

Agreement for the provision of Services

(Sole Entity Multiple Purchase)

Civil Construction Services (Preferred Contractors)

MH18-005

Mount Hotham Alpine Resort Management Board

Version 1.1

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Parties

Date: [insert]

Mount Hotham Alpine Resort Management Board
of 28 Great Alpine Road, Hotham Heights, Victoria, 3741
(Organisation)

and

[Supplier name]

Australian Business Number: [insert]

of [Insert registered address]

(Supplier)

Background

- (A) The Supplier wishes to provide the Services to the Organisation.
- (B) The Organisation has agreed to engage the Supplier to make a standing offer to provide the Services in accordance with this Agreement.
- (C) The Parties agree to work together throughout the Term in accordance with the terms of this Agreement to continuously improve the provision of Services under this Agreement for the benefit of both Parties.

Agreed Terms and Conditions

Interpreting this Agreement

1. Definitions and Interpretation

1.1 Definitions

In this Agreement:

ADC has the meaning given to that term in clause 18.2(a).

Agreement means this agreement for the provision of Services, including the Schedules and any annexures to the Schedule or items incorporated by reference.

Business Day means a day which is not a Saturday, Sunday or public holiday (being a public holiday appointed as such under the *Public Holidays Act 1993* (Vic)) in Melbourne.

Change in Control Notice has the meaning given to that term in clause 17(a).

Code of Practice means a code of practice as described in, and approved under, the PDP Act.

Commencement Date means the date from which the Supplier's standing offer to provide the Services will commence, as specified as such in Item 1 of Schedule 1.

Commissioners means the Privacy and Data Protection Deputy Commissioner appointed under the PDP Act and the Information Commissioner and the Public Access Deputy Commissioner appointed under the *Freedom of Information Act 1982 (Vic)*.

Completion Date for a Purchase Order Contract, means the date the Supplier is required to complete the Services required under the Purchase Order Contract as specified in the Purchase Order Contract.

Confidential Information means any technical, scientific, commercial, financial or other information of, about or in any way related to, the Organisation, including any information designated by the Organisation as confidential, which is disclosed, made available, communicated or delivered to the Supplier in connection with this Agreement, but excludes information which:

- (a) is in or which subsequently enters the public domain (and confidential information will not be deemed to be in the public domain merely because it relates to other information which may be in the public domain), other than as a result of a breach of an obligation of confidentiality;
- (b) the Supplier can demonstrate was in its possession before the date of this Agreement;
- (c) the Supplier can demonstrate was developed by it independently of any disclosures previously made by the Organisation; or
- (d) is lawfully obtained by the Supplier on a non-confidential basis from a person who is not bound by a confidentiality agreement with the Organisation or otherwise prohibited from disclosing the information to the Supplier.

Contract Materials means any materials (including any part of a Deliverable) which the Supplier creates (whether alone or jointly with any other person) in performing the Services under this Agreement or any Purchase Order Contract.

Contract Publishing System means the system of the Victorian Government for publication of details of contracts entered into by some Victorian Public Entities, including any replacement or amended system.

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

Data means all data, information, text, drawings, statistics, analysis and other materials embodied in any form which is:

- (a) supplied by or on behalf of the Organisation in connection with this Agreement (**Input Data**); or
- (b) generated, placed, stored, processed, retrieved, printed, accessed or produced utilising the Input Data or in the course of supply the Services or the Deliverables.

Deliverable means any item or material (including reports and other documentation) produced or delivered by the Supplier as an output of the Services.

Dispute has the meaning given to that term in clause 18.1(a).

Dispute Notice has the meaning given to that term in clause 18.1(a).

Expiry Date means the date set out in Item 1 of Schedule 1.

Fees means any fixed fees payable to the Supplier for the provision of specified Services under a Purchase Order Contract, determined in accordance with the Price Schedule.

Guidelines has the meaning given to that term in clause 18.2(a).

Health Privacy Principles means the health privacy principles set out in the *Health Records Act 2001* (Vic).

IBAC means the commission established under the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic) and includes any other organisation that may, from time to time, perform the functions of the commission.

Indemnified Party has the meaning given to that term in clause 24(a).

Index has the meaning given to that term in clause 10.6(a).

Information Privacy Principles has the meaning given in the PDP Act.

Initial Insurance has the meaning given to that term in clause 26(c).

Insolvency Event means, in relation to the Supplier, any of the following:

- (a) anything that reasonably indicates that there is a significant risk that the Supplier is or will become unable to pay debts as they fall due, including:
 - (i) execution or distress being levied against any income or assets of the Supplier;
 - (ii) a meeting of the Supplier's creditors being called or held;
 - (iii) a security becoming enforceable or being enforced in relation to any of the Supplier's assets or undertakings;
 - (iv) a step being taken to make the Supplier bankrupt or to wind the Supplier up;
 - (v) the appointment to the Supplier of a controller or administrator as defined in section 9 of the *Corporations Act 2001* (Cth);
 - (vi) the Supplier entering into any type of agreement, composition or arrangement with, or assignment for the benefit of, all or any class of its creditors; or
 - (vii) the Supplier being made subject to a deed of company arrangement;
- (b) a step being taken to have a receiver, receiver and manager, liquidator or provisional liquidator appointed to the Supplier or any of its assets; or
- (c) the Supplier ceasing, or indicating that it is about to cease, carrying on business.

Intellectual Property Rights means all intellectual property rights at any time recognised by law, including all present and future copyright, all proprietary rights in relation to inventions (including patents), registered and unregistered trademarks, trade secrets and know how, registered designs, circuit layouts, and all other proprietary rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

Invitation means the documents published by the Organisation inviting the market place to submit offers to provide the Services pursuant to this Agreement.

IPR Claim has the meaning given to that term in clause 24(e).

Key Personnel has the meaning given to that term in clause 6(a).

Laws means:

- (a) any statute, regulation or subordinate legislation of the Commonwealth of Australia, the State of Victoria or local or other government in force in the State of Victoria, irrespective of where enacted; and
- (b) lawful requirements of any government or government department or other body or a governmental, semi-governmental, judicial, municipal, statutory or public entity or authority (including a statutory authority or a State-owned enterprise), a self-regulatory authority established under statute or a stock exchange (wherever created or located) or a person (whether autonomous or not) who is charged with the administration of a law.

Losses has the meaning given to that term in clause 24(a).

Mediation has the meaning given to that term in clause 18.1(c)(ii).

Milestone means a milestone specified in Item 2 of Schedule 2 or a Purchase Order (as relevant).

Milestone Date, for a Milestone, means the date specified in Item 2 of Schedule 2 or a Purchase Order (as relevant) by which the Supplier must perform the Milestone.

Model Litigant Guidelines means the guidelines regarding the conduct of litigation by the State, as updated from time to time.

Moral Rights has the meaning given to that term in the *Copyright Act 1968* (Cth) and includes a right of a similar nature that is conferrable by statute, and that exists or comes into existence anywhere in the world.

Offer means the documentation and any supporting materials lodged by the Supplier in response to the Invitation containing an offer to provide Services in the form finally accepted by the Organisation.

PDP Act means the *Privacy and Data Protection Act 2014* (Vic).

Personal Information has the meaning given to that term in the PDP Act and also includes, for the purposes of this Agreement, health information, as that term is defined in the *Health Records Act 2001* (Vic).

Personnel of a party includes the officers, employees, agents, contractors, sub-contractors and Key Personnel of that party.

Pre-Existing Intellectual Property means all materials owned by or licensed to a party as at the Commencement Date or developed by or on behalf of a party independently of this Agreement and any Purchase Order Contracts.

Price Schedule means the schedule of Rates and/or Fees payable by the Organisation to the Supplier for the provision of the Services under a Purchase Order Contract, as set out in Schedule 2.

Privacy Obligations has the meaning given to that term in clause 23.7.

Proposal has the meaning given to that term in clause 4.5(a).

Protective Data Security Standard means any standard issued under Part 4 of the PDP Act.

Public Sector Employee has the same meaning as in the *Public Administration Act 2004* (Vic).

Purchase Order means an order for Services submitted by the Organisation to the Supplier that is in, or substantially in, the form set out in Annexure A.

Purchase Order Contract means a contract for the provision of Services which is formed between the Organisation and the Supplier in accordance with clause 3.6.

Quote means a quote from the Supplier provided under clause 3.3.

Rates means the monetary amount (whether charged on an hourly, daily, weekly or other time-related basis) payable to the Supplier for the provision of specified Services under a Purchase Order Contract, determined in accordance with the Price Schedule.

Replacement Staff has the meaning given to that term in clause 6(b).

Representative means, in respect of each party, the person(s) specified in Item 7 of Schedule 1 or any replacement person(s) appointed in accordance with clause 13.1(c).

Request for Quote means a request for a quote for the provision of Services issued by the Organisation to the Supplier under clause 3.2.

Responsibility Chart has the meaning given to it by clause 13.2

Service Credit means the amount by which the sums paid by the Organisation will be reduced for a failure by the Supplier to meet a Service Level Requirement, as calculated in accordance with Schedule 3.

Service Level Requirements means the minimum levels at which the Supplier must provide the Services as specified in Schedule 3, as amended from time to time in accordance with clause 4.5.

Services means the services, including any Deliverables, offered by the Supplier pursuant to this Agreement, as specified in Schedule 2, and in relation to a Purchase Order Contract, means the specific Services to be provided as set out in the relevant Purchase Order.

Specifications means the specifications to which the Services must comply, including any relevant performance requirements, technical constraints and quality standards, as set out in Schedule 5.

Staff Costs means Pay as you go (**PAYG**) Income Tax Instalments, withholding tax (including PAYG withholding), superannuation contributions or charge amounts, fringe benefits tax, workers' compensation insurance premiums, payroll tax and any like taxes and charges arising out of or in relation to this Agreement, or any engagement arising under this Agreement (together with all interest or penalties payable by reference to those costs).

Start Date means the date on which the provision of Services is to start under a Purchase Order, as specified in the relevant Purchase Order.

State means the Crown in right of the State of Victoria.

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

Tax Invoice has the meaning given in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Term means the duration of this Agreement, as calculated in accordance with clause 28.

Victorian Public Entity means:

- (a) a public sector body as defined in section 4 of the *Public Administration Act 2004* (Vic);
- (b) a statutory corporation, a State owned company, a State body or a State business corporation as those terms are defined in the *State Owned Enterprises Act 1992* (Vic);
- (c) a Council as defined in the *Local Government Act 1989* (Vic); or
- (d) an entity which receives the majority of its funding from any of the entities listed in paragraphs (a) to (c) or any entity under the control of any of the entities listed in paragraphs (a) to (c).

Victorian Public Sector Commission (VPSC) Code of Conduct means the Code of Conduct for Public Sector Employees 2015 (as amended or replaced from time to time), issued by the Victorian Public Sector Commission pursuant to section 61 of the *Public Administration Act 2004* (Vic), unless the Services are services of a kind usually provided by directors of Victorian Public Entities or the Organisation is a special body, in which case it means either the Code of Conduct for Directors of Victorian Public Entities 2016 or the Code of Conduct for Victorian Public Sector Employees of Special Bodies 2015 (each as issued by the Victorian Public Sector Commission pursuant to section 61 of the *Public Administration Act 2004* (Vic) and as amended or replaced from time to time).

VIPP means the Victorian Industry Participation Policy made pursuant to section 4 of the *Victorian Industry Participation Policy Act 2003* (Vic).

1.2 Interpretation

Unless expressed to the contrary, in this Agreement:

- (a) words in the singular include the plural and vice versa;
- (b) any gender includes the other genders;
- (c) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (d) 'includes' and 'including' are not words of limitation;
- (e) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (f) the obligations of the Supplier, if more than one person, under this Agreement are joint and several and each person constituting the Supplier acknowledges and agrees that it will be causally responsible for the acts and omissions, including breaches of this Agreement, of the other as if those acts or omissions were its own;
- (g) the rights of the Supplier, if more than one person, under this Agreement, including the right to payment, jointly benefit each person constituting the Supplier;
- (h) if the date on or by which any act must be done under this Agreement is not a Business Day, the act must be done on or by the next Business Day;
- (i) a reference to:
 - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
 - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;

- (iii) any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (iv) '\$', 'dollars' or 'AUD' is a reference to the lawful currency of the Commonwealth of Australia and all amounts payable under this Agreement are payable in Australian dollars; and
- (v) a party or parties is a reference to the Organisation and the Supplier (as the case requires).

1.3 Headings

Headings do not affect the interpretation of this Agreement.

Requesting the Services

2. Standing offer to provide the Services

The Supplier makes a standing offer to provide the Services to the Organisation until this Agreement expires or is validly terminated.

3. Ordering Services

3.1 The Organisation may issue a Request for Quote

At any time during the Term, the Organisation may:

- (a) issue a Request for Quote to the Supplier; or
- (b) through its Representative, verbally request that the Supplier provide a Quote.

3.2 Requests for Quote

A Request for Quote issued by the Organisation:

- (a) may specify the date by which a Quote is required to be delivered to the Organisation;
- (b) may specify whether a Quote is to be provided in a form other than a draft purchase order;
- (c) must specify the information required to be included in a Purchase Order (except for that information which the Organisation is unable to provide or calculate);
- (d) must specify the type of Quote required by the Organisation (namely a fixed price Quote, a time and materials Quote or a combination of both); and
- (e) must specify any other information relevant to the Services to be provided or that the Organisation requires the Supplier to include in its Quote.

3.3 Provision of Quotes

Within two Business Days of receipt of a Request for Quote (or a verbal request for a Quote), or the later period specified in the Request for Quote (or verbally requested), the Supplier must provide to the Organisation a Quote. The Quote must be in the form of a draft purchase order (in the form set out in Annexure A), or in the form otherwise requested by the Organisation, and must include:

- (a) the information specified in the Request for Quote (including confirmation of the proposed dates and Milestones);
- (b) a quote for the provision of the requested Services that:
 - (i) is calculated on the basis requested by the Organisation in its Request for Quote;
 - (ii) is calculated in accordance with the Rates and Fees specified in the Price Schedule; and
 - (iii) contains:
 - A. the total amount payable by the Organisation for the provision of the required Services; and
 - B. a full breakdown of the Rates and/or Fees comprising that amount, including by reference to Milestones and Deliverables, if applicable.

3.4 Receipt of Quotes

On receipt of a Quote, the Organisation may:

- (a) negotiate with the Supplier the terms of the Quote, following which the Supplier must resubmit a Quote containing the revised agreed terms;
- (b) accept the Quote, in which case the Organisation must issue a Purchase Order; or
- (c) decline to accept the Quote, in which case no Purchase Order Contract will be formed.

3.5 Contents of a Purchase Order

A Purchase Order issued by the Organisation must specify:

- (a) the identity of the Organisation, the Organisation's Representative and the order number;
- (b) the Supplier's details;
- (c) the specific Services to be provided to the Organisation (which may be some or all of the Services described in Schedule 2), including the quantity of each item required;
- (d) the applicable Rates and/or Fees, and the consequent amounts that will be payable to the Supplier;
- (e) the Start Date and Completion Date;
- (f) the Key Personnel, if any, required to provide the Services;
- (g) any applicable Milestone(s) and Milestone Date(s) relevant to the performance of the Services;

- (h) any invoicing and/or notice requirements that are required in addition to, or instead of, the invoicing and/or notice requirements set out in Schedule 1; and
- (i) whether liquidated damages, under clause 8.3, are to apply to failures to provide Services or Deliverables by the required dates.

3.6 When a Purchase Order Contract is formed

- (a) A Purchase Order Contract is formed, and the Purchase Order will become binding on the Supplier and the Organisation, upon receipt of the Purchase Order by the Supplier.
- (b) Unless and until a Purchase Order Contract is formed:
 - (i) a Quote will not be binding on the Supplier or the Organisation;
 - (ii) the Supplier must not start performing or charge the Organisation for any Services; and
 - (iii) the Organisation has no liability to pay for any Services.
- (c) The Supplier must promptly in writing confirm to the Organisation its receipt of a Purchase Order and the formation of the Purchase Order Contract.

3.7 Terms incorporated into a Purchase Order Contract

A Purchase Order Contract incorporates all of the terms of this Agreement (other than clauses 2, 3.1, 3.2, 3.3, 3.4, 3.5, 28.1 and 28.2 (and any corresponding Items in the Schedules)), with such necessary changes as should be made to reflect the formation of the relevant Purchase Order Contract under this Agreement.

3.8 Inconsistency

Where there is any inconsistency between the provisions of this Agreement and any Purchase Order Contract, the provisions of this Agreement will prevail to the extent of that inconsistency.

3.9 Costs of preparing Requests for Quotes, Quotes and Purchase Orders

The Supplier is not entitled to charge the Organisation for the development of a Quote or a draft purchase order. Each party is responsible for its own costs relating to the development, negotiation and finalisation of each Purchase Order Contract.

Providing the Services

4. Performance of Services

4.1 When Services start and end under a Purchase Order Contract

- (a) The Supplier must start providing Services under a Purchase Order Contract on the Start Date.
- (b) The Supplier must:
 - (i) complete the Services required under a Purchase Order Contract by the Completion Date; and
 - (ii) meet each Milestone by its Milestone Date.

- (c) The Supplier must provide the Services required under a Purchase Order Contract until the earliest to occur of:
 - (i) the date that the Supplier completes those Services (whether or not this occurs on, before, or after the applicable Completion Date); and
 - (ii) the date that the Purchase Order Contract is terminated.

4.2 The Supplier's Services performance obligations

- (a) The Supplier must provide the Services:
 - (i) to the reasonable satisfaction of the Organisation and in a proper, timely and efficient manner using that standard of care, skill, diligence, prudence and foresight that would reasonably be expected from a prudent, expert and experienced provider of services that are similar to the Services;
 - (ii) in accordance with any reasonable directions given by the Organisation; and
 - (iii) in accordance with the Service Level Requirements.
- (b) The Supplier must:
 - (i) act in good faith and in the best interests of the Organisation;
 - (ii) comply with all statements and representations as to its performance of the Services set out in the Offer and any applicable Quote;
 - (iii) without limiting its obligations under clause 8.1, keep the Organisation informed of all matters of which it ought reasonably be made aware and provide such information in relation to the provision of the Services as may reasonably be required by the Organisation; and
 - (iv) use appropriately skilled and qualified Personnel to provide the Services.

4.3 Acceptance

- (a) After performance of the Services or delivery of any Deliverable provided as part of the Services, the Organisation may undertake such reviews as it considers necessary to determine whether the Services or Deliverable(s) are fit for purpose and comply with this Agreement (including the Service Level Requirements). After reviewing the Services or Deliverable(s), the Organisation may notify the Supplier in writing:
 - (i) of its acceptance of the Services or Deliverable(s) if it is satisfied that the Services or Deliverable(s) are fit for purpose and comply with this Agreement; or
 - (ii) if the Services or Deliverable(s) are not fit for purpose or do not comply with this Agreement, in which case clause 4.3(b) will apply.
- (b) If the Organisation notifies the Supplier that the Services or Deliverable(s) are not fit for purpose or do not comply with this Agreement the Supplier must promptly rectify the non-compliance in the Service or Deliverable(s), following which the Organisation will undertake further review of the Services or Deliverable(s) in accordance with clause 4.3(a). This process will continue until, at the Organisation's discretion, the Organisation:
 - (i) waives, in writing, the requirement for the Services or Deliverable(s) to comply with this Agreement;

- (ii) is satisfied that the Services or Deliverable(s) comply with this Agreement and accepts the Services or Deliverable(s) in accordance with clause 4.3(a)(i);
 - (iii) conditionally accepts the Services or Deliverable(s), subject to the Supplier agreeing to rectify the non-compliance within a reasonable timeframe and on such terms as the Organisation specifies; or
 - (iv) subject to the Organisation having provided the Supplier with at least two opportunities to rectify the non-compliance pursuant to clause 4.3(a)(ii), immediately terminate this Agreement and/or the relevant Purchase Order Contract by written notice to the Supplier. If the Organisation terminates this Agreement and/or the relevant Purchase Order Contract under this clause 4.3(b)(iv), the Organisation will be entitled to a full refund of all moneys paid to the Supplier in respect of the Services or Deliverable(s) which the Organisation is unable to use following termination.
- (c) If the Organisation fails to notify the Supplier of its acceptance or rejection of the Services or Deliverable(s) pursuant to clause 4.3(a)(i) or 4.3(a)(ii) within a reasonable period following performance of the Services or delivery of any Deliverable, the Supplier may notify the Organisation in writing of this fact, following which the Organisation must promptly respond to the Supplier in accordance with clause 4.3(a)(i) or 4.3(a)(ii), as the case may be.
- (d) No act or omission on the part of the Organisation in connection with this clause 4.3 constitutes deemed acceptance of a Service or Deliverable.

4.4 Supplier to provide equipment

The Supplier must, at its own cost, provide any and all equipment (including computer hardware and software) necessary for the performance of the Services.

4.5 Variations

- (a) Either party may, at any time, give written notice to the other party proposing a variation to the scope of the Services or the Service Level Requirements. Within five Business Days of giving or receiving such notice, the Supplier must provide a written proposal (**Proposal**) setting out:
- (i) the Rates and/or Fees that would apply with respect to the provision of the varied Services or Service Level Requirements (based on the value for money proposition reflected in the then current Price Schedule). Any increase to the Rates and/or Fees proposed by the Supplier must represent the increase in the cost to the Supplier of providing the varied Services or complying with the varied Service Level Requirements (as applicable);
 - (ii) whether or not it is intended that the variation applies to current Purchase Order Contracts, if any; and
 - (iii) any other impacts that the change will have on the Supplier's ability to perform its obligations under this Agreement.
- (b) The Organisation may accept a Proposal by notifying the Supplier in writing. In the absence of such acceptance, the Services must be performed in accordance with this Agreement without any variation. Unless the Organisation specifies in its notice to the Supplier, the variations contained in the Proposal will apply only to Purchase Order Contracts formed following notification to the Supplier of the Organisation's acceptance of that Proposal.

4.6 Co-operation with third parties

Where the Organisation engages a third party to provide goods or services which are related to or otherwise necessary for the Organisation to accept the Services, the Supplier agrees to provide all reasonable assistance and co-operation as required by that third party to ensure the Organisation receives the third party's goods or services, and the Services, in a seamless and efficient manner.

5. Access and safety

5.1 Access to premises

If the Supplier requires access to the premises of the Organisation in connection with the provision of the Services, the Organisation will, subject to its usual security requirements, permit the Supplier reasonable access to the premises at such times as may be reasonably necessary to enable the Supplier to provide the Services.

5.2 Obligations

When the Supplier enters the premises of the Organisation, the Supplier must (and must ensure that its Personnel will):

- (a) protect people and property;
- (b) prevent nuisance and unnecessary noise and disturbance;
- (c) act in a safe and lawful manner and comply with the safety standards and policies of the Organisation (as notified to the Supplier);
- (d) comply with any lawful directions of the Organisation or its Personnel; and
- (e) comply with the *Occupational Health and Safety Act 2004* (Vic) and any applicable regulations made under that Act.

6. Supplier's Personnel

- (a) If Key Personnel are required to perform the Services, as indicated by Item 3 of Schedule 1, then the Services must be performed by the persons specified in Item 3 of Schedule 1 (**Key Personnel**) and referenced in the relevant Purchase Order Contract. The Supplier may not remove or replace any Key Personnel without the Organisation's written consent, which will not be unreasonably withheld.
- (b) If any of the Key Personnel are unable to provide the Services, the Supplier must promptly notify the Organisation of that fact and provide details of alternate, suitably qualified and experienced Personnel to replace such Key Personnel (**Replacement Staff**).
- (c) The Organisation must notify the Supplier in writing within two Business Days as to whether or not it accepts the Replacement Staff proposed by the Supplier pursuant to clause 6(b). The Supplier acknowledges and agrees that the Organisation will be under no obligation to accept any Replacement Staff proposed by the Supplier if the Organisation is not satisfied as to the qualifications and experience of such person.

- (d) The Organisation may request that the Supplier withdraw any of its Personnel (including any Key Personnel) from providing any part of the Services. If the Organisation makes a request under this clause 6(d), the Supplier must:
 - (i) promptly arrange for that person to cease being involved in providing the Services;
 - (ii) ensure that the person does not return to the Organisation's premises except with the Organisation's prior written consent, which may be withheld in its absolute discretion; and
 - (iii) replace that person with another person of suitable ability and qualifications, at no additional charge within the time period specified by the Organisation, which must be reasonable in the circumstances.

7. Specifications

7.1 The Specifications

- (a) The Services must comply in all respects with the Specifications.
- (b) Without limiting anything else in the Specifications, the Services must:
 - (i) utilise the latest available technology; and
 - (ii) comprise the most recent model or version of the relevant Services that are available at the time of provision.

7.2 Variation of Specifications

- (a) The Organisation may, at any time, give written notice to the Supplier proposing a variation to the Specifications (including any resulting extension of the Completion Date or a Milestone Date).
- (b) The Supplier must, if it reasonably considers that a proposed variation will result in an increase in the Rates and/or Fees for providing the Services, or affect any Completion Date and/or Milestone Date(s) under any current Purchase Order Contracts, within five Business Days of receiving a notice under clause 7.2(a), provide to the Organisation a written proposal for a variation to the Price Schedule (based on the value for money proposition reflected in the current Price Schedule), and if applicable, the Completion Date and/or Milestone Date(s).
- (c) The Organisation may, by giving written notice to the Supplier, accept such proposal in full or with conditions, or reject the proposal, within five Business Days of its receipt from the Supplier. If the Organisation rejects the proposal, the parties may negotiate to finalise any aspects of the Supplier's proposal. In the absence of acceptance by the Organisation of a proposal, the Services must be provided in accordance with this Agreement without such variation.

8. Delays and failure to perform

8.1 Duty to warn of delays and failures to perform

- (a) If the Supplier is aware of any actual or possible delay in the provision of the Services or delivery of a Deliverable, including any failure to complete the Services by the Completion Date or a Milestone by the relevant Milestone Date, the Supplier:
 - (i) must advise the Organisation by written notice immediately upon becoming aware of such delay or possible delay; and
 - (ii) may include in the notice a request for an extension of time.
- (b) A notice given under clause 8.1(a) must set out:
 - (i) the circumstances giving rise to the actual or possible delay, including the cause of the delay;
 - (ii) the likely length of the actual or possible delay; and
 - (iii) the steps the Supplier intends to take to prevent the delay from occurring or minimise the delay.
- (c) On request from the Organisation, the Supplier must promptly provide any additional information the Organisation requires about a notice given under clause 8.1(a).
- (d) The Organisation may, in its absolute discretion and by written notice to the Supplier, extend any Milestone Date or Completion Date.

8.2 Effect of failures to perform

- (a) If the Supplier fails to perform any of the Services or deliver any Deliverables in accordance with this Agreement, the Organisation:
 - (i) will not be required to pay for those Services or Deliverables until they are provided in accordance with the requirements set out in this Agreement; and
 - (ii) may issue a notice to the Supplier requiring the Supplier to remedy any default in a Deliverable or re-perform the Services within the time specified by the Organisation (which time must be reasonable having regard to the nature of the relevant Services or Deliverables).
- (b) If:
 - (i) the default referred to in clause 8.2(a) is remedied; or
 - (ii) the relevant Services are re-performed to the standard required by this Agreement, including the applicable Service Level Requirements, and otherwise to the reasonable satisfaction of the Organisation,

the Organisation will pay the applicable Rates and/or Fees for the remedied Deliverable or re-performed Services (which the parties acknowledge may be less than the cost to the Supplier of remedying the default in the Deliverable or re-performing the Services).
- (c) If:
 - (i) the default referred to in clause 8.2(a) is not capable of being remedied or the Services are not capable of being re-performed; or
 - (ii) the Supplier fails within the time specified to remedy the default or re-perform the Services within the time specified in the notice issued under clause 8.2(a),

the Organisation may either have the Services or Deliverables remedied or re-performed by a third party or do so itself. In either case, the Supplier must pay the reasonable costs incurred by the Organisation in doing so.

- (d) If the Organisation exercises its rights under clause 8.2(c), the Organisation will issue the Supplier with an invoice for all reasonable costs incurred in remedying the default or re-performing the Services. The Supplier must pay this invoice within 10 Business Days of its receipt.
- (e) Nothing in this clause 8.2 derogates or otherwise limits any other remedy available to the Organisation at Law.

8.3 Liquidated damages payable for failing to meet required dates

- (a) If liquidated damages apply to Purchase Order Contracts formed under this Agreement, as indicated by Item 2 of Schedule 1, and the Supplier fails to provide the relevant Services or Deliverables, or the Organisation does not accept the relevant Services or Deliverables, by the dates specified in Item 2 of Schedule 1 or the relevant Purchase Order Contract, the Organisation may recover from the Supplier (or deduct from money owed to the Supplier) liquidated damages.
- (b) Liquidated damages will be payable at the rate specified in Item 2 of Schedule 1 or the relevant Purchase Order Contract for each day that the Supplier does not provide the Services or the Organisation does not accept the Deliverables after the relevant date for performance. The Supplier will not be required to pay liquidated damages to the extent that a delay is caused by the Organisation.
- (c) The parties agree that any such liquidated damages constitute a genuine and reasonable pre-estimate of the loss that would be incurred by the Organisation arising from such failure by the Supplier, and are not the Organisation's sole remedy in relation to the circumstances giving rise to the liquidated damages.

Pricing and payments

9. Price for the Services

- (a) The Price Schedule according to which the Supplier will charge the Organisation for the Services is set out in Schedule 2. Subject to any change in the Rates and/or Fees agreed under clause 4.5 or 9(d), the Rates and/or Fees are fixed for the Term and are inclusive of all taxes (excluding GST).
- (b) If Schedule 2 permits the Supplier to recover expenses and/or disbursements in relation to the Services, the Supplier must notify the Organisation in writing of any such expenses and/or disbursements it may incur, excluding any discounts, rebates or refunds paid or payable to the Supplier, before the expense or disbursement, as the case may be, is incurred.
- (c) After receiving notification of any expenses in accordance with clause 9(b), the Organisation will either:
 - (i) approve the expense and/or disbursement; or
 - (ii) decline the expense and/or disbursement, in which case the Organisation will not be liable if the Supplier incurs that expense and/or disbursement.

- (d) Where a price review mechanism is set out in Item 4 of Schedule 1:
- (i) the parties will adopt that price review mechanism in accordance with the requirements in Item 4 of Schedule 1; and
 - (ii) any revised Rates and/or Fees resulting from the operation of the price review mechanism in Item 4 of Schedule 1 will take effect from the review dates set out in Item 4 of Schedule 1.

10. GST and other taxes

10.1 Definitions

Terms used in this clause 10 have the same meanings given to them in the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**).

10.2 Consideration is exclusive of GST

Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under or in accordance with this Agreement are exclusive of GST.

10.3 GST Gross Up

If GST is imposed on any supply made under or in accordance with this Agreement, the recipient of the taxable supply must pay to the party making the taxable supply an amount equal to the GST payable on or for the taxable supply. Subject to the recipient first receiving a valid Tax Invoice, payment of the GST amount will be made at the same time the consideration for the taxable supply is to be paid or provided in accordance with this Agreement.

10.4 Reimbursement

If this Agreement requires a party to pay for, reimburse or contribute to any expense, loss or outgoing (**Reimbursable Expense**) suffered or incurred by another party, the amount required to be paid, reimbursed or contributed by the first party will be the amount of the Reimbursable Expense net of input tax credits (if any) to which the other party is entitled in respect of the Reimbursable Expense plus any GST payable by the other party.

10.5 Adjustment Event

If an adjustment arises in relation to a taxable supply made under this Agreement, the Supplier must recalculate the amount payable on account of GST under clause 10.3 to take account of the adjustment event. The Supplier must issue an adjustment note to the Organisation within 28 days of becoming aware of the adjustment event. A corresponding payment to reflect the adjustment must be made by the Supplier to the Organisation, or by the Organisation to the Supplier, as the case may be.

10.6 CPI Reviews

The Supplier agrees that, if:

- (a) the parties agree to review the Rates and/or the Fees pursuant to clause 9(d) by reference to a specific index or indices (**Index**); and
- (b) such Index is increased as a result of any change to either (or both) the GST rate or the GST base,

the impact of that GST related increase on the Index will be excluded for the purposes of calculating any consideration or other adjustments under this Agreement. If requested by

the Organisation, the parties must use their best endeavours to agree either a replacement Index, or an adjustment to the published Index, for the purposes of excluding the impact of the GST related increase on the Index. If the parties cannot agree within 10 Business Days on either a replacement Index, or an adjustment to the published Index, the Dispute will be resolved in accordance with clause 18.

10.7 Other taxes

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

11. Staff Costs

- (a) The Supplier will indemnify and keep indemnified the Organisation from and against all liability for the Staff Costs in any way relating to the Services.
- (b) If the Organisation is or becomes liable to pay any Staff Costs, the Organisation may deduct the amount of its liability for the Staff Costs from any amount due by the Organisation to the Supplier, whether under this Agreement or otherwise.

12. Invoicing and payment

12.1 Invoicing

- (a) The Supplier must submit Tax Invoices to the Organisation in respect of the Services as soon as practical after performance of the Services, or at the time(s) and to the address specified in Item 5 of Schedule 1, or as otherwise set out in the relevant Purchase Order.
- (b) A Tax Invoice submitted for payment pursuant to clause 12.1(a) must contain each of the matters specified in Item 5 of Schedule 1 as well as all information required in a tax invoice for the purposes of the GST Act.

12.2 Payment of invoices

- (a) Subject to the remainder of this clause 12.2, the Organisation will pay each undisputed invoice which meets the requirements in clause 12.1 to the Supplier, less any amount required by Law, within 30 days of receipt of the invoice, in the manner specified in Item 6 of Schedule 1.
- (b) An invoice will not be paid until such time as the invoice is certified for payment by the Organisation's Representative. An invoice will not be certified for payment unless the Organisation's Representative is satisfied that it is correctly calculated with respect to the Services that are the subject of the relevant invoice.
- (c) If the Organisation's Representative disputes the invoiced amount (whether in whole or in part) for any reason, the Organisation must pay the undisputed amount of such invoice (if any), and notify the Supplier of the amount the Organisation believes is due for payment. If the Organisation and the Supplier are unable to agree on the balance of the invoiced amount, the dispute will be referred for determination in accordance with clause 18. If requested, the Supplier will withdraw the disputed Tax Invoice and issue a replacement Tax Invoice for the undisputed amount.

- (d) Payment of an invoice is not to be taken as:
 - (i) evidence or an admission that the Services have been provided in accordance with the Specifications, Service Level Requirements or otherwise in accordance with this Agreement;
 - (ii) evidence of the value of the Services supplied;
 - (iii) an admission that the Services were satisfactorily supplied;
 - (iv) an admission of liability; or
 - (v) acceptance or approval of the Supplier's performance,
 but must be taken only as payment on account.

12.3 Fair payment

- (a) Where the value of a Purchase Order Contract is less than \$3 million, the Organisation will, on demand by the Supplier, pay simple interest on a daily basis on any overdue amount, at the rate for the time being fixed under section 2 of the *Penalty Interest Rates Act 1983* (Vic).
- (b) For the purposes of clause 12.3(a), **overdue amount** means an amount (or part thereof) that:
 - (i) is not, or is no longer, disputed in accordance with this Agreement;
 - (ii) is due and owing under a Tax Invoice properly rendered by the Supplier in accordance with this Agreement; and
 - (iii) has been outstanding for more than 30 days from the date of receipt of the invoice or the date that the amount ceased to be disputed, as the case may be.

Governance and relationship management

13. Contract management

13.1 Parties' Representatives

- (a) For the purposes of ensuring a productive and efficient relationship between the Organisation and the Supplier under this Agreement, the Organisation and Supplier each agree to nominate the relevant person(s) specified in Item 7 of Schedule 1 as its Representative in relation to all queries, consents, approvals, complaints and disputes required or arising under or in connection with this Agreement.
- (b) The Supplier will have regard to all requirements of the Organisation's Representative and will comply with all reasonable directions of the Organisation's Representative.
- (c) Either party may nominate a replacement Representative by providing the other party with written notice. The appointment of the replacement Representative will be effective from the date on which such notice is given.

13.2 Responsibility Chart

If required by Item 5 of Schedule 2, the Supplier must prepare a chart identifying the key tasks and obligations under this Agreement, and the party or person responsible for completing or otherwise performing the relevant task or obligation (**Responsibility Chart**).

13.3 'Value adding' initiatives

- (a) The Supplier agrees that it will, to the extent that it is commercially feasible to do so, identify new measures or initiatives during the Term to continuously improve the provision of Services under this Agreement, including through the:
 - (i) identification of efficiencies in the provision of Services;
 - (ii) implementation of any applicable technological improvements; and
 - (iii) utilisation of any applicable industry-wide productivity gains, with a view to achieving improvements in value for both parties.
- (b) Any value adding measures or initiatives identified by the Supplier will be discussed with the Organisation and, if accepted by the Organisation, implemented by the parties as soon as practicable. If the implementation of a value adding measure or initiative in accordance with clause 13.3 results in a change to the Services or the Service Level Requirements, the parties will follow the process in clause 4.5.

13.4 Service Level Requirements

- (a) The Supplier must meet or exceed the Service Level Requirements when performing the Services.
- (b) The Supplier's performance against the Service Level Requirements must be tracked, monitored and reported on by the Supplier to the Organisation in accordance with Schedule 3.
- (c) Where the Supplier fails to meet any of the Service Level Requirements, the Supplier must, at no additional cost to the Organisation, promptly:
 - (i) notify the Organisation of the failure in writing; and
 - (ii) arrange all additional resources reasonably necessary to perform the Services in accordance with the Service Level Requirements as soon as reasonably practicable.
- (d) Without limiting clause 13.4(c), if there is any failure by the Supplier to meet a Service Level Requirement, Service Credits will be payable by the Supplier if specified in Schedule 3. If applicable, the parties agree that the Service Credits are a genuine pre-estimate of the loss likely to be suffered by the Organisation as a result of the Supplier's actions, including the diminution in value of the Services resulting from the failure and do not constitute a penalty.

13.5 Progress report

The Supplier must provide to the Organisation's Representative:

- (a) a progress report in respect of the Supplier's performance under this Agreement or each Purchase Order Contract, such report to be provided at the times, in the format and containing the matters specified in Item 8 of Schedule 1; and
- (b) all other data or information that the Organisation's Representative may request to enable it to adequately assess the performance of the Supplier.

13.6 Contract management review

The parties' Representatives must meet at the time and in the manner specified in Item 9 of Schedule 1 to discuss contract management issues and to review the Supplier's performance under this Agreement and the Purchase Order Contracts, including:

- (a) a review of the Supplier's compliance with the Service Level Requirements; and
- (b) an examination of the value adding measures or initiatives proposed or implemented by the parties pursuant to clause 13.3.

14. Sub-contracting

- (a) The Supplier must not sub contract to any person any of its obligations under this Agreement or a Purchase Order Contract without the prior written consent of the Organisation, which consent may be given (conditionally or unconditionally) or withheld by the Organisation in its absolute discretion.
- (b) If requested by the Organisation, the Supplier must provide reasonable details of the following when requesting the Organisation's approval for a proposed sub-contractor under clause 14(a):
 - (i) the purposes for which the proposed sub-contractor will be employed, including the scope of any services to be provided by the proposed sub-contractor;
 - (ii) the proposed sub-contractor's capabilities in performing services of a similar nature;
 - (iii) the proposed sub-contractor's financial standing; and
 - (iv) a copy of the proposed sub-contract (provided that commercially sensitive payment or security terms, and pricing information, may be omitted).
- (c) The Supplier must ensure that any sub-contractor engaged by it complies with all obligations imposed on the Supplier by this Agreement.
- (d) The Supplier will not, as a result of any sub-contracting arrangement, be relieved from the performance of any obligation under this Agreement and will be liable for all acts and omissions of a sub-contractor as though they were the actions of the Supplier itself.
- (e) No sub-contractor of the Supplier will itself be entitled to sub-contract or assign its obligations.

15. Compliance with Law and Policy

15.1 General Law and Policy

The Supplier must, in performing its obligations under this Agreement and any Purchase Order Contract, comply with:

- (a) all Laws affecting or applicable to the provision of Services by the Supplier under this Agreement, including any Laws specified in Item 17 of Schedule 1; and
- (b) the State's policies and procedures as notified to the Supplier in writing from time to time.

15.2 Victorian Public Sector Commission Code of Conduct

Where, in the course of providing the Services, the Supplier, or its Personnel:

- (a) supervise or work with Public Sector Employees;
- (b) undertake work that is of a similar nature to the work undertaken by Public Sector Employees at premises or a location generally regarded as a public sector workplace; or
- (c) use or have access to public sector resources or information that are not normally accessible or available to the public,

the Supplier must (and must ensure that its Personnel) comply with the VPSC Code of Conduct.

15.3 Supplier Code of Conduct

The Supplier acknowledges that:

- (a) the Supplier Code of Conduct is an important part of the State's approach to procurement and describes the State's minimum expectations regarding the conduct of its suppliers;
- (b) it has read the Supplier Code of Conduct; and
- (c) the expectations set out in the Code are not intended to reduce, alter or supersede any other obligations which may be imposed on the Supplier, whether under this Agreement or at Law.

15.4 Employment policy

- (a) The Supplier and any Personnel engaged in the provision of the Services must not:
 - (i) engage in unethical work practices; or
 - (ii) engage employees or sub-contracted workers upon terms and conditions which do not meet industry standards generally applicable in Victoria.
- (b) Where a federal industrial award may apply to the capacity in which an employee is engaged by the Supplier, or by a sub-contractor, in the provision of the Services, the Supplier must:
 - (i) where applicable, comply with the better off overall test under section 193 of the *Fair Work Act 2009* (Cth) in relation to any enterprise agreement it is bound by; or
 - (ii) otherwise ensure that the conditions on which that employee is engaged are no less beneficial to the employee than the rates and conditions under that award.

15.5 Victorian Industry Participation Policy (VIPP)

If the VIPP applies to this Agreement (as indicated by Item 18 of Schedule 1), then the terms and conditions set out in Schedule 4 are incorporated into and form part of this Agreement.

15.6 No unlawful inducements

- (a) The Supplier will not, and will ensure that its Personnel will not, directly or indirectly, offer, promise, agree to pay, give, accept, or solicit anything of value (including to or from any third party) in order to secure any reward or improper benefit other than payment for the performance of their obligations under this Agreement.
- (b) The Organisation may terminate this Agreement immediately on notice to the Supplier if the Supplier or any of its Personnel is found to have engaged in any

conduct under clause 15.6(a) and recover the amount of any loss resulting from such termination as a debt due from the Supplier.

16. Conflict of interest

- (a) The Supplier warrants to the Organisation that it does not, and will ensure that its Personnel do not, hold any office or possess any property, are not engaged in any business, trade or calling and do not have any obligations by virtue of any contract whereby, directly or indirectly, duties or interests are or might be created in conflict with, or might appear to be created in conflict with, their duties and interests under this Agreement.
- (b) The Supplier must promptly inform the Organisation of any matter which may give rise to an actual or potential conflict of interest and comply with any reasonable directions given by the Organisation in terms of dealing with that conflict.
- (c) The Supplier acknowledges and agrees that failure to comply with this clause 16 will constitute a breach of a fundamental term of this Agreement.

17. Change in Control

- (a) The Supplier must notify the Organisation in writing of any Change in Control of the Supplier (or of the ultimate holding company of the Supplier) within five Business Days after that change occurs (**Change in Control Notice**).
- (b) The Organisation may, upon receiving a Change in Control Notice, in its absolute discretion, terminate this Agreement and any Purchase Order contracts on written notice to the Supplier.
- (c) Termination under clause 17(b) will take effect from the Organisation's nominated date, provided the nominated date is no later than 12 months after the Organisation received the Change in Control Notice.

18. Disputes

18.1 Parties to meet

- (a) If any dispute arises under or in connection with this Agreement or a Purchase Order Contract (**Dispute**), either party may at any time give written notice to the other (**Dispute Notice**) requesting that a meeting take place to seek to resolve the Dispute.
- (b) The parties' Representatives must, within five Business Days of the date of service of a Dispute Notice, meet to discuss the Dispute in good faith with a view to resolving the Dispute.
- (c) If the Dispute has not been resolved within:
 - (i) 10 Business Days from the date of service of a Dispute Notice or such later date as the parties may agree, it will escalate to the nominated senior executive officer (or equivalent) of each of the Organisation and the Supplier, who will promptly meet and discuss the Dispute in good faith with a view to resolving the Dispute; and

- (ii) 15 Business Days of the date of service of a Dispute Notice or such later date as the parties may agree, the Dispute is referred to mediation (**Mediation**) in accordance with clause 18.2.

18.2 Mediation

- (a) Subject to clause 18.2(b), the Mediation will be conducted by the Australian Disputes Centre (**ADC**) in accordance with the ADC mediation guidelines (**Guidelines**). The Guidelines set out the procedures to be adopted, the process of selection of the mediator, and the costs involved. The terms of those Guidelines (as amended from time to time) are incorporated into this Agreement.
- (b) The mediator will be selected by mutual agreement. If the parties have not reached agreement on a mediator within three Business Days of the date that the Dispute was referred to Mediation (or such other time frame agreed between the parties), the mediator will be selected in the manner specified in the Guidelines.
- (c) Each party must bear its own costs in relation to the Mediation and the costs of the mediator will be shared equally by the parties.
- (d) Any breach of the Guidelines will constitute a breach of this Agreement.

18.3 Arbitration or litigation

- (a) If the parties fail to settle the Dispute at the Mediation in accordance with clause 18.2, the parties may agree to submit the Dispute for determination at arbitration under the Rules of Arbitration of the Institute of Arbitrators and Mediators Australia by one or more arbitrators appointed in accordance with those rules. The parties acknowledge that any determination made at arbitration will be final and binding.
- (b) If the parties do not agree to refer the Dispute to arbitration in accordance with clause 18.3(a), either party may submit the Dispute for resolution to the exclusive jurisdiction of the Courts of Victoria, Australia.

18.4 Performance during Dispute resolution

The parties to a Dispute will continue to perform their respective obligations under this Agreement and the relevant Purchase Order Contract pending the resolution of the Dispute under this clause 18.

18.5 Interlocutory relief

Nothing in this clause 18 restricts or limits the right of either party to obtain urgent interlocutory or injunctive relief, or to immediately terminate this Agreement where this Agreement provides such a right.

19. Notices

19.1 Giving a communication

A notice, demand, certification, process or other communication relating to this Agreement (or a Purchase Order Contract) must be in writing in the English language, and may be sent by pre-paid post, pre-paid courier, document exchange or (only if an email address is included in Item 19 of Schedule 1 or as specified in a Purchase Order Contract) by email as follows:

- (a) to the Organisation: to the relevant address which is set out in Item 19 of Schedule 1 (or as specified in the Purchase Order Contract); and

- (b) to the Supplier: to the relevant address which is set out in Item 19 of Schedule 1 (or as specified in the Purchase Order Contract).

19.2 Time of delivery

A notice or document will be taken to be delivered or served as follows:

- (a) in the case of delivery in person or by courier, when delivered;
- (b) in the case of delivery by post within Australia, five Business Days after the date of posting or, if sent via a next day delivery service, on the next Business Day following the date of posting;
- (c) in the case of delivery by post to or from an address outside Australia, eight Business Days after the date of posting;
- (d) in the case of delivery by document exchange, two Business Days after being placed into the document exchange; and
- (e) in the case of email, when the message is correctly addressed to and successfully transmitted to that party's email address, and acknowledgment of receipt is recorded on the sender's computer.

19.3 After hours communications

If any notice or document is delivered or deemed to be delivered:

- (a) after 5.00pm in the place of receipt; or
- (b) on a day which is a Saturday, Sunday or public holiday in the place of receipt, it is taken as having been delivered at 9.00am on the next day which is not a Saturday, Sunday or public holiday in that place.

Information and intellectual property

20. Access to records

20.1 Supplier to retain records

The Supplier must, during the Term and for a period of seven years after the performance of the Services, keep true and particular accounts and records of all Services provided under this Agreement (and any Purchase Order Contract) and all associated records, including all supporting materials used to generate and substantiate Tax Invoices submitted in respect of the Services supplied under this Agreement.

20.2 Right to access and audit

- (a) The Organisation or its authorised representatives may, during ordinary business hours, inspect and/or audit the accounts and records of the Supplier relating to the Supplier's compliance with its obligations under this Agreement, including calculation of the Rates and/or Fees. The Organisation or its authorised representatives will be entitled to take copies of or extracts from any such records.
- (b) The Supplier must participate promptly and cooperatively in any audits conducted by the Organisation or its authorised representative.
- (c) Except in those circumstances in which the Organisation determines that notice is not practicable or appropriate, the Organisation must give the Supplier reasonable

notice of an audit and, where reasonably practicable, an indication of which documents or class of documents the auditor may require access to.

- (d) If the outcome of an audit does not require any corrective action, each party must bear its own costs associated with any audits. If the audit identifies any error, non-compliance or inaccuracy requiring remedial action (other than a trivial or insignificant error, non-compliance or inaccuracy), the Organisation's costs in respect of the audit will, if notified by the Organisation to the Supplier, be payable by the Supplier as a debt due to the Organisation.
- (e) The Supplier must promptly take corrective action in order to rectify any error, non-compliance or inaccuracy identified in any audit relating to the way the Supplier has, under this Agreement:
 - (i) provided any Service or Deliverable; or
 - (ii) calculated any Rates and/Fees or any other amounts or fees billed to the Organisation.

21. Intellectual Property Rights

21.1 Contract Materials

- (a) Unless specified otherwise in Item 10 of Schedule 1, ownership of the Contract Materials will vest in the Supplier.
- (b) If Item 10 of Schedule 1 specifies that ownership of the Contract Materials vests in the Organisation, the Supplier assigns and agrees to assign to the Organisation all right, title and interest (including all Intellectual Property Rights) in the Contract Materials. To avoid doubt, nothing in this clause 21.1(b) requires the Supplier to assign its Intellectual Property Rights in its Pre-Existing Intellectual Property.
- (c) Where clause 21.1(b) applies, the Supplier warrants that it will be entitled to own and assign to the Organisation any and all Contract Materials in accordance with clause 21.1(b).

21.2 Ownership of Pre-Existing Intellectual Property

- (a) The Organisation's and, unless specified otherwise in Item 11 of Schedule 1, the Supplier's Pre-Existing Intellectual Property will remain vested in each of them (or the relevant third parties).
- (b) If Item 11 of Schedule 1 specifies that ownership of the Supplier's Pre-Existing Intellectual Property vests in the Organisation, the Supplier assigns and agrees to assign to the Organisation all right, title and interest (including all Intellectual Property Rights) in the Supplier's Pre-Existing Intellectual Property incorporated in or otherwise required to use the Contract Materials or any Deliverables.
- (c) Where clause 21.2(b) applies, the Supplier warrants that it will be entitled to assign to the Organisation any and all Pre-Existing Intellectual Property incorporated in or otherwise required to use the Contract Materials or any Deliverables.

21.3 Licence of Pre-Existing Intellectual Property by the Supplier

- (a) Subject to clause 21.3(c), the Supplier hereby irrevocably and unconditionally grants to the Organisation, free of additional charge, a non-exclusive, royalty-free, worldwide, transferable, licence (including the right to sub-license) to exercise all Intellectual Property Rights in:

- (i) the Contract Materials, where ownership of the Contract Materials remains with the Supplier under clause 21.1(a); and
 - (ii) any of the Supplier's Pre-Existing Intellectual Property incorporated in or otherwise required to use the Contract Materials, any Deliverables, or to obtain the benefit of the Services, where ownership of the Supplier's Pre-Existing Intellectual Property remains with the Supplier.
- (b) Unless specified otherwise in Item 12 of Schedule 1, the licence granted in this clause 21.3 is perpetual.
 - (c) The licence granted to the Organisation in clause 21.3(a) is subject to any additional licence terms specified in Item 13 of Schedule 1.

21.4 Licence of Pre-Existing Intellectual Property and Contract Materials by the Organisation

The Organisation grants the Supplier a non-exclusive, non-transferable, royalty-free licence to use:

- (a) the Organisation's Pre-Existing Intellectual Property;
- (b) where ownership of the Contract Materials vests in the Organisation, the Contract Materials; and
- (c) where ownership of the Supplier's Pre-Existing Intellectual Property vests in the Organisation, the Supplier's Pre-Existing Intellectual Property,

for the sole purpose of performing, and only to the extent required to perform, the Services and complying with its obligations under this Agreement and any Purchase Order Contracts for the Term.

21.5 Moral Rights

- (a) The Supplier warrants that the Organisation may use any Service or Deliverable (or any part of any Service or Deliverable) in any way, without identifying any person as the individual responsible for creating any particular material comprised in it, without infringing the Moral Rights of any person.
- (b) If specified in Item 14 of Schedule 1, the Supplier must obtain from any person (including the Supplier's Personnel and Personnel of any sub-contractor) whose Moral Rights may be affected, a written consent, in the form required by the Organisation, that such person:
 - (i) irrevocably consents to any amendment of the material to which the Moral Rights relate in any manner by the Organisation and for any purposes;
 - (ii) irrevocably consents to the Organisation using or applying the materials to which the Moral Rights relate for any purpose and in any manner, including by identifying the Organisation as the author of the material, without any attribution of authorship;
 - (iii) agrees that his or her consent extends to acts and omissions of any of the Organisation's licensees and successors in title; and
 - (iv) agrees that his or her consent is a genuine consent under the *Copyright Act 1968* (Cth) and has not been induced by duress.
- (c) The Supplier must ensure that in relation to any consent required under clause 21.5(b):

- (i) the consent has not been obtained by duress; and
 - (ii) the consent has not been obtained on the basis of a false or misleading statement.
- (d) The Supplier must provide a copy of any consent required under clause 21.5(b) to the Organisation, upon request.

21.6 Additional obligations

The Supplier must do all things reasonably requested by the Organisation to give full effect to this clause 21, including entering into further agreements to assign the rights referred to in clauses 21.1 and 21.3 to the extent applicable.

22. Data

- (a) Data will remain (and, if necessary, will become) the property of the Organisation. The Supplier will assign to the Organisation from the date of creation all Intellectual Property Rights in any Data created by or on behalf of the Supplier. For the avoidance of doubt, Data includes data that does not form part of the Deliverables.
- (b) If the Supplier or a sub-contractor is deemed to be the first owner of any database right or other Intellectual Property Rights in the Data, it must assign those Intellectual Property Rights to the Organisation.
- (c) The Supplier must only use the Data to the extent necessary to perform its obligations under this Agreement.
- (d) The Supplier must:
 - (i) subject to any more stringent requirements imposed pursuant to this Agreement, prohibit and prevent any person who does not have the appropriate level of security clearance from gaining access to the Data; and
 - (ii) comply with any policies of the Organisation in effect from time to time in respect of the secure disposal of equipment and destruction of records and the Data.
- (e) If the Supplier suspects that any Data has (or may) become lost or corrupted or there is unauthorised access to that Data, it will immediately notify the Organisation and propose remedial action, including action to ensure that this does not recur.
- (f) The Supplier must not, and must ensure that its Personnel and sub-contractors do not, without the Organisation's prior written consent:
 - (i) remove Data or allow the Data to be removed from the Organisation's premises or equipment; or
 - (ii) take, disclose or make available the Data or allow the Data to be taken, disclosed or made available outside of Victoria.

23. Confidentiality, privacy and data protection

23.1 Use of Confidential Information

- (a) The Supplier must keep the Confidential Information confidential and secure and must (and must ensure that its Personnel and advisers will):

- (i) use and reproduce Confidential Information only to the extent necessary to perform its obligations under this Agreement; and
 - (ii) not disclose or otherwise make available Confidential Information other than to its Personnel who have a need to know the information to enable the Supplier to perform its obligations under this Agreement.
- (b) The Supplier acknowledges that the Organisation will be entitled (in addition to any other remedy it may have) to seek an injunction or other equitable relief with respect to any actual or threatened breach by the Supplier of this clause 23.1 and without the need on the part of the Organisation to prove any special damage or to comply with the requirements of clause 18.
- (c) The Supplier must not make any public announcement in relation to this Agreement without the prior written consent of the Organisation.
- (d) On request by the Organisation, the Supplier must ensure that all of its Personnel involved in providing the Services who may have access to the Organisation's Confidential Information execute a deed of confidentiality in a form acceptable to the Organisation prior to commencing the provision of any Services under or in connection with this Agreement.

23.2 Exceptions to the Supplier's obligations of confidentiality

- (a) Notwithstanding clause 23.1, the Supplier may disclose the Confidential Information:
- (i) to its legal advisors, auditors and other advisors who require this information to provide advice to the Supplier in relation to this Agreement or a Purchase Order Contract; or
 - (ii) subject to clause 23.4, if required to do so by Law, court order, a House of Parliament, or Committee of a House of Parliament.

23.3 Prevention of use or disclosure of Confidential Information

- (a) The Supplier must immediately notify the Organisation in writing of any actual, threatened or suspected unauthorised use or disclosure of any Confidential Information, and must include in its notification:
- (i) the nature of the Confidential Information; and
 - (ii) the person to whom the Confidential Information has been (or may be) disclosed or is being used by.

23.4 Disclosure by Supplier required by Law

- (a) Subject to the Supplier first complying with clause 23.4(b)(iii), 23.4(b)(iv) and 23.4(b)(v), the Supplier may disclose Confidential Information to the extent that is required under clause 23.4(b)(i) or 23.4(b)(ii).
- (b) In the event that the Supplier:
- (i) is required by Law, court order, a House of Parliament, or a Committee of a House of Parliament to disclose all or any part of the Confidential Information; or
 - (ii) anticipates or has cause to anticipate that it may be required by Law, court order, a House of Parliament, or a Committee of a House of Parliament,
- the Supplier must, as soon as possible and to the extent permitted by the relevant requirement:

- (iii) notify the Organisation of such actual or anticipated requirement(s);
 - (iv) cooperate fully with the Organisation to try to lawfully avoid or limit the scope of that disclosure, if the Organisation so requests; and
 - (v) take such steps as the Organisation reasonably requires to permit the Organisation to have a reasonable opportunity to oppose or to restrict such disclosure by lawful means.
- (c) If required by the Organisation, if the Supplier is required to disclose Confidential Information to a Court, the Supplier must notify the Court of the obligations the Supplier owes to the Organisation in respect of the Confidential Information and use its reasonable endeavours to have the relevant Confidential Information disclosed only on a confidential basis and any proceedings be held in private (as appropriate).

23.5 Supplier's consent to disclosure of information

The Supplier consents to the Organisation publishing or otherwise making available information in relation to the Supplier (and the provision of the Services):

- (a) as may be required in order to comply with the requirements of the Contract Publishing System;
- (b) to other Victorian Public Entities or Ministers of the State of Victoria in connection with the use of the Services;
- (c) to any public sector agency (of the State, any other state or territory or the Commonwealth) for the purposes of benchmarking, provided that it will not identify the Supplier;
- (d) to the office of the Auditor General appointed under section 94A of the *Constitution Act 1975 (Vic)* (**Auditor-General**) or the ombudsman appointed under the *Ombudsman Act 1973 (Vic)* (**Ombudsman**);
- (e) to comply with the Law, including the *Freedom of Information Act 1982 (Vic)*; or
- (f) to the IBAC.

23.6 Return of Confidential Information by the Supplier

- (a) All Confidential Information will remain the property of the Organisation and all copies or other records containing Confidential Information (or any part of it) must, except to the extent necessary to comply with:
 - (i) clause 20;
 - (ii) any requirements of Law; or
 - (iii) any reasonable requirements of professional indemnity insurance,
 upon request or upon termination or expiry of this Agreement, be returned by the Supplier to the Organisation, or at the election of the Organisation, destroyed.
- (b) Upon the occurrence of any of the events specified in clause 23.6(a), the Supplier must not make any further use of, exploit or deal with in any way the relevant Confidential Information unless expressly permitted to do so by clause 23.
- (c) The Supplier must not refuse to comply with, or delay the performance of, its obligations under clause 23.6(a) whether on the basis of any alleged lien, set off, proprietary or quasi proprietary right or any other claim or demand against the Organisation or any other person.

- (d) Despite clause 23.6(a), the Supplier may retain copies of information (including Confidential Information) that it is required to retain for its legitimate internal audit or quality assurance purposes, but any information so retained will be retained and held subject in all respects to the terms of this Agreement.

23.7 Privacy

- (a) The Supplier acknowledges that it will be bound by the Information Privacy Principles, Health Privacy Principles and any applicable Code of Practice (together, **Privacy Obligations**) with respect to any act done or practice engaged in by the Supplier for the purposes of this Agreement, in the same way and to the same extent as the Privacy Obligations would have applied to the Organisation in respect of that act or practice had it been directly done or engaged in by the Organisation.
- (b) The Supplier agrees that it will:
- (i) assist the Organisation to comply with its obligations under the Privacy Obligations, to the extent possible;
 - (ii) immediately notify the Organisation upon becoming aware of any breach of the Privacy Obligations and comply with all directions of the Organisation in respect of the breach;
 - (iii) provide the Organisation with such co-operation as the Organisation requires in relation to resolving any complaint concerning privacy; and
 - (iv) provide access to or amendment of any record as directed by the Organisation.
- (c) The Supplier also agrees to comply with any directions made by any of the Commissioners, the Commonwealth Privacy Commissioner or the Victorian Health Services Commissioner relevant to this Agreement.
- (d) Without limiting clauses 23.7(a) to 23.7(c), in relation to any Personal Information obtained by the Supplier in connection with this Agreement, the Supplier must:
- (i) not collect, use, disclose, store, transfer or handle the information except in accordance with the Privacy Obligations;
 - (ii) not, without the prior consent of the Organisation, disclose the information to a person who is outside Victoria;
 - (iii) take all reasonable steps to ensure that the information is protected from misuse, interference or loss, and from unauthorised access, modification or disclosure;
 - (iv) take all reasonable steps to destroy or permanently de-identify information that is no longer needed for the purposes of this Agreement;
 - (v) co-operate with any reasonable request or direction the Organisation makes which relates to the protection of the information or the exercise of the functions of any of the Commissioners, the Commonwealth Privacy Commissioner or the Victorian Health Services Commissioner;
 - (vi) ensure that access to the information is limited to those of its Personnel who are required to access that information for the purposes of this Agreement; and
 - (vii) comply with any reasonable direction of the Organisation in relation to a complaint concerning privacy received by either party.

23.8 Data protection

The Supplier acknowledges that the Organisation is bound by the Protective Data Security Standards. The Supplier will not do any act or engage in any practice that contravenes a Protective Data Security Standard or would give rise to contravention of a Protective Data Security Standard by the Organisation in respect of any Data collected, held, used, managed, disclosed or transferred by the Supplier on behalf of the Organisation under or in connection with this Agreement.

Liability

24. Liability

- (a) The Supplier indemnifies, and will at all times hold harmless, defend and keep the Organisation and each of its Personnel indemnified (**Indemnified Party**), against any liabilities, losses, damages, costs and expenses (including all legal and settlement costs determined on a full indemnity basis) (**Losses**) or compensation arising out of, or in any way connected with, any:
- (i) personal injury, including sickness and death;
 - (ii) property damage;
 - (iii) a breach of an obligation of confidence or privacy, whether under this Agreement or otherwise;
 - (iv) fraudulent acts or omissions;
 - (v) any wilful misconduct or unlawful act or omission;
 - (vi) breaches of logical or physical security;
 - (vii) loss or corruption of Data;
 - (viii) any third party claim arising out of a breach of this Agreement by the Supplier or its Personnel (including breach of warranty) or any negligent act or omission of the Supplier or its Personnel; or
 - (ix) any infringement or alleged infringement of the Intellectual Property Rights, Moral Rights or any other rights of any person, including any third party, which was caused, or contributed to by, any act or omission of the Supplier or any of its Personnel.
- (b) The Supplier's liability to indemnify the Organisation under clause 24(a) is reduced to the extent that any wilful, unlawful or negligent act or omission of the Organisation or its Personnel contributed to their liability, loss, damage, cost, expense or compensation.
- (c) To the extent that the indemnity in this clause 24 refers to persons other than the Organisation, the Organisation holds this clause on trust for those other persons.
- (d) If any indemnity payment is made by the Supplier under this clause 24, the Supplier must also pay to the Indemnified Party an additional amount equal to any tax which is payable by the Indemnified Party in respect of that indemnity payment.

- (e) The Organisation may, in its absolute discretion, permit the Supplier, at the Supplier's expense, to handle all negotiations for settlement and, as permitted by Law, to control and direct any litigation that may occur following a claim that receipt of the Services or use of the Deliverables violates the Intellectual Property Rights, Moral Rights or any other rights of a third party (**IPR Claim**).
- (f) If the Organisation requests the Supplier to defend an IPR Claim in accordance with clause 24(e):
 - (i) the Supplier must comply at all times with any Government policy relevant to the conduct of the IPR Claim (including the Model Litigant Guidelines) and with any conditions imposed and directions given by the Organisation;
 - (ii) the Supplier may not settle or compromise the IPR Claim conducted by it without the Organisation's consent;
 - (iii) the Organisation may, at any time, give notice to the Supplier that the Organisation wishes to conduct the IPR Claim (including associated settlement discussions) and the Supplier will permit the Organisation to do so; and
 - (iv) the Supplier must comply at all times with any instructions provided by the Organisation in relation to the day to day conduct and management of the IPR Claim.

Representations and warranties

25. Warranties

The Supplier represents and warrants to the Organisation that:

- (a) it has the right to enter into this Agreement and perform the Services and provide the Deliverables;
- (b) the execution, delivery and performance of this Agreement by it does not contravene any contractual, legal or other obligation that applies to it;
- (c) it holds all licences, permits, consents and authorisations required under any Law in relation to the provision of the Deliverables and Services;
- (d) it is entitled to use and deal with any Intellectual Property Rights, and obtained all necessary consents to use and deal with any Moral Rights, which may be used by it in connection with the Services and Deliverables and to grant to the Organisation the licences contemplated by this Agreement;
- (e) the receipt of the Services and the possession or use of any Deliverable by the Organisation will not infringe the Intellectual Property Rights or other rights of any person or any Laws;
- (f) the Services will be:
 - (i) provided with due care and skill;
 - (ii) provided in accordance with all applicable standards, principles, practices and in accordance with the requirements of this Agreement (including the Specifications and any Purchase Order Contract); and
 - (iii) completed within a reasonable time;

- (g) it has the accreditation or membership of professional or other bodies in relation to the provision of the Services as set out in the Offer and that it will use its best endeavours to maintain such accreditation or membership during the Term;
- (h) it and its Personnel are appropriately qualified and have the requisite knowledge, skill and expertise to provide the Services in accordance with this Agreement;
- (i) whilst on the premises owned or controlled by the Organisation, the Supplier and its Personnel will at all times comply with the Organisation's lawful directions and policies, of which the Supplier is notified or is otherwise aware, including any applicable occupational health and safety and security policies;
- (j) where the Organisation has, either expressly or by implication, made known to the Supplier any particular purpose for which the Services are required, the Services will be performed in such a way as to achieve that result;
- (k) all representations made by the Supplier in or in connection with the Offer were and remain accurate and the Supplier has and will maintain at all relevant times the quality assurance arrangements set out in the Offer (if any);
- (l) the Supplier will not vary the Specifications of the Services without first obtaining the written consent of the Organisation; and
- (m) if Item 15 of Schedule 1 states that the Supplier is entering into this Agreement on behalf of a trust:
 - (i) it is a validly appointed trustee of the Trust;
 - (ii) there has not been any contravention of or non-compliance with any of the terms of the Trust Deed;
 - (iii) it has the right to be indemnified out of, and a lien over, the assets of the Trust except where the Supplier is fraudulent, negligent or in breach of trust;
 - (iv) this Agreement does not conflict with the operation or terms of the Trust or the Trust Deed;
 - (v) this Agreement constitutes valid and enforceable obligations of the Trust;
 - (vi) it has full and valid power and authority under the Trust to enter into this Agreement and to carry out the transactions contemplated by this Agreement (including all proper authorisations and consents);
 - (vii) it enters into this Agreement and the transactions evidenced by it for the proper administration of the Trust and for the benefit of all of the beneficiaries of the Trust; and
 - (viii) it is the sole trustee of the Trust,
 and the terms **Trust** and **Trust Deed** have the meaning given to them in Item 15 of Schedule 1.

26. Insurance

- (a) The Supplier must (and must ensure that any sub-contractors appointed by it) obtain and maintain for the Term and, if requested by the Organisation, for a period of up to seven years after the provision of the Services, the insurances specified in Item 16 of Schedule 1 in respect of any claim related to this Agreement.

- (b) The Supplier must, within 10 Business Days of a request by the Organisation, provide evidence of the currency of any insurance it is required to obtain under this Agreement.
- (c) Where any insurance the Supplier is required to obtain and maintain is due to expire (**Initial Insurance**), the Supplier must, on request by the Organisation, provide the Organisation with evidence of the currency of relevant replacement insurance prior to the expiration of the Initial Insurance (**Replacement Insurance**).
- (d) If this clause applies, as indicated by Item 16 of Schedule 1, any Replacement Insurance obtained pursuant to clauses 26(a) or 26(c) must be:
 - (i) taken out with an insurer acceptable to the Organisation; and
 - (ii) on terms (including any excess) which are acceptable to the Organisation.

27. Accident compensation

The Supplier must ensure that, in respect of its Personnel and any other persons engaged by the Supplier to provide the Services, it:

- (a) complies with the provisions of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic);
- (b) insures against its liability to pay compensation, whether under Law or otherwise; and
- (c) produces to the Organisation on request any certificates or like documentation required by the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).

Term and termination

28. Term

28.1 Initial Term

This Agreement begins on the Commencement Date and continues until the Expiry Date, unless extended in accordance with clause 28.2 or terminated earlier in accordance with its terms.

28.2 Extension

- (a) This Agreement may be extended beyond the Expiry Date, as agreed by the parties in writing, for the period or periods specified in Item 1 of Schedule 1.
- (b) Any such further term or terms will be on the same terms and conditions as this Agreement (excluding, in respect of the final further period, this clause 28.2).

29. Termination

29.1 Termination for cause

The Organisation may terminate this Agreement and any or all Purchase Order Contracts with immediate effect (or with effect from a specified date) by giving notice in writing to the Supplier if the Supplier:

- (a) fails to provide the Services in accordance with the Service Level Requirements or otherwise in accordance with the requirements of this Agreement;
- (b) breaches any provision of this Agreement or a Purchase Order Contract and, where that breach is capable of remedy, fails to remedy the breach within 10 Business Days after receiving written notice requiring it to do so (or such later date as may be specified in that notice);
- (c) breaches any provision of this Agreement that is not capable of remedy;
- (d) or any of its Personnel involved in the provision of the Services is guilty of fraud, dishonesty or any other serious misconduct;
- (e) commits any act or does anything that may be prejudicial or otherwise detrimental to the reputation of the State; or
- (f) suffers from an Insolvency Event.

29.2 Termination without cause

- (a) The Organisation may terminate a Purchase Order Contract without cause on notice to the Supplier (such termination to take effect upon receipt of the notice or such later date as specified in the notice).
- (b) If a Purchase Order Contract is terminated pursuant to clause 29.2(a), the Organisation will pay the Supplier:
 - (i) for the Services performed in accordance with the Purchase Order Contract up to the date of the termination; and
 - (ii) the unavoidable and substantiated costs incurred by the Supplier as a direct result of the termination, excluding any loss of profit,and the Organisation has no other liability to the Supplier in relation to the termination of that Purchase Order Contract.
- (c) When the Organisation issues a notice under clause 29.2(a), the Supplier must immediately comply with any directions given in the notice and do all that is possible to mitigate its losses arising from the termination of the relevant Purchase Order Contract.

29.3 Grounds for termination by the Supplier

- (a) The Supplier may terminate a Purchase Order Contract by giving at least 20 Business Days written notice to the Organisation if the Organisation fails to pay amounts due under that Purchase Order Contract which have the following characteristics:
 - (i) are the subject of Tax Invoices complying with this Agreement;
 - (ii) are due and payable in accordance with this Agreement;
 - (iii) are not the subject of a good faith dispute;
 - (iv) are overdue for a period of at least 60 Business Days; and
 - (v) are amounts for which a demand has been made, provided that the demand clearly states that the amount has been overdue for a period of at least 60 Business Days and that the Supplier will have the right to terminate the Purchase Order Contract on 20 Business Days' notice after the expiration of five Business Days following service of the demand if the demand is not met within that five Business Day period.

- (b) Clause 29.3(a) constitutes the Supplier's sole and exclusive right to terminate a Purchase Order Contract, and the Supplier has no right to terminate this Agreement.

29.4 Consequences of termination or expiry

- (a) Termination or expiry of this Agreement or a Purchase Order Contract will not prejudice any right of action or remedy which may have accrued to either party prior to termination or expiry.
- (b) On termination or expiration of this Agreement or a Purchase Order Contract (as the case may be), the Supplier must immediately cease using all materials (whether in written or electronic form) that contain or encapsulate any Data or Confidential Information in relation to the Agreement or the Purchase Order Contract (as the case may be) and, at the election of the Organisation:
 - (i) delete or destroy the materials, as applicable; or
 - (ii) return the materials to the Organisation in the format in which they were first provided by the Organisation and, in addition, if required by the Organisation, in a non-proprietary and open access file format (such as .txt, .csv, .rft, etc) as specified by the Organisation,at no additional cost to the Organisation.

29.5 Survival

Clauses 1, 3.7, 4, 8, 9, 10, 11, 12, 13, 14(c), 14(d), 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29 and 30 of this Agreement survive the termination or expiry of this Agreement and any Purchase Order Contract or the completion of the Services and may be enforced at any time.

Other miscellaneous terms

30. General

30.1 Legal costs

Except as expressly stated otherwise in this Agreement, each party must pay its own legal and other costs and expenses of negotiating, preparing, executing and performing its obligations under this Agreement.

30.2 Amendment

This Agreement may only be varied or replaced by a written document executed by the parties.

30.3 Waiver and exercise of rights

- (a) A waiver of any right, power or remedy under this Agreement must be in writing and signed by the party granting it. The fact that a party fails to do, or delays in doing, something the party is entitled to do under this Agreement does not amount to a waiver.
- (b) A single or partial exercise or waiver by a party of a right relating to this Agreement does not prevent any other exercise of that right or the exercise of any other right.

- (c) A party is not liable for any loss, cost or expense of any other party caused or contributed to by the waiver, exercise, attempted exercise, failure to exercise or delay in the exercise of a right.

30.4 Severability

Any provision of this Agreement or a Purchase Order Contract which is invalid or unenforceable is to be read down, if possible, so as to be valid and enforceable, and, if that is not possible, the provision will, to the extent that it is capable, be severed to the extent of the invalidity or unenforceability, without affecting the remaining provisions.

30.5 Rights cumulative

Except as expressly stated otherwise in this Agreement, the rights of a party under this Agreement are cumulative and are in addition to any other rights of that party.

30.6 Set off

The Organisation may set off against any sum owing to the Supplier under this Agreement, or any Purchase Order Contract, any amount then owing by the Supplier to the Organisation.

30.7 Time of the essence

Time is of the essence in relation to the provision of the Services under this Agreement and all Purchase Order Contracts.

30.8 Governing law and jurisdiction

- (a) This Agreement is governed by and is to be construed in accordance with the Laws.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

30.9 Assignment or transfer of rights and obligations

- (a) Subject to clause 30.9(c), a party may not assign any right under this Agreement without the prior written consent of the other party.
- (b) The Supplier will be responsible for acts and omissions of any assignee.
- (c) The Organisation may, by notice in writing to the Supplier, assign its rights, transfer its obligations or novate this Agreement to any other Victorian Public Entities in the event of any State government restructure or other re-organisation or change in policy.
- (d) Each party agrees to execute any documents necessary to document the exercise of a permitted right of assignment, transfer or novation under this Agreement.

30.10 Counterparts

This Agreement or any Purchase Order Contract may consist of a number of counterparts and, if so, the counterparts taken together constitute one document.

30.11 Entire understanding and order of precedence

- (a) This Agreement is comprised of the following items:
 - (i) clauses 1 to 30 (inclusive);
 - (ii) the Schedules to this Agreement;

- (iii) the Invitation (if specified in Item 20 of Schedule 1);
 - (iv) the Offer (if specified in Item 20 of Schedule 1); and
 - (v) any other documents or representations specified in Item 20 of Schedule 1.
- (b) In the event and to the extent of any inconsistency between the items listed in clause 30.11(a), the provisions of the earlier mentioned item will prevail to the extent of the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions will be severed from the item lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that item.
- (c) Each Purchase Order Contract is comprised of the following items:
- (i) the terms of this Agreement incorporated into the Purchase Order Contract as specified in clause 3.7;
 - (ii) the Purchase Order;
 - (iii) the Request for Quote;
 - (iv) the Quote; and
 - (v) any other documents or representations specified in the Purchase Order or the Request for Quote.
- (d) In the event and to the extent of any inconsistency between the items listed in clause 30.11(c), the provisions of the earlier mentioned document will prevail to the extent of the inconsistency. If the inconsistency remains incapable of resolution by reading down, the inconsistent provisions will be severed from the item lower in the order of precedence without otherwise diminishing the enforceability of the remaining provisions of that item.
- (e) This Agreement, and each Purchase Order Contract formed under this Agreement, contains everything the parties have agreed in relation to the subject matter it deals with. No party can rely on an earlier written document or anything said or done by or on behalf of another party before this Agreement was executed.
- (f) Except as otherwise provided in clause 30.11(a):
- (i) all previous negotiations, understandings, representations, warranties, memoranda or commitments concerning the subject matter of a Purchase Order Contract are merged in and superseded by the Purchase Order Contract and are of no effect; and
 - (ii) no oral explanation or information provided by any party to another:
 - A. affects the meaning or interpretation of this Agreement or a Purchase Order Contract; or
 - B. constitutes any collateral agreement, warranty or understanding between any of the parties.

30.12 Relationship of parties

- (a) This Agreement is not intended to create a partnership, joint venture or agency relationship between the parties.
- (b) The parties agree that the Supplier is engaged as an independent contractor and not as an employee of the Organisation.

Schedule 1 – Contract variables

Item 1	Commencement and expiry (Clause 28)	Commencement Date:	25 April 2018 [to be confirmed]	
		Expiry Date:	11 June 2021	
		Extension period(s):	One period of three years	
Item 2	Liquidated Damages (Clause 8.3)	<input type="checkbox"/> Liquidated damages are applicable <input checked="" type="checkbox"/> Liquidated damages are not applicable		
Item 3	Supplier's Key Personnel (Clause 6)	<input type="checkbox"/> Key Personnel are applicable [Insert details of Supplier's employees or contractors who will be engaged in the provision of the Services.]		
			Name:	Role:
			[insert]	[insert]
			[insert]	[insert]
			[insert]	[insert]
		<input type="checkbox"/> Key Personnel are not applicable		
Item 4	Price review (Clause 9(d))	<input checked="" type="checkbox"/> A price review mechanism is applicable Review mechanism: Increase rates by CPI (Melbourne All Groups) Review Dates: 29 September 2019 and the 1st Sunday in September thereafter. <input type="checkbox"/> A price review mechanism is not applicable		
Item 5	Invoicing (Clause 12.1)	Invoice requirements: Invoice to be submitted on or immediately after the last working day of the month. Address for invoices: Invoices to be sent to the Organisation's address.		
Item 6	Payment (Clause 12.2)	Payment for Services is to be made in accordance with any of the following methods: Electronic Transfer of Funds		
Item 7	Parties' Representatives (Clause 13.1)	Organisation's Representative:		
		Name:	Tom Pelly	
		Title:	Manager Technical Services and Environment	
		Telephone:	03 5759 4022	
		Mobile:	0409 141 796	

		Email:	tompelly@mthotham.com.au
		Supplier's Representative:	
		Name:	[insert]
		Title:	[insert]
		Telephone:	[insert]
		Mobile:	[insert]
		Email:	[insert]
Item 8	Progress Report (Clause 13.5)	<input type="checkbox"/> Progress reports are required <input checked="" type="checkbox"/> Progress reports are not required	
Item 9	Contract management review (Clause 13.6)	<input checked="" type="checkbox"/> Contract management meetings are required <input type="checkbox"/> Contract management meetings are not required	
Item 10	Ownership of Contract Material (Clause 21.1)	<input type="checkbox"/> Supplier <input checked="" type="checkbox"/> Organisation	
Item 11	Ownership of Supplier's Pre-Existing Intellectual Property (Clause 21.2(a))	<input checked="" type="checkbox"/> Supplier <input type="checkbox"/> Organisation	
Item 12	Duration of licence (Clause 21.3(b))	<input checked="" type="checkbox"/> Perpetual <input type="checkbox"/> Other (please specify): <input type="checkbox"/> Not applicable [this option should only be selected if the Organisation owns the Contract Material (as indicated in Item 10 above) and the Supplier's Pre-Existing Intellectual Property (as indicated in Item 10 above).]	
Item 13	Licence terms (Clause 21.3(c))	<input type="checkbox"/> Additional licence terms are applicable <input checked="" type="checkbox"/> Additional licence terms are not applicable	
Item 14	Moral Rights (Clause 21.5)	<input checked="" type="checkbox"/> The Supplier must obtain written consent from any person who Moral Rights may be affected.	
Item 15	Trust (Clause 25(m))	<input type="checkbox"/> The Supplier is entering into this Agreement as a trustee If ticked, the Supplier is entering into this Agreement on behalf of the Trust and the warranties in clause 25(m) are incorporated into this Agreement, where: <ul style="list-style-type: none"> • Trust means [specify] • Trust Deed means [specify] <input type="checkbox"/> The Supplier is not entering into this Agreement as a trustee [to be reviewed prior to appointment]	
Item 16	Insurance		

	(Clause 26)		Type of coverage	Amount (AUD)
		<input checked="" type="checkbox"/>	Public liability insurance	\$20 million per event
		<input checked="" type="checkbox"/>	Product liability insurance	\$20 million per event
		<input type="checkbox"/>	Professional indemnity insurance	Not required
		<input type="checkbox"/>	Contract works insurance	Not required
		<input type="checkbox"/> Clause 26(d) is applicable to this Agreement <input checked="" type="checkbox"/> Clause 26(d) is not applicable to this Agreement		
Item 17	Applicable Laws (Clause 15.1)	The Supplier must comply with all Laws, including any which may be listed here for information purposes due to their particular relevance to the Services: All laws.		
Item 18	VIPP (Clause 15.5)	<input type="checkbox"/> VIPP is applicable to this Agreement <input checked="" type="checkbox"/> VIPP is not applicable to this Agreement		
Item 19	Notice particulars (Clause 19)	Organisation:		
		Addressee:	Jon Hutchins Chief Executive Officer	
		Address:	28 Great Alpine Road, Hotham Heights, Victoria, 3741	
		Email:	jonhutchins@mthotham.com.au	
		Supplier:		
		Addressee:	[insert]	
		Address:	[insert]	
		Email:	[insert]	
Item 20	Additional Items (Clause 30.11)	<input type="checkbox"/> Additional items form part of this Agreement <input checked="" type="checkbox"/> No additional items form part of this Agreement [confirm pre contract preparation]		

Schedule 2 – Services and Price Schedule

Item 1	Services	The Services are as described in the Invitation, the Offer and any other items or representation as listed in Item 20 of Schedule 1 subject to the order of precedence in clause 30.11.
Item 2	Work program	The Works program as described in the Invitation, the Offer and any other items or representation as listed in Item 20 of Schedule 1 subject to the order of precedence in clause 30.11.
Item 3	Price Schedule	[Insert]
Item 4	Expenses and Disbursements	<input type="checkbox"/> The Supplier may recover expenses and/or disbursements in relation to the Services <input checked="" type="checkbox"/> The Supplier may not recover expenses and/or disbursements in relation to the Services
Item 5	Responsibility Chart	<input type="checkbox"/> Responsibility Chart required <input checked="" type="checkbox"/> No responsibility Chart required

Schedule 3 – Service Level Requirements

In providing the Services and otherwise performing its obligations under the Agreement, the Supplier must comply with the following Service Level Requirements:

1. Refer Specification.

Schedule 4 – Victorian Industry Participation Policy (VIPP)

Not applicable.

Schedule 5 – Specifications

Executed as an Agreement

Signed by **[name]** a duly authorised officer of
Mount Hotham Alpine Resort Management Board
in the presence of:

}

.....

.....
Signature of Witness

.....
Name of Witness (print)

.....
Date

Where the Supplier is a company incorporated in Australia with more than one director:

Executed by [Supplier name] ACN **[insert
ACN]** acting by the following persons or, if
the seal is affixed, witnessed by the
following persons in accordance with s127
of the *Corporations Act 2001* (Cth):

.....
Signature of Company Secretary/Director

.....
Signature of Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

.....
Date

Where the Supplier is a company incorporated in Australia with a sole director:

Executed by [Supplier name] ACN **[insert
ACN]** acting by the following person or, if
the seal is affixed, witnessed by the
following person in accordance with s127
of the *Corporations Act 2001* (Cth):

.....
Signature of Sole Director and Company
Secretary

.....
Signature of Witness

.....
Name of Sole Director and Company
Secretary (print)

.....
Name of Witness (print)

.....
Date

Where the Supplier is an individual:

Signed by [Supplier name] in the presence
of: }

.....

.....
Signature of Witness

.....
Name of Witness (print)

.....
Date

Where the Supplier is a corporate trustee:

Executed by [Supplier name] ACN **[insert
ACN]** as a trustee of **[insert name of
trust]** acting by the following persons or, if
the seal is affixed, witnessed by the
following persons in accordance with s127
of the *Corporations Act 2001* (Cth):

.....
Signature of Company Secretary/Director

.....
Signature of Director

.....
Name of Company Secretary/Director
(print)

.....
Name of Director (print)

.....
Date

Annexure A – Form of Purchase Order

PURCHASE ORDER

issued by

Mount Hotham Alpine Resort Management Board (**Organisation**)

to

[Supplier name](Supplier)

under the agreement for the provision of services dated [insert date of Agreement] (**Agreement**)

1.	Purchase Order number	[Insert Purchase Order number]
2.	Date of Purchase Order	[Insert date]
3.	Start Date	[Insert date for start of provision of Services]
4.	Completion Date	[Insert date for completion of all Services]
5.	Services	[Describe Services]
6.	Deliverables	[Describe any Deliverables to be provided as part of the Services]
7.	Work program	[Describe the applicable Milestones, and Milestone Dates by which those Milestones must be achieved. Describe the delivery dates required for Deliverables]
8.	Pricing	[Insert details of the Rates and/or Fees for the Services to be provided, as contained in the Quote (and negotiated, if applicable). Include: <ul style="list-style-type: none"> • the GST exclusive price; • the GST payable; and • the total cost for the Services.]
9.	Key Personnel	[Select which of the following applies in relation to this Purchase Order:]
		<input type="checkbox"/> All Key Personnel listed in Item 3 of Schedule 1 of the Agreement are required for this Purchase Order.
		<input type="checkbox"/> Key Personnel are not required for this Purchase Order.
		<input type="checkbox"/> The following Key Personnel from the list in Item 3 of Schedule 1 of the Agreement are required for this Purchase Order:
	Name:	Role:
10.	Other information	[Describe any other information relevant to the provision of the Services under the Purchase Order Contract. Note that this information will not over-ride the terms and conditions of the Agreement.]

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