a notice that the Purchaser intends to cancel any Purchase Order, the Supplier must take all reasonable steps to ensure that all forms of expenditure in relation to the cancelled Purchase Order are either avoided or, if unavoidable, minimised. The Purchaser will pay for any unavoidable costs incurred by the Supplier as a direct result of the cancellation of a Purchase Order by it that are properly evidenced and invoiced in accordance with the procedures set out in clause 23.

5. TRANSITION IN

- 5.1. If specified in the Purchase Order, the Supplier shall comply with the transition in requirements in Schedule 5.

6. PROVISION OF GOODS AND SERVICE

Standard of Goods

- 6.1. The Goods supplied under the Contract must comply in all respects with their Specifications.
- 6.2. Without limitation to anything else in the Specifications, all Goods supplied under the Contract must:
- 6.2.1. comply with the environmental requirements set out in the Specifications;
 - 6.2.2.utilise the latest available technology; and
 - 6.2.3.comprise the most recent model or version of the relevant Goods that is available at the time of supply.

Standard of Services

- 6.3. The Supplier must provide the Services to the Purchaser from the Commencement Date in accordance with the terms of the Contract such that they comply with the Specifications, and must:
- 6.3.1. complete the Services by the Completion Date and any other dates for delivery specified in the Contract;
 - 6.3.2. provide the Services in a proper, timely and efficient manner using that standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, expert and experienced provider of services that are similar to the Services;
 - 6.3.3. ensure the highest quality of work and the delivery of the Services with the utmost efficiency;
 - 6.3.4. act in good faith and without prejudice to the Purchaser's interests;
 - 6.3.5. provide the Services and Deliverables in accordance with any standards, policies and procedures specified in the Purchase Order; and
 - 6.3.6. provide any and all equipment and other resources necessary for the performance of the Services.
- 6.4. If any other services, functions or duties are identified by either party after the Commencement Date and those services, functions or duties are incidental to the Services and are necessary for the proper performance and provision of the Services and would in the normal course of business customarily be performed as part of the Services, then the Supplier will perform those services, functions or duties at no additional cost to the Purchaser.

Inability to supply

- 6.5. If at any time during the Term the Supplier is unable or is likely to become unable, for whatever reason, to supply a particular Good or Service within the time specified for delivery, irrespective of the reason for that inability to supply, the Supplier must:
- 6.5.1. immediately notify the Purchaser of that fact; and
 - 6.5.2. promptly provide to the Purchaser for its consideration, a substitute for the relevant item.
- 6.6. Any substitute or replacement item will be supplied at the same cost (or lower) as the item that it has replaced, unless otherwise agreed in writing by the Purchaser. If the Purchaser agrees to accept the substituted item in replacement for the original item, that substituted item will become part of the Goods and Services for the purposes of the Contract.

Goods and Services Catalogue

- 6.7. The Supplier must ensure that the information relating to the Goods and Services contained in the Goods and Services Catalogue is at all times complete, accurate and current.

7. DELIVERY OF GOODS

Contractor's Responsibility

- 7.1. The Supplier will be responsible for all transport arrangements for delivery of the Goods to the Purchaser. This includes responsibility for ensuring service and quality levels are maintained, and the packaging of products so as to minimise damage in transit.

Delivery of Goods

- 7.2. The Supplier must deliver the Goods to the Delivery Point at the Time for Delivery, or by such other date and time as is agreed in writing between the Purchaser and the Supplier. Delivery will not be taken to have occurred unless and until the delivery is acknowledged in writing by an authorised representative of the Purchaser.

8. THIRD PARTY ASSISTANCE

- 8.1. Where a third party provides services to the Purchaser, the Supplier agrees to provide all reasonable assistance and co-operation as required by that third party to ensure the Purchaser receives those services in a seamless and efficient manner.
- 8.2. Where the Supplier requires assistance and co-operation from any third party supplier to the Purchaser in respect of the Services, the Purchaser will use its reasonable endeavours to obtain that assistance and co-operation.

9. PURCHASER'S RESPONSIBILITIES

- 9.1. The Purchaser will provide any resources and/or facilities specified as being provided by it in the Contract in accordance with this clause.

Site Preparation

- 9.2. To the extent specified in the Purchase Order, the Purchaser will be responsible for site preparation to enable the performance of a Service.

Access to Purchaser's premises

- 9.3. The Purchaser must provide the Supplier with access to the Purchaser's premises as specified in the Contract to enable the Supplier to fulfil its obligations under the Contract. The Supplier must, and must ensure that its employees, agents and contractors, use reasonable endeavours to protect people and property, prevent nuisance and act and in a safe and lawful manner and comply with the safety standards and policies of the Purchaser (including those listed in the Purchase Order or as otherwise notified to the Supplier).
- 9.4. Access provided under clause 9.3 may be temporarily denied or suspended by the Purchaser, in its absolute discretion.
- 9.5. Where access is temporarily denied or suspended by the Purchaser in accordance with clause 9.4 (except in circumstances where access is temporarily denied or suspended due to an investigation into the conduct of the Supplier's employees, agents or contractors), the Supplier may request an extension of time to complete any obligations which are directly and adversely affected by the denial of access. For the avoidance of doubt, the Supplier is not entitled to recover any costs incurred in connection with its inability to access the Purchaser's premises, howsoever caused.
- 9.6. The Purchaser will not deny a request by the Supplier for an extension of time under clause 9.5 where the length of the extension requested is no longer than the period for which access was temporarily denied or suspended.

9.7. The Purchaser must use reasonable endeavours to permit a resumption of access as soon as practicable where access has been temporarily denied or suspended by the Purchaser in accordance with clause 9.4.

Provision of requirements

9.8. To the extent specified in the Purchase Order, the Supplier will provide the Purchaser with particulars of the implementation and environmental requirements of any Goods and/or a Service in order to permit the Purchaser to prepare the site accordingly.

10. FAILURE TO PERFORM

10.1. Without limiting any other available remedy, if the Supplier fails to provide any of the Goods or Services in accordance with the Contract, the Purchaser will not be required to pay for those Goods or Services until they are provided in accordance with the requirements set out in the Contract, and may require the Supplier to remedy any default or re-perform the Services within the time specified in a notice given by the Purchaser to the Supplier, which time must be reasonable having regard to the nature of the Services.

10.2. If the default referred to in clause 10.1 is not capable of being remedied or the Services are not capable of being re-performed, or the Supplier fails within the time specified to remedy the default or re-perform the Services, the Purchaser may either have the Services remedied or re-performed by a third party or do so itself. In either case, the Supplier must pay the reasonable costs incurred by the Purchaser in doing so.

11. DELAYS

11.1. The Supplier must notify the Purchaser in writing as soon as it becomes aware that any date for performance, including a Milestone Date or the Time for Delivery of any Goods, will not be met. A notice under this clause 11.1 must include:

- 11.1.1. the cause of the (possible) delay;
- 11.1.2. the steps the Supplier intends to take to overcome or minimise the (possible) delay; and
- 11.1.3. the estimated length of the (possible) delay.

11.2. After the Purchaser has received a notice under clause 11.1, it may, but is not obliged to, grant the Supplier an extension of time for delivery of the Goods and Services affected by the delay and amend the affected dates for performance, including any Milestone Dates or Times for Delivery, accordingly. Where the delay is caused or contributed to by the Purchaser, the Purchaser shall act reasonably when considering whether to grant an extension of time under this clause.

11.3. If specified in the Purchase Order, the Purchaser may recover Liquidated Damages from the Supplier or deduct Liquidated Damages from money due to the Supplier if:

- 11.3.1. the Supplier fails to:
 - a. deliver the Goods by the relevant Time for Delivery; or
 - b. provide the Services by the relevant Milestone Dates; or

c. the Purchaser does not accept any Deliverables by the relevant Milestone Dates.

11.4. Liquidated Damages will be payable at the rate specified in the Purchase Order for each day that:

11.4.1. the Supplier does not:

- a. deliver the Goods after the relevant Time for Delivery; or
- b. provide the Services after the relevant Milestone Dates; or

11.4.2. the Purchaser does not accept the Deliverables after the relevant Milestone Dates.

The Supplier shall not be required to pay Liquidated Damages to the extent that a delay is caused or contributed to by the Purchaser.

11.5. The parties acknowledge that Liquidated Damages:

11.5.1. are based upon a reasonable and mutual pre-estimate of the loss likely to be suffered by the Purchaser in respect of the delays to which they relate;

11.5.2. are not the Purchaser's sole remedy arising in relation to the circumstances giving rise to the Liquidated Damages;

11.5.3. do not limit other remedies available to the Purchaser at law, in equity, pursuant to statute or otherwise, under or in connection with the Contract, provided that the amount of any damages awarded to the Purchaser shall take into account the Liquidated Damages received by the Purchaser; and

11.5.4. are subject to the limitation on the Supplier's liability in clause 31.2..

11.6. The Supplier's payment of Liquidated Damages will not, in any way, relieve the Supplier from any other liability for performing or complying with its obligations under the Contract.

12. ACCEPTANCE

12.1. The Purchase Order will specify the Goods and Services which are subject to acceptance testing by the Purchaser in accordance with this clause 12. The Purchase Order may specify the acceptance criteria for those Goods and Services, or the method of determining the acceptance criteria. After delivery of the relevant Goods or Services to the Purchaser, the Purchaser will review the Goods or Services to confirm that they conform with the Specifications and any other requirements for those Goods or Services. Where requested by the Purchaser, the Supplier must provide assistance and support to suitably qualified personnel of the Purchaser in respect of the testing of Goods or Services under this clause 12.1 at no additional cost.

12.2. The Purchaser may specify in the Purchase Order that partial delivery of Goods and/or Services is acceptable. Where partial delivery is acceptable, the Supplier may issue a partial invoice for payment.

12.3. The Purchaser will promptly notify the Supplier in writing of any Defect discovered during its testing of any of the Goods or Services under clause 12.1 at any time prior to completion of its verification and testing activities. Upon receiving a notice under this clause 12.3, the Supplier must promptly rectify such Defects as soon as practicable, and in any event within five

business days of receiving the notice from the Purchaser, or such other longer period determined by the Purchaser, acting reasonably.

12.4. After the Purchaser has completed its verification and testing activities, the Purchaser will give the Supplier one of the following within 7 days of completion of verification and testing:

- 12.4.1. if the Purchaser is satisfied that the Goods or Services, as the case may be, operate in accordance with and comply in all respects with the Contract, notice that it accepts ("Acceptance Certificate") the Goods or Services; or
- 12.4.2. if there is a Defect in the Goods or Services, as the case may be, notice of this fact with details of the Defect, in which case clause 12.5 will apply.

Defects

12.5. If there is a Defect in any of the Goods or Services once the Purchaser has completed its verification and testing activities, the Purchaser may elect to do any of the following:

- 12.5.1. require the Supplier to rectify the Defect within the timeframe determined by the Purchaser and undertake further testing of the Goods or Services, as the case may be, to demonstrate that it complies in all respects with the Contract, after which the Purchaser will then re-conduct its testing of the Goods or Services and, if the Purchaser is satisfied that the Goods or Services operate in accordance with and comply in all respects with the Contract, it will accept the Goods or Services by issuing an Acceptance Certificate;
- 12.5.2. accept the Goods or Services, as the case may be, by issuing an Acceptance Certificate for the Goods or Services on the condition that the Supplier agree to deliver a work-around or otherwise rectify the Defect within a reasonable time frame determined by the Purchaser;
- 12.5.3. partially accept the Goods or Services, as the case may be, by issuing an Acceptance Certificate for the Goods or Services and waive the requirement for the Purchaser's testing to be satisfactorily completed; or
- 12.5.4. subject to the Purchaser having provided the Supplier with at least two opportunities to rectify a Defect pursuant to clause 12.5.1, immediately terminate the Contract by notice in writing to the Supplier.

12.6. The Supplier will provide any reasonable assistance requested by the Purchaser to conduct its testing of the Goods and Services, at no additional cost to the Purchaser.

12.7. If the Purchaser terminates the Contract under clause 12.5.4 then, notwithstanding any other provision of the Contract, the Supplier must refund all amounts paid by the Purchaser for or in relation to the relevant Goods or Services and all other Goods and Services which are affected by the termination.

12.8. For the avoidance of doubt:

- 12.8.1. no act or omission on the part of the Purchaser in connection with this clause 12 constitutes deemed acceptance of any of the Goods or Services; and
- 12.8.2. acceptance of any of the Goods or Service does not occur until such time as the Purchaser issues an Acceptance Certificate in respect of those Goods or Services.

13. DOCUMENT APPROVAL PROCESS

- 13.1. Where the Contract requires the Supplier to submit any draft report, plan or other written document ("**Document**") for approval by the Purchaser, or otherwise specifies that this clause 13 will apply, the process in clauses 13.2 to 13.7 shall apply.
- 13.2. Within 10 business days (or such other period as is reasonable having regard to the nature of the Document) of the date on which the Purchaser receives a draft Document, the Purchaser shall notify the Supplier in writing whether it:
- 13.2.1. approves the draft Document; or
 - 13.2.2. rejects the draft Document, in which case the Purchaser may specify the reasons for its rejection and/or request amendments to the draft Document which must be made before the Purchaser will approve the draft Document.
- 13.3. If the Purchaser fails to notify the Supplier of its acceptance or rejection of a draft Document under clause 13.2 within the period specified in that clause, the Supplier may request the Purchaser in writing to notify the Supplier of its decision within the next 10 business days.
- 13.4. Within five business days of the Purchaser rejecting a draft Document under clause 13.2.2, the Supplier must submit a revised draft of the draft Document, incorporating the Purchaser's requested modifications (if any).
- 13.5. The Purchaser will respond to the revised draft Document submitted by the Supplier under clause 13.4 in accordance with clause 13.2 and the process will continue until the draft Document is approved by the Purchaser in accordance with clause 13.2.1.
- 13.6. If the Supplier is required to, or otherwise wishes to, update any Document following its approval by the Purchaser, the Supplier must submit its proposed amendments to the Document to the Purchaser and the process in clauses 13.2 to 13.5 will apply.
- 13.7. Until a proposed amendment to a Document is approved in writing by the Purchaser, the original Document will remain in effect.

14. TITLE AND RISK

- 14.1. The Supplier transfers title in each item, unit or module of the Goods to the Purchaser immediately upon Acceptance.
- 14.2. Risk of loss or damage or other issues that may occur from the point of order to the point of Acceptance of the Goods by the Purchaser will be managed by and is the responsibility of the Supplier.

15. WARRANTY PERIOD

- 15.1. During the Warranty Period for any Goods, the Supplier must:
- 15.1.1. remedy all Defects in the relevant Goods by either repair, replacement or modification, whichever is required by the Purchaser;

- 15.1.2. pay all costs in relation to performance of its obligations under the warranty, including any packing, freighting, repair, modification, disassembly and reassembly costs; and
 - 15.1.3. investigate and determine the root cause of each Defect and design and implement the solution to address and permanently rectify each Defect. To the extent the Purchaser incurs any costs in connection with this clause 15.1.3, the Supplier must reimburse the Purchaser for those costs.
- 15.2. If the Supplier is required to attend the Purchaser's premises to rectify a Defect pursuant to clause 15.1 and the Defect has been caused by:
- 15.2.1. misuse of the Goods by the Purchaser or its personnel; or
 - 15.2.2. failure of the Purchaser's hardware,
- such on-site support will be provided by the Supplier at the additional rates specified in the Purchase Order (if any).
- 15.3. Nothing in clause 15.1 limits the application of any indemnity provided under the Contract.

Third Party Product Warranties

- 15.4. Without limiting any obligation of the Supplier under the Contract, the Supplier must, unless specified otherwise in the Purchase Order, ensure the Purchaser receives:
- 15.4.1. all standard manufacturer and other relevant third party warranties for those Goods provided under the Contract that are sourced by the Supplier from third parties; and
 - 15.4.2. a copy of, and is fully advised of and approves, all such warranties prior to any order or commitment being made in respect of the relevant Goods.

16. SERVICE LEVELS

- 16.1. The Supplier must meet or exceed the Service Levels specified in the Contract.
- 16.2. The Supplier must:
- 16.2.1. use appropriate measurement and monitoring procedures to measure its performance of the Services against the Service Levels accurately and provide the Purchaser with details of (or access to) those measurement and monitoring procedures on request;
 - 16.2.2. on a monthly basis, or otherwise as specified in the Purchase Order, provide the Purchaser with details of:
 - a. the Supplier's performance against the Service Levels, both during that month and on a calendar year to date basis; and
 - b. any matters which have impacted on the Supplier's performance of the Services during the relevant month.
- 16.3. If there is any failure by the Supplier to meet a Service Level:
- 16.3.1. the Purchaser may notify the Supplier in writing and request a remediation plan, whereupon the Supplier must provide a remediation plan for the Purchaser's

approval in accordance with clause 13 within 10 business days from the Purchaser's request; and

16.3.2. the Service Credits specified in the Contract will be payable by the Supplier.

16.4. The Supplier acknowledges that Service Credits:

16.4.1. represent a reduction in the charges payable for the Services to reflect the provision by it of a lower level of service than is required of it under the Contract;

16.4.2. are a reasonable pre-estimate of the loss likely to be suffered by the Purchaser as a result of the Supplier's actions, including the diminution in value of services resulting from the failure; and

16.4.3. constitute an agreed amount by which the Fees payable for the Services may be reduced according to the Contract.

16.5. If Service Credits are payable by the Supplier, the Purchaser may:

16.5.1. issue a written demand to the Supplier requiring the Supplier to identify the Service Credits corresponding to the failure to meet that Service Level in its next invoice and requiring the Supplier to pay those Service Credits to the Purchaser; or

16.5.2. notify the Supplier in writing that the Service Credits corresponding to that failure to meet that Service Level have become a deduction, and deduct one or more amounts totalling, in aggregate, those Service Credits, at any time from any payment due by the Purchaser to the Supplier.

16.6. The Supplier shall not be required to pay Service Credits to the extent that the failure (or series of failures) to which the Service Credit relates is caused or contributed to by the Purchaser.

16.7. The parties agree that the Purchaser's right to receive Service Credits is without prejudice to any other rights or remedies the Purchaser may have in respect of the failure (or series of failures) to which the Service Credit relates, provided that the amount of any damages awarded to the Purchaser shall take into account the Service Credits received by the Purchaser.

17. PERSONNEL

17.1. The Supplier will utilise such personnel as are necessary to enable it to fulfil its obligations under the Contract and provide the Goods and Services. The Supplier will ensure that its personnel providing the Goods and Services:

17.1.1. are not, and will not be at any time whilst assigned to perform the Services, restricted by contract or otherwise in any way from performing the Services; and

17.1.2. possess and will use the specific skills, qualifications and experience required to deliver the Goods and Services.

17.2. The Supplier will ensure that the Supplier's personnel listed in the Contract ("**Key Personnel**") will provide the Services for the period specified in the Contract (or, if no period is specified, for the Term). Except where the Purchase Order permits the replacement of Key Personnel,

the Supplier may not remove or replace any Key Personnel without the Purchaser's written approval, which shall not be unreasonably withheld.

17.3. The Purchaser may reasonably request that the Supplier withdraw any of its personnel (including Key Personnel) from providing any part of the Services. If the Purchaser makes a request under this clause 17.3, the Supplier must:

- 17.3.1. promptly arrange for that person to cease being involved in providing the Goods and Services;
- 17.3.2. ensure that the person does not return to the Purchaser's premises except with the Purchaser's prior written consent, which may be withheld in its absolute discretion; and
- 17.3.3. replace that person with another person of suitable ability and qualifications, at no additional charge to the Purchaser and at the earliest opportunity.

18. SECURITY

18.1. The Supplier must:

- 18.1.1. ensure that all of its employees, agents and contractors involved in the provision of Goods and Services at the Purchaser's premises have satisfactorily undergone a police check within the previous 12 months;
- 18.1.2. as appropriate, inform its employees, agents and contractors of the provisions of any legislation, policies and procedures relating to secrecy and security which are listed in the Purchase Order;
- 18.1.3. comply with such other State or Commonwealth legislation, policies or procedures relating to matters of security as may be specified in the Purchase Order or advised by the Purchaser from time to time; and
- 18.1.4. comply with any specific security requirements specified in the Purchase Order or as advised by the Purchaser (including undergoing finger printing checks or other checks) prior to obtaining access to the Purchaser's premises, or providing any Goods or Services or fulfilling its obligations under the Contract, including any specific security clearance requirements.

19. DOCUMENTATION

19.1. Any documentation, publications and aids provided with or relevant to the Goods must be:

- 19.1.1. in English and of a high standard in terms of presentation, accuracy and scope with all key terms, words and symbols adequately defined or explained, with all monetary figures in Australian currency;
- 19.1.2. the most current, accurate and up-to-date versions available at the date of supply of the Goods; and
- 19.1.3. sufficient to ensure that the Purchaser and its appropriately trained personnel can utilise the full functionality and can obtain the full benefit of each of the Goods.

20. TRAINING

20.1. The Supplier will provide the Purchaser and its nominated personnel with the training specified in the Contract in order for the Purchaser to access, use and utilise the full functionality of the Goods and Services.

21. VARIATION OF GOODS OR SERVICES

21.1. Any variation to the Goods or Services, or addition of new goods or services, proposed by either party must be submitted and approved in accordance with this clause 21.

21.2. If the Purchaser wishes to vary the Goods or Services, it will submit a copy of the proposed variations to the Supplier.

21.3. If:

21.3.1. the Purchaser proposes a variation under clause 21.2; or

21.3.2. the Supplier wishes to vary the Goods or Services,

the Supplier will submit to the Purchaser a detailed description of the variation proposed, including any resulting variations to any Fees, using a change order in substantially the form set out in Schedule 9 (“**Change Order**”). The draft Change Order must include, to the extent requested by the Purchaser:

21.3.3. a detailed description of:

- a. the benefits to the Purchaser arising from the proposed variation; and
- b. the risks to the Purchaser should it decide against effecting the proposed variation; and

21.3.4. any material impacts that the proposed variation may have on:

- a. the functionality, interoperability or performance of existing software, hardware, systems, operations and processes used by, or on behalf of, the Purchaser;
- b. the specifications for the Goods and Services; and
- c. project scheduling, the achievement of Milestone Dates and Purchaser and Supplier resourcing.

21.4. If the Purchaser has proposed a variation under clause 21.2, the Supplier must provide a draft Change Order within 10 business days, or such other period as the parties agree, of receipt of the proposed variation.

21.5. Any resulting variation in the Fees must not exceed an amount that represents the reasonable additional cost (if any) associated with the relevant variation (taking into account any reduction in cost that will result from implementing the variation) and must be based on the rates set out in the Purchase Order, including using any agreed rates for particular types of Services or predefined tasks.

21.6. The Purchaser will accept or reject the draft Change Order, or withdraw the proposed variation (if applicable), within 20 business days of receipt of the draft Change Order or such other period agreed by the parties.

- 21.7. Any variations that are accepted pursuant to this clause 21 will be effective from the date on which the Change Order is signed on behalf of both parties. Neither party is obliged to commence work in connection with any variation until the relevant Change Order is signed on behalf of both parties.
- 21.8. If a proposed variation is not accepted by the Purchaser pursuant to this clause 21, each party must continue to perform its obligations under the Contract in accordance with its terms, which will continue to apply unchanged.
- 21.9. The Supplier agrees that it will not seek to impose any unreasonable terms and conditions in relation to any variation, including unreasonable timeframes or charges.

22. PRICE FOR THE GOODS AND SERVICES

Initial Unit Prices

- 22.1. The initial Unit Price for each of the Goods and Services is set out in the Goods and Services Catalogue (**the “Price List”**). Subject to any change in the Unit Price for any Goods or Services resulting from the application of any express provision of the Contract, the Unit Prices are fixed for the Term and are the maximum prices which the Supplier may charge for the Goods and Services during the Term.
- 22.2. The Supplier may, at any time during the Term, offer price specials, discounts and/or reductions to the then current Unit Prices, which are deemed to be automatically accepted by the Purchaser, and ensure that those specials, discounts and reductions are notified to the Purchaser.

Unit Prices inclusive

- 22.3. Except as expressly provided otherwise in the Contract, the Unit Prices for:
- 22.3.1. the Goods include all packaging, transport, delivery, insurance, loading, unloading and storage costs, up to the point of delivery of the Goods, including unloading of the Goods at the Delivery Point, but delivery costs must also be listed as a separately costed item in the Price List; and
 - 22.3.2. the Services are the only amounts payable by the Purchaser for the provision of the Services under the Contract.
- 22.4. To avoid doubt, no other amounts are due to the Supplier, and the Purchaser is not liable to pay the Supplier any additional amounts, for or in relation to the provision of the Goods or Services (subject to any variation agreed by the parties in accordance with the Contract).
- 22.5. Not used.
- 22.6. Not used.

23. FEES AND INVOICING

- 23.1. The Fees payable by the Purchaser for the Goods and Services are set out in the Purchase Order. Expenses may only be charged in accordance with the Purchase Order.
- 23.2. The Supplier must submit to the Purchaser a tax invoice for the Fees due in respect of the Goods and Services once they are delivered or completed (as the case may be), or at such

other time or times as specified in the Purchase Order or otherwise agreed by the parties. A tax invoice submitted for payment must contain the information necessary to be a tax invoice for the purposes of the GST Act, together with such other information as the Purchaser may reasonably require and be sent to the address specified in the Purchase Order.

- 23.3. The Purchaser will pay the invoiced amount within 30 days of receipt of an accurate invoice ("**Due Date**"). However, if the Purchaser disputes the invoiced amount it must pay the undisputed amount (if any) and the parties will endeavour to resolve any such dispute using the dispute resolution procedure in clause 40. The Purchaser must pay any sums found or agreed to be due following resolution of a dispute, following submission of an invoice by the Supplier which complies with the requirements in clause 23.2.
- 23.4. Payment of an invoice is not to be taken as evidence that the Goods or Services have been supplied in accordance with the Contract but must be taken only as payment on account.
- 23.5. If the Purchaser fails to pay an undisputed invoice by the Due Date, the Supplier may claim penalty interest in accordance with clause 23.6 by delivering to the Purchaser, within thirty (30) days of the Due Date, a notice clearly headed "Fair Payments Policy – Penalty Interest Claim".
- 23.6. Subject to clause 23.7, the Supplier may claim and the Purchaser must pay simple interest calculated on a daily basis at the rate for the time being fixed under Section 2 of the *Penalty Interest Rates Act 1983 (Vic)* on any amount outstanding, from the Due Date until the date of payment.
- 23.7. Clause 23.6 applies only if:
- 23.7.1. the Victorian Government Fair Payments Policy is applicable to the Contract; and
 - 23.7.2. the Fees payable in respect of the Contract do not exceed \$3,000,000; and
 - 23.7.3. the *Building and Construction Industry Security of Payment Act 2002 (Vic)* is not applicable to the Contract.

24. TAXES

- 24.1. Terms used in this clause that are not otherwise defined in the Contract have the same meanings given to them in the GST Act.

Recovery of GST on supplies and adjustments under the Contract

- 24.2. Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with the Contract are inclusive of GST.
- 24.3. If an adjustment event varies the amount of GST payable by a party making a taxable supply under the Contract ("**Provider**"), the Provider will adjust the amount payable by the other party ("**Recipient**") to take account of the adjustment event and notify the Recipient of the same. Any payment will be made by the Recipient to the Provider or by the Provider to the Recipient within 10 business days of the Provider becoming aware of the adjustment event. The Provider will issue an adjustment note to the Recipient within 10 business days of becoming aware of the adjustment event.

Other GST matters

24.4. Subject to an express provision in the Contract to the contrary, any payment, amount, reimbursement or indemnity required to be made to a party (**the “Payee”**) under the Contract that is calculated by reference to a cost, expense, liability or other amount paid or payable by the Payee to a third party (**“Expense”**) will be calculated by reference to that Expense inclusive of GST, less the amount of any input tax credit which the Payee is entitled to claim on that Expense. The Payee is assumed to be entitled to a full input tax credit on an Expense unless it demonstrates otherwise before the date the payment, amount, reimbursement or indemnity is required to be made.

24.5. Any reference in the Contract to sales, revenue, income, value or similar amount (**“Revenue”**) is a reference to that Revenue exclusive of GST (unless that Revenue is expressed to be GST-inclusive).

Other taxes

24.6. Subject to the other provisions of this clause, the Fees include all taxes, duties (including stamp duty), charges, fees and other imposts of whatever kind (including any fine or penalty imposed in connection with them) that may be levied, assessed, charged or collected in connection with the Contract.

25. WARRANTIES

25.1. The Supplier warrants to the Purchaser that:

- 25.1.1. it has the right to enter into the Contract and provide the Goods and perform the Services;
- 25.1.2. the execution, delivery and performance of the Contract by it does not contravene any contractual, legal or other obligation that applies to it;
- 25.1.3. it holds all licences, permits, consents and authorisations required under any law or this Contract in relation to the provision of the Goods and Services;
- 25.1.4. it has the appropriate experience, skill, knowledge, competence and resources to provide the Goods and Services;
- 25.1.5. the Goods and Services will be fit for the purpose or purposes specified in the Purchase Order (either expressly or by implication);
- 25.1.6. it will comply with all applicable laws;
- 25.1.7. it will comply with all directions of the Purchaser in providing the Goods and Services and in performing its obligations under the Contract;
- 25.1.8. it will provide the Services:
 - a. in a professional manner with due skill and care; and
 - b. using appropriately skilled and qualified employees, agents and contractors;
- 25.1.9. it is entitled to use and deal with any Intellectual Property Rights which may be used by it in connection with the Goods and Services and to grant to the Purchaser the licences contemplated by the Contract;

- 25.1.10. it has the right to sell and transfer title to and property in the Goods to the Purchaser;
- 25.1.11. the Goods:
 - a. (except as otherwise provided in the Specifications) are new when delivered to the Purchaser;
 - b. conform to the description, model number and the sample (if any) provided by the Supplier;
 - c. conform in all other respects with the requirements of the Contract (including the Specifications);
 - d. are free from Defects (including defects in installation) and omissions in design, performance, workmanship and materials; and
 - e. are of merchantable quality and comply with all applicable laws and standards; and
- 25.1.12. it will not vary the specification, design, shape, configuration or characteristics of the Goods during the Term without first obtaining the written consent of the Purchaser.
- 25.2. The Supplier must, where the Specifications so provide and to the extent that it is possible to do so, obtain for the relevant Purchaser the benefit of any manufacturer's warranty applicable to any Goods supplied under the Contract.

26. CONTRACT MANAGEMENT, RECORDS AND REPORTS

Contract Management

- 26.1. The Supplier must:
 - 26.1.1. supply to the Purchaser the reports specified in the Purchase Order and attend the meetings specified in the Purchase Order;
 - 26.1.2. comply with all reasonable directions of the Purchaser; and
 - 26.1.3. provide the Purchaser with such information as is reasonably required for the purpose of supervising or reviewing the provision of the Goods and Services.

Records

- 26.2. The Supplier must at all times maintain full, true and up-to-date accounts and records relating to the Contract. Such accounts and records must:
 - 26.2.1. include appropriate audit trails for transactions performed;
 - 26.2.2. record all receipts and expenses in relation to the Goods and Services provided to the Purchaser;
 - 26.2.3. be kept in a manner that permits them to be conveniently and properly audited
 - 26.2.4. be drawn in accordance with any applicable Australian Accounting Standards; and
 - 26.2.5. in the case of any Service performed on a time and materials or cost plus basis, identify the time spent by the Supplier's personnel in performing that Service.

Archival Requirements

- 26.3. The Supplier agrees to comply with any applicable State or Commonwealth legislation relating to archival requirements.
- 26.4. Without limiting the scope of clause 26.3, the Supplier shall cooperate with and assist the Purchaser to comply with any obligations imposed by the *Public Records Act 1973* (Vic).
- 26.5. Without prejudice to clause 38, the Purchaser may, on 10 business days' written notice to the Supplier, examine the Supplier's books and records relating to the Services at the Supplier's premises during reasonable business hours for the purpose of monitoring the Supplier's compliance with the Contract.

27. TERMINATION

Termination by the Purchaser

- 27.1. The Purchaser may terminate or sever part of the Contract at any time and for any reason by giving written notice to the Supplier who must, on receipt, immediately cease all work and take appropriate action to mitigate any loss and prevent further costs being incurred with respect to the Goods and Services. Where the Contract is terminated, wholly or in part, under this clause 27.1, the Purchaser must pay invoices in respect of:
 - 27.1.1. all reasonable amounts due in accordance with clause 23.1 for all work performed by the Supplier in accordance with the terms of the Contract up until the date of termination; and
 - 27.1.2. amounts equivalent to any liabilities or expenses of the Supplier relating to the terminated Goods and Services which are substantiated and which are properly incurred by the Supplier, to the extent that those liabilities or expenses cannot be mitigated, but no other amount, provided that in no event shall the Purchaser be required to pay any loss of prospective profits.
- 27.2. Without prejudice to any other rights the Purchaser may have under the Contract or at law, the Purchaser may terminate or sever part of the Contract:
 - 27.2.1. immediately by notice in writing if the Supplier:
 - a. is subject to an Adverse Event;
 - b. breaches a material term of the Contract which is not capable of remedy; or
 - c. fails to remedy a breach capable of remedy within 10 business days of receiving notice from the Purchaser of the breach (or such longer period as the Purchaser considers is reasonable); or
 - 27.2.2. pursuant to clause 12.5.4, 28.4 or 35.6 or clause 5.10 of Schedule 1.

Termination for change in Control

- 27.3. The Supplier must notify the Purchaser in writing of any proposed or impending change in Control of the Supplier (or of the ultimate holding company of the Supplier) of which it becomes aware.

27.4. If the Supplier:

- 27.4.1. fails to notify the Purchaser of a change in Control under clause 27.3; or
- 27.4.2. undergoes a change in Control; or
- 27.4.3. undergoes any other change in business structure or operations which creates a new legal entity (including a change in Australian Business Number),

and the Supplier or its ultimate holding company (as applicable) is not listed on a public stock exchange, the Purchaser may, acting reasonably, terminate the Contract on written notice to the Supplier. Termination under this clause 27.4 will take effect at any time nominated by the Purchaser within the immediately succeeding 12 months.

Partial Termination

27.5. For the purposes of clauses 27.1 and 27.2, the Purchaser may elect to sever part of the Contract ("**Partial Termination**") by notifying the Supplier that it no longer requires the Supplier to provide particular Goods or Services, in which case:

27.6. the Supplier will cease to provide those Goods or Services; and

- 27.6.1. the Purchaser will no longer be obliged to pay any Fees in respect of those Goods or Services.

Following a Partial Termination, the Contract will be construed, and its provisions will be enforceable by and against the parties, as if references to the Goods and/or Services that are the subject of that Partial Termination, and Fees payable in respect of those Goods and/or Services, were severed from the Contract.

27.7. If notice is given to the Supplier to terminate the Contract under clause 27.2 or 27.4, the Purchaser may, in addition to terminating the Contract:

- 27.7.1. recover any sums paid to the Supplier on any account or for Goods and Services that have not been fulfilled or performed;
- 27.7.2. be regarded as discharged from any further obligations under the Contract; and
- 27.7.3. pursue any additional or alternative remedies provided by law.

Termination by the Supplier

27.8. If the Purchaser fails to pay amounts due under the Contract which are:

- 27.8.1. the subject of tax invoices complying with the Contract;
- 27.8.2. due and payable in accordance with the Contract;
- 27.8.3. not the subject of a dispute under clause 23.3; and
- 27.8.4. overdue for a period of at least 60 days;

then the Supplier may:

- 27.8.5. issue a demand to the Purchaser clearly stating that the amount has been overdue for a period of at least 60 days; and

- 27.8.6. if the amount due has not been paid within 5 business days of service of the Supplier's demand, terminate the Contract on 30 days' written notice to the Purchaser.
- 27.9. Clause 27.7 constitutes the Supplier's sole and exclusive right to terminate the Contract.

Termination is without prejudice

- 27.10. Termination or expiry of the Contract will not prejudice any right of action or remedy which may have accrued to either party prior to termination or expiry (as the case may be).

28. CONFLICT OF INTEREST

- 28.1. The Supplier warrants to the Purchaser that it does not, and will ensure that its employees, agents and contractors do not, hold any office or possess any property, are not engaged in any business, activity, trade or calling and do not have any obligations whereby, directly or indirectly, duties or interests are or might be created in conflict with or might appear to be created in conflict with its obligations under the Contract.
- 28.2. The Supplier agrees that, if specified in the Purchase Order, the Supplier and each of its employees, agents and contractors engaged in the provision of the Goods and Services will provide a declaration of compliance with clause 28.1, in the form required by the Purchaser.
- 28.3. The Supplier must promptly inform the Purchaser of any matter which may give rise to an actual or potential conflict of interest at any time during the Term, and comply with any reasonable directions given by the Purchaser in terms of dealing with that conflict.
- 28.4. The Purchaser may terminate the Contract immediately by notice in writing in the event that a conflict of interest occurs in respect of the Supplier which is not resolved to the Purchaser's satisfaction.

29. INTELLECTUAL PROPERTY RIGHTS

Warranty and indemnity by Supplier

- 29.1. The Supplier warrants to the Purchaser that it is entitled to use and deal with in accordance with the Contract any Intellectual Property Rights which may be used by it in connection with the supply of, or which is incorporated in, any Goods and Services.
- 29.2. The Supplier indemnifies and will at all times keep the Purchaser and each of its employees, agents and contractors (in this clause "those indemnified") indemnified against any action, claim, suit, demand or liability to pay compensation or damages and costs or expenses arising out of or in respect of any breach or alleged breach of any third party's Intellectual Property Rights or other rights relating to the supply of the Goods and Services or relating to the Purchaser's use of the Goods and Services.

Licence - Goods and Services

- 29.3. The Supplier grants to the Purchaser a non-exclusive, perpetual, royalty-free licence to use any Intellectual Property Rights in relation to any Goods and Services to the extent necessary to allow the Purchaser the full use and enjoyment of those Goods and Services and the Supplier must, upon request by the Purchaser, do all things as may be necessary (including executing any documents) to give full effect to this clause.

Deliverables

- 29.4. All Intellectual Property Rights in any Deliverables created by or on behalf of the Supplier in the course of fulfilling its obligations under the Contract are, upon their creation, owned by the Supplier.
- 29.5. The Supplier grants to the Purchaser a worldwide, perpetual, irrevocable, transferable, royalty-free and non-exclusive licence to exercise all Intellectual Property Rights in the Deliverables and all Supplier Pre-Existing Intellectual Property incorporated in or required to exercise the Purchaser's licence to the Deliverables. For the avoidance of doubt, such licence to the Deliverables includes the right of the Purchaser to:
- 29.5.1. use those Deliverables for the purpose of providing services to any Victorian Public Entity;
 - 29.5.2. permit any Victorian Public Entity to use those Deliverables; and
 - 29.5.3. grant a sublicense of those Deliverables to any Victorian Public Entity to use those Deliverables or to any third party in order for that third party to exercise all Intellectual Property Rights in those Deliverables for the benefit of any Victorian Public Entity.
- 29.6. The Purchaser will own the media in which the Deliverables are delivered to the Purchaser.
- 29.7. Nothing in the Contract:
- 29.7.1. transfers ownership of any Pre-Existing Intellectual Property of a party to the other party; or
 - 29.7.2. allows the Purchaser or any other Victorian Public Entity to commercially exploit the Supplier's Pre-Existing Intellectual Property, unless specified otherwise in the Purchase Order.
- 29.8. To the extent that the provision of Services by the Supplier necessitates use by the Supplier of the Purchaser's Pre-Existing Intellectual Property, the Purchaser grants the Supplier a non-exclusive, non-transferable licence to use such Pre Existing Intellectual Property during the Term for purposes solely related to the provision of the Services.
- 29.9. The Supplier will obtain, at the earliest opportunity, from any person (including the Supplier's employees) whose Moral Rights may be affected, written consent to the doing of such acts (with respect to the material to which the Moral Rights relate) as required for the provision of, and for the Purchaser to derive full benefit from, the Goods, Services and Deliverables.
- 29.10. The Supplier warrants that any Service or Deliverable may be used in any way by the Purchaser without infringing the Moral Rights of any person.

Licence fee

- 29.11. The parties acknowledge and agree that all licence fees and other amounts payable by the Purchaser for the licences granted under this clause 29 are included in the Fees and that no other amounts will be payable by the Purchaser to the Supplier or any other party for those licences.

Purchaser Data

- 29.12. For the avoidance of doubt, all Purchaser Data is owned by the Purchaser.
- 29.13. The Purchaser grants the Supplier a limited licence to use the Purchaser Data solely to the extent required to provide the Goods and Services to the Purchaser in accordance with the terms of the Contract.

30. THIRD PARTY SOFTWARE

- 30.1. Unless specified in the Purchase Order, the Supplier must arrange for all licences required in relation to any Third Party Software required for the provision of the Goods and Services. The Purchaser will contract directly with the Third Party Software licensor(s) in relation to those licences.
- 30.2. The Supplier must ensure that the licences for the Third Party Software include the relevant licence terms set out in the Purchase Order. The Supplier must ensure that the licences will not in any way inhibit or restrict the Purchaser's use or enjoyment of the Goods or Services provided under the Contract. The Supplier must do all things necessary to manage the Third Party Software licences on behalf of the Purchaser. This includes:
- 30.2.1. liaising with the Third Party Software licensor(s) in relation to defects, upgrades and new versions;
 - 30.2.2. negotiating the best available terms and prices, including renewal of licences;
 - 30.2.3. acting as the Purchaser's single point of contact for all Third Party Software licence and performance related issues; and
 - 30.2.4. escalating issues with the Third Party Software provider(s).
- 30.3. Where the Supplier requires authorisation or assistance from the Purchaser to fulfil its obligations under clause 30.2, the Supplier must notify the Purchaser of the assistance or authorisation required, and prepare and provide to the Purchaser any documentation necessary to effect the assistance or authorisation.

31. LIABILITY

- 31.1. The Supplier indemnifies the Purchaser and each of its employees and agents against any loss, damage or expense (including legal costs on a full indemnity basis) which any of them may sustain or incur as a result of or in connection with:
- 31.1.1. a third party claim in respect of any infringement of, or an allegation that the Purchaser's receipt or use of any of the Goods or Services or any Deliverables infringe upon, the Intellectual Property Rights or any other right of any third party;

- 31.1.2. any breach of the Supplier's warranties under the Contract resulting in a loss suffered by a third party;
 - 31.1.3. any breach of clause 34 by the Supplier or its personnel;
 - 31.1.4. any personal injury, death or damage to tangible property caused or contributed by the Supplier or its personnel;
 - 31.1.5. a third party claim in respect of negligence by the Supplier or its personnel; or
 - 31.1.6. any fraud or deliberate or wilful misconduct of the Supplier or its personnel.
- 31.2. Subject to clause 31.3, the aggregate liability of each party to the other party in respect of all losses, damages, liability, costs, expenses, suits and claims (whether direct, indirect or consequential) arising from breach of contract, tort (including negligence) or otherwise, for all claims arising under or in connection with the Contract is limited (to the extent permitted by law) to the amount specified in the Purchase Order.
- 31.3. The limitation of liability in clause 31.2 does not apply in respect of:
- 31.3.1. personal injury, death or damage to tangible property;
 - 31.3.2. a breach of an obligation of confidence or privacy;
 - 31.3.3. fraud;
 - 31.3.4. infringement of a third party's Intellectual Property Rights; or
 - 31.3.5. liability of the Supplier under the indemnity in clause 31.1.
- 31.4. The liability of a party for loss or damage sustained by the other party will be reduced proportionately to the extent that such loss or damage has been caused by the other party's failure to comply with its obligations and responsibilities under the Contract and/or to the extent that the negligence of the other party has contributed to such loss or damage, regardless of whether a claim is made by the other party for breach of contract or for negligence.
- 31.5. Without prejudice to any other rights the Purchaser may have under the Contract or at law, if a mandatory term is implied by law or a mandatory consumer guarantee applies to goods or services provided in connection with the Contract, and the Supplier breaches such term or guarantee, the Supplier must, at the Purchaser's option:
- 31.5.1. in the case of goods not of a kind ordinarily acquired for personal, domestic or household use or consumption, either replace or repair the goods or pay the cost of replacing or repairing the goods; and
 - 31.5.2. in the case of services not of a kind ordinarily acquired for personal, domestic or household use or consumption, either resupply the services or pay the cost of the resupply of the services.

32. INSURANCE

Obligation to insure

- 32.1. The Supplier must take out and maintain during the Term and, in respect of clause 32.1.3, for seven years after the Term the following types of insurance policies with an insurance company approved by the Purchaser:
- 32.1.1. public liability insurance for an insured amount of not less than \$10 million per claim;
 - 32.1.2. product liability insurance (including product recalls) for an insured amount of not less than \$5 million per claim;
 - 32.1.3. professional liability or 'errors and omissions' insurance for an insured amount of not less than \$5 million in aggregate to cover any claim against the Supplier for any reason for any loss, damage, costs or expense due to the errors or any negligent or wrongful act or omission by the Supplier (or any of its employees, agents or contractors) in rendering or failing to render professional services;
 - 32.1.4. workers compensation insurance as required by law; and
 - 32.1.5. any other insurance specified in the Purchase Order.

Confirmation of compliance

- 32.2. The Supplier must, on request by the Purchaser, provide confirmation from its insurance brokers certifying that it has insurance as required by this clause 32.
- 32.3. The Supplier must immediately advise the Purchaser if it no longer has the benefit of any of the insurance policies required under this clause 32 for any reason.

33. PERFORMANCE GUARANTEE AND FINANCIAL UNDERTAKING

- 33.1. The Supplier will, where and to the extent specified in the Purchase Order, provide or procure a performance guarantee, financial undertaking or other similar arrangement substantially in the form specified in Schedule 6 and/or Schedule as applicable.
- 33.2. The Purchaser will consent to the discharge of a performance guarantee, financial undertaking or similar arrangement made pursuant to clause 33.1 one (1) year after termination or expiry of the Contract, or such earlier time as may be agreed between the parties.

34. CONFIDENTIALITY AND PRIVACY

- 34.1. The Supplier and its employees, agents, directors, partners, shareholders, contractors and consultants must not disclose or otherwise make available any Confidential Information to any other person.
- 34.2. If specified in the Purchase Order, the Supplier must procure that each of its employees, agents and contractors engaged in the provision of the Goods or Services executes a deed of confidentiality in a form acceptable to the Purchaser.
- 34.3. The Supplier hereby consents to the Purchaser publishing or otherwise making available information in relation to the Supplier (and the provision of the Goods and Services) as may be required:

- 34.3.1. on the Contracts Publishing System in order to comply with Victorian Government policy requiring publication of details of contracts entered into by Victorian Government departments, as amended from time to time;
 - 34.3.2. by the Auditor-General; or
 - 34.3.3. to comply with the *Freedom of Information Act 1982* (Vic).
- 34.4. On termination or expiration of the Contract, the Supplier shall immediately cease using all materials (whether in written or electronic form) that contain or encapsulate any Purchaser Data or Confidential Information and, at the election of the Purchaser:
- 34.4.1. delete or destroy the materials, as applicable; or
 - 34.4.2. return the materials to the Purchaser in the format in which they were first provided by the Purchaser and, in addition, if required by the Purchaser, in a non-proprietary and open access file format (such as .txt, .cvs, .rft, etc) as specified by the Purchaser, at no additional cost to the Purchaser, provided that the Supplier may retain one (1) copy of any materials that contain or encapsulate any Purchaser Data or Confidential Information to the extent required to comply with law, subject always to the requirements in this clause 34.
- 34.5. On termination or expiration of the Contract, the Supplier shall certify that it has complied with clause 34.4 and provide the Purchaser with a copy of the certification, including, if required, a statement that none of the Purchaser Data or Confidential Information is retained by the Supplier.
- 34.6. The Supplier agrees that it will:
- 34.6.1. be bound by the Information Privacy Principles, any applicable Codes of Practice and the *Health Records Act 2001* (Vic) (“Privacy Obligations”) with respect to any act done in connection with the provision of the Services in the same way as the Purchaser would have been bound had the relevant act been done by the Purchaser;
 - 34.6.2. assist the Purchaser to comply with its obligations under the Privacy Obligations, to the extent possible; and
 - 34.6.3. immediately notify the Purchaser upon becoming aware of any breach of the Privacy Obligations and comply with all directions of the Purchaser.
- 34.7. The Supplier acknowledges and agrees that the Purchaser is bound by the Protective Data Security Standards. The Supplier will not do any act or engage in any practice that gives rise to a breach of a Protective Data Security Standard in respect of any Purchaser Data collected, held, used, managed, disclosed or transferred by the Supplier, on behalf of the Purchaser, under or in connection with the Contract.

35. SECURITY MEASURES

Policies and procedures

- 35.1. The Supplier must:

- 35.1.1. as appropriate, inform its employees, agents and contractors of the provisions of any legislation, policies and procedures relating to secrecy and security which are listed in the Contract. Prior to being granted access to documents, materials or information pursuant to the Contract, any such employee, agent or contractor may first be required to provide the Purchaser with an acknowledgment that he or she is aware of any applicable legislation or security instructions. Nothing in this clause 35.1 excuses compliance by the Supplier or its employees, agents or contractors with any applicable legislation;
- 35.1.2. comply with such other State or Commonwealth legislation, policies or procedures relating to matters of security as may be specified in the Contract or advised by the Purchaser from time to time; and
- 35.1.3. comply with any specific security requirements specified in the Contract or as advised by the Purchaser (including undergoing any police checks, fingerprinting checks or other checks) prior to obtaining access to the Purchaser's premises, or providing any Services or fulfilling its obligations under the Contract, including any specific security clearance requirements.

Back Up and Data security

- 35.2. The Supplier must back up the Purchaser Data in the manner and at the frequency set out the Contract. The backup must not interfere with the Purchaser's or any end user's use of the Goods or Services.
- 35.3. The Supplier must:
 - 35.3.1. comply with, and ensure that its employees, agents and contractors comply with, all Purchaser data security requirements in respect of access to and use of Purchaser Data as specified by the Purchaser from time to time, in addition to any statutory obligations relevant to data security;
 - 35.3.2. prohibit and prevent any person who does not have the appropriate level of security clearance from gaining access to Purchaser Data; and
 - 35.3.3. notify the Purchaser immediately and comply with all directions of the Purchaser if the Supplier becomes aware of any contravention of the Purchaser's data security requirements.

Removal of Purchaser Data

- 35.4. The Supplier must not, and must ensure that its employees, agents and contractors do not, without the Purchaser's prior written consent:
 - 35.4.1. remove the Purchaser Data or allow the Purchaser Data to be removed from the Purchaser's premises; or
 - 35.4.2. take, disclose or make available the Purchaser Data or allow the Purchaser Data to be taken, disclosed or made available outside of Australia.

Security acknowledgment by Supplier

- 35.5. The Supplier acknowledges and agrees that:
 - 35.5.1. the Purchaser holds and deals with highly sensitive data and information; and

35.5.2. the Purchaser is concerned to ensure that such data and information is not improperly transferred, used or disclosed contrary to the Contract or any laws, and the Supplier must at all times use its best endeavours to prevent the unauthorised transfer, use or disclosure of the Purchaser Data and information.

35.6. The Purchaser may terminate the Contract immediately by notice in writing if the Supplier breaches clause 35.5.

Access to Purchaser Data and Virus protection

35.7. The Supplier shall at all times:

35.7.1. comply with any applicable security policies specified in the Purchase Order;

35.7.2. take all care in utilising the Purchaser's information technology systems and the Purchaser Data, including all hardware, software and applications;

35.7.3. not interfere with, disrupt or cause damage to such systems or Purchaser Data;

35.7.4. ensure that such systems and Purchaser Data are protected from unauthorised access or use, or misuse, damage or destruction; and

35.7.5. in addition to any requirements specified in the Contract, use its best endeavours to ensure that no Virus is introduced in the Purchaser's information technology systems or Purchaser Data.

35.8. In this clause, “**Virus**” is programming or files that have been developed for the purpose of doing harm and includes, without limitation, computer viruses, worms, Trojan horses, spyware, malware and adware.

Certification

35.9. The Supplier must maintain any security or other accreditations and/or certifications specified in the Purchase Order throughout the Term and provide proof of its compliance with this clause to the Purchaser on request.

36. DISASTER RECOVERY

36.1. The Supplier shall ensure that it has in place, at all times throughout the Term, a disaster recovery plan which is sufficient to ensure the continued provision of the Goods and Services by the Supplier following a Disaster.

36.2. If a Disaster continues to prevent, hinder or delay performance of the Goods and/or Services for more than 10 business days or such other period specified in the Purchase Order, the Purchaser may terminate the Contract for cause, wholly or in part, by notice in writing to the Supplier.

37. COMPLIANCE WITH LAW AND POLICIES

37.1. In performing its obligations under the Contract, the Supplier must comply with the provisions set out in this clause 37 (without limiting any of its other obligations under the Contract), unless specified otherwise in the Contract.

Employment practices

- 37.2. The Supplier agrees, during the Term:
- 37.2.1. to comply with its obligations, if any, under the *Equal Opportunity Act 2010* (Vic) or the *Disability Discrimination Act 1992* (Cth);
 - 37.2.2. to comply with its obligations, if any, under the *Workplace Gender Equality Act 2012* (Cth);
 - 37.2.3. not to enter into a sub-contract with an entity named in a report tabled in Commonwealth Parliament by the Director of Workplace Gender Equality as a supplier that has not complied with the *Workplace Gender Equality Act 2012* (Cth);
 - 37.2.4. to comply with such other State and Commonwealth legislation relevant to anti discrimination as may be relevant to the Contract; and
 - 37.2.5. to use its reasonable endeavours to provide employment opportunities to Aboriginal and Torres Strait Islander people where there are positions available and there are Aboriginal or Torres Strait Islander people available with suitable qualifications and expertise.

Occupational Health and Safety

- 37.3. The Supplier agrees, when using the Purchaser's premises, to comply with all reasonable directions of the Purchaser, including, but not limited to, documented procedures relating to occupational health, safety and security in effect at those premises. This obligation extends to all procedures which are notified to the Supplier by the Purchaser or which might reasonably be inferred by the Supplier in all the circumstances.
- 37.4. In addition to the requirements of clause 37.3, the Supplier agrees that, when working on the Purchaser's premises, it will comply, and will ensure that its personnel comply, with all applicable Commonwealth, State and local government laws, regulations and procedures relating to occupational health and safety, including any policies and procedures specified in the Purchase Order.

Code of Conduct

- 37.5. If the Supplier:
- 37.5.1. is required to supervise any employees, contractors, subcontractors or agents of the Purchaser;
 - 37.5.2. is performing functions and duties on behalf of the Purchaser at the Purchaser's premises; and
 - 37.5.3. has access to resources and/or information which are not usually accessible by or available to the general public,
- then the Supplier and its employees, contractors, subcontractors and agents must, throughout the Term, observe the Code of Conduct for Victorian Public Sector Employees and such other relevant State Government policies as may be specified in the Purchase Order or notified by the Purchaser to the Supplier.

Applicable Industrial Instruments and Applicable Legislation

- 37.6. The Supplier must not engage in any practice that is contrary to any Applicable Industrial Instrument or Applicable Legislation, insofar as it applies to the Supplier.
- 37.7. In addition to any other rights under the Contract, if the Supplier is in breach of clause 37.6, the Purchaser may suspend the operation of the Contract, or the performance of the Purchaser's obligations under it, immediately by notice to the Supplier for so long as the breach continues.

Supplier Code of Conduct

- 37.8. The Supplier acknowledges that:
- 37.8.1. the Supplier Code of Conduct is an important part of the State's approach to procurement and describes the State's minimum expectations regarding the conduct of its suppliers;
 - 37.8.2. it has read the Supplier Code of Conduct; and
 - 37.8.3. the expectations set out in the Supplier Code of Conduct are not intended to reduce, alter or supersede any other obligations which may be imposed on the Supplier, whether under the Contract or at law.

VIPP compliance

- 37.9. Unless otherwise specified in the Purchase Order, the Supplier must, in performing its obligation under the Contract, comply with the VIPP Plan.
- 37.10. The Supplier acknowledges and agrees that its obligations, as set out in the VIPP Plan, apply during the Term.
- 37.11. The Supplier must:
- 37.11.1 permit the VIPP Department, or its duly authorised representative, from time to time to undertake a review of the Supplier's performance in accordance with the VIPP Plan; and
 - 37.11.2 ensure that its employees, agents and contractors give all reasonable assistance to any person authorised by the VIPP Department to undertake such audit or inspection.
- 37.12. The Supplier acknowledges and agrees that the VIPP Department, the VIPP Department's duly authorised representative and Industry Capability Network (ACN 007 058 12) ("**ICN**") are authorised to obtain information from any relevant persons, firms or corporations, including third parties, regarding the Supplier's compliance with the VIPP Plan.
- 37.13. The Supplier acknowledges and agrees that:
- 37.13.1. ICN will assess the Supplier's performance against the Supplier's VIPP Plan; and
 - 37.13.2. the statistical information contained within the Supplier's VIPP Plan and the measures of the Supplier's compliance with the VIPP Plan will be:
 - 37.13.2.1. included in the VIPP Department's report of operations under Part 7 of the *Financial Management Act 1994* (Vic) in respect of the Supplier's compliance with the VIPP Plan in the financial year to which the report of operations relates; and

37.13.2.2 provided to the VIPP Responsible Minister for inclusion in the VIPP Responsible Minister's report to the Parliament of Victoria for each financial year on the implementation of the VIPP during that year.

37.14. The Supplier must:

37.13.1.prepare and maintain records demonstrating its compliance with the VIPP Plan; and

37.13.2.provide an annual report to the Purchaser demonstrating its progress towards implementing the VIPP Plan,

in the format requested by the Purchaser from time to time.

37.15. On request from the Purchaser, the Supplier must provide further information or explanation regarding the VIPP Plan, or any departures from the VIPP Plan.

38. AUDIT

38.1. The Purchaser or its nominee may, at any time during the Term, conduct an audit under this clause 38 in respect of:

38.1.1. the Supplier's compliance with its obligations under the Contract; and/or

38.1.2. any other matters reasonably determined by the Purchaser to be relevant to the performance of the Supplier's obligations under the Contract.

38.2. The Purchaser may conduct a maximum of one audit in every 12 month period unless an audit discloses any error, non-compliance or inaccuracy in respect of the Supplier's obligations under the Contract.

38.3. The Purchaser shall ensure that any third party engaged by it to conduct an audit under this clause 38 is subject to reasonable confidentiality requirements and complies with any reasonable security requirements of the Supplier.

38.4. The Supplier must promptly participate in and co-operate with the Purchaser or its nominee in any audits conducted by the Purchaser or its nominee.

38.5. Except in those circumstances in which notice is not practicable or appropriate, the Purchaser must give the Supplier reasonable notice of an audit and, where reasonably practicable, an indication of which documents and/or class(es) of documents the auditor may require.

38.6. The requirement for, and participation in, audits does not in any way reduce the Supplier's responsibility to perform its obligations in accordance with the Contract.

38.7. The Supplier must promptly take, at no additional cost to the Purchaser, corrective action to rectify any error, non-compliance or inaccuracy identified in any audit in the way the Supplier has, under the Contract:

38.7.1. supplied any of the Goods or Services; or

38.7.2. calculated the Fees, or any other amounts or charges billed to the Purchaser.

38.8. Each party must bear its own costs associated with any audits.

39. ACCESS TO THE SUPPLIER'S PREMISES AND RECORDS

- 39.1. For the purposes of clause 38, the Supplier must grant, and where relevant must ensure that its sub-contractors grant, the Purchaser and its nominees access as required by the Purchaser to the Supplier's premises and data, records, accounts and other financial material or material relevant to the performance of the Contract.
- 39.2. In the case of documents or records stored on a medium other than in writing, the Supplier must make available, on request and at no additional cost to the Purchaser, such reasonable facilities as may be necessary to enable a legible reproduction to be created.
- 39.3. The Supplier must ensure that any sub-contract entered into for the purpose of the Contract contains an equivalent clause granting the rights specified in this clause with respect to the sub-contractor's premises, data, records, accounts, financial material and information of its personnel.
- 39.4. Without limiting any of its other obligations under the Contract, the Supplier must, at its own cost, ensure that it keeps full and complete records relating to the Goods and Services supplied under the Contract in accordance with all applicable Australian Accounting Standards for 7 years and that those records are maintained in such a form and manner as to facilitate access and inspection under this clause.
- 39.5. Nothing in the Contract reduces, limits or restricts in any way any function, power, right or entitlement of, and the rights of the Purchaser under the Contract are in addition to any other power, right or entitlement of, the Auditor-General or a delegate of the Auditor-General or the Commissioners or a delegate of a Commissioner or the Ombudsman or a delegate of the Ombudsman.

Interpretation of this clause

- 39.6. In this clause:
- 39.6.1. a reference to the 'Auditor-General' is a reference to the Auditor-General or equivalent office holder with jurisdiction over the Purchaser;
- 39.6.2. a reference to the 'Commissioners' is a reference to the Privacy and Data Protection Deputy Commissioner appointed under the *Privacy and Data Protection Act 2014* (Vic) and the Information Commissioner and the Public Access Deputy Commissioner appointed under the *Freedom of Information Act 1982* (Vic); and
- 39.6.3. a reference to the 'Ombudsman' is a reference to the Ombudsman or equivalent office holder with jurisdiction over the Purchaser.

40. DISPUTE RESOLUTION

- 40.1. Subject to clause 40.9, if a dispute arises under the Contract or concerning its subject matter, a party must not commence or maintain a court action or proceeding until the parties have exhausted the dispute resolution procedure outlined in this clause 40.
- 40.2. A notice of dispute ("**Notice**") must be given in writing by the party claiming that a dispute has arisen to the other party to the Contract specifying the nature of the dispute.

- 40.3. If a Notice is given under clause 40.2, upon receipt of that Notice:
- 40.3.1. appropriate representatives of the parties must meet within five business days of the Notice to try to resolve the dispute in good faith; and
 - 40.3.2. if the meeting referred to in clause 40.3.1 does not take place or if, after five business days of that meeting, the dispute remains unresolved, either party may refer the dispute to appropriately senior executives of each party.
- 40.4. If a dispute is referred to the parties' senior executives, such persons must meet within five business days of the dispute being referred to them and endeavour to resolve the dispute.
- 40.5. If, within 15 business days of receipt of the Notice, the dispute is not resolved or an appropriate dispute resolution process is not agreed, then the parties agree to endeavour in good faith to settle the dispute by mediation administered by the Australian Disputes Centre ("**ADC**") before having recourse to litigation.
- 40.6. The mediation will be conducted in accordance with the mediation guidelines of ADC ("**Guidelines**"), which set out the procedures to be adopted, the process of selection of the mediator and the costs involved and the terms of those Guidelines are incorporated into the Contract.
- 40.7. If the dispute is not resolved at mediation or in any event within 40 business days of service of a Notice, either party may pursue its rights at law.
- 40.8. Despite the existence of a dispute, each party must continue to perform its obligations under the Contract.
- 40.9. Nothing in this clause 40 restricts or limits the right of either party to obtain urgent interlocutory or injunctive relief, or to immediately terminate the Contract where the Contract provides such a right.

41. SUB-CONTRACTING

- 41.1. The Supplier must not sub-contract to any third person any of its obligations in relation to the Contract without the prior written consent of the Purchaser (which may be given or withheld in its absolute discretion). The Purchaser is deemed to have given its consent to any sub-contractors listed in the Purchase Order.
- 41.2. The Supplier will not, as a result of any sub-contracting arrangement, be relieved from the performance of any obligation under the Contract and will be liable for all acts and omissions of a sub-contractor as though they were the actions of the Supplier itself.

42. NOTICES

- 42.1. Any notice given to a party under the Contract is only given if it is in writing and sent in one of the following ways:
- 42.1.1. delivered or posted to that party at its address and marked for the attention of the relevant department or officer (if any) set out in the Purchase Order; or

- 42.1.2. faxed to that party at its fax number and marked for the attention of the relevant department or officer (if any) set out in the Purchase Order.
- 42.2. If a party gives the other party three business days' notice of a change of its address or fax number, any notice is only given by that other party if it is delivered, posted or faxed to the latest address or fax number.
- 42.3. Subject to clause 42.4, any notice is to be treated as given at the following time:
 - 42.3.1. if it is delivered, when it is left at the relevant address;
 - 42.3.2. if it is sent by post, two (or, in the case of a notice or communication posted to another country, nine) business days after it is posted; or
 - 42.3.3. if it is sent by fax, as soon as the sender receives from the sender's fax machine a report of an error free transmission to the correct fax number.
- 42.4. If any notice is given at the place of the party to whom it is sent, on a day that is not a business day or after 5.00pm on a business day, it is to be treated as having been given at the beginning of the next business day.
- 42.5. Nothing in this clause 42 prevents day to day communications between the parties being made electronically.

43. GENERAL

- 43.1. The Contract is governed by and is to be construed in accordance with the laws applicable in Victoria. Each party irrevocably and unconditionally submits to the non exclusive jurisdiction of the courts of the State of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.
- 43.2. Unless otherwise specified in the Purchase Order, time will not be of the essence in relation to the provision of the Services and Deliverables.
- 43.3. Unless the Contract expressly provides otherwise, a party may give or withhold an approval or consent in that party's absolute discretion and subject to any conditions determined by the party. A party is not obliged to give its reasons for giving or withholding a consent or approval or for giving a consent or approval subject to conditions.
- 43.4. Where the Contract refers to a matter being to the 'satisfaction' of a party, this means to the satisfaction of that party in its absolute discretion.
- 43.5. The Supplier shall not be released from any of its obligations under the Contract as a result of or due to the Purchaser's exercise of any of its rights under the Contract or otherwise at law.
- 43.6. The Supplier must not assign or transfer any of its rights or obligations under the Contract without the prior written consent of the Purchaser.
- 43.7. The following provisions will survive termination or expiry of the Contract: clauses 10 (Failure to Perform), 14.2 (Warranty Period), (Taxes), 27 (Termination), 29 (Intellectual Property Rights), 31 (Liability), 32 (Insurance), 33 (Performance Guarantee and Financial

Undertaking), 34 (Confidentiality and Privacy), (Access to the Supplier's Premises and Records), 42 (Notices) and 43 (General) of these terms and conditions and Schedule 8.

- 43.8. Each provision of the Contract is individually severable. If any provision is or becomes illegal, unenforceable or invalid in any jurisdiction it is to be treated as being severed from the Contract in the relevant jurisdiction, but the rest of the Contract will not be affected. The legality, validity and enforceability of the provision in any other jurisdiction will not be affected.
- 43.9. No variation of the Contract will be of any force or effect unless it is in writing and signed by both parties to the Contract.
- 43.10. Each party must at its own expense promptly execute all agreements and do or use reasonable endeavours to cause a third party to do all things that the other party from time to time may reasonably request in order to give effect to, perfect or complete the Contract and all transactions incidental to it.
- 43.11. A waiver of any right, power or remedy under the Contract must be in writing signed by the party granting it. A waiver only affects the particular obligation or breach for which it is given. It is not an implied waiver of any other obligation or breach or an implied waiver of that obligation or breach on any other occasion. The fact that a party fails to do, or delays in doing, something the party is entitled to do under the Contract does not amount to a waiver.
- 43.12. Except as expressly provided in the Contract, no party is an agent, representative, trustee, employee or partner of any other party by virtue of the Contract and no party may represent itself as such in any circumstances.
- 43.13. Except where expressly stated to the contrary in the Contract, the rights of a party under the Contract are cumulative and are in addition to any other rights available to that party whether those rights are provided for under this the Contract, any other document or by law.