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FOR YOUR INFORMATION - TO HELP YOU DECIDE WHETHER TO
PARTICIPATE IN THIS RFT AND THEN BECOME A PROSPECTIVE
TENDERER**

Please read and Note:

This file is provided on the Commerce tenders web site when the Request For Tender (RFT) document is issued in Dmax Lite format.

This file contains (below) a brief scope statement and extracts from the RFT documents, but is not a complete RFT document and does not contain the responsible questions.

To participate in this tendering process you MUST first return to the Commerce tenders web site:

<https://tenders.nsw.gov.au/commerce>

Then from the RFT web page (see RFT number below) download a full copy of the RFT documents, including the responsible components, and also any addenda issued to date; and also during the tender period.

Copy/Save the RFT documents to your own computer drive or network location – the blue “DOWNLOAD A SOFT COPY” link at the bottom provides access to the page from which you can do this.

DMax Lite Software

You will need to have a current licensed copy of the Dmax Lite 5.1 software to read, complete, and respond to the RFT with your tender. If you do not currently have such a licensed copy it can be optionally purchased and downloaded when downloading the full RFT documents from the tenders web site.



**NSW Procurement – Contracting Services is a Business Unit of the NSW
Department of Commerce**

**NSW Procurement – Contracting Services invites this tender for and on behalf
of the
NSW Government State Contracts Control Board**

Request for Tender RFT 0701816

0813 Clinical Technology – IV Pumps and Associated Consumables

1 April 2008 to 31 March 2013

Tender Issue Date: 17 December 2007

Closing Date: 31 January 2008

Closing Time: 9:30 am Sydney Time

Note: In order to respond to this RFT tenderers **must** have a current license for DMax Lite software.
Licenses can be purchased through NSW Procurement | eBusiness Solutions SupportDesk at :

eBS_SupportDesk@commerce.nsw.gov.au or 1800 003 985

at a cost of \$110 (inclusive of GST) (representing the DecisionMax license fee). This provides 12 months unlimited application to any RFTender formatted in TenderMax Pro. It is anticipated that most RFTs released by the SCCB will be in this format.

Alternatively, in downloading the document/s for this RFT you can also follow the prompts to confirm your request and purchase of the DMax Lite software and be issued with your Digital Registering Key to commence preparing your tender submission in the appropriate format.

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For the purposes of this RFT, inquiries should be directed to the Contact Officer nominated in Part A of this RFT.

Other matters should be directed to:

Group General Manager
NSW Procurement – Contracting Services
NSW Department of Commerce
McKell Building
2-24 Rawson Place
Sydney NSW 2000
Tel: (02) 9372 7504
Fax: (02) 9372 7533

0813 Clinical Technology – IV Pumps and Associated Consumables

0813 CLINICAL TECHNOLOGY – IV PUMPS AND ASSOCIATED CONSUMABLES 0

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PART A Tender Conditions - The Requirement and Specifications

1. Outline Description of the Requirement

1.1 Introduction

This Request For Tender ("RFT") is made by the State Contracts Control Board ("the Board") for the supply to Eligible Customers of the Deliverables defined in this RFT and detailed in the Specification.

The Board is responsible for the conduct of the tender process, assisted by NSW Procurement – Contracting Services.

1.2 Outline of the Requirement

This RFT covers the supply and delivery of programmable intravenous pumps for volumetric infusion capable of micro and macro delivery and associated dedicated consumables, for the period 1 April 2008 to 31 March 2013 (5 years) The deliverable that may be able to be procured through the contract to be entered into as a result of this procurement process is to be for NSW Health and other eligible customers

This RFT is the first round of the intake into this contract. Subsequent tenders may be released for additional items under this contract.

1.3 Procurement Objective

The objective of this RFT is to establish Standing Offer Agreements (Contracts) which meet the tender specifications and provide best overall "value for money". It is the intention of the Board to select a sole supplier or two suppliers to cover the entire range of products requested, however the Board Reserves the right to select more than two suppliers.

The Board, as a result of this RFT, seeks:

- to provide Public Health Organisations access to IV infusion pumps and associated consumables (hereinafter referred to as Administration Sets)
- Transparency in the total cost of holding and utilising infusion pumps over the life of the equipment
- Standardisation of the fleet of infusion pumps across Public Health Organisations to improve patient safety and minimise cost of holding and utilising the equipment
- The provision of infusion pumps through an Amortisation pricing model where the cost of providing pumps is amortised into the cost of the six most commonly used Administration Sets (as defined in Part C Specification at a average usage rate of these sets per pump per week. Other Administration Sets would be available for purchase with no amortisation charge.

- To allow for the option for separate outright purchase of infusion pumps and Administration Sets net of any capital charge
- Mechanisms for the provision of warranty, maintenance and service cover for infusion pumps either purchased outright or provided as part of an agreement to purchase Administration Sets at a price including amortisation of the cost of Infusion Pumps supplied
- Mechanisms for the negotiation of an implementation phase during which the supply of infusion pumps will commence
- Mechanisms for the negotiation of a phased transition of the supply of infusion pumps to a new Contractor at the expiry of the agreement
- Creation and Maintenance of a comprehensive register of infusion pumps supplied under an Amortisation arrangement
- Regular reporting of Administration Set purchases and Infusion Pumps supplied
- Engagement of Contractors in change management aiming at the optimisation of the supply of Infusion Pumps and Administration Sets during the term of the agreement to promote effective and efficient delivery of clinical services, including providing training in the use of supplied pumps to clinical and technical staff.
- Opportunity for Suppliers to optimise Infusion Pump fleet size to minimise total cost over the term of the agreement.

It should be noted that::

- It is the Board's intention that rebates and other forms of value-added options will not be offered, accepted or solicited;
- That the Supplier will work with Public Health Organisations to ensure the spread of developments in best practice, both clinical, and in managing and reducing the total cost of providing the pumps and administration sets over the contract term.
- Suppliers are requested to indicate their willingness to offer trade in terms on the existing pump fleet at the commencement of the Contract.

1.4 Indicative Volumes

The following information is provided in Pricing Schedule.

- Estimated infusion pump replacements currently estimated over the intended Agreement term; and

Estimated average usage of Administration Sets used per pump per week

These estimates are provided:

before optimisation of pump numbers and minimisation of Administration Set usage;

Without determining the treatment of infusion pumps provided under existing amortisation agreements, which have been included in the count of currently owned pumps;

The Board in no way warrants these estimates as the level of pump or Administration set usage under the Contract. Tenderers should satisfy themselves of the likely pump usage when preparing a tender response.

Successful tenderers will be required as part of the Implementation Phase to undertake an audit of the existing Infusion Pump fleet as part of delivery of mechanisms to:

- Determine the optimal number of Infusion Pumps to meet clinical need
- Achieve pump utilisation efficiency
- Minimise cost to Health Services

2 Summary information for tenderers

2.1 Interpretation

2.1.1 Definitions of terms used in Parts A-C are contained in cl.6 of Part B

2.2 Structure of Request for Tender

2.2.1 This Tender is structured in the TenderMax Pro format.

TenderMax Pro is an e-sourcing application designed to fully automate the traditional paper-based tendering process introducing best practice processes in Electronic Tender production, submission and evaluation.

2.2.2 This RFT is made up of four Parts as follows:

Tender Conditions

Part A: The Requirement and Specification;
Part B: The Tender Process;

Response to be completed by Tenderer

Part C: Tender Response, to be completed by the Tenderer, using Dmax Lite software

Conditions of Contract

Part D: Deed of Agreement

Once the responses are completed by the Tenderer then these form the Tender, and are to be submitted in accordance with Parts A, B and D.

2.3 Contact Officer

- 2.3.1 Refer requests for information or advice regarding this RFT to:

Name: John Morrison
 Phone: (02) 9372 8846
 Fax: (02) 9372 7799
 E-mail: john.morrison@commerce.nsw.gov.au

- 2.3.2 Any information given to a tenderer to clarify any aspect of this RFT will also be given to all other tenderers if in the Board's opinion the information would unfairly favour the inquiring tenderer over other tenderers.

2.4 Not Used

2.5 Nature and duration of contract

- 2.5.1 The Requirement is to be met by means of a Standing Offer agreement to be embodied in a deed of agreement between the Board and the successful tenderer(s) on the conditions contained in Part D.

- 2.5.3 The Standing Offer agreement will be for a term of five (5) years

2.6 Non-exclusive Standing Offer agreement

- 2.6.1 The Board reserves the right to appoint more than one Contractor to supply the Requirement or a part of the Requirement, at any time and from time to time.

- 2.6.2 The Board reserves the right to issue a further RFT during the term of the Standing Offer agreement for the additional intake of suppliers for the remaining term of the agreement for the supply of the Deliverables covered by this RFT.

Tenderers will have to meet the same terms and conditions and will be subject to the same evaluation criteria as for this RFT except for the tender issue and closing dates and the agreement period.

2.7 Eligibility to tender

- 2.7.1 Tenders must be submitted by a legal entity or, if a joint Tender, by legal entities, with the capacity to contract. The Board will only enter a deed of agreement with the relevant legal entity or entities.
- 2.7.2 The Board may ask a tenderer to provide evidence of its legal status or capacity to contract. If Tenders from entities propose to contract in their capacity as trustees, such evidence may include copies of the relevant trust deeds. Any evidence requested is to be provided within 3 working days of the request.
- 2.7.3 The Board reserves the right to reject any Tender if the Board judges the tenderer not to have appropriate financial assets.

2.7.4 Board judges the tenderer's financial position to be marginal, the Board reserves the right to make acceptance of any Tender conditional upon the tenderer entering into a bank, parent company or personal guarantee, or an unconditional performance bond in a form satisfactory to the Board.

2.7.5 Tenderers must read, understand and comply with the requirements of the Commerce Business Ethics Statement, which is available at the link below. Tenderers must disclose any potential conflict of interests (including any relevant relationships) in the Tender Response.

The Board will consider any disclosure and will only enter a deed of agreement with tenderers that do not have improper conflict of interests. If the Board becomes aware of improper conflict of interests by a successful tenderer at the time a deed of agreement has already been executed then the Board reserves the right to terminate the agreement.

<http://www.commerce.nsw.gov.au/About+Commerce/Business+ethics+statement/Business+ethics+statement.htm#commerce>

2.8 Other Eligibility Requirements

2.8.1 The Board will not enter into an agreement with a company that does not have an Australian Business Number and is not registered for GST. Normally, Tenderers must be registered for GST and state their ABN in their Tender Response.

2.8.2 Tenders from Tenderers that do not have an ABN and/or are not registered for GST, such as Tenderers commencing business in Australia, may be considered at the Board's discretion if the Tenderer demonstrates that it will obtain an ABN and GST registration before entering into an agreement with the Board. Such Tenderers must state how and when they intend to obtain an ABN and register for GST in their Tender Response.

2.9 National Product Catalogue

2.9.1 As part of a national health supply chain initiative all States & Territories are committing to a common approach regarding the source and structure of product and pricing data through the use of the National Product Catalogue (NPC). The NPC is based on the EANnet system hosted by GS1 Australia and further details can be found at <http://www.gs1au.org/services/eannet/npc/>.

2.9.2 The NPC will ensure nationally consistent practices around product and pricing information enabling the progression to the widespread adoption of electronic trading.

2.9.3 The tenderer is required to provide in Part C information relevant to NPC.

3. Submission of Tenders

3.1 General instructions for submission of Tenders

3.1.1 A Tender must be fully received by the Closing Date and Closing Time.

- 3.1.2 In order to prepare and lodge a response, tenderers must have a current license for the DMax Lite software being used. DMax Lite is the application required to participate and respond to any RFT published in the TenderMax Pro format.
- 3.1.3 A Tender must be lodged into the designated tender box/es, and must be lodged by:
- a) **electronic lodgement** to the **electronic tender box for this RFT**, in accordance with Section 8 of this RFT, through the NSW Department of Commerce eTendering website at:
- <https://tenders.nsw.gov.au/commerce>**
- Locate the web page for RFT 0701816, and follow the instructions, to lodge the tender through the blue LODGE A RESPONSE link

4. Evaluation of Tenders

4.1 General

- 4.1.1 Tenders will be assessed against the selection criteria listed below, which are not necessarily exhaustive, in order of significance or to be given equal weight.
- 4.1.2 Not Used
- 4.1.3 Information supplied by the tenderer in Part C will contribute to the assessment against each criterion. Tenderers are advised to respond clearly to all the selection criteria listed in this RFT.
- 4.1.4 If any criterion or sub-criterion is stated to be “mandatory” a failure by the Tender to fully comply with that criterion or sub-criterion will result in automatic exclusion of the Tender without further consideration. Mandatory criteria include those in which mandatory language such as “must” or “shall” is used.

4.2 Selection criteria

(a) Fit for purpose of Deliverables offered - including

- Compliance with the Specifications and relevant Standards
- Quality
- innovative aspects
- product design
- operational and ergonomic performance
- Warranties

(b) Price

(c) Delivery considerations and Implementation capability.

(d) Capacity to perform the Standing Offer agreement including:

- (i) *Production/technical capacity*
- (ii) *Training resource capacity, qualifications, skills and experience*
- (iii) *Financial capacity and stability (including security considerations)*
- (iv) *Technical, warehousing, inventory and distribution systems*
- (v) *Maintenance and support service levels including availability of Help Desk for repair and help calls*
- (vi) *Quality assurance systems*
- (vii) *Suitability of sub-contractors*
- (xi) *Previous experience and performance on similar Standing Offer Agreements for Deliverables covered in this RFT or other Deliverables under any NSW Government contract, including compliance with management fee obligations*
- (xii) *Record of ethical behaviour in service delivery*
- (e) Compliance with the proposed conditions of the deed of agreement, as stated in Part D.
- (f) Compliance with NSW Government procurement policy and other applicable NSW Government policies
- (g) Capacity and capability to facilitate electronic commerce through Smartbuy and the Health Item Master file.

It is the tenderers responsibility to read in Part C policy considerations relevant to this RFT. Tenderers are required to respond to the policy questions provided in Part C.

5. Preparation of Tender – Price Schedule

5.1 Price Schedule

- 5.1.1 Tenderers must complete the Price Schedule that is contained in Part C3 to this RFT. The Price Schedule requires that each Deliverable be priced as a discrete item that can be separately ordered.
- 5.1.2 All prices are be given net of (excluding) GST
- 5.1.3 Prices are to be given on the basis:
 - Sole Supplier Status.
 - Multiple Supplier Status.

- 5.1.4 Prices are to be for the following procurement fulfilment options:
Core Administration Sets with the cost of infusion pumps amortise into the price.
The separate purchase of infusion pumps and core administration set.

5.1.5 Not Used

5.1.6 Not Used

5.2 Not Used

5.3 Calculating the Tender Price

5.3.1 General

5.3.1.1 The Tender Price must:

- (a) be in Australian dollars;
- (b) cover all costs of performing the Standing Offer agreement;
- (c) be provided in Part C (Price Schedule) to include costs of delivery as specified in cl. 5.3.2 of this Part and separately to exclude costs of delivery as specified in cl 5.3.2 of this Part.
- (d) include costs of packaging as specified in clause 5.3.3 of this Part;
- (e) take account of the Management Fee (see clause 6.11 of Part D), which is not to be shown as a separate charge;
- (f) include Goods and Services Tax if it is payable and all other applicable taxes, duties and charges at the rates applicable at the Closing Date and Time for Tenders;
- (g) include all costs associated with the preparation and submission of the Tender;
- (h) include any Government Discount, or Government Discount from list price, which applies;
- (i) exclude all other discounts;
- (j) include any Government Mark-Up on list price, which applies;

5.3.2 Delivery Charges

- 5.3.2.1 The tendered prices are to provide for delivery (shall include the cost of delivery) FREE-INTO-STORE (FIS) throughout NSW and the ACT, in such quantities and at such times as may be required during the period of any final contract.
- 5.3.2.2 Delivery will be required as soon as possible within the guaranteed delivery time, after placement of orders. Tenderers shall state, at Part C1, the delivery time they are prepared to guarantee to complete orders for reasonable quantities of each item tendered. Contractors are required to maintain adequate stocks to be able to satisfy orders for reasonable quantities within the guaranteed delivery time. Tenderers are to note that delivery times tendered will be a factor in the evaluation of tenders. Failure to adhere to guaranteed delivery

times tendered may be regarded as grounds for termination of a Contract.

5.3.2.3 Contractors shall notify the Customer (being any of the organisations described in Schedule 12 which placed the order for the Goods) immediately and in any event in not more than 24 hours, of any item on an order that cannot be supplied within the guaranteed delivery time.

5.3.2.4 The prices tendered are to provide for goods to be suitably packed to ensure safe transport to their destination. Packs are to show details of contents and country of origin.

5.3.2.5 THE CONTRACTOR MUST ADVISE NSW PROCUREMENT – CONTRACTING SERVICES OF ALL DELIVERY DELAYS DURING THE PERIOD OF THE CONTRACT.

5.3.2.6 Delivery charges shall not apply when a purchase order has been received by the Contractor and contains a minimum total of 50% of any Board contracted items.

5.3.2.7 If the Contractor is unable to provide Deliverables for any reason, the Contractor must arrange for the supply of equivalent products from an alternative supplier within the guaranteed delivery time. The Contractor is to liaise with the Customer to ensure that the alternative product is acceptable and meets the purchaser's needs.

5.3.2.8 In reference to 5.3.2.7 (where contract is awarded on the basis of FIS prices), any additional cost in arranging the alternative supply is to be borne by the Contractor.

5.3.3 Packaging charges

5.3.3.1 The Tender Price must be inclusive of costs of suitable packaging in accordance with any packaging requirements stated in the Specification.

5.4 Price Adjustment

5.4.1 The Tender Price is a maximum (ceiling) price that cannot be exceeded during the term (including any extension of the term) of the Standing Offer agreement unless price variation is provided for in this RFT.

5.4.2 However if a successful tenderer has a temporary or periodical special offer, which is lower than the Tender Price, this should be made available to all Eligible Customers promptly, and prior notification to the Board is not required. This does not apply to permanent price decreases that shall be submitted to the Board for approval in accordance with the terms and conditions of Part D.

5.4.3 The tenderer may determine the Tender Price on the basis of one of the two options below. The tenderer will be asked to indicate which option is selected in Part C1.

- (1) Firm for the **entire duration** of the Standing Offer agreement five (5) years
- (2) Firm for the first twenty four (24) months of the term of the Standing Offer agreement then subject to review at the end of that period and each twelve (12) months, following based on **Consumer Price Index (CPI)** - CPI index for GO2 "ALL GROUPS"

5.5 Discounts

- 5.5.1 Tenderers must provide full details in Part C1 of any discounts that will apply to the Tender Price. (These discounts do not include any Government Discount, or Government Discount from list price, which, if either applies, are incorporated in the Tender Price.)

5.6 GST Free or Input Taxed Supplies

- 5.6.1 Tenderers must identify and state the value of any GST Free or Input Taxed Supplies to be made under the Standing Offer agreement.

5.7 Minimum Tender validity period

- 5.7.1 Tenders must remain open for acceptance for a period of at least 6 months from the Closing Date and Time for Tenders. Tenderers must state in Part C1 if their Tenders will remain open for any longer period.

ANNEXURE 1 TO PART A

ANNEXURE 2 TO PART A

Other Information Supplied By The Board

PART B Tender Conditions -The Tender Process

6. Definitions of terms used in Parts A-C

6.1 Unless the context indicates otherwise, the following terms, where used in Parts A-C of this RFT, shall have the meanings set out below. Note the defined terms below will not all necessarily appear in this RFT.

“ABN” means an Australian Business Number as provided in the GST law.

“Addendum” means an addendum or addition to this RFT made by the Board before the Closing Date and Time under cl. 7.5.

“Alternative Tender” means a Non-Conforming Tender that is intended to offer a different method of meeting the object and intent of the Requirement.

“Board” means the State Contracts Control Board established under the *Public Sector Employment and Management Act 2002* whose responsibilities include:

- Inviting and accepting tenders;
- Determining the conditions under which tenders are invited or accepted;
- Entering into contracts on behalf of the Crown in right of the State of New South Wales; and
- On-going contract administration and management,

and includes the duly authorised delegates of the Board, including officers of NSW Procurement – Contracting Services.

“Breakpoint” means the number of Order Units at which nominated discounts take effect. There may be more than one Breakpoint nominated by the tenderer in the tender.

“Bulk Purchase Discount(s)” means the discount(s) (if any) applying to the Tender Price and specified in the Tender which are based on the aggregate volume of goods comprised in any single Order placed by a particular Customer.

“Catalogue number” means the tenderer's unique catalogue number required for the purposes of an Order.

“Closing Date and Time” means the Closing Date and Time for receipt of tenders, specified on the cover sheet to this RFT.

“Code” means the NSW Government Code of Practice for Procurement as amended from time to time, together with any other codes of practice relating to procurement, including any amendments to such codes that may be applicable to the particular RFT. The code can be viewed and downloaded from:

http://www.treasury.nsw.gov.au/procurement/pdf/code_of_prac-curr.pdf

“Conforming Tender” means a Tender that:

- (a) conforms to the Requirement;
- (b) is in the prescribed form;
- (c) conforms to the terms and conditions of Part D, and
- (d) conforms to all of the other requirements of this RFT.

“Contractor” means a tenderer who has entered into a Deed of Agreement with the Board.

“Customer” means the Eligible Customer that places an Order with the Contractor under the Standing Offer agreement.

“Customer Contract” means the contract that is made between the Contractor and a Customer, on the terms and conditions stated in cl.2.2.1 of Part D, by means of the placing of an Order by the Customer with the Contractor.

“Deliverables” means the goods and services or goods or services sought under this RFT, as detailed in the Specification.

“Eligible Customer” means

- (a) an entity listed in Schedule 1 to the Public Sector Employment and Management Act 2002 as amended from time to time;
- (b) a public sector agency as defined by clause 18(4) of the Public Sector Management (goods and Services) Regulation 2000 being:
 - 1) a government trading enterprise (including a State owned corporation)
 - 2) a public or private hospital (including an area health service)
 - 3) a local government agency
 - 4) a charity or other community non-profit organisation
 - 5) a public or private school, college or university
 - 6) a public sector agency of this State, the Commonwealth or of any other State or Territory
 - 7) a contractor to a public sector agency (but only in respect of things done as such a contractor)
 - 8) a Nominee Purchaser provided that it satisfies the requirements of clause 4.2 of Part D (Deed of Agreement) and
 - 9) such other persons or entities, which the Board may from time to time in its discretion, determine through a customer registration process.

“FREE-INTO-STORE (FIS)” means free into store and is the basis for purchase of goods, under which the supplier is responsible for supply, delivery, insurance and off loading of goods at the purchasers point of acceptance.

“Government Businesses” means in general, entities which:

- (a) have some form of public sector ownership;
- (b) are engaged in trading goods and/or services;
- (c) have a large measure of self sufficiency; and
- (d) are subject to Executive control.

In this context, the term Government business includes Public Trading Enterprises, State Owned Corporations and General Government Businesses.

“Government Discount” means the standard discount, and, in the case of a Government Discount from list price, means the standard minimum percentage discount from the relevant list price, which in each case may be offered by the tenderer to Customers under the proposed Standing Offer agreement.

“Government Mark-Up” means the standard maximum mark-up on the Manufacturer's Price List to be offered by the tenderer to Customers under the proposed Standing Offer agreement.

“GST” is a goods and services tax and has the same meaning as in the GST Law.

“GST Free Supplies” and **“Input Taxed Supplies”** have the same meaning as in the GST Law.

“GST Law” means any law imposing a GST and includes *A New Tax System (Goods & Services Tax) Act 1999* (C'th) or if that Act does not exist, means any Act imposing, or relating, to a GST and any regulation made under those Acts.

“Late Tender” means a Tender received after the Closing Date and Time for tenders and includes a Tender, which is only partly received by the Closing Date and Time.

“Minimum Order Quantity” means the minimum quantity of each Deliverable that must be ordered by a Customer. This should be given in Order Units (see definition below).

“Non-Conforming Tender” means a Tender that:

- (a) does not conform to the Requirement;
- (b) is not in the prescribed form;
- (c) does not conform to any one or more of the terms and conditions of Part D, including a Tender which seeks to qualify or amend these conditions, or
- (d) does not conform to any of the other requirements of this RFT.

“NON FREE-INTO-STORE (NFIS)” or “Ex Factory” or “Ex Works” is the basis for purchase of goods under which the supplier is responsible only for providing the items in a suitable condition for transport to a single delivery point within the Greater Sydney Metropolitan Area. The purchaser is responsible for transport, insurance, unloading and assembly if necessary.

“OHS&R” means occupational health, safety and rehabilitation.

“Order” means a request by a Customer to the Contractor for the provision or supply of any or all of the Deliverables.

“Order Unit(s)” means the unit(s) used when ordering Deliverables from a Contractor. An Order Unit may be “each”, “per box”, “per carton” or some other unit.

“Price” includes a price expressed as a lump sum or a rate per unit of quantity, calculated in accordance with cl.5.3.

“Price Schedule” means the list of Deliverables offered by the tenderer, together with the corresponding pricing information. The Price Schedule forms, or is to be attached to, Part C3 of the RFT.

“Product Code” means the tenderer's unique product code number that identifies each Deliverable and is required for the purposes of an Order.

“Requirement” means the requirement for the Deliverables to be met by the Tender, outlined in cl.1 of the RFT and detailed in the Specification.

“RFT” means the Request for Tender.

“Selected Price Schedule” means the list of selected Deliverables and corresponding pricing information that may form Part C4 to some RFTs.

“**smartbuy®**” means an electronic market place, consisting of an internet web site and associated databases and applications, maintained on behalf of the NSW Government, located at <http://smartbuy.nsw.gov.au> and associated domains.

“**SME**” means small to medium enterprise.

“**Specification**” means the detailed description of the required goods and services or goods or services contained in Part C Tender Response.

“**Standing Offer**” means an agreement made by a tenderer with the Board pursuant to the RFT under which there is a standing offer for the provision of the Deliverables on the Order of any Customer for whom the Board has arranged the contract. The Standing Offer will be embodied in a deed of agreement between the Board and the Contractor in the form of Part D to this RFT.

“**State Contracts Control Board**” See definition for **Board**.

“**NSW Procurement – Contracting Services**” means a business unit of the NSW Department of Commerce representing the Board and authorised to arrange and administer contracts on behalf of the Board.

“**Tender**” means the offer to supply the Deliverables submitted in response to the RFT.

“**Tender Price**” means, in respect of each Deliverable offered, the Price nominated in the Price Schedule for that Deliverable, except if the Price is calculated on the basis of a Government Discount from list price or Government Mark-Up on list price, when the Tender Price will be the Price nominated in the Price Schedule less the Government Discount or plus the Government Mark-Up, as applicable.

“**Volume Discount(s)**” means the discount(s) (if any) applying to the Tender Price and specified in the Tender which are based on the aggregate yearly volume of Deliverables purchased by a Customer in a specified period.

7 Tender Process – General

7.1 Conformity of Tenders

- 7.1.1 The Board seeks Conforming Tenders.
- 7.1.2 Non-Conforming Tenders that do not include a fully completed Part C, in particular those Tenders which do not contain sufficient information to permit a proper evaluation to be conducted, or, in the case of electronic tenders, which cannot be effectively evaluated because the file is not in the required format, or is not prepared using the required software, or has become corrupt, may be excluded from the tender process without further consideration at the Board's discretion.
- 7.1.3 Tenderers may, if they choose, submit an Alternative Tender. Tenderers are encouraged to offer options or solutions that contribute to the Customer's ability to carry out its business in a more cost-effective manner.
- 7.1.4 Alternative Tenders will only be considered if submitted in conjunction with a Conforming Tender.
- 7.1.5 The Board may assess an Alternative Tender against the evaluation criteria where submitted with a Conforming Tender.
- 7.1.6 An Alternative Tender must be clearly marked “Alternative Tender”.

- 7.1.7 The Board expressly reserves the right to accept, in its discretion, either or both of the following:
- (a) Any Alternative Tender or part of an Alternative Tender, where submitted with a Conforming Tender; and
 - (b) Any other Non-Conforming Tender or part of a Non-Conforming Tender (not, in either case, being an Alternative Tender or part of an Alternative Tender) that, in the Board's opinion, is substantially a Conforming Tender.

7.2 Prescribed form of Tender

- 7.2.1 The Tender, including any Alternative Tender, must comprise a completed Part C and any attachments to Part C, as may be necessary. Any attachments should be labelled to identify those clauses of the RFT to which they relate.

7.3 General instructions for completion of Tenders

- 7.3.1 Prices, responses and other information provided in the Tender are to be in writing and in English.
- 7.3.2 Tenderers must complete ALL of Part C of this RFT, as directed and must not amend any of the questions provided.
- 7.3.3 Tenderers should notify the Contact Officer in writing on or before the Closing Date and Time if they find any discrepancy, error or omission in this RFT.
- 7.3.4 All tenders must be provided in the TenderMax Pro format, using the DMax Lite software. The tender response in Part C must be included in one or more files with an extension of *.dtr. . The DMax Lite software is only supported on a Microsoft Windows 9X and above operating system; other operating systems are not compatible. Tenderers must ensure access to a Microsoft Windows compatible computer is used to prepare the tender.
- 7.3.5 Product samples, models and other supporting items that are required to be delivered must be identified in the tender and delivered in accordance with arrangements made with the Contact Officer
- 7.3.6 Tenderers must ensure that all excel or word attachments can be opened and viewed by Microsoft Excel 2003 or Microsoft Word 2003. Other formats for the attachments are only to be submitted if an arrangement has first been made with the Contract Officer prior to lodgment of the tender.

7.4 Tenderers to inform themselves

- 7.4.1 Before submitting its Tender, a tenderer must:
- (a) Examine all information relevant to the risks and contingencies and other circumstances having an effect on its Tender; and
 - (b) Satisfy itself:
 - (i) that the Tender, including the Tender Price is correct; and

- (ii) that it is financially and practically viable for it to enter into and perform the proposed Deed of Agreement.

7.4.2 The following must be considered:

- (a) The eTendering system is at peak use on the morning prior to Tenders closing.
 - 1) Due to communication traffic via this means of communication it may take longer to lodge a Tender near Closing Date and Closing Time than at other times.
 - 2) When lodging through the NSW Department of Commerce *eTendering* website, it is recommended that a Tender be lodged well in advance of the Closing Date and Closing Time.
- (b) The NSW Department of Commerce *eTendering* system may experience difficulties in accepting a large Tender. A tender lodged via the NSW Department of Commerce *eTendering* website should ideally be below 7 megabytes (MB) in total file size. Responses totalling more than 7MB may experience difficulties in lodgement. In this case Tenderers may break down the lodgement into smaller packages if clearly identified eg. package 1 of 3; 2 of 3; 3 of 3. A tenderer is referred to cl. 8.1.4(b) for instructions as to compressing electronically submitted Tenders.

(1) If submitting an electronic tender with supporting items:

- a) The complete Tender, including the required supporting items unless otherwise directed, must be submitted by Closing Date and Closing Time, and
- b) Supporting items should be clearly designated as "Supporting Items to..." the RFT to which they relate.
- c) Supporting items not required to be lodged as part of the initial Tender by the RFT should not be lodged in the tender box, and arrangements should be made with the Contact Officer.

7.4.3 A tenderer is not required to provide multiple copies of a Tender. Any "Alternative Tender" under clause 7.1 must be attached to the Conforming Tender at Part C of this RFT.

7.4.4 If a tenderer provides multiple lodgements, the latest complete tender received in a NSW Department of Commerce Tender Box will be the tender evaluated.

7.5 Addenda to RFT

7.5.1 If, for any reason the Board, at its sole discretion, requires the RFT to be amended before the Closing Date and Time, an Addendum will be issued.

7.5.2 In each case, an Addendum becomes part of the RFT.

7.5.3 The Board, during the tender period may issue Addenda altering the RFT. In such cases, it is the obligation of the tenderer to verify if any addenda were issued prior to closing date, even if a tender has already been submitted. They must obtain a copy of all addenda as given in clause 7.5.4 or 7.5.5 as applicable.

- 7.5.4 Tenderers must check the web site address, <https://tenders.nsw.gov.au/commerce> and download the Addendum.
- 7.5.5 Failure to complete tender response 21.7 in Part C may result in your tender not being considered.

7.6 Late Tenders

- 7.6.1 In accordance with the requirements of the NSW Government Code of Practice for Procurement, Late Tenders will not be considered except when the Board is satisfied that the delay is not the fault of the tendering party.

7.7 Extension of the Closing Date and Time

- 7.7.1 The Board may, in its discretion, extend the Closing Date and Time.

8. Tender Process – Submission of Tenders

8.1 Electronic Tenders to the NSW Department of Commerce *eTendering* website

- 8.1.1 A tenderer is required, to lodge its Tender electronically through the NSW Department of Commerce *eTendering* website at <https://tenders.nsw.gov.au/commerce>. A tender submitted electronically will be treated in accordance with the *Electronic Transactions Act 2000* (NSW), and given no lesser level of confidentiality, probity and attention than Tenders lodged by other means.
- 8.1.2 A tenderer, by electronically lodging a Tender, is taken to have accepted conditions shown in the Conditions of Tendering and rules on the NSW Department of Commerce *eTendering* website.
- 8.1.3 A tenderer must follow the following directions:
- (a) RFT for which electronic lodgement is available through the website can be identified by the blue “Lodge a Response” link on the web pages for the RFT.
 - (b) To lodge a Tender electronically, the files containing the Tender Response must be up-loaded through the website. Access to the up-loading process is through the blue “Lodge a Response” link, then follow the steps and instructions on the NSW Department of Commerce *eTendering* website and any instructions which may have been supplied with the RFT.
- 8.1.4 A tenderer must observe the following format for lodgements:
- (a) An electronically lodged Tender must be lodged in a file format required by the RFT.
 - (b) If a tenderer compresses files, it must be possible to decompress them using WinZip. A tenderer must not submit self-extracting (*.exe) zip files.
 - (c) A tenderer must not change pre-existing text in the RFT other than to insert the required information.

- (d) The file/s name/s must have an extension and not have invalid characters or file names/loading pathnames too long for the system, as detailed on the NSW Department of Commerce *eTendering* website
- 8.1.5 Signatures are not required for a Tender submitted to the NSW Department of Commerce *eTendering* website. A tenderer must ensure that a Tender is authorised by the person or persons who may do so on behalf of the Tenderer and appropriately identify the person and indicate the person's approval of the information communicated.
- 8.1.6 Electronically submitted Tenders may be made corrupt or incomplete, for example by computer viruses. The Board may decline to consider for acceptance a Tender that cannot be effectively evaluated because it is incomplete or corrupt. Note that:
 - (a) To reduce the likelihood of viruses, a tenderer must not include any macros, applets, or executable code or files in a Tender.
 - (b) A tenderer should ensure that electronically submitted files are free from viruses by checking the files with an up to date virus-checking program before submission.
- 8.1.7 If a tenderer experiences any persistent difficulty with the NSW Department of Commerce *eTendering* website in submitting a Tender or otherwise, it is encouraged to advise the Contact Officer promptly in writing.
 - (a) If there is a defect or failure of the NSW Department of Commerce *eTendering* website and the Board is advised, the Tender Closing Date and Closing Time may be extended provided that, in the view of the Board, the tender process will not be compromised by such an extension.

9. Tender Process – Evaluation of Tenders

9.1 Variation of Tenders

- 9.1.1 At any time before the Board accepts any Tender received in response to this RFT, a tenderer may, subject to cl.9.1.2, vary its Tender:
 - (a) by providing the Board with further information by way of explanation or clarification;
 - (b) by correcting a mistake or anomaly; or
 - (c) by documenting agreed changes to the Tender negotiated under cl.10.2 of this Part.
- 9.1.2 Such a variation may be made either:
 - (a) at the request of the Board, or
 - (b) with the consent of the Board at the request of the tenderer;
 but only if,
 - (c) in the case of variation requested by the tenderer under cl.9.1.1(a)-(b), it appears to the Board reasonable in the circumstances to allow

the tenderer to provide the information or correct the mistake or anomaly; or

- (d) in the case of variation under cl.9.1.1(c), the Board has confirmed that the draft-documented changes reflect what has been agreed.

9.1.3 If a Tender is varied in accordance with cl. 9.1.1(a) or (b), the Board will provide all other tenderers whose Tenders have similar characteristics with the opportunity of varying their Tenders in a similar way.

9.1.4 A variation of a Tender under cl. 9.1.1 will not be permitted if in the Board's view:

- (a) it would substantially alter the original Tender; or
- (b) in the case of variation under cl.9.1.1(a) or (b), it would result in the revising or expanding of a Tender in a way that would give a tenderer an unfair advantage over other tenderers.

9.2 Corrupt or unethical conduct

9.2.1 If a tenderer, or any of its officers, employees, agents or sub-contractors is found to have:

- (a) offered any inducement or reward to any public servant or employee, agent or subcontractor of the Board, Customer or the NSW Government in connection with this RFT or the submitted Tender;
- (b) committed corrupt conduct in accordance with the provisions of the *Independent Commission Against Corruption Act 1988*, or
- (c) a record or alleged record of unethical behaviour,
- (a) not complied with the requirements of Commerce Business Ethics Statement available at:

<http://www.commerce.nsw.gov.au/About+Commerce/Business+ethics+statement/Business+ethics+statement.htm>

this may result in the Tender not receiving further consideration.

9.2.2 The Board may, in its discretion, invite a relevant tenderer to provide written comments within a specified time before the Board excludes the tenderer on this basis.

9.3 Exchange of information between government agencies

9.3.1 Lodgement of a Tender will itself be an authorisation by the tenderer to the Board to make available, on request, to any NSW government agency information, including but not limited to, information dealing with the tenderer's performance on any contract that may be awarded. Such information may be used by the recipient NSW Government agency for assessment of suitability for pre-qualification, selective tender lists, expressions of interest or the award of a contract or termination of contract.

9.3.2 The provision of the information by the Board to any other NSW Government agency is agreed by the tenderer to be a communication falling within section 22(1) of the *Defamation Act 1974* (NSW), and the tenderer shall have no claim against the Board and the State of New South Wales in respect of any

matter arising out of the provision or receipt of such information, including any claim for loss to the tenderer arising out of the communication.

- 9.3.3 In the evaluation of Tenders, the Board may take into account any information about the tenderer that the Board receives from any source.
- 9.3.4 To avoid doubt, information that may be collected, exchanged and used in accordance with this provision includes “personal information” about the tenderer for the purposes of the *Privacy and Personal Information Protection Act 1998*. Lodgement of a Tender will be an authorisation by the tenderer to the Board to collect such information from third parties, and to use and exchange such information in accordance with this cl. 9.3.
- 9.3.5 The tenderer’s attention is drawn to the *Freedom of Information Act 1989* which may confer rights, subject to the terms of that Act, to access, and to require the correction of, information held by certain agencies.
- 9.3.6 During the course of the Agreement, the successful tenderer’s performance will be monitored and assessed. Performance assessment reports, including substantiated reports of unsatisfactory performance, can be taken into account by NSW government agencies and may result in future opportunities for NSW government work being restricted or lost.

10. Outcomes

10.1 Acceptance or rejection of Tenders

- 10.1.1 The Board may accept all or any part or parts of any Tender or Tenders, including, in accordance with cl. 7.1, any Alternative Tender or other Non-Conforming Tender.
- 10.1.2 The Board is not bound to accept the lowest or any Tender.
- 10.1.3 If the Board rejects all the Tenders received it may:
 - (a) invite fresh Tenders based on the same or different criteria (specifications and details contained in Alternative Tenders will not be used as the basis for the calling of new Tenders), or
 - (b) conduct post-tender negotiations in accordance with cl. 10.3.

10.2 Negotiations before determination of outcome

- 10.2.1 Before making any determination as to acceptance or rejection of Tenders the Board may, at its discretion, elect to conduct limited negotiation with preferred tenderers, including those who have submitted Alternative Tenders or who have submitted substantially Conforming Tenders, to mutually improve outcomes.
- 10.2.2 The Board will generally not enter into negotiations on the standard conditions of contract contained in Part D.

10.3 Post Tender negotiations in the event all Tenders are rejected

- 10.3.1 If the Board rejects all Tenders on the basis that all Tenders are Non-Conforming, but considers that conformity with the requirements of this RFT is achievable, it may enter into negotiations with the least non-conforming tenderer with a view to achieving a Conforming Tender and entering into a Standing Offer agreement. If such negotiations are unsuccessful the Board may then enter negotiations with the next most acceptable tenderer. This process may be repeated with each of the rejected Tenders in order of potential acceptability. However, the Board is not obliged to enter into negotiations with any tenderer.
- 10.3.2 The purpose of the negotiations will be advised by the Board and made clear to the participants before the commencement of negotiation. Negotiations will not seek to play off tenderers' prices against other tenderers' prices.

10.4 Custody of Tenders after receipt

- 10.4.1 All tenders lodged are kept in a NSW Department of Commerce Tender Box, which is a secure tender box, until after the Closing Date and Closing Time.
- 10.4.2 Tenders lodged electronically to the NSW Department of Commerce Tenders website will be treated in accordance with the *Electronic Transactions Act 2000* (NSW) and given no lesser level of confidentiality, probity and attention than Tenders lodged by other means.
 - (a) On receipt of Tenders lodged electronically to the NSW Department of Commerce *eTendering* website, Tenders are encrypted and stored in a secure "electronic tender box."
 - (b) For reasons of probity and security, NSW Department of Commerce is prevented from interrogating the electronic tender box to ascertain whether tenders have been received or for any reason, until after the Closing Date and Closing Time.
 - (c) The e-mail receipt that is sent to the Tenderer after successfully uploading and lodging the Tender electronically is the only evidence of Tender lodgement provided.

10.5 Ownership of Tenders

- 10.5.1 All Tenders become the property of the Board on submission.
- 10.5.2 The Board may make copies of the Tenders for any purpose related to this RFT.

10.6 Discontinuance of the Tender process

- 10.6.1 Where the Board determines that awarding a contract would not be in the public interest, the Board reserves the right to discontinue the tender process at any point, without making a determination regarding acceptance or rejection of Tenders.
- 10.6.2 The Board will not be liable for any losses suffered by a tenderer as a result of discontinuance of the tender process, including costs of tendering.

10.7 Notification of outcome

- 10.4.1 Following the Board's decision, all tenderers will be notified in writing of the outcome of their Tenders.

10.8 Complaints

- 10.8.1 It is the NSW Government's objective to ensure that industry is given every opportunity to win Government contracts. Should any entity feel that it has been unfairly excluded from tendering or unfairly disadvantaged by the Conditions in Part D or the Requirement, it is invited to write to:
Chairman, State Contracts Control Board
Level 22, McKell Building
2-24 Rawson Place
SYDNEY NSW 2000

10.9 Entry into Standing Offer agreement

- 10.9.1 Acceptance of a Tender or part Tender will be subject to the execution of a formal deed of agreement in the terms of Part D. Until the Board and the successful tenderer(s) execute a formal deed or deeds there will be no legally enforceable agreement concluded between them.

10.10 Disclosure of information concerning tenderers and outcome of the tender process

- 10.10.1 Details of tenderers and the outcome of the tender process may be disclosed in accordance with the NSW Government Tendering Guidelines, available at:
<http://www.dpws.nsw.gov.au/Government+Procurement/Procurement+Policy+Framework/NSW+Government+Tendering+Guidelines.htm>

An outline of these requirements can be found in Annexure 1 of Part B of this RFT.

10.11 Monitoring of Contractor Performance

- 10.11.1 During the course of the Standing Offer agreement the Contractor's performance will be monitored and assessed. Approval for any price variation request may be dependent on Contractor performance
- 10.11.2 The terms and conditions of the proposed deed of agreement set out in Part D, detail the performance criteria to be applied in the monitoring of Contractor performance.
- 10.11.3 The Contractor will be required to submit to NSW Procurement – Contracting Services, on a monthly basis, details of all sales on the contract for the previous month for each Deliverable they are contracted to supply and for each Customer. The document must be provided electronically and may include, but is not limited to, the following data requirements:

Submitting Organisation Name:
Submitting Organisation ABN:
Submitter Contact Name:
Submitter Contact Phone:
Submitter Contact Email:
SCCB Contract Number
SCCB Contract Name
Customer Organisation Name

Customer ABN
 Customer Contact Name
 Customer Contact Phone
 Customer Contact Email
 Order Date
 Purchase Order Number
 Purchase Order Total
 Supplier Booking / Order Ref No
 Reseller (distributor) Name (as applicable)
 Reseller (distributor) ABN (as applicable)
 UNSPSC Code
 Customer Product Code (as applicable)
 Supplier Product Code
 Reseller (distributor) Product Code (as applicable)
 Product / Service Description (various levels)
 Unit of Measure
 Quantity
 Unit Price (Various Components)
 Total Price (Full Price x Quantity)
 Delivery Date
 Delivery Location
 Invoice Date
 Invoice Number

10.11.4 Once a contract is in place, KPI metrics are to be agreed upon by both the Contractor and the Board. On the basis of the KPI metrics to be evaluated the Contractor will be required to submit electronically to NSW Procurement – Contracting Services, by the 20th of every month, a Monthly Performance Scorecard. The data submitted is to be self-input and must be supported by reports or information to validate the scores provided. Regular meetings are to be established between the Contractor and the Board, at a frequency to be agreed, to review the submitted KPI metrics and to agree on a final monthly score. Details of the Monthly Performance Scorecard are to be agreed as part of discussions to establish the KPI metrics.

10.11.5 A formal bound report is to be tabled by the Contractor at a regular review meeting. The Board at its sole discretion is to decide on the dates and times of these meetings. This report can be developed as part of implementation and may include the following:

Sales trends in tabular and graphical forms;
 Customer – sales profiles;
 Customer – top product summaries;
 Marketshare information;
 Any relevant benchmarks against your customer base / best practice;
 Improvement ideas / innovation / initiative;
 Action log and tracking status;
 Annual summary of achievements;
 Any other data that Contractors feel would be useful to highlight or grow value

10.11.6 Failure to meet acceptable levels of contract performance may result in the Board exercising its right, under clause 11.1.1(j) in the Deed of Agreement, to terminate the Agreement for cause.

ANNEXURE 1 TO PART B (Disclosure of Information)

Disclosure of information concerning tenderers and outcome of the tender process

1. In accordance with the NSW Government Tendering Guidelines referred to in clause 10.10.1 and found at

<http://www.dpws.nsw.gov.au/Government+Procurement/Procurement+Policy+Framework/NSW+Government+Tendering+Guidelines.htm>, the following **tender information** is required to be disclosed -

Tender Type	Level of disclosure	Basis of disclosure
For all public calls for tender, expressions of interest or other such public calls which may result in a contract with the private sector.	As a minimum: a concise description of the proposed works, goods or services the subject of the tender call; the date responses to the tender call close and where responses are lodged; and location of the tender call documents. The names and addresses of all entities which submit responses.	Routine public disclosure at the time tender calls are advertised. Routine public disclosure within 7 days of the date tender calls closed.
In a multi-stage tender process.	The names and addresses of the shortlisted entities, except where such disclosure is likely to compromise the competitiveness of the subsequent tender process.	Routine public disclosure within 7 days of these entities being advised of their shortlisting.

2. In accordance with the NSW Government Tendering Guidelines referred to in clause 10.10.1 above, the following **contract** information is required to be disclosed -

Contract size and type	Level of disclosure	Basis of disclosure
Class 1 contracts All government contracts with estimated value \$150,000 or above).	(a) The name and business address of the contractor; (b) Particulars of any related body corporate (within the meaning of the Corporations Act 2001 of the Commonwealth) in respect of the contractor, or any other private sector entity in which the contractor has an interest, that will be involved in carrying out any of the contractor's obligations under the contract or will receive a benefit under the contract; (c) The date on which the contract became effective and the duration of the contract; (d) Particulars of the project to be undertaken, the goods or services to be provided or the real property to be leased or transferred under the contract; (e) The estimated amount payable to the contractor under the contract;	Routine public disclosure within 60 days after the contract becomes effective.

	<p>(f) A description of any provisions under which the amount payable to the contractor may be varied;</p> <p>(g) A description of any provisions with respect to the renegotiation of the contract;</p> <p>(h) In the case of a contract arising from a tendering process, the method of tendering and a summary of the criteria against which the various tenders were assessed; and</p> <p>(i) A description of any provisions under which it is agreed that the contractor is to receive payment for providing operational or maintenance services.</p>	
<p>Class 2 contracts Class 1 contracts (i.e government contracts with estimated value \$150,000 or above) which also:</p> <ul style="list-style-type: none"> - result from a direct negotiation where there has not been a tender process; or - have been the subject of a tender process and where the final contract terms and conditions are substantially negotiated with the successful tenderer (this includes alliance type contracts); or - involve operation or maintenance obligations for 10 years or longer; or - involve a privately financed project as defined by relevant Treasury guidelines; or - involve a transfer of land or other asset to a party in exchange for the transfer of land or other asset to an agency. 	<p>The information required for class 1 contracts and</p> <p>(a) Particulars of future transfers of significant assets to the State at zero, or nominal, cost to the State, including the date of their proposed transfer;</p> <p>(b) Particulars of future transfers of significant assets to the contractor, including the date of their proposed transfer;</p> <p>(c) The results of any cost-benefit analysis of the contract conducted by the agency;</p> <p>(d) The components and quantum of the public sector comparator if used;</p> <p>(e) Where relevant, a summary of information used in the contractor's full base case financial model (for example, the pricing formula for tolls or usage charges);</p> <p>(f) Where relevant, particulars of how risk, during the construction and operational phases of a contract to undertake a specific project (such as construction, infrastructure or property development), is to be apportioned between the parties, quantified (where practicable) in net present-value terms and specifying the major assumptions involved;</p> <p>(g) Particulars as to any significant guarantees or undertakings between the parties, including any guarantees or undertakings with respect to loan agreements entered into or proposed to be entered into; and</p> <p>(h) Particulars of any other key elements of the contract.</p>	<p>Routine public disclosure within 60 days after the contract becomes effective.</p>
<p>Class 3 contracts Class 2 contracts where the estimated value of the government contract is \$5 million or more.</p>	<p>The information for class 1 and 2 contracts and the complete contract, less confidential information.</p> <p>Note: if some or all of a class 3 contract is not disclosed for reasons of confidentiality, the agency is to disclose:</p> <ul style="list-style-type: none"> the reasons for not publishing the contract or provisions; a statement as to whether the contract or provisions will be published and, if so, when; and where some but not all of the provisions of the contract have been disclosed, a general 	<p>Routine public disclosure within 60 days after the contract becomes effective.</p>

	description of the types of provisions that have not been published.	
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3. Requests for disclosure of additional contract information

Tenderers must acknowledge that any person may make a specific request to the State Contracts Control Board for any item of contract information contained in schedules 1 or 2, or for a copy of a contract, which is not required to be routinely disclosed under section 15A of the FOI Act. The State Contracts Control Board must provide the requested contract information or the requested copy of the contract to the requesting person (less any confidential information) within 60 days of receiving the request.

Where a copy of a contract has been requested and some or all of the contract is not provided for reasons of confidentiality, the State Contracts Control Board will disclose:

- the reasons for not providing;
- a statement as to whether the contract or provisions will be provided and, if so, when; and
- where some but not all of the provisions of the contract have been provided, a general description of the types of provisions that have not been provided.

4. Disclosure of amendments or variations to contract information under the FOI Act

The FOI Act requires that, if there is an amendment to the contract terms or a material variation made under the contract that changes information already routinely disclosed under the FOI Act, the State Contracts Control Board must ensure that the information concerning the change is routinely disclosed within 60 days after such amendment or variation becomes effective, less any confidential information. In the case of class 3 contracts, the full amendment or material variation, less any confidential information, must be disclosed within the 60 day timeframe.

5. Confidential information

None of the disclosure obligations contained in the FOI Act, or the requirements for disclosing tender information or a copy of a contract or information in relation to a contract under these guidelines, require the disclosure of:

- the commercial-in-confidence provisions of a contract (as defined in schedule 3 to the Freedom of Information Act) (the contractor's financing arrangements; the contractor's cost structure or profit margins; the contractor's full base case financial model; any intellectual property in which the contractor has an interest; or any matter whose disclosure would place the contractor at a substantial commercial disadvantage in relation to other contractors or potential contractors, whether at present or in the future.);
- details of any unsuccessful tender;
- any matter that could reasonably be expected to affect public safety or security; or
- information which would be exempt from disclosure if it were the subject of an application under the Freedom of Information Act.

Where such confidential information is withheld, the State Contracts Control Board must inform the requesting person that access to that information may be sought in accordance with the Freedom of Information Act. This will enable a person seeking the information to have the appeal rights available under the Freedom of Information Act.

6. Tenderers are invited to nominate items they consider are confidential and why.



**NSW Procurement – Contracting Services is a Business Unit of the NSW
Department of Commerce**

Dated: <Insert Date>

NSW STATE CONTRACTS CONTROL BOARD

and

<Insert Contractor name>

DEED OF AGREEMENT FOR

0813 Clinical Technology – IV Pumps and Associated Consumables

Part D – Deed of Agreement

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THIS DEED OF AGREEMENT is made on the ____ day of _____ 20__

BETWEEN NEW SOUTH WALES STATE CONTRACTS CONTROL BOARD for and on behalf of the Crown in right of the State of New South Wales, of McKell Building, 2-24 Rawson Place, Sydney, in the State of New South Wales ("the Principal")

AND [insert name of contractor] of
..... [insert address] in the State of ("the Contractor")

BACKGROUND

- A. The Principal issued the Request for Tender for the supply of the Deliverables.
- B. The Contractor submitted the Tender that was accepted by the Principal.
- C. The Principal and the Contractor have agreed to enter a Standing Offer agreement for the supply of the Deliverables in the form of this Agreement.

NOW THE PARTIES AGREE:

PART D1 – Interpretation Provisions

1. Interpretation

1.1 Definitions

“Adverse Event” means any unplanned event resulting in, or with the potential for, patient injury caused by health care management in connection with the use of the Deliverables

“Agreement” means this Deed of Agreement including the Schedules.

“Applicable Discount” means an applicable discount offered in the Tender, including in the Price Schedule to the Tender, as varied from time to time in accordance with the Agreement, or any other applicable discount which may be offered by the Contractor from time to time.

“Approved Dealer and Distributor Information” means the schedule of information supplied in respect of each approved dealer and distributor in Schedule 11.

“Approved Sub-Contractor Information” means the schedule of information supplied in respect of each approved sub-contractor in Schedule 11.

“Circumstances Beyond the Control of the Contractor” include:

- (a) acts of God;
- (b) fire, flood, or earthquake;
- (c) national emergency or war; or
- (d) a serious industrial dispute

“Confidential Information” means, in relation to a Party, information that:

- (a) is by its nature confidential;
- (b) is designated by that Party as confidential; or
- (c) the other Party knows or ought to know is confidential.

“Contract Material” means:

- (a) any material brought into existence as part of, or for the purpose of providing the Deliverables including records, documents and Information stored by any means (“New Contract Material”);
- (b) any material which is existing at the date of this Agreement and which is incorporated with the New Contract Material (“Existing Contract Material”).

“Contract Price” means the total amount payable by the Customer to the Contractor for the Deliverables ordered under a Customer Contract and calculated in accordance with clause 18.

“Contractor” means the person or corporation referred to in item 2 of Schedule 1 who will provide the Deliverables.

“Contractor Information” means the information provided by the Contractor in Schedule 10.

“Contractor’s Insolvency” means any of the following:

- (a) insolvency;
- (b) the Contractor indicates that it does not have the resources to perform the Agreement or any Customer Contract;
- (c) an application for winding up is made and not stayed within 14 days;
- (d) a winding up order is made;
- (e) a controller, administrator, receiver and manager, provisional liquidator or liquidator is appointed;
- (f) a mortgagee enters the possession of any property of the Contractor;
- (g) notice is given of a meeting of creditors for the purposes of a deed of arrangement; or
- (h) any actions of a similar effect are taken.

“Customer” means each of the following: NSW Health and any other eligible customer.

“Customer Contract” means the contract that is made between the Contractor and a Customer when that Customer places an Order;

“Deliverables” means the goods and/or services to be supplied by the Contractor in accordance with this Agreement and itemised in the Price Schedule as amended:

- (a) by any document forming Schedule 4 to this Agreement; and
- (b) from time to time in accordance with this Agreement.

“Eligible Customer” means

- (a) an entity listed in Schedule 1 to the Public Sector Employment and Management Act 2002 as amended from time to time;
- (b) a public sector agency as defined by clause 18(4) of the Public Sector Management (goods and Services) Regulation 2000 being:
 - 1) a government trading enterprise (including a State owned corporation)
 - 2) a public or private hospital (including an area health service)
 - 3) a local government agency
 - 4) a charity or other community non-profit organisation
 - 5) a public or private school, college or university
 - 6) a public sector agency of this State, the Commonwealth or of any other State or Territory
 - 7) a contractor to a public sector agency (but only in respect of things done as such a contractor)
 - 8) a Nominee Purchaser provided that it satisfies the requirements of clause 4.2 of Part D (Deed of Agreement) and
 - 9) such other persons or entities, which the Principal may from time to time in its discretion, determine through a customer registration process.

“FREE-INTO-STORE (FIS)” means free into store and is the basis for purchase of goods, under which the supplier is responsible for supply, delivery, insurance and off loading of goods at the purchasers point of acceptance.

“Guaranteed Delivery Time” means the guaranteed time for the supply of the Deliverables specified in the Tender and agreed by the Principal, or such earlier time as may be agreed by the Customer and the Contractor in respect of a particular Order.

“Information” includes information in the form of data, text or images.

“Intellectual Property” includes copyright, patent, trademark, design, semi-conductor or circuit layout rights, trade, business or company names, or other proprietary rights, or any rights to registration of such rights existing in Australia, whether created before or after the date of this Agreement.

“Management Fee” means the fee payable by the Contractor to the Principal in accordance with clause 6.11.

“Nominee Purchaser” means a contractor to a public sector agency, nominated by the public sector agency to be authorised to place Orders under Standing Offer Agreements for things done as such a contractor and registered by NSW Procurement – Contracting Services.

NON FREE-INTO-STORE (NFIS)” or “Ex Factory” or “Ex Works” is the basis for purchase of goods under which the supplier is responsible only for providing the items in a suitable condition for transport to a single delivery point within the Greater Sydney Metropolitan Area. The purchaser is responsible for transport, insurance, unloading and assembly if necessary.

“NSW Department of Commerce Customer Number” means the identification number issued by NSW Procurement – Contracting Services to a Customer for the purposes of the Customer entering into the Customer Contract.

“Order” means a written request by a Customer for the supply of any or all of the Deliverables.

“Payment Period” means each period nominated in item 8 of Schedule 1 or where this Agreement expires or is terminated before the conclusion of one such period, the period up to and including the date of expiration or termination.

“Parties”, where used in relation to the Agreement, means the Principal and the Contractor, and where used in relation to a Customer Contract, means the Customer and the Contractor.

“Price” means the price payable for a Deliverable as set out in the Price Schedule and includes a price expressed as a lump sum or a rate per unit of quantity and, if applicable, means that price less any Government Discount and/or plus any Government Mark-up specified in the Price Schedule.

“Price Schedule” means the Price Schedule attached to the Tender as Part C2 and any variations to the Price Schedule made by the documents forming Schedule 4 to this Agreement and/or variations made in accordance with this Agreement.

“Principal’s Material” means any material, document, or Information supplied by the Principal, a Customer or any department or agency of the Crown to the Contractor by whatever means.

“Public Service” has the same meaning as that given to it in the *Public Sector Employment and Management Act 2002* (NSW).

“Public sector agency” means an entity as defined from time to time in clause 18(4) of the *Public Sector Management (Goods & Services) Regulation 2000* (NSW) and includes:

- (a) a government trading enterprise (including a State owned corporation);
- (b) a public or private hospital (including an area health service);
- (c) a local government agency;
- (d) a charity or other community non-profit organisation;
- (e) a public or private school, college or university;
- (f) public sector agency of:
 - (i) this State (including the Principal),
 - (ii) the Commonwealth, or
 - (iii) any other State or Territory; and
- (g) provided that it satisfies the requirements of clause 4.2, a Nominee Purchaser.

“Request for Tender” means the Request for Tender described in item 1 of Schedule 1 including any addenda to the Request for Tender issued by the Principal.

“Schedule” means a schedule to this Agreement.

“Security” means the security in the amount and form specified by the Principal in its discretion, as set out in item 11 of Schedule 1.

“Specification” means the detailed description of the Deliverables to be provided under this Agreement that is attached as Schedule 2, as amended by any document attached as Schedule 4. In the event of any inconsistency between the Specification and any part of this Agreement, this Agreement will prevail to the extent of the inconsistency.

“Standing Offer” means an agreement under which there is a standing offer for the provision or disposal of goods or services over the period of the agreement, on the order of any Customer for whom the Principal has arranged the contract.

“State Contracts Control Board ” means the State Contracts Control Board established by the *Public Sector Employment and Management Act 2002* and includes the duly authorised delegates of the Board, including officers of NSW Procurement – Contracting Services.

“State of New South Wales” means the Crown in right of the State of New South Wales.

“NSW Procurement – Contracting Services” means a business unit of the NSW Department of Commerce, representing the Principal and authorised to arrange and administer contracts on behalf of the Principal.

“Statutory Requirements” means the laws relating to the performance of this Agreement or the lawful requirements of any authority with respect to the performance of this Agreement.

“Substantial Breach” means:

- (a) in the case of this Agreement, a substantial breach of a term of this Agreement by the Contractor and includes any breach of the following clauses (which will be taken in each case to be a substantial breach of this Agreement):
 - (i) clause 3.4 (Prices for the Deliverables),
 - (ii) clause 3.5 (Price Adjustment),
 - (iii) clause 3.6 (Best Price),
 - (iv) clause 6.5 (Minimum Insurance Requirements),
 - (v) clause 6.10 (Licences and Approvals),
 - (vi) clause 6.11 (Management Fee),
 - (vii) clause 6.13 Not Used
 - (viii) clause 7.3 (Specified Personnel),
 - (ix) clause 8 (Confidentiality),
 - (x) clause 9 (Copyright and Intellectual Property); and
 - (xi) clause 12 (No assignment or novation)
- (b) in the case of a Customer Contract, a substantial breach of a term of the Customer Contract, and includes any breach of the following clauses (which will be taken in each case to be a substantial breach of the Customer Contract):
 - (i) clause 3.6 (Best Price);
 - (ii) clause 16 (Time for Delivery)

“Tender” means the tender submitted by the Contractor in answer to the Request for Tender, including any accepted variation to the tender, attached as Schedule 3 or, in some cases, as Schedule 4.

“Term” means the period of this Agreement, set out in item 4 of Schedule 1 and any extension of the Term in accordance with clause 2.3.2.

“Warranty Period” means, in relation to a particular Deliverable, the period of warranty of that Deliverable offered in the Tender.

1.2 Rules for interpreting this Agreement

- 1.2.1 Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.
- 1.2.2 A reference to:
 - (a) legislation (including subordinate legislation) is a reference to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (b) a document or agreement, or a provision of a document or agreement, is a reference to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (c) a person includes any type of entity or body of persons whether or not it is incorporated or has a separate legal entity;
 - (d) anything (including a right, obligation or concept) includes each part of it.

- 1.2.3 (a) If the Contractor consists of more than one person or corporation, this Contract binds each of them separately and any two or more of them jointly and severally.
- (b) An obligation, representation or warranty made by the Contractor in the tender and in any contract made pursuant to an acceptance of the tender shall bind each person or corporation separately and jointly and each person or corporation shall alone be responsible for the performance of every obligation, representation or warranty contained in the tender or any contract made pursuant to the tender.
- 1.2.4 A singular word includes the plural, and vice versa.
- 1.2.5 A word which suggests one gender includes the other genders.
- 1.2.6 If a word is defined, another part of speech of that word has a corresponding meaning.
- 1.2.7 The Parties may undertake business by the electronic exchange of information and the provisions of this Agreement will be interpreted to give effect to undertaking business in this manner.
- 1.2.8 Subject to clause 1.2.9, if there is any conflict between the terms and conditions of this Agreement and any provisions of the Schedules, the terms and conditions of this Agreement will take precedence over the Schedules.
- 1.2.9 To the extent that documents in Schedule 3 (The Tender and documents evidencing agreed variations to the Tender) or Schedule 4 (Documents notifying the Principal's acceptance) expressly modify or replace clauses of this Agreement or the Specification, those documents will take precedence, in chronological order, over the Agreement or the Specification, as applicable.

PART D2 – Provisions of the Agreement between Principal and Contractor

2. Supply under a Standing Offer for the Term

2.1 Nature of the Agreement between the Principal and the Contractor

- 2.1.1 This Agreement describes the terms and conditions of the Standing Offer between the Principal and the Contractor under which the Contractor agrees with the Principal that it will supply the Deliverables to Customers, as and when Orders are placed, on the terms and conditions of the Customer Contract and subject to this Agreement.
- 2.1.2 This Agreement constitutes the entire agreement between the Parties. Any prior arrangements, agreements, representations or undertakings are superseded. No notification or alteration of any clause of this Agreement will be valid except in writing signed by both Parties.
- 2.1.3 The Parties agree that any Customer, although not a Party to this Agreement, may take the benefit of, and seek to enforce, this Agreement in its own name.

2.2 Formation of Customer Contracts

- 2.2.1 The Contractor agrees that each time a Customer places an Order a separate Customer Contract is formed on the date of receipt of the Order by the Contractor. The terms and conditions of the Customer Contract are those appearing in:
 - (a) Part D1 of this Agreement, including any Schedules referred to in Part D1;
 - (b) Part D3 of this Agreement;
 - (c) the Order (including any Additional Conditions); and
 - (d) any variations of the Customer Contract as may be made in accordance with that contract.

2.3 Term

- 2.3.1 This Agreement commences on the commencement date specified in item 4 of Schedule 1 and expires on the expiry date specified in the same item 4, unless sooner determined in accordance with this Agreement.

3. Deliverables and Pricing

3.1 List of Deliverables

- 3.1.1 The list of Deliverables offered by the Contractor is contained in the Price Schedule.

3.2 Variation of Deliverables offered

- 3.2.1 The Contractor must notify NSW Procurement – Contracting Services in writing as soon as practicable of any variation to the description of a Deliverable offered in the Price Schedule.
- 3.2.2 A variation under clause 3.2.1 may include a variation to the description of the item number, name or Specification of the Deliverable but excludes a variation:

- (a) to the Price of the Deliverable;
 - (b) that modifies or upgrades the Deliverable; or
 - (c) that introduces a new Deliverable to the Price Schedule.
- 3.2.3 NSW Procurement – Contracting Services will notify the Contractor of its acceptance or rejection of the variation to the description of a Deliverable. If the variation is accepted, it shall be taken to be incorporated in the Price Schedule.

3.3 Changes or Additions

3.3.1 At any time after the commencement of the contract, the Board may decide to accept, in lieu of any deliverable/s accepted, and only from the successful contractor/s, changed or additional item/s provided that it can be substantiated that:

- (a) The functional specifications of the changed or additional deliverable/s do not differ in any substantial sense from the functional requirements in the contract; and
- (b) The cost effectiveness of the changed or additional deliverable/s is not less than that of the accepted items.

3.3.2 Where a contractor proposes an additional deliverable or change to any aspect of the deliverable including the country of Manufacture, source of manufacture, composition, design or method of manufacture of the deliverable, packaging, labelling, or any other factor affecting the deliverable supplied under the Contract, it shall notify NSW Department of Commerce in writing, giving at least two (2) calendar months notice of the proposed change/addition. The request will consist of :

- (a) The current item number of the deliverable
- (b) The product code of the deliverable
- (c) The correct and full name (including brand name or marking) of the deliverable.
- (d) The Order Unit in line with original tendered details
- (e) The price per order unit.
- (f) TGA or other legislative requirements as relevant
- (g) Information relating to the change or reason for the addition including: sales levels, evaluation reports (if available)
- (f) Any other details as required

The Principal reserves the right to accept or reject any changes/additions proposed by the Contractor.

3.3.3 Upon receipt of the request, the Principal will have the sole discretion as to one or more of the following actions to be taken:

- (a) institute trials of the product and evaluate results;
- (b) evaluate the change version;
- (c) invite all existing suppliers under the Standing Offer for the Deliverables to tender for the change version;
- (d) invite a supplementary tender for the changed version from any interested tenderers; or
- (e) decline the request for inclusion of the changed or additional items in this Agreement.
- (f) approve the request for inclusion of the changed or additional items in the agreement either adding this to the list or replacing the Deliverable listed in the Price Schedule with the improved version.

3.3.4 New Generation Deliverables

3.3.4.1 At the time of establishing an Agreement with the successful contractor/s for this requirement, at three 3 monthly intervals only (quarterly) of the Agreement, the Board may decide to accept, only from the successful Contractors, New Generation Deliverable/s released subsequent to the lodgement of Tenders and establishment of Contract, provided that it can be substantiated that:

- a) the functional specifications of the new generation deliverable/s does not differ in any substantial sense from the broader requirements of the Contract; and
- b) the cost effectiveness of the new generation deliverable/s is not less than that of Contracted deliverables.

3.3.4.2 Where the Contractor implements, or is planning to implement, a New Generation deliverable the improvement characteristics of the Deliverable, including:

- (a) changes to its formulation;
- (b) changes to its indication;
- (c) changes to its presentation;
- (d) changes to all or a combination of the above; or
- (e) improvement (whether as a result of technological advances, revised Australian Standards or Customer requirements);

the Contractor will submit a request in writing to the Group General Manager, NSW Procurement - Contracting Services to include the New Generation Deliverable/s. The request shall include:

- a) the correct and full name (including brand name or marking) of the New Generation Deliverable/s;
- b) a full and detailed description of where the New Generation Deliverable/s is used and how it is used;
- c) if, whether or not to the best of the Contractor's knowledge, any other Deliverable/s are to be used in conjunction with the New Generation Deliverable/s;
- d) a comparison table listing the characteristics of a like Deliverable/s and the characteristics of the New Generation deliverable/s; and
- e) the reason behind the changes or, what the improvement is, a description of the benefits that would accrue to Customers should the New Generation deliverable/s be included in the Agreement.

3.3.4.3 Upon receipt of the request, the Principal will have the sole discretion as to one or more of the following actions to be taken:

- a) institute trials of the new generation deliverable and evaluate results;
- b) evaluate the new generation deliverable;
- c) decline the request for inclusion of the new generation deliverable in this Agreement; and/or
- d) approve the request for inclusion of the new generation deliverable in the Agreement, either adding this to the contract or replacing a Deliverable listed in the Price Schedule with the new generation item/s.

3.3.4.4 In the event that the New Generation deliverable/s is not approved by the Principal or NSW Health, and any original accepted Deliverable on contract can no longer be supplied, the Principal reserves the right to remove the Deliverable from the Agreement.

3.4 Prices for the Deliverables

- 3.4.1 Subject to clauses 3.5, 3.6, and 3.7.2, the price of a Deliverable to be supplied under a Customer Contract shall be the Price for that Deliverable, less any Applicable Discount.
- 3.4.2 Clause 3.4.1 does not prevent the Contractor from offering, or the Contractor and Customer from negotiating, to reduce the Price or increase the discount for a particular Deliverable provided that the Price or discount is consistent with clauses 3.6 and 3.7.2 of this Agreement.

3.5 Price Adjustment

3.5.1 Price Adjustment process for Increases in Prices

- 3.5.1.1 The Contractor may not vary the Price of a Deliverable except in accordance with the Price mechanism selected in Part C1 of the Tender.
- 3.5.1.2 The Contractor must apply in writing to the Principal to increase Prices in the Price Schedule. Sufficient documentation to justify applications for Price variation must accompany the application.
- 3.5.1.3 Subject to the Contractor having provided the Principal with sufficient documentation, the Principal will, in writing, approve or reject a price variation within six (6) weeks of lodgement of the application.
- 3.5.1.4 Increased prices approved by the Principal shall apply to all Customer Contracts made on or after the date upon which the Principal publishes the increased Price. No Price increase shall be applied retrospectively.
- 3.5.1.5 Where the Price variation is accepted, the Price Schedule will be taken to include the varied Price. The increased Price becomes the basis from which any future applications for Price variations will be calculated.
- 3.5.1.6 The provision of Deliverables under a Customer Contract shall not be withheld or disrupted by formalities or disputes associated with the variation of a Price.
- 3.5.1.7 The Principal reserves the right to delete a Deliverable from the Price Schedule or terminate this Agreement if it considers a Price increase application to be unreasonable.

3.5.2 Price Adjustment process for Decreases in Prices

- 3.5.2.1 Where the Price variation calculated in accordance with Part C1 of the Tender results in a reduced price, the Contractor must apply in writing to the Principal to decrease the Price.
- 3.5.2.2 Notwithstanding a Firm Price basis for the Contract in terms of Part C1 of the Tender, and notwithstanding a variable price basis in terms of Part C1 of the Tender, the Contractor may apply in writing to the Principal to decrease its Prices at any time without any supporting documentation.
- 3.5.2.3 The Principal will approve or reject a price variation within six (6) weeks of lodgement of the application.
- 3.5.2.4 Decreased prices approved by the Principal shall apply to all Customer Contracts made after the "effective date" as determined by the Principal.
- 3.5.2.5 The decreased Price, once approved, becomes the basis from which any future applications for Price variations are calculated.

- 3.5.2.6 Applications for decreases in Price must be made by the individual contractors concerned. Applications by Trade or similar Associations will not be considered.

3.6 **Best Price**

- 3.6.1 The Price for a Deliverable taking into account any Applicable Discounts on the Price must be no less favourable than the price paid by any other purchaser of substantially similar goods or services (“the similar goods or services”) to the Contractor.
- 3.6.2 Where the Contractor offers more favourable prices to any other purchaser of similar goods or services, it must make the more favourable price available to all Customers entitled to the benefit of this Agreement.
- 3.6.3 A failure to comply with this clause will entitle the Principal to terminate this Agreement in accordance with clause 11.1.
- 3.6.4 If a Customer has paid a Price for a Deliverable during a period when the Contractor has offered a more favourable price, then the Contractor agrees to reimburse the Customer the difference between the amount represented by the Price less any Applicable Discount that has been paid by the Customer and the more favourable price.

3.7 **Maximum Ceiling Price**

- 3.8.1 The Price for each Deliverable in the Price Schedule is a maximum ceiling Price which cannot be exceeded without the Contractor applying for a Price variation under clause 3.5 of this Agreement.
- 3.8.2 Where the Contractor offers a temporary or periodical price special that is lower than a Price specified in the Price Schedule it will make available that lower price to all Customers without prior notification to the Principal. Such prices do not apply to permanent price decreases which must be submitted to the Principal for its approval in accordance with clause 3.5 of this Agreement.

3.9 **Goods and Services Tax**

- 3.9.1 In this clause and Agreement:

“**Consideration**”, “**Tax Invoice**”, “**Taxable Supply**” and “**Supply**” have the same meaning as provided for in the GST Law.

“**GST**” is a goods and services tax and has the same meaning as in the GST Law.

“**GST Law**” means any law imposing a GST and includes *A New Tax System (Goods & Services Tax) Act 1999* (Cth) or if that Act does not exist, means any Act imposing, or relating, to a GST and any regulation based on those Acts.

- 3.9.2 The Contractor must hold an Australian Business Number (ABN) and be registered for GST.
- 3.9.3 Every invoice issued by a person making a Supply must be in the form of, or be accompanied by, a valid Tax Invoice. No amount is payable until a valid Tax Invoice for the Contract Price, or any instalment of the Contract Price, is received.

- 3.9.4 If there is any abolition or reduction of any tax, duty, excise or statutory charge associated with the GST, or any change in the GST, the Consideration payable for the Supply must be varied so that the Contractor's net dollar margin for the Supply remains the same.
- 3.9.5 Any contract entered into by a Party to this Agreement with a third party which involves a Supply being made, the cost of which will affect the cost of any Supply made under or in connection with this Agreement, must include a clause in equivalent terms to clause 3.9.3.
- 3.9.6 The Parties agree that this clause will apply to the Management Fee payable by the Contractor to the Principal.

4. Customers

4.1 Contractor must supply to all Customers

- 4.1.1 If a Customer, other than a Nominee Purchaser, places an Order with the Contractor during the Term, the Contractor must supply the required Deliverables to the Customer on the terms and conditions of the Customer Contract and in accordance with this Agreement.

4.2 Nominee Purchasers

- 4.2.1 Subject to cl. 4.2.2, the Contractor must satisfy any Order placed under this Agreement by a Nominee Purchaser, provided that the Nominee Purchaser provides in its order:
- a) its NSW Procurement – Contracting Services Registration Number;
 - b) the identity of the Nominating Agency;
 - c) the contract number, name and location of the contract in respect of which the purchase is being made; and
 - d) a statement saying that the goods or services ordered are related to carrying out its obligations under a contract with a public sector agency.
- 4.2.2 If at any time during the Term of this Agreement, the Contractor wishes to restrict its dealings with a Nominee Purchaser, the Contractor shall so request in writing to the Principal. The Principal may approve the request if there are genuine commercial reasons for the Contractor's request. If approved by the Principal, the details of the restrictions will be included in Item 14, Schedule 1.
- 4.2.3 Where the Principal does not approve a request of the Contractor under clause 4.2.2 and the Contractor refuses to deal with a Nominee Purchaser, the Principal may terminate this Agreement under cl. 11.
- 4.2.4 The Contractor may at any time lift the restrictions it has placed on its dealings with a Nominee Purchaser and shall notify the Principal accordingly.

- 4.2.5 If the Contractor makes a supply under the Agreement to an entity purporting to be a Nominee Purchaser, the Contractor is taken to be satisfied that the supply is properly made under this Agreement.

5. Orders

5.1 No Assurance of Orders and Non-Exclusive supply

- 5.1.1 This Agreement does not:
- (a) imply that the Contractor will receive any orders for the Deliverables,
 - (b) imply that the Contractor is the exclusive provider of the Deliverables to the Customer; or
 - (c) oblige any Customer to place an Order for the Deliverables with the Contractor.
- 5.1.2 The Contractor acknowledges that the Principal may, from time to time, in its discretion, appoint other suppliers under a Standing Offer agreement to supply the Deliverables and that the Contractor will make no objection to such appointment.

5.2 Supply through dealers and distributors

- 5.2.1 The Contractor may supply the Deliverables through a dealer or distributor of the Contractor approved by the Principal from time to time and identified in Schedule 1 ("Approved dealer or distributor") on the terms of this clause.
- 5.2.2 The Contractor must make the approved dealer or distributor aware of this Agreement and the standard terms and conditions of Customer Contract and of this clause.
- 5.2.3 If the Principal requires it, the Contractor must arrange for the approved dealer or distributor to execute the statutory declaration at Schedule 6.
- 5.2.4 The approved dealer or distributor must offer to supply under the terms and conditions of the Customer Contract and otherwise on terms that enable the Contractor to comply with this clause.
- 5.2.5 The Contractor guarantees the dealer or distributor's performance under the Customer Contract as if the Customer Contract had been entered into by the Contractor.
- 5.2.6 The Contractor must ensure the approved dealer or distributor has an adequate system in place to supply sales information to the Contractor so as to enable the Contractor to comply with its own obligations under this Agreement to supply sales information to the Principal for calculation of the Management Fee.
- 5.2.7 The Contractor must ensure the approved dealer or distributor supplies the Contractor with the above sales information.
- 5.2.8 The Contractor must obtain the approved dealer or distributor's agreement to the Principal at its own cost taking such measures as it considers reasonable in the circumstances (including the appointment of an auditor) to verify the sales information supplied by the approved dealer or distributor to the Contractor.

5.3 Supply through Sub-contractors

- 5.3.1 The Contractor may sub-contract part or all of a Customer Contract to a sub-contractor approved by the Principal from time to time and identified in Schedule 1 ("approved sub-contractor") on the terms of this clause.
- 5.3.2 The Contractor must make the approved sub-contractor aware of the terms and conditions of the Customer Contract and this clause;
- 5.3.3 If the Principal requires it, the Contractor must arrange for the approved sub-contractor to execute the statutory declaration at Schedule 6.
- 5.3.4 The terms and conditions of the sub-contract must be consistent with the Customer Contract.
- 5.3.5 The Contractor will continue to be bound by, and responsible for performance of, the Customer Contract notwithstanding that part or all of it may have been sub-contracted.
- 5.3.6 The Principal may, without incurring liability, withdraw its approval of a sub-contractor if in its reasonable opinion the sub-contractor is not meeting the requirements of a Customer Contract. The Principal will notify the Contractor and the Customer in writing that its approval is withdrawn and the Contractor will immediately terminate its arrangement with the sub-contractor.
- 5.3.7 To the extent that loss is not attributable to the Principal's withdrawal of approval of a sub-contractor:
 - (a) the Contractor will be liable for any acts or omissions of any sub-contractor or any employee or agent of the sub-contractor as fully as if they were the acts or omissions of the Contractor, and
 - (b) the Contractor will indemnify and release the Customer from any liability or loss resulting from the acts or omissions of any sub-contractor.
- 5.3.8 The indemnity given under this clause may be enforced by the Customer to the relevant Customer Contract as if it was itself a party to this Agreement.

5.4 Electronic Orders

- 5.4.1 The contractor must accept Orders placed by electronic communication in accordance with the Electronic Transactions Act (NSW) 2000.

6. Specific Obligations of the Contractor

6.1 Contractor to fulfil all Orders

- 6.1.1 The Contractor must fulfil all Orders during the Term in accordance with this Agreement and the Customer Contract.
- 6.1.2 If quantities or values of the Deliverables are described as 'approximate' in the Specification, they are an estimate only and the Customer is not required to take or accept the estimated quantities or values.

- 6.1.3 The Customer may place an Order for any one type or item of the Deliverables either at one time or in instalments or in such quantities as may be required from time to time.

6.2 Conflict of Interest

- 6.2.1 The Contractor promises that, to the best of its knowledge, no conflict of interest of the Contractor, its employees, agents or sub-contractors exists or is likely to arise in the performance of its obligations under the Agreement.
- 6.2.2 The Contractor must:
- (a) notify in writing, and consult with, the Principal immediately upon becoming aware of the existence, or possibility, of a conflict of interest; and
 - (b) comply with any direction given by the Principal in relation to those circumstances designed to manage that conflict of interest.
- 6.2.3 For the purposes of this clause, a “conflict of interest” includes engaging in any activity, or obtaining any interest, likely to conflict with the performance by the Contractor of, or to restrict the Contractor in performing, its obligations under the Agreement.
- 6.2.4 The Principal may terminate the Agreement in accordance with clause 11.1 if in its view a conflict of interest exists which prevents the proper performance of the Agreement.

6.3 Mistakes in Information

- 6.3.1 The Contractor must pay for the extra costs (if any) occasioned by errors or omissions in material or other Information supplied by it, even though that material or Information may have been approved by the Principal.

6.4 Contractor’s Obligation to supply Deliverables at Prices in the Price Schedule

- 6.4.1 The Contractor must supply the Deliverables on the basis of the Prices in the Price Schedule except where provided in this Agreement. The Prices, except as specifically provided, are inclusive of all the costs and expenses that the Contractor incurs in the supply of the Deliverables.

6.5 Minimum Insurance Requirements

- 6.5.1 The Contractor must hold and maintain, and must ensure that all subcontractors are beneficiaries under or otherwise hold and maintain, the following insurances for the Term, or for such other period as may be specifically required by this Agreement for the particular policy:
- (a) a broad form liability policy of insurance which includes:
 - (i) public liability insurance for at least the amount specified in item 5(a) of Schedule 1 in respect of each claim; and
 - (ii) products liability insurance for at least the amount specified in item 5(b) of Schedule 1 for the total aggregate liability for all claims arising out of the Contractor’s products for the period of cover.

- (b) workers' compensation insurance in accordance with applicable legislation for all the Contractor's employees; and
 - (d) such other insurances as are specified in item 5 of the Agreement Details.
- 6.5.2 All policies of insurance must be effected with an insurer approved by the Principal (which approval will not be unreasonably withheld).
- 6.5.3 The Contractor must ensure that each policy is in effect for the Term of this Agreement or such other period as required by the Principal.
- 6.5.4 All policies must, apart from workers compensation and professional indemnity insurance must:
 - (a) note the interest of the Principal, the State and any subcontractor;
 - (b) not exclude liability assumed by the Contractor under this Agreement.
- 6.5.5 The Contractor shall, and shall ensure sub-contractors, as soon as practicable, inform the Principal in writing of the occurrence of an event that may give rise to a claim under a policy of insurance effected as required by the Agreement and shall ensure that the Principal is kept fully informed of subsequent action and developments concerning the claim.
- 6.5.6 The Contractor must, when requested in writing by the Principal, supply proof that all insurance policies required by this Agreement are current.
- 6.5.7 The Contractor must, when requested in writing by the Principal, arrange for its insurer to complete a "Confirmation of Insurances Obtained" form, and on-send this to the Principal within 30 days of this request. An example of this form is at Schedule 14. Equivalent evidence as to the currency of insurance policies required by this Agreement will be acceptable to the Principal.
- 6.5.8 If the Contractor fails to comply with clause 6.5, the Principal:
 - (a) may effect and maintain that insurance and pay the necessary premiums; and
 - (b) may recover from the Contractor the cost of the premiums and the Principal's reasonable costs of effecting and maintaining the insurance.
- 6.5.9 Where the Contractor is insured under its parent company's insurance policy, the parent company's insurance policy must clearly indicate that it applies and extends coverage to the Contractor.
- 6.5.10 The effecting of insurance shall not limit the liabilities or obligations of the Contractor under other provisions of this Agreement.

6.6 General Indemnity

- 6.6.1 The Contractor will be liable in respect of, and indemnifies, and shall keep indemnified, the Principal and its officers, employees and agents against any claim, loss or expense (including a claim, loss or expense arising out of personal injury or death or damage to property) which any of them pays, suffers, incurs or is liable for (including legal costs on a solicitor and client basis) (together "the loss") as a result of:
 - (a) any unlawful, negligent, reckless or deliberately wrongful act or omission of the Contractor (or its employees, agents or subcontractors or their employees) in the performance of this Agreement; or

- (b) any breach of this Agreement or the confidentiality deeds required by this Agreement.

6.6.2 The Contractor's liability in respect of, and indemnity given in, clause 6.6.1 shall be reduced proportionally to the extent that any unlawful, negligent, or deliberately wrongful act or omission of the Principal, its officers, employees or agents caused or contributed to the loss.

6.7 Compliance with Laws and Standards

6.7.1 The Contractor must, in carrying out this Agreement, comply with:

- (a) all applicable Statutory Requirements;
- (b) the codes, policies, guidelines and Australian standards listed in Item 6 of Schedule 1 or any other codes, policies, guidelines and Australian standards specified in writing by the Principal to the Contractor; and
- (c) Where a particular Australian or other Standard has been agreed between the Contractor and the Principal, and that Standard is revised, the Contractor must submit evidence of compliance with the revised Standard within a reasonable period of time.
- (d) Where Therapeutic goods (both drugs and devices) are supplied to a Customer, the Contractor must ensure that these goods are contained on the Australian Register of Therapeutic Goods (ARTG), unless exempted, in accordance with the *Therapeutic Goods Act 1989 (Cth)*. The Contractor must comply in all respects with the Uniform Recall Procedure for Therapeutic Goods as called for by the Therapeutic Goods Administration. The Contractor must also comply with the Therapeutic Goods Order 37 for the labelling of therapeutic goods.

6.7.2 Occupational Health Safety & Rehabilitation

6.7.2.1 The Contractor must comply with the following OHS&R requirements in the performance of this Agreement:

- (a) The Occupational Health and Safety Act 2000 (NSW) and any regulation made under this Act, including the OHS Regulation 2001; and
- (b) Codes of Practice, approved and issued pursuant to the above Act and/or regulations made under the Act.

6.7.2.2 The Contractor must ensure compliance with the conditions referred to in 6.7.2.3 by all persons engaged by them to undertake work on a NSW Department of Commerce construction site.

Unless one of the exceptions listed below applies, work on a construction site includes:

- (a) deliveries onto the site, and/or installation on the site, of any goods, for example building, furnishing, or other materials, and
- (b) the loading of trucks on site.

Work on a construction site does not include:

- (a) deliveries made only to the project or site office if no occupant of the truck leaves the immediate vicinity of that office whilst on foot, and

- (b) deliveries onto the site if no occupant of the truck exits the vehicle whilst on site.
(For this exception to apply, the truck must be unloaded by a site worker.)

6.7.2.3 If an Order is placed under the Agreement requiring any of the included work (excluding the exceptions above) on a NSW Department of Commerce construction site, the following are required before any work commences:

- (a) The Contractor's employees or agents must provide to the principal contractor for the construction site evidence of having received General Construction Industry Induction Training (commonly known as "green card" training), including the number on their card.
- (b) The Contractor's employees or agents must attend Site Specific Induction Training when first arriving at the site, to be provided by the principal contractor on site.
- (c) The Contractor and/or the employer must provide to the principal contractor on site a copy of their workers compensation certificate of currency which:
 - (i). is for the current period,
 - (ii) is for the correct industry category, and
 - (iii) is for the estimated total annual wages based on a minimum average wage of \$40,000 for each full-time adult worker, unless evidence is provided to substantiate a lower wages estimate.
- (d) The Contractor's and/or the employer's workers entering NSW Department of Commerce construction sites must provide a site specific risk assessment for the work activity and a safe work method statement to the principal contractor on site.
- (e) The Contractor and/or the employer, if required by the principal contractor on site must provide evidence of compliance with superannuation award or legislation requirements, which are currently an additional payment or contribution of nine percent of total wages for each employee in accordance with the NSW Government's Industrial Relations Management Guidelines (December 1999).

6.7.2.4 The Contractor must also ensure compliance by all persons engaged by them with any other conditions required on other NSW Government construction sites. For this purpose, the Contractor shall make inquiries at the time of receiving orders from the relevant NSW Government agency as to whether delivery, installation or other work related to the order will be undertaken on a construction site, and if so, what requirements may be required in relation to this work.

6.7.3 Material Safety Data Sheets

6.7.3 The Contractor must provide Material Safety Data Sheets as provided for in the Tender or when requested by the Principal from time to time

6.8 Not Used

6.9 The Contractor's On-Costs

6.9.1 The Principal will not be liable for any of the Contractor's employee "on-costs", including wages, salaries, holiday pay or allowances, sick pay, Workers' Compensation, or any tax or levy voluntarily undertaken by or imposed (either by statute or otherwise) on the Contractor.

6.10 Licences and Approvals

- 6.10.1 The Contractor must obtain at its own cost all licences, approvals and consents necessary to perform this Agreement, including any licences listed below or otherwise offered in the Tender.

6.11 Management Fee

- 6.11.1 (a)
The Contractor must pay to the Principal a Management Fee in accordance with this clause.
- (b)
The Contractor shall act in good faith in respect of all its obligations under this clause 6.11 and shall use its best endeavours to ensure that the obligations imposed on it in relation to management fee are met.
- 6.11.2 The Management Fee is the GST-exclusive value of the Deliverables supplied to a Customer, multiplied by the percentage shown in Item 7 of Schedule 1 (the Management Fee Rate), plus the GST payable on this amount, where the supply of Deliverables to the Customer was or should have been made under this Agreement.
- 6.11.3 The amount of the Management Fee will not under any circumstances be shown as a separate charge in any quote or invoice to a Customer.
- 6.11.4 The Contractor agrees to take all reasonable steps to ensure that all Eligible Customers do purchase all Deliverables under this Agreement. The Contractor agrees that the Principal may treat all purchases of Deliverables by Eligible Customers as Orders under this Agreement, whether or not a NSW Department of Commerce Customer Number is quoted, unless the Contractor can provide evidence, to the satisfaction of the Principal, that the purchase was made under some other contract between that Eligible Customer and the Contractor.
- 6.11.5 The Contractor agrees that the Management Fee payable has been allowed for in the Prices specified in the Price Schedule together with all costs associated with the calculation and proving payment of the Management Fee.
- 6.11.6 At the end of each Payment Period, the Principal shall forward to the Contractor a request for a Report ("The Sales Report") which relates to the relevant Payment Period and which requires the Contractor to report the:
- (a) total amount, exclusive of GST, all Customers are liable to pay in respect of all items invoiced by the Contractor or its approved dealers or distributors to Customers in respect of the Agreement; and
 - (b) the sales information as set out in Item 9 of Schedule 1 ("the sales information"), or as the Principal requests in writing from time to time.
 - (c) such other relevant information as the Contract Authority may require.
- 6.11.7 (a)
Upon receipt of a request for a Sales Report, the Contractor shall within 30 days complete the Sales Report for the relevant Payment Period and return the same to the Principal.
- (b)

In the event that the Contractor does not complete the Report within 30 days:

- (i) The Contractor shall be liable to pay to the Principal the cost to the Principal of ensuring the compliance by the Contractor with its obligations under this clause (which would likely include the number of hours multiplied by the hourly rate for Staff of the Principal), and
- (ii) Will be liable for interest in accordance with item 15 of Schedule 1 Agreement Details, on the amount which (had this clause been complied with) would have been invoiced to the Contractor under clause 6.11.8, calculated from 60 days after the expiry of the relevant Payment Period.

6.11.8 (a) The Principal shall then compile a tax invoice based on the Sales Report and forward that invoice to the Contractor.

(b) The Contractor shall then forward payment to the Principal within sixty days of the conclusion of the Payment Period.

(c) In the event that the Contractor does not provide payment within sixty days:

- (i) The Contractor shall be liable to pay to the Principal the cost to the principal of ensuring the compliance by the Contractor with its obligations under this clause (which would likely include the number of hours multiplied by the hourly rate for Staff of the Principal; and
- (ii) Will be liable for interest in accordance with item 15 of Schedule 1 Agreement Details, on the invoiced amount, calculated from 60 days after the expiry of the relevant Payment Period.

6.11.9 The tax invoice will set out the Management Fee payable to the Principal and the GST payable on the Management Fee.

6.11.10 The Principal may alter the above procedure for the collection of the Management Fee as advised in writing and from time to time during the Term.

6.11.11 Where the Contractor considers that an accounting adjustment to the amount of the Management Fee paid or payable during a Payment Period is required, it should consult with the Principal and the Parties may agree on the amount of any adjustment.

6.11.12 Where the Contractor has not issued any invoice to a Customer during a relevant Payment Period the Contractor must provide, within 30 days of the conclusion of that Payment Period, a report stating that no Deliverables were provided by the Contractor to any Customer during the Payment Period.

6.11.13 The Contractor must set up and maintain a system which:

- (a) to the reasonable satisfaction of the Principal is suitable for identifying all purchasers of the Deliverables that are eligible Customers whether pursuant to Official Orders or otherwise and
- (b) enables monitoring by the Principal of the Orders placed with and invoices issued by the Contractor or its approved dealers or distributors and for the provision of the sales information; and
- (c) accommodates the use of the Customer's corporate credit card if the Parties have agreed to use that card for the purchases of Deliverables.

- (d) Failure to establish such a system to the reasonable satisfaction of the Principal shall constitute a breach of this Agreement and the Contract Authority may, in its discretion terminate the Agreement.
- 6.11.14 (a) The Principal may at its own cost, take such measures as it considers reasonable in the circumstances (including the appointment of an auditor) to verify the Contractor has paid the correct amount of Management Fee due to the Principal by the Contractor and the Contractor agrees to cooperate with the Principal (including any auditor appointed by the Principal).
- (b) If the Principal appoints an auditor, the Principal will inform the Contractor in writing of the appointment. The Contractor agrees to cooperate with the auditor appointed by the Principal including providing access within 10 working days of the written notification from the Principal that an audit will take place, to information about all sales of Deliverables made to Eligible Customers (whether pursuant to an Order or otherwise), copies of all contracts, orders and invoices between the Contractor and any eligible Customers. The Contractor agrees to provide the Auditor appointed by the Principal access on the basis of the appointed auditor entering into an Auditor Confidentiality Agreement in the form set out in Schedule 15.
- 6.11.15 If the measures taken in clause 6.11.14 verify that the Contractor has not paid the Management Fee that is actually due to the Principal, the Contractor must:
- (a) remit the difference between the Management Fee paid to the Principal and the Management Fee actually due to the Principal within 30 days of a direction from the Principal; and
- (b) will be liable for interest in accordance with item 15 of Schedule 1 Agreement Details, on the additional amount calculated from 60 days after the expiry of the relevant Payment Period, and
- (c) at the discretion of the Principal, reimburse the Principal's costs and expenses of the measures taken (including any auditor's fees) under clause 6.11.14 to the Principal in accordance with the sliding scale set out below:
- Difference between management fee paid and payable
- (a) 99% or more of management fee was paid
- (b) 90-98% of management fee paid
- (c) 75-89% of management fee paid
- (d) 50-74% of management fee paid
- (e) less than 50% of payable management fee paid
- Portion of Audit costs to be borne
- (a) \$0
- (b) 25% of audit and other costs
- (c) 50% of audit and other costs
- (d) 75% of audit and other costs
- (e) 100% of audit and other costs.
- 6.11.16 The Contractor shall during the Term of this Agreement and for a 12 month period after the Agreement has expired or is terminated, keep secure all relevant documents and Information for the purposes of this clause and give any auditor appointed by the Principal access to those documents and Information at all reasonable times.
- 6.11.17 A breach of this clause (including without limitation, a failure by the Contractor to cooperate satisfactorily with the audit referred to in clause 6.11.14) shall be a substantial breach of this Agreement which will entitle the Principal to terminate this Agreement pursuant to clause 6.11.1 without prejudice however to the right of the Principal to recover

from the Contractor any sums payable to the Principal under this agreement or otherwise, or the right of the Principal to deduct those sums from any money that may be or become payable by the Principal to the Contractor on any other account.

6.12 Keeping of Records and Access to Records

- 6.12.1 The Contractor must keep proper accounts, records and time sheets in accordance with the accounting principles generally applied in commercial practice.
- 6.12.2 During the Term, the Contractor must, within a reasonable time of a request from the Principal, give the Principal access to, and copies of, any material relevant to the performance of the Contractor's obligations under this Agreement, and any financial information, that the Principal reasonably requires.

6.13 Not used

6.14 Marketing by the Principal and the Contractor

- 6.14.1 The Principal may carry out advertising and marketing and issue promotional material for the purposes of this Agreement. The Contractor must make every endeavour to assist the Principal with such advertising, marketing and promotional material including conducting seminars and providing the Principal with Information about the Deliverables and the Contractor's advertising material, including copies of that material.

6.15 The Principal's Material and Contract Material

- 6.15.1 The Contractor must keep secure the Principal's Material and the Contract Material.
- 6.15.2 The Contractor must, within 7 days of completion or termination of this Agreement, or such other period as agreed to in writing by the Principal, return to the Principal any of the Principal's Material and the Contract Material it has in its possession.
- 6.15.3 The Contractor agrees that it will not make any alteration to the Principal's Material or the Contract Material without the prior written consent of the Principal.
- 6.15.4 Clause 6.15.2 does not prevent the Contractor from retaining a copy of the Contract Material for its records.

6.16 Electronic Commerce (Smartbuy® TM)

- 6.16.1 To participate in smartbuy® the Contractor must, within 28 days after the commencement of this Agreement:
 - a) enter into the smartbuy® Supplier's Agreement appearing on smartbuy®;
 - b) submit a Participant Profile as defined in smartbuy®.

6.17 Maintenance of Contractor, Approved Dealer and Distributor Information and Approved Sub-Contractor Information

- 6.17.1 The Contractor must notify the Principal of any change in the Approved Dealer and Distributor Information, the Approved Sub-Contractor Information and the Contractor Information as and when it occurs.

- 6.17.2 The Contractor must provide this information in any manner and format requested by the Principal.

6.18 Provision of Catalogue Information for E-commerce Initiatives

- 6.18.1 From time to time the Principal may request the Contractor to supply information in the nature of catalogue information, for use in e-commerce initiatives in NSW Government contracting.
- 6.18.2 The Contractor must promptly supply any such information that is reasonably requested by the Principal in the format, and using the method of delivery, specified by the Principal at the time of the request.
- 6.18.3 The Contractor consents to the use of such information, including any personal information, in any catalogue created by NSW Department of Commerce to facilitate e-commerce in NSW Government contracting.

6.19 Child Protection

- 6.19.1 If any Customer Contract involves child-related employment, the Contractor must ensure that:
- (a) it complies with, and ensures that its sub-contractors comply with, the NSW Department of Commerce Code of Behaviour for the Protection of Children and other Vulnerable People, attached at Schedule 13;
 - (b) it complies with its obligations, and ensures that its sub-contractors comply with their obligations, as an employer under the Child Protection (Prohibited Employment) Act 1998 ("Prohibited Employment Act") and the Commission for Children and Young People Act 1998 ("Children and Young People Act").
- 6.19.2 Details of relevant obligations are contained in guidelines issued by the NSW Department of Education and Training, called "the working with children check." The guidelines are available at www.kids.nsw.gov.au.
- 6.19.3 Without affecting the obligations imposed by the Prohibited Employment Act and the Children and Young People Act:
- (a) if any work under a Customer Contract is "child-related employment" under the Prohibited Employment Act (employment of specified kinds that primarily involves direct contact with children where that contact is not directly supervised), the Contractor:
 - (i) must obtain, and ensure that its sub-contractors obtain, a prohibited person declaration from any person who is to perform the work; and
 - (ii) must conduct, and ensure that its sub-contractors conduct, a working with children check on any person who is to perform the work.
 - (b) if any work under a Customer Contract is "child-related employment" under the Children and Young People Act (any employment that involves direct contact with children where the contact is not directly supervised) the Contractor must conduct, and ensure that its sub-contractors conduct, a working with children check on any person who is to perform the work.
- 6.19.4 The Contractor must not, and must ensure that its sub-contractors do not, engage any person who is a "prohibited person" under the Prohibited Employment Act (persons who

have committed a serious sex offence within the meaning of that Act) to perform work under any Customer Contract that is “child-related employment” under that Act.

- 6.19.5 If the work involves access to Department of Education sites, additional requirements relating to community expectations concerning child protection may be imposed as a condition of entry to that site.
- 6.19.6 The Principal may require the immediate removal of a “prohibited person” or a person who is the subject of a child abuse allegation or investigation from performance of child-related employment under the relevant Customer Contract.
- 6.19.7 If the Contractor does not comply with any requirement under this clause the Principal may do either or both of the following:
 - (a) ensure termination of any relevant Customer Contract by giving written notice to the Customer that the Contractor has not complied with a requirement under this clause;
 - (b) terminate this Agreement for cause.

6.20 Notification of Adverse Events

- 6.20.1 The Contractor must notify the Chief Executive of the Health Service and the Principal in writing of any adverse event relating to the use of the Deliverables in any jurisdiction within 48 hours of becoming aware of the adverse event. The written notification must include the following details:
 - (i) Date of Adverse Event.
 - (ii) Nature and circumstances of Adverse Event
 - (iii) Identification details for Deliverable involved in Adverse Event.
 - (iv) Patient Outcome.
 - (v) Location (facility, state, country) where Adverse Event occurred.
 - (vi) Names of any regulatory authorities (i.e. Therapeutic Goods Administration, State Health Department) that the Contractor has informed of the Adverse Event.
 - (vii) Results of any investigations undertaken or planned by the Contractor as a result of the Adverse Event.
 - (viii) Details of any remedial, corrective or preventative action taken or planned by the Contractor as a result of the Adverse Event.
 - (ix) Whether the Contractor is aware of any similar Adverse Events, and if so, details of these.
 - (x) Any statistical information demonstrating the risk of likely occurrence of further similar events.

6.21 Changes in indication for use

- 6.21.1 The Contractor must notify the Chief Executive of the Health Service and the Principal in writing of any change in the recommended indications or contraindications for use or any change in instructions for use of the Deliverables within 48 hours of becoming aware of the change. The written notification must include the following details:
 - (i) Reasons for the change, (including details of any Adverse Event(s) which influenced the change as set out in the clause 6.20.1 (i) – (x).
 - (ii) How the Contractor has or will communicate the change to users of the Deliverables (i.e. will instructions be modified, training be conducted, leaflets distributed).

- (iii) Names of any regulatory authorities (i.e. Therapeutic Goods Administration, State Health Department) that the Contractor has informed of the change.
- (iv) Results of any investigations undertaken by the Contractor which influenced the change.

6.22 National Product Catalogue Requirements

6.22.1 The Contractor is required to support the national health supply chain initiative through:

- (i) Getting and maintaining membership with GS1 Australia within one month from contract commencement;
- (ii) Registering for the National Product Catalogue and meet all of the National Product Catalogue requirements regarding product and pricing information within six months from contract commencement; and
- (iii) Assigning Global Trade Item Numbers (GTINs) to all products, at all levels of packing, as the primary item identifier within six months of contract commencement.

7. Performance Monitoring and Exchange of Information

7.1 Monitoring of Performance

7.1.1 The Contractor must meet with the Principal from time to time, as reasonably directed by the Principal, to evaluate and monitor performance of this Agreement (including Customer Contracts) by the Contractor on the basis of the KPI metrics to be agreed by the Parties. The KPI metrics to be agreed upon may include:

Quality of good/service delivered
 Sales Performance
 Marketing Performance
 Management Fee management and reporting compliance
 Time management
 Management and suitability of personnel
 Management of sub-contractors, consultants and other service providers
 Contract administration and management
 Environmental management
 Management of employees and industrial relations
 Industry and workforce management
 OH&S Management

NSW Health monitors and resolves performance of this Agreement, specifically on the criteria listed above, through the use of a centralised electronic reporting system called "Health Quality Reporting System" (HQRS). HQRS enables all Public Health Organisations to electronically report, amongst others, any product quality issues, non-supply of products and delay in delivery concerns to Contractors and where appropriate to authorities such as the Therapeutic Goods Administration (TGA), the Principal through NSW Procurement – Contracting Services and NSW Health through Health Procurement. The HQRS system is accessible only to Public Health Organisation personnel who are appropriately trained and accredited.

The Contractor acknowledges that substantiated information contained in HQRS entries, may also be used by NSW Procurement – Contracting Services and/or NSW Health for the renewal process (i.e. future Request for Tenders to be issued and considered), in the review of the quality of the product supplied by a Contractor and/or the performance of the Contractor.

- 7.1.2 The Contractor and the Principal are to agree on KPI metrics relevant to monitoring performance of the Agreement. On the basis of the agreed KPI metrics, the Contractor will be required to submit electronically to NSW Procurement – Contracting Services, by the 20th of every month, a Monthly Performance Scorecard as per clause 10.11.4 of Part B of the RFT. Regular meetings are to be established between the Contractor and the Principal, at a frequency to be agreed, to review the submitted KPI metrics and to agree on a final monthly score. The Format of the Performance Scorecard is subject to review during the term of the contract.
- 7.1.3 A formal bound report is to be tabled by the Contractor at a regular review meeting. The Principal at its sole discretion is to decide on the dates and times of these meetings. This report can be developed as part of implementation and may include the following:
- (a) Sales trends in tabular and graphical forms;
 - (b) Customer – sales profiles;
 - (c) Customer – top product summaries;
 - (d) Any relevant benchmarks against your customer base / best practice;
 - (e) Improvement ideas / innovation / initiative;
 - (f) Action log and tracking status;
 - (g) Annual summary of achievements;
 - (h) List of savings;
 - (i) Any other data that Contractors feel would be useful to highlight or grow value
- 7.1.4 The performance of the Contractor as measured by sales, product suitability, market trends and new technology may be reviewed by the Principal after the first twelve months from the date of the Agreement.
- 7.1.5 Having regard to any performance report prepared for the purposes of clauses 7.12, 7.13 & 7.16 the Principal may terminate this Agreement in accordance with clause 11 if the Contractor is not performing the Agreement to the reasonable satisfaction of the Principal including where the:
- (a) total sales returns of the Contractor are relatively minimal under the Agreement, or
 - (b) the Contractor consistently has nil returns over the Term.
- 7.1.6 The Contractor will be required to provide to NSW Procurement - Contracting Services, on a quarterly basis, 'granular usage data' of all sales to NSW Area Health Services. This data shall be in a Microsoft Excel format under the following headings:
- 1. Customer Account Code
 - 2. Customer Account Name (eg Hospital Name)
 - 3. Name of Area Health Service
 - 4. Supplier Name
 - 5. Supplier's Product Code
 - 6. Supplier's Item Description
 - 7. Brand /Manufacturer
 - 8. Manufacturer's Product Code
 - 9. EAN
 - 10. UNSPSC
 - 11. Sales period

12. Order Unit of Measure
13. No.of Sales Units expressed in Order Unit Measure
14. Actual Sales (\$) excl GST
15. Quantity of Each per Order Unit of Measure
16. Contract Number
17. Contract Name
18. Item No. as per Contract
19. Item No. Description

Nil sales should also be reported. The Principal will supply the data template as part of contract implementation, and Contractors will be notified of changes to the template, where necessary.

Granular usage data is in addition to the Management Fee return and should be forwarded separately via email to Vendor Management and Performance Reporting (VM& PR). Contractors will be advised of the VM& PR contact at the time of contract implementation.

The information provided by the Contractor under this clause may form the basis of the performance report prepared for the purposes of clauses (7.1.2 & 7.1.3).

7.2 Exchange of information between government agencies

- 7.2.1 The Contractor authorises the Principal and its employees and agents to make available to NSW Government departments or agencies Information concerning the Contractor, including any Information provided by the Contractor to the Principal and any Information relating to the Contractor's performance under the Agreement, or the Contractor's financial position.
- 7.2.2 The Contractor acknowledges that Information about the Contractor from any source including any substantiated reports of unsatisfactory performance, may be taken into account by NSW Government agencies in considering whether or not to offer the Contractor future opportunities for NSW Government work.
- 7.2.3 The Principal regards that the provision of Information about the Contractor to any New South Wales Government department or agency as privileged within section 22 of the *Defamation Act 1974* (NSW).
- 7.2.4 The Contractor releases and indemnifies the Principal and the State of New South Wales from any claim in respect of any matter arising out of the provision of Information. Without limiting the above, the Contractor releases the Principal and the State of New South Wales from any claim it may have for any loss to the Contractor arising out of the provision of Information relating to the use of such Information by the recipient of the Information.

7.3 The Contractor's personnel/specified personnel

- 7.3.1 The Contractor warrants that all personnel engaged in the provision of the Deliverables are appropriately qualified, competent and experienced.
- 7.3.2 The Contractor must employ only such persons:
 - (a) as are careful, skilled and experienced in the provision of the Deliverables or similar Deliverables;
 - (b) (where applicable) who hold all necessary licences, permits and authorities; and

- (c) whose standards of workmanship are entirely suitable for the supply of the Deliverables and the requirement of this Agreement.
- 7.3.3 The Contractor must at all times ensure that the Specified Personnel are engaged in the supply of the Deliverables.
- 7.3.4 The Contractor must ensure that the Specified Personnel undertake work in respect of the Deliverables in accordance with the terms of this Agreement and will not be hindered or prevented in any way in the performance of their duties including by being removed from undertaking work to supply the Deliverables or being requested to perform services which in any way interfere with the due supply of the Deliverables by the Specified Personnel.
- 7.3.5 Where Specified Personnel are unable to undertake work in respect of a Deliverable, due to illness or other incapacity or resignation from employment with the Contractor, the Contractor will notify the Principal immediately and the Contractor will, if requested by the Principal, provide replacement personnel approved in writing by the Principal at no additional charge to the Principal and at the earliest opportunity.
- 7.3.6 Where the Principal is of the opinion that the Specified Personnel are unable to provide a Deliverable in accordance with this Agreement due to illness or other incapacity, the Principal may request in writing that the Contractor provide replacement personnel at no additional charge. Specified Personnel may, with the prior approval of the Principal, on such conditions, if any, as the Principal thinks fit, be absent from the provision of the Deliverables.
- 7.3.7 The Contractor warrants that it will not, in the absence of criminal misconduct, terminate any Specified Personnel without first providing the Principal 14 days prior written notice of such termination.
- 7.3.8 In the event of termination or resignation of a member of the Specified Personnel, the Principal may terminate this Agreement in accordance with in clause 11.1.1 of this Agreement.
- 7.3.9 In this clause and Agreement, "Specified Personnel" means the key personnel specified in item 3 of Schedule 1 required to supply the Deliverables or part of the work constituting the Deliverables or such other personnel as the Principal agrees, in writing, to supply the Deliverables.

7.4 Contractor to establish necessary facilities

The Contractor must establish all facilities necessary for the proper and effective conduct and management of all its obligations under this Agreement.

7.5 Access to the Contractor's premises

The Contractor must at all reasonable times permit officers authorised by the Principal to have access to the premises of the Contractor and where necessary and where requested by the Principal arrange for access to premises of any sub contractors engaged by the Contractor.

8. Confidentiality

- 8.1 Subject to clause 8.2, the Contractor must not disclose any Confidential Information in connection with this Agreement to any person other than the Principal without first obtaining the written consent of the Principal.
- 8.2 The Contractor may disclose the Confidential Information to its officers, employees and agents where the disclosure is essential to carrying out their duties for the purposes of this Agreement.
- 8.3 The Contractor must ensure that the Confidential Information is used solely in connection with, or for the purposes of, the provision of the Deliverables.
- 8.4 This clause does not affect the Contractor's obligation to disclose any Confidential Information that is required to be disclosed by law.

9. Copyright and Intellectual Property

9.1 Ownership

- 9.1.1 The Contractor agrees that ownership of Intellectual Property rights in or in relation to New Contract Material vests upon its creation in the Principal. The Contractor, upon request by the Principal, agrees, at its own cost, to do all things necessary and execute all documents to permit the vesting of ownership and title of Intellectual Property in the Principal.
- 9.1.2 The Contractor acknowledges and agrees that the Principal or, where applicable, particular third parties, are the sole owners of the Intellectual Property rights in or in relation to the Existing Contract Material.
- 9.1.3 If ownership of or title in Intellectual Property in relation to Contract Material is not capable of being vested in the Principal under clause 9.1.1 because the Contractor itself does not own, and is unable at a reasonable cost to obtain ownership of, that Intellectual Property, the Contractor must at its own cost ensure that the Principal and the Customers are suitably and irrevocably licensed to use that Contract Material or that Intellectual Property.
- 9.1.4 The Contractor must ensure all licence fees and/or consents required under law are paid and/or obtained as a result of any reproduction, adaptation or use of any Intellectual Property or Contract Material necessary for the provision of the Deliverables.
- 9.1.5 At the completion of the Agreement, or at such other time as the Agreement or the Principal may require, the Contractor must fully and promptly disclose to the Principal all New Contract Material created or developed under or in connection with this Agreement.
- 9.1.6 Where directed by the Principal, the Contractor must ensure that an appropriate notice is incorporated on all Contract Material that the Intellectual Property rights in that material are owned by the Crown in right of the State of New South Wales.

9.2 Delivery of Contract Material

- 9.2.1 On or as soon as practicable after the end of this Agreement, the Contractor must deliver to the Principal all Contract Material and the Principal's Material. The Contractor may in good faith keep a copy of the Contract Material for its records.

9.3 Indemnity

- 9.3.1 The Contractor must not at any time breach or infringe any Intellectual Property rights of the Principal or of any other person whether in the course of providing the Deliverables or otherwise.
- 9.3.2 The Contractor agrees to indemnify and keep indemnified the Principal (which term includes in this clause, any Customer, and their officers, employees and agents) from and against any actions, claims, proceedings, demands, costs, expenses, losses and damages, arising from or in connection with any infringement or alleged infringement of any Intellectual Property rights.
- 9.3.3 The Principal may take legal proceedings including injunctive proceedings against the Contractor if there is any actual, threatened or suspected breach of clause 9.3.1 despite the provisions of clause 13.
- 9.3.4 The Contractor acknowledges that, in the event of a breach of clause 9.3.1, the Principal may terminate this Agreement in accordance with clause 11.1 without prejudice to any accrued rights or remedies of the Principal.
- 9.3.5 In the event of any claim being made or brought against the Principal in respect of any breach or alleged breach by the Contractor of any Intellectual Property rights, the Principal will notify the Contractor. The Contractor will, with the reasonable assistance, if required, of the Principal, but at the Contractor's sole expense, conduct all negotiations for the settlement of such claims or any litigation that may arise in connection with the claim. If the Contractor fails to conduct such negotiations or settlement the Principal may direct Customers to suspend payment of any money due to the Contractor under the Agreement until such claim has been satisfied, settled, or withdrawn.

10. Variations

- 10.1 This Agreement may not be varied except in writing signed by both the Principal and the Contractor.

11. Termination

11.1 Termination for cause

- 11.1.1 Without prejudice to its rights at common law, the Principal may immediately terminate this Agreement, in whole or in part, by written notice to the Contractor ("Notice of Termination for Cause"):
 - (a) where the Contractor makes any statement, fact, information, representation or provides material in the Tender which is false, untrue, or incorrect in a way which materially affects the Agreement;
 - (b) where proceedings or investigations are commenced or threatened by the Independent Commission Against Corruption or similar public body against the Contractor including for corrupt conduct or for collusive pricing;
 - (c) where the Contractor commits a Substantial Breach of the Agreement that is not capable of remedy;
 - (d) where the Contractor commits a Substantial Breach of the Agreement in a manner that is capable of remedy and does not remedy the breach within 7 days of receiving a notice from the Principal requiring it to do so ("Notice of Breach"), or such further time, having regard to the nature of the breach and a reasonable time to remedy it, as the Principal may reasonably allow;
 - (e) where the Contractor assigns its rights and/or obligations, or novates this Agreement or subcontracts the Customer Contract except in accordance with this Agreement;

- (f) in the case of the Contractor's Insolvency;
- (g) where the Contractor has not for three consecutive Payment Periods issued any invoice to a Customer or received any Order; or
- (h) If in the Principal's view a conflict of interest exists for the Contractor which prevents the proper performance of the Agreement.
- (i) where the Contractor fails to comply with clauses 6.20 and 6.21 of this Agreement.
- (j) when the Contractor fails to meet acceptable levels of contract performance.

11.1.2 Effect of Termination for cause

11.1.2.1 If the Principal terminates this Agreement for cause the Principal may:

- (a) contract with any other person to complete the provision of the Deliverables including but not limited to any Order remaining to be filled;
- (b) deduct loss or damages arising from or in connection with the termination, including any loss or damages incurred by a Customer under any Customer Contract (which may be ascertained and certified by the Principal), from any money due, or which may become due to the Contractor (whether under this Agreement or any Customer Contract) and/or from the Security (if any); and
- (c) recover from the Contractor in an appropriate court the balance of any monies remaining unpaid as a debt due and payable by the Contractor to the Principal.

11.1.2.2 The Principal's termination under this clause will not affect any Customer Contract unless the context requires it.

11.2 Termination for the Principal's convenience

11.2.1 The Principal may terminate this Agreement in whole or in part for its convenience by giving written notice ("Notice of Termination for Convenience") with effect from the date stated in the notice and without the need to give reasons.

11.2.2 Effect of Termination for convenience

11.2.2.1 The Principal's termination under this clause will not affect any Customer Contract unless the context requires it.

11.2.2.2 The Principal shall reimburse the Contractor its unavoidable costs directly incurred as a result of termination provided that any claim by the Contractor:

- (a) must be supported by written evidence of the costs claimed;
- (b) will be in total satisfaction of the liability of the Principal to the Contractor in respect of this Agreement and its termination.

11.2.2.3 The Principal shall not in any circumstances be liable for any consequential loss or loss of profits suffered by the Contractor as a result of the termination of this Agreement by the Principal.

11.2.3 The Contractor must, wherever possible, include in all sub-contracts and supply agreements an equivalent provision to this clause 11.2.

12. No Assignment or novation

- 12.1 The Contractor must not assign or novate this Agreement without first obtaining the prior written consent of the Principal.
- 12.2 The Contractor acknowledges that the Principal may make financial checks on the entity proposing to take over this Agreement before determining whether or not to give consent to the assignment or novation.

13. Issue Resolution

13.1 General

13.1.1 In order to resolve any conflicts or issues between the Parties promptly and to the satisfaction of the Parties, the issue resolution process stated below will be followed in this order until an issue is resolved:

- (a) Amicable Resolution (cl.13.2);
- (b) Expert Determination (cl.13.3)

13.2 Amicable Resolution

- 13.2.1 Either Party may give notice to the other Party of an issue, including a dispute or difference, ("the Issue Notice") about the meaning or effect of the Agreement or about any matter arising under or out of the Agreement. The Issue Notice must be given within a reasonable time of the Party becoming aware of the issue.
- 13.2.2 If the Party giving the Issue Notice is the Contractor, and this issue has arisen under the Agreement, it must give the Issue Notice to the Principal.
- 13.2.3 If the Party giving the Issue Notice is the Principal, it must give the Issue Notice to the Contractor.
- 13.2.4 The Parties must follow the issue resolution process in this clause before either commences proceedings or takes similar action except to seek an urgent injunction or declaration.
- 13.2.5 If a Party gives an Issue Notice under this clause, each Party will nominate in writing a senior executive who will promptly confer to resolve the issue.
- 13.2.6 A Party is not entitled to refer an issue to Expert Determination until 21 days after the giving of the Issue Notice.
- 13.2.7 A Party may only refer an issue to Expert Determination by giving notice in writing specifying the issue to be decided ("the Referral Notice").
- 13.2.8 If the Party giving the Referral Notice is the Contractor it must give the Referral Notice to the Principal.
- 13.2.9 If the Party giving the Referral Notice is the Principal, it must give the Referral Notice to the Contractor.

- 13.2.10 If a Referral Notice has not been given within 28 days of becoming entitled under clause 13.2.6 then the issue is barred from Expert Determination or any other action or proceedings (including court proceedings).

13.3 Expert Determination

- 13.3.1 If a Referral Notice is given under clause 13.2, the expert is to be agreed between the Principal and the Contractor. If they cannot agree within 28 days of the Referral Notice, the expert is to be nominated by the Chief Executive Officer, Australian Commercial Disputes Centre, Sydney.
- 13.3.2 The expert nominated must be a lawyer unless otherwise agreed. The expert must not be:
- (a) an employee of the Parties;
 - (b) a person who has been connected with the Agreement or the Customer Contract as the case may be; or
 - (c) a person who the Parties have not been able to agree on.
- 13.3.3 When the person to be the expert has been agreed or nominated, the Principal, on behalf of both Parties, must engage the expert by letter of engagement (and provide a copy to the Contractor) setting out:
- (a) the issue referred to the expert for determination
 - (b) the expert's fees
 - (c) the procedure for the determination set out in Schedule 5.
 - (d) any other matter which is relevant to the engagement.
- 13.3.4 The Parties must share equally the fees and out-of-pocket expenses of the expert for the determination, and bear their own expenses.
- 13.3.5 The procedure for expert determination is set out in Schedule 5.
- 13.3.6 In answer to any issue referred to the expert by a Party, the other Party can raise any defence, set-off, or counter-claim.
- 13.3.7 If the expert determines that one Party must pay the other an amount exceeding the amount shown in Item 10 of Schedule 1 (calculating the amount without including interest on it, and after allowing for set-offs), then either Party may commence litigation, but only within 56 days after receiving the determination.
- 13.3.8 Unless a Party has a right to commence litigation under clause 13.3.7
- (a) the Parties must treat each determination of the expert as final and binding and give effect to it; and
 - (b) if the expert determines that one Party owes the other money, that Party must pay the money within 28 days.

13.4 Performance of Agreement during Issue Resolution

- 13.4.1 The Parties agree to continue performing their obligations under this Agreement while the issue is being dealt with in accordance with this clause 13.

14. Miscellaneous

14.1 Waiver

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

14.2 Severability

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

14.3 Notices

14.3.1 Notices must be sent to the other Party at the address shown in item 13 of Schedule 1, or the address last notified to the other Party in writing, or in the case of the Contractor, at the Contractor's registered office.

14.3.2 All notices must be in writing and signed by the relevant Party and must be given either by hand delivery, post or facsimile transmission.

14.3.3 If delivery or receipt of a notice is not made on a business day, then it will be taken to be made on the next business day.

14.4 Counterparts

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

14.5 Applicable Law

This Agreement is governed by the laws of the State of New South Wales and the Parties submit to the non-exclusive jurisdiction of the courts of the State of New South Wales and the Commonwealth of Australia.

14.6 Rights Cumulative

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

14.7 No agency/no employment/no partnership

The Contractor agrees that the Contractor will not be taken to be, nor will it represent that it is, the employee, partner, officer and/or agent of the Principal.

14.8 Disengagement Period

For 6 months following the expiry or termination of a Customer Contract (or part thereof) the Contractor will provide such assistance as is reasonably requested by the Principal for the supply of the Deliverables to continue without interruption to facilitate an orderly, prompt and efficient transition to an alternative service provider or to the Customer. Such assistance includes (without limitation)

- a. Providing reasonable co-operation with a third party supplier nominated by the Customer, and
- b. Providing the Customer data, information and materials that may be required to enable NSW Health to transact with a new provider as requested by the Principal or Customer.

PART D3 – Standard Provisions of Contract between a Customer and the Contractor

15. Provisions of Agreement to apply to the Customer Contract

15.1 The following provisions of Part D2 of this Agreement apply to the Customer Contract as if they were repeated in this Part:

- (a) Best Price (clause 3.6);
- (b) General Indemnity (clause 6.6);
- (c) Compliance with laws (clause 6.7);
- (d) Performance Monitoring (clause 7);
- (e) Confidentiality (clause 8); and
- (f) Miscellaneous (clause 14)

provided that in respect of the Customer Contract, “Agreement” and “Principal” wherever appearing in the clauses described above shall be read as “Customer Contract” and “Customer” respectively.

16. Time for delivery

16.1 Punctual Delivery

- 16.1.1 The Contractor must deliver the Deliverables within the relevant Guaranteed Delivery Time.
- 16.1.2 As soon as practicable after becoming aware of any matter which is likely to change or which has changed the time for delivery, the Contractor must notify the Customer in writing of the circumstances which the Contractor considers will give rise to the delay, and the extent or likely extent of the delay, and whether the Contractor will be requesting a reasonable extension of time in accordance with clause 16.2.
- 16.1.3 If the Contractor fails to deliver by the Guaranteed Delivery Time and has not been granted an extension of time for delivery under clause 16.2, the Customer may terminate the Customer Contract under clause 24.

16.2 Extension of Time

- 16.2.1 Where there is likely to be a significant delay in the Contractor discharging an obligation under this Agreement because of a Circumstance Beyond the Contractor's Control (other than a circumstance arising out of any act or omission on the part of the Contractor), the Contractor will:
 - (a) within 7 days of becoming aware of the possibility of such a significant delay, notify the Customer, in writing of the circumstances which the Contractor considers will give rise to the delay, and the extent or likely extent of the delay and strategies proposed to manage the consequences of the delay; and
 - (b) request a reasonable extension of time.

- 16.2.2 The Customer may consent to a request for extension of time under this clause 16.2 provided that:
- (a) the Contractor uses its best endeavours to minimise the delay and recover lost time; and
 - (b) where appropriate, the Contractor provides the Customer with a plan indicating in detail the steps the Contractor proposes to take to minimise the impact of the Circumstance Beyond its Control.
- 16.2.3 The Customer may terminate the Customer Contract in accordance with clause 24 if the delay continues beyond the time consented to in this clause 16.
- 16.2.4 The Contractor will not be entitled to any increase in the Contract Price or damages, costs or expenses in connection with the delay.

17. Supply of Deliverables

17.1 Specified Models/Products

Where a particular model or product is specified in the Price Schedule, the Contractor must supply only that model or product unless otherwise approved in writing by the Principal.

17.2 Packaging

The Contractor must ensure that all Deliverables are properly, safely and securely packaged and labelled for identification and country of origin.

17.3 Expenses of Delivery

The Contractor must pay all packaging, freight, insurance, and other charges, in connection with the delivery of Deliverables and the return of Deliverables wrongly supplied except where it is expressly provided in this Agreement.

17.4 Delivery and Acceptance of Deliverables

- 17.4.1 The Contractor must deliver the Deliverables to the place or places and within the Guaranteed Delivery Time and shall obtain a receipt of their delivery.
- 17.4.2 Title in the Deliverables shall pass to the Customer on satisfactory delivery of the Deliverables in accordance with the Customer Contract.
- 17.4.3 Delivery and receipt of the Deliverables shall not be taken to be an acceptance of the Deliverables by the Customer.
- 17.4.4 The Customer may reject Deliverables which are not in accordance with the Customer Contract.
- 17.4.5 Receipt of delivery, acceptance or payment shall not prejudice the right of the Customer to maintain an action for breach of condition or warranty should the Deliverables prove to be of inferior quality or contrary to the requirements of the Customer Contract.

- 17.4.6 Delivery may be either FREE-INTO-STORE (FIS) throughout NSW and the ACT or NON FREE-INTO-STORE (NFIS) depending on the basis by which contract is awarded to the Contractor by the Principal, in such quantities and at such times as may be required during the period of the contract. Where the contract is awarded on the basis of NFIS pricing, the Contractor must adhere to the requirements of clause 17.6,
- 17.4.7 Delivery will be required as soon as possible within the guaranteed delivery time, after placement of orders. Contractors are required to maintain adequate stocks to be able to satisfy orders for reasonable quantities within the guaranteed delivery time. Failure to adhere to guaranteed delivery times tendered may be regarded as grounds for termination of a Contract.
- 17.4.8 Contractors shall notify the Customer (being any of the organisations described in Schedule 12 which placed the order for the Deliverables) immediately and in any event in not more than 24 hours, of any item on an order that cannot be supplied within the guaranteed delivery time.
- 17.4.9 The contracted prices are to provide for goods to be suitably packed to ensure safe transport to their destination. Packs are to show details of contents and country of origin.
- 17.4.10 THE CONTRACTOR MUST ADVISE THE PRINCIPAL AND NSW PROCUREMENT – CONTRACTING SERVICES OF ALL DELIVERY DELAYS DURING THE PERIOD OF THE CONTRACT.
- 17.4.11 If the Contractor is unable to provide Deliverables for any reason, the Contractor must arrange for the supply of equivalent products from an alternative supplier within the guaranteed delivery time. The Contractor is to liaise with the Customer to ensure that the alternative product is acceptable and meets the purchaser's needs. Any additional cost in arranging alternative supply is to be borne by the Contractor.
- 17.4.12 The Contractor will replace Goods at no cost (including freight and handling charges) where stocks are delivered with unacceptably close use-by dates. An unacceptable use-by date is one that is LESS THAN TWELVE (12) MONTHS from the date of delivery.

17.5 Rejection of Deliverables

- 17.5.1 Upon rejection of any Deliverables the Customer shall notify the Contractor and may direct that the rejected Deliverables be removed and replaced or rectified at the Contractor's risk and expense within such reasonable time as the Customer may direct.
- 17.5.2 If the Contractor fails to remove or rectify the rejected Deliverables within the time directed, the Customer may have the rejected Deliverables re-delivered at the Contractor's risk and expense.
- 17.5.3 Where the Contractor fails to deliver the Deliverables by the Guaranteed Delivery Time, or where Deliverables are rejected and the Contractor fails to replace the rejected Deliverables or to deliver Deliverables conforming to the Agreement, the Customer:
- (a) may purchase from another supplier substitute Deliverables of the kind and quality ordered; or
 - (b) where it is not possible or practicable to purchase from another supplier substitute Deliverables of the kind or quality ordered, purchase goods or services which in the opinion of the Customer are most suitable, even though such goods or services are of a superior kind and quality to the Deliverables.
- 17.5.4 In both cases listed in clause 17.5.3 any extra cost or expense incurred over and above the Contract Price, shall be a debt due from the Contractor to the Customer.

17.6 Non Free-into-Store (NFIS) Arrangements

- 17.6.1 Where the contract is awarded on the basis of NFIS prices in the purchase of Deliverables, the Contractor must agree to hand over Deliverables to the third party for delivery, as arranged by the Customer.
- 17.6.2 The contracted prices are still to provide for goods to be suitably packed to ensure safe transport to their destination. Packs are to show details of contents and country of origin.

18. Contract Price

18.1 Calculating the Contract Price

- 18.1.1 Subject to clause 18.1.2, the Contract Price shall be calculated as follows:
- (a) If the Price of each Deliverable ordered is expressed as a lump sum then the Contract Price shall be the sum of the Price for each Deliverable less any Applicable Discount;
 - (b) If the Price of each Deliverable ordered is expressed as a rate per unit of quantity (whether that quantity is measured in time, weight, volume or by some other method) the Contract Price shall be the sum of the products of the rates and the corresponding quantities set out in the Price Schedule, less any Applicable Discount;
 - (c) If the Prices of some of the Deliverables ordered are expressed as a lump sum and the Prices of others as a rate per unit of quantity, the Contract Price shall be the sum of :
 - (i) the sum of each of the lump sum Prices; and
 - (ii) the sum of the products of the rates and the corresponding quantities set out in the Price Schedule,less any Applicable Discount;
 - (d) If the Price of the Deliverable is expressed as a price range (within which the Customer and the Contractor may negotiate a Price for each Deliverable) then:
 - (i) if the range of Prices stated in the Price Schedule is given on a lump sum basis (that is, a minimum and maximum lump sum price) the Contract Price shall be the sum of each agreed Price less any Applicable Discount;
 - (ii) if the range of Prices stated in the Price Schedule is expressed as a minimum and maximum rate per unit of quantity the Contract Price shall

be the sum of the products of the agreed rates and the corresponding quantities less any Applicable Discount.

18.1.2 Clause 18.1.1 shall not prevent the Contractor from offering, or the Contractor and Customer negotiating, to reduce the Price or increase the discount for a particular Deliverable in accordance with the Customer Contract.

18.2 Not Used

19. Payment

19.1 Payment of Contract Price

19.1.1 In consideration for the Contractor providing the Deliverables, the Customer shall, subject to the terms and conditions of the Customer Contract, pay the Contractor the Contract Price in the amounts and at the times set out in the Customer Contract.

19.1.2 Failure by any Customer to pay the Contract Price at the due time will not be grounds to avoid this Customer Contract.

19.2 Invoices and Time for Payment

19.2.1 Subject to this clause 19.2, the Customer shall make payment within 30 days from the end of the month after receipt of a correct claim and documents necessary to evidence delivery to the Customer.

19.2.2 All claims made by the Contractor shall be in the form of a Tax Invoice. A claim for payment shall be substantiated by an itemised account and the Contractor shall provide any further details in regard to the account that are reasonably requested by the Customer.

19.2.3 The making of a payment is not an acknowledgment that the Deliverables have been supplied in accordance with the Customer Contract, but shall be taken to be payment on account only.

19.2.4 If the Customer disputes the invoice amount the Customer shall certify the amount it believes is due for payment and shall pay that amount and the liability for the balance of payment shall be determined in accordance with the Customer Contract.

19.2.5 The Contractor will not be entitled to any credit charge, service fee or any other fee or charge for extending credit or allowing time for the payment of money becoming due for the provision of Deliverables.

19.3 Set-Off/Money Recoverable by Customer

19.3.1 The Customer may deduct from amounts which may be payable or which may become payable to the Contractor, any amount due from the Contractor to the Customer in connection with the supply of the Deliverables.

19.3.2 Without limiting clause 19.3.1, any damages, costs and expenses recoverable by the Customer from the Contractor in consequence of the Contractor's breach of the Customer Contract may be deducted from money then due to the Contractor under the Customer

Contract. If that money is insufficient for that purpose, the balance remaining unpaid will be a debt due by the Contractor to the Customer and may be:

- (a) set off against any other money due to the Contractor by the Customer under this or any other agreement between the Customer and the Contractor; or
 - (b) recovered from the Contractor by the Customer in an appropriate court.
- 19.3.3 Nothing in this clause will affect the right of any Customer to recover from the Contractor the whole of the debt or any balance that remains owing after deduction.
- 19.3.4 For the purposes of this clause, the Principal may act for and on behalf of any Customer for the purpose of assessing and certifying any damages, losses, costs and expenses sustained or incurred by the Customer as a result of the breach of the Customer Contract.

20. The Contractor's additional expenses

- 20.1** The Customer will only reimburse the Contractor any reasonable costs, expenses, or charges incurred by the Contractor and not provided for in the Customer Contract where the Contractor has first obtained the Customer's written approval.

21. Contractor's Warranties

21.1 Contractor's warranties (Goods)

- 21.1.1 In relation to Deliverables that are goods, the Contractor warrants that:
- (a) at the time ownership of a Deliverable passes to the Customer, the Deliverable will be free from any charge or liability;
 - (b) during the Warranty Period, each Deliverable:
 - (i) shall be new and shall conform with the Specification;
 - (ii) shall conform to the description, model number and the sample (if any) provided by the Contractor; and
 - (iii) shall be free from defects.

21.2 Contractor's warranties (Services)

- 21.2.1 In relation to Deliverables that are services, the Contractor warrants that:
- (a) it will provide the Deliverables in accordance with the requirements of the Customer Contract and with due care and skill;
 - (b) it will comply with all statements or representations as to the provision of the Deliverables contained in the Tender;
 - (c) the information contained in the Tender as to the structure, viability, reliability, insurance cover, capacity, experience and expertise of the Contractor and its employees and subcontractors is correct; and

- (d) it will not enter into any arrangement that impedes or is likely to impede the performance of the Customer Contract in the manner and to a standard satisfactory to the Customer, without first obtaining the Customer's consent.

21.3 Contractor's warranties (General)

21.3.1 The Contractor warrants that:

- (a) the Deliverables do not infringe the Intellectual Property rights of a third party; and
- (b) the Deliverables shall conform to any legally applicable standards.
- (c) it has established and will comply with and maintain during the Customer Contract, the quality assurance arrangements set out in the Tender.
- (d) It has capacity to enter into this Customer Contract and perform the obligations imposed on the Contractor and the Contractor has not entered into any arrangement, whether a trust arrangement or otherwise, that impedes or is likely to impede the performance of the Customer Contract by the Contractor.

21.4 Warranty Period

- 21.4.1 The Contractor shall remedy any error or defect in a warranted Deliverable that has been notified to it by a Customer during the Warranty Period at the Contractor's own cost and expense.
- 21.4.2 If the Contractor fails to remedy an error or defect in a warranted Deliverable within 30 days after notification by the Customer, the Customer may arrange for performance of the necessary remedial work by a third party at the Contractor's expense.
- 21.4.3 The rights and remedies provided in this clause 21 are in addition to, and do not limit, any other rights of the Customer under the Customer Contract or otherwise at law.

21.5 Third party warranties

- 21.5.1 Where the Contractor supplies Deliverables that have been procured from third parties, the Contractor assigns to the Customer, to the extent permitted by law, the benefits of any warranties given by the third parties.
- 21.5.2 Assignment of any third party warranties is in addition to the warranties offered directly by the Contractor under this Customer Contract and does not relieve the Contractor from the obligation to comply with the Contractor's own warranties.

22. No assignment or sub-contracting of Customer Contract

- 22.1** The Contractor must not assign a Customer Contract without first obtaining the written consent of the Customer and the Principal, which may be given subject to conditions.
- 22.2** The Contractor must not sub-contract a Customer Contract, except to a sub-contractor approved by the Principal from time to time and identified in Schedule 1 ("approved sub-contractor"):
 - (a) without the prior written consent of the Principal and the Customer, which may be given subject to conditions, and

(b) on the terms and conditions of this clause.

- 22.3** A consent under this clause does not relieve the Contractor from its liabilities or obligations under the Customer Contract.
- 22.4** Regardless of any consent given, the Contractor will be responsible for ensuring the suitability of any sub-contractor and that the sub-contractor meets the requirements of a Customer Contract.
- 22.5** The Parties agree that the Principal, without incurring any liability, may withdraw its consent to a sub-contractor if in its reasonable opinion the sub-contractor is not meeting the requirements of the Customer Contract. The Principal will notify the Contractor in writing that its consent is withdrawn and the Contractor will immediately terminate its arrangement with the sub-contractor.
- 22.6** To the extent that loss is not attributable to withdrawal of the Principal's consent to the sub-contract:
- (a) the Contractor will be liable for any acts or omissions of any sub-contractor or any employee or agent of the sub-contractor as fully as if they were the acts or omissions of the Contractor, and
 - (b) The Contractor will indemnify and release the Customer from any liability or loss resulting from the acts or omissions of any sub-contractor.
- 22.7** The Parties agree that the Principal may also enforce, on behalf of the Customer, the indemnity given to the Customer under this clause.
- 22.8** This clause will not merge on the completion or earlier termination of the Customer Contract.
- 22.9** The Contractor will ensure that a sub-contractor is aware of and complies with all the terms and conditions of the Customer Contract and that the sub-contract is consistent with those terms and conditions.
- 22.10** This clause does not apply in the event that the Principal requests a particular sub-contractor to provide the Deliverables.

23. Variation of the Customer Contract

The standard provisions of the Customer Contract shall not be varied except by agreement in writing signed by the Parties and having first obtained the consent in writing of the Principal.

24. Termination by Customer

- 24.1** Without prejudice to its rights at common law, the Customer may immediately terminate the Customer Contract, by written notice to the Contractor ("Notice of Termination"):
- (a) where proceedings or investigations are commenced or threatened by the Independent Commission Against Corruption or similar public body against the Contractor including for corrupt conduct or for collusive pricing;
 - (b) where the Contractor commits a Substantial Breach of the Customer Contract that is not capable of remedy;
 - (c) where the Contractor commits a Substantial Breach of the Customer Contract in a manner that is capable of remedy and does not remedy the breach within 7 days of receiving a notice from the Customer requiring it to do so ("Notice of Breach"), or such further time as the Customer may reasonably allow;
 - (d) where the Contractor assigns its rights and/or obligations, or subcontracts the Customer Contract otherwise than in accordance with the Customer Contract; or

- (e) in the case of the Contractor's Insolvency.

24.2 In the event of termination, the Customer:

- (a) may procure from any other source a reasonably similar alternative to the Deliverable suitable to the Customer and the Contractor shall be liable to the Customer for any reasonable extra expense incurred together with any loss sustained by the Customer;
- (b) may, by notice in writing to the Contractor, require the Contractor at its expense to remove the specified Deliverable not accepted by the Customer and to dismantle or remove specified work from the Customer's premises by a date specified in the notice;
- (c) shall be liable under the Customer Contract to pay only for the Deliverables delivered and accepted by the Customer or performed to the satisfaction of the Customer, in accordance with the Customer Contract; and
- (d) may recover from the Contractor the amount of any loss or damage suffered by the Customer as a result of the termination.

This clause will survive the termination of the Customer Contract.

24.3 If the Customer terminates this Customer Contract the Customer may:

- (a) deduct any loss or damages arising from or in connection with the termination, from any money due, or which may become due to the Contractor and/or from the Security (if any); and
- (b) recover from the Contractor in an appropriate court the balance of any monies remaining unpaid as a debt due and payable by the Contractor to the Customer.

24.4 The Customer's termination under this clause will not affect the Agreement, unless the context requires it.

24.5 Any termination by the Customer is without prejudice to any accrued rights or remedies of the Customer under the Customer Contract.

25. Issue Resolution

25.1 General

25.1.1 In order to resolve any conflicts or issues between the Parties promptly and to the satisfaction of the Parties, the issue resolution process stated below will be followed in this order until an issue is resolved:

- (a) Amicable Resolution (clause 25.2);
- (b) Expert Determination (clause 25.3)

25.2 Amicable Resolution

25.2.1 Either Party may give notice to the other Party of an issue, including a dispute or difference, ("the Issue Notice") about the meaning or effect of the Customer Contract or about any matter arising under or out of the Customer Contract. The Issue Notice must be given within a reasonable time of the Party becoming aware of the issue.

- 25.2.2 If the Party giving the Issue Notice is the Contractor, and this issue has arisen under the Customer Contract, it must give the Issue Notice to the Customer and to the State Contracts Control Board.
- 25.2.3 If the Party giving the Issue Notice is the Customer, it must give the Issue Notice to the Contractor and to the State Contracts Control Board.
- 25.2.4 The Parties must follow the issue resolution process in this clause before either commences proceedings or takes similar action except to seek an urgent injunction or declaration.
- 25.2.5 If a Party gives an Issue Notice under this clause, each Party will nominate in writing a senior executive who will promptly confer to resolve the issue.
- 25.2.6 A Party is not entitled to refer an issue to Expert Determination until 21 days after the giving of the Issue Notice to the person or persons specified.
- 25.2.7 A Party may only refer an issue to Expert Determination by giving notice in writing specifying the issue to be decided ("the Referral Notice") within 28 days of becoming entitled to under clause 25.2.6.
- 25.2.8 If the Party giving the Referral Notice is the Contractor it must give the Referral Notice to the Customer and the State Contracts Control Board.
- 25.2.9 If the Party giving the Referral Notice is the Customer, it must give the Referral Notice to the Contractor and the State Contracts Control Board.
- 25.2.10 If a Referral Notice has not been given to the person or persons specified within the time limited by clause 25.2.7 then the issue is barred from Expert Determination or any other action or proceedings (including court proceedings).
- 25.2.11 For the avoidance of doubt, failure to give an Issue Notice or a Referral Notice in accordance with the requirements of clause 25 and clause 26 will result in an invalid notice for the purposes of this clause.

25.3 Expert Determination

- 25.3.1 Clause 13.3 (Expert Determination) of Part D2 of the Agreement applies to the Customer Contract as if it was repeated in this Part D3. Reference to "the Principal" in clause 13.3.3 shall be read as a reference to the State Contracts Control Board.
- 25.3.2 The Parties agree that the State Contracts Control Board will represent the Customer in the expert determination process.

26. Notices (Customer and Contractor)

- 26.1** A notice which may be given to or served on a Party (including the Board) under a Customer Contract must be in writing addressed to the other Party and:-
 - (a) in the case of the Contractor, at the registered office or principal place of business of the Contractor or the address set out in the Order or such other address as is notified in writing to the Customer from time to time;
 - (b) in the case of the Customer, at the address set out in the Order or such other address as is notified in writing to the Contractor from time to time;
 - (c) in the case of the Board, at the registered office of the Board.

- 26.2** All notices must be in writing and signed by the relevant Party and must be given either by hand delivery, post or facsimile transmission.
- 26.3** If delivery or receipt of a notice is not made on a business day, then it will be taken to be made on the next business day.

27. Additional conditions

Subject to clause 23, the Customer and the Contractor may agree in writing to such other terms and conditions (in the Customer Contract called the “Additional Conditions”) as they think fit, which terms and conditions are to be set out in the Order. The Parties agree that the Additional Conditions shall not, without the consent of the Principal, either expressly or by implication, derogate from the terms and conditions set out in this Agreement and to the extent that those Additional Conditions do derogate from those terms and conditions, the Parties agree that those Additional Conditions shall be void and have no effect.

Schedule 1

Agreement Details

Item 1	Request for Tender No 0701816 date submitted.....(clause 1.1)
Item 2	Contractor's Name (clause 1.1)
Item 3	Specified Personnel (if any)(clause 7.3):
Item 4	Term: (clause 2.3.1) Commencement Date: 1 April 2008 Expiry Date: 31 March 2013 Period of extended term (if any): (clause 2.3.2) Commencement Date: Expiry Date:
Item 5	Broad Form Liability Insurance Policy Amount (clause 6.5) (a) Public Liability Insurance Limit of Indemnity: \$AUS20M (b) Product Liability Insurance Limit of Indemnity: \$AUS20M
Item 6	Codes (clause 6.7.1(b)) 1. The Code of Practice for NSW Government Procurement. 2. Implementation Guidelines for NSW Government Procurement. 3. ARTG registration
Item 7	Management Fee Rate (clause 6.11) 1%
Item 8	Payment Period of Management Fee (clause 6.11) monthly.
Item 9	Sales Information (clause 6.11.6) <u>1. The names of the ten largest Customers listed by dollar value invoiced by the Contractor in the relevant Payment Period.</u>
Item 10	Expert Determination Amount (clause 13.3.7): \$A: Not used
Item 11	Security (clause 6.13): Amount: Not used Form:

Item 12	<p>A. List of approved dealers and distributors (Clause 5.2)</p> <p>B. List of approved sub-contractors (Clause 5.3)</p>
Item 13	<p>Notices to: (clause 14.3)</p> <p>The Contractor's contact name and address:</p> <p>Name:</p> <p>Address:</p> <p>Position:</p> <p>Telephone:</p> <p>Facsimile:</p> <p>The Principal's contact name and address:</p> <p>Name: Chairman, SCCB</p> <p>Address: McKell Building, 2-24 Rawson Place, SYDNEY, NSW 2000</p> <p>Telephone: 9372 8818</p> <p>Facsimile: 9372 8803</p>
Item 14	<p>Restrictions on Nominee Purchasers (clause 4.2)</p>
Item 15	<p>Interest for Late Payment of Management Fee (clause 6.11.7, 6.11.8 and 6.11.15)</p> <p>Interest of 5% per annum shall be payable by the Contractor on any Management Fee not remitted to the Principal in accordance with the clause 6.11.7, 6.11.8 and 6.11.15.</p>

Schedule 2

Specification

Guide Note:

Only insert the Specification after the tender process and when you are preparing your Deed for execution by the Board and the winning tenderer(s).

At this time, insert Clause 1 of Part A and Annexure 1 to Part B of the Request for Tender: Outline Description and Specification of the Requirement. Further, if you have negotiated amendments to the Specification post-tender, either amend the Specification to reflect these amendments, or ensure that you have the supporting documentation attached to Schedule 4.

Schedule 3

The Tender and documents evidencing agreed variations to the Tender

Schedule 4

Documents notifying the Principal's acceptance

Guide Note: Attach any documentation notifying the Principal's acceptance here, before execution of the contract with the successful tenderer.

Schedule 5

Expert Determination Procedure

1. Questions to be determined by the Expert

- 1.1 The expert must determine for each issue the following questions (to the extent that they are applicable to the issue):
- 1.1.1 Is there an event, act or omission which gives the claimant a right to compensation:
under the Agreement
(a) for damages for breach of the Agreement, or
(b) otherwise in law?
- 1.1.2 If so:
what is the event, act or omission?
(a) on what date did the event, act or omission occur?
(b) what is the legal right which gives rise to the liability to compensation?
(c) is that right extinguished, barred or reduced by any provision of the Agreement, estoppel, waiver, accord and satisfaction, set-off, cross-claim, or other legal right?
- 1.1.3 In the light of the answers to clauses 1.1.1 and 1.1.2 of this Expert Determination Procedure:
(a) What compensation, if any, is due from one party to the other and when did it fall due?
(b) What interest, if any, is due when the expert determines that compensation?
- 1.2 The expert must determine for each issue any other questions required by the parties, having regard to the nature of the issue.

2. Submissions

- 2.1 The procedure for submissions to the expert is as follows:
- 2.2 The Party to the Agreement which has referred the issue to Expert Determination must make a submission in respect of the issue, within 15 business days after the date of the letter of engagement referred to in clause 13.3.2 of the Agreement.
- 2.3 The other party must respond within 15 business days after receiving a copy of that submission. That response may include cross-claims.
- 2.4 The Party referred to in clause 2.2 may reply to the response, but must do so within 10 business days after receiving the response, and must not raise new matters.
- 2.5 The other party may comment on the reply, but must do so within 10 business days after receiving the reply, and must not raise new matters.
- 2.6 The expert must ignore any submission, response, reply, or comment not made within the time given in clauses 2.2 to 2.5 of this Expert Determination Procedure, unless the Principal and the Contractor agree otherwise.
- 2.7 The expert may request further information from either Party. The request must be in writing, with a time limit for the response. The expert must send a copy of the response to the other Party, and give the other Party a reasonable opportunity to comment on the response.
- 2.8 All submissions, responses, replies, requests and comments must be in writing. If a Party to the Agreement gives information to the expert, it must at the same time give a copy to the other Party.

3. Conference

- 3.1 The expert may request a conference with both parties to the Agreement. The request must be in writing, setting out the matters to be discussed.
- 3.2 The Parties agree that such a conference is considered not to be a hearing which would give anything under this Expert Determination Procedure the character of an arbitration.

4. Role of Expert

- 4.1 The Expert:
 - 4.1.1 acts as an expert and not as an arbitrator
 - 4.1.2 must make its determination on the basis of the submissions of the parties, including documents and witness statements, and the Expert's own expertise; and
 - 4.1.3 must issue a certificate in a form the expert considers appropriate, stating the expert's determination and giving reasons, within 12 weeks after the date of the letter of engagement referred to in clause 13.3.3 of the Agreement.
 - 4.1.4 If a certificate issued by the expert contains a clerical mistake, an error arising from an accidental slip or omission, a material miscalculation of figures, a mistake in the description of any person, matter or thing, or a defect of form, then the expert must correct the certificate.

Schedule 6

Statutory Declaration for Sub-Contractors

Oaths Act 1900 (NSW), Ninth Schedule

I
(1) _____

do solemnly and sincerely declare that to the best of my knowledge and belief:

1. *[insert full dealer/distributor/sub-contractor company name and its ACN]* ("the Declarant") has been selected as a dealer/distributor of, or sub-contractor to, *[insert name of the Contractor]* ("the Contractor") under a standing offer agreement between the **NEW SOUTH WALES STATE CONTRACTS CONTROL BOARD** for and on behalf of the Crown in right of the State of New South Wales ("Principal") and the Contractor for the supply of the Deliverables to certain customers ("the Agreement").
2. The Declarant is aware of:
 - (a) where relevant, the responsibilities imposed on Contractors under clause 5.2 of the Agreement in relation to use of approved dealers and distributors including obligations to ensure that these persons supply relevant sales information to the Contractor and permit independent audit of that information by the Principal, and
 - (b) the standard terms and conditions of customer contracts as set out in the Agreement.
3. The Declarant, if an approved dealer or distributor of the Contractor, offers to supply:
 - (a) under the standard terms and conditions of customer contract;
 - (b) on terms that enable compliance by the Contractor with clause 5.2 of the Agreement.
4. The Declarant, if a sub-contractor, will offer to sub-contract on terms that will:
 - (a) be consistent with the standard terms and conditions of customer contract and,
 - (b) in the case of a Board approved sub-contractor under the Agreement, enable compliance by the Contractor with clause 5.3 of the Agreement.
5. There are no reasons of which I am aware that would prevent a customer contract or sub-contract (as relevant) from being signed and performed in a manner that would allow the satisfactory and timely performance of:
 - (a) the customer contract, and
 - (b) any relevant Contractor responsibilities under clause 5.3 of the Agreement.

And I make this solemn declaration, as to the matter aforesaid according to the law in this behalf made, and subject to the punishment by law provided for any wilfully false statement in any such declaration.

·
(2) _____

Declared at _____

the _____ day of _____ 200_____

Before me, (3) _____

(4) _____

- (1) Here insert name, address and occupation of person making the declaration and his or her position in the company.
 - (2) Signature of person making declaration
 - (3) Signature of person before whom the declaration is made *
 - (4) Here insert title of person before whom the declaration is made.
-

* the jurisdiction within which this declaration is made will depend on who may witness the declaration.

Note: State and Territories to use equivalent, appropriate legislation and modify this form accordingly

Schedule 7

Deed of Confidentiality

BY THIS DEED DATED THE _____ day of _____ 200__

BETWEEN **NEW SOUTH WALES STATE CONTRACTS CONTROL BOARD** for and on behalf of the Crown in right of the State of New South Wales of McKell Building, 2-24 Rawson Place, Sydney, in the State of New South Wales ("the Principal")

AND *[Name and address of Confidant]* ("the Confidant ")

RECITALS:

- A. In the course of the Confidant supplying certain Deliverables for the Principal (whether directly or indirectly) pursuant to the Agreement, the Confidant will have access to and may become aware of Confidential Information belonging to or in the possession of the Principal.
- B. Improper use or disclosure of the Confidential Information would severely damage the Principal's ability to perform its governmental/statutory functions and would severely damage the commercial interests of the NSW Government.
- C. The Principal requires, and the Confidant agrees, that it is necessary to take all reasonable steps (including the execution of this Deed) to ensure that the Principal's Confidential Information is kept confidential and that the Confidant provides the Deliverables faithfully and without any conflicting interest.
- D. This Deed sets out the terms on which the Confidant will have access to the Confidential Information

OPERATIVE PROVISIONS:

1. **Recitals**

The Parties acknowledge the truth and accuracy of the Recitals in every particular.

2. **Interpretation**

2.1 **Definitions**

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

"Agreement" means the Agreement between the Principal and the Contractor dated *[insert date]* for the supply of the Deliverables as defined in the Agreement.

"Confidential Information" means information that:

- (a) is by its nature confidential;
- (b) is designated by the Principal as confidential; or
- (c) the Confidant knows or ought to know is confidential;

and includes but is in no way limited to:

- (d) the Contract Material;

- (e) The Principal's Material including the financial information, the corporate information and the commercial information of the Principal or any Customer;
- (f) any material which relates to the affairs of a third party;
- (g) information relating to the policies, strategies, practices and procedures of the NSW Government and any information in the Contractor's possession relating to the NSW Public Service.

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

"Contract Material" means:

- (a) any material created, written or otherwise brought into existence as part of, or for the purpose of performing the Deliverables including but not in any way limited to all Records, working papers, programs, flow charts, reports, including documents, equipment and information and data stored by any means ("New Contract Material");
- (b) any material which is existing at the date of this Agreement and which is incorporated with the New Contract Material ("Existing Contract Material").

"Customer" has the same meaning as in the Agreement;

"Express Purpose" means the Confidant performing the obligations under the Agreement.

"Intellectual Property Rights" includes copyright, patent, trademark, design, semi-conductor or circuit layout rights, trade, business or company names, or other proprietary rights, or any rights to registration of such rights existing in Australia, whether created before or after the date of this Agreement;

"Principal's Material" means any documentation, information or material supplied by or on behalf of the Principal, or a Customer to the Confidant

"Notice" means notice in writing given in accordance with this Deed; and

"Records" includes the Contract Material and any other information, documents or data brought into existence by any means and stored by any means in connection with the performance of the Agreement;

2.2 General

- 2.2.1 Headings are for convenience only, and do not affect interpretation. The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.
- 2.2.2 A reference to:
- (a) legislation (including subordinate legislation) is a reference to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;
 - (b) a document or agreement, or a provision of a document or agreement, is a reference to that document, agreement or provision as amended, supplemented, replaced or novated;
 - (c) a person includes any type of entity or body of persons whether or not it is incorporated or has a separate legal entity;
 - (d) anything (including a right, obligation or concept) includes each part of it.
- 2.2.3 If this Agreement expressly or impliedly binds more than one person then it shall bind each such person separately and all such persons jointly.
- 2.2.4 A singular word includes the plural, and vice versa.
- 2.2.5 A word which suggests one gender includes the other genders.
- 2.2.6 If a word is defined, another part of speech of that word has a corresponding meaning.

3. Non disclosure

- 3.1.1 The Confidant must not disclose the Confidential Information to any person without the prior written consent of the Principal.
- 3.1.2 The Principal may grant or withhold its consent in its discretion.
- 3.1.3 If the Principal grants its consent, it may impose conditions on that consent, including a condition that the Confidant procure the execution of a Deed in these terms by the person to whom the Confidant proposes to disclose the Confidential Information.
- 3.1.4 If the Principal grants consent subject to conditions, the Confidant must comply with those conditions.
- 3.1.5 Despite cl.3.1.1, the Confidant may disclose the Confidential Information to its directors, officers, employees, and contractors ("permitted recipients") where such disclosure is essential to carrying out their duties owed to the Confidant or in accordance with this Deed.
- 3.1.6 Before disclosing the Confidential Information to a permitted recipient, the Confidant will ensure that the permitted recipient is aware of the confidentiality requirements of this Deed and is advised that it is strictly forbidden from disclosing the Confidential Information or from using the confidential information other than as permitted by this Deed.

- 3.1.7 The Confidential Information must not be copied or reproduced by the Confidant or the permitted recipients without the expressed prior written permission of the Principal, except as for such copies as may be reasonably required for the purposes of this Deed.
- 3.1.8 The Principal may at any time require the Confidant to promptly arrange for the permitted recipients to execute a Deed of Confidentiality substantially in the form of this Deed.
- 3.1.9 If any person being any director, officer, contractor or employee of the Confidant, who has had access to the Confidential Information in accordance with this clause leaves the service or employ of the Confidant then the Confidant will procure that that person does not do or permit to be done anything which, if done or permitted to be done by the Confidant, would be a breach of the obligations of the Confidant under this Deed.
- 3.1.10 The requirements of this Deed do not affect the obligation of the Confidant to disclose any Confidential Information where it is required to be disclosed at law.

4. Restriction on use

- 4.1 The Confidant must use the Confidential Information only for the Express Purpose and must not without the prior written consent of the Principal use the Confidential Information for any purpose other than the Express Purpose.
- 4.2 The Confidant must, unless otherwise authorised by the prior written consent of the Principal:
 - (a) treat as confidential and secret all of the Confidential Information which the Confidant has already acquired or will acquire from the Principal;
 - (b) take proper and adequate precautions at all times and enforce such precautions to preserve the confidentiality of the Confidential Information and take all necessary action to prevent any person obtaining access to the Confidential Information other than in accordance with this Deed;
 - (c) not directly or indirectly use, disclose, publish or communicate or permit the use disclosure, publication or communication of the Confidential Information to any person other than in accordance with this Deed;
 - (d) not copy or disclose to any person in any manner any of the Confidential Information other than in accordance with this Deed; and
 - (e) ensure that the permitted recipients comply with the terms of this Deed and keep the Confidential Information confidential and not use or disclose the Confidential Information other than as permitted by this Deed.

5. Survival

This Deed will survive the termination or expiry of the Agreement.

6. Rights of the Principal

6.1 Production of Documents

- 6.1.1 The Principal may demand the delivery up to the Principal of all documents in the possession or control of the Confidant containing the Confidential Information.
- 6.1.2 The Confidant must immediately comply with a demand under this Clause 6.
- 6.1.3 If the Principal makes a demand under this clause 6, and the Confidant has placed or is aware that documents containing the Confidential Information are beyond his or her possession or control, then the Confidant must provide full particulars of the whereabouts

of the documents containing the Confidential Information, and the identity of the person in whose possession or control they lie.

- 6.1.4 In this clause 6, "documents" includes any form of storage of information, whether visible to the eye or not.

6.2 Legal Proceedings

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

7. Indemnity and release

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

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

8. No exclusion of law or equity

This Deed does not exclude the operation of any principle of law or equity intended to protect and preserve the confidentiality of the Confidential Information.

9. Waiver

- 9.1 No waiver by the Principal of one breach of any obligation or provision of this Deed will operate as a waiver of another breach of any other obligation or provision of this Deed.
- 9.2 None of the provisions of this Deed will be taken to have been varied waived discharged or released by the Principal unless by its express consent in writing.

10. Remedies Cumulative

10.1 Cumulative

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

10.2 Other Instruments

Subject to the other covenants of this Deed, the rights and obligations of the parties pursuant to this Deed are in addition to and do not derogate from any other right or obligation between the parties under any other deed or agreement to which they are parties.

11. Variations and amendments

No term or provision of this Deed may be amended or varied unless reduced to writing and signed by the parties in the same manner as this instrument.

12. Applicable law

This Deed will be governed and construed in accordance with the law of New South Wales and the Commonwealth of Australia.

13. Notices

- 13.1 Notices must be sent to the other party at the address shown in this Deed, or the address last notified to the other party in writing, or in the case of the Confidant, at the Confidant's registered office.
- 13.2 All notices must be in writing and signed by the relevant party and must be given either by hand delivery, post or facsimile transmission.
- 13.3 If delivery or receipt of a notice is not made on a business day, then it will be taken to be made on the next business day.

Executed as a Deed

SIGNED, SEALED AND DELIVERED)
)
by [***name and position of person signing***])
for and on behalf of the **STATE**) (signature of the Principal)
CONTRACTS CONTROL BOARD)
for and on behalf of the Crown in right of)
the State of New South Wales but not so)
as to incur any personal liability in the)
presence of:)

[insert name of Witness]) (signature of Witness)

SIGNED, SEALED AND DELIVERED)
)
by _____)
[insert name of Confidant]) (signature of Confidant)
)
in the presence of _____)
[insert name of Witness]) (signature of Witness)

- END OF SCHEDULE 7 -

Schedule 8 Not Used

Schedule 9 Not Used

Schedule 10

Contractor Information

Guide Note: This must be completed by Contract Officers on the basis of the information provided by the successful tenderer in cl. 22 of Part C1.

Schedule 11

Approved Dealer, Distributor or Sub-Contractor Information

Guide Note: This must be completed by Contract Officers on the basis of the information provided by the tenderer in the response to the RFT (Part C) in respect of each dealer, distributor or sub-contractor that has been selected as an Approved Agent.

Schedule 12

Not Used

Schedule 13

Code of Behaviour - Protection of Children and other Vulnerable People

The Contractor must ensure that all persons working on the site or sites under the Contract, including but not limited to the Contractor's employees and managers, consultants, subcontractors and suppliers (Contractor Employees) understand and comply with the requirements shown below.

- All Contractor Employees must gain permission to enter the school or facility before commencing work and they may only enter approved areas. The Contractor's representative or where a subcontractor is working without the supervision of the Contractor, the subcontractor's representative must report their presence to the person in charge of the school or facility on arrival each day and record, in the Site Visit Log, the details of all Contractor's or subcontractor's employees working at the site or sites that day.
- Contractor Employees should avoid talking with, touching or interacting with any children or residents or other users of the school or facility except where the work requires it or in an emergency or safety situation.
- Contractor Employees must only use approved toilets and other facilities, unless the person in charge of the school or facility gives written authority to use alternative arrangements.
- The work area must not be able to be used or accessed by children, or residents or other users of the school or facility while work is in progress. Clear signs and barricades (where appropriate) must be used to prevent any inadvertent or unauthorised access.
- Appropriate privacy must be maintained when working on toilets and similar facilities. Contractor Employees must ensure that toilets and similar facilities are not occupied or in use by children, residents or other users before entering to perform work, and that work does not continue when use of the facilities is required. Where practicable male employees should perform work on male facilities and female employees on female facilities.
- Contractor Employees must wear clothing that is tidy and in good condition, including a shirt, shorts or trousers or skirts at all times.
- Contractor Employees should report any concerns about children's behaviour or child abuse to the person in charge of the school or facility.
- Contractor Employees must wear or carry an identity card at all times when on the site or sites.

Schedule 14

Guide Note: You must review this form for consistency with the Minimum Insurance Requirements we have asked for in clause 6.5.

Confirmation of Insurances

Insurance Body:

Insured:

Re: Agreement for the provision of <Contract Officer to insert Contract title> between the Insured and the State Contracts Control Board, NSW

It is confirmed that:

1. The Insured has obtained the following policies (the Insurance Policies)

- (a) Broad Form Liability Expiry __/__/20__
- (b) The public liability component of the Broad Form Liability policy is to the value of \$AUD____(the Limit of Indemnity) in respect of each claim; and
- (c) The products liability component of the Broad Form Liability policy is to the value of \$AUD____for the total aggregate liability for all claims arising out of the Insured's products for the period of cover.
- (d) Professional Indemnity Insurance to the value of \$AUD_____, Expiry __/__/20__
- (e) Other insurances, if required:

Type of insurance	Value
_____	_____
_____	_____

- 4. The respective rights and interests of the Principal and any sub-contractors of the insured are noted on the Insurance Policy(ies) 1(a), 1(b) and 1(c).
- 5. The Insurer will accept a notice of claim given by the Insured, the Principal, or any sub-contractor as being a claim given by all of the insured under insurance policies 1(a), 1(b) and 1(c).

4. The insurance policies conform to the requirements of clause 6.5 of the Agreement between the Principal and the Insured.

Attach a Certificate of Currency for the policy/ies above.

Specify below any exclusions beyond the standard exclusions for the Insurance Policies.

Authorised Representative of Insurer
Position:
Dated:

Signed:

Schedule 15

MANAGEMENT FEE AUDIT CONFIDENTIAL DISCLOSURE AGREEMENT

Effective Date:

Auditor (Company):

This Confidential Disclosure Agreement is entered into by and between the Contractor ("**Contractor**") ABN _____ and the "Auditor", which has been engaged by the State Contracts Control Board ("**Board**") to carry out a review of the Contractor's records and systems in connection with the contract referred to in clause 1 below as notified to the Contractor by the Board on [] date]("**the Audit**").

The Contractor and the Auditor agree in relation to the confidential information disclosed to the Auditor by the Contractor as follows:

1. **Disclosure of Information.** The Audit relates to the following contract between the Board and the Contractor ("**Contract**"), and is to be governed by the terms and conditions contained therein:

Name of contract

In accordance with the clause ## of the Contract the Contractor will disclose to the Auditor all information that the Auditor may reasonably require in connection with the following purposes:

"The Principal may at its own cost, take such measures as it considers reasonable in the circumstances (including the appointment of an auditor) to verify the Contractor has paid the correct amount of Management Fee due to the Principal by the Contractor and the Contractor agrees to cooperate with the Principal (including any auditor appointed by the Principal) including providing access to information about all sales made to any entity that is eligible to buy Deliverables under this Agreement, copies of all contracts, orders and invoices between the Contractor and any such entity."

2. **Representatives.** The officer(s) responsible for disclosing or receiving Confidential Information are:

On behalf of the Contractor:

Name:

Title:

The Contractor's address:

Other officer:

On behalf of Auditor:

Name: -----and any other partner or employee of the Auditor who is involved in the Audit or has a need to know in connection with the Audit.

Title:

Work Address of Auditor's representative above:

3. **Definition of Confidential Information.** The "Confidential Information" disclosed under this Agreement is all information in any form received in connection with the Audit. A recipient of Confidential Information under this Agreement shall have a duty to protect all such Confidential Information whether expressly disclosed as Confidential Information or not.
4. **Disclosure Period and Term.** This Agreement controls only Confidential Information which is disclosed between the Effective Date and 3 months thereafter ("Disclosure Period"). The Auditor's duty to protect Confidential Information disclosed under this Agreement expires three (3) years after the end of the Disclosure Period ("the Term").
5. **Use of Confidential Information.** The Auditor shall use, and shall ensure that any of its employees or contractors use, the Confidential Information for the sole purpose of fulfilling the Auditor's obligations to the Board in relation to the Audit.
6. **Protection of Confidential Information.** The Auditor shall not disclose the Confidential Information to a third party other than the Board, and solely for the purposes for which the information was disclosed and where such persons have a need to know. The Auditor shall protect the Confidential Information by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorised use, dissemination or publication of the Confidential Information as the Auditor uses to protect its own confidential information of a like nature. For the avoidance of doubt, the Auditor's partners and employees referred to in clause 2 are not third parties for the purposes of this clause.
7. **Exclusions.** This Agreement imposes no obligation upon a Recipient of the Auditor with respect to the Confidential Information which:
 - (a) is or becomes a matter of public knowledge through no fault of the Recipient;
 - (b) is required to be disclosed under operation of law; or
 - (c) is disclosed by the Recipient or the Participant with the Discloser's prior written approval; or
 - (d) is disclosed to a party's legal adviser in connection with the Review or this agreement.
8. **Proprietary Rights.** Neither party to this Agreement acquires any intellectual property rights or any other

rights under this Agreement except the limited right to use set out in paragraph 5 above.

9. **General.** The parties do not intend that any agency or partnership relationship be created between them by this Agreement. This Agreement sets forth the entire agreement with respect to the Confidential Information

disclosed herein and supersedes all prior or contemporaneous agreements concerning such Confidential Information, whether written or oral. All additions or modifications to this Agreement must be made in writing and must be signed by both parties.

This Agreement shall be governed by the laws of the State of New South Wales and shall be subject to the jurisdiction of the Courts in Sydney, Australia.

CONTRACTOR: ABN/ACN:	AUDITOR: ABN/ACN:
Authorised Signature:_____	Authorised Signature:_____
Name: _____	Name: _____
Title : _____	Title : _____
Date: _____	Date: _____

EXECUTED AS A DEED

SIGNED, SEALED AND DELIVERED by <insert name and position of person signing>)
For and)
on behalf of the **NEW SOUTH WALES STATE**)
CONTRACTS CONTROL BOARD for and on
behalf of the Crown in right of the State of New
South Wales but not so as to incur any personal
liability in the presence of:

Witness

Signatory

Print Name

Print Name

Option 1. Company

Contract officers are no longer required to obtain the Company common seal when dealing with a company. However, you are required to obtain the signatures of one of two combinations:

- 1) the Corporate Secretary and a Director, or
- 2) two Directors

SIGNED by <insert name of company>, ACN)
<insert ACN number> in accordance with section)
127 of the Corporations Act and in the presence)
of:

<Director/Secretary>

Director

Print Name

Print Name

Guide Note: The signature required for and on behalf of SCCB is a core clause. Please select from the Library options the relevant contractor (Company, Individual, or Power of Attorney) that will sign the Deed.

SIGNED, SEALED AND DELIVERED by <insert name and position of person signing>)
For and)
on behalf of the **NEW SOUTH WALES STATE**)
CONTRACTS CONTROL BOARD for and on
behalf of the Crown in right of the State of New
South Wales but not so as to incur any personal
liability in the presence of:

Witness

Signatory

Print Name

Print Name

Option 2. Company

Please use this clause when the sole director is also the sole secretary.

SIGNED SEALED AND DELIVERED by)
<insert name of company>, ACN <insert ACN)
number> in accordance with section 127 of the)
Corporations Act and in the presence of :

Witness

Signatory

Print Name

Print Name

Option 3. Individual

SIGNED by <name of individual> in the)
presence of:)
)

Witness

Signatory

Print Name

Print Name

Option 4: Power of Attorney

Guide Note: Contract officers do not have to require a registered Power of Attorney from the contractor. To prove legal authority, officers must obtain a certified copy of the letter conferring the Power of Attorney.

SIGNED by <insert name of individual> by)
<his/her/its> attorney, <insert name of attorney>)
under power of attorney (who states that the)
attorney has no notice of revocation of the
attorney) in the presence of:

Witness

Signatory

Print Name

Print Name