



WALGA

## Member Contract Conditions (ICT Services)

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**Version 2 (July 2023)**

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# 1 Definitions

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The meanings of the terms used in the Contract are set out below.

Term	Meaning
<b>Acceptance</b>	the Principal determining, in accordance with clause 10, that a Service (or any part including each Deliverable) complies with the Services Requirements and other requirements of the Contract and is free from material Defects, and <b>Accepted</b> has a corresponding meaning.
<b>Acceptance Date</b>	with respect to any particular Service or Deliverable, the date on which such Service or Deliverable is Accepted in accordance with clause 10(b)(1).
<b>Acceptance Testing Plan</b>	a plan, if any, for determining Acceptance of the Services, as: <ol style="list-style-type: none"> <li>1 prepared by the Contractor in accordance with clause 6.7; or</li> <li>2 specified in the Procurement Form Details.</li> </ol>
<b>Additional Term</b>	the period specified as the “Additional Term” in the Procurement Form Details.
<b>Alternative Software Product</b>	has the meaning given in clause 17.4(b).
<b>Ancillary Data</b>	metadata and other statistical information generated as a result of the Principal's use of an Externally Delivered Service.
<b>Approval</b>	each approval, certificate, licence, authority, waiver, exemption, registration, consent, permit or authorisation required to perform the Services in accordance with all applicable Laws.
<b>Approved Subcontractor</b>	a Subcontractor listed as an “Approved Subcontractor” in the Procurement Form (if any).
<b>Background IP</b>	in respect of each party, any Intellectual Property which is owned by that party or licensed by that party from a third party and which: <ol style="list-style-type: none"> <li>1 is in existence at the date of the Contract; or</li> <li>2 comes into existence after the date of the Contract otherwise than in connection with the Contract,</li> </ol>

Term	Meaning
	excluding Intellectual Property in any Licensed Software.
<b>Backup</b>	in respect of an Externally Delivered Service, a full or part copy of software and data required for that Service to function as required under the Contract, including all Principal Data entered into, or generated by, the Service. To ' <b>Back-up</b> ' means the process of creating a Backup.
<b>Business Day</b>	a day that is not a Saturday, Sunday, a public holiday in the place where the Principal has its head office, or 27, 28, 29, 30 or 31 December.
<b>Claim</b>	a claim, demand, action or proceeding of any nature, whether actual or threatened, arising out of, or in connection with, the Contract or otherwise arising in any way whatsoever.
<b>Completion</b>	<p>in respect of any Services, the Contractor's completion of the Services and delivery of any required Deliverables, including:</p> <ol style="list-style-type: none"> <li>1 the Acceptance of such Services and Deliverables; and</li> <li>2 the completion of the Contractor's Obligations in respect of such Services and Deliverables,</li> </ol> <p>and <b>Complete</b> and <b>Completed</b> have the corresponding meaning.</p>
<b>Confidential Information</b>	<p>the terms of the Contract and in respect of a party, all information in connection with the party's business, operations, finances or customers, regardless of its form, which is disclosed to, or acquired by, the other party directly or indirectly (whether before or after the date of the Contract) and which:</p> <ol style="list-style-type: none"> <li>1 is, by its nature, confidential; or</li> <li>2 is treated or designated as confidential by the party, or the receiving party knows, or ought to know, is confidential,</li> </ol> <p>but does not include information which:</p> <ol style="list-style-type: none"> <li>3 is or becomes public knowledge other than by a breach of the Contract; or</li> <li>4 has been independently developed by the receiving party, or is in the possession of the receiving party without restrictions on disclosure.</li> </ol>
<b>Contract</b>	<p>the agreement formed between the parties regarding the performance of the Services by:</p> <ol style="list-style-type: none"> <li>1 with respect to the Services, either: <ul style="list-style-type: none"> <li>– the relevant Procurement Form; or</li> <li>– the details in VendorPanel; and</li> </ul> </li> </ol>

Term	Meaning
	<p>2 the ICT Services Contract Conditions, with the documents forming part of the Contract prevailing in the order of precedence set out in this definition.</p>
<b>Contractor</b>	the party defined as the “Contractor” in the Procurement Form.
<b>Contractor IP</b>	<p>any Intellectual Property of the Contractor (or Intellectual Property licensed to the Contractor by a third party) which:</p> <ol style="list-style-type: none"> <li>1 is in existence before the date of the Contract or comes into existence after the date of the Contract other than in connection with the Contract or the provision of the Services; and</li> <li>2 the Contractor makes available, contributes, brings to or uses in connection with the Contract.</li> </ol>
<b>Contractor’s Obligations</b>	all of the Contractor’s obligations under the Contract.
<b>Contractor’s Personnel</b>	the Contractor’s officers, employees, agents and subcontractors and their respective employees and agents.
<b>Contractor Representative</b>	has the meaning given in clause 8.2(a).
<b>Contractor Software</b>	the software owned by the Contractor and developed prior to entering into the Contract.
<b>COVID-19</b>	the coronavirus disease identified by the World Health Organisation on 11 February 2020 as COVID-19 and declared a pandemic by the World Health Organisation on 11 March 2020, and includes any and each mutation, variant or strain of the virus that causes the disease.
<b>Data Centre</b>	the data centre specified in the Externally Delivered Services Specifics.
<b>Date for Completion</b>	the date specified in the Procurement Form Details for Completion of the Services.
<b>Date for Transition Completion</b>	the date specified in the Procurement Form Details for Completion of the Transition In Services.



Term	Meaning
<b>Date of Completion</b>	in respect of any Services, including the delivery of any required Deliverables, the date on which the Services are Completed.
<b>Defect</b>	<p>any defect, error, damage, deficiency, fault or inadequacy in the design, performance, workmanship, quality or makeup of the Services or any fault, failure, degradation, deficiency or error in respect of any part of a Deliverable which results in:</p> <ol style="list-style-type: none"> <li>1 the Deliverable not complying with the Specifications;</li> <li>2 an error message being displayed;</li> <li>3 the Deliverable doing something that it was not designed to do; or</li> <li>4 the Deliverable not doing something that it was designed to do, and which detrimentally affects the operation of the Deliverable.</li> </ol>
<b>Defects Liability Period</b>	<p>in respect of each Service and Deliverable:</p> <ol style="list-style-type: none"> <li>1 the period specified in the Procurement Form Details; or</li> <li>2 if no period is specified, 12 months,</li> </ol> <p>commencing on the Acceptance Date of that Service or Deliverable.</p>
<b>Deliverable</b>	each deliverable, including any Hardware, Equipment, Developed Software, Licensed Software and Documentation, to be supplied by the Contractor to the Principal under the Contract.
<b>Design Specification</b>	<p>the document, if any:</p> <ol style="list-style-type: none"> <li>1 prepared by the Contractor in accordance with clause 6.5; or</li> <li>2 specified in the Procurement Form Details.</li> </ol>
<b>Developed Project Documents</b>	any Design Specifications, Project Plan and Acceptance Testing Plan (as applicable) or other Project Documents specified in the Procurement Form Details or Specification as being required to be prepared by the Contractor.
<b>Developed Software</b>	any software to be created by or on behalf of the Contractor under the Contract, and includes all source code and Documentation related to that software.
<b>Development Services</b>	the Services, if any, specified as Development Services in the Procurement Form Details.

Term	Meaning
<b>Digital Communication Services</b>	the Services, if any, specified as Digital Communication Services in the Procurement Form Details.
<b>Digital Communication Services Plan</b>	the plan or scheme specified in the Digital Communication Services Specifics, if any, that is agreed by the parties relating to matters including pricing, devices, connection, speed and volume.
<b>Digital Communication Services Specifics</b>	the part of the Procurement Form Details headed Digital Communication Services Specifics.
<b>Disabling Code</b>	any virus, Trojan horse or computer programming code, including source and object code, which would have the effect of disrupting, impairing, disabling or otherwise adversely affecting, shutting down or denying the Principal access to the Deliverables provided under the Contract.
<b>Dispute</b>	a difference, dispute or issue arising at any time between the parties arising out of, or in connection with, the Contract.
<b>Dispute Notice</b>	a notice in respect of a Dispute given under clause 36(b).
<b>Documentation</b>	<ol style="list-style-type: none"> <li>1 any training manuals, user manuals, operating manuals, technical manuals or other documentation specified in the Procurement Form Details; and</li> <li>2 any other documentation which is necessary for the effective installation, operation, Use (and, where applicable, modification, development and maintenance) of any Deliverables supplied by the Contractor under the Contract, whether in electronic form or otherwise.</li> </ol>
<b>End Date</b>	the date specified as the "End Date" in the Procurement Form.
<b>Equipment</b>	each item of equipment, if any, to be leased by the Contractor to the Principal as specified in the Procurement Form Details.
<b>Excluded Loss</b>	loss of production, loss of revenue, loss of profit or anticipated profit, loss of business reputation, business interruptions of any nature and loss of opportunities.
<b>Externally Delivered Services</b>	the Services, if any, specified to be delivered as Externally Delivered Services in the Procurement Form Details.

<b>Term</b>	<b>Meaning</b>
<b>Externally Delivered Services Specifics</b>	the part of the Procurement Form Details headed Externally Delivered Services Specifics.
<b>Fee</b>	the fee or rates set out in the Procurement Form Details.
<b>Force Majeure</b>	<p>any of the following events, to the extent that it reasonably prevents the affected party from performing its obligations under the Contract and is not within the reasonable control of the affected party:</p> <ol style="list-style-type: none"> <li>1 the unavailability of utility services such as electricity, gas and water (other than by reason of any act or omission of the Contractor);</li> <li>2 fire (other than as caused by any act or omission of the Contractor), storm, lightning, flood, earthquake or other acts of God;</li> <li>3 acts of war, terrorism or riots; and</li> <li>4 strikes and lockouts (other than strikes or lockouts involving only or principally, the Contractor's Personnel),</li> </ol> <p>however, will not include failure by the affected party to perform its obligations due to any effects of the COVID-19 pandemic or another pandemic or epidemic that:</p> <ol style="list-style-type: none"> <li>5 are current as at the Start Date; or</li> <li>6 were (or could have been) reasonably anticipated by the affected party as at the Start Date.</li> </ol>
<b>Good Industry Practice</b>	the exercise of the degree of skill, diligence, prudence and foresight that reasonably would be expected from a professional contractor in providing services similar to the Services and under conditions comparable to those applicable to the Services.
<b>Government Agency</b>	any government or governmental, local governmental, semi-governmental, judicial, quasi-judicial or administrative entity, agency, department, commission, authority or Minister in Western Australia or the Commonwealth of Australia.
<b>GST</b>	has the meaning given in section 195-1 of the GST Act.
<b>GST Act</b>	<i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth) and any other act, ordinance, regulation, public binding ruling or subordinate legislation relating to the imposition of GST.
<b>Hardware</b>	each item of hardware and other equipment to be supplied by the Contractor to the Principal as specified in the Procurement Form, other than Equipment.

<b>Term</b>	<b>Meaning</b>
<b>ICT Services Contract Conditions</b>	this document called 'Member Contract Conditions for ICT Services'.
<b>Incident</b>	<p>any occurrence or event that has resulted in, or has the potential to result in, adverse consequences to people, property, the environment, reputation or production or a combination of these, including:</p> <ol style="list-style-type: none"> <li>1 deviations from the Principal's health, safety and environmental Policies and Guidelines; and</li> <li>2 non-compliances with relevant health, safety and environmental Laws and Approvals and any public complaint regarding the Contractor and relating to its performance of the Services.</li> </ol>
<b>Interfacing Providers</b>	a third party engaged by the Principal with whom the Contractor must interface or interact as part of performing the Contractor's Obligations.
<b>Initial Term</b>	the period from the Start Date until the End Date.
<b>Insolvency Event</b>	<p>in respect of the Contractor:</p> <ol style="list-style-type: none"> <li>1 the appointment of an administrator, a liquidator, a provisional liquidator or a controller (including any receiver or receiver and manager);</li> <li>2 any compromise, arrangement, merger, amalgamation, reconstruction, winding up, dissolution, deregistration, assignment for the benefit of creditors, scheme, composition or arrangement with creditors (including a deed of company arrangement), insolvency, bankruptcy; or</li> <li>3 any similar procedure or situation which involves a moratorium or the suspension of the payment of any debts or, where applicable, changes in the constitution of any partnership or person, or death.</li> </ol>
<b>Insurances</b>	the insurances which the Contractor is required to obtain under the Panel Agreement.
<b>Intellectual Property</b>	all intellectual and industrial property rights, including trademarks, copyright (including future copyright), Moral Rights, inventions, patents, designs, circuits and other eligible layouts, database rights, and other intellectual property rights as defined in Article 2 of the Convention Establishing the World Intellectual Property Organisation dated 14 July 1967 (as amended from time to time), including any application or right to apply for registration of any of these rights.
<b>Laws</b>	any act, ordinance, regulation, subordinate legislation, by-law or award of the State, Territory or Commonwealth (as applicable) in which the Contractor's Obligations are being carried out.

Term	Meaning
<b>Licensed Software</b>	each item of Contractor Software or Third Party Software to be supplied by the Contractor to the Principal under the Contract.
<b>Loss</b>	any liability, cost, expense, loss, personal injury (including illness), death or damage, amounts payable on a Claim (whether or not the Claim is successful), suit, charge, diminution in value, action, statutory or equitable compensation, demand, legal costs and disbursements.
<b>Maximum Liability Amount</b>	by reference to each party: <ol style="list-style-type: none"> <li>1 the amount in the Procurement Form; or</li> <li>2 where no amount is provided in the Procurement Form, an amount equal to the Fee.</li> </ol>
<b>Moral Rights</b>	has the meaning given in the <i>Copyright Act 1968</i> (Cth).
<b>New Releases</b>	any major amendments which have been produced primarily to extend, alter or improve any Software, including any update, enhancement, extension or replacement of the functionality of such Software, but excluding Updates and New Software Products.
<b>New Software Product</b>	has the meaning given in clause 13.4.
<b>Non-Acceptance Notice</b>	is defined in clause 10(b)(2).
<b>Panel Agreement</b>	the agreement between WALGA and the Contractor, regarding the panel pursuant to which the Contractor is providing the Services to the Principal.
<b>Party Details</b>	the details of each party set out in the Procurement Form.
<b>Personal Information</b>	information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not.
<b>Policies and Guidelines</b>	all of the policies and guidelines of the Principal made available to the Contractor, as amended from time to time.

Term	Meaning
<b>Principal</b>	the party defined as the “Principal” in the Procurement Form, being an entity within the definition of “Member” (as that term is defined in the Panel Agreement).
<b>Principal Data</b>	information and materials of the Principal in respect of which the Contractor has custody or control for the purpose of providing the Services or which are accessed, transmitted or stored using the Contractor’s information systems or equipment under the Contract.
<b>Principal IP</b>	any Intellectual Property of the Principal (or licensed to the Principal by a third party) which the Principal makes available, contributes, brings to or uses in connection with the Contract.
<b>Principal Representative</b>	has the meaning given in clause 8.2(c).
<b>Privacy Laws</b>	<ol style="list-style-type: none"> <li>1 the <i>Privacy Act 1988</i> (Cth);</li> <li>2 the Australian Privacy Principles; and</li> </ol> any other Commonwealth or Western Australian legislation or guidelines relating to privacy.
<b>Procurement Form</b>	as appropriate: <ol style="list-style-type: none"> <li>1 the form of that title, order or requisition issued by the Principal to the Contractor from time to time, which provides for the specifics, execution and creation of the Contract for the provision of the Services; or</li> <li>2 where a Contract is to be created in VendorPanel, the specifics contained on that system, by reference to the Services, necessary for a Contract to be created.</li> </ol>
<b>Procurement Form Details</b>	Part B of the Procurement Form.
<b>Professional Contractor</b>	a contractor with skill and experience in, and the expertise and resources necessary to complete the performance of services the same as, or similar to, the Services.
<b>Project Documents</b>	<ol style="list-style-type: none"> <li>1 the Project Documents specified in the Procurement Form Details; and</li> <li>2 any Developed Project Documents once accepted by the Principal under clause 6.3(a).</li> </ol>

Term	Meaning
<b>Project IP</b>	all present or future Intellectual Property created, discovered or coming into existence as a result of the performance of the Contractor's Obligations and, for clarity, includes any Developed Software.
<b>Project Plan</b>	the document, if any: 1 prepared by the Contractor in accordance with clause 6.6; or 2 specified in the Procurement Form Details.
<b>Resources</b>	personnel, facilities, systems, equipment, procedures, processes and other resources.
<b>Secondary Code</b>	code that is written within or for an existing application environment, including configuration elements, ancillary functions or capabilities and script-based operational enhancements.
<b>Security Audit</b>	an audit performed by the Contractor, or a third party, in accordance with clause 12.7.
<b>Service Credit Cap</b>	the amount specified as the "Service Credit Cap" (if any) in the Procurement Form Details.
<b>Service Credits</b>	in respect of each Service Level, the Service Credits, if any, specified in the Procurement Form Details.
<b>Service Levels</b>	the Service Levels, if any, specified in the Procurement Form Details.
<b>Service Level Failure</b>	a failure by the Contractor to meet a Service Level.
<b>Services</b>	any services set out in the Procurement Form, including the delivery of any Deliverables and performance of services ancillary to the Services.
<b>Services Requirements</b>	that: 1 the Services meet the requirements of the Contract (including those set out in the Specifications); and 2 those tests which are required by the Contract to be carried out and passed in respect of the Services have been carried out and passed (or, where no such tests are set out in the Contract, any tests which are commonly required for services of the same nature as the Services, have been carried out and passed).

<b>Term</b>	<b>Meaning</b>
<b>Services Term</b>	the period of time from the Start Date to the last date of the Initial Term or Additional Term, as applicable.
<b>Site</b>	any premises which the Principal owns or which is in the care, control and management of the Principal including any land on which the Principal's property is situated on and which the Contractor or the Contractor's Personnel needs to access in connection with the Contract.
<b>Site Requirements</b>	any requirements, including safety requirements, that the Contractor must comply with when on the Site, as may be notified by the Principal to the Contractor from time to time.
<b>Software</b>	<ol style="list-style-type: none"> <li>1 Licensed Software;</li> <li>2 software used to provide an Externally Delivered Service;</li> <li>3 software used on, or integrated into, any Hardware or Equipment; and</li> <li>4 any other Deliverables that comprise or include software.</li> </ol>
<b>Specifications</b>	the specifications and requirements describing the Services to be supplied under the Contract, as set out in the Procurement Form.
<b>Start Date</b>	the date specified as the "Start Date" in the Procurement Form.
<b>Subcontractor</b>	any subcontractor of the Contractor performing any part of the Services in accordance with clause 19.2.
<b>Support Representative</b>	the person specified as the Contractor's Support Representative in the Procurement Form Details.
<b>Support Hours</b>	the support hours during which the Support Representative must be available, as specified in the Procurement Form Details.
<b>Sustainability Objectives</b>	has the meaning given in clause 21.
<b>Tax</b>	any income, land, indirect and other taxes, levies, imposts, deductions, charges, duties, compulsory loans and withholdings, including financial institutions duty, debits tax or other taxes whether incurred by, payable by return or passed on to another person and includes any interest, penalties,



<b>Term</b>	<b>Meaning</b>
	charges, fees, fines or other amounts imposed in respect of any of the above, but does not include GST.
<b>Tax Invoice</b>	any document or record treated by the Commissioner of Taxation as a tax invoice or as a document entitling a recipient to an input tax credit.
<b>Term</b>	the period of time from the Start Date to the End Date.
<b>Third Party Item</b>	any Third Party Software or any Hardware or Equipment that is manufactured by a third party.
<b>Third Party Software</b>	the software that is owned by a third party and is to be procured by the Contractor, including any related Documentation.
<b>Transition In Services</b>	has the meaning given in clause 5.1(a).
<b>Transition Out Commencement Date</b>	the date on which the Contract, or any part of it, is terminated or expires.
<b>Transition Out Plan</b>	the Transition Out Plan to be prepared and maintained by the Contractor in accordance with clause 35.3.
<b>Transition Out Services</b>	has the meaning given in clause 35.4(b).
<b>Use</b>	includes install, operate, test, copy, access, execute, display and, where applicable, reproduce, distribute, support and maintain and anything reasonably incidental to such activities.
<b>Update</b>	software which has been produced primarily to overcome defects in, or to improve the operation of any Software without significantly altering the operation or nature of the Software including any patch.
<b>Variation</b>	an increase, decrease, addition, omission, substitution or other change to any part of the Services to be performed under the Contract.
<b>Variation Notice</b>	a notice issued by the Principal under clause 32(b) directing the Contractor to carry out a Variation requested under clause 32(a).

Term	Meaning
<b>Variation Quotation</b>	a quotation from the Contractor which sets out the Contractor's additional costs or savings and the effect on the Services and the Date for Completion for performing a Variation requested under clause 32(a).
<b>VendorPanel</b>	WALGA's online quotation, compliance and contract management system, as updated from time to time, which includes the system formerly branded as "eQuotes".
<b>WALGA</b>	the Western Australian Local Government Association (ABN 28 126 945 127) of 170 Railway Parade, West Leederville, in the State of Western Australia.
<b>Work Health and Safety Requirements</b>	<p>the requirements set out in the Contract relating to work health and safety, and any of the following related to work health and safety or dangerous goods:</p> <ol style="list-style-type: none"> <li>1 Laws;</li> <li>2 the National Standard for Construction Work, codes of practice, Australian Standards and compliance codes;</li> <li>3 directions, notices and the like issued by any Government Agency or in accordance with any Laws;</li> <li>4 any such matters of which the Contractor has been informed by the Principal, orally or in writing; and</li> <li>5 any relevant Policies and Guidelines,</li> </ol> <p>and, for clarity, includes the <i>Work Health and Safety Act 2020 (WA)</i> and the <i>Work Health and Safety (General) Regulations 2022 (WA)</i>.</p>

## 2 Interpretation

In the Contract, unless the context suggests otherwise:

- (a) headings and bold type are for convenience only and do not affect the interpretation of the Contract;
- (b) the singular includes the plural and the plural includes the singular;
- (c) other parts of speech and grammatical forms of a word or phrase defined in the Contract have a corresponding meaning;
- (d) an expression importing a person includes any company, partnership, joint venture, association, corporation or other body corporate and any Government Agency as well as an individual;
- (e) a reference to a clause, party, schedule or attachment is a reference to a clause of, and a party, schedule or attachment to, the Contract;

- (f) a reference to any legislation includes all delegated legislation made under it and amendments, consolidations, replacements or re-enactments of any of them;
- (g) a reference to a document includes all amendments or supplements to, or replacements or novations of, that document;
- (h) a reference to a party to a document includes that party's successors and permitted assignees;
- (i) a promise on the part of 2 or more persons binds them jointly and severally;
- (j) no provision of the Contract will be construed adversely to a party because that party was responsible for the preparation of the Contract or that provision;
- (k) specifying anything after the words 'include' or 'for example' or similar expressions does not limit what else is included;
- (l) a reference to 'consent', 'approved' or 'approval' will be deemed to mean 'consent to in writing', 'approved in writing' or 'approval in writing';
- (m) a reference to a 'day', 'month', 'quarter' or 'year' is a reference to a calendar day, a calendar month, a calendar quarter or a calendar year;
- (n) Part 1F of the *Civil Liability Act 2002 (WA)* does not apply to the Contract; and
- (o) to the extent of any inconsistency between the provisions of the documents forming the Contract, the Contractor must give the Principal notice of that inconsistency, and the Principal will direct the Contractor as to the interpretation and construction to be followed.

## 3 Services Term

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### 3.1 Services Term

- (a) The Contract commences on the Start Date and ends on the End Date, unless terminated under clause 34.
- (b) Subject to clause 34 the Contract continues in full force and effect, notwithstanding the termination or expiry of the Panel Agreement.

### 3.2 Extension to the Services Term

The parties may, by agreement in writing, at any time prior to the expiry of the Initial Term, extend the Services Term of the Contract for the Additional Term.

## 4 Performance of Services

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### 4.1 General obligations

- (a) The Contractor must perform the Services in accordance with the Services Requirements and otherwise in accordance with the Contract.
- (b) The Contractor must ensure that it and the Contractor's Personnel, in performing the Contractor's Obligations under the Contract:

- (1) have all of the necessary skills and training and hold all of the required qualifications and licences to perform the Services in accordance with all applicable Laws and industry standards;
  - (2) obtain any Approvals required for the performance of the Services, including any approvals set out in the Specifications;
  - (3) comply with all applicable Laws, Work Health and Safety Requirements, the Policies and Guidelines and any reasonable directions given by the Principal;
  - (4) do not interfere with the Principal's activities or the activities of any other person at the Site;
  - (5) carry out the Contractor's Obligations in a safe manner in a way which does not prejudice safe working practices, safety and care of property or continuity of work;
  - (6) provide all such information and assistance as the Principal reasonably requires; and
  - (7) at their own expense, supply all plant, equipment and resources required for the performance of the Services, except for any items of plant and equipment to be provided by the Principal as set out in the Specifications.
- (c) The Contractor must allow the Principal or a representative of the Principal, at all reasonable times, to inspect, examine, review and witness tests of the Services (including as required under clause 10), or the performance of the Services and to carry out site inspections at the Contractor's premises.

## **4.2 Quality**

The Contractor must ensure that:

- (a) the Services match the description of the Services set out in the Procurement Form and comply with the requirements in the Contract;
- (b) the Services are performed with the professional skill, care and diligence expected of a skilled and experienced Professional Contractor;
- (c) any goods, materials, supplies, equipment or other items the Contractor uses or supplies as part of the Services are new and of merchantable quality and are free from Defects in design, materials and workmanship; and
- (d) the Services are fit for the purpose stated in the Contract (including the Specifications), or the purpose which could reasonably be inferred by a Professional Contractor performing the Services.

## **4.3 Deliverables**

- (a) The Contractor must deliver and, where required by the Contract, install the Deliverables at the locations and by the times specified in, and otherwise consistently with, the Contract and as otherwise directed by the Principal.
- (b) The Contractor must ensure that all materials that the Contractor uses or supplies as part of any Deliverables:
  - (1) are new, of merchantable quality and are free from Defects in design, materials and workmanship; and
  - (2) have not been previously installed other than for the purpose of testing.

- (c) In respect of materials that the Contractor uses or supplies as part of the Services and any Hardware:
- (1) title (including any replacement Hardware or parts supplied by the Contractor) passes to the Principal on payment for the materials or Hardware by the Principal in accordance with the Contract;
  - (2) risk of damage or loss passes to the Principal on the relevant Acceptance Date of such materials or Hardware; and
  - (3) risk of damage to, or loss of, any materials or Hardware that is collected by the Contractor from the Principal for repair or replacement passes to the Contractor on collection of such materials or Hardware.

## 5 Transition in

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### 5.1 Transition In Services

Where the Contractor is required to provide Transition In Services, as specified in the Procurement Form Details, on and from the Start Date, the Contractor must:

- (a) perform the following services (collectively, **Transition In Services**):
- (1) all services, functions and tasks assigned to the Contractor as set out in the Procurement Form as part of the Transition In Services; and
  - (2) all other services, functions and tasks (other than any services, functions and tasks assigned to the Principal in the Procurement Form) necessary to ensure there is a timely and orderly transfer of responsibility for the provision of the Services from the Principal, or any existing third party services providers to the Principal, (as the case may be) to the Contractor.
- (b) during the performance of the Transition In Services, ensure that there is no degradation to or interruption in the provision of the Services or any material adverse impact on the Principal or its operations;
- (c) provide the Transition In Services in a timely manner, so as to ensure that they are successfully Completed by the Date for Transition Completion; and
- (d) notify the Principal immediately if the performance of the Transition In Services is to be delayed for any reason, and take all reasonable steps to minimise or avoid the delay and its effects.

### 5.2 Testing and acceptance

- (a) When the Contractor has performed the Transition In Services, the parties will conduct such tests as are reasonably required by the Principal to demonstrate that the Transition In Services have been Completed in a satisfactory manner and the Contractor is ready to commence providing the Services.
- (b) When the Principal is satisfied, acting reasonably, that the Transition In Services have been Completed successfully, the Principal must notify the Contractor in writing.

### 5.3 Failure to Complete the Transition In Services

- (a) If the Principal is not satisfied, acting reasonably, that the Transition In Services have been Completed successfully by the Date for Transition Completion, the Principal may terminate the Contract immediately by written notice to the Contractor and the Principal will have no obligation to pay the Contractor any Fee, costs or amounts in relation to the Transition In Services.
- (b) Upon termination of the Contract under clause 5.3(a), the Contractor must refund to the Principal, within 30 days of a request by the Principal, the Fee, costs or other amounts paid to the Contractor by the Principal.

## 6 Project Documents

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### 6.1 Compliance with Project Documents

The Contractor must comply with the Project Documents when performing the Contractor's Obligations including, once accepted by the Principal under clause 6.3(a), any Developed Project Documents, including by:

- (a) performing the Services so as to deliver Deliverables in accordance with any relevant Design Specifications;
- (b) performing the Services in accordance with any relevant Project Plan; and
- (c) testing and otherwise performing its responsibilities in relation to Acceptance of Deliverables in accordance with any relevant Acceptance Testing Plan.

### 6.2 Development of Developed Project Documents

If the Contractor is required to develop any Developed Project Documents, the Contractor must:

- (a) develop; and
- (b) submit to the Principal for approval,

a draft of each Developed Project Document by the date set out in the Procurement Form or, where applicable, another Project Document, and ensure that each Developed Project Document:

- (c) is consistent with; and
- (d) meets any requirements,

for that Developed Project Document, as set out in the Procurement Form.

### 6.3 Acceptance of Developed Project Documents

- (a) The Principal must review the Developed Project Documents supplied to it by the Contractor in accordance with clause 6.2 and will promptly notify the Contractor in writing whether it accepts or rejects the Developed Project Documents.
- (b) If the Principal rejects the Developed Project Documents under clause 6.3(a), the Contractor must promptly:
  - (1) make any amendments requested by the Principal;

- (2) make any amendments the Contractor believes necessary; and
- (3) resubmit the amended Developed Project Document to the Principal in accordance with clause 6.2, and clause 6.3(a) will apply again to the resubmitted Developed Project Documents.

#### **6.4 Failure to prepare acceptable Developed Project Documents**

If the Contractor fails to submit to the Principal, or the Principal is not satisfied, acting reasonably, with any Developed Project Document by:

- (a) the dates specified in the Procurement Form;
  - (b) where applicable, the dates specified in another Project Document;
  - (c) another date as agreed between the parties; or
  - (d) otherwise, within a reasonable period as required by the Principal,
- then the Principal may at its sole discretion, terminate part or all of the Contract.

#### **6.5 Design Specification**

- (a) Where required to prepare a Design Specification as part of any Services, as specified in the Procurement Form Details, the Contractor must prepare the Design Specification as a Developed Project Document.
- (b) A Design Specification prepared by the Contractor must, as applicable to the applicable Services:
  - (1) provide a technical explanation of how the relevant Deliverables will be developed;
  - (2) contain the information specified in the Procurement Form Details; and
  - (3) otherwise be consistent with the Contract.

#### **6.6 Project Plan**

- (a) Where required to prepare a Project Plan, as specified in the Procurement Form Details, the Contractor must prepare the Project Plan as a Developed Project Document.
- (b) A Project Plan prepared by the Contractor must, as applicable to the applicable Services:
  - (1) take into account all stages in the development life cycle, including development, production and testing, and set out responsibilities, timeframes, costs and assumptions in relation to each stage;
  - (2) state the circumstances (if any) in which a delay in achieving a milestone in relation to a development stage set out in the Project Plan is acceptable to the Principal and will not be a breach of clause 9.1;
  - (3) contain the information required by the Procurement Form Details; and
  - (4) otherwise be consistent with the Contract.

## 6.7 Acceptance Testing Plan

- (a) Where required to prepare an Acceptance Testing Plan for any Deliverables, as specified in the Procurement Form Details, the Contractor must prepare the Acceptance Testing Plan as a Developed Project Document.
- (b) An Acceptance Testing Plan prepared by the Contractor must contain details, in respect of each relevant Deliverable of:
  - (1) the criteria that must be satisfied in order to determine that the Deliverable has been Accepted;
  - (2) the process for performing tests of the Deliverables against the relevant criteria to determine that the Deliverable has been Accepted;
  - (3) the roles of each party in performing such tests; and
  - (4) any other requirements to be satisfied before the Deliverables are Accepted.

## 7 Service Levels and Service Credits

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### 7.1 Service Levels

Without limiting clause 4.2, the Contractor must:

- (a) perform the Services in such a manner as to meet or exceed the Service Levels (if any); and
- (b) comply with the remainder of this clause 7.

### 7.2 Monitoring and management of Service Levels

The Contractor must implement appropriate measurement, monitoring and management tools and procedures to enable it to detect, prevent, minimise and promptly rectify any potential or actual failure to meet the Service Levels.

### 7.3 Responding to Service Level Failures

- (a) If a Service Level Failure occurs, the Contractor must immediately notify the Principal in writing.
- (b) As soon as practicable after notification under clause 7.3(a), the Contractor must:
  - (1) perform a root cause analysis to identify the cause of the relevant Service Level Failure;
  - (2) allocate such resources as may be necessary to remedy the relevant Service Level Failure and any consequences; and
  - (3) provide the Principal with a written report detailing the cause of, and the procedure for correcting, the relevant Service Level Failure.
- (c) Within 10 Business Days after the end of each month of the Term, if Service Levels apply to any Services performed in that month, the Contractor must provide the Principal with a written report (in the form required by the Principal) containing a summary of the Contractor's performance against the Service Levels during that month.



## 7.4 Entitlement to Service Credits

- (a) Subject to clause 7.4(b), but without limiting any other provision of the Contract affecting the liability of the Contractor, if:
  - (1) the Contractor fails to meet any Service Levels; and
  - (2) the Service Credits apply to such failure,the Contractor must deduct those Service Credits from its next invoice.
- (b) The total amount of Service Credits payable by the Contractor to the Principal will not exceed the Service Credit Cap.
- (c) The Contractor will not be liable to pay Service Credits for failing to meet a Service Level if the failure occurred as a direct result of:
  - (1) the negligent actions or inaction of the Principal; or
  - (2) a breach of the Contract by the Principal.
- (d) If at any stage it is discovered that the Contractor has under-credited the amount of Service Credits, the Contractor must promptly remedy the discrepancy.
- (e) The parties acknowledge and agree that:
  - (1) the Service Credits are a price adjustment to reflect the Services not being performed to meet the Service Levels and are not an estimate of the Loss that may be suffered or incurred by the Principal as a result of the Contractor's failure to meet any Service Level; and
  - (2) the Principal's entitlement to any Service Credits does not derogate from any rights of the Principal in relation to a breach of the Contract by the Contractor.

## 8 Management, governance and interfacing

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### 8.1 Management

The Contractor must provide efficiently manage the performance of its obligations under the Contract, including:

- (a) liaising with the Principal as reasonably necessary, while carrying out its obligations;
- (b) managing the performance of its obligations in accordance with a recognised quality control management system;
- (c) identifying potential areas that it anticipates may increase the cost to the Principal or cause the Services or Deliverables to fail to comply with the Service Requirements and advising the Principal of possible corrective action; and
- (d) coordinating the work done so that it occurs with minimum disruption to the normal operations at any Site and to the Principal's systems.

## 8.2 Primary contract representatives

- (a) The Contractor must appoint as its primary representative a senior employee acceptable to the Principal (acting reasonably) with account management skills of a high order (**Contractor Representative**).
- (b) The Contractor must replace the Contractor Representative within 10 Business Days of a reasonable request by the Principal. The appointment of a replacement must satisfy the criteria set out in clause 8.2(a).
- (c) The Principal must appoint an employee as its representative to liaise with the Contractor Representative (**Principal Representative**) and may change its nomination by notice to the Contractor.
- (d) The Principal Representative and the Contractor Representative will:
  - (1) monitor and review the Contractor's performance of its obligations under the Contract on an ongoing basis; and
  - (2) serve as the principal interface between the parties with respect to all issues relating to the Services.
- (e) The Contractor Representative must attend meetings as and when required by the Principal.

## 8.3 Support Representative

- (a) The Contractor must make the Support Representative available to the Principal to provide technical support and assistance in respect of the Services and Deliverables:
  - (1) at the phone and email details; and
  - (2) during the support hours, specified in the Procurement Form Details.
- (b) The Contractor must, during Support Hours, ensure that the Support Representative will allow the Principal to access adequate Contractor's Personnel who are trained to promptly respond to technical and user questions relating to the Services and Deliverables.
- (c) The Support Representative must answer calls by the Principal during Support Hours and respond to technical and user questions relating to the Services and Deliverables as soon as practicable, and in any event within any timeframes required by applicable Service Levels.

## 8.4 Interfacing Providers

The Contractor must:

- (a) co-operate in good faith with, and provide such assistance as is reasonably necessary to, Interfacing Providers; and
- (b) comply with all reasonable directions of the Principal with respect to Interfacing Providers, which may include:
  - (1) developing joint planning and collaboration with any such Interfacing Providers;

- (2) liaising with representatives of Interfacing Providers to ensure the Interfacing Provider is able to perform the activities that the Principal has engaged them to do; and
- (3) providing information regarding the Deliverables and their constraints, protocols, interfaces, architecture and other operating parameters that the Interfacing Providers reasonably require to perform the activities that the Principal has engaged them to do.

## 9 Timings and delays

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### 9.1 Time for performance

The Contractor must perform and Complete the Services in accordance with any timing requirements in the Specifications and any other Project Document and otherwise Complete the Services by the Date for Completion.

### 9.2 Conduct following delays

As soon as practicable after becoming aware of any matter (including any conduct of the Principal or an event of Force Majeure) which is likely to affect its ability to meet a Date for Completion, or otherwise comply with the timeframes specified in any Project Document, the Contractor must:

- (a) notify the Principal in writing, detailing such matter and its likely effect on such compliance; and
- (b) take all steps reasonably necessary to minimise the delay caused by that matter.

### 9.3 Adjustment of times

- (a) The Contractor may claim an extension of time if there has been a delay and that delay is:
  - (1) the type of delay described in clause 9.2; and
  - (2) caused by the acts or omissions of the Principal or Force Majeure.
- (b) If the Contractor wishes to claim an extension of time, the Contractor must, during or after the delay has ceased, promptly submit a written claim to the Principal, providing details, to the Principal's reasonable satisfaction, of:
  - (1) the delay;
  - (2) the Contractor's claim; and
  - (3) the mitigation steps taken.
- (c) If:
  - (1) the delay is of a kind described in clause 9.2; and
  - (2) the Contractor complies with clause 9.3(b),
 then the relevant Date for Completion or other timeframe will be extended by an amount of time commensurate with the delay encountered by the Contractor, as agreed in writing between the parties, acting reasonably.

- (d) The Contractor's sole and exclusive remedy for any delay caused by the Principal or Force Majeure is to an extension of time in accordance with this clause 9.3.

#### 9.4 Liquidated damages

- (a) Subject to the delay management processes in this clause 9, if the Procurement Form Details include a liquidated damages daily amount and:
  - (1) the Contractor fails to Complete the Services by the Date for Completion; and
  - (2) the Principal has given the Contractor written notice of the circumstances set out in clauses 9.4(a)(1),then the Contractor must pay the Principal, as a reasonable estimate of the Principal's loss due to such delay, the daily amount set out in the Procurement Form Details for each day that passes until:
  - (3) the date on which the Contractor Completes the Services; or
  - (4) the date the Services are terminated by the Principal,whichever occurs first, provided that the Contractor's liability under this clause 9.4(a) will not exceed any cap on the relevant liquidated damages specified in the Procurement Form Details.
- (b) Recovering moneys under clause 9.4(a) does not prevent the Principal from asserting any other rights (including in respect of termination).

## 10 Acceptance

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- (a) The Contractor must, where it is required to perform (or re-perform) any Services under the Contract, give notice to the Principal when, in its opinion, the Services are Complete.
- (b) Subject to clause 10(c), within 20 Business Days after receiving a notice from the Contractor under clause 10(a), the Principal must notify the Contractor of whether it has determined that:
  - (1) the Services are Accepted; or
  - (2) the Services are not Accepted, stating the reasons why the Services are not Accepted (**Non-Acceptance Notice**).
- (c) Where an Acceptance Testing Plan has been prepared in respect of any Deliverables, the process for testing and otherwise determining that any Deliverables have been Accepted must be performed in accordance with the details, including any timeframes, specified in that Acceptance Testing Plan.
- (d) Acceptance of the Services by the Principal under clause 10(b)(1) does not constitute approval of the Services or prejudice any claim the Principal may have in connection with the Services.
- (e) If the Contractor receives a Non-Acceptance Notice under clause 10(b)(2), the Contractor must, at its cost, re-perform the Services, or that part of the Services that are not Accepted, until the Services are Accepted. The Principal has no liability to pay for Services that are subject to a Non-Acceptance Notice.

- (f) If, after reviewing Services that have been re-performed as required under clause 10(e), the Principal determines that the re-performed Services are not Accepted, the Principal may, at its option:
  - (1) issue a further Non-Acceptance Notice under clause 10(b)(2) triggering this clause 10 again;
  - (2) accept the Services, subject to such reasonable reduction in the Fee as agreed by the parties to reflect the reduced functionality of the Services; or
  - (3) terminate part or all of the Contract.

## 11 Defects liability

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### 11.1 Defects Liability Period

- (a) At any time prior to the expiration of the relevant Defects Liability Period, the Principal may direct the Contractor to rectify any Defect in any Services existing at the Acceptance Date, or which becomes apparent prior to the expiration of the Defects Liability Period, and the Contractor must promptly rectify the Defect.
- (b) Nothing in this clause 11 prejudices any other right that the Principal may have against the Contractor arising out of the failure of the Contractor to provide the Services and Deliverables in accordance with the Contract.
- (c) If the Principal directs the Contractor to rectify a Defect and the Contractor fails to rectify that Defect within a reasonable time specified by the Principal:
  - (1) the Principal may, without prejudice to any other rights the Principal may have against the Contractor, rectify the Defect itself or procure others to rectify the Defect at the Contractor's risk; and
  - (2) the rectification costs incurred by the Principal will be a debt due and payable on demand from the Contractor to the Principal.

### 11.2 Third Party Items

- (a) The Contractor must do all things necessary to ensure that the Principal receives the benefit of the manufacturer's warranties applying to any Third Party Items during the Term and, if such warranties have not yet expired and the Principal retains possession of the Third Party Items, beyond the Term.
- (b) If any Third Party Items (or any part of any Third Party Items) are subject to a product recall by the manufacturer, the Contractor must:
  - (1) immediately notify the Principal in writing of the recall and the reasons for the recall;
  - (2) if requested by the Principal, provide the Principal with information and copies of documents held by the Contractor in relation to the recall and the reasons for the recall;
  - (3) promptly and, in any event, within 10 Business Days, collect the recalled Third Party Items from the Principal's premises or pay the Principal's costs of returning the Third Party Items to the Contractor; and

- (4) provide the Principal with appropriate 'like for like' replacement Third Party Items as soon as practicable and, in any event, within 10 Business Days, at no cost to the Principal.

## 12 Data, security and privacy

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### 12.1 Data security

The Contractor acknowledges that the security of the Principal Data and other information or data generated or obtained by the Contractor regarding the Principal for its own internal business purposes, and the Principal's systems, is fundamental to the business of the Principal and that, without limitation, any security breach may directly affect the Principal's:

- (a) relationship with its customers, stakeholders and employees; and
- (b) obligations under the Privacy Laws and other applicable Laws.

### 12.2 Use of the Principal Data and Personal Information

Subject to clauses 14.3 and 26.3, nothing in the Contract is intended to give the Contractor any Intellectual Property in, or other rights in respect of any of:

- (a) the Principal Data; or
- (b) Personal Information, that is not the Principal Data, which it collects or has access to in connection with the Contract,

and, in respect of such Principal Data or Personal Information (**data**), the Contractor must:

- (c) hold that data in accordance with all Laws and Good Industry Practice and take all reasonable measures to ensure that data is protected against loss and unauthorised access, use, modification or disclosure;
- (d) comply with any reasonable direction, policy or guidelines of the Principal which relate to the security, use and disclosure of that data;
- (e) only access, Use, develop or disclose (including to the Contractor's Personnel or third parties) that data for the purposes of fulfilling its obligations under the Contract in connection with which it was supplied;
- (f) not transfer, store or process that data outside Australia (including by way of a cloud storage arrangement which is hosted overseas) except as otherwise specified (including pursuant to clause 14.2(b)), and only to those countries and facilities specified, in the Contract in connection with which that data was supplied;
- (g) if required by the Principal, promptly return any such data or destroy it so it is irretrievable as required by the Principal;
- (h) not possess or assert any lien or other right against or to, or otherwise deal with, such data; and
- (i) immediately notify the Principal where the Contractor becomes aware of a breach or potential breach of the Contractor's obligations under this clause 12 in respect of such data.

### 12.3 Privacy Laws

In addition to its obligations under clause 12.2, in relation to any Personal Information which the Contractor collects or has access to in connection with the Contract, the Contractor must:

- (a) comply with the Privacy Laws (whether or not it is otherwise bound to do so); and
- (b) not do anything which would cause the Principal to breach any Privacy Law (whether or not the Principal is bound by the Privacy Laws).

### 12.4 Access and security

The Contractor must in the performance of its obligations under the Contract:

- (a) comply with all of the Principal's data security requirements and policies notified to the Contractor from time to time;
- (b) prohibit and prevent any person who does not have the appropriate level of security clearance from gaining access to the Principal Data; and
- (c) notify the Principal immediately and comply with all directions of the Principal if the Contractor becomes aware of any contravention of the Principal's data security requirements.

### 12.5 Data destruction or archiving

- (a) Upon termination or expiry of the Contract or any Services, the Principal must provide written notice to the Contractor as to whether it wishes the Contractor to destroy or archive the Principal Data relevant to the Services that are ending.
- (b) Where the Principal provides written notice to the Contractor that Principal Data is to be archived, all Principal Data in the Contractor's possession must be made available to the Principal in a reasonably accessible digital format.
- (c) The Contractor must comply with the direction of the Principal within 10 Business Days of a notice under clause 12.5(a) and provide a certificate to the Principal certifying that Principal Data has been destroyed or archived accordingly.

### 12.6 Data breach mitigation protocol

- (a) If the Contractor is providing any Externally Delivered Services or Development Services, the Contractor must provide to the Principal copies of the Contractor's protocols for the mitigation of data breaches (which must, at a minimum, comply with the other requirements of this clause 12), and any updated versions of the same from time to time, and the Contractor must comply with such protocols when providing Externally Delivered Services.
- (b) The protocols of the Contractor under clause 12.6(a) must contain the content required by the Procurement Form Details, if any.
- (c) The Contractor must undertake a regular maintenance program to ensure the reliability and stability of the Services.

## 12.7 Security Audit

- (a) The Principal may require the Contractor or, subject to clause 12.7(c), a third party, to conduct a Security Audit of the data security requirements and policies in place to protect the Principal Data that is accessed, stored, processed or otherwise handled by the Contractor in connection with the Contract.
- (b) Where the Contractor is to conduct a Security Audit, the Contractor will as soon as reasonably practicable:
  - (1) compare the level of current safeguards and security measures in place with Good Industry Practice; and
  - (2) provide the results of the Security Audit to the Principal in writing as soon as practicable after its completion.
- (c) A third party engaged by the Principal to conduct a Security Audit must not be a direct competitor of the Contractor.
- (d) Where a third party is engaged by the Principal to undertake a Security Audit, the Contractor must, subject to the third party agreeing to comply with the Contractor's reasonable confidentiality and security requirements, provide the third party with access to the Contractor's premises, systems and all documentation, materials and other information (including information in electronic form) relating to the data security requirements and policies in place to protect the Principal Data.
- (e) If the results of a Security Audit indicate (in the Principal's reasonable opinion) that the data security requirements and policies in place to protect the Principal Data do not meet Good Industry Practice, the Contractor must promptly take such reasonable steps as are necessary to improve the data security requirements and policies to at least that standard.
- (f) The costs of any Security Audit conducted under this clause 12.7 will, subject to clause 12.7(g), be borne by the Principal.
- (g) If the results of any Security Audit indicate (in the Principal's reasonable opinion) that the Contractor's data security requirements and policies employed by the Contractor to protect the Principal Data materially deviate from Good Industry Practice, the costs of complying with the results of such a Security Audit will be borne by the Contractor.

## 12.8 Security breaches

If the Contractor becomes aware of a breach or potential breach of the security of any Principal Data, Personal Information obtained in connection with the Contract or any Services provided under the Contract, the Contractor must immediately:

- (a) notify the Principal of such breach or potential breach;
- (b) identify the cause;
- (c) take all steps within its power to remedy the breach and mitigate its consequences;
- (d) use its best endeavours to ensure that any potential breach does not become an actual breach;
- (e) assist the Principal in identifying compromised Principal Data and Personal Information; and
- (f) provide the Principal with a written report detailing the cause of, and procedure for correcting, the breach or potential breach and mitigating its consequences.



## 12.9 Disabling Code

- (a) The Contractor must:
- (1) not insert or activate;
  - (2) ensure that the Contractor's Personnel do not insert or activate; and
  - (3) not suffer or permit any third party to insert or activate,
- any Disabling Code into the Services, Deliverables or any system which is used by the Principal or otherwise linked to the Services, Deliverables or Principal's systems.
- (b) The Contractor is relieved of its liability under clause 12.9(a) to the extent that a Disabling Code was inserted into or activated by a third party acting under the direction of the Principal.
- (c) The Contractor must use reputable, commercially available, up-to-date:
- (1) anti-virus software;
  - (2) software to prevent unauthorised access; and
  - (3) intrusion detection software,
- and must take any other reasonably prudent steps to check for, remove and prevent Disabling Code and unauthorised access from affecting the Services or Deliverables.

## 12.10 Confidentiality

Nothing in this clause 12 limits the Contractor's Obligations under the Contract including in relation to Confidential Information.

## 13 Updates and New Releases

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### 13.1 Application

This clause 13 applies to all Software specified in the Procurement Form Details for which the Contractor must provide Updates and New Releases or, if not specified, all Software other than Developed Software.

### 13.2 Offer of Updates and New Releases

- (a) The Contractor must:
- (1) keep the Principal fully informed of the Updates and New Releases that the Contractor intends to develop; and
  - (2) use all reasonable endeavours to keep informed of any Updates and New Releases which are being developed by its own suppliers.
- (b) The Contractor must notify the Principal promptly, and in any event within 20 Business Days, when an Update or New Release becomes available and provide to the Principal:
- (1) any information relating to the Update or New Release reasonably requested by the Principal; and

- (2) any reasonable assistance requested by the Principal to enable the Principal to evaluate the Update or New Release.

### 13.3 Principal's use of Updates and New Releases

- (a) If the Principal wishes to use an Update or New Release offered by the Contractor, then the Principal must notify the Contractor accordingly.
- (b) Subject to clause 13.3(c), within 20 Business Days after receipt of a notice from the Principal pursuant to clause 13.3(a), the Contractor must provide the Update or New Release to the Principal free-of-charge together with any amendments to the Documentation that are necessary to enable the Principal to make full and proper use of the New Release.
- (c) Notwithstanding clause 13.3(b), the Contractor will have no obligation to provide a New Release to the Principal on a free-of-charge basis if the provision of Updates or New Releases is specifically excluded from the Services as set out in the Procurement Form Details.
- (d) If the nature of the Update or New Release is such that further work must be undertaken by the Contractor to install the Update or New Release so that it can be used by the Principal, the Contractor must notify the Principal in writing and if the Principal elects to proceed with the installation, the Principal must pay the Contractor's costs of installing such Update or New Release as agreed in writing by the parties.

### 13.4 New Software Products

If the Contractor develops and releases a new Software product (**New Software Product**) which replaces or supersedes any Software, the Contractor must offer the New Software Product to the Principal and provide to the Principal written notice of the costs of accepting the New Software Product, including licensing and implementation costs.

### 13.5 Refusal to use an Update, New Release or New Software Product

- (a) For clarity, the Principal is not required to use any Update, New Release or New Software Product.
- (b) The Contractor acknowledges and agrees that the Principal's refusal to use an Update, New Release or New Software Product does not relieve the Contractor of any of its obligations under the Contract.

## 14 Externally Delivered Services

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### 14.1 Application

This clause 14 applies to any Services which are Externally Delivered Services.

### 14.2 Data Centre requirements

- (a) The parties agree that the Principal Data is to be stored in the Data Centre, as specified in the Externally Delivered Services Specifics.

- (b) Where a specific location has been stated in the Externally Delivered Services Specifics, the Contractor must not change the Data Centre in which Principal Data is stored without the prior written consent of the Principal.
- (c) In addition to its obligations under clause 12, the Contractor must maintain the specific:
  - (1) physical and digital security systems; and
  - (2) minimum security certifications and satisfy the minimum safety standards,specified in the Externally Delivered Services Specifics.

### 14.3 Ancillary Data

Only where expressly specified in the Externally Delivered Services Specifics or the Specifications, Ancillary Data may be used by the Contractor for the specified purposes provided always that it is fully and completely anonymized and contains no Personal Information or Principal Data of any kind.

### 14.4 Access to Principal Data

- (a) The Principal may access Principal Data uploaded in using an Externally Delivered Service as set out in the Externally Delivered Services Specifics.
- (b) The Principal may upload or download Principal Data in using an Externally Delivered Service in the formats and in the manner as set out in the Externally Delivered Services Specifics.

### 14.5 Data Back-up and remediation

- (a) Unless otherwise agreed, the Contractor is responsible for:
  - (1) ensuring that Principal Data is Backed-up in the form of an entirely recoverable Backup at the frequencies specified in the Externally Delivered Services Specifics and made available to the Principal in a digital format as specified in the Externally Delivered Services Specifics;
  - (2) conducting testing of the relevant Back-up processes and facilities and providing evidence of the same to the Principal at the frequencies specified in the Externally Delivered Services Specifics;
  - (3) ensuring that any Backup under clause 14.5(a)(1) is maintained for the period of time specified in the Externally Delivered Services Specifics;
  - (4) preparing a plan for recovery and remediation of Principal Data, which must be approved by the Principal and updated on a periodic basis as agreed by the parties; and
  - (5) recovering and remediating Principal Data to the extent specified in the Externally Delivered Services Specifics.
- (b) The Contractor must provide the Principal with access to any data Backed-up under clause 14.5(a)(1) as specified in the Externally Delivered Services Specifics.
- (c) Subject to clause 14.5(d), the Contractor is responsible for its costs associated with complying with clause 14.5(a).

- (d) If recovery or remediation of Principal Data is required as a result of an act or omission of the Principal which is negligent or in breach of an obligation of the Principal under the Contract, the Principal is responsible for the costs of such recovery and remediation.

## 14.6 Additional guidelines and usage restrictions

The Principal must comply with any relevant additional guidelines, licensing limitations or usage restrictions set out in the Externally Delivered Services Specifics when using the Service.

## 15 Development Services

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### 15.1 Application

This clause 15.1 applies to any Services which are Development Services, and the Developed Software and other Deliverables specified as the product of such Development Services.

### 15.2 Methodology

The Contractor must fully document the process of development of the Developed Software and any other Deliverables and must, in addition to its obligations under clauses 8 and 9:

- (a) take timely corrective action prior to the Date for Completion, where this is required to address any evident Defects in the Deliverables, including any corrective action agreed by the parties as appropriate;
- (b) take timely corrective action prior to the Date for Completion where the Deliverables are not performing in accordance with the Design Specification or the Specification; and
- (c) ensure that the Developed Software is written in a way, and provide Documentation, which will enable future modification by a competent software developer without further reference to the Contractor.

### 15.3 Maintenance

Unless otherwise agreed in writing by the parties, the Principal may engage any third party to undertake maintenance in relation to the Deliverables.

### 15.4 Source code

- (a) As soon as practicable after Acceptance and, in any event, within 10 Business Days, the Contractor must provide to the Principal the source code of the Developed Software. Where Secondary Code has been developed, a list of changes must be provided to the Principal in writing.
- (b) The Contractor must:
  - (1) supply the Principal with all Documentation that was developed in conjunction with the Developed Software;

- (2) supply the Principal with any materials required to support the Developed Software; and
  - (3) otherwise ensure that the Developed Software may be re-created or modified by a competent Software developer without further reference to the Contractor.
- (c) Where the Contractor is providing Development Services to the Principal after Acceptance of the Developed Software and has access to source code or other digital assets relating to the Developed Software, a mutually agreed escrow provider must be identified and used, with the Principal identified as the primary data owner.

## 16 Equipment lease and maintenance

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### 16.1 Application

This clause 16 applies to any Equipment.

### 16.2 Leasing of Equipment and Principal's obligations

- (a) The Contractor agrees to lease the Equipment to the Principal for the Term.
- (b) To avoid doubt, while leased to the Principal, the Equipment continues to be the property of the Contractor and the Principal must keep the Equipment free from charge, mortgage, lien or encumbrance.
- (c) The Principal:
  - (1) must use and maintain the Equipment in accordance with the Contractor's reasonable written instructions as attached to, or referred to in, the Procurement Form;
  - (2) is responsible for any theft or damage to the Equipment while it is in the Principal's possession; and
  - (3) must ensure that all other equipment which the Principal uses in connection with the Equipment is fully compatible with the Equipment where specific requirements relating to compatibility are identified in the Procurement Form Details.

### 16.3 Equipment maintenance

- (a) The Contractor must provide to the Principal in writing:
  - (1) information regarding ongoing maintenance requirements for the Equipment and any rules regarding the validity of any warranty, the provision of support by the Contractor or the performance of the Equipment in relation to the completion of maintenance or the failure to complete maintenance; and
  - (2) a recommended schedule for maintenance and, where possible, estimates of costs for the Contractor to provide maintenance services to the Principal.
- (b) The Principal reserves the right to engage other persons or entities to undertake maintenance in relation to the Equipment, unless the Contractor is the manufacturer of the Equipment.

## 17 Licensed Software

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### 17.1 Application

This clause 17 applies to any Licensed Software to be provided to the Principal by the Contractor.

### 17.2 Licence of Licensed Software

- (a) The Contractor grants, or must procure the grant, to the Principal, at no cost other than the Fee, a non-exclusive licence to:
  - (1) Use the Licensed Software and related Documentation during the Term and for the purposes specified in the Licensed Software Specifics (or where no purpose is specified, for any business purpose of the Principal); and
  - (2) make as many copies of the Licensed Software as the Principal considers necessary to make full Use of the Licensed Software or for backup and security purposes.
- (b) Except as otherwise specified in the Licensed Software Specifics, the Principal may grant a sub-licence of its rights under clause 17.2(a) to:
  - (1) any contractor, agent or third party service provider of the Principal for the purpose of providing services to the Principal;
  - (2) the purchaser of any business or assets of the Principal in connection with which the Licensed Software is Used by the Principal; or
  - (3) any other person or entity specified in the Licensed Software Specifics.
- (c) The Principal, and its sub-licensees under clause 17.2(b), may Use the Licensed Software at any location reasonably required for it to exercise its rights under clause 17.2(a).
- (d) The Principal acknowledges that it has no right, title or interest in the Licensed Software or related Documentation except as set out in this clause 17.2.

### 17.3 Restrictions on use of Licensed Software

- (a) The Principal must comply with any restrictions on Use of Licensed Software, if any, specified in the Licensed Software Specifics.
- (b) Licensed Software provided to the Principal will be subject to the terms of the Contractor's or third party's (as the case may be) standard licence agreement applicable to the relevant Licensed Software but only:
  - (1) where a copy of the relevant standard licence agreement is referred to in, or attached to, the Licensed Software Specifics (provided that any reference is specified in sufficient detail to directly refer to a particular document which is readily accessible by the Principal, at all times during the Term, without any additional involvement of the Contractor); and
  - (2) to the extent that the terms of the relevant standard licence agreement are not inconsistent with the rights granted to the Principal under clause 17.2. For clarity, any terms in such standard licence

agreements that are inconsistent with the Principal's rights under clause 17.2 are void and of no effect.

- (c) Except as otherwise permitted under the Contract, the Principal must not:
- (1) distribute, sub-license or otherwise transfer all or any part of Licensed Software to any other person;
  - (2) grant any security interest over Licensed Software;
  - (3) attempt to disassemble, decompile or otherwise reverse engineer Licensed Software, except as permitted by the *Copyright Act 1968* (Cth);
  - (4) alter, customise, modify or create derivative works of the Licensed Software; or
  - (5) remove, obliterate or alter any proprietary notice on Licensed Software.

## 17.4 New Software Products

In respect of Licensed Software only, where the Principal refuses to use any New Software Product:

- (a) if the Licensed Software remains supported and can continue to be provided by the Contractor to the Principal, the Contractor must continue to provide the Licensed Software on the terms and conditions of the Contract at no additional cost to the Principal;
- (b) if the Licensed Software is no longer supported and cannot continue to be provided by the Contractor to the Principal:
  - (1) the Principal may request in writing to the Contractor that an alternative Software product be provided in lieu of the Licensed Software (**Alternative Software Product**); or
  - (2) if no request for an Alternative Software Product has been made, where the Contract relates:
    - (A) only to the provision of that Licensed Software, the Contract will terminate upon the Principal providing written notice to the Contractor that it does not accept the New Software Product; or
    - (B) where the Contract relates to the provision of other Licensed Software or other Services, the Contract will remain on foot but the parties will be released from their obligations in relation to the Licensed Software which is no longer supported; and
  - (3) notwithstanding any other provision of the Contract, the Contractor must not impose on the Principal any early termination charges or other charges or costs as a result of the Principal's decision not to accept the New Software Product or to request an Alternative Software Product; and
- (c) if the Principal accepts the Contractor's offer of a New Software Product under clause 13.4 or requests in writing an Alternative Software Product from the Contractor under clause 17.4(b)(1):
  - (1) the Contractor must provide assistance to the Principal, and take whatever action is necessary, to transition the Principal's use of the

Licensed Software to the New Software Product or Alternative Software Product, as the case may be; and

- (2) the supply of the New Software Product or Alternative Software Product will satisfy the Contractor's obligations to provide the Licensed Software and the provisions of the Contract will apply to the New Software Product or Alternative Software Product, as the case may be, as if it was the Licensed Software.

## 18 Digital Communication Services

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### 18.1 Application

This clause 18 applies to any Services which are Digital Communication Services, and the Deliverables delivered as part of such Digital Communication Services.

### 18.2 Digital Communication Services Plan

The Contractor must provide the Digital Communication Services in accordance with any agreed Digital Communication Services Plan.

### 18.3 Service failure or interruption

- (a) If there is a failure in, or interruption to, the Digital Communication Services, the Principal may withhold payment of some or all of the Fee relating to the provision of such Services until the failure or interruption is rectified to the Principal's satisfaction.
- (b) Upon withholding payment of any part of the Fee under clause 18.3(a), the Principal must give a written notice to the Contractor stating the amount withheld. When the relevant failure or interruption has been rectified to the Principal's satisfaction, the Principal must:
  - (1) give written notice to the Contractor that the failure or interruption has been rectified; and
  - (2) within 10 Business Days after giving such notice, pay to the Contractor the amount withheld, provided that the Principal may set off and deduct from that payment any costs or expenses reasonably incurred by the Principal in connection with, or as a result of, the relevant failure or interruption.

### 18.4 Services variation

- (a) At any time, the Principal may provide written notice to the Contractor if it wishes to add or subtract components from the Digital Communication Services, including by way of a variation to a Digital Communication Services Plan.
- (b) The addition or subtraction of the component from the Digital Communication Services must be effected as soon as reasonably possible and within any reasonable time period specified in the Digital Communication Services Specifics.
- (c) The Contractor must not impose any additional charges on the Principal for such addition or subtraction, except for such charges specified as part of the



Fee or arising out of the Principal's use of an added component calculated in accordance with the method for calculating the Fee.

## 18.5 Security

In addition to the requirements of clause 12, the Contractor must maintain and implement the security systems and measures set out in the Digital Communication Services Specifics in providing the Digital Communication Services, subject to the limitations and disclaimers also set out in those specifics.

## 18.6 Adherence to standards

- (a) Digital Communications Services provided by the Contractor must comply with contemporary international standards and protocols applicable to the provision of the Digital Communication Services, unless the application of alternative standards, including proprietary standards, is agreed in writing by the parties.
- (b) Where proprietary standards are used and it is reasonable to expect during the Term that the Principal's communication networks or devices will be required to connect with other communications networks or devices, the Contractor must, at no additional cost, provide a mechanism, and take whatever actions are reasonably necessary, to allow this.
- (c) Where proprietary standards or protocols are used, and a connection to the Principal's communications infrastructure is required during the Term, the Contractor must provide access to allow the Principal to satisfy itself regarding the sufficiency of network security measures.

## 19 Assignment and Subcontracting

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### 19.1 Assignment

- (a) The Principal may, without the Contractor's consent, assign or novate the Contract or assign any other right, benefit or interest under the Contract to any person or entity who is solvent and able to make the payments required by the Contract, and able to comply with the Principal's other obligations.
- (b) The Contractor must not assign or novate the Contract or assign any other right, benefit or interest under the Contract to any person or entity without the prior consent of the Principal.

### 19.2 Subcontracting

- (a) Unless otherwise provided for in the Panel Agreement, the Contractor must not, without the prior written approval of the Principal, subcontract any part or all of the performance of the Services.
- (b) Approved Subcontractors are taken to have the approval of the Principal for the purposes of clause 19.2(a).
- (c) The Principal may request further information regarding a proposed Subcontractor and the particulars of the Services to be subcontracted in order to approve (or otherwise) a proposed Subcontractor under clause 19.2(a).
- (d) Approval to subcontract does not relieve the Contractor from any liability or obligation under the Contract, and the Contractor is absolutely liable:

- (1) to the Principal for the acts and omissions of any Subcontractor, its personnel and the Contractor's Personnel as if they were acts or omissions of the Contractor;
  - (2) for undertaking the appropriate due diligence to ensure that the Subcontractor is able to perform the Services that it has been subcontracted in accordance with this clause 19.2; and
  - (3) for the direct payment of all Subcontractors,
- notwithstanding the Principal's approval (or otherwise) of any Subcontractor (including Approved Subcontractors).

## 20 Working on the Site

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- (a) This clause 20 applies to the extent the Contractor or any of the Contractor's Personnel are required to be on, or near the vicinity of, the Site for the purposes of the Contract.
- (b) Without limiting any other obligation under the Contract, the Contractor agrees to comply, and to ensure that the Contractor's Personnel comply, with:
  - (1) all Site Requirements;
  - (2) the Principal's health, safety and environmental Policies and Guidelines applicable from time to time;
  - (3) all relevant Work Health and Safety Requirements, environmental Laws and Approvals;
  - (4) all reasonable instructions from a representative of the Principal; and
  - (5) the health, safety and environmental conditions in this clause 20.
- (c) The Contractor must work co-operatively with other contractors working at the Site, and must use best endeavours to avoid any conflict between the Contractor's activities and the activities of other contractors.
- (d) Where required, each of the Contractor's Personnel must attend all appropriate and relevant induction courses required by the Principal to enter the Site.
- (e) The Contractor must ensure that the Contractor's Personnel entering the Site:
  - (1) maintain the Site in a safe, secure, clean and orderly manner having regard to the condition of the Site immediately before such entry; and
  - (2) do not interfere with the activities of the Principal or any other person while on the Site.
- (f) The Contractor must notify the Principal as soon as possible of any Incident.
- (g) If the Contractor or any of the Contractor's Personnel fail to comply with any obligation under this clause 20, then the Principal may in its discretion deny that person access to the Site or require that person to leave the Site immediately.
- (h) The Principal is not liable to the Contractor for any Loss or Claim arising from the removal of any person under clause 20(g).
- (i) Nothing in this clause 20 affects any obligation or duty imposed on the Contractor or the Contractor's Personnel to secure and have proper regard to the health and safety of any of the Contractor's Personnel.

## 21 Sustainable procurement

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- (a) The Contractor acknowledges that the Principal supports ethical and environmentally, socially and economically sustainable procurement practices (**Sustainability Objectives**).
- (b) The Contractor agrees to:
  - (1) use reasonable endeavours to conduct its business and supply the Services in a manner which seeks to support and is consistent with the Sustainability Objectives;
  - (2) provide the Principal with any reasonably requested information relating to the measures adopted by the Contractor in pursuit of the Sustainability Objectives; and
  - (3) undertake reasonable due diligence and monitoring of its supply chain on an ongoing basis to ensure that the Services are supplied from sustainable sources and free from modern slavery.
- (c) The Contractor acknowledges that a rating system may be implemented by WALGA or the Principal to assess the Contractor's performance in relation to the Sustainability Objectives, and in considering whether to engage the Contractor or another supplier.
- (d) The Principal may request from time to time, and the Contractor must provide within the timeframe stipulated in such request:
  - (1) evidence of the Contractor's compliance with the Sustainability Objectives and this clause 21; and
  - (2) any other information reasonably requested by the Principal in connection to this clause 21.
- (e) The Contractor must allow the Principal (or its nominee) prompt access to the Contractor's records in connection with this clause 21, and to otherwise audit the Contractor's compliance with this clause 21 and the Sustainability Objectives.

## 22 Records and reporting

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- (a) The Contractor must keep and maintain accurate and reasonably detailed books and records in connection with the performance of the Contractor's Obligations.
- (b) Within a reasonable time of the Principal's request, the Contractor will permit the Principal to audit and examine any books and records necessary for the verification of compliance with the Contractor's Obligations.
- (c) The Contractor must provide reports as required by the Principal as to the progress of the Contractor's performance under the Contract, including details of:
  - (1) the work done under the Contract during the period since the last report;
  - (2) projections for future progress;

- (3) any risks to the timely and successful completion of the Contractor's Obligations under the Contract and recommendations as to how to overcome or minimise those risks;
- (4) any matters which may impact on the costs incurred by the Principal in relation to the Contract; and
- (5) any other information reasonably requested by the Principal.

## 23 Audit

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### 23.1 Audit rights

- (a) The Principal has the right to audit and inspect, and appoint one or more third party auditors to audit and inspect, any premises, systems, documents, records, practices, data and matters as the Principal requests in relation to the Contract.
- (b) The Contractor must permit the audits and inspections referred to in clause 23.1(a).
- (c) Audits conducted by the Principal pursuant to this clause 23 must only be carried out during usual business hours and following reasonable written notice to the Contractor.

### 23.2 Audit assistance

The Contractor must provide all reasonable assistance required by the Principal or any third party auditor in relation to any audit or inspection, including by answering any questions relating to the audit or inspection in writing.

### 23.3 Discrepancies

If an audit or inspection reveals any breach of the Contract by the Contractor, then the Contractor must take remedial action including complying with any reasonable directions or instructions from the Principal.

### 23.4 Audit costs

- (a) Subject to clause 23.4(b), each party will bear its own costs associated with audits and inspections.
- (b) If an audit or inspection reveals that the Contractor has overcharged the Principal or materially breached the Contract, the Contractor will be responsible for the Principal's audit and inspection costs and must promptly reimburse the Principal for those costs following any written request by the Principal to do so.

### 23.5 Errors in invoices

If any audit reveals that the Contractor's invoices for the audited period are not correct for such period:

- (a) the Contractor must promptly reimburse the Principal for the amount of any overcharges; or
- (b) the Principal must promptly pay to the Contractor the amount of any undercharges,

as the case may be.

## 24 Documentation

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All Documentation provided under the Contract, other than Documentation prepared by a third party in respect of Third Party Software or Third Party Items, must:

- (a) be reasonably acceptable to the Principal in terms of its presentation, accuracy and scope;
- (b) include the most current and up-to-date versions of documentation available;
- (c) be in English and clearly expressed;
- (d) include adequate definitions of all key terms, words and symbols; and
- (e) if:
  - (1) the correction of defects or faults by the Contractor in connection with the Contract necessitates an amendment to the Documentation; or
  - (2) the Documentation is found to be inaccurate or insufficient for any reason (whether as a result of any changes or updates to the Deliverables, changes to the Specifications or otherwise),

then the Contractor must promptly update the Documentation and provide the updated Documentation to the Principal.

## 25 Confidentiality and publicity

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### 25.1 Confidential Information

- (a) Each party must:
  - (1) keep confidential, and not use or disclose, any of the other party's Confidential Information, except:
    - (A) to the extent necessary for the performance of its obligations under the Contract;
    - (B) that a party may disclose to its legal advisers or auditors who are under a duty of confidence;
    - (C) that a party may disclose if required by Law (including any order of a court of competent jurisdiction), the rules of any stock exchange or statutory duty; and
    - (D) that the Principal may (where applicable) disclose to the Minister responsible for administering the *Local Government Act 1995* (WA) or that Minister's department; and
  - (2) immediately provide notice to the other party if it becomes aware of any loss or unauthorised use, access, copying or disclosure of any of the other party's Confidential Information.
- (b) The Contractor must return to the Principal, or destroy or delete as the Principal directs, all original documents and copies (including in electronic form) in the Contractor's possession, custody or control which comprise, contain, reproduce,

are based on, utilise or relate to the Confidential Information of the Principal, at the earliest of the following:

- (1) immediately on demand by the Principal; or
  - (2) on the termination or expiry of the Contract.
- (c) The Contractor acknowledges that the Principal may be subject to the *Freedom of Information Act 1992 (WA)* and that the Contract or documents relating to the Contract may become the subject of an application under that Act and access to them may need to be given to a third party in accordance with that Act. The Principal has no liability to the Contractor whatsoever for giving access to a document in accordance with the *Freedom of Information Act 1992 (WA)*.

## 25.2 Publicity and reputation

The Contractor must not:

- (a) make any public announcement or issue any media release relating to the Contract or the performance of the Services or exploit the fact that it has entered into the Contract, without the prior written approval of the Principal, which may be withheld at the Principal's discretion or given subject to any conditions; and
- (b) commit any act or omission that damages or adversely affects, or has the potential to damage or adversely affect, the Principal's reputation, trademark or brand.

## 26 Intellectual Property

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### 26.1 Background IP

Each party acknowledges and agrees that each party retains the ownership of, or rights to, that party's Background IP.

### 26.2 Project IP

The Contractor:

- (a) acknowledges and agrees that all Project IP and related Intellectual Property rights are vested in the Principal and is the Principal's property as and when created; and
- (b) hereby assigns all rights, title and interest in and to the Project IP to the Principal,

except as otherwise specified in the Procurement Form.

### 26.3 Licence to Contractor

The Principal grants to the Contractor a non-exclusive, non-transferable licence to Use and develop:

- (a) the Principal's Background IP; and
- (b) the Project IP,

for the sole purpose of providing the Services and the Deliverables.

## 26.4 Licences to the Principal

The Contractor grants to the Principal a perpetual, non-exclusive, royalty free, irrevocable, sub-licensable and transferable licence to Use and develop the Contractor's Background IP, to the extent that it is incorporated in or relates to any Project IP, as required for the Principal to make full use of the Project IP in connection with its business.

## 26.5 Moral Rights

The Contractor must obtain all necessary consents, including from the Contractor's Personnel, to allow the Principal to Use and, where applicable, develop the Intellectual Property which has been:

- (a) assigned under clause 26.2(b); and
- (b) licensed under clause 26.4,

without attributing ownership, in a derogatory manner and in a manner which falsely attributes ownership.

## 26.6 Intellectual Property Warranties

The Contractor warrants that:

- (a) it has the right to grant the assignment under clause 26.2(b);
- (b) it has the right to grant the licences granted under clauses 17.2(a) and 26.4; and
- (c) the Principal's use of the Intellectual Property which is assigned or licensed to the Principal under the Contract will not infringe any rights of third parties, including any rights in respect of Intellectual Property or moral rights.

## 26.7 Infringement of Intellectual Property

- (a) The Contractor must promptly notify the Principal if the Contractor becomes aware of or suspects that:
  - (1) a third party is infringing or challenging, or threatening to infringe or challenge, the Contractor's Background IP or Intellectual Property in any Licensed Software; or
  - (2) the Contractor's or the Principal's use of the Contractor's Background IP, any Licensed Software or any Project IP infringes or may infringe third party rights.
- (b) For any action or defence taken by the Principal in relation to any Project IP, the Contractor must provide, on request by the Principal, all reasonable assistance in relation to that action or defence.

## 27 Indemnity and limits of liability

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### 27.1 Indemnity

- (a) The Contractor indemnifies the Principal from and against any Claim or Loss, however caused, brought against, suffered or incurred by the Principal arising out of or in connection with the provision of the Services, the Contractor's

breach of the Contract, or the negligence or wilful misconduct of the Contractor or the Contractor's Personnel, in respect of:

- (1) damage to, or loss or destruction of, any property (including damage to the environment);
  - (2) injury to, or death or disease of, any person;
  - (3) reputational damage to the Principal;
  - (4) any breach of Law; or
  - (5) any breach of a party or third party's Intellectual Property.
- (b) The indemnity in clause 27.1(a) will be reduced to the extent that the Loss is caused, or contributed to, by the Principal's negligence or breach of the Contract.

## 27.2 Limits of liability

- (a) To the extent permitted by Law, but subject to clause 27.2(c), each party will have no liability to the other party arising under or in connection with the Contract (howsoever arising, including negligence) for Excluded Loss.
- (b) Subject to clause 27.2(c), the Contractor's liability to the Principal, and the Principal's liability to the Contractor, in respect of Loss arising out of or in connection with the Contract, in the aggregate for all Claims, is limited to the Maximum Liability Amount.
- (c) The Contractor's liability in respect of the following is not limited by clause 27.2(a) or 27.2(b), and is not counted towards the limit under clause 27.2(b):
  - (1) personal injury and death, including third party Claims in connection with personal injury or death;
  - (2) damage to, or loss or destruction of, any property;
  - (3) breach of any Laws, confidence or privacy;
  - (4) the infringement of any Intellectual Property of a party or third party;
  - (5) any amount agreed as the Fee under the Contract; and
  - (6) to the extent that the Contractor recovers proceeds under insurances required by the Contract in respect of the liability, or would have recovered insurance proceeds if it had complied with the Contract, complied with the insurance policy, and taken all reasonable steps to do so.
- (d) When determining the insurance proceeds that would have been recovered for the purposes of clause 27.2(c)(6), the exclusions and limits of liability under clauses 27.2(a) and 27.2(b) will not be taken into account.
- (e) A party's liability in respect of the following is not limited by clauses 27.2(a) or 27.2(b), and is not counted towards the limit under clause 27.2(b):
  - (1) fraud, deliberate default, wilful misconduct; or
  - (2) any act or omission done or not done with a reckless disregard for the consequences by the party or any other party for whom the party is responsible.
- (f) Liability to which a limit under clause 27.2(b) applies is counted towards the limit when discharged by a party.



## 28 Force Majeure

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- (a) A party affected by Force Majeure is not liable for any failure or delay in performing its obligations under the Contract to the extent such failure or delay is caused by that Force Majeure, if:
  - (1) the failure or delay could not have been prevented by reasonable precautions, or could not have reasonably been circumvented by that party by means of alternate sources, workarounds or other means; and
  - (2) as soon as is practicable after the occurrence of the Force Majeure, the affected party:
    - (A) gives written notice to the other party of the Force Majeure; and
    - (B) keeps the other party informed as to the details of any event or circumstances giving rise to Force Majeure and the effect the Force Majeure will have on the affected party performing its obligations under the Contract.
- (b) The Principal may terminate the Contract by notice to the Contractor if any Force Majeure affecting the Contractor:
  - (1) has the result that the Contractor's performance of the Services by the Date for Completion is delayed by more than one month; or
  - (2) continues for longer than 3 months.

## 29 Fee and invoicing

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### 29.1 Payment of the Fee

- (a) The Principal must pay the Fee to the Contractor for the Services in accordance with this clause 29.
- (b) The Fee is inclusive of all costs and expenses including packaging, freight, delivery, insurance, the cost of any miscellaneous services, compliance with the Contract and Taxes and no additional amounts will be payable by the Principal, subject to:
  - (1) clause 32;
  - (2) any cost and expense being included or excluded from being paid under the Contract in accordance with the terms of the Panel Agreement; and
  - (3) any amounts payable as set out in the Procurement Form.

### 29.2 Tax invoice

- (a) Subject to clause 29.2(b), on or promptly after the later of the Date of Completion of the Services, the Contractor must submit a Tax Invoice to the Principal for the amount due to the Contractor.
- (b) If agreed in writing by the Principal, the Contractor may submit a Tax Invoice to the Principal at the end of each month, or any other period specified by the

Principal in writing, for any Services performed during that or previous months provided those Services have not already been included in a previous Tax Invoice issued to the Principal.

- (c) A Tax Invoice must include:
  - (1) the Procurement Form number;
  - (2) a description of the Services performed;
  - (3) the amount being claimed for the Services;
  - (4) the amount of any applicable GST; and
  - (5) any further information reasonably requested by the Principal.
- (d) Tax Invoices must be submitted to the details provided by the Principal in writing, as updated from time to time.
- (e) If a Tax Invoice does not contain the information required in clause 29.2(c), the Principal may, at its option, complete the missing details or return the incomplete Tax Invoice to the Contractor, in which case the Contractor must submit a replacement Tax Invoice which complies with clause 29.2(c).
- (f) The Contractor warrants that it is registered for GST purposes in Australia and, if requested by the Principal, must provide to the Principal sufficient evidence to substantiate that the Contractor is registered for GST purposes.

### **29.3 Payment**

Subject to clause 29.5, the Principal must pay the amount payable within 30 days after the provision by the Contractor of a Tax Invoice in compliance with clause 29.2.

### **29.4 Payment not approval**

Payment under this clause 29 will not be taken as proof or admission that all, or any part of, the Services have been performed to the satisfaction of the Principal, but will be taken to be payment on account only.

### **29.5 Principal's right of set-off**

The Contractor agrees that the Principal may:

- (a) deduct from amounts due to the Contractor any money due or which may become due from the Contractor to the Principal under, or in connection with, the Contract; and
- (b) withhold payment of any amounts payable under the Contract pending resolution of any dispute.

## **30 GST**

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- (a) Words or expressions used in this clause 30 which are defined in the GST Act have the same meaning as in the GST Act.
- (b) Unless otherwise stated, all amounts payable or the value of other consideration provided in respect of the supplies made under the Contract are exclusive of GST and where the value of any supply is to be calculated with

reference to a monetary turnover figure, the GST exclusive value of the monetary turnover will be used in calculating the value of the supply.

- (c) If a party (**supplier**) makes a taxable supply under or in connection with the Contract:
- (1) the consideration otherwise payable or to be provided for that supply is increased by, and the party paying or providing the consideration (**recipient**) must also pay to the supplier, an amount equal to the GST payable by the supplier on that supply;
  - (2) subject to the supplier complying with clause 30(c)(3), the recipient must pay the GST amount in Australian dollars, at the same time and in the same manner as it must pay or provide the consideration for that supply; and
  - (3) the supplier must issue a valid Tax Invoice or adjustment note to the recipient of the supply at or before the time of payment of the GST inclusive consideration or at such other time as the parties agree.
- (d) Where an amount is payable to a party as a reimbursement, indemnification or similar payment calculated by reference to a Loss or any other amount incurred by that party, then such amount must be reduced by any part of that Loss or other amount which is attributable to GST for which that party, or the representative member of any GST group of which that party is a member, is entitled to an input tax credit.

## 31 Insurance

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- (a) The Contractor acknowledges and agrees that:
- (1) it is obliged under the Panel Agreement to take out and maintain Insurances, which, as a minimum, Insurances will apply in respect of contracts with WALGA members (including the Principal) for the procurement of goods, services and works under the Panel Agreement;
  - (2) due to the nature of the Services, the Procurement Form may require that levels of insurances greater than those required under clause 31(a)(1) be provided by the Contractor; and
  - (3) in circumstances where the Procurement Form requires higher levels of insurance, the Contractor must ensure that it has insurances sufficient to meet such requirements.
- (b) The parties acknowledge and agree that the relevant provisions of the Panel Agreement are repeated and apply in the Contract, as modified for the application to the provision of the Services under the Contract.
- (c) Subject to clause 19.2, if the Contractor subcontracts any part of the Services, the Contractor must ensure that each Subcontractor effects and maintains all of the insurances required under the Panel Agreement, as appropriate for the Services being performed by that Subcontractor, before the Subcontractor commences providing any part of the Services.
- (d) In addition to the Principal's rights under clause 34(a)(2), if the Contractor fails to comply with any of its obligations under this clause 31, the Principal may, immediately suspend the Contract in accordance with clause 33(a)(4) or refuse

payment of any amount due to the Contractor until evidence of the Insurances required by this clause 31 is produced to the Principal.

- (e) The Insurances contemplated by this clause 31 are primary and not secondary to the indemnities referred to in the Contract.

## 32 Variations

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- (a) If at any time the Principal notifies the Contractor that it requires a Variation, the Contractor must promptly provide a Variation Quotation.
- (b) If the Principal accepts a Variation Quotation, the Principal will issue a Variation Notice to the Contractor and:
  - (1) the Contractor must then carry out the Variation;
  - (2) the Fee will be adjusted by the amount set out in the relevant Variation Quotation; and
  - (3) the Date for Completion will be adjusted as set out in the Variation Quotation.
- (c) The Contractor will not be entitled, in any circumstances, to an adjustment to the Fee or any extension of time except as set out in a Variation Notice.

## 33 Suspension by Principal

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- (a) The Principal may, by written notice to the Contractor, suspend the performance of all or part of the Services if:
  - (1) the Contractor breaches a provision of the Contract and fails to comply with a written notice issued by the Principal within 10 Business Days of receiving such notice;
  - (2) the Principal reasonably believes that the Contractor, or the Contractor's Personnel, is not complying or will not comply with clause 20;
  - (3) the Principal reasonably believes that the Contractor, or any Contractor's Personnel, is endangering or will endanger any person, property or the environment; or
  - (4) the Contractor has failed to ensure insurance is effected and maintained in accordance with clause 31, or to provide evidence of insurance in accordance with clause 31.
- (b) The Principal's written notice must state the Principal's reasons for the suspension.
- (c) The Contractor must recommence any Services suspended under this clause 33 as soon as practicable after receiving written notice from the Principal directing the Contractor to recommence the Services. The Contractor must notify the Principal in writing before recommencing the suspended Services.
- (d) Subject to clause 33(e), the Contractor is not entitled to make any Claim against the Principal arising out of, or in connection with, a suspension under this clause 33.

- (e) If the Principal suspends the Services for a reason other than the reasons identified in clause 33(a), the Contractor will be paid the standby rates approved by the Principal (acting reasonably).

## 34 Termination

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- (a) The Principal may terminate the Contract by notice to the Contractor:
  - (1) at any time and in its discretion by giving the Contractor not less than 20 Business Days' notice;
  - (2) if the Contractor commits a breach of the Contract and fails to remedy that default within 10 Business Days of the Principal giving notice of the breach;
  - (3) in accordance with clauses 10(f)(3) or 28(b);
  - (4) immediately if an Insolvency Event occurs; or
  - (5) immediately if the Principal becomes aware that WALGA has suspended or terminated the Panel Agreement, in accordance with the terms of the Panel Agreement.
- (b) The Contractor may terminate the Contract by notice to the Principal if the Principal does not comply with its obligations under clause 29.3 and fails to remedy that default within 15 Business Days of notice of that default from the Contractor.
- (c) On termination of the Contract, the Contractor must:
  - (1) immediately cease performance of the Contractor's Obligations;
  - (2) ensure that accurate notes are made of the Services performed up to the date of termination and delivered to the Principal; and
  - (3) promptly comply with its obligations under clause 25.1(b) and deliver to the Principal all employee lists, working papers, correspondence, documents and other property belonging to the Principal that may be in the Contractor's possession or under its control.
- (d) If the Contract is terminated under clause 34(a) or 34(b):
  - (1) the Principal must pay the Contractor that part of the Fee specified in respect of any of the Contractor's Obligations that have been performed prior to termination, where such part of the Fee has not already been paid by the Principal; and
  - (2) the Contractor is not entitled to, and the Principal is not liable for, any additional parts of the Fee whatsoever.
- (e) Subject to clause 34(d), termination of the Contract, however it may occur, does not prejudice any Claim that either party may have against the other under the Contract on termination.

## 35 Transition out

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### 35.1 Application

This clause 35 applies to any Services which are Externally Delivered Services, Digital Communication Services or any other Services for which Transition Out Services are required as specified in the Procurement Form Details.

### 35.2 Continuity of Service

- (a) On expiry or termination of the Contract, the Principal may require the Contractor to continue to comply with the terms of the Contract on a temporary month to month basis for up to 12 months after the date on which the Contract would otherwise expire or terminate on the then current terms and conditions (including as to the Fee).
- (b) To the extent possible, the Principal will give the Contractor notice of such requirement at least 90 days' prior to the date of expiry of the Contract or within 14 days after the Principal delivers a termination notice to the Contractor.
- (c) In addition to the Fee, the Contractor may charge the Principal additional costs which are reasonably incurred by the Contractor in extending contracts with third parties in order to retain those Subcontractors and Resources which are reasonably required to enable the Contractor to continue to perform the Services during the relevant period, provided that:
  - (1) the Principal approves such costs in advance;
  - (2) the Contractor uses reasonable endeavours to minimise any such additional costs; and
  - (3) timesheets, invoices or other evidence of such additional costs are provided in a form reasonably satisfactory to the Principal.

### 35.3 Transition Out Plan

- (a) The Transition Out Plan must be prepared by the Contractor as a Developed Project Document within 3 months after the Start Date and, once accepted by the Principal under clause 6.3(a), must be updated by the Contractor:
  - (1) at least once every 12 months;
  - (2) whenever required by the Principal following a change or proposed change to the Services or how, or from where, the Services are delivered; and
  - (3) if required by the Principal, on the Transition Out Commencement Date.
- (b) The Transition Out Plan must include adequate details of how the Transition Out Services will be performed so as to ensure timely and successful completion of the Transition Out Services, including:
  - (1) a detailed description of the proposed transition-out approach, support tools, methodology and systems, which must take into account the requirement to minimise any foreseeable disruption to normal business operation;

- (2) a project timetable showing the proposed list of tasks with the associated resource role required to transition-out together with a time schedule and time estimate for each task;
- (3) a description of the processes, procedures and schedules which must be used by the Principal and the Contractor in transferring the provision of the Services in a timely, orderly and efficient manner;
- (4) strategies for data migration from existing databases and systems;
- (5) details of the technical environment in existence before transition-out commences, including, where relevant, data network diagrams and diagrams showing the flow of information within the Contractor's systems;
- (6) requirements for the provision of all application documentation, including documentation for all interfaces and customisations;
- (7) details of the proposed approach for the safeguarding and retrieval of the Principal's Data which is Backed-up or archived which is in the Contractor's possession; and
- (8) a description of the proposed approach to transferring all Backed-up or archived data.

#### 35.4 Transition Out Services

- (a) The Contractor must, acting in good faith, provide the Transition Out Services on and from the Transition Out Commencement Date for the period nominated by the Principal, such period not to exceed 12 months.
- (b) Transition Out Services are such services as the Principal requests to achieve an orderly and staged transition of the Services, without interruption, from the Contractor to the Principal or one or more third parties nominated by the Principal (**Transition Out Services**).
- (c) For the avoidance of doubt, Transition Out Services must be provided, as applicable, on partial termination of the Contract (including termination of a particular part of the Services), with further Transition Out Services to be provided on expiry or full termination of the Contract.

## 36 Dispute Resolution

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- (a) Neither party may commence any action, bring any proceedings or seek any relief or remedy in a court, except interlocutory or equitable relief from a court in respect of a Dispute, until they have complied with the dispute resolution process in accordance with this clause 36.
- (b) If any Dispute arises between the parties in relation to the Contract, either party may give notice of the Dispute to the other party (**Dispute Notice**).
- (c) A Dispute Notice must specify the:
  - (1) alleged facts on which the Dispute is based;
  - (2) legal basis on which the Dispute is made, including any issues of law relevant to the Dispute (if any); and
  - (3) relief that is claimed.

- (d) Within 3 Business Days of a party receiving a Dispute Notice, the parties must arrange for a senior representative from the Principal and a senior representative from the Contractor to meet to attempt to resolve the Dispute.
- (e) If a Dispute is not resolved within 3 Business Days of the parties' senior representatives meeting to attempt to resolve the Dispute in accordance with clause 36(d), the parties may escalate the Dispute to WALGA, for WALGA to assist the parties in the resolution of the Dispute.
- (f) If a Dispute is not resolved within 20 Business Days of the party receiving a Dispute Notice, either party who has given a Dispute Notice under clause 36(b) and complied with this clause 36 may end the dispute resolution process and commence court proceedings in relation to the Dispute.
- (g) If a Dispute exists, each party must continue to comply with its obligations under the Contract, except with respect to any aspect that is in dispute.

## 37 Notices

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### 37.1 How and where notices may be sent

- (a) Subject to clause 37.1(b), a notice must be in writing and:
  - (1) delivered by hand or sent by post, to the address of the party set out in the Party Details or otherwise notified; or
  - (2) sent by email, as an attachment to an email, to the email address of the party set out in the Party Details or otherwise notified.
- (b) A notice under clause 34 may only be delivered by hand or sent by post.

### 37.2 When notices are taken to have been delivered and received

A notice is effective:

- (a) if delivered by hand, on the date it is delivered to the recipient;
- (b) if sent by post:
  - (1) within Australia to an Australian address, on the third Business Day following the postage date; or
  - (2) from a place within Australia to an address outside of Australia, or from a place outside Australia to an address within Australia, on the eighth Business Day following the postage date; or
- (c) if sent by email, on the earlier of:
  - (1) an email delivery confirmation report being received by the sender; or
  - (2) 4 hours after the email was sent unless the sender receives notification from its or the recipient's email server that the email is undeliverable, was not delivered or the recipient is out of the office,provided that where any notice is sent by email and is received after 4:00pm (recipient's time) or on a day other than a Business Day (recipient's time), then the notice will be deemed as being received at 9:00am on the next Business Day (recipient's time).



## 38 General

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### 38.1 Governing law and jurisdiction

The Contract is governed by the law in force in Western Australia and each party irrevocably submits to the exclusive jurisdiction of courts exercising jurisdiction in Western Australia.

### 38.2 Entire agreement and reliance

- (a) The Contract states all the express terms of the agreement between the parties in respect of its subject matter. It supersedes all prior representations, discussions, negotiations, understandings and agreements in respect of its subject matter.
- (b) Neither party has relied on any statement by the other party not expressly included in the Contract.

### 38.3 Waiver

No party to the Contract may rely on the words or conduct of any other party (including any delay in exercising a right) as a waiver of any right unless the waiver is in writing and signed by the party granting the waiver. In this clause 38.3, “waiver” includes an election between rights and remedies, and conduct which might otherwise give rise to an estoppel.

### 38.4 Relationship of the parties

- (a) The Contractor acknowledges and agrees that:
  - (1) it is an independent contractor and not an agent of the Principal;
  - (2) the Contract is entered into in accordance with the terms of the Panel Agreement;
  - (3) the Contract is entered into between the Principal and the Contractor, and WALGA is not a party to the Contract; and
  - (4) the Contractor has no authority to bind the Principal, or WALGA, by contract or otherwise.
- (b) In carrying out their respective obligations under the Contract, each party is acting independently of the other party. Nothing in the Contract creates a partnership, trust or agency between the parties or imposes any fiduciary duties on either party in relation to the other, unless expressly stated.
- (c) In the event that the Contractor assigns or novates any right, benefit or interest under the Panel Agreement in accordance with the terms of the Panel Agreement, the Contractor must provide the Principal with such reasonable assistance as may be necessary to assign or novate (as applicable) the Contractor’s rights, benefit or interest under the Contract to the assignee or novatee (as applicable).

### 38.5 Amendment

An amendment of any term of the Contract must be in writing and signed by both parties.

### **38.6 Invalidity and enforceability**

- (a) Any provision of the Contract which is invalid or unenforceable will not affect the remaining provisions of the Contract which remain in full force and effect.
- (b) If any provision of the Contract is found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question will apply with such modification as may be necessary to make it valid.

### **38.7 Executing the Contract**

- (a) Each party must do all things and execute all documents necessary to give full effect to its obligations under the Contract and the transactions contemplated by it.
- (b) The Contractor represents and warrants that it:
  - (1) has full power and authority to enter into and perform its obligations under the Contract; and
  - (2) has taken all necessary action to authorise the execution, delivery and performance of the Contract.
- (c) The Contract may be executed in any number of counterparts and all counterparts, taken together, constitute one instrument. A party may execute the Contract by signing any counterpart.

### **38.8 Rights under the Contract**

- (a) Unless the Contract provides otherwise:
  - (1) a party may exercise a right, power or remedy in any way at its discretion; and
  - (2) the rights, powers and remedies provided by the Contract are in addition to any rights, powers and remedies provided at Law.
- (b) Nothing in the Contract:
  - (1) gives a party authority to bind any other party in any way; or
  - (2) imposes any fiduciary duties on a party in relation to any other party.
- (c) The Principal is not required to engage the Contractor exclusively to perform the Services.

### **38.9 Survival**

Clauses 1, 2, 11, 25, 12, 26, 27, 34(e) and 38, and any other obligations which are expressed to or, by their nature, survive expiry or termination of the Contract, will survive termination or expiry of the Contract, and are enforceable at any time at Law.