

**PROCURE IT FRAMEWORK  
VERSION 3.0**

**PART 1: HEAD AGREEMENT**

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# 1. Recitals

## PROCURE IT FRAMEWORK

- 1.1 The NSW Government, represented by the State Contracts Control Board (**SCCB**), has authorised the *Procure IT Framework* to be used by Eligible Customers for the acquisition of information and communications technology related Products and Services.
- 1.2 The New South Wales Department of Finance and Services administers the *Procure IT Framework* and acts on behalf of the SCCB, which is the Contract Authority under the Head Agreement (if any).
- 1.3 The Contract Authority is responsible for the administration of the Head Agreement on behalf of Eligible Customers and has authority to act on behalf of these entities in this respect.
- 1.4 The *Procure IT Framework* is designed so that Products and Services can be acquired:
  - (a) as a result of a panel arrangement where an entity acts as the Contract Authority and establishes a master purchasing arrangement where one or more Contractors agree to offer certain Products and/or Services to Eligible Customers at pre-agreed Prices and on pre agreed core terms and conditions, for a defined Term (**Panel Arrangement**); or
  - (b) by an entity who is permitted by the SCCB to use the *Procure IT Framework* using a procurement process that does not involve a Contract Authority (**Non-Panel Arrangement**).

## PANEL ARRANGEMENT

- 1.5 Where the *Procure IT Framework* is used for a Panel Arrangement, the Contract Authority will undertake a procurement process and the successful Contractors will sign the Head Agreement and go onto the panel. The Head Agreement requires that all Eligible Customers who acquire Products and Services under the Panel Arrangement acquire the Products and Services using the form of Customer Contract that is set out in the *Procure IT Framework*.
- 1.6 This Head Agreement describes the relationship between the Contract Authority and the Contractor for the administration of the Panel Arrangement, including the Products and Services that can be acquired under the Panel Arrangement, how those Products and Services can be updated during the Term, the Pricing for the Products and Services, which entities are entitled to acquire Products and Services under the Panel Arrangement, which Approved Agents can be used by the Contractor to supply the Products and Services, the Term of the Panel Arrangement, the minimum insurance requirements and any Performance Guarantee that might apply to Customer Contracts entered into under this Head Agreement, as well as the general terms and conditions applicable to the relationship. This Head Agreement also provides the Contract Authority the right to require the Contractor to pay a Management Fee for Customer Contracts that are entered into under this Head Agreement.

## NON-PANEL ARRANGEMENT

- 1.7 Where there is no Contract Authority, a Customer may acquire Products or Services from the Contractor under a Customer Contract, and the terms and conditions of this Head Agreement are not to be used.

## CUSTOMER CONTRACT

- 1.8** The Customer Contract describes the relationship between the Customer and the Contractor for the supply of the Products and Services that are described in the Customer Contract. Where the Customer Contract is made under a Head Agreement:
- (a) the Products and Services that can be acquired, the Prices at which they can be sold, and the degree to which the terms and conditions can be varied are limited by the terms of this Head Agreement; and
  - (b) the Customer is entitled to the benefits of any arrangements that have been made by the Contract Authority under this Head Agreement in respect to insurance and any Performance Guarantee.
- 1.9** By this deed the Parties agree to perform their obligations in accordance with its terms.

## DICTIONARY

- 1.10** The *Procure IT Framework* includes the Dictionary, which defines key terms and concepts.

# 2. Scope of Contract

## PRODUCTS AND SERVICES

- 2.1** Subject to clause 2.2, the Contractor must supply any Product or Service stated in Annexure 3 at the Prices, which must not exceed the amounts stated in Annexure 3 (including any price variation mechanism), to any Eligible Customer, under a Customer Contract that is entered into during the Term. Nothing in this clause 2.1 restricts or prevents the Contractor and an Eligible Customer agreeing Prices which will apply to a Customer Contract which are lower than the amounts stated in Annexure 3.
- 2.2** After the expiry or termination of any Head Agreement and where a Customer has entered into a Customer Contract with a Contractor during the Term the Customer may, provided that the Customer first obtains the written approval of the Contract Authority, and provides a copy of that approval to the Contractor:
- (a) acquire additional Products or Services stated in Annexure 3 (or upgraded or modified version of the Products or Services); or
  - (b) acquire maintenance or support Services in respect of the Products or Services (or upgraded or modified version of the Products or Services),
- provided that at the relevant time the Products and Services the Customer wishes to acquire are generally made available by the Contractor to its customers. The Parties acknowledge that any approval of the Contract Authority required under this clause 2.2 may take the form of an ongoing approval in respect of the continued purchase by a Customer of a type of products or services which could apply to more than one acquisition of such Products or Services for a defined period.
- 2.3** Any Products of Services stated in Annexure 3 (or upgraded or modified version of the Products or Services) acquired under clause 2.2 shall be acquired on the terms and conditions of a Customer Contract at prices that are no greater than the Contractor's then current commercial price.

- 2.4** This Head Agreement does not:
- (a) imply that the Contractor is the exclusive provider of any Product or Service; or
  - (b) oblige any Eligible Customer to enter into a Customer Contract with the Contractor for any Product or Service.
- 2.5** The Contractor must promptly provide the Contract Authority with written notice of any proposed material variation to the description of a Product or Service that is stated in Annexure 3.
- 2.6** A variation under clause 2.5 excludes a variation:
- (a) to the Price of a Product or Service;
  - (b) that modifies or upgrades a Product or Service; or
  - (c) that introduces a new Product or Service.
- 2.7** The Contract Authority will provide the Contractor with written notice stating whether it accepts the variation to the description of the Product or Service and, if it does accept the variation, the variation is deemed to update the description of the Product or Service in Annexure 3 on the date when the Contract Authority provides written notice to the Contractor that the Contract Authority accepts the Contractor's offer. The Contract Authority must not unreasonably withhold or delay acceptance of the variation.
- 2.8** If, during the Term, the Contractor makes available on a general commercial basis, products or services that:
- (a) are modified versions or upgrades of a Product or Service; or
  - (b) have a function or purpose similar to that performed by a Product or Service; or
  - (c) have a new function or purpose consistent with the nature of a Product or Service,
- the Contractor must offer to include those products or services in Annexure 3 within 60 days of the product or service being available on a general commercial basis. The Contractor must make this offer by providing the Contract Authority with written notice of the product or service, its description, Price and any Price variation that may apply.
- 2.9** If, during the Term, the Contractor makes available on a general commercial basis, new products or services with a function or purpose that are unrelated to a Product or Service, the Contractor may, in its discretion, offer to include those products or services in Annexure 3. The Contractor may make this offer by providing the Contract Authority with written notice of the new product or service, its description, Price and any Price variation that may apply.
- 2.10** The products and services offered by the Contractor under clauses 2.8 and 2.9, including their description, Price and any price variation mechanism, are deemed to be added to Annexure 3 on the date when the Contract Authority provides written notice to the Contractor that the Contract Authority accepts the Contractor's offer.
- 2.11** If the Contract Authority has not provided written notice to the Contractor that the Contract Authority accepts the Contractor's offer within 30 days of the date that the Contractor provided the offer under clause 2.8 or 2.9, that offer is deemed to have been rejected.

## PRICING

- 2.12** The amounts set out in Annexure 3 are the maximum amounts payable by a Customer for a Product or Service during the Term, subject to any increase made in accordance with any price variation mechanism stated in Annexure 3. Nothing in this clause 2.12 prevents the Contractor from charging a Customer for any item, service, expense or other thing which is permitted to be charged for under a Customer Contract (e.g. delivery charges, the costs of a Financial Security entered into under the Customer Contract).
- 2.13** The Contractor may reduce the amounts set out in Annexure 3 or increase the discount applicable to a Product or Service at any time by providing the Contract Authority with written notice of the change and upon receipt of such notice by the Contract Authority, Annexure 3 will be deemed to be updated accordingly.
- 2.14** Where the Contractor offers a temporary price special that is lower than the amount stated in Annexure 3 the Contractor may make that lower amounts available to all Eligible Customers.
- 2.15** The Contract Authority may request quotations from the Contractor for:
- (a) discounts on volume purchases of Products and/or Services for one or more Eligible Customer(s); and/or
  - (b) aggregating purchases of Products and/or Services for one or more Eligible Customers.
- 2.16** Where the Contractor provides a quotation in response to a request under clause 2.15 the arrangements on the quotation are deemed to be added to Annexure 3 on the date when the Contractor provides the quotation to the Contract Authority. The quotation applies only in respect of the volumes and/or aggregated purchases stated in the quotation (including any future purchases at such volumes and/or aggregated purchases).
- 2.17** The Contractor must use reasonable efforts throughout the Term to ensure that the Prices for Products agreed with Customers under Customer Contracts represent good value for money and are in line with then current good industry practice taking into account all relevant circumstances. As part of this obligation, the Contractor must:
- (a) seek to identify new or potential improvements including changes in business processes and ways of working that would enable the Products to be delivered at lower costs and/or at greater benefits to Customers, and report on these to the Contract Authority within 90 days of written request (such requests to be no more than annually) during the Term; and
  - (b) comply with the review and reporting requirements, if any, specified in the Modules.

If any changes to the Prices are agreed by the Contract Authority and the Contractor under clause 2.17, such changes will be made by written agreement updating Annexure 3 signed by the Parties, and the changed Prices will apply for purchases that are made by Customers after the date that Annexure 3 is amended.

## TERM

- 2.18** This Head Agreement commences on the date stated in Item 6(a) of the Head Agreement Details, and will expire on the date stated in Item 6(b) of the Head Agreement Details.
- 2.19** The Contract Authority may extend the Term of this Head Agreement on the same terms and conditions for the period specified in Item 6(c) of the Head Agreement Details, by giving the Contractor Notice in Writing at least 30 days prior to the end of the Term.

## NOMINEE PURCHASER

- 2.20** If an Eligible Customer requires a Nominee Purchaser to enter into a Customer Contract on its behalf, the Contractor may not refuse to enter into that Customer Contract solely on the basis that the Customer Contract will be signed by the Nominee Purchaser as agent for the Eligible Customer and will not be signed by the Eligible Customer itself, provided that the Nominee Purchaser:
- (a) provides its current registration number as given by the Contract Authority;
  - (b) provides its nominating Eligible Customer's Australian Business Number; and
  - (c) provides the Contractor with the written authorisation from the Eligible Customer that confirms the Nominee Purchaser's rights to purchase Products and/or Services as agent for the Eligible Customer under this Head Agreement.

## RESTRICTIONS ON SUPPLYING TO PARTICULAR CUSTOMERS

- 2.21** The Contractor may refuse to supply Products or Services to a particular Eligible Customer or Nominee Purchaser provided that:
- (a) it has used its best efforts to reach agreement with the Eligible Customer or Nominee Purchaser; and
  - (b) it has obtained the Contract Authority's prior written consent. The Contract Authority must not act unreasonably in delaying or withholding consent.

## 3. Management Fee

- 3.1** The Contractor, or if the order is to be placed with an Approved Agent, the Approved Agent, must use its best efforts to:
- (a) encourage all NSW Eligible Customers who wish to place orders for Products and/or Services stated in Annexure 3, to place those orders under this Head Agreement in accordance with NSW procurement policy;
  - (b) encourage Eligible Customers to use the General Order Form and other Order Documents when using a Customer Contract to acquire Products and Services under a Customer Contract from the Contractor.
- 3.2** The Contractor must pay to the Contract Authority a Management Fee at the rate set out at Item 9 of the Head Agreement Details on the value (exclusive of any GST) of all Products and/or Services invoiced to and paid for by a Customer pursuant to a Customer Contract under this Head Agreement.
- 3.3** Within 7 days of the end of each Payment Period the Contractor must forward electronically through smartbuy® to the Contract Authority a report (**Sales Report**) which relates to the relevant Payment Period and which includes:
- (a) the total value of the amounts paid by Customers pursuant to Customer Contracts for Products and/or Services;
  - (b) the total of any amounts that have to be rebated against the Management Fee, as stated in clause 3.10;
  - (c) the names of the five largest Customers, listed by dollar value of amounts paid by the Customer; and

- (d) such other relevant information as the Contract Authority may reasonably require.
- 3.4** The Parties agree that the Contract Authority may by prior notice in writing to the Contractor amend the procedure for collection of information set out in clause 3.3 from time to time.
- 3.5** Upon receipt of each Sales Report, the Contract Authority must compile a Tax Invoice for the Management Fee based on the Sales Report and forward that Tax Invoice to the Contractor. In the event that the Contractor does not complete the Sales Report within 7 days of the end of a Payment Period, the Contractor will be liable for interest in accordance with Item 9 of the Head Agreement Details on the amount which (had this clause been complied with) would have been invoiced to the Contractor, calculated from 7 days after the expiry of the relevant Payment Period.
- 3.6** The Contractor must pay the amount due to the Contract Authority within 14 days of the date of receipt of a correct Tax Invoice. In the event that the Contractor does not provide payment within 14 days the Contractor will be liable for interest in accordance with Item 9 of the Head Agreement Details on the invoiced amount, calculated from 21 days from the date of the Tax Invoice.
- 3.7** Where the Contractor has appointed an Approved Agent, the Contractor will remain responsible for the payment of the Management Fee under this clause 3 unless otherwise stated in Item 13 of the Head Agreement Details.
- 3.8** Where it is stated in Item 13 of the Head Agreement Details that the Approved Agent is responsible for the payment of the Management Fee then:
- (a) prior to the Approved Agent entering into a Customer Contract, the Approved Agent must sign the Deed Poll in Annexure 4;
  - (b) the Approved Agent is responsible for providing Sales Reports in respect of the amounts paid by Customers for the Products and Services supplied by the Approved Agent under Customer Contracts; and
  - (c) the Contract Authority must only seek payment of the Management Fee and any related interest for late payment from the Approved Agent, and not from the Contractor.
- 3.9** The Contractor must make payment by means of electronic funds transfer to a bank as advised in the Tax Invoice or by a cheque made payable to the addressee set out at Item 9(c) of the Head Agreement Details and shall be forwarded to the address set out at Item 9(d) of the Head Agreement Details.
- 3.10** If there is subsequent adjustment to any invoice for a Product or Services that has been acquired under a Customer Contract agreed by the Customer and the Contractor (or Approved Agent, if applicable) (e.g. as a result of an administrative error in the original invoice or any refund, credit or set off for Service Credits, liquidated damages or other loss, damage, expense or liability) then the Contractor (or Approved Agent, if applicable) shall include that amendment in the next Sales Report and the amount payable for the Management Fee in respect of that Sales Report shall be adjusted accordingly. If the adjustment results in a negative amount on the Sales Report, the Contractor (or Approved Agent, if applicable) must issue a Tax Invoice for that amount and the Contract Authority must pay that amount to the Contractor (or Approved Agent, if applicable) within 30 days of receipt of the Tax Invoice.
- 3.11** Where the Contractor has not received payment from a Customer during a Payment Period, the Contractor (or Approved Agent, if applicable) shall provide, within 30 days from the conclusion of that Payment Period, a report stating that no payment was made during that Payment Period, such report to be signed by the Contractor's Authorised Representative or a senior representative of the Contractor (or Approved Agent, if applicable).

- 3.12** The Parties agree that for the purpose of determining if a Management Fee is payable under this clause 3, the following criteria shall apply in determining whether Products and/or Services have been acquired pursuant to a Customer Contract under this Head Agreement:
- (a) where Products and/or Services stated in Annexure 3 have been acquired during the Term (or under clause 2.2) by a NSW Government Body, the Customer will be treated as having made its purchase pursuant to a Customer Contract made under this Head Agreement, unless the Contractor can provide evidence that the purchase was made under another contract that was made, or is pursuant to a contract that was made, prior to the first day of the Term;
  - (b) where the Products and/or Services stated in Annexure 3 have been acquired during the Term (or under clause 2.2) by an Eligible non-Government Body, that Eligible non-Government Body will be treated as having made its purchase pursuant to a Customer Contract made under this Head Agreement only where that Eligible non-Government Body placed the order by signing (in hard copy or using electronic means) a General Order Form or has otherwise indicated in writing to the Contractor that purchase of the Products and/or Services is made under this Head Agreement.

**3.13** The Contractor acknowledges that the Management Fee payable has been allowed for in the Price together with all costs associated with calculation proving and payment of the Management Fee. The Contractor agrees that it will not separately identify the amount of the Management Fee in any quotation or invoice.

**3.14** The Contractor must set up and maintain a system to the reasonable satisfaction of the Contract Authority, that is suitable for:

- (a) identifying all purchases of Products and/or Services provided by the Contractor to Eligible Customers pursuant to Customer Contracts made under the Head Agreement (including any purchase under clause 2.2);
- (b) the monitoring by the Contract Authority of orders placed with, and amounts received for such Products and/or Services by, the Contractor; and
- (c) for the provision of the information required under clause 3.3.

The system shall enable the Contract Authority to check whether any Eligible Customers have procured Product and/or Services from the Contractor in accordance with this Head Agreement.

**3.15** The Contract Authority may take such measures as are reasonable in all the circumstances (including the appointment of an auditor) to verify that the Contractor has paid the correct amount of Management Fee due to the Contract Authority. If the Contract Authority appoints an auditor (being an auditor who must not be a competitor of the Contractor), the Contract Authority will inform the Contractor in writing of the appointment. The Contractor agrees to cooperate with the auditor appointed by the Contract Authority including providing access during Business Hours within 10 Business Days of the written notification from the Contract Authority that an audit will take place, to information about all sales of Products and/or Services made to Eligible Customers under this Head Agreement (including any purchase under clause 2.2), including copies of all Customer Contracts and invoices (excluding disclosure of the Contractor's internal costings, profit margins and information not associated with compliance with this Head Agreement). The Contractor agrees to provide the Auditor appointed by the Contract Authority access subject to the appointed auditor first entering into a confidentiality agreement in substantially the form set out in Annexure 6, and in accordance with the Contractor's reasonable access and security requirements.

- 3.16** If the measures taken in clause 3.15 demonstrate that the Contractor has not paid the Management Fee that is due to the Contract Authority, the Contractor shall:
- (a) pay the difference between the Management Fee paid to the Contract Authority and the Management Fee that is payable to the Contract Authority within 30 days of a direction from the Contract Authority; and
  - (b) at the discretion of the Contract Authority, reimburse the Contract Authority's costs and expenses of the measures (including the appointed auditor's fees) taken under clause 3.15 to the Contract Authority in accordance with the sliding scale set out below:

Proportion of auditors fees to be borne	Amount of Management Fee paid
\$0	95% of payable Management Fee was paid
50% of audit and other costs	75-95% of payable Management Fee paid
75% of audit and other costs	50-75% of payable Management Fee paid
100% of audit and other costs	less than 50% of payable Management Fee paid

- 3.17** The Contractor shall during the Term and a period of 12 months after the Term, keep secure all relevant documents and supporting materials and give any auditor access at all reasonable times to those documents and supporting materials.
- 3.18** The Contractor (or Approved Agent, as applicable) will pay to the Contract Authority an amount equal to the GST in addition to the Management Fee that is payable under this Head Agreement. The GST amount will be paid to the Contract Authority at the time the Management Fee is payable under this Head Agreement.
- 3.19** A breach by the Contractor of this clause 3 (including a failure by the Contractor to cooperate satisfactorily with the audit referred to in clause 3.15) shall be a breach of this Head Agreement which will entitle the Contract Authority to terminate this Head Agreement pursuant to clause 19.1(b) without prejudice however to the right of the Contract Authority to recover from the Contractor (or Approved Agent, if applicable) any sums payable to the Contract Authority under this Head Agreement or otherwise, or the right of the Contract Authority to deduct those sums from any money that may be or become payable by the Contract Authority to the Contractor (or Approved Agent, if applicable) on any other account.

## 4. Formation of Contract

### RESPONSIBILITY FOR ADMINISTRATION

- 4.1** The Contract Authority is responsible for the administration of this Head Agreement on behalf of Eligible Customers and has authority to act on behalf of these entities in this respect.

### FORMATION OF HEAD AGREEMENT

- 4.2** This Head Agreement comprises:
- (a) the terms and conditions of this Head Agreement and the Head Agreement Details;
  - (b) the Modules that are stated in Item 4A of the Head Agreement Details and the relevant Module Order Forms;
  - (c) Part 2, the Customer Contract (including Schedule 1, General Order Form and the other Schedules that are stated in Item 4B of the Head Agreement Details);
  - (d) Part 3, the Dictionary;

- (e) Annexures 3 to 7;
- (f) any document that is attached to or referenced in Annexure 2; and
- (g) the Head Agreement Documents (if any).

- 4.3** To the extent that there is any conflict between any of the documents that comprise this Head Agreement the conflict shall be resolved by giving priority to the documents in the order in which they appear in clause 4.2 (with an item higher in the list having priority over a lower item).
- 4.4** For clarity, the terms and conditions of use of smartbuy® or any other electronic purchasing system used by the Contract Authority are not part of the Head Agreement and do not apply to the Contractor in respect of any dealings with the Contract Authority and/or any Eligible Customer.

#### FORMATION OF CUSTOMER CONTRACT UNDER HEAD AGREEMENT

- 4.5** A Customer Contract between a Contractor and an Eligible Customer will be created under this Head Agreement upon:
- (a) the Eligible Customer and the Contractor agreeing the Order Details in the Order Documents, and any Additional Conditions for the Products and/or Services; and
  - (b) the Eligible Customer and the Contractor signing the General Order Form,
- and will comprise the documents listed in clause 3.6 of Part 2.
- 4.6** The Parties agree that each time the Customer and the Contractor enter into a Customer Contract in accordance with clause 4.5, a separate agreement is created between the Contractor and the Customer which takes effect on the date the General Order Form is signed by the Eligible Customer and the Contractor.
- 4.7** The Contractor has no obligation to supply any Product or Service to an Eligible Customer until a Customer Contract for the supply of that Product or Service has been created in accordance with clause 4.5.

#### ENFORCEMENT OF CUSTOMER CONTRACT BY CONTRACT AUTHORITY

- 4.8** Where a Customer Contract is entered into under this Head Agreement, the Contractor acknowledges and agrees that:
- (a) the Contract Authority may enforce the Customer Contract as agent for the Customer, even though the Contract Authority is not a party to the Customer Contract in its own right; and
  - (b) where (a) applies, the applicable limitations and exclusions of liability in respect of the relevant claim will be those set out in the Customer Contract, rather than those set out in clause 12 of this Head Agreement.

## 5. Relationship

- 5.1** The Contractor agrees that it will not be taken to be and must not represent that it is the employee, partner, officer and/or agent of the Contract Authority.

## 6. Approved Agents

- 6.1** The Contractor may supply Products and/or Services to Eligible Customers using any Approved Agent that is stated in Item 12 of the Head Agreement Details or as may be agreed by the Contract Authority.
- 6.2** If a Customer Contract is entered into between one of the Contractor's Approved Agents and an Eligible Customer, the Customer Contract is binding on the Contractor and the Eligible Customer.
- 6.3** Unless stated otherwise in Item 13 the Head Agreement Details, the Approved Agent is not an agent of the Contractor for the purpose of providing Sales Reports or paying any applicable Management Fee, that may arise from a Customer Contract that is entered into by the Approved Agent.
- 6.4** Prior to an Approved Agent entering into a Customer Contract, the Approved Agent must execute a Deed Poll in substantially in the form of Annexure 4 – Deed Poll – Approved Agent, that includes provisions:
- (a) confirming that the Approved Agent is the lawful agent of the Contractor for the purpose of supplying the Products and/or Services under the Customer Contract; and
  - (b) that require the Approved Agent to pay any applicable Management Fee and provide the Sales Reports in respect of the Customer Contract, where the Parties have agreed in Item 13 of the Head Agreement Details that the Approved Agent is responsible for the payment of the Management Fee and the provision of the Sales Reports.

## 7. General Warranties

### CONTRACTOR WARRANTIES

- 7.1** The Contractor warrants to the Contract Authority that:
- (a) as at the date this Head Agreement is signed, the Contractor is properly constituted, and has the right and authority to enter into this Head Agreement;
  - (b) as at the Commencement Date of every Customer Contract that is entered into under this Head Agreement, the Contractor is properly constituted and has the right and authority to enter into the Customer Contract;
  - (c) as at the date this Head Agreement is signed, to the best of its knowledge and belief there is no Conflict of Interest of the Contractor or its Personnel, and during the Term the Contractor will use its reasonable efforts not to permit a Conflict of Interest of the Contractor or its Personnel to arise in the performance of its obligations;
  - (d) the information provided to the Contract Authority in terms of the structure, viability, reliability, insurance cover, capacity, experience and expertise of the Contractor and its Personnel, was to the best of the Contractor's knowledge and belief correct when it was provided to the Contract Authority;
  - (e) as at the date this Head Agreement is signed, to the best of its knowledge and belief the Contractor has all the necessary licences, approvals and consents necessary to perform its obligations under this Head Agreement; and
  - (f) it will comply with the codes, policies, guidelines and standards and any other laws stated in Item 8 of the Head Agreement Details.

## MUTUAL WARRANTIES

**7.2** Each Party warrants to the other Party that during the Term it will:

- (a) act reasonably and in good faith with respect to matters that arise out of, or in connection with, this Head Agreement;
- (b) work together in a collaborative manner;
- (c) to the extent that is reasonably possible, perform its obligations so as to avoid hindering the performance of the other Party;
- (d) perform its obligations under this Head Agreement in compliance with:
  - (i) all Statutory Requirements;
  - (ii) the Worst Forms of Child Labour Convention, 1999 (ILO Convention 182) ensuring that the Product and/or Services have not been produced using "worst forms of child labour" as defined.

## 8. Confidentiality

**8.1** Except to the extent necessary to comply with any Statutory Requirement or government policy relating to the public disclosure of Confidential Information, neither Party will make public, disclose or use any Confidential Information of the other Party except in accordance with this Head Agreement, unless the other Party gives its prior written consent.

**8.2** Each Party may disclose the Confidential Information of the other Party:

- (a) to the Customer where the disclosure is essential to the performance of the Customer Contract or to an Eligible Customer where the disclosure is required for the purposes of the formation of the relevant Customer Contract;
- (b) to its Personnel where the disclosure is essential to enable them to carry out their duties in connection with this Head Agreement or a Customer Contract;
- (c) to its Personnel, Related Companies and their directors, officers, employee, agents, contractors, lawyers, accountants, insurers, financiers and other professional advisers where the disclosure is in connection with advising on, reporting on, or facilitating the Party's performance under, this Head Agreement or a Customer Contract; or
- (d) if the receiving Party is required to disclose by law, order of a court or tribunal of competent jurisdiction or the listing rules of an applicable securities exchange.

**8.3** Each Party must ensure that any Confidential Information of the other Party is used solely for the purposes permitted under clauses 8.1 and 8.2.

## 9. Privacy

**9.1** The Contractor must:

- (a) use, access, retain or disclose Personal Information obtained in connection with this Head Agreement only for the purpose for which the Personal Information was acquired;
- (b) not do any act or engage in any practice that would breach an IPP, or which if done or engaged in by the Contract Authority, would be a breach of that IPP;

- (c) comply with, carry out and discharge the obligations contained in the IPPs as if it were the Contract Authority carrying out and discharging those obligations;
- (d) notify the Contract Authority immediately upon becoming aware of a breach or possible breach of any of the obligations in this clause 9.1, whether by the Contractor, its Approved Agents or their Personnel;
- (e) notify any individual that makes a complaint to the Contractor regarding the Contractor's acts or practices in relation to such individual's Personal Information, that the complaint may be investigated by the Privacy Commissioner;
- (f) comply with all reasonable directions of the Contract Authority in relation to the care and protection of Personal Information held in connection with this Head Agreement and take all reasonable measures to ensure that such information is protected against loss, unauthorised access or use, modification or disclosure and other misuse;
- (g) ensure that any of the Contractor's Personnel who are required to deal with the Personal Information for the purposes of this Head Agreement are made aware of the obligations of the Contractor under this clause 9.1; and
- (h) ensure that any agreement with any Approved Agent or Subcontractor who may be fulfilling a requirement in relation to this Head Agreement which includes the handling of Personal Information, contains the same or equivalent obligations to this clause 9.1 which are enforceable by the Contractor against the Approved Agent or the Subcontractor, as applicable.

## 10. Insurance

- 10.1** The Contractor must hold and maintain, or be an insured under, one or more insurance policies, that provide the following cover:
- (a) public liability insurance with an indemnity of at least \$10,000,000 in respect of each claim for the period of cover;
  - (b) product liability insurance with an indemnity of at least \$10,000,000 for the total aggregate liability for all claims for the period of cover; and
  - (c) workers' compensation insurance in accordance with applicable legislation for all the Contractor's employees.
- 10.2** During the Term the Contract Authority may on reasonable grounds request that the Contractor increase the amount of cover under any of the policies of insurance stated in clauses 10.1(a), 10.1(b) or 10.4. If the Contractor provides the Contract Authority with written notice that the Contractor will not increase its insurance cover then the Contractor acknowledges and agrees that Eligible Customers may not enter into any further Customer Contracts with the Contractor under this Head Agreement and/or the Contract Authority may exercise its rights under clause 19.2 to terminate this Head Agreement. For the avoidance of doubt, the Contractor is not in breach of this Head Agreement if it does not agree to increase its insurance cover following a request under this clause 10.2.
- 10.3** The Contractor must maintain the coverage required under clause 10.1 during the Term and during any Contract Period under any Customer Contract entered into under this Head Agreement.
- 10.4** Where Annexure 3 includes Services, the Contractor must also hold and maintain, or be an insured under, one or more insurance policies that include professional indemnity or errors and omissions insurance that provide indemnity cover of at least \$1,000,000 for the total aggregate liability for all claims for the period of cover. The Contractor must maintain the coverage required under this clause 10.4 from the first day of any Contract Period under any

Customer Contract entered into under this Head Agreement until the date that is 4 years from the last day of any Contract Period under any Customer Contract entered into under this Head Agreement.

**10.5** Where the Contract Authority requires that:

- (a) the Contractor has the benefit of limits of cover that exceed the limits of cover required under clauses 10.1(a), 10.1(b) or 10.4; or
- (b) the Contractor has the benefit of additional types of insurance,

these additional requirements must be agreed and stated in Item 7 of the Head Agreement Details. The Contractor must maintain the additional coverage required under this clause 10.5 from the first day of any Contract Period under any Customer Contract entered into under this Head Agreement. The Contractor must retain the benefit of any additional limits of cover until the last day that the underlying insurance cover is required to be held.

**10.6** The insurance policies in clauses 10.1(a), 10.1(b) and 10.4 and any increased limits of cover agreed under clause 10.5, shall include cover for the Contractor's liability for the acts and omissions of the Contractor's subcontractors to the same extent as if they were the acts and omissions of the Contractor.

**10.7** All policies of insurance must be entered into with an insurer which has a rating of A- or better by AM Best or an equivalent rating organisation at the date when cover is commenced, or for workers' compensation insurance the insurer (including any self-insurance) must be authorised by law.

**10.8** The Contractor must:

- (a) within 30 days of the start of the Term; and
- (b) within 30 days of a request in writing from the Contract Authority,

provide the Contract Authority with a certificate of currency issued by its insurer or insurance broker (or other form of evidence acceptable to the Contract Authority) confirming that all the insurance policies required by this Head Agreement are current and that the insurance has the required limits of cover. Where the Contractor is insured under a Related Company's insurance policy, the certificate of currency must also show that the insurance policy includes the Contractor as an insured.

**10.9** It is acknowledged by the Parties that a Customer may require additional insurances and/or limits of cover in respect of a particular Customer Contract. If any such requirement is agreed by the Customer and the Contractor, it will be stated in the relevant Order Document.

**10.10** Where the Contractor does not wish to hold and maintain, or be an insured under, insurance required by clauses 10.1 to 10.7, or does not wish to enter into one or more of those insurance policies with an insurer of the type required by clause 10.7, the Contractor may make application to the Contract Authority to be exempted from the provisions of clauses 10.1 to 10.8. Such application must be supported by such documentation as may be required by the Contract Authority, (including the Contractor's financial records (limited to publicly available financial records where a Contractor or any of its Related Companies is publicly traded)). The Contract Authority, may accept, conditionally accept or reject the Contractor's application. The Contract Authority must provide the Contractor with written notice within 30 days of receipt of the Contractor's application of the Contract Authority's determination under this clause 10.10, and in absence of receipt of such written notice, the Contractor's application is deemed accepted by the Contract Authority.

**10.11** The effecting of insurance does not limit or expand the liabilities or obligations of the Contractor under the other provisions of this Head Agreement.

- 10.12** The Contractor must promptly provide the Contract Authority with Notice in Writing of:
- (a) any payment by way of indemnity by an insured under any insurance policy required by this Head Agreement where such payment amounts to more than 50% of the total aggregate cover of the insurance cover for the period of cover ("**Relevant Payment**"); and
  - (b) any event that may give rise to a claim under a policy of insurance required by this Head Agreement which, if the claim is accepted by the insurer, is likely to give rise to a Relevant Payment being made.

## 11. Guarantees

### PERFORMANCE GUARANTEES

- 11.1** Where it is agreed in the Head Agreement Details, the Contractor must arrange for a guarantor approved in writing by the Contract Authority to enter into an agreement with the Contract Authority substantially in the form of the agreement set out in Annexure 5, or such other document reasonably acceptable to the Contract Authority. Where the guarantor is not domiciled in Australia the Contract Authority may not refuse to accept an alternative form of guarantee solely on the basis that the jurisdiction and law of the guarantee is the jurisdiction and law of the country of the guarantor. This Performance Guarantee must be provided to the Contract Authority within 30 days of the date that this Head Agreement is signed by both Parties.
- 11.2** Any Performance Guarantee provided under clause 11.1 will apply automatically to all Customer Contracts signed by Customers (other than Eligible non-Government Bodies) that are entered into under this Head Agreement.
- 11.3** During the Term the Contract Authority may on reasonable grounds request that the Contractor arrange for a guarantor approved in writing by the Contract Authority to enter into an agreement with the Contract Authority substantially in the form of the agreement set out in Annexure 5, or such other document reasonably acceptable to the Contract Authority. Where the guarantor is not domiciled in Australia the Contract Authority may not refuse to accept an alternative form of guarantee solely on the basis that the jurisdiction and law of the guarantee is the jurisdiction and law of the country of the guarantor. The Contractor must notify the Contract Authority in writing within 30 days of receipt of the Contract Authority's request as to whether the Contractor is willing to provide such a Performance Guarantee.
- 11.4** If the Contractor provides the Contractor Authority with written notice that the Contractor will provide the Performance Guarantee requested under clause 11.3 then the Contractor must arrange for a guarantor approved in writing by the Contract Authority to enter into an agreement with the Contract Authority substantially in the form of the agreement set out in Annexure 5, or such other document reasonably acceptable to the Contract Authority. This Performance Guarantee must be provided to the Contract Authority within 30 days of the date when the Contractor provided written notice to the Contract Authority stating that a Performance Guarantee would be provided.
- 11.5** Any Performance Guarantee provided under clause 11.4 will apply automatically to all Customer Contracts signed with Customers (other than Eligible non-Government Bodies) after the date that the Performance Guarantee was provided to the Contract Authority.
- 11.6** If the Contractor provides the Contractor Authority with written notice that the Contractor will not provide the Performance Guarantee requested under clause 11.3 then the Contractor acknowledges and agrees that Eligible Customers may not enter into any further Customer Contracts with the Contractor under this Head Agreement and/or the Contract Authority may exercise its rights under clause 19.2 to terminate this Head Agreement. For the avoidance of doubt, the Contractor is not in breach of this Head Agreement if it does not provide agree to provide a Performance Guarantee following a request under clause 11.3.

- 11.7** If the Contractor has provided a Performance Guarantee under clauses 11.1 or 11.4 and an Eligible non-Government Body wishes to enter into a Customer Contract under the Head Agreement, the Eligible non-Government Body may require the Contractor to provide a Performance Guarantee in favour of the Eligible non-Government Body in respect of that Customer Contract. This Performance Guarantee must be provided from the same guarantor and on the same terms and conditions as the Performance Guarantee provided in favour of the Contract Authority under clause 11.1 or 11.4 (as applicable), unless otherwise agreed by the Contractor and the Eligible non-Government Body. This Performance Guarantee must be provided to the Eligible non-Government Body within 30 days of the date that the Customer Contract is signed by both Parties.
- 11.8** Any Performance Guarantee that is issued in favour of a Customer that is a NSW Government Body can only be enforced by the Contract Authority acting on behalf of the Customer.

## 12. Liability

- 12.1** To the extent permitted by law, and subject to clauses 12.2 to 12.5, the Contractor's liability to the Contract Authority in contract (including under an indemnity), tort (including negligence), breach of statutory duty or otherwise in respect of any loss, damage or expense shall not exceed the greater of:
- (a) \$250,000; or
  - (b) 1.5 times the total of the Management Fees paid, or unpaid but due and outstanding, under this Head Agreement up to the date the claim first arose,
- in aggregate for any and all claims that arise out of, or in connection with, this Head Agreement.
- 12.2** The Contractor has no financial cap on its legal liability where that liability arises from:
- (a) bodily injury (including sickness and death) including where such liability is covered by the indemnity in clause 13.1;
  - (b) loss of, or damage to, tangible property including where such liability is covered by the indemnity in clause 13.1;
  - (c) infringement of a third party's intellectual property rights; or
  - (d) breach of the Contractor's obligation of confidence in clause 8.
- 12.3** Notwithstanding any other clause in this Head Agreement, neither Party is liable to the other Party for any Consequential Loss (including under an indemnity).
- 12.4** The liability of a Party (**Party A**) for any damage incurred by another Party (**Party B**) will be reduced proportionately to the extent that:
- (a) any malicious or negligent act or omission of Party B or its Personnel; or
  - (b) any failure by Party B or its Personnel to comply with its obligations and responsibilities under this Head Agreement,
- contributed to the damage, regardless of whether legal proceedings are brought by Party A for negligence or breach of contract.
- 12.5** The Parties must use their best efforts to mitigate any loss arising out of or in connection with this Head Agreement.

## 13. Indemnity

### INDEMNITY FOR CONTRACT AUTHORITY

- 13.1** The Contractor must indemnify and hold harmless the Contract Authority, its officers and employees against any claim, loss or expense (including a claim, loss or expense arising out of bodily injury (including sickness and death), or loss of, or damage to, tangible property) which any of them pays, suffers, incurs or is liable for (including legal costs on a solicitor and client basis), to the extent that the claim, loss or expense was caused by any malicious or negligent act or omission of the Contractor, its directors, officers, employees, agents and subcontractors in the performance of the Contractor's obligations to the Contract Authority under the Head Agreement (and not any obligations owed to a Customer that may arise under a Customer Contract).
- 13.2** Where a claim is made against the Contract Authority, its officers or employees by a third party under clause 13.1 then the Contract Authority must promptly, and in any event within 5 Business Days of being notified of a claim for which it is seeking an indemnity under clause 13.1, provide the Contractor with Notice in Writing which includes the details of the claim. The Contract Authority must (unless there is any government policy that prohibits the Contractor from handling the process for settling the claim) permit the Contractor, at the Contractor's expense, to handle the process for the settlement of such claim and, as permitted by law, to control and direct any litigation that may follow a claim under clause 13.1 (including selecting solicitors and counsel), subject to the Contractor agreeing to comply at all times with the government policy relevant to the conduct of the litigation.
- 13.3** If the Contract Authority does not permit the Contractor to handle the process for the settlement of such claim and, as permitted by law, to control and direct any litigation that may follow a claim under clause 13.1 then the Contract Authority must promptly and fully defend the claim (whilst complying with government policy), and not settle the claim without the Contractor's prior written consent, such consent not to be unreasonably withheld. The Contract Authority must keep the Contractor fully informed throughout the period of the claim, including providing copies of all relevant documents.
- 13.4** The Contract Authority must, upon the Contractor confirming its obligations under the indemnity in clause 13.1 provide the Contractor with reasonable assistance in defending, settling or otherwise conducting the negotiations or litigation, at the Contractor's expense, including providing all relevant documents, permitting its Personnel to testify for the Contractor if requested by the Contractor and using any defence that might be available to the person being indemnified.
- 13.5** Notwithstanding clause 13.1, the Contractor shall not be required to indemnify the Contract Authority, its officers and employees if a Customer institutes legal proceedings against the Contract Authority, its officers and employees for a breach of the Contract Authority's obligations to the Customer.
- 13.6** Subject to clause 12.2, the Contractor's liability in respect of the indemnity provided under clause 13.1 is subject to clauses 12.1 to 12.5.

## 14. Conflict of Interest

- 14.1** The Contractor must:
- (a) provide the Contract Authority with Notice in Writing upon becoming aware of the existence or possibility of a Conflict of Interest; and
  - (b) comply with any direction given by Contract Authority in relation to managing that Conflict of Interest.

## 15. Performance Management

### REVIEW

- 15.1** The Contract Authority may from time to time during the Term conduct performance reviews to evaluate, monitor or review the Contractor's performance and compliance with this Head Agreement or any Customer Contracts. This review may include consideration of Contractor Information and/or Performance Criteria.
- 15.2** The Contract Authority will give the Contractor the opportunity to participate in any performance reviews and to seek a review of each written performance report compiled in response to any performance review by a senior officer of the Contract Authority. A written performance report will note any objections by the Contractor made when participating in the performance review as provided for in clause 15.1. The Contract Authority regards the provision of any performance reports as being subject to qualified privilege within the meaning of Section 30 of the Defamation Act 2005 (NSW).

### EXCHANGE OF INFORMATION

- 15.3** The Contractor authorises the Contract Authority to make available any Contractor Information to any other Agency where the Contract Authority has reasonable grounds for believing that the Agency has a legitimate interest in receiving that Contractor Information.
- 15.4** The Parties may agree that certain Contractor Information may not be provided to certain Agencies. The details of that agreement must be stated in Item 5 of the Head Agreement Details.

## 16. Government Policy

### POLICY

- 16.1** If the Contractor is required to provide a competitive quote to enter into a Customer Contract under this Head Agreement it must comply with the NSW Government policy known as "Local Jobs First Plan". Depending on the threshold value of the procurement to be made via competitive quotes, the Contractor acknowledges that this policy may require the tenderer to submit the value of ANZ-SME (Australia New Zealand Small to Medium Enterprise) content of the goods and services offered and to respond to SME participation questions or complete a SME Participation Plan (**SMEPP**) (a plan submitted by tenderers in response to a tender. A SMEPP describes the nature of, or proposed nature of, the tenderer's engagement with ANZ-SMEs. An important aspect of SMEPPs is SME capability development).
- 16.2** The Contractor acknowledges that, where SME participation questions are required to be addressed or a SMEPP is required in competitive quotes, reliance will be placed on the responses to the SME participation questions or the SMEPP in the evaluation of the quotation submitted by the Contractor and by the Customer in entering into any agreement with the Contractor.
- 16.3** The Contractor agrees to comply with the requirements and commitments provided for in any future responses to the SME participation questions or any future SMEPP tendered by the Contractor in relation to this Head Agreement and to take all steps reasonably required to enable the Contract Authority to monitor compliance by the Contractor with any future responses to the SME participation questions or any future SMEPP in relation to this Head Agreement.

**16.4** The Parties agree that:

- (a) the Contract Authority may establish mechanisms to monitor compliance by the Contractor with the requirements and its commitments under any future responses to the SME participation questions or any future SMEPP in relation to this Head Agreement;
- (b) non-compliance by the Contractor of any future commitments in the responses to the SME participation questions or any future SMEPP commitments will constitute a breach of contract and entitle the Contract Authority to terminate this Head Agreement for cause;
- (c) the Contract Authority may take into consideration non-compliance by the Contractor with any future responses to the SME participation questions or future tendered SMEPP in relation to this Head Agreement when evaluating tenders submitted by the Contractor in the future for other agreements.

## 17. Contract Administration

### REPRESENTATIVES

- 17.1** Each Party must nominate an employee who is its Authorised Representative in Item 2(b) or 3(b) of the Head Agreement Details.
- 17.2** Each Party warrants to the other Party that its Authorised Representative has the authority to provide such consents and approvals as are required for the purposes of this Head Agreement and to issue instructions and directions as necessary for the purposes of this Head Agreement, on behalf of that Party.

### NOTICE OF CHANGE OF CONTROL

- 17.3** The Contractor must promptly provide the Contract Authority with Notice in Writing of any Change in Control, other than a Change of Control that is a solvent re-organisation with shares being transferred between Related Companies.

### NOTICES

- 17.4** Any Notice in Writing must be sent to the receiving Party's Service Address addressed to the Party's nominee for receipt of notices, or if no such position is nominated, it must be addressed to the Authorised Representative. A Notice in Writing must not be sent by email.
- 17.5** Any Notice in Writing is regarded as given and received:
- (a) if sent by mail; 3 Business Days after it is posted; and
  - (b) if sent by fax; at 9.00 am on the Business Day following the day when the addressee actually receives it in full and in legible form.

## 18. Dispute Resolution

- 18.1** The Parties agree to resolve any conflicts or issues between them that arise out of, or in connection with, this Head Agreement in accordance with this clause 18.
- 18.2** If a dispute arises out of, or in connection with this Head Agreement, then, subject to clause 18.13, the aggrieved Party must submit a Notice in Writing to the other Party of the issue, and if the issue relates to an allegation of breach of contract or any damages the notice must include details of the breach, including the relevant clauses of the agreement which are alleged to have been breached, and (if applicable) the damages claimed and how the damages are calculated (the “**Issue Notice**”). The Issue Notice must be submitted within a reasonable time of the Party becoming aware of the issue.
- 18.3** If a Party submits an Issue Notice under clause 18.2, each Party must nominate in writing, within 5 Business Days, a senior executive who will attempt to resolve the dispute. The nominated senior executives will promptly meet at a time and place that is mutually convenient with the objective of resolving the issue. The nominated senior executives may invite other personnel to attend the mutually convenient conference subject to a list of additional invited personnel being provided to the other nominated senior executive at least 24 hours prior to the conference.
- 18.4** If the Parties are able to agree upon a resolution to the dispute, the terms of the agreement are to be documented and signed by both nominated senior executives. Such an agreement will be binding on both Parties.
- 18.5** Each Party will bear its own costs under clauses 18.2 to 18.4.
- 18.6** If the dispute is not resolved within 15 Business Days of the date that the Issue Notice was received by the other Party, either Party may then refer the dispute to expert determination in accordance with clauses 18.7 to 18.8.
- 18.7** The Party that requires that the dispute is resolved by expert determination must submit a Notice in Writing to the other Party specifying the issue to be decided by expert determination, and if the issue relates to an allegation of breach of contract or any damages the notice must include details of the breach, including the relevant clauses of the agreement which are alleged to have been breached, and (if applicable) the damages claimed and how the damages are calculated (“the **Referral Notice**”).
- 18.8** If the dispute is to be resolved by expert determination the Parties will be bound by the provisions and procedures contained in Annexure 7 – Expert Determination Procedure, unless agreed otherwise in writing.
- 18.9** If a Referral Notice has not been submitted within 20 Business Days of becoming entitled under clause 18.6 then the issue is barred from expert determination or any other action or proceedings, subject to clause 18.13. The Contract Authority and the Contractor may, in writing, agree to extend this 20 Business Days period for the purposes of continuing to negotiate a resolution of a particular dispute for up to another 20 Business Days.
- 18.10** Notwithstanding the existence of a dispute and provided the Head Agreement has not been terminated, each Party must continue to perform its obligations under this Head Agreement during the period of the attempt to resolve this issue under clauses 18.2 to 18.8.
- 18.11** Unless the Parties otherwise agree in writing, clauses 18.7 to 18.8 do not apply to disputes the for which either Party’s claim exceeds \$100,000 or such other amount stated in Item 10 of the Head Agreement Details. In this case if the dispute is not resolved within 15 Business Days of the date that the Issue Notice was received by the other Party, either Party may commence any other form of resolution, including court proceedings.

- 18.12** The amount specified in Item 10 of the Head Agreement Details shall include the total amount being claimed by the Party, but excludes any set offs, interest and legal costs.
- 18.13** The provisions of clauses 18.2 to 18.12 do not apply where a party seeks urgent interlocutory relief or where a Party has terminated this Head Agreement under clause 19.1.

## 19. Termination

### TERMINATION FOR CAUSE BY THE CONTRACT AUTHORITY

- 19.1** The Contract Authority may terminate this Head Agreement immediately by providing the Contractor Notice in Writing if:
- (a) the Contractor suffers an Insolvency Event; or
  - (b) the Contractor has committed a breach of this Head Agreement (including a breach of clause 3 or 16.3) and the Contractor has not either:
    - (i) rectified that breach within 10 Business Days (or such longer period as stated in the Notice in Writing) of receipt of a Notice in Writing specifying the details of the breach; or
    - (ii) proposed steps that are reasonably acceptable to the Contract Authority that it will take to remedy the breach and a timeframe within which the Contractor will take them which are reasonably acceptable to the Contract Authority.

### TERMINATION FOR CONVENIENCE

- 19.2** Either Party may terminate this Head Agreement for convenience, without liability to the other in respect of such termination, by providing the other Party at least 60 days Notice in Writing.

### CONSEQUENCES OF TERMINATION

- 19.3** Termination or expiry of this Head Agreement for any reason does not affect any Customer Contract.
- 19.4** Termination of this Head Agreement is without prejudice to any other right of action or remedy that has accrued or may accrue to either Party.

## 20. General

### VARIATION

- 20.1** Except as stated otherwise in this Head Agreement, a variation to this Head Agreement shall not be valid unless effected by a deed properly executed by the Contract Authority and the Contractor.

### ASSIGNMENT AND NOVATION

- 20.2** The Contractor must not assign in whole or in part or novate this Head Agreement or any Customer Contract that is made under this Head Agreement without obtaining the prior written consent of the Contract Authority, (and for each Customer Contract, the relevant Customer), which consent may be withheld at the Contract Authority's discretion.

**20.3** The Contractor acknowledges that the Contract Authority may conduct financial and other inquiries or checks on the entity proposing to take over this Head Agreement before determining whether or not to give consent to the assignment or novation.

**20.4** The Contract Authority at its own cost, may assign or novate, this Head Agreement, where by operation of statute the Contract Authority is reconstituted into a new legal entity, to that new legal entity.

#### WAIVER

**20.5** A waiver in respect of a breach of a provision of this Head Agreement by a Party shall not be taken to be a waiver in respect of any other breach. The failure of either Party to enforce any provision of this Head Agreement will not be interpreted as a waiver of that provision.

#### MATERIAL ADVERSE EVENTS AND INSOLVENCY EVENTS

**20.6** The Contractor must provide the Contract Authority with Notice in Writing immediately upon becoming aware of the existence or possibility of a Material Adverse Event.

**20.7** If the Contractor suffers an Insolvency Event it must immediately provide Notice in Writing to the Contract Authority of any:

- (a) action taken in relation to the Contractor's insolvency in so far as it affects this Head Agreement or any Customer Contract;
- (b) existing Customer Contracts that have been entered into under this Head Agreement; and
- (c) Performance Guarantees or Financial Securities that are in force.

**20.8** If the Contractor suffers an Insolvency Event it must immediately provide Notice in Writing of that fact to each Customer with an existing Customer Contract under this Head Agreement, such Notice in Writing to be served on the Service Address of the relevant Customer.

#### SEVERABILITY

**20.9** If any part of this Head Agreement is void or voidable, then that part is severed from this Head Agreement without affecting the continued operation of the remainder of this Head Agreement.

#### ENTIRE AGREEMENT

**20.10** This Head Agreement constitutes the entire understanding and agreement between the Contractor and the Contract Authority in relation to its subject matter. Any prior representation, arrangement, agreement or undertaking given or received by either Party is superseded and shall have no effect.

**20.11** To the extent permitted by law:

- (a) the warranties stated in this Head Agreement are the sole warranties provided by the Parties; and
- (b) neither Party makes any other warranty, including any implied warranties of merchantability and of fitness for a particular purpose.

**RIGHTS ARE CUMULATIVE**

**20.12** The rights and remedies provided under this Head Agreement are cumulative and not exclusive of any rights or remedies provided by law or any other right or remedy.

**SURVIVAL**

**20.13** The provisions of clauses 2.2, 2.3, 3, 5, 8, 9, 10.4, 10.12, 11, 12, 13, 18, 19.3, 19.4, 20.13, 20.15 and any other clause which naturally should survive termination or expiry of this Head Agreement shall survive termination or expiry of this Head Agreement.

**COUNTERPARTS**

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

**APPLICABLE LAW**

**20.15** The laws of the New South Wales govern this Head Agreement and the Parties submit to the exclusive jurisdiction of the courts of New South Wales.

**EXECUTED BY THE PARTIES AS A DEED AS AT THE DATE STATED BELOW**

Signed, sealed and delivered by [insert name of Contract Authority]

[Signature line for Contract Authority]

By [insert name of Contract Authority Representative] but not so as to incur personal liability

[Signature line for Contract Authority Representative]

In the presence of: [insert name of witness]

[Signature line for Witness]

[Signature line for Contract Authority Representative]

Signature of Contract Authority Representative

[Signature line for Witness]

Signature of Witness

[Print name line for Contract Authority Representative]

Print name

[Print name line for Witness]

Print name

[Date line for Contract Authority Representative]

Date

[Date line for Witness]

Date

Signed, sealed and delivered by [insert Contractor's name and ACN/ABN]

[Redacted signature line]

in accordance with s127 of the *Corporations Act 2001* (Cth) by:

[Redacted signature line]

Signature Director

[Redacted name line]

Print name

[Redacted date line]

Date

[Redacted signature line]

Signature of Director/Secretary

[Redacted name line]

Print name

[Redacted date line]

Date

## Annexure 1: Head Agreement Details

<b>Item 1</b>	<b>Head Agreement Number</b>	<input type="text"/>
<b>Item 2</b>		
<b>(a)</b>	<b>Contract Authority</b>	
	<i>Name:</i>	<input type="text"/>
	<i>Address:</i>	<input type="text"/>
<b>(b)</b>	<b>Authorised Representative</b> (Contract Authority's authorised representative. See clause 17.1))	
	Name	<input type="text"/>
	Position:	<input type="text"/>
	Address:	<input type="text"/>
	Telephone:	<input type="text"/>
	Facsimile:	<input type="text"/>
<b>Item 3</b>		
<b>(a)</b>	<b>Contractor</b>	
	Name	<input type="text"/>
	Address:	<input type="text"/>
	ABN/ACN:	<input type="text"/>
<b>(b)</b>	<b>Authorised Representative</b> (Contractor's authorised representative (clause 17.1))	
	Name:	<input type="text"/>
	Position:	<input type="text"/>
	Address:	<input type="text"/>
	Telephone:	<input type="text"/>
	Facsimile:	<input type="text"/>

**Item 4A**

**Modules agreed between the Parties**

*Indicate, by marking with an X, the modules that apply*

Module 1 – Hardware Acquisition and Installation	<input type="checkbox"/>	Module 9 – Data Migration	<input type="checkbox"/>
Module 2 – Hardware Maintenance and Support Services	<input type="checkbox"/>	Module 10 – Software as a Service and Platform as a Service	<input type="checkbox"/>
Module 3 – Licensed Software	<input type="checkbox"/>	Module 11 – Infrastructure as a Service	<input type="checkbox"/>
Module 4 – Development Services	<input type="checkbox"/>	Module 12 – Managed Services	<input type="checkbox"/>
Module 5 – Software Support Services	<input type="checkbox"/>	Module 13 – Systems Integration	<input type="checkbox"/>
Module 6 – Contractor Services	<input type="checkbox"/>	Module 14 –Hosting Services	<input type="checkbox"/>
Module 7 – Professional Services	<input type="checkbox"/>	Module 15 - Telecommunications Services	<input type="checkbox"/>
Module 8 – Training Services	<input type="checkbox"/>	Module 16 – Satellite Services	<input type="checkbox"/>

**Item 4B**

**Schedules agreed between the Parties in addition to Schedule 1**

*Indicate, by marking with an X, the Schedules that apply*

Schedule 1 – General Order Form	Applies	Schedule 7 – Statutory Declaration - Subcontractor	<input type="checkbox"/>
Schedule 2 – Agreement Documents	<input type="checkbox"/>	Schedule 8 – Deed of Confidentiality	<input type="checkbox"/>
Schedule 3 – Service Level Agreement	<input type="checkbox"/>	Schedule 9 – Performance Guarantee	<input type="checkbox"/>
Schedule 4 – Variation Procedures	<input type="checkbox"/>	Schedule 10 – Financial Security	<input type="checkbox"/>
Schedule 5 – Escrow Agreement	<input type="checkbox"/>	Schedule 11 – Dispute Resolution Procedures	<input type="checkbox"/>
Schedule 6 – Deed Poll – Approved Agents	<input type="checkbox"/>	Schedule 12 – Project Implementation and Payment Plan	<input type="checkbox"/>

**Item 5**

**Exchange of Contractor Information between Government Agencies (clause 15.4)**

Contractor Information exclusions

**Item 6**

**Term: (clause 2.18)**

(a) Commencement Date of the Term:

(b) Last day of the Term:

(c) Period of extended Term (if any) (clause 2.19):

**Item 7**

**Insurance Policy Amount (clause 10)**

(a) Public Liability Insurance level required (if different to clause 10.1(a)): \$AUS M:

- (b) Product Liability Insurance Limit level required (if different to clause **10.1(b)**) \$AUS M:
- (c) Where Annexure 3 includes Services Professional Indemnity Insurance level required (if different to clause 10.4) \$AUS
- If the Contractor is a member of occupational association with an approved scheme under The Professional Standards Act (NSW) 1994 or similar State or Territory legislation, then the insurance amount may be limited by the Contract Authority, accordingly.*
- (d) (If requested in clause 10) Insert other insurances required:
- Item 8** Codes, policies, guidelines and standards and other laws (**clause 7.1(c)**)
- Item 9** **Management Fee (clause 3)**
- (a) Is the Management Fee payable? Yes  No
- (b) Management Fee Percentage (**clause 3.2**)
- (c) Management Fee payable to (**clause 3.9**) Specify the bank account details of the Contract Authority or specify the entity the cheque should be made payable to.
- (d) Address Management Fee forwarded to (**clause 3.9**)
- (e) Rate of interest (**clauses 3.5 and 3.6**)
- Item 10** **Expert Determination Amount (clause 18.11)**
- 
- Item 11** **Performance Guarantee (clause 11.1 to 11.8 and Annexure 5)**
- Specify here if Performance Guarantee is required:
- Item 12** **List of Approved Agents (clause 6.1)**
- Item 13** Liability to pay Management Fee and provide Sales Reports (**clause 3.7 and 6.3**) [Insert "Approved Agent" if the Parties have agreed that the Approved Agent, and not the Contractor, is responsible for the payment of the Management Fee and providing Sales Reports to the Contract Authority].

## Annexure 2: Head Agreement Documents

Itemise all documentation (including any supplemental terms and conditions agreed to by the Contract Authority, accepted tenders, offers or quotes from the Contractor, and any letter of acceptance or award issued by the Contract Authority) between the Contract Authority and the Contractor. All such documentation must be itemised in this Annexure 2 and listed below in descending date order.

Document	Date of Document

## Annexure 3: Product and Service List

Include details of Products and Services that are available under the Head Agreement, including:

- (a) *the maximum amounts (GST exclusive, GST component and GST inclusive amounts) in Australian dollars;*
- (b) *specify whether any price variation mechanism is to apply (clause 2.12);*
- (c) *the description of the Product or Service.*

Product or Service	Description	Price (excluding GST)	GST	Price (including GST)	Price Variation Mechanism to apply Y/N

Price variation mechanism	
---------------------------	--

## Annexure 4: Deed Poll – Approved Agents

This Deed Poll is made on *[insert date]* by *[insert full legal name of Approved Agent and ACN/ABN]* (**Approved Agent**) in favour of *[insert full legal name of Contract Authority]* (**Contract Authority**)

### 1. Definitions

- 1.1 Contractor** means *[insert full legal name of the Contractor]*.
- 1.2 Customer** means *[insert full legal name of the Customer]*.
- 1.3 Customer Contract** means the agreement dated *[insert date]* signed by the Customer and the Approved Agent as agent for the supply of the Products and/or Services under that agreement.
- 1.4 Head Agreement** means the agreement dated *[insert date]* signed by the Contract Authority and the Contractor under which the Approved Agent is authorised by the Contract Authority to be an Approved Agent, and to which this Deed Poll is Annexure 4.

#### By this Deed:

- The Approved Agent warrants to the Contract Authority that it is the lawful agent of the Contractor to provide the Products and/or Services under the Head Agreement.
- Where the Contractor and the Contract Authority have agreed in the Head Agreement that the Approved Agent is responsible for the payment of the Management Fee and provide Sales Reports (as defined in the Head Agreement) to the Contract Authority in place of the Contractor, the Approved Agent will meet the obligations in clause 3 (Management Fee) of the Head Agreement in respect of Customer Contracts that it enters into with any Eligible Customer to the same extent as if it were the Contractor.
- The Approved Agent agrees that the Contract Authority may conduct performance reviews of the Approved Agent and produce written reports in the same way as the Contract Authority is able to conduct performance reviews and produce written reports of the Contractor under clause 15 (Performance Management) of the Head Agreement.

Signed, sealed and delivered by *[insert full legal name of Approved Agent and ACN/ABN]*

in accordance with s127 of the *Corporations Act 2001* (Cth) by:

Signature Director

Print name

Date

Signature of Director/Secretary

Print name

Date

## Annexure 5: Performance Guarantee

Deed dated the  day of  20

Between [*insert full legal name of the 'Contract Authority'*] ('the Contract Authority')

And [*insert full legal name and any ACN/ABN of the Guarantor*] ('the Guarantor')

Purpose [*insert full legal name and ACN/ABN of the Contractor*] ("the Contractor") has agreed to offer to supply Products and Services to Eligible Customers (who are not Eligible non-Government Customers) under Customer Contacts that are entered into under the Head Agreement ("the Head Agreement").

The Contract Authority warrants to the Guarantor that it acts as the agent of each Eligible Customer (who is not Eligible non-Government Customer) under any Customer Contact(s) that may be entered into under the Head Agreement by that Eligible Customer for the purpose of entering into this Performance Guarantee.

By this Deed, the Guarantor agrees to provide the guarantees and indemnities stated below:

1. in respect of each Customer Contract for Products or Services that is entered into under the Head Agreement by Eligible Customers (who are not Eligible non-Government Customers);
2. to the relevant Eligible Customer (who is not Eligible non-Government Customer) that entered into the relevant Customer Contract.

The provisions of Part 3, Dictionary apply to this Performance Guarantee.

### What is agreed:

The Guarantor guarantees to the Customer the performance of the obligations undertaken by the Contractor under the Customer Contract on the following terms and conditions:

1. If the Contractor (unless relieved from the performance of the Customer Contract by the Customer or by statute or by a decision of a tribunal of competent jurisdiction) fails to execute and perform its undertakings under the Customer Contract, the Guarantor will, if required to do so by the Customer, complete or cause to be completed the undertakings contained in the Customer Contract.
2. Where the Guarantor consists of more than one legal person each of those persons agree to be bound jointly and severally by this Deed of Guarantee and the Contract Authority (acting as agent of the Customer), may enforce this Deed of Guarantee against all or any of the persons who constitute the Guarantor.

3. The Guarantor will not be discharged, released or excused from this Deed of Guarantee by an arrangement made between the Contractor and Customer with or without the consent of the Guarantor, or by any alteration, amendment or variation in the obligations assumed by the Contractor or by any forbearance whether as to payment, time, performance or otherwise.
4. The obligations of the Contractor will continue in force and effect until the completion of the undertakings of this Deed of Guarantee by the Guarantor.
5. The obligations and liabilities of the Guarantor under this Deed of Guarantee will not exceed:
  - (a) the obligations and liabilities of the Contractor under the Customer Contract; and
  - (b) \$ *[insert dollar amount]*.
6. Where the Contractor has failed to perform under the Customer Contract, the obligations of the Guarantor will continue even though the Contractor has been the subject of an Insolvency Event.
7. The rights and obligations under this Deed of Guarantee will continue until all obligations of the Contractor under the Customer Contract have been performed, observed and discharged.
8. A notice under this deed of Guarantee must be a Notice in Writing.
9. The address for services of Notices in Writing under this Deed of Guarantee for a party is, in the case of the:

**Guarantor**

Physical address

Postal address

Fax number

**Contractor**

Physical address

Postal address

Fax number

**Customer**

Physical address

Postal address

Fax number

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

10. A Notice in Writing is deemed to be received if:
  - (a) delivered by hand, when the party who sent the notice holds a receipt for the notice signed by a person employed at the physical address for service;
  - (b) sent by post from and to an address within Australia, after 3 Business Days;

- (c) sent by post from or to an address outside Australia, after 10 Business Days;
- (d) sent by facsimile, at the time which the facsimile machine to which it has been sent records that the communication has been transmitted satisfactorily (or, if such time is outside normal business hours, at 9.00 am the next Business Day).

11. The laws of the New South Wales govern the this Deed of Guarantee and the parties submit to the exclusive jurisdiction of the courts of New South Wales

### EXECUTED BY THE PARTIES AS A DEED AT THE DATE STATED BELOW

Signed, sealed and delivered by *[insert name of Contract Authority]* as agent of all Eligible Customers other than Eligible non-Government Customers.

By *[insert name of Contract Authority representative]*

In the presence of: *[insert name of witness not a party to this Deed]*



Signature of Contract Authority representative

Print Name

Date

Signature of Contract Authority's Witness

Print Name

Date

Signed, sealed and delivered by *[insert Contractor's name and ACN/ABN]*

in accordance with s127 of the *Corporations Act 2001 (Cth)* by:

Signature Director

Print name

Date

Signature of Director/Secretary

Print name

Date

## Annexure 6: Management Fee Audit Confidential Disclosure Agreement

**BETWEEN:** [insert name of Contractor] [insert ABN of Contractor] of [insert address] (**Contractor**)

**Contact Details:**

**Fax:**

**AND:** [insert full legal name of Auditor] [insert ABN of Auditor] of [insert address] (**Auditor**)

**Contact Details:**

**Fax:**

**IT IS AGREED THAT:**

### 1. Definitions and Interpretation

1.1 The provisions of Part 3, Dictionary apply to this Agreement.

### 2. Appointment

2.1 The Auditor has been appointed by the Contract Authority to conduct an audit under clause 3.15 of the Head Agreement.

### 3. Disclosure of Information

3.1 The Contractor will make available to the Auditor the information required by clause 3.15 of the Head Agreement. The Auditor acknowledges and agrees that all such information, any information that is received by the Auditor during its activities or any information that is derived from any of that information (**Disclosed Information**), is the confidential information of the Contractor.

### 4. Use of Confidential Information

4.1 The Auditor must use all Disclosed Information strictly for the purpose of compiling an audit report for the use of the Contract Authority in accordance with clause 3 of the Head Agreement.

4.2 The Auditor must not disclose the Disclosed Information to any person other than the Contract Authority, without the prior written consent of the Contractor, unless the Disclosed Information:

- (a) is or becomes a matter of public knowledge through no fault of the Auditor;
- (b) is required to be disclosed under operation of law.

- 4.3** The Auditor must destroy or return to the Contractor all Disclosed Information (other than a copy of the report that is provided to the Contract Authority) at the end of the audit, or on the Contractor's demand.

## 5. Proprietary Rights

- 5.1** The Contractor does not grant the Auditor any Intellectual Property Rights in any Disclosed Information, except a right to provide a copy of the report and any of the Contractor's comments to the Contract Authority.

## 6. Procedures

- 6.1** The Auditor must provide a draft copy of any report prior to providing that report to the Contract Authority to enable the Contractor to make comments upon the report. The Contractor must provide any comments to the Auditor within 20 Business Days of the date of receipt of the draft report.
- 6.2** The Auditor must:
- (a) create a revised copy of the draft report that takes in account any comments that the Contractor has made; or
  - (b) provide a copy of any comments that the Contractor has made to the Contract Authority at the same time as providing the report.
- 6.3** The Auditor must provide the Contractor with a copy of any information that it provides to the Contract Authority at the same time as it provides that information to the Contract Authority.
- 6.4** In conducting any audit, the Auditor must:
- (a) comply with the Contractor's responsible security and access requirements; and
  - (b) minimise the interference with the Contractor's normal business operations.

## 7. General

- 7.1** A variation to this Agreement shall not be valid unless effected by written agreement signed by the parties.
- 7.2** A waiver in respect of a breach of a provision of this Agreement by a party shall not be taken to be a waiver in respect of any other breach. The failure of either party to enforce any provision of this Agreement will not be interpreted as a waiver of that provision.
- 7.3** If any part of this Agreement is void or voidable, then that part is severed from this Agreement without affecting the continued operation of the remainder of this Agreement.
- 7.4** This Agreement constitutes the entire understanding and agreement between the Contractor and the Auditor in relation to its subject matter. Any prior representation, arrangement, agreement or undertaking given or received by either party is superseded and shall have no effect.
- 7.5** The rights and remedies provided under this Agreement are cumulative and not exclusive of any rights or remedies provided by law or any other right or remedy.
- 7.6** If there are a number of counterparts of this Agreement, the counterparts taken together constitute one and the same instrument.

**7.7** The laws of the New South Wales govern this Head Agreement and the parties submit to the exclusive jurisdiction of the courts of New South Wales.

**Signed as an agreement**

Signed for and on behalf of *[insert name of Auditor and ACN/ABN]*

[Redacted signature line]

[Redacted signature line]

Signature of Authorised Signatory

[Redacted signature line]

Print name

[Redacted signature line]

Date

Signed for and on behalf of *[insert Contractor's name and ACN/ABN]*

[Redacted signature line]

[Redacted signature line]

Signature of Authorised Signatory

[Redacted signature line]

Print name

[Redacted signature line]

Date

## Annexure 7: Expert Determination Procedure

### 1. Expert Determination

- 1.1** If a Referral Notice is submitted under clause 18.7 of the Head Agreement, the expert is to be agreed between the Parties. If they can not agree within 28 days of the Referral Notice, the expert is to be nominated on the application of either Party by the Chief Executive Officer, Australian Commercial Disputes Centre of NSW.
- 1.2** The expert nominated must be a person who is an experienced Australian legal practitioner, unless otherwise agreed. The expert must not be:
- (a) an employee of the Parties;
  - (b) a person who has been connected with this Head Agreement or has a conflict of interest, as the case maybe; or
  - (c) a person who the Parties have not been able to agree on.
- 1.3** The expert may appoint any person that the expert believes will be able to provide the specialists skills that are necessary to make a determination. The expert must consult with both Parties prior to appointing such person.
- 1.4** When the person to be the expert has been agreed or nominated, the Contract Authority, on behalf of both Parties, must engage the expert by letter of engagement (and provide a copy to the Contractor) setting out:
- (a) the issue referred to the expert for determination;
  - (b) the expert's fees;
  - (c) the procedure for the determination set out in this Annexure; and
  - (d) any other matter which is relevant to the engagement.

### 2. Submissions

- 2.1** The procedure for submissions to the expert is as follows:
- (a) The Party that has referred the issue to expert determination must make a submission in respect of the issue, within 30 Business Days after the date of the letter of engagement referred to in clause 1.4.
  - (b) The other Party must respond within 30 Business Days after receiving a copy of that submission. That response may include cross-claims.
  - (c) The Party referred to in clause 2.1(a) may reply to the response, but must do so within 20 Business Days after receiving the response, and must not raise new matters.
  - (d) The other Party may comment on the reply, but must do so within 20 Business Days after receiving the reply, and must not raise new matters.
  - (e) The expert must ignore any submission, response, reply, or comment not made within the time given in this clause 2.1, unless the Contract Authority and the Contractor agree otherwise.

- (f) The expert may request further information from either Party. The request must be in writing, with a time limit for the response. The expert must send a copy of the request and response to the other Party, and give the other Party a reasonable opportunity to comment on the response.
- (g) All submissions, responses, replies, requests and comments must be in writing. If a Party gives information to the expert, it must at the same time give a copy to the other Party.

### 3. Conference

- 3.1 The expert must arrange at least one conference with both Parties. The request must be in writing, setting out the matters to be discussed.
- 3.2 Each Party is entitled to be represented at any preliminary conference before the expert by its legal representatives and other authorised representatives, with information and knowledge of the issues.
- 3.3 The expert is not bound by the rules of evidence and may receive information in any manner the expert sees fit, but must observe the requirements of procedural fairness. Consultation between the expert and a Party must only take place in the presence of the other Party, unless a Party fails to attend a conference or meeting which has been convened by the expert and of which prior notice has been given. Any Party providing information to the expert must provide that information to the other Party.
- 3.4 The Parties agree that such a conference is considered not to be a hearing that would give anything under this Annexure the character of arbitration.
- 3.5 In answer to any issue referred to the expert by a Party, the other Party can raise any defence, set-off or counter-claim.

### 4. Questions to be determined by the Expert

- 4.1 The expert must determine for each issue the following questions (to the extent that they are applicable to the issue):
  - (a) is there an event, act or omission that gives the claimant a right to compensation under the Head Agreement:
    - (i) for damages for breach of the Head Agreement, or
    - (ii) otherwise in law?
  - (b) if so:
    - (i) what is the event, act or omission?
    - (ii) on what date did the event, act or omission occur?
    - (iii) what is the legal right which gives rise to the liability to compensation?
    - (iv) is that right extinguished, barred or reduced by any provision of the Head Agreement, estoppel, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?

- (c) in the light of the answers to clause 4.1:
  - (i) What compensation, if any, is due from one Party to the other and when did it fall due?
  - (ii) What interest, if any, is due when the expert determines that compensation?
- 4.2** The expert must determine for each issue any other questions required by the Parties, having regard to the nature of the issue.
- 4.3** The Parties must share equally the fees of the expert, any other costs associated with the process, including room hire expenses, transcript expenses and the like and the fees of any person appointed by the expert under clause 1.3 for the determination, and bear their own expenses.
- 4.4** If the expert determines that one Party must pay the other an amount exceeding the amount specified in Agreement Details (calculating the amount without including interest on it and after allowing for set-offs), then either Party may commence litigation, but only within 56 days after receiving the determination.
- 4.5** Unless a Party has a right to commence litigation or otherwise resolve the dispute under the Head Agreement:
  - (a) in the absence of a manifest error the Parties must treat each determination of the expert as final and binding and give effect to it; and
  - (b) if the expert determines that one Party owes the other money, that Party must pay the money within 20 Business Days.

## 5. Role of Expert

- 5.1** The expert must:
  - (a) act as an expert and not as an arbitrator, adjudicator or as expert witness;
  - (b) make its determination on the basis of the submissions of the Parties, including documents and witness statements, and the expert's own expertise;
  - (c) act impartially, free of bias and with no vested interest in the outcome of the dispute;
  - (d) adopt procedures for the Expert Determination suitable to the circumstances of the dispute so as to provide for an expeditious cost effective and fair means for the determination of the dispute; and
  - (e) issue a certificate in a form the expert considers appropriate, stating the expert's determination and giving reasons, within 45 Business Days after the receipt of the information in clause 2.1(d).
- 5.2** If a certificate issued by the expert contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the expert must correct the certificate and give notice to the Parties of such correction.

## 6. Confidentiality

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

- (a) the Parties have otherwise agreed in writing;
- (b) the information is already in the public domain;
- (c) disclosure is required to a Party's insurers, auditors, accountants, lawyers or other professional advisers;
- (d) disclosure is required for the purposes of any legal proceedings relating to the dispute or the expert's determination; or
- (e) disclosure is otherwise required by law.