

**PROCURE IT AGREEMENT
VERSION 2.1.3**

[TWO]

DICTIONARY
Version 2.1.3

DICTIONARY

Now the parties agree as follows:

1. INTERPRETATION

This part contains a Dictionary (Glossary) of defined terms that feature in the terms and conditions of this Agreement or a Contract. Specific terms used only in some Modules are defined in those Modules.

1.1 DEFINITIONS

“Acceptance Criteria” means the criteria to be applied in the performance of any Acceptance Test.

“Acceptance Notification Period” means the period specified in the Order within which acceptance of a Deliverable must be notified.

“Acceptance Period” means the period for the performance of any Acceptance Tests for any Deliverable, as specified in the Order, or such other period agreed between the Parties in writing.

“Acceptance Tests” means any acceptance tests detailed or referred to in the Order.

“Actual Acceptance Date” or **“AAD”** means the date when acceptance is notified in accordance with clause 14.3.2 and 14.3.3.

“Additional Conditions” means any terms or conditions which are additional to the Agreement, which are specified or referenced in the Order.

“Agency” means:

- (a) a body corporate or an unincorporated body established or constituted for a public purpose by Commonwealth, state or Territory legislation, or an instrument made under that legislation (including a local authority);
- (b) a body established by the Governor-General, a state Governor, or by a Minister of state of the Commonwealth, a state or a Territory; or
- (c) an incorporated company over which the Commonwealth, a state or a Territory exercises control.

“Agreement” means Parts 1 and 2 of this Document between the Contract Authority and the Contractor, the Schedules in Part 3 and the Modules in Part 4 referenced in or annexed to the Agreement Details.

“Agreement Details” means those details listed in Schedule 1.

“Approved Parties” means any agent, distributor, reseller or other supplier through which the Contractor is authorised by the Contract Authority to supply a Deliverable to the Customer.

“Business Contingency Plan” means a plan detailing the nature and scope of the business contingency Services to be provided by the Contractor to overcome any interruption to the Customer’s business including as applicable information about time-frames, scheduling, service levels, methodologies, systems, processes or programs for the implementation of such Services and any other information specified in the Order.

“Change in Control” means a circumstance in which control is or may be exercised over the Contractor:

- (a) by virtue of the change of a direct holding of at least fifteen percent of the voting shares in the Contractor or a holding company of the Contractor; or
- (b) by any other means whatsoever.

“Change Request” means a change requested by either Party in respect of operational or project management issues related to the Contract.

“Commencement Date” means in relation to a Contract either:

- (a) the Commencement Date specified in the Order; or
- (b) if no Commencement Date is specified in the Order the date the Order is forwarded to the Contractor by the Customer.

“Confidential Information” means information that

- (a) is by its nature confidential; or
- (b) is communicated by the disclosing party to the Confidant as confidential; or
- (c) the Confidant knows or ought to know is confidential; and
- (d) includes but is in no way limited to:
 - (i) the Deliverable;
 - (ii) materials including the financial, the corporate and the commercial information of any Party;
 - (iii) any material which relates to the affairs of a third party;
 - (iv) information relating to the strategies, practices and procedures of the State and any information in the Contractor’s possession relating to the State public service.

But does not include anything which the Confidant establishes:

- (I) was in the public domain at the time it was received by the Confidant;
- (II) entered the public domain after being received by the Confidant; or
- (III) that the Confidential Information was disclosed pursuant to the terms of this Agreement,

unless it entered the public domain due to a breach of confidentiality by the Confidant; or which the Confidant establishes was received by it from another person before or after it was received from the Customer, if the other person did not breach any law or agreement by giving it to the Confidant.

“Conflict of Interest” includes engaging in any activity, or obtaining any interest, likely to restrict the Contractor in performing its obligations under this Agreement or a Contract. A Conflict of Interest also includes any matters materially affecting the Contractor’s ability to perform any of its obligations under this Agreement or a Contract that include but are not limited to:

- (a) any material litigation or proceeding whatsoever, actual or threatened, against the Contractor;

- (b) the existence of any material breach or default or alleged breach or default of any agreement, order or award binding upon the Contractor;
- (c) matters relating to the commercial, technical or financial capacity of the Contractor or in the knowledge of the Contractor of any Approved Party or subcontractor proposed to be engaged in respect of this Agreement; or
- (d) any obligation under another contract the compliance with which may place the Contractor in breach of this Agreement or a Contract.

"Consequential Loss" means any loss recoverable at law (other than a loss arising in the usual course of things) which is:

- (a) consequential upon other loss;
- (b) a loss of opportunity or goodwill;
- (c) a loss of profits;
- (d) a loss of anticipated savings or business; or
- (e) loss of value of any equipment,

and any costs or expenses incurred in connection with the foregoing.

"Consideration" has the same meaning as provided for in the GST Law.

"Contract" means the contract that is formed when the Customer places an Order with the Contractor pursuant to clause 6.1

"Contract Authority" means the entity described in item 2 of the Agreement Details and its duly authorised representatives and officers.

"Contract Price" means the total of all Prices payable by the Customer to the Contractor for the Deliverables supplied under a Contract.

"Contract Period" means the period of the Contract specified in the Order, including any period or periods of extension of the Contract specified in the Order.

"Contract Specifications" means the totality of any technical or descriptive specifications of functional, operational, performance or other characteristics required of a Deliverable provided by a Party under the Contract and may include:

- (a) any specifications agreed to and brought into existence by the Customer and the Contractor in the performance of their obligations under and in accordance with the terms of the Contract;
- (b) any specifications detailed or referred to by the Customer in the Order; and/or
- (c) those specifications generally published or made publicly available by the Contractor.

To the extent that there is any inconsistency between the Contract Specifications referred to in (a), (b) and (c), the priority shall be (a), (b) and (c) to the extent of any inconsistency.

"Contract Variation" means a variation to the terms and conditions of a Contract between the Customer and the Contractor.

"Contractor" means the person or body corporate referred to in item 3 of the Agreement Details who agrees to supply the Deliverables and includes its Personnel.

“Contractor Information” includes information relating to:

- (a) this Agreement and any Contract formed pursuant to this Agreement subject to the exclusions specified in item 5(a) of the Agreement Details;
- (b) the Contractor’s performance under this Agreement or a Contract including any substantiated reports of satisfactory or unsatisfactory performance;
- (c) the financial position or reputation of the Contractor; and/or
- (d) the shareholdings in the Contractor, or the corporate structure, directorship or shareholdings of the Contractor.

However excludes Confidential Information of the Contractor and Intellectual Property (except for trade marks.)

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

- (a) the Contractor becoming unable to pay its debts as and when they fall due;
- (b) the Contractor no longer has the resources or the ability to obtain the resources required to perform this Agreement or any Contract;
- (c) an application for winding up is made regarding the Contractor and not stayed within 14 days;
- (d) a winding up order is made against the Contractor;
- (e) a controller, administrator, receiver and manager, provisional liquidator or liquidator is appointed to the Contractor;
- (f) a mortgagee enters into 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.

“Correctly Rendered Invoice” means an invoice that is rendered in the form of a Tax Invoice where:

- (a) the amount claimed in the invoice is due for payment and correctly calculated in Australian dollars;
- (b) the invoice is set out as an itemised account, which identifies the GST exclusive amount, the GST component and the GST inclusive amount and enables the Customer to ascertain what the invoice covers and the Contract Price payable;
- (c) the invoice is accompanied by documentary evidence that signifies that acceptance (where appropriate) has occurred in accordance with the Contract; and
- (d) the invoice is addressed to the officer specified in the Order to receive invoices.

“Customer” means the Eligible Customer that has placed an Order under this Agreement.

“Customer’s Materials” means any documentation, information or material supplied by or on behalf of the Customer to the Contractor.

“Customer Supplied Items (CSI)” means the items set out in the Order to be supplied by the Customer under a Contract.

“Cyberterrorism” means a terrorist attack on, or by means of, information systems.

“Defect” means a defect, error, or malfunction that causes a Deliverable to not comply or not perform in accordance with the Contract Specifications.

“Deliverable” means any Product or Service and any associated material offered for supply or provided by the Contractor in accordance with this Agreement or a Contract.

“Department” means an administrative unit or department of the Commonwealth, a State or a Territory.

“Document” includes:

- (a) any paper or other material on which there is writing;
- (b) any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and/or
- (c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device.

“Documentation” means any Document that enables the full use and operation of the Deliverables in accordance with the Contract Specifications. The Documentation must be:

- (a) of a reasonable standard in terms of its presentation, accuracy and scope;
- (b) a resource that provides a comprehensive explanation of functions, capacity and operations of the Deliverables;
- (c) the most current and up-to-date version available;
- (d) in the English language; and
- (e) of a form where all key terms, words and symbols are adequately defined.

“Eligible Customers” means a Department, an Agency or, where approved in writing by the Contract Authority, an Eligible non-Government Body, which requires a Product or Service.

“Eligible non-Government Body” means a body (including a private school) which is:

- (a) directly or indirectly, partially or entirely, funded by the Commonwealth, a State or a Territory; and/or
- (b) non-profit making.

“Escrow Agreement” means an Agreement substantially in the form of Schedule 11.

“Escrow Fee” means the fee set out in Attachment 1 of Schedule 11.

“Escrow Materials” means the source code and/or object code of any Deliverable and all other computer programs, Documentation, drawings and plans necessary to keep the Deliverables in good order and repair that are specified in the Order.

“Event” means a circumstance beyond the reasonable control of a Party that results in that Party being unable to perform an obligation on time. An Event includes:

- (a) natural events like fire, flood, or earthquake; or
- (b) national emergency; or
- (c) terrorist acts (including Cyberterrorism) and acts of vandalism; or

(d) war.

“Financial Security” means the security described in item 12 of the Agreement Details.

“Fundamental Breach” means a breach of the Contract by the Customer which prevents the Contractor from carrying out its obligations under the Contract.

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

“GST Law” means any law imposing or relating to a GST and includes A New Tax System (Goods & Service Tax) Act (Cth), A new tax system (Pay As You Go) Act 1999 and any regulation based on those Acts.

“Hardware Warranty Period” means the first 365 days after the AAD or any greater period specified in the Order.

“Information Privacy Principles or IPP” means the principles contained in the Information Protection Principles contained in sections 8 to 19 of the *Privacy and Personal Information Act 1988 (NSW)*.

“Intellectual Property” means all intellectual property rights including:

- (a) copyright, patent, trademark, design, semi-conductor or circuit layout rights, registered design, trade marks or name and other protected rights, or related rights, existing worldwide, whether created before or after the date of this Agreement; and
- (b) any licence, consent, application or right, to use or grant the use of, or apply for the registration of, any of the rights referred to in (a).

“Management Fee” means the fee referred to in item 11 of the Agreement Details, payable by the Contractor to the Contract Authority in accordance with clause 3.1.

“Milestones” means the groups of tasks relating to and including the provision of Deliverables to be performed or provided by the Contractor under the Contract.

“Module” means Modules 1 to 12 of Part 4.

“Moral Rights” means a person’s moral rights as defined in the *Copyright Act 1968 (Cth)*.

“New Release” means software which has been produced primarily to extend, alter or improve a Deliverable by providing additional functionality or performance enhancement (whether or not Defects in the Deliverable are also corrected) while still retaining the original designated purpose of the Deliverable.

“Nominee Purchaser” means a contractor to a Customer that is nominated by the Customer and authorised by the Contract Authority, to place Orders under this Agreement on behalf of the Customer as its agent.

“Notice in Writing” means a notice signed by a Party’s authorised representative, or his/her delegate or agent, which is either given to, served on, emailed or faxed to the other Party.

“Order” means the written document containing the Order Details and as relevant any Additional Conditions that the Customer places with the Contractor in accordance with clause 6.

“Order Details” means all those details of the Contract to be included in an Order by the Customer and Contractor.

“Parties” means the Contract Authority and the Contractor in relation to this Agreement, and means the Customer and the Contractor in relation to an Order or a Contract.

“Performance Criteria” means the criteria applicable to the performance of the Contractor including the:

- (a) quality of Deliverables offered or delivered;
- (b) competitiveness of the Deliverables and pricing;
- (c) Contractor’s sales and marketing performance;
- (d) Contractor’s financial stability;
- (e) Contractor’s management fee compliance;
- (f) Contractor’s management and suitability of its Personnel;
- (g) Contractor’s administration of the Agreement, any Contracts and risk;
- (h) Contractor’s management of environmental issues;
- (i) Contractor’s Occupational, Health, Safety and Rehabilitation (OHS&R) Management;
- (j) Contractor’s industrial relations performance; and
- (k) claims on insurance and other financial assurances made in respect of the Contractor’s business or this Agreement and any Contracts.

“Performance Guarantee” means the performance guarantee described in item 14 of the Agreement Details.

“Personal Information” means information or an opinion (including information or an opinion forming part of a database) whether true or not, and whether recorded in a material form or not, about a natural person whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

“Personnel” means:

- (a) in the case of the Contractor, the Contractor’s employees, officers, Approved Parties and subcontractors: and
- (b) in the case of respectively the Contract Authority and the Customer, their employees, officers, agents and subcontractors.

“Price” means an itemised price (including a rate for a quality unit) in Schedule 3, and as otherwise determined under a contract as, payable in Australian dollars by a Customer for a Deliverable under the Contract.

“Procure IT” means the framework for the procurement of information technology Products and Services and includes:

- (a) Part 1 – Agreement;
- (b) Part 2 – Dictionary;
- (c) Part 3 – Schedules;
- (d) Part 4 – Modules;
- (e) Part 5 – Order Forms; and
- (f) Part 6 – Service Level Agreement.

“Product” means a good set out in Schedule 3 that the Contractor offers to supply or provides to a Customer in accordance with this Agreement.

“Project Implementation and Payment Plan” or “PIPP” means a plan including information relevant to the implementation of the project and associated payment arrangement as specified in the Order.

“Schedules” means Schedule 1 to 13 of the Agreement.

“Service” means the services set out in Schedule 3 including any associated materials, that the Contractor offers to provide or provides to a Customer in accordance with this Agreement.

“Service Address” means:

- (a) in the case of the Contract Authority at the address set out in this Agreement;
- (b) in the case of the Contractor, at the address set out in this Agreement or in relation to a Contract at its address set out in the Order or such other address as is notified in writing by the Contractor for notices to be served on it from time to time; or
- (c) in the case of the Customer, in the address set out in the Order or the address as is notified in writing by the Customer for notices to be served to it from time to time.

“Service Level Agreement” means the Document that sets out the performance expectations of the Parties and defines the benchmarks for measuring the performance of the Services.

“Site” means the place or places specified in the Order where the Deliverable is to be provided.

“Site Specification” means the Document which details the environmental, operational, safety and management requirements in relation to the Site, that are necessary for the provision of the Deliverables.

“Small to Medium Enterprise” means an enterprise or business will less than 200 full time employees.

“Specified Personnel” means the key personnel of the Contractor nominated in the Order as the Personnel required to undertake the provision of the Deliverables or part of the work constituting the Deliverables.

“Stage” means a stage identified in the Project, Implementation and Payment Plan for the performance of the Contract.

“State” means the state or territory specified in item 6 of the Agreement Details.

“Statement of Requirements” means the Customer’s statement of any requirements that the Contractor must fulfill in respect of the Deliverables which may include all relevant instructions, information, data, documents, specifications, plans, drawings and other materials and particulars.

“Statutory Requirements” means the Australian laws, regulation or by-laws relating to the performance of this Agreement or a Contract or the lawful requirements of any Australian authority with respect to the performance of this Agreement and/or a Contract.

“Substantial Breach” means a substantial breach of the Contract or Agreement by the Contractor, including any of the following:

- (a) Failing to comply with any of the Management Fee provisions under clause 3.1;
- (b) failing to effect and maintain insurance policies as required under 8.1;

- (c) failing to provide a Financial Security as required under clause 8.2;
- (d) failing to provide a Performance Guarantee as required under clause 8.3;
- (e) breaching any warranty under clauses 11.3, 11.4;
- (f) failing to provide suitable replacement personnel as required under clause 13.4 which prevents the Contractor from performing fundamental obligations under the Contract;
- (g) failing to pass Acceptance Tests which results in rejection of the Deliverable by the Customer under clause 14.5.11(e);
- (h) where a delay continues beyond the extension of time granted under clause 14.7.2; and
- (i) the existence of a Conflict of Interest which in the Customer's reasonable opinion prevents the full and proper performance of the Contract by the Contractor.

"Supplementary Tests" means the additional or different tests that are reasonably required by a Customer to demonstrate that a Deliverable complies with the Contract Specifications.

"Tax Invoice" has the same meaning as provided for in the GST Law.

"Taxable Supply" has the same meaning as provided for in the GST Law.

"Term" means the term of this Agreement, set out in item 7 of the Agreement Details and any extension of the term in accordance with clause 2.1.

"Time and Materials" basis means the fee agreed to by the Parties as specified in the Order for any additional services to be supplied by the Contractor.

"Update" means software which has been produced primarily to overcome Defects in, or to improve the operation of, a Deliverable without significantly altering the Contract Specifications whether or not the Deliverable has also been extended, altered or improved by providing additional functionality or performance enhancement.

"Virus" means a computer program, code, device, product or component that is designed to or may in the ordinary course of its operation, prevent, inhibit or impair the performance of a Deliverable in accordance with the Deliverable's Contract Specifications.

"Warranty Period" means the first 365 days after the AAD or any greater period specified in the Order.

"Work" means literary, artistic, musical, and dramatic works and cinematographs as defined in the *Copyright Act 1968 (Cth)*.

1.2 RULES FOR INTERPRETING THIS AGREEMENT

- 1.2.1** In this Agreement, and any Contracts created under this Agreement, unless the contrary intention appears:

Headings are for the purpose of convenient reference only, and do not affect interpretation or form part of the Agreement.

- 1.2.2** The following rules also apply in interpreting this document, except where the context makes it clear that a rule is not intended to apply.

(a) A reference to:

- (i) legislation (including subordinate legislation) is a reference to that legislation as amended, re-enacted or replaced, and includes any subordinate legislation issued under it;

- (ii) monetary references are references to Australian currency;
 - (iii) a document or agreement, or a provision of a document or agreement, is a reference to that document, agreement or provision as varied or novated;
 - (iv) a person includes any type of entity or body of persons whether or not it is incorporated or has a separate legal entity;
 - (v) anything (including a right, obligation or concept) includes each part of it;
 - (vi) a business day means any day other than Saturday, Sunday or a day that is a public holiday for the Customer.
- (b) If this Agreement expressly or impliedly binds more than one person then it must bind each such person separately and all such persons jointly.
- (c) A singular word includes the plural, and vice versa.
- (d) The Parties may undertake business by the electronic exchange of information and the provisions of this Agreement and Contracts will be interpreted to give effect to undertaking business in this manner.