

## 1. CONDITIONS OF CONTRACT

The conditions contained herein and in Nukon's proposal submitted to the Client shall apply without exception to the supply of services by Nukon. They shall supersede, without exception, any and all terms and conditions inferred by, or referenced within, any purchase order issued to Nukon unless expressly agreed by Nukon in writing.

## 2. NUKON'S OBLIGATIONS

### 2.1 Nukon shall:

- (a) perform the Services at the time, location and for the Fee set out in Nukon's proposal;
- (b) ensure that all Services and Deliverables supplied by Nukon will be:
  - (i) fit for purpose; and
  - (ii) comply with the specifications set out or referred to in Nukon's proposal;
- (c) ensure that it has the full power and authority to grant the licences granted under this Agreement;
- (d) comply with all applicable laws, codes and standards, and any Client policies communicated to Nukon; and
- (e) exercise the degree of care, skill and diligence which would reasonably and ordinarily be expected from a skilled and experienced contractor engaged in the same type of undertaking under the same or similar circumstances.

### 2.2 Nukon shall keep confidential, and not use, any Client information obtained from the Client which is commercially sensitive or confidential, except:

- (a) as necessary to perform its obligations under this Agreement;
- (b) with the Client's prior written consent (including as to form and content); or
- (c) to the extent required to be disclosed by law.

### 2.3 Nukon may subcontract any part of the Services.

### 2.4 If specified in Nukon's proposal, the Fee includes an allowance in the final sprint for the rectification of any defects or bugs (as assessed by reference to the Acceptance Criteria).

## 3. VARIATIONS

The Client may, by written notice to Nukon, request a variation to the Services. If a variation affects the Fee, specifications or performance time, Nukon and the Client shall seek to agree a reasonable adjustment to the Fee and any completion date prior to the variation taking effect. If the parties cannot agree a variation requested by the Client, either party may give not less than 20 days' notice to terminate this Agreement.

## 4. SOFTWARE

### 4.1 If the Services include the installation of Software:

- (a) Nukon will provide the installation services and advise the Client in writing when the relevant Software is ready for use; and
  - (b) The Client shall provide Nukon with the necessary access to the Client's premises to carry out the installation services.
- 4.2 Nukon grants the Client a non-exclusive, subscription licence to use the Software in accordance with the Licence Model for that Software.
- 4.3 If specified in Nukon's proposal, Nukon will provide support and maintenance services on the terms and conditions set out in Nukon's proposal.
- 4.4 Nukon warrants that:
- (a) with respect to any Software licensed to Nukon by a third party, it has the full power and authority to sub-license the third party software;
  - (b) Nukon will take all reasonable steps to ensure that the Software contains no viruses, spyware or malware, or any other code which would have the effect of materially disrupting, impairing, disabling or otherwise adversely affecting, shutting down or denying the Client with access to all or any part of any Software or any other Client software, hardware, network or system; and
  - (c) any Software supplied under this Agreement will not:
    - (i) contain any hidden files or illicit code;
    - (ii) replicate, transmit or activate itself without control of the person operating the computing equipment on which it resides; or
    - (iii) alter, damage or erase any data or computer program without control of a person operating the computer equipment on which it resides.

## 5. DELAYS

- 5.1 If Nukon is delayed in performing the Services by an event which is beyond its reasonable control, it may make a written request to the Client for an extension of time to complete the Services.
- 5.2 Upon receipt of a request for an extension of time in accordance with clause 5.1, the Client shall grant Nukon an extension of time to complete the Services equivalent to the length of the delay.

## 6. FEE AND PAYMENT

- 6.1 The Fee for the Services is set out in Nukon's proposal. Unless otherwise specified in Nukon's proposal, the Fee is inclusive of all taxes and duties (other than GST).
- 6.2 Unless otherwise specified in Nukon's proposal, Nukon shall invoice the Client for the Services monthly.
- 6.3 The Client shall pay Nukon's invoice within 30 days of receipt of the invoice without set-off or deduction.

## 7. INTELLECTUAL PROPERTY

- 7.1 Where a licence or any other authorisation is required for the Client to use any Deliverable, Nukon shall, at no additional cost to the Client, procure a licence (on a non-exclusive and transferable basis) for the Client to use each Deliverable.
- 7.2 Nukon will ensure that the receipt and use by the Client of any Service or Deliverable will not in any way infringe or otherwise violate any intellectual property or any other right or interest of any person.
- 7.3 All intellectual property which is owned by, or is proprietary to, a party at the date of this Agreement shall remain owned exclusively by that party.
- 7.4 Any new intellectual property (including any information, design, data, specification know-how or any other form of intellectual property) which is created by Nukon in connection with the provision of the Services ("**New Intellectual Property**") will be owed by Nukon and Nukon grants the Client a non-exclusive licence to use the New Intellectual Property to the extent required to use and maintain the Services and the Deliverables.

## 8. TITLE AND RISK

- 8.1 Title to any Deliverable will pass to the Client when the Client has paid in full for the Services.
- 8.2 Risk in each Deliverable passes to the Client on completion of the Services, except when a Deliverable is within the Client's exclusive possession or control, in which case, risk shall pass to the Client when such Deliverable is in the Client's exclusive possession or control.

## 9. HEALTH AND SAFETY

- 9.1 Nukon will comply with all health and safety legislation and applicable codes of practice.
- 9.2 Nukon will establish a work health and safety management system which will detail how it will maintain a safe work environment and ensure legislative compliance.
- 9.3 Where any employees or sub-contractors of Nukon enter a Client's premises, Nukon agrees that they will be subject to the Client's work health and safety policies and procedures.

## 10. FAILURE TO COMPLY

- 10.1 If:
- (a) Nukon breaches any of its obligations under this Agreement and fails to remedy such breach within 20 business days of receipt of a notice from the Client identifying and requesting remedy of that breach; or
  - (b) Nukon ceases to carry on its business, goes into receivership or liquidation or any like occurrence arises;

### **the Client may:**

- (c) suspend or terminate (in whole or in part) this Agreement on 30 days written notice to Nukon; and
- (d) have all or any part of the Services supplied by anyone else.

## **11. CONSEQUENCES OF TERMINATION OR EXPIRY**

- 11.1 Termination of this Agreement is without prejudice to the rights and remedies of either party arising out of or in connection with any breach of this Agreement occurring prior to the date of termination.
- 11.2 Following the expiry or termination of this Agreement:
- (a) each party will either promptly deliver to the other or, at the other party's option, destroy all of the other party's confidential information, as and when reasonably requested in writing by the other party; and
  - (b) Nukon will within 30 days of expiry or termination deliver to the Client all work in progress on any Deliverable.
- 11.3 In addition to any other provision of this Agreement intended to survive termination or expiry, the provisions of clauses 2.2, 7.3, 7.4, 11, 13.2 and 13.3 shall survive the termination or expiration of this Agreement.

## **12. QUALITY ASSURANCE AND ACCEPTANCE CRITERIA**

- 12.1 Where the Nukon proposal provides that acceptance testing will be undertaken, the provisions of this clause 12 shall apply.
- 12.2 If the Nukon proposal states that acceptance tests are to be conducted for each Deliverable, the acceptance tests for each Deliverable shall be conducted within 5 business days of completion of that Deliverable in accordance with the Acceptance Criteria.
- 12.3 Unless Nukon's proposal provides otherwise, acceptance tests will be run by the Client. Where requested by the Client, Nukon will provide the Client with reasonable assistance in carrying out the acceptance tests.
- 12.4 A final acceptance test shall be conducted within 5 business days of completion of the final sprint for the Deliverables.
- 12.5 If an acceptance test is successfully completed, the Client will notify Nukon within 5 business days of conducting the acceptance test. If any acceptance test is not successfully completed, the Client will notify Nukon within 5 business days of conducting the acceptance test and Nukon will rectify the cause of the failure. Nukon will notify the Client when the relevant deliverable is ready to be re-tested.
- 12.6 If the Client does not notify Nukon of the results of an acceptance test in accordance with clause 12.5, the acceptance test shall be deemed to successfully completed.

## **13. GENERAL**

### **13.1 GST**

Unless otherwise specified in Nukon's proposal, all amounts referred to in this Agreement are exclusive of GST.

### **13.2 Limitation of liability**

**Subject to clause 13.3:**

- (a) Nukon's total liability arising out of or in relation to the Services or the Agreement shall not exceed the total Fee; and

- (b) neither party shall be liable to the other for any indirect, consequential, exemplary, special or punitive loss or damage suffered or incurred by the other pursuant to this Agreement,

and this limitation of liability applies whether the claim is based upon breach of contract, tort, in equity, under a warranty, an indemnity, statute or otherwise.

- 13.3 **Exclusions:** The limitation of liability or exclusion in clause 13.2 shall not apply to any personal injury or death caused by, or any fraud, dishonesty or wilful default by a party or to any claims relating to a breach of clauses 2.2 or 7.2 of the General Terms.
- 13.4 **Force Majeure:** A party is not liable for any failure or delay in performing an obligation to the extent it is due to a cause reasonably beyond the control of that party and that party has notified the other in writing as soon as practicable of the nature, extent and likely duration of the cause ("**Force Majeure Event**").
- 13.5 **Amendments:** No amendment to this Agreement is effective unless it is in writing and signed by both parties.
- 13.6 **Disputes:**
  - (a) If a party believes that there is a dispute in respect of this Agreement, it will notify the other party in writing, giving details of the dispute. Within 10 business days of receipt of the notice, the dispute will be referred to a senior representative of each party for resolution;
  - (b) If such senior representatives do not resolve the dispute within 10 business days, the parties must endeavour to settle any dispute by mediation. Such mediation is to be conducted by a mediator who is independent of the parties and appointed by agreement of the parties or, failing agreement, by a person appointed by the Chair of Resolution Institute, or the Chair's designated representative. The [Resolution Institute Mediation Rules](#) shall apply to the mediation.
  - (c) It is a condition precedent to the right of either party to commence litigation other than for interlocutory relief that it has first offered to submit the dispute to mediation.
- 13.7 **Notices:** All notices are to be in writing and delivered by hand, mail or email to the other party's relationship manager. Receipt will be deemed on delivery by hand, 3 business days after posting or on the sending of an email (provided that a valid email address has been used and no delivery failure notice has been received by the sender).
- 13.8 **Severance:** If any provision of this Agreement is held to be invalid, illegal or unenforceable, it will be severed and the remainder of the Agreement will remain in full force and effect.
- 13.9 **Conflict:** Unless agreed otherwise in writing by Nukon, in the event of conflict between the terms of this Agreement the conflict will be resolved by reference to the following documents in descending order of priority:
  - (a) Nukon's proposal; and
  - (b) These General Terms.
- 13.10 **Waiver:** No failure or delay by either party in exercising any right under this Agreement will operate as a waiver. No single or partial exercise of a right will preclude any other or further exercise of any right under this Agreement. A waiver of any breach of any provision of this Agreement shall not be effective unless that waiver is in writing and is signed by the party against whom that waiver is claimed.

- 13.11 **Entire Agreement:** This Agreement constitutes the entire agreement between the parties relating to the subject matter of this Agreement and supersedes and cancels any previous agreement, understanding or arrangement whether written or oral and any terms and conditions issued by the Client.
- 13.12 **Governing Law:** The laws of South Australia govern this Agreement and the courts of South Australia have non-exclusive jurisdiction to hear all disputes arising in relation to this Agreement.
- 13.13 **Definitions and Interpretation:** In this Agreement, unless the context otherwise requires or specifically otherwise stated:
- (a) **"Acceptance Criteria"** means the criteria specified in Nukon's proposal.
  - (b) **"Agreement"** means these General Terms and Nukon's proposal;
  - (c) **"business day"** means any day other than a Saturday, Sunday or public holiday in the place where an obligation is to be performed;
  - (d) **"Deliverable"** means any deliverable, product, equipment, material, labour or intellectual property to be provided in connection with the Services;
  - (e) **"Fee"** means the price payable by the Client for the Services, as set out in Nukon's proposal and as amended in accordance with this Agreement;
  - (f) **"Force Majeure Event"** has the meaning given to it in clause 13.4;
  - (g) **"Licence Model"** means the licensing rules for the Software set out in Nukon's proposal;
  - (h) **"Services"** means the specific services described in the Nukon proposal;
  - (i) **"Software"** means any software to be provided by Nukon under this Agreement (if any), including the provision of all related Deliverables;
  - (j) **"including"** and similar words do not imply any limitation;
  - (k) all currency shall be in Australian dollars;
  - (l) headings are for convenience only;
  - (m) singular includes plural and vice versa;
  - (n) a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them; and
  - (o) references to a party or a person includes any form of entity and their respective successors, assigns and representative.

**NUKON**

 **SAGE**