This document has been proactively released. Redactions have been made consistent with the following provisions of the Official Information Act 1982: sections 6(c), 6(d), 9(2)(a), 9(2)(b)(ii) and 9(2)(ba).

Evolution of MBIE's approach to protective security and regulatory systems

This note provides a short overview of the evolution of MBIE's approach to:

- protective security and the use of external security contractors in protecting its people and assets, and their use in regulatory compliance and enforcement activities
- regulatory systems stewardship.

- ***Protective Security***

During the early years of MBIE (2012/2013) there was no centralised function responsible for protective security across MBIE, apart from the management of security clearances. During this period groups and branches within MBIE entered into contracts with external parties to supply a range of security services as the need arouse (e.g. advice on security arrangements for the 2013 Petroleum Conference) and various guard and alarm monitoring services. In the wake of the Ashburton 2014 MSD shootings an internal function was established to develop and implement a security improvement programme initially focused on improving the physical security of MBIE's sites (approximately 55).

External consultants (e.g. KPMG) were initially used to undertake site security assessments. However, over time the internal capability has been expanded to give effect to the Government's Protective Security Requirements, resulting in a protective security team of 8 FTEs. The work programme for the team is over seen by the protective Security Governance Committee, which is chaired by the Chief Security Office (a Deputy Chief Executive). The Protective Security team now undertake the vast majority of MBIE site assessments (on-shore and off-shore) and provide advice on security plans around specific events, as well as providing advice on information security and personal security. External consulting advice is now limited to specialist pieces of work (e.g. Dr Frank Stoks review of MBIE Site Security Guidelines and design options for the Stout Street ground floor reception).

Training in areas such as de-escalation of aggressive situations has been provided by external providers (Cert Systems) as part of a national programme to improve the management of health and safety risks to our staff. The Protective Security team is currently undertaking an exercise to understand and rationalise the number of external contracts that MBIE has for guard and alarm monitoring services on a national basis, as these have been entered into by a wide range of cost centre managers according to their various needs over time. The majority of these contracts relate to the monitoring and patrolling of MBIE premises and properties that are in MBIE's statutory care after normal business hours.

- ***Regulatory systems***

Over the same period of time MBIE has had a strategic focus on improving the stewardship and management of the 16 regulatory systems that it is responsible for. A regulatory system includes the rules, institutions and practices working together to achieve desired behaviours and objectives. It is a requirement under State Sector Act for chief executives to undertake regulatory stewardship and this involves ensuring appropriate compliance and enforcement practices are in place to meet objectives of regulations e.g. labour inspectorate undertaking compliance and if necessary enforcement (as empowered by act and regulations) for breaches of labour laws.

MBIE's goal is to set the highest standards for stewardship of regulation; to be a 'world-leading' regulatory steward. MBIE has committed to reaching best practice standards for all six of its regulatory objectives by the end of 2022. This includes making improvements to targeting

compliance and enforcement activity at those areas posing the greatest risk to regulatory system performance. This has included an integration of compliance activities across a number of regulatory regimes in the form of joint investigations operations, which are facilitated by MBIE's Integrated Regulatory Enforcement branch. For example, the branch facilitated a joint investigation into building quality and employment issues on Auckland building sites involving the Labour Inspectorate, Building Systems Performance branch, Immigration NZ, Energy Safety (WorkSafe), the building, plumbing and electrical registration boards and Auckland Council. Investigations like this can involve the use of private investigators when 24 hour surveillance is required of building sites to check if critical products are being substituted or removed (i.e. insulation, reinforcing).

There have also been considerable changes to the approach to the petroleum and minerals regulatory regime, where there has been an increased focus on compliance and enforcement activities. There has also been a move to recruit senior managers who have a strong regulatory background as opposed to an industry background, which was the case in 2013. The majority of the leadership team of the Energy and Resource Markets branch (with which NZ Petroleum and Minerals sits) are now career public servants with regulatory backgrounds.

Adrian Regnault
GM Enterprise Risk & Assurance

Corporate, Governance and Information group
Ministry of Business, Innovation & Employment

Private Investigators, Process Servers and Security Guards Used Within Insolvency and Trustee Service

	Private Investigators and Process Servers	Work Undertaken	Security Guards
Auckland	Process service only		• Warden Consulting Ltd • Paragon
Hamilton	• Arthur Twyford - Twyford & Associates Tauranga • Steve West – West Document & investigation Services Hamilton • Dennis Parsons -= Indepth Forensic – Hamilton • Grant Coward and Susan Ashton – Third Eye Investigations • Linda Nairn, New Plymouth • Dave Wilkson & Clive Annard - Wilkinson & Associates • Ray Keenan - WaiVista, Wellington • Stephen Smith, BOP Recoveries (2015) Ltd, Whakatane • Private Investigations Limited	• Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Inspection of business, valuation of business in situ • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets,	• Waikato Security • Chubb • Peter West • Immigration compliance staff

	• Peter Ward, Mairangi Bay • Northland Document Services • Total Debt Solutions • DM Solutions • Wilkinson & Associates	collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records • Tracking & securing assets, collection of business records	
Central Region	Process service only	•	• Horowhenua Security Ltd • Armourguard
Christchurch	• Avon Investigations • Tasman Investigations	• Tracking & securing assets, collection of business records, business closures, and interview for Statement of Affairs • Tracking & securing assets, collection of business records, business closures, and interview for Statement of Affairs	• First Security

	• Westland Investigations • Laing and Associates	• Tracking & securing assets, collection of business records, business closures, and interview for Statement of Affairs • Tracking & securing assets, collection of business records, business closures, and interview for Statement of Affairs	

NB:

- No record is kept by ITS for the use of investigators etc, so the information provided is based purely from memory.

- Process servers identified have been involved with collection of assets in the field, site visits for the OA particularly in remote areas.

- No contracts obtained as less than $1500 in value.

SECURITY FIRMS UTILISED BY CRIMINAL PROCEEDS MANAGEMENT UNIT SINCE 2014-15 FINANCIAL YEAR – DATA NOT AVAILABLE PRIOR TO THIS TIME

Investigation Service providers to Integrity and Enforcement Team		
PARAGON NETWORK		
Ronald McQuilter	Managing Director of Paragon New Zealand.com Limited	Staff – Paragon New Zealand.com Limited
Wayne Kiely	General Manager of Paragon New Zealand.com Limited	Staff – Paragon New Zealand.com Limited

OTHER PROVIDERS	
Mickey Earl	Corporate Risks (1997) Limited
Peter Wards	Pete Ward & Associates
Ray Keenan	Waivista Investigators
Suzanne Young	Cargill Consultants Otage Ltd
Dave Pizzini	Veritas Invesigations
Bruce Currie	
John Deal	Eastbourne Search Limited
Dennis Parsons	Indepth Forensic Limited

AoG Consultancy Services Order

Tier 1 and 2

V2 January 2016

Part A – for Participating Agency (client) to complete
The Participating Agency (referred to as the client in this Consultancy Services Order) will complete this and email the entire form (including all Parts) to the Provider.

Date	11 March 2016	Client	**Immigration New Zealand**
Provider	KPMG	Contact Name	Michael Carley
Nominated Personnel	David Sinkins Greg Davies Additional KPMG staff as required.	Contact Title	Area Manager, Operations Support
Project name	Fishing Vessel Audits	Contact Phone #	04 896 5370
Client reference	*[Participating Agency unique job reference / purchase order number]*	Sub-category of Services	

Purpose and any background information

To renew the arrangement between MBIE and KPMG to provide auditing services of employers who employ foreign crew for fishing vessels.

The objectives of these audits are to determine whether pay practices and employment standards comply with the Agreement in Principle (AIP) conditions, requirements under the immigration instructions, and terms of the crew members' employment agreements.

KPMG has developed expertise in this area and is familiar with INZ's AIP requirements.

Specific questions / instructions for Provider

INZ wishes to conduct four to five fishing vessel audits per year for the next two financial years.

The exact number will be agreed between KPMG and MBIE as they come due.

Additional Information e.g. risks to Participating Agency, additional contact information

KPMG has conducted a number of audits of fishing vessels on behalf of INZ. The requirements of these audits necessitate a high level of understanding of the relevant immigration instructions. As such, the renewal of the existing arrangement would minimise the risk to MBIE of errors or omissions during the required audits.

Timeframes

[What turnaround is required for the Estimate or Quote?]

INZ wishes to conduct two further audits before the end of the current financial year. Due to the considerable amount of work involved in each audit the timeframe for renewing this agreement is short if we wish to conduct audits before the end of the financial year. Therefore we need to complete this process by 31 March 2016.

[When are the Services required?]

April and March 2016 and for the 2016-17 financial year.

Indicative budget

$20,000 per audit

Provider liability cap

Use this box if the Participating Agency wants to increase the liability cap of the Provider (e.g. for a high risk engagement) above what is set out in the Services Agreement (refer to Part F of this Consultancy Services Order). Leave blank if the default liability cap(s) set out in Part F apply.

Part B – for Provider to complete

The Provider will complete Part B and email the form back to the client

Specific Services to be provided

This box is to be populated on a case-by-case basis for each Consultancy Services Order.

The Provider will review Part A and set out here a detailed description of the Services it is to provide to meet the objectives and in response to the other information in Part A.

The Services and Deliverables will be provided for the purposes contemplated in Part A.

We will complete audits of employers who employ foreign crew for fishing vessels to assess compliance with:

- Agreement in Principle (AIP) conditions
- requirements under the immigration instructions
- terms of the crew members' employment agreements.

Our Approach

In conducting this audit we will:

- perform a desktop audit of documentation provided to us by the vessel operator
- perform a site visit to inspect conditions on board the vessel
- interview key personnel including the vessel operator and captain
- interview a sample of crew
- discuss our observations with the vessel operator to ensure factual accuracy and obtain management comments from them regarding any areas of non-compliance identified.

Deliverables

The deliverables from this audit will be a report containing:

- a compliance summary according to the AIP and legislative requirements
- an explanation of all identified areas of non-compliance
- comments from the fishing vessel's management regarding the report.

Can you confirm that the Nominated Personnel (if any) is available to provide the Services?	**Yes**
Can you confirm that the timeframe is acceptable?	**Yes**

Estimate / Quote

Charges	$18,000
Administration Fee (1% of Charges)	$180
Expenses	$1,800
Total	$19,980
Identify whether the Total is an Estimate / Quote and the method that the Charges have been calculated	*Expenses have been estimated based of costs incurred from prior engagements.*

Additional information / assumptions:

Expenses will be billed at cost and will cover:

- transport to and from ports to conduct vessel inspection and crew interviews
- accommodation (if necessary)
- meals
- translator services.

All expenses will be agreed with MBIE prior to being incurred.

Conflict of Interest declaration and Additional Information

I, *David Sinkins* have made diligent inquiry whether *KPMG* has any actual, potential or perceived Conflict of Interest were it to provide the Services described in this Consultancy Services Order and I have disclosed any actual, potential or perceived Conflict of Interest and how it will be managed below:

KPMG provides other assurance services to MBIE. We have reviewed these engagements and do not believe they present any actual, potential or perceived conflicts of interest.

Prior to each audit, KPMG will complete a conflict check against the vessel operators. If we identify a conflict, we will notify MBIE immediately and agree a conflict management plan.

Additional information

Part C – Variations to Part A
LEAVE BLANK WHEN ISSUING CONSULTANCY SERVICES ORDER
The client will complete Part C if they wish to change any details in Part A

Revised scope and/or timeframe

Part D – Variations to Part B
LEAVE BLANK WHEN ISSUING CONSULTANCY SERVICES ORDER
The Provider will complete this only if and when it receives a Variation per Part C above from the Participating Agency

Revised Estimate	
Revised Charges	$
Revised Administration Fee (1% of Charges)	
Revised Expenses	$
Total	$
Identify whether the Total is an Estimate / Quote and the method that the Charges have been calculated	

Additional information / assumptions:

Part E – Acceptance
LEAVE BLANK WHEN ISSUING CONSULTANCY SERVICES ORDER
The Provider and Participating Agency to complete on acceptance of this Consultancy Services Order

Name of Provider's authorised signatory	**David Sinkins**
Signature of authorised signatory	

Participating Agency accepts and authorises this Consultancy Services Order	[Yes/No]
Name of Participating Agency's authorised signatory	Michael Carley
Signature of authorised signatory	
Date of acceptance	14. 3. 2016
Client's job reference or purchase order number	**[if required]**

Part F – Terms

THE PROVIDER AND PARTICIPATING AGENCIES ARE NOT PERMITTED TO AMEND THIS PART F.

*This Part F contains an extract of selected terms and conditions from the Services Agreement (the **Agreement**). Clause, schedule and paragraph references have been updated to refer to clauses, schedules and paragraphs in this Part F where applicable. For the full terms and conditions that govern the Services, please refer to the Agreement.*

1. Services

1.1 Services

(a) The Provider will provide Services to each Participating Agency in accordance with the terms of this Agreement (including any Consultancy Services Order).

(b) The Provider will use all reasonable endeavours to ensure that, on the date the Documentation is provided under any Consultancy Services Order, such Documentation is in a readable and readily useable format.

1.2 Requesting information

(a) A Participating Agency may contact the Provider, either orally or in writing, about the Provider performing Services before it decides whether to issue a Consultancy Services Order.

(b) Following such contact, the Provider must provide such information reasonably requested by the Participating Agency at no cost to the Participating Agency.

1.3 Consultancy Services Order

(a) Each time a Participating Agency wishes to engage the Provider to perform Services, those Services will be subject to a Consultancy Services Order recording the terms agreed by those parties for the performance of those Services.

(b) Each Consultancy Services Order must be substantially in the form prescribed in Schedule 2 (Consultancy Services Order) – *refer to the Agreement.*

(c) Each Consultancy Services Order must record the nature and detail of the Charges, including amounts and/or formula for calculating such Charges.

1.4 Agents may procure Services

A Participating Agency may, by notice to the Provider and the CoE, appoint one or more third parties to procure Services under a Consultancy Services Order on the Participating Agency's behalf and/or receive invoices, as if that agent was a Participating Agency, provided that any such procurement is for the sole benefit of the Participating Agency.

1.5 Process for issuing and responding to a Consultancy Services Order

(a) If a Participating Agency wishes to engage the Provider to perform Services, it will complete Part A of the Consultancy Services Order and email it to the Provider.

(b) After receiving a Consultancy Services Order, the Provider must, subject to clause 2.1(a) and 3.1, complete the information specified in Part B of the Consultancy Services Order, and email it to the Participating Agency.

(c) Upon receipt of the completed Part B of the Consultancy Services Order, the Participating Agency must promptly advise the Provider in writing if the completed Part B is acceptable and the Provider may not commence performing the Services until this approval has been given.

1.6 Timely performance

The Provider will ensure that the Services to be performed under a Consultancy Services Order are provided on or before the date specified for performance (if any) in the Consultancy Services Order and, if no time is specified, within a reasonable time after the issue of the Consultancy Services Order.

1.7 Delay

(a) If the Provider considers that it is (or is likely to be) prevented or delayed from achieving a date or time for performance (Milestone) specified in a Consultancy Services Order (Delay), it will:

(i) immediately provide notice verbally or in writing to the Participating Agency, setting out:

(A) the cause of the Delay and its expected duration;

(B) the effect of the Delay on its ability to perform its obligations under the Consultancy Services Order (including any future Milestones);

(C) what extension, if any, to the relevant Milestone is being sought; and

(D) what steps, if any, the Participating Agency may take to mitigate the effect of the Delay; and

(ii) take all reasonable steps necessary (including by the allocation of additional resources) to eliminate or avoid the Delay and, in all cases, mitigate its effects.

(b) If the Provider and Participating Agency agree that the Delay is acceptable or wish to amend the Milestone:

(i) the Provider will complete and submit Part C of the Consultancy Services Order to the Participating Agency; and

(ii) upon receipt of the completed Part C of the Consultancy Services Order, the Participating Agency must promptly advise the Provider in writing if the completed Part C is acceptable.

(c) If the Provider does not achieve the Milestone (as amended from time to time) and the Participating Agency's acts or omissions, or those of its Personnel or third parties acting on its behalf, have not caused the Provider to fail to achieve the Milestone, the Participating Agency may, without prejudice to any other right or remedy, suspend payment of any Charges relating to that Consultancy Services Order until the Provider remedies the relevant failure.

1.8 Service standards

(a) The Provider must provide the Services to a standard that reaches or exceeds the Service Levels specified in Schedule 3 (Performance Management).

(b) In addition, the Provider must:

(i) provide the Services diligently, efficiently, effectively and in accordance with Industry Best Practice;

(ii) ensure that the Services to be performed under a Consultancy Services Order are provided on or before the date specified for performance (if any) in the Consultancy Services Order and, if no time is specified, within a reasonable time after the issue of the Consultancy Services Order;

(iii) ensure that all Documentation, information and advice (including Documentation, information and advice provided prior to the issue of a Consultancy Services Order) provided to a Participating Agency or published on the Provider Database is Fit for Purpose so that, without limitation, it contains sufficient content and detail to enable the Participating Agency to make use of it for the purpose for which it was requested;

(iv) act in the best interests of the Participating Agency who issued the Consultancy Services Order in the provision of Services to that Participating Agency;

(v) provide information as outlined in Schedule 6 (Reporting) to the CoE – *refer to the Agreement*;

(vi) provide and maintain its information on the Provider Database;

(vii) keep the CoE informed of all matters of which it ought reasonably to be made aware, and provide such information in relation to the provision of Services as may reasonably be required by the CoE or by any Participating Agency with respect to the provision of Services to that Participating Agency, including under any Consultancy Services Order between the Provider and the Participating Agency; and

(viii) provide Services to the reasonable satisfaction of the Participating Agency who issued the Consultancy Services Order (as reported to the CoE).

2. Estimates and Quotes

2.1 Estimates and Quotes

(a) The Provider must provide an Estimate or Quote for all Services to be provided under a Consultancy Services Order, unless the total Fees in respect of the Services under any Consultancy Services Order are likely to be less than $10,000 (exclusive of GST) or such other amount as determined by the CoE and notified to the Provider.

(b) Despite clause 2.1(a), if, during the course of providing the Services, the Provider becomes aware that the total Fees (excluding GST) are likely to exceed the amount referred to in clause 2.1(a), the Provider must provide an Estimate in accordance with clauses 2.1(f) and (g).

(c) All Estimates and Quotes will be provided at no cost to the Participating Agency.

(d) The Participating Agency may at its sole discretion:

(i) request a Quote or Estimate on a lump sum or maximum fee or other basis; and/or

(ii) give one or more providers on the Panel an opportunity to provide an Estimate or Quote based on the maximum rates recorded in their respective agreements with the CoE or, in the case of the Provider, the Rates in this Agreement.

(e) The purpose of clause 2.1(d)(ii) is to allow a Participating Agency, at its discretion, to run a small secondary procurement process if the Services required are sufficiently extensive to merit obtaining an Estimate or Quote from more than one provider on the Panel. For the avoidance of doubt, a secondary procurement process is not mandatory for Participating Agencies.

(f) All Estimates and Quotes must specify the estimated timeframe to perform the Services requested in the Consultancy Services Order and the Rates of Personnel providing the Services and include any Charges likely to be incurred in providing the Services.

(g) All Quotes and Estimates must be provided to the Participating Agency in writing and must be included in the Consultancy Services Order.

2.2 If Charges exceed the Estimate

(a) If during the course of providing the Services under a Consultancy Services Order, the Provider becomes aware that the total Charges (excluding GST) are likely to exceed the Estimate, the Provider must give written notice to the Participating Agency using Part D of the Consultancy Services Order as soon as the Provider becomes so aware, but no later than the time the costs accrued or incurred reach 80% of the Estimate.

(b) The notice under clause 2.2(a) must specify a revised Estimate for the Services and include the reason the total Charges will exceed the original Estimate.

(c) A Participating Agency has sole discretion whether to approve a revised Estimate and must act reasonably when deciding whether to approve a revised Estimate.

(d) When a revised Estimate is approved, the Participating Agency must provide written notice of the same to the Provider.

(e) If a Provider has provided an Estimate to a Participating Agency for Services, the Participating Agency is not liable to pay the Provider any amount exceeding the Estimate unless the Participating Agency has approved a revised Estimate.

2.3 If Charges exceed the Quote

(a) The Provider acknowledges that neither the CoE nor the Participating Agency are obliged to pay any Charges to the Provider in relation to Services performed under a Consultancy Services Order if those Charges exceed any Quote provided in relation to that Consultancy Services Order, unless the Participating Agency has given its prior written consent in accordance with clause 2.3(b).

(b) If the Participating Agency agrees to allow the Provider to increase the Charges:

(i) the Provider will complete and submit Part D of the Consultancy Services Order to the Participating Agency; and

(ii) upon receipt of the completed Part D of the Consultancy Services Order, the Participating Agency must promptly advise the Provider (in writing) if the completed Part D is acceptable.

3. Conflicts of Interest

3.1 Conflicts of Interest

(a) The Provider must, upon receipt of a Consultancy Services Order, make diligent inquiry whether it has any actual, potential or perceived Conflicts of Interest if it were to provide the Services specified in the Consultancy Services Order and, if no such Conflict of Interest exists, the Provider must provide confirmation to that effect to the Participating Agency that issued the Consultancy Services Order.

(b) If the Provider has an actual, potential or perceived Conflict of Interest, the Provider must immediately notify the Participating Agency who issued the Consultancy Services Order and must not begin performing the Services without the prior written approval of the Participating Agency.

(c) The Provider must take all reasonable steps to ensure that:

(i) a situation does not arise that might result in an actual, potential or perceived Conflict of Interest; and

(ii) any Personnel or Subcontractors of the Provider do not engage in any activity or obtain interests that might result in the Provider or such Personnel or Subcontractors having an actual, potential or perceived Conflict of Interest,

that cannot be managed to the satisfaction of the Participating Agency who issued the Consultancy Services Order.

(d) If, after commencing Services under any Consultancy Services Order, the Provider becomes aware of any matter, circumstance, interest or activity that may give rise to any actual, potential or perceived Conflict of Interest, the Provider must immediately notify the Participating Agency of all relevant details and must immediately cease work on the Services until such time as the Participating Agency provides written notice confirming the Provider may continue to perform the Services or terminates the engagement of the Provider in respect to the Services to be performed under the relevant Consultancy Services Order in accordance with clause 3.1(e).

(e) If the Participating Agency who issued a Consultancy Services Order considers that the Provider has an actual Conflict of Interest of sufficient gravity that the Provider can no longer perform Services for it, the Participating Agency may, by written notice to the Provider, terminate the Consultancy Services Order with immediate effect on the date of termination specified in that notice.

(f) Any approval or notice given by the Participating Agency pursuant to clause 3.1(b) or 3.1(d) may require the Provider to take steps reasonably required by the Participating Agency to manage the Conflict of Interest, and the Provider must provide written notice confirming its acceptance of those steps before it may commence or continue to provide the Services under that Consultancy Services Order.

4. Responsibilities

4.1 Provider responsibilities

In addition to its other obligations under this Agreement, the Provider will:

(a) respond promptly, accurately and adequately to any requests for information made by any Participating Agency in relation to the Services, including requests for advice;

(b) in performing Services for a Participating Agency under a Consultancy Services Order comply with all privacy and other policies and guidelines issued by the Participating Agency and notified or made available to the Provider;

(c) obtain, maintain and comply with any governmental, regulatory or other approvals, permissions, consents, licences, and requirements necessary to provide the Services and perform its obligations under this Agreement;

(d) comply with all Laws at all times during the Term in so far as they relate to the provision of the Services, including the Privacy Act 1993 and all applicable consumer laws;

(e) ensure that it and its Personnel providing the Services do not access any Participating Agency's information or systems except to the extent necessary to provide the Services and for no other purpose;

(f) as soon as is practicable, notify the CoE and all other relevant Participating Agencies of any problems or issues that arise in relation to the performance of its obligations under this Agreement, including any problems or issues that will, or are likely to, affect the provision or quality of the Services or the ability of the Provider to perform its obligations under this Agreement;

(g) provide and maintain information in the Provider Database as detailed in Schedule 7 (Provider Database) – *refer to Agreement*;

(h) without limiting any other provision of this Agreement, use all reasonable endeavours to avoid damaging or adversely affecting any Participating Agency's reputation; and

(i) conducting the Agency Satisfaction Survey by asking Participating Agencies the questions recorded in Annexure B of Schedule 5 (Governance) within 5 Business Days of the Services in each CSO being provided – *refer to the Agreement*.

4.2 Participating Agencies' responsibilities

Each Participating Agency has the following responsibilities in relation to the Services:

(a) to manage its operational relationship with the Provider, including in relation to the fulfilment of each Consultancy Services Order;

(b) to notify the Provider of all relevant policies, guidelines and procedures of the Participating Agency that the Provider must comply with when performing the Services under each Consultancy Services Order;

(c) to provide adequate instructions and information to the Provider to allow it to perform the Services under each Consultancy Services Order;

(d) to make timely decisions where approvals or consents are reasonably sought by the Provider in performing the Services under each Consultancy Services Order;

(e) to pay the Charges; and

(f) to use its best efforts to resolve any dispute directly with the Provider before involving the CoE in accordance with clause 12.

4.3 Transition

(a) The Provider will manage the transition of each Participating Agency to the supply arrangements contemplated by this Agreement in a manner which minimises disruption to, or adverse impact on, that Participating Agency and other Participating Agencies.

(b) If a Participating Agency has one or more pre-existing engagements with the Provider that require the Provider to provide services of a similar nature to the Services to the Participating Agency after the Commencement Date, the Provider and Participating Agency may agree to transition those engagements onto the terms of this Agreement.

5. Resourcing

5.1 General requirements

The Provider will provide and maintain sufficient resources (including human resources, equipment, telecommunications connectivity, premises and other facilities) to enable it to perform its obligations on time and otherwise in accordance with this Agreement.

5.2 Provider's Nominated Personnel

(a) The Participating Agency may, in any Consultancy Services Order, nominate specific Personnel (Nominated Personnel) to be the primary providers or to supervise the delivery of the Services.

(b) If any Nominated Personnel nominated in a Consultancy Services Order are not available to provide or supervise the Services requested, the Provider must immediately notify the Participating Agency and provide details of other Personnel (if any) with the necessary skills and experience to provide or supervise the Services requested pursuant to that Consultancy Services Order.

(c) Notice given under clause 5.2(b) must specify the period for which the Nominated Personnel will continue to be unavailable.

(d) Upon receipt of notice under clause 5.2(b), the Participating Agency must notify the Provider whether the replacement Personnel are acceptable.

(e) The Participating Agency is under no obligation to accept any replacement Personnel and, if it does not approve the replacement Personnel, the Provider may not commence or continue providing the Services.

5.3 Personnel

(a) The Provider will ensure that all of its Personnel who are engaged in the performance of the Provider's obligations under this Agreement:

(i) have the requisite skills, expertise, qualifications and experience;

(ii) have, before performing any such obligations, obtained all security clearances and passed all probity checks required by, or necessary to provide the Services to, a Participating Agency;

(iii) comply with all health, safety, security and other policies, codes of conduct, procedures and reasonable directions as may be reasonably required by a Participating Agency from time to time; and

(iv) will carry out their respective duties with due care, skill and diligence.

(b) The Participating Agency will notify the Provider of any security clearances and probity checks required by, or necessary to provide the Services to, that Participating Agency.

5.4 Subcontracting

(a) The Provider will not subcontract the performance of all or part of the Services or any of its other obligations under this Agreement, except with the prior written consent of the Participating Agency for whom it is providing Services.

(b) The Provider is solely responsible for the selection of each Subcontractor and must ensure that each Subcontractor is creditworthy, qualified and has the relevant experience to perform the work it is required to carry out for the Provider.

(c) To the extent permitted by Law, the Provider is and remains fully responsible for any act or omission of any Subcontractor.

(d) The Provider must ensure that each Subcontract contains obligations on the Subcontractor that are consistent with the relevant terms of this Agreement, including in relation to clauses 9 (Confidentiality), 10 (Intellectual Property), 15 (Audit) – *refer to the Agreement*, and 13 (Termination) and Schedule 3 (Performance Measurement).

(e) If, in the CoE's reasonable opinion, a Subcontractor is:

(i) materially not performing in accordance with the terms of this Agreement, the CoE may, by notice to the Provider, require the Provider to procure that the Subcontractor performs the relevant obligations within 10 Business Days, failing which the CoE may, by notice to the Provider, require the Provider to remove that Subcontractor; or

(ii) a material threat to the health, safety or security of the Personnel or property of any Participating Agency, or has breached security or confidentiality requirements of this Agreement, the CoE may, by notice to the Provider, require the Provider to remove that Subcontractor,

and the Provider will ensure the immediate removal of that Subcontractor.

6. Changes

6.1 Change procedure

Each Participating Agency who issues a Consultancy Services Order may agree any variations to that Consultancy Services Order with the Provider using Part C of the Consultancy Services Order.

7. Price and payment

7.1 Calculation of Charges

The Charges will be calculated in accordance with the terms of Schedule 2 (Pricing).

7.2 Participating Agency to pay for Services

(a) Each Participating Agency will pay the Provider the Charges applicable to any Services procured by that Participating Agency on the terms of this clause 7.

(b) The Charges comprise the total amount payable by Participating Agencies for the Services.

7.3 Invoicing and payment

Except as otherwise provided in Schedule 2 (Pricing) or as agreed with a Participating Agency in any Consultancy Services Order, the Provider will invoice:

(a) each Participating Agency; or

(b) if the Participating Agency has appointed an agent to purchase Services on its behalf in accordance with clause 1.4 and the Participating Agency has instructed the Provider in writing to invoice that agent,

for the Charges applicable to that Participating Agency and the Participating Agency will pay those Charges, in accordance with the following terms:

(c) the Provider will render one itemised invoice to the Participating Agency at the end of each month during the Term for all Services performed during that month specifying (as applicable):

(i) the nature and amount of the Fees or other applicable fees and fee structures;

(ii) the Personnel and their hourly rate;

(iii) the hours billed (by Personnel and in the aggregate);

(iv) the nature and amount of any Expenses (including any third party Charges to be passed on to the Participating Agency);

(v) the amount representing the Administration Fee;

(vi) how much of the Estimate or Quote has been used;

(vii) a brief description of the Services provided during that month; and

(viii) any other matters the Participating Agency may reasonably request;

(d) each correctly rendered invoice will be payable on or before the 20th day of the month following the month in which the invoice was received;

(e) the Participating Agency will have no obligation to pay any Charges which are invoiced more than 90 days after the date that such amount was required to be invoiced pursuant to this clause 7.3; and

(f) the Provider may only invoice a Participating Agency for any Expenses at the cost actually incurred by the Provider.

7.4 Invoice disputes

If a Participating Agency or the Provider disputes an invoice:

(a) it may withhold the disputed sum and associated Administration Fee until the dispute is resolved;

(b) the dispute will be resolved in accordance with clause 12; and

(c) it will pay the undisputed portion in accordance with clause 7.3.

The Provider will not be excused from performing its obligations under this Agreement while an invoice is disputed by a Participating Agency.

7.5 Taxes

(a) Except for any GST payable by a Participating Agency, any present or future tax, levy, impost, duty, charge, assessment or fee of any nature (including applicable interest and penalties) payable in connection with this Agreement under any Law is to be paid by the Provider and not passed on to a Participating Agency unless otherwise expressly agreed in writing by the Participating Agency.

(b) The Participating Agency may deduct from any payment to be made to the Provider any withholding taxes or other deductions that it is required by Law to make.

7.6 Suspension of payment

(a) Without prejudice to any other right or remedy that may be available to a Participating Agency, a Participating Agency may suspend payment of all or any part of the Charges if the CoE has notified the Provider that the Provider is in Material Breach, until that Material Breach is remedied.

(b) If the Material Breach is not capable of remedy the Participating Agency and the Provider agree to treat the Charges as being in dispute and clause 13 will apply.

8. Warranties

8.1 General warranties

Each party represents, warrants and undertakes that:

(a) it has full power, capacity and authority to execute, deliver and perform its obligations under this Agreement;

(b) it has, and will continue to have, all the necessary consents, permissions, licences and rights to enter into and perform its obligations under this Agreement; and

(c) this Agreement constitutes its legal, valid and binding obligations and is enforceable in accordance with its terms.

8.2 Provider's warranties

The Provider represents, warrants and undertakes that:

(a) it will perform its obligations under this Agreement with due care, skill, promptness and diligence at all times;

(b) it has, and will have throughout the Term, sufficient Personnel to supply the Services and to perform its other obligations under this Agreement;

(c) it, and each of its Personnel engaged in the performance of the Services, has, and will have throughout the Term, the necessary expertise and all necessary governmental, regulatory or other approvals, permissions, consents, licences, qualifications, accreditations and requirements to provide the Services and perform its other obligations under this Agreement;

(d) it will comply with the requirements of all Laws as they relate to the provision of Services by the Provider;

(e) the possession or use of any item of Intellectual Property supplied or licensed by it, or the use of any item of Intellectual Property by it to perform its obligations under this Agreement, will not infringe the rights of any third party;

(f) all Documentation (and any other information or advice supplied by it to a Participating Agency) will be accurate, complete and Fit for Purpose;

(g) there are no existing agreements, undertakings or arrangements which prevent it from entering into this Agreement, or which would impede the performance of its obligations under this Agreement, or that it would breach by entering into this Agreement;

(h) it is not (and nor is any of its Personnel) a party to any litigation, proceedings or disputes which could adversely affect its ability to perform its obligations under this Agreement;

(i) it has not offered any inducement in connection with the entering into or negotiation of this Agreement, and will not offer any inducement in connection with the supply of Services to Participating Agencies;

(j) In responding to the RFP and establishing the Charges, such decisions and prices were arrived at independently and without collusion; and

(k) all representations, statements and warranties made in the RFP Response were true and correct when provided to the CoE.

8.3 **Continuous application**

The warranties, representations and undertakings set out in clause 8.2 will be deemed to be given by the Provider continuously throughout the Term.

8.4 **Notification**

Each party will promptly notify the other if at any time during the Term it breaches any of the warranties, representations and undertakings in this clause 8.

8.5 **Other warranties excluded**

All warranties (statutory, express or implied) which are not expressly referred to in this Agreement are excluded to the fullest extent permitted by Law.

9. Confidentiality

9.1 **Protection of Confidential Information**

(a) Subject to clauses 9.1(c) and 9.2, the Provider and each Participating Agency will treat as confidential and not disclose to any third party nor use for its own benefit any Confidential Information that is the Confidential Information of the other (or, in the case of the Provider, that is the Confidential Information of any Participating Agency).

(b) The Provider will:

(i) ensure that all Confidential Information of the CoE or any other Participating Agency (and any backup archives containing such Confidential Information) in the possession or control of the Provider from time to time is kept secure and managed and protected and only disclosed or otherwise dealt with in accordance with this Agreement;

(ii) not use any Agency Information for its own purposes or for any purposes different from those contemplated by this Agreement; and

(iii) advise the CoE in writing if any Confidential Information of the CoE or any other Participating Agency will be transferred or stored outside New Zealand before such information is transferred and will confirm that the requirements of this clause 9.1 will be met while such Confidential Information is stored outside New Zealand.

(c) Clause 9.1(a) does not prevent the disclosure of Confidential Information:

(i) if that information was known, or becomes known, to the public through no act or default of the recipient;

(ii) that the recipient is required by Law or parliamentary practice (including parliamentary questions) to disclose, or to a Select Committee or to a Minister of the Crown, so long as the recipient provides notice of the required disclosure promptly upon receipt of notice of the required disclosure (if it is permitted to do so by Law);

(iii) that was lawfully known to the recipient prior to the date it was received;

(iv) that becomes available to the recipient from a source other than a party to this Agreement or a Participating Agency, provided that the recipient has no reason to believe such source is itself bound by an obligation of confidence to the person that disclosed that information or is otherwise prohibited under Law from disclosing such information;

(v) to any Professional Adviser for the purposes of rendering professional services to a party in relation to this Agreement;

(vi) to the extent that such disclosure is authorised by this Agreement; or

(vii) if such disclosure is approved for release with the consent of the party from whom the Confidential Information is first received.

9.2 **Limited disclosure**

(a) The Provider may, subject to clause 9.2(d), disclose the Confidential Information of a Participating Agency to its Subcontractors, Personnel, Related Entities and Professional Advisers who need to know the same for the sole purpose of enabling the Provider to perform its obligations and exercise its rights under this Agreement.

(b) A Participating Agency may, subject to clause 9.2(d), disclose the Confidential Information of the Provider to its third party suppliers, Personnel and Professional Advisers and any other Participating Agency (including the CoE) who need to know the same in connection with the Services.

(c) The Provider will not disclose a Participating Agency's Confidential Information to any of its Subcontractors, Related Entities or Professional Advisers, and a Participating Agency will not disclose the Provider's Confidential Information to any of its third party suppliers or Professional Advisers, unless the recipient has given a written confidentiality undertaking to the disclosing party in terms substantially similar to those set out in this clause 9.

(d) Any undertaking given pursuant to clause 9.2(c) will be provided to the other party to this Agreement or the relevant Participating Agency on request.

10. Intellectual Property

10.1 **Intellectual Property owned by Provider**

(a) The CoE acknowledges that all:

(i) Intellectual Property held by the Provider before the Commencement Date;

(ii) Intellectual Property developed independently from this Agreement by the Provider, and that is not developed, commissioned or created under or in connection with this Agreement; and

(iii) adaptations and modifications to the Intellectual Property described in clauses 10.1(a)(i) and (ii),

remains the Provider's sole and exclusive property (Provider IP).

(b) To the extent that a Participating Agency needs to use any of the Provider IP to receive the full benefit of the Services, the Provider grants to the Participating Agency a royalty-free, non-exclusive licence (including, if agreed in a Consultancy Services Order, the right to sublicense) to use, copy, modify and distribute during the Term any Provider IP provided to a Participating Agency by or on behalf of the Provider.

10.2 **Intellectual Property owned by Participating Agencies**

(a) The Provider acknowledges that each Participating Agency or its licensor has, and continues to have, sole and exclusive ownership of all Intellectual Property rights in all of the Agency Information together with all adaptations and modifications of such Agency Information (Pre-contract Participating Agency IP).

(b) All Intellectual Property created or developed by the Provider or its employees or Subcontractors in performing the Services and developing the Documentation will be owned by the Participating Agency that issued the Consultancy Services Order for those Services from the date the Intellectual Property is created or developed (Post-contract Participating Agency IP and, together with the Pre-contract Participating Agency IP, the Participating Agency IP).

(c) If the Provider (or any of its Subcontractors) has under any Law any right in or claim to any of the Participating Agency IP or holds any of the Participating Agency IP, the Provider (by itself and for its Subcontractors):

(i) assigns to the Participating Agency all of its rights, title and interest in and to that Participating Agency IP from the date it was created or developed; and

(ii) waives all right of lien or similar rights as may now or later be claimed in that Participating Agency IP; and

(iii) waives all of its moral rights under Part 4 of the Copyright Act 1994 in that Participating Agency IP,

and the Provider will sign all documents and do all acts and things that are necessary to give effect to this clause 10.2(c).

(d) To the extent that the Provider needs to use any of the Participating Agency's IP for the purpose of performing its obligations under this Agreement, the CoE will use its reasonable endeavours to procure the grant by the Participating Agency to the Provider, subject to any written direction given by the CoE or the Participating Agency, of a royalty-free, non-exclusive, non-transferable licence to use and store that Participating Agency's IP for the sole purpose of performing its obligations under this Agreement during the Term.

10.3 Intellectual Property owned by third parties

(a) To the extent that the Provider needs to use any Intellectual Property held or owned by a third party (Third Party IP) in performing the Services under a Consultancy Services Order issued by a Participating Agency, the Provider will use its best endeavours to obtain the fullest rights of use and licence of that Third Party IP (on terms and at a cost to be agreed with the Participating Agency) as are necessary for the performance of those Services for the benefit of the Participating Agency.

(b) The CoE acknowledges that the Provider may have limited ability to obtain rights and/or a licence to use any Third Party IP and, where the Provider, using its best endeavours, cannot obtain appropriate rights and/or a licence for a Participating Agency to use that Third Party IP, the warranty in clause 8.2(e) applies.

11. Liability

11.1 Indemnity

(a) The Provider will, to the extent permitted by Law, indemnify the Participating Agency who issued a Consultancy Services Order against all Losses suffered or incurred by that Participating Agency as a result of any:

(i) unlawful, malicious or negligent act or omission by the Provider;

(ii) personal injury, sickness, death or loss of, or damage to, tangible property due to an act or omission of the Provider; or

(iii) any other breach by the Provider of its obligations under this Agreement.

(b) The Provider will, subject to clause 11.1(c), indemnify the CoE and the Participating Agencies against all Losses suffered or incurred by the CoE or a Participating Agency as a result of any claim that the possession or use of any Intellectual Property supplied or licensed by the Provider, or the use of any Intellectual Property used to provide the Services, infringes any third party's rights.

(c) The Provider will have no liability under clause 11.1(b) to the extent that any IP Claim arises from any:

(i) modification by the Participating Agency of any item of Intellectual Property supplied or licensed by the Provider without the approval of the Provider;

(ii) use by a Participating Agency of Intellectual Property supplied or licensed by the Provider for any purpose disallowed by this Agreement or the applicable Intellectual Property licence (but only if the licence has been provided to the Participating Agency prior to such use), or

(iii) use of Intellectual Property used to provide the Services if and to the extent that Intellectual Property was supplied by a Participating Agency or the CoE.

11.2 IP Claims

(a) In the event of a claim under clause 11.1(b) (an IP Claim):

(i) the affected Participating Agency will give the Provider notice of the IP Claim as soon as practicable and, to the extent permissible by Law, permit the Provider (at the Provider's cost) to handle all negotiations for settlement and to control and direct any litigation that may follow (Control of the IP Claim);

(ii) if the Provider has Control of the IP Claim:

(A) the affected Participating Agency will provide all reasonable assistance to the Provider (at the Provider's cost) in the handling of any negotiations and litigation; and

(B) the Provider will keep the affected Participating Agency informed of the defence or negotiations of the IP Claim and diligently conduct any litigation or negotiations, using competent counsel and in a manner that does not adversely affect the name or reputation of the CoE or any Participating Agency;

(iii) the Provider will not enter into any settlement or compromise in relation to the IP Claim without the prior written consent of the affected Participating Agency (which will not be unreasonably withheld); and

(iv) the Provider will notify the CoE of the IP Claim, and the outcome within 5 Business Days of the claim being concluded.

(b) If any IP Claim disrupts a Participating Agency's use or enjoyment of a Service, the Provider will (unless otherwise requested by the CoE), at its own expense and at its option, immediately:

(i) obtain for the Participating Agency the legal right to continued use of the infringing materials; or

(ii) replace, modify or resupply the infringing materials so that there is no further infringement, without adversely affecting the performance or functionality of those materials.

11.3 Maximum liability of Participating Agency

In addition to its obligation to pay the Charges, the maximum aggregate liability of each Participating Agency to the Provider under or in connection with a Consultancy Services Order will be, in respect of all Losses, limited to the total Charges paid and payable under the Consultancy Services Order.

11.4 Maximum liability of the Provider

The maximum liability of the Provider to the CoE and a Participating Agency for all Losses under or in connection with a Consultancy Services Order in respect of all claims will not exceed:

(a) in relation to the sub-categories for which the Provider has been appointed as a Tier 1 Provider in the Appointment Letter, the greater of:

(i) 10 times the total Charges paid and payable under the Consultancy Services Order;

(ii) $5,000,000; and

(iii) any greater amount or multiple set out in the Consultancy Services Order; and

(b) in relation to the sub-categories for which the Provider has been appointed as a Tier 2 Provider in the Appointment Letter, the greater of:

(i) 10 times the total Charges paid and payable under the Consultancy Services Order;

(ii) $2,000,000; and

(iii) any greater amount or multiple set out in the Consultancy Services Order.

11.5 Exclusions on liability

The limitations on liability set out in clauses 11.3 and 11.4 will not limit the liability of:

(a) the Provider under clauses 11.1(a) and 11.1(b) (other than in respect of negligent acts or omissions under clause 11.1(a)(i) and breach by the Provider of its obligations under this Agreement under clause 11.1(a)(iii), which are subject to the limitations of liability in clauses 11.3 and 11.4);

(b) the Provider for any fraudulent act or omission; or

(c) either party for any breach of confidentiality.

11.6 Categories of loss

(a) Irrespective of how liability arises, neither the CoE, the Provider nor any Participating Agency who issued any Consultancy Services Order to the Provider will, under any circumstances, be liable for any indirect loss or damage (including consequential loss) arising under or in connection with this Agreement.

(b) Neither the CoE nor any Participating Agency will, under any circumstances, be liable for any loss of profits or loss of revenue suffered by the Provider in connection with this Agreement.

(c) Losses relating to administration, operations, fines and penalties arising from the Provider's act or omission will be considered direct loss or damage that the CoE is not prevented from recovering by any term of this Agreement.

(d) For the avoidance of doubt, clause 11.3(a) will not preclude the CoE taking action to recover any unpaid Administration Fee.

11.7 Force majeure

(a) The CoE, the Provider and any Participating Agency who issues a Consultancy Services Order to the Provider (in this clause 11.7, referred to as a party) will not be liable to the other for any failure to perform its obligations under this Agreement during the time and to the extent that such performance is prevented, wholly or substantially, by reason of any Force Majeure Event.

(b) The party subject to the Force Majeure Event (the non-performing party) must:

(i) notify the other party (and, if the non-performing party is the Provider, all affected Participating Agencies) as soon as practicable after the Force Majeure Event occurs and provide full information concerning the Force Majeure Event, including the extent of its inability to perform, an estimate of the time likely to be required to overcome the Force Majeure Event and the steps the non-performing party will take to comply with clauses 11.7(b)(ii) and 11.7(b)(iii);

(ii) use all reasonable endeavours to mitigate and remedy the effect of the Force Majeure Event and minimise the impact of the event on the other party (including, if the non-performing party is the Provider, on the Participating Agencies); and

(iii) use all reasonable endeavours to perform its obligations under this Agreement as far as is practicable,

and a Participating Agency will not be required to pay Charges to the extent that the Provider fails to perform its obligations to that Participating Agency due to a Force Majeure Event.

(c) If the non-performing party affected by the Force Majeure Event is the Provider, each affected Participating Agency may, to the extent that any Service requested by the Participating Agency under a Consultancy Services Order has not been delivered and delivery has, or will be, delayed by the Force Majeure Event, terminate the Consultancy Services Order for the supply of that Service, by notice to the Provider within five Business Days following receipt by the Participating Agency of notice of the Force Majeure Event, at no cost to the Participating Agency, subject to the Participating Agency paying for Services delivered up to the date of the Force Majeure Event.

11.8 Insurance

(a) During the Term and for a period of two years following the termination of this Agreement, the Provider will, at its own expense, ensure that it maintains adequate insurance in respect of its potential liability for loss or damage under this Agreement in accordance with Industry Best Practice, but as a minimum the Provider must hold professional indemnity insurance and public liability insurance in respect of the Services provided under this Agreement and other insurance to cover standard commercial risks (including in respect of Documentation which is the property of a Participating Agency and in the Provider's possession or control).

(b) The Provider will, at the CoE's request, promptly provide satisfactory evidence that it has complied with its obligations in this clause 11.8

12. Dispute resolution

12.1 Dispute

In the event of any dispute, difference or question arising out of, or in connection with, this Agreement or its formation (a dispute):

(a) the relevant Participating Agency and the Provider will each use its best efforts to resolve the dispute through good faith negotiations and informal dispute resolution techniques, and will continue to perform its obligations under this Agreement as far as possible as if the dispute had not arisen, pending final settlement of the dispute; and

(b) neither the Participating Agency nor the Provider will commence any formal proceedings relating to the dispute unless it has complied with clause 12.2.

12.2 Escalation

(a) The Participating Agency and the Provider will each advise its respective Representative (or equivalent person) of a dispute on the day that the dispute arises.

(b) The Representatives will use their best efforts to resolve the dispute in accordance with clause 12.1(a).

(c) If the dispute is not resolved:

(i) within 10 Business Days, the dispute will be escalated to senior representatives of the Provider and the Participating Agency with delegated authority to resolve the dispute;

(ii) within a further 10 Business Days, the dispute will be escalated to the CoE's Manager, All-of-Government Contracts and the Provider's Chief Executive.

12.3 Mediation

(a) If a dispute is not resolved under clause 12.2, either party may, by written notice to the other, refer the dispute to mediation, or they may agree in writing to refer the dispute to mediation.

(b) The mediation will be conducted by a single mediator in accordance with the terms of the LEADR New Zealand Inc. Standard Mediation Agreement and at a fee to be agreed by the parties.

(c) If the parties fail to agree on the identity of the mediator and/or the mediator's fee within five Business Days of referral of the dispute to mediation, the mediator will be chosen, and the mediator's fee determined, by the chairperson for the time being of LEADR New Zealand Inc. (or his or her nominee).

12.4 Urgent relief

Nothing in this clause 12 will preclude either party from taking immediate steps to seek urgent relief before a New Zealand court.

13. Termination

13.1 Termination of Consultancy Services Order

The Participating Agency may terminate a Consultancy Services Order:

(a) for convenience by giving the Provider at least one month's prior written notice;

(b) by notice to the Provider with immediate effect on the date of termination specified in that notice, if the Provider commits a Material Breach which is:

(i) not capable of being remedied (and, for the avoidance of doubt, paragraphs (a) and (b) of the definition of "Material Breach" are deemed incapable of being remedied); or

(ii) capable of being remedied but which is not remedied to the satisfaction of the Participating Agency within 10 Business Days following the date of receipt by the Provider of the Participating Agency's notice of the Material Breach;

(c) in accordance with clause 3.1(e) (Conflict of Interest); or

(d) in accordance with clause 11.7(c) (Force Majeure Event).

13.2 Consequences of termination or expiry

(a) In the event of termination or expiry of this Agreement, no Participating Agency will be obliged to make any payment to the Provider except for any Charges payable for Services supplied pursuant to a Consultancy Services Order entered into on or before the effective date of expiry or termination.

(b) Termination or expiry will not, unless otherwise provided in this Agreement, affect:

(i) any rights and remedies available to either party which have accrued up to and including the date of termination or expiry; and

(ii) the provisions of this Agreement which expressly, or by their nature, survive termination or expiry, including clauses 14 (Entire agreement), 1.4 (Precedence – *refer to the Agreement*), 9 (Confidentiality), 10 (Intellectual Property), 15 (Audit - *refer to*

the Agreement), 11 (Liability), 12 (Dispute Resolution), 13.2 (Consequences of termination or expiry) and 19 (General - *refer to the Agreement*) and Schedule 1 (Definitions).

(c) After expiry or termination of this Agreement for any reason, each party will, within five Business Days of receiving notice from the other party, return all Documentation, Confidential Information or other property belonging to the party and (in the case of the Provider) to each Participating Agency that issued a Consultancy Services Order to the Provider (or destroy such Confidential Information, if requested), except if such Documentation, Confidential Information or other property is required to be retained by any Law.

14. Entire agreement

14.1 Entire agreement

(a) No other terms or conditions, including any conditions of sale, invoices or any other communication not included in a Consultancy Services Order (Communication), will be incorporated into this Agreement, even if at some later date the other party (including, in the case of the CoE, any other Participating Agency) signs or otherwise purports to accept those terms and conditions or the terms of that Communication.

(b) For the avoidance of doubt, and without limiting clauses 1.3(a) to 1.3(c) – *refer to the Agreement*:

(i) any Communication which is expressed or intended to operate as an indemnity, warranty, representation, undertaking, condition or other term of such a nature is hereby disapplied and excluded from this Agreement; and

(ii) any part of a Consultancy Services Order which describes the nature, scope, price or manner of delivery of Services will, subject to clause 14.1(b)(i), form part of this Agreement, but only to the extent that it does not conflict with any other part of this Agreement.

SCHEDULE 1: DEFINITIONS

In this Agreement, unless the context otherwise requires:

Administration Fee means the amount referred to in clause 11.8 of the Base Agreement – *refer to the Agreement*;

Agency Information means all:

(a) information and records belonging to a Participating Agency that are supplied to or collected by the Provider for the purpose of enabling the Provider to perform its obligations under this Agreement;

(b) compilations of data created by a Participating Agency or the Provider for the purposes of this Agreement, but excluding the Provider's working papers; and

(c) legal names, logos, trademarks, brands or images of a Participating Agency, including all related Intellectual Property of the Participating Agency and the New Zealand Coat of Arms or any other coat of arms or emblem used by the Participating Agency;

Agreement is described in clause 1.3(a) of the Base Agreement – *refer to Agreement*;

Annexure means any document physically attached to a Schedule and identified as such and any other document incorporated by reference in any part of this Agreement (other than an Annexure);

Appointment Letter means the letter issued to the Provider by the CoE, as amended or reissued from time to time, confirming (among other things) the Provider's appointment as an All-of-Government provider of consultancy services and detailing the terms and conditions of the appointment (including the Services and the applicable Tier(s));

Base Agreement means clauses 1 to 19 (inclusive, in each case) of, and Schedule 1 (Definitions) to, this Agreement;

Business Day means any day of the year other than a Saturday, a Sunday or a public holiday (as defined in section 44 of the Holidays Act 2003), provided that:

(a) in relation to any Consultancy Services Order, public holiday means a public holiday observed at the location of the Participating Agency who issued the Consultancy Services Order; and

(b) in all other cases, public holiday means a public holiday observed in Wellington, New Zealand;

Business Hours means the hours between 8.30 a.m. and 5.00 p.m. on any Business Day;

Change means any change to this Agreement made in accordance with clause 10.1 of the Base Agreement – *refer to Agreement*;

Charges means the amount payable by Participating Agencies for Services and includes Expenses, as described in Schedule 2 (Pricing) and agreed in a Consultancy Services Order;

Commencement Date is the date on which this Agreement is signed by both parties or, if two dates, the later date;

Confidential Information means:

(a) all information and trade secrets already communicated or subsequently communicated under or in connection with this Agreement, including information obtained during the negotiation of this Agreement or in the performance of this Agreement and information on the Provider Database;

(b) any information about the business or property of either party or a Participating Agency including any information:

(i) relating to the financial position of that party or Participating Agency;

(ii) concerning that party's or Participating Agency's suppliers and customers; or

(iii) relating to that party's or Participating Agency's internal management, structure, Personnel or strategies;

(c) the terms of this Agreement; and

(d) Agency Information;

Conflict of Interest means any matter, circumstance, interest or activity of the Provider, its Personnel or Subcontractors, arising by whatever means that directly or indirectly conflicts with:

(a) the duties of the Provider and any of its Personnel or Subcontractors to the Participating Agency who issued the Consultancy Services Order; or

(b) the interests of any Participating Agency in relation to this Agreement (including any Consultancy Services Order) or otherwise in respect to the provision of consultancy services to the Participating Agency either before or after the Commencement Date;

or otherwise impairs or might appear to impair the ability of the Provider (or any of its Personnel or Subcontractors) to provide the Services to any Participating Agency under a Consultancy Services Order diligently, independently, impartially and in the best interests of the Participating Agency;

Consultancy Services Order means a service order relating to the supply of Services issued by a Participating Agency in accordance with clause 1.4 and substantially in the form attached as Schedule 2 (Consultancy Services Order – *refer to the Agreement*) and, if agreed between the Participating Agency and the Provider or required under the Appointment Letter, may contain additional information or further particularity in respect of the Services to be provided under the service order to that contained in the Appointment Letter;

Contract Quarter means a period of three consecutive months commencing on 1 January, 1 April, 1 July or 1 October, provided that:

(a) the first Contract Quarter will begin on the Commencement Date and end on the date specified in the Appointment Letter; and

(b) the final Contract Quarter will end on the effective date of expiry or termination of this Agreement;

Control means, in relation to the Provider or any ultimate or intermediate holding company or Holding Entity of the Provider, the power to:

(a) manage, directly or indirectly, the operation of the business; or

(b) control, directly or indirectly, the composition of the board of directors or board of management or equivalent governing body,

of the Provider or such ultimate or intermediate holding company or Holding Entity, whether through the ownership of voting securities, by contract or otherwise, and for these purposes "holding company" will have the same meaning as in section 5 of the Companies Act 1993;

Documentation means all advice, communications, documentation (including information on the Provider Database) and reports (whether in paper, electronic, audio or audio-visual format) relating to, or provided as part of, the Services together with additions, modifications to and replacements of, that documentation, but excludes the Provider's working papers;

Eligible Agency means:

(a) each Public Service department, as defined in section 27 of the State Sector Act 1988;

(b) the New Zealand Defence Force, the New Zealand Police, the New Zealand Security Intelligence Service, the Parliamentary Counsel Office, the Office of the Clerk of the House of Representatives and the Parliamentary Service;

(c) each Crown Entity, as defined in section 7 of the Crown Entities Act 2004;

(d) each organisation listed in the fourth schedule to the Public Finance Act 1989;

(e) the Reserve Bank of New Zealand;

(f) the Office of the Controller and Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment;

(g) each corporation listed in the first schedule to the State Owned Enterprises Act 1986;

(h) each local authority, as defined in section 5 of the Local Government Act 2002; and

(i) any other, person, organisation or entity that does not fall within the above categories but which the CoE determines should be treated as an Eligible Agency for the purposes of this Agreement;

Estimate means an estimate of the total Charges for the Services required by the Participating Agency;

Expense means any actual and reasonable out-of-pocket costs incurred by the Provider in the delivery of the Services and agreed to in any Consultancy Services Order, and includes any freight and related costs, travelling and incidental expenses and other costs, disbursements, fees, charges and expenses directly or indirectly incurred by the Provider;

Fees means the amount payable by the Participating Agency to the Provider for its time spent delivering the Services calculated on the basis of the Rates, excluding Expenses;

Fit for Purpose means, in relation to any Service or Documentation to be provided by the Provider to a Participating Agency, that such Services or Documentation are, in descending order of priority, fit for the purpose(s):

(a) expressly made known in writing by that Participating Agency to the Provider (including in a Consultancy Services Order); or

(b) for which the Provider, given its knowledge of that Participating Agency and understanding why the Services or Documentation are required, has reason to expect such Services or Documentation to be used;

Force Majeure Event means an event or circumstance beyond the reasonable control of either party which makes it impossible or illegal to perform, or prevents compliance with, or the performance of, a party's obligations under this Agreement, including:

(a) fire, floods, tsunami, storms, tempest, earthquake or other act of God;

(b) any act of a public enemy, war, riot, or act of civil or military authority;

(c) nuclear, chemical or biological contamination; and

(d) subject to paragraph (g) of this definition, any act of a third party engaged in subversive or terrorist activity or sabotage,

but does not include an event to the extent that:

(e) the effect of that event could have been substantially prevented, avoided or overcome or mitigated by

(i) implementation of any contracted business continuity or disaster recovery service, or any contingency plans agreed between the parties or which a party has represented it has in place; or

(ii) exercising a reasonable standard of care; or

(iii) using information provided by the other party or which is available in the public domain; or

(f) it is an event for which the party affected is or was directly responsible; or

(g) that event is constituted or caused by any act or omission of Personnel or a Subcontractor unless and to the extent that the Personnel or Subcontractor was itself affected by an event, which if it occurred in relation to either party would have been a Force Majeure Event; or

(h) that event is constituted or caused by an Insolvency Event or the insolvency of a Subcontractor or lack of funds for any reason;

GST means goods and services tax under the Goods and Services Tax Act 1985;

Holding Entity means a trust, unit trust, partnership, limited partnership, unincorporated joint venture or other body corporate or unincorporated body of persons that Controls the Provider, and includes any natural person that Controls the Provider;

Industry Best Practice means the high professional standard that would reasonably be expected from a prudent and experienced provider of Services in New Zealand having regard to market practice at the relevant time,

Insolvency Event means, in relation to the Provider:

(a) the presentation of an application for its liquidation that is not discharged within 30 days of its filing or which is not demonstrated to the CoE prior to the expiry of that 30 day period as being an application that is frivolous or vexatious;

(b) any step taken in or toward the making of any compromise, proposal or deed of arrangement with all or some of its creditors;

(c) the appointment of a liquidator, receiver, statutory manager, administrator or similar official, to it;

(d) the suspension or threatened suspension by it of the payment of its debts;

(e) cessation by it of a whole or any relevant part of its business in New Zealand;

(f) the enforcement of any security against the whole or a substantial part of its assets; or

(g) any other insolvency event or proceedings analogous to any of the foregoing occurring in any relevant jurisdiction;

Intellectual Property means copyright, all rights in relation to inventions (including patents), registered and unregistered trademarks, registered and unregistered designs, trade or other proprietary rights or rights derivative of those rights (including licence rights) anywhere in the world as well as any other rights in intellectual property which are recognised or protected under Law;

Law means:

(a) any statute, regulation, bylaw, ordinance or subordinate legislation in force from time to time to which a party is subject;

(b) the common law and the law of equity as applicable to the parties from time to time;

(c) any binding court order, judgment or decree;

(d) any applicable industry code of practice or conduct, convention, policy, rule or standard to which a party is bound; or

(e) any applicable direction, policy, permission, consent, licence, rule or order that is binding on a party and that is made or given by any governmental or regulatory body having jurisdiction over a party or any of that party's assets, resources or business,

in any jurisdiction that is applicable to this Agreement;

Losses means liabilities, expenses, losses, damages and costs (including legal costs on a full indemnity basis);

Material Breach means any material breach by the Provider of the terms of this Agreement or the occurrence of any event having a material effect on the ability of the Provider to perform its obligations under this Agreement (other than a Force Majeure Event), including:

(a) the occurrence of an Insolvency Event in relation to the Provider or the likely occurrence of an Insolvency Event;

(b) the occurrence of a change in Control of the Provider or any ultimate or intermediate holding company or Holding Entity of the Provider that the CoE has not previously approved (acting reasonably);

(c) any representation or warranty made by the Provider in terms of this Agreement being found to be untrue or incorrect; and

(d) any failure on the part of the Provider to comply with, observe or perform any of the terms of this Agreement in circumstances where that contract breach or that contract breach together with other contract breaches is considered by the CoE on reasonable grounds to cause the Provider to be unable or unwilling, or be likely to be unable or unwilling, to perform its obligations under this Agreement;

Panel means the All-of-Government panel of providers who provide consultancy services to Participating Agencies, including any sub-panel, as detailed on www.procurement.govt.nz;

Participating Agency means each of the CoE and every other Eligible Agency that is a party to the Participation MoU in relation to the Services;

Participation MoU means the memorandum of understanding between the CoE and all other Participating Agencies relating to the management of their relationship with each other and with the Provider in relation to the Services, as amended from time to time;

Personnel includes partners, principals, directors, employees, agents, officers and individual independent contractors;

Professional Adviser means any accounting, legal, procurement or technical professional;

Provider Database means the IT platform described in Schedule 7 (Provider Database – *refer to the Agreement*);

Quote means a fixed price, capped price or other pre-agreed basis for establishing the Charges for Services required by the Participating Agency where the Provider is prevented from increasing the Charges without the prior written consent of the Participating Agency;

Rates means the maximum rates (whether hourly, daily or weekly or other time-related basis) payable to the Provider for providing the Services, determined in accordance with Schedule 2 (Pricing), excluding Expenses;

Related Entity means a related company under the Companies Act 1993 (New Zealand) or a related body corporate under the Corporations Act 200, provided that any reference in the Companies Act 1993 to a "company" is deemed to include any partnership, body corporate, association or other entity, whether corporate or unincorporated, irrespective of the place of incorporation or registration of that partnership, body corporate, association or other entity;

Reports mean the reports generated by the Provider specified in Schedule 6 (Reporting), as amended from time to time by the CoE – *refer to the Agreement*;

Representative has the meaning given in paragraph 3.1 of Schedule 5 (Governance – *refer to the Agreement*);

RFP means the request for proposals in relation to the supply of the Services to Participating Agencies, issued by the CoE as described in the Appointment Letter;

RFP Response means the Provider's original response to the RFP, as clarified and amended by subsequent oral and written correspondence (including questions and answers) between the CoE and the Provider prior to the Commencement Date;

Service Level means a required standard for the Provider's performance of its obligations under this Agreement, as described in Schedule 3 (Performance Management);

Service Level Default means a failure by the Provider to meet one or more Service Levels;

Services means the consultancy services provided from time to time under the terms of this Agreement, including any Consultancy Services Order, as more particularly described in the Appointment Letter;

Subcontractor means any person to whom the Provider has subcontracted any part of its obligations under this Agreement or who is a supplier to the Provider in respect of this Agreement and includes the employees and subcontractors of that person and Subcontract will be construed accordingly;

Term means the term specified in clause 3 – *refer to the Agreement*; and

Tiers means any of Tiers 1 and Tiers 2 for which members of the Panel are appointed and, in respect of the Provider, means the Tier(s) the Provider is appointed to as detailed in the Appointment Letter – *refer to the Agreement*.

SCHEDULE 2: PRICING

1. Introduction

This Schedule sets out general principles underlying the Charges.

2. Principles

2.1 **Participating Agencies will only pay for Services ordered**

(a) The Provider will invoice each Participating Agency for the Charges applicable to that Participating Agency in accordance with clause 7.3 of the Base Agreement – *refer to the Agreement*.

(b) A Participating Agency will only pay for Services that it orders in accordance with this Agreement.

2.2 **No minimum volume**

Neither the CoE nor any Participating Agency is required to meet a minimum aggregate expenditure or volume level for any Services.

2.3 **No interest**

No interest will be payable on any amount due to the Provider under this Agreement.

2.4 **Rates**

(a) The Fees are calculated on the Rates that are recorded Provider Database.

(b) The Rates are the maximum amounts payable by a Participating Agency for the Services.

3. Charges

The Charges payable by a Participating Agency for Services must not include any Fees invoiced at Rates higher than those recorded in the Provider Database.

SCHEDULE 3: PERFORMANCE MEASUREMENT

1. Introduction

1.1 **This Schedule describes:**

(a) the Service Levels; and

(b) how performance against Service Levels will be measured and reported.

2. Service Levels

2.1 **Format**

Each Service Level is described in Annexure A using the following format:

Parameter	Description
Description	Description of what the Service Level will measure
Purpose	Why it is important to Participating Agencies that the Service Level is met
Calculation	Method for calculating the Service Level
Service Level	The performance standard that the Provider is required to meet or exceed

2.2 **Service Levels must be met**

(a) At all times during the Term, the Provider will perform its obligations to meet or exceed the Service Levels.

(b) The Provider acknowledges that any failure to meet the Service Levels may have a significant impact on Participating Agencies.

2.3 **Changes to Service Levels**

(a) From time to time during the Term, the CoE and the Provider may negotiate in good faith to add, delete or modify then-existing Service Levels to reflect changes in the Participating Agencies' requirements or objectives.

(b) Any changes to Service Levels will be effected in accordance with clause 10 of the Base Agreement – *refer to the Agreement*.

3. Performance measurement

3.1 **Implement tools**

The CoE will implement appropriate measurement, monitoring and management tools and procedures to enable it to measure the Provider's performance against the Service Levels.

3.2 **Measure performance**

The CoE will measure the performance of the Provider under this Agreement against the Service Levels recorded in Annexure A to this Schedule.

3.3 **Measurement period**

(a) Except for the Service Levels set out in paragraph 3.3(b), each Service Level will be measured by reference to performance over a Contract Quarter.

(b) Service Levels one and five will be measured by reference to performance biannually.

3.4 **Failure to meet Service Levels**

If the Provider fails to achieve one or more of the Service Levels in any Contract Quarter, it will:

(a) take such steps and do all things necessary, as soon as possible, to correct the failure; and

(b) notify the CoE and the Participating Agency(s) who issued the Consultancy Services Order(s), the subject of the Service Level Defaults, of the reasons for the failure and the steps that the Provider is taking to ensure that the failure is not repeated; and

(c) consider whether the Charges for the Services that are subject to the Service Level Default should be reduced to reflect the lower value of the Services provided.

3.5 **Respond to feedback on performance**

The Provider will respond constructively to the CoE's feedback on Service Level performance, and to all other reasonable requests from the CoE for additional metrics, analyses and reports relating to performance against Service Levels from time to time during the Term, at no additional cost to the CoE.

3.6 **Reporting on Provider performance**

The CoE may report, at any time, on poor performance by the Provider against the Service Levels to all Participating Agencies and any Eligible Agencies.

Annexure A: Service Levels

Parameter	1. Services Fit for Purpose
Description	Were the Services subject to each Consultancy Services Order Fit for Purpose?
Purpose	To ensure Services provided are Fit for Purpose.
Calculation	The Participating Agency will advise whether the Services are Fit for Purpose as part of the Agency Satisfaction Survey.
Service Level	100% of Services delivered to a Participating Agency must be Fit for Purpose.

Parameter	2. Timely Performance of Services
Description	Did the Provider perform the Services subject to each Consultancy Services Order within the timeframe recorded in that Consultancy Service Order (or as amended by agreement from time to time)?
Purpose	To ensure on-time provision of Services requested under a Consultancy Services Order.
Calculation	The Provider is required to report on this metric as part of the reporting requirements in Schedule 6 (Reporting).
Service Level	The Provider must deliver all Services subject to a Consultancy Services Order within the agreed timeframe for delivery recorded in the Consultancy Services Order including any variation to the timeframe recorded in Part D of the Consultancy Services Order.

Parameter	3. Services Performed to budget
Description	Were the Charges for the Services subject to each Consultancy Services Order within the Estimate or Quote recorded in that Consultancy Services Order?
Purpose	To ensure Services requested under a Consultancy Services Order are performed on or under the Provider's Estimate or Quote.
Calculation	The Provider is required to report on this metric as part of the reporting requirements in Schedule 6 (Reporting).
Service Level	The Provider must deliver all Services subject to a Consultancy Services Order within the agreed Estimate or Quote recorded in the Consultancy Services Order including any variation to the Estimate recorded in Part D of the Consultancy Services Order.

Parameter	4. Reporting Provided
Description	Did the Provider submit the information required of it as detailed in Schedule 8 (Reporting) accurately, in the required format and on time?
Purpose	To ensure the reporting information is provided accurately, regularly and on time.
Calculation	The CoE will receive the reporting information each Contract Quarter.

Parameter	4. Reporting Provided
Description	Did the Provider submit the information required of it as detailed in Schedule 8 (Reporting) accurately, in the required format and on time?
Purpose	To ensure the reporting information is provided accurately, regularly and on time.
Service Level	All reporting information must be completed accurately and submitted on time.

Parameter	5. Results of Agency Satisfaction Survey
Description	Each Participating Agency is satisfied with the overall level of service it received from the Provider.
Purpose	To ensure that the Participating Agencies are satisfied with the service of the Provider.
Calculation	The Provider's biannual average score from the Agency Satisfaction Survey will be calculated as the mean (average) of the Provider's individual scores for the survey period.
Service Level	The Provider's average score for each survey must exceed 5/10.

STRATEGIC SECURITY GROUP LTD

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GST 104-167-330

Ministry of Business, Innovation & Employment
Integrated Regulatory Enforcement Branch

Tax Invoice Number: Inv 1982

Auckland

30/09/2015

Description of Goods and Services	QTY	Unit Price	Total Price
Ref: **IREB 15-04LEE**			
Surveillance conducted as required - Operation LEE			
28.09.15 - 4 x Surveillance Operators as instructed			
Surveillance hours:			
			$3,487.50
			$1,312.50
Mileage:			
Operator 1 - 364			
Operator2 - 420			
Operator3 - 423			
Operator4 - 412			
Total			$1,133.30
Payment 14 Days			
		Sale amount	$5,933.30
		GST	$889.99
Internet Banking - Strategic Security Group		Total Amount	$6,823.29
06-0169-0200489-00			

Thankyou for using our services

AoG Consultancy Services Order

Tier 1 and 2

V2 January 2016

Part A – for Participating Agency (client) to complete
The Participating Agency (referred to as the client in this Consultancy Services Order) will complete this and email the entire form (including all Parts) to the Provider.

Date	11 March 2016	Client	**Immigration New Zealand**
Provider	KPMG	Contact Name	Michael Carley
Nominated Personnel	David Sinkins Greg Davies Additional KPMG staff as required.	Contact Title	Area Manager, Operations Support
Project name	Fishing Vessel Audits	Contact Phone #	04 896 5370
Client reference	*[Participating Agency unique job reference / purchase order number]*	Sub-category of Services	

Purpose and any background information

To renew the arrangement between MBIE and KPMG to provide auditing services of employers who employ foreign crew for fishing vessels.

The objectives of these audits are to determine whether pay practices and employment standards comply with the Agreement in Principle (AIP) conditions, requirements under the immigration instructions, and terms of the crew members' employment agreements.

KPMG has developed expertise in this area and is familiar with INZ's AIP requirements.

Specific questions / instructions for Provider

INZ wishes to conduct four to five fishing vessel audits per year for the next two financial years.

The exact number will be agreed between KPMG and MBIE as they come due.

Additional Information e.g. risks to Participating Agency, additional contact information

KPMG has conducted a number of audits of fishing vessels on behalf of INZ. The requirements of these audits necessitate a high level of understanding of the relevant immigration instructions. As such, the renewal of the existing arrangement would minimise the risk to MBIE of errors or omissions during the required audits.

Timeframes

[What turnaround is required for the Estimate or Quote?]

INZ wishes to conduct two further audits before the end of the current financial year. Due to the considerable amount of work involved in each audit the timeframe for renewing this agreement is short if we wish to conduct audits before the end of the financial year. Therefore we need to complete this process by 31 March 2016.

[When are the Services required?]

April and March 2016 and for the 2016-17 financial year.

Indicative budget

$20,000 per audit

Provider liability cap

Use this box if the Participating Agency wants to increase the liability cap of the Provider (e.g. for a high risk engagement) above what is set out in the Services Agreement (refer to Part F of this Consultancy Services Order). Leave blank if the default liability cap(s) set out in Part F apply.

Part B – for Provider to complete

The Provider will complete Part B and email the form back to the client

Specific Services to be provided

This box is to be populated on a case-by-case basis for each Consultancy Services Order.

The Provider will review Part A and set out here a detailed description of the Services it is to provide to meet the objectives and in response to the other information in Part A.

The Services and Deliverables will be provided for the purposes contemplated in Part A.

We will complete audits of employers who employ foreign crew for fishing vessels to assess compliance with:

- Agreement in Principle (AIP) conditions
- requirements under the immigration instructions
- terms of the crew members' employment agreements.

Our Approach

In conducting this audit we will:

- perform a desktop audit of documentation provided to us by the vessel operator
- perform a site visit to inspect conditions on board the vessel
- interview key personnel including the vessel operator and captain
- interview a sample of crew
- discuss our observations with the vessel operator to ensure factual accuracy and obtain management comments from them regarding any areas of non-compliance identified.

Deliverables

The deliverables from this audit will be a report containing:

- a compliance summary according to the AIP and legislative requirements
- an explanation of all identified areas of non-compliance
- comments from the fishing vessel's management regarding the report.

Can you confirm that the Nominated Personnel (if any) is available to provide the Services?	**Yes**
Can you confirm that the timeframe is acceptable?	**Yes**

Estimate / Quote

Charges	$18,000
Administration Fee (1% of Charges)	$180
Expenses	$1,800
Total	$19,980
Identify whether the Total is an Estimate / Quote and the method that the Charges have been calculated	*Expenses have been estimated based of costs incurred from prior engagements.*

Additional information / assumptions:

Expenses will be billed at cost and will cover:

- transport to and from ports to conduct vessel inspection and crew interviews
- accommodation (if necessary)
- meals
- translator services.

All expenses will be agreed with MBIE prior to being incurred.

Conflict of Interest declaration and Additional Information

I, *David Sinkins* have made diligent inquiry whether *KPMG* has any actual, potential or perceived Conflict of Interest were it to provide the Services described in this Consultancy Services Order and I have disclosed any actual, potential or perceived Conflict of Interest and how it will be managed below:

KPMG provides other assurance services to MBIE. We have reviewed these engagements and do not believe they present any actual, potential or perceived conflicts of interest.

Prior to each audit, KPMG will complete a conflict check against the vessel operators. If we identify a conflict, we will notify MBIE immediately and agree a conflict management plan.

Additional information

Part C – Variations to Part A
LEAVE BLANK WHEN ISSUING CONSULTANCY SERVICES ORDER
The client will complete Part C if they wish to change any details in Part A

Revised scope and/or timeframe

Part D – Variations to Part B
LEAVE BLANK WHEN ISSUING CONSULTANCY SERVICES ORDER
The Provider will complete this only if and when it receives a Variation per Part C above from the Participating Agency

Revised Estimate	
Revised Charges	$
Revised Administration Fee (1% of Charges)	
Revised Expenses	$
Total	$
Identify whether the Total is an Estimate / Quote and the method that the Charges have been calculated	

Additional information / assumptions:

Part E – Acceptance
LEAVE BLANK WHEN ISSUING CONSULTANCY SERVICES ORDER
The Provider and Participating Agency to complete on acceptance of this Consultancy Services Order

Name of Provider's authorised signatory	**David Sinkins**
Signature of authorised signatory	
Participating Agency accepts and authorises this Consultancy Services Order	**[Yes/No]**
Name of Participating Agency's authorised signatory	Michael Carley
Signature of authorised signatory	
Date of acceptance	14. 3. 2016
Client's job reference or purchase order number	**[if required]**

Part F – Terms

THE PROVIDER AND PARTICIPATING AGENCIES ARE NOT PERMITTED TO AMEND THIS PART F.

*This Part F contains an extract of selected terms and conditions from the Services Agreement (the **Agreement**). Clause, schedule and paragraph references have been updated to refer to clauses, schedules and paragraphs in this Part F where applicable. For the full terms and conditions that govern the Services, please refer to the Agreement.*

1. Services

1.1 Services

(a) The Provider will provide Services to each Participating Agency in accordance with the terms of this Agreement (including any Consultancy Services Order).

(b) The Provider will use all reasonable endeavours to ensure that, on the date the Documentation is provided under any Consultancy Services Order, such Documentation is in a readable and readily useable format.

1.2 Requesting information

(a) A Participating Agency may contact the Provider, either orally or in writing, about the Provider performing Services before it decides whether to issue a Consultancy Services Order.

(b) Following such contact, the Provider must provide such information reasonably requested by the Participating Agency at no cost to the Participating Agency.

1.3 Consultancy Services Order

(a) Each time a Participating Agency wishes to engage the Provider to perform Services, those Services will be subject to a Consultancy Services Order recording the terms agreed by those parties for the performance of those Services.

(b) Each Consultancy Services Order must be substantially in the form prescribed in Schedule 2 (Consultancy Services Order) – *refer to the Agreement.*

(c) Each Consultancy Services Order must record the nature and detail of the Charges, including amounts and/or formula for calculating such Charges.

1.4 Agents may procure Services

A Participating Agency may, by notice to the Provider and the CoE, appoint one or more third parties to procure Services under a Consultancy Services Order on the Participating Agency's behalf and/or receive invoices, as if that agent was a Participating Agency, provided that any such procurement is for the sole benefit of the Participating Agency.

1.5 Process for issuing and responding to a Consultancy Services Order

(a) If a Participating Agency wishes to engage the Provider to perform Services, it will complete Part A of the Consultancy Services Order and email it to the Provider.

(b) After receiving a Consultancy Services Order, the Provider must, subject to clause 2.1(a) and 3.1, complete the information specified in Part B of the Consultancy Services Order, and email it to the Participating Agency.

(c) Upon receipt of the completed Part B of the Consultancy Services Order, the Participating Agency must promptly advise the Provider in writing if the completed Part B is acceptable and the Provider may not commence performing the Services until this approval has been given.

1.6 Timely performance

The Provider will ensure that the Services to be performed under a Consultancy Services Order are provided on or before the date specified for performance (if any) in the Consultancy Services Order and, if no time is specified, within a reasonable time after the issue of the Consultancy Services Order.

1.7 Delay

(a) If the Provider considers that it is (or is likely to be) prevented or delayed from achieving a date or time for performance (Milestone) specified in a Consultancy Services Order (Delay), it will:

(i) immediately provide notice verbally or in writing to the Participating Agency, setting out:

(A) the cause of the Delay and its expected duration;

(B) the effect of the Delay on its ability to perform its obligations under the Consultancy Services Order (including any future Milestones);

(C) what extension, if any, to the relevant Milestone is being sought; and

(D) what steps, if any, the Participating Agency may take to mitigate the effect of the Delay; and

(ii) take all reasonable steps necessary (including by the allocation of additional resources) to eliminate or avoid the Delay and, in all cases, mitigate its effects.

(b) If the Provider and Participating Agency agree that the Delay is acceptable or wish to amend the Milestone:

(i) the Provider will complete and submit Part C of the Consultancy Services Order to the Participating Agency; and

(ii) upon receipt of the completed Part C of the Consultancy Services Order, the Participating Agency must promptly advise the Provider in writing if the completed Part C is acceptable.

(c) If the Provider does not achieve the Milestone (as amended from time to time) and the Participating Agency's acts or omissions, or those of its Personnel or third parties acting on its behalf, have not caused the Provider to fail to achieve the Milestone, the Participating Agency may, without prejudice to any other right or remedy, suspend payment of any Charges relating to that Consultancy Services Order until the Provider remedies the relevant failure.

1.8 Service standards

(a) The Provider must provide the Services to a standard that reaches or exceeds the Service Levels specified in Schedule 3 (Performance Management).

(b) In addition, the Provider must:

(i) provide the Services diligently, efficiently, effectively and in accordance with Industry Best Practice;

(ii) ensure that the Services to be performed under a Consultancy Services Order are provided on or before the date specified for performance (if any) in the Consultancy Services Order and, if no time is specified, within a reasonable time after the issue of the Consultancy Services Order;

(iii) ensure that all Documentation, information and advice (including Documentation, information and advice provided prior to the issue of a Consultancy Services Order) provided to a Participating Agency or published on the Provider Database is Fit for Purpose so that, without limitation, it contains sufficient content and detail to enable the Participating Agency to make use of it for the purpose for which it was requested;

(iv) act in the best interests of the Participating Agency who issued the Consultancy Services Order in the provision of Services to that Participating Agency;

(v) provide information as outlined in Schedule 6 (Reporting) to the CoE – *refer to the Agreement*;

(vi) provide and maintain its information on the Provider Database;

(vii) keep the CoE informed of all matters of which it ought reasonably to be made aware, and provide such information in relation to the provision of Services as may reasonably be required by the CoE or by any Participating Agency with respect to the provision of Services to that Participating Agency, including under any Consultancy Services Order between the Provider and the Participating Agency; and

(viii) provide Services to the reasonable satisfaction of the Participating Agency who issued the Consultancy Services Order (as reported to the CoE).

2. Estimates and Quotes

2.1 Estimates and Quotes

(a) The Provider must provide an Estimate or Quote for all Services to be provided under a Consultancy Services Order, unless the total Fees in respect of the Services under any Consultancy Services Order are likely to be less than $10,000 (exclusive of GST) or such other amount as determined by the CoE and notified to the Provider.

(b) Despite clause 2.1(a), if, during the course of providing the Services, the Provider becomes aware that the total Fees (excluding GST) are likely to exceed the amount referred to in clause 2.1(a), the Provider must provide an Estimate in accordance with clauses 2.1(f) and (g).

(c) All Estimates and Quotes will be provided at no cost to the Participating Agency.

(d) The Participating Agency may at its sole discretion:

(i) request a Quote or Estimate on a lump sum or maximum fee or other basis; and/or

(ii) give one or more providers on the Panel an opportunity to provide an Estimate or Quote based on the maximum rates recorded in their respective agreements with the CoE or, in the case of the Provider, the Rates in this Agreement.

(e) The purpose of clause 2.1(d)(ii) is to allow a Participating Agency, at its discretion, to run a small secondary procurement process if the Services required are sufficiently extensive to merit obtaining an Estimate or Quote from more than one provider on the Panel. For the avoidance of doubt, a secondary procurement process is not mandatory for Participating Agencies.

(f) All Estimates and Quotes must specify the estimated timeframe to perform the Services requested in the Consultancy Services Order and the Rates of Personnel providing the Services and include any Charges likely to be incurred in providing the Services.

(g) All Quotes and Estimates must be provided to the Participating Agency in writing and must be included in the Consultancy Services Order.

2.2 If Charges exceed the Estimate

(a) If during the course of providing the Services under a Consultancy Services Order, the Provider becomes aware that the total Charges (excluding GST) are likely to exceed the Estimate, the Provider must give written notice to the Participating Agency using Part D of the Consultancy Services Order as soon as the Provider becomes so aware, but no later than the time the costs accrued or incurred reach 80% of the Estimate.

(b) The notice under clause 2.2(a) must specify a revised Estimate for the Services and include the reason the total Charges will exceed the original Estimate.

(c) A Participating Agency has sole discretion whether to approve a revised Estimate and must act reasonably when deciding whether to approve a revised Estimate.

(d) When a revised Estimate is approved, the Participating Agency must provide written notice of the same to the Provider.

(e) If a Provider has provided an Estimate to a Participating Agency for Services, the Participating Agency is not liable to pay the Provider any amount exceeding the Estimate unless the Participating Agency has approved a revised Estimate.

2.3 If Charges exceed the Quote

(a) The Provider acknowledges that neither the CoE nor the Participating Agency are obliged to pay any Charges to the Provider in relation to Services performed under a Consultancy Services Order if those Charges exceed any Quote provided in relation to that Consultancy Services Order, unless the Participating Agency has given its prior written consent in accordance with clause 2.3(b).

(b) If the Participating Agency agrees to allow the Provider to increase the Charges:

(i) the Provider will complete and submit Part D of the Consultancy Services Order to the Participating Agency; and

(ii) upon receipt of the completed Part D of the Consultancy Services Order, the Participating Agency must promptly advise the Provider (in writing) if the completed Part D is acceptable.

3. Conflicts of Interest

3.1 Conflicts of Interest

(a) The Provider must, upon receipt of a Consultancy Services Order, make diligent inquiry whether it has any actual, potential or perceived Conflicts of Interest if it were to provide the Services specified in the Consultancy Services Order and, if no such Conflict of Interest exists, the Provider must provide confirmation to that effect to the Participating Agency that issued the Consultancy Services Order.

(b) If the Provider has an actual, potential or perceived Conflict of Interest, the Provider must immediately notify the Participating Agency who issued the Consultancy Services Order and must not begin performing the Services without the prior written approval of the Participating Agency.

(c) The Provider must take all reasonable steps to ensure that:

(i) a situation does not arise that might result in an actual, potential or perceived Conflict of Interest; and

(ii) any Personnel or Subcontractors of the Provider do not engage in any activity or obtain interests that might result in the Provider or such Personnel or Subcontractors having an actual, potential or perceived Conflict of Interest,

that cannot be managed to the satisfaction of the Participating Agency who issued the Consultancy Services Order.

(d) If, after commencing Services under any Consultancy Services Order, the Provider becomes aware of any matter, circumstance, interest or activity that may give rise to any actual, potential or perceived Conflict of Interest, the Provider must immediately notify the Participating Agency of all relevant details and must immediately cease work on the Services until such time as the Participating Agency provides written notice confirming the Provider may continue to perform the Services or terminates the engagement of the Provider in respect to the Services to be performed under the relevant Consultancy Services Order in accordance with clause 3.1(e).

(e) If the Participating Agency who issued a Consultancy Services Order considers that the Provider has an actual Conflict of Interest of sufficient gravity that the Provider can no longer perform Services for it, the Participating Agency may, by written notice to the Provider, terminate the Consultancy Services Order with immediate effect on the date of termination specified in that notice.

(f) Any approval or notice given by the Participating Agency pursuant to clause 3.1(b) or 3.1(d) may require the Provider to take steps reasonably required by the Participating Agency to manage the Conflict of Interest, and the Provider must provide written notice confirming its acceptance of those steps before it may commence or continue to provide the Services under that Consultancy Services Order.

4. Responsibilities

4.1 Provider responsibilities

In addition to its other obligations under this Agreement, the Provider will:

(a) respond promptly, accurately and adequately to any requests for information made by any Participating Agency in relation to the Services, including requests for advice;

(b) in performing Services for a Participating Agency under a Consultancy Services Order comply with all privacy and other policies and guidelines issued by the Participating Agency and notified or made available to the Provider;

(c) obtain, maintain and comply with any governmental, regulatory or other approvals, permissions, consents, licences, and requirements necessary to provide the Services and perform its obligations under this Agreement;

(d) comply with all Laws at all times during the Term in so far as they relate to the provision of the Services, including the Privacy Act 1993 and all applicable consumer laws;

(e) ensure that it and its Personnel providing the Services do not access any Participating Agency's information or systems except to the extent necessary to provide the Services and for no other purpose;

(f) as soon as is practicable, notify the CoE and all other relevant Participating Agencies of any problems or issues that arise in relation to the performance of its obligations under this Agreement, including any problems or issues that will, or are likely to, affect the provision or quality of the Services or the ability of the Provider to perform its obligations under this Agreement;

(g) provide and maintain information in the Provider Database as detailed in Schedule 7 (Provider Database) – *refer to Agreement*;

(h) without limiting any other provision of this Agreement, use all reasonable endeavours to avoid damaging or adversely affecting any Participating Agency's reputation; and

(i) conducting the Agency Satisfaction Survey by asking Participating Agencies the questions recorded in Annexure B of Schedule 5 (Governance) within 5 Business Days of the Services in each CSO being provided – *refer to the Agreement*

4.2 Participating Agencies' responsibilities

Each Participating Agency has the following responsibilities in relation to the Services:

(a) to manage its operational relationship with the Provider, including in relation to the fulfilment of each Consultancy Services Order;

(b) to notify the Provider of all relevant policies, guidelines and procedures of the Participating Agency that the Provider must comply with when performing the Services under each Consultancy Services Order;

(c) to provide adequate instructions and information to the Provider to allow it to perform the Services under each Consultancy Services Order;

(d) to make timely decisions where approvals or consents are reasonably sought by the Provider in performing the Services under each Consultancy Services Order;

(e) to pay the Charges; and

(f) to use its best efforts to resolve any dispute directly with the Provider before involving the CoE in accordance with clause 12.

4.3 Transition

(a) The Provider will manage the transition of each Participating Agency to the supply arrangements contemplated by this Agreement in a manner which minimises disruption to, or adverse impact on, that Participating Agency and other Participating Agencies.

(b) If a Participating Agency has one or more pre-existing engagements with the Provider that require the Provider to provide services of a similar nature to the Services to the Participating Agency after the Commencement Date, the Provider and Participating Agency may agree to transition those engagements onto the terms of this Agreement.

5. Resourcing

5.1 General requirements

The Provider will provide and maintain sufficient resources (including human resources, equipment, telecommunications connectivity, premises and other facilities) to enable it to perform its obligations on time and otherwise in accordance with this Agreement.

5.2 Provider's Nominated Personnel

(a) The Participating Agency may, in any Consultancy Services Order, nominate specific Personnel (Nominated Personnel) to be the primary providers or to supervise the delivery of the Services.

(b) If any Nominated Personnel nominated in a Consultancy Services Order are not available to provide or supervise the Services requested, the Provider must immediately notify the Participating Agency and provide details of other Personnel (if any) with the necessary skills and experience to provide or supervise the Services requested pursuant to that Consultancy Services Order.

(c) Notice given under clause 5.2(b) must specify the period for which the Nominated Personnel will continue to be unavailable.

(d) Upon receipt of notice under clause 5.2(b), the Participating Agency must notify the Provider whether the replacement Personnel are acceptable.

(e) The Participating Agency is under no obligation to accept any replacement Personnel and, if it does not approve the replacement Personnel, the Provider may not commence or continue providing the Services.

5.3 Personnel

(a) The Provider will ensure that all of its Personnel who are engaged in the performance of the Provider's obligations under this Agreement:

(i) have the requisite skills, expertise, qualifications and experience;

(ii) have, before performing any such obligations, obtained all security clearances and passed all probity checks required by, or necessary to provide the Services to, a Participating Agency;

(iii) comply with all health, safety, security and other policies, codes of conduct, procedures and reasonable directions as may be reasonably required by a Participating Agency from time to time; and

(iv) will carry out their respective duties with due care, skill and diligence.

(b) The Participating Agency will notify the Provider of any security clearances and probity checks required by, or necessary to provide the Services to, that Participating Agency.

5.4 Subcontracting

(a) The Provider will not subcontract the performance of all or part of the Services or any of its other obligations under this Agreement, except with the prior written consent of the Participating Agency for whom it is providing Services.

(b) The Provider is solely responsible for the selection of each Subcontractor and must ensure that each Subcontractor is creditworthy, qualified and has the relevant experience to perform the work it is required to carry out for the Provider.

(c) To the extent permitted by Law, the Provider is and remains fully responsible for any act or omission of any Subcontractor.

(d) The Provider must ensure that each Subcontract contains obligations on the Subcontractor that are consistent with the relevant terms of this Agreement, including in relation to clauses 9 (Confidentiality), 10 (Intellectual Property), 15 (Audit) – *refer to the Agreement*, and 13 (Termination) and Schedule 3 (Performance Measurement).

(e) If, in the CoE's reasonable opinion, a Subcontractor is:

(i) materially not performing in accordance with the terms of this Agreement, the CoE may, by notice to the Provider, require the Provider to procure that the Subcontractor performs the relevant obligations within 10 Business Days, failing which the CoE may, by notice to the Provider, require the Provider to remove that Subcontractor; or

(ii) a material threat to the health, safety or security of the Personnel or property of any Participating Agency, or has breached security or confidentiality requirements of this Agreement, the CoE may, by notice to the Provider, require the Provider to remove that Subcontractor,

and the Provider will ensure the immediate removal of that Subcontractor.

6. Changes

6.1 Change procedure

Each Participating Agency who issues a Consultancy Services Order may agree any variations to that Consultancy Services Order with the Provider using Part C of the Consultancy Services Order.

7. Price and payment

7.1 Calculation of Charges

The Charges will be calculated in accordance with the terms of Schedule 2 (Pricing).

7.2 Participating Agency to pay for Services

(a) Each Participating Agency will pay the Provider the Charges applicable to any Services procured by that Participating Agency on the terms of this clause 7.

(b) The Charges comprise the total amount payable by Participating Agencies for the Services.

7.3 Invoicing and payment

Except as otherwise provided in Schedule 2 (Pricing) or as agreed with a Participating Agency in any Consultancy Services Order, the Provider will invoice:

(a) each Participating Agency; or

(b) if the Participating Agency has appointed an agent to purchase Services on its behalf in accordance with clause 1.4 and the Participating Agency has instructed the Provider in writing to invoice that agent,

for the Charges applicable to that Participating Agency and the Participating Agency will pay those Charges, in accordance with the following terms:

(c) the Provider will render one itemised invoice to the Participating Agency at the end of each month during the Term for all Services performed during that month specifying (as applicable):

(i) the nature and amount of the Fees or other applicable fees and fee structures;

(ii) the Personnel and their hourly rate;

(iii) the hours billed (by Personnel and in the aggregate);

(iv) the nature and amount of any Expenses (including any third party Charges to be passed on to the Participating Agency);

(v) the amount representing the Administration Fee;

(vi) how much of the Estimate or Quote has been used;

(vii) a brief description of the Services provided during that month; and

(viii) any other matters the Participating Agency may reasonably request;

(d) each correctly rendered invoice will be payable on or before the 20th day of the month following the month in which the invoice was received;

(e) the Participating Agency will have no obligation to pay any Charges which are invoiced more than 90 days after the date that such amount was required to be invoiced pursuant to this clause 7.3; and

(f) the Provider may only invoice a Participating Agency for any Expenses at the cost actually incurred by the Provider.

7.4 Invoice disputes

If a Participating Agency or the Provider disputes an invoice:

(a) it may withhold the disputed sum and associated Administration Fee until the dispute is resolved;

(b) the dispute will be resolved in accordance with clause 12; and

(c) it will pay the undisputed portion in accordance with clause 7.3.

The Provider will not be excused from performing its obligations under this Agreement while an invoice is disputed by a Participating Agency.

7.5 Taxes

(a) Except for any GST payable by a Participating Agency, any present or future tax, levy, impost, duty, charge, assessment or fee of any nature (including applicable interest and penalties) payable in connection with this Agreement under any Law is to be paid by the Provider and not passed on to a Participating Agency unless otherwise expressly agreed in writing by the Participating Agency.

(b) The Participating Agency may deduct from any payment to be made to the Provider any withholding taxes or other deductions that it is required by Law to make.

7.6 Suspension of payment

(a) Without prejudice to any other right or remedy that may be available to a Participating Agency, a Participating Agency may suspend payment of all or any part of the Charges if the CoE has notified the Provider that the Provider is in Material Breach, until that Material Breach is remedied.

(b) If the Material Breach is not capable of remedy the Participating Agency and the Provider agree to treat the Charges as being in dispute and clause 13 will apply.

8. Warranties

8.1 General warranties

Each party represents, warrants and undertakes that:

(a) it has full power, capacity and authority to execute, deliver and perform its obligations under this Agreement;

(b) it has, and will continue to have, all the necessary consents, permissions, licences and rights to enter into and perform its obligations under this Agreement; and

(c) this Agreement constitutes its legal, valid and binding obligations and is enforceable in accordance with its terms.

8.2 Provider's warranties

The Provider represents, warrants and undertakes that:

(a) it will perform its obligations under this Agreement with due care, skill, promptness and diligence at all times;

(b) it has, and will have throughout the Term, sufficient Personnel to supply the Services and to perform its other obligations under this Agreement;

(c) it, and each of its Personnel engaged in the performance of the Services, has, and will have throughout the Term, the necessary expertise and all necessary governmental, regulatory or other approvals, permissions, consents, licences, qualifications, accreditations and requirements to provide the Services and perform its other obligations under this Agreement;

(d) it will comply with the requirements of all Laws as they relate to the provision of Services by the Provider;

(e) the possession or use of any item of Intellectual Property supplied or licensed by it, or the use of any item of Intellectual Property by it to perform its obligations under this Agreement, will not infringe the rights of any third party;

(f) all Documentation (and any other information or advice supplied by it to a Participating Agency) will be accurate, complete and Fit for Purpose;

(g) there are no existing agreements, undertakings or arrangements which prevent it from entering into this Agreement, or which would impede the performance of its obligations under this Agreement, or that it would breach by entering into this Agreement;

(h) it is not (and nor is any of its Personnel) a party to any litigation, proceedings or disputes which could adversely affect its ability to perform its obligations under this Agreement;

(i) it has not offered any inducement in connection with the entering into or negotiation of this Agreement, and will not offer any inducement in connection with the supply of Services to Participating Agencies;

(j) in responding to the RFP and establishing the Charges, such decisions and prices were arrived at independently and without collusion; and

(k) all representations, statements and warranties made in the RFP Response were true and correct when provided to the CoE.

8.3 **Continuous application**

The warranties, representations and undertakings set out in clause 8.2 will be deemed to be given by the Provider continuously throughout the Term.

8.4 **Notification**

Each party will promptly notify the other if at any time during the Term it breaches any of the warranties, representations and undertakings in this clause 8.

8.5 **Other warranties excluded**

All warranties (statutory, express or implied) which are not expressly referred to in this Agreement are excluded to the fullest extent permitted by Law.

9. Confidentiality

9.1 **Protection of Confidential Information**

(a) Subject to clauses 9.1(c) and 9.2, the Provider and each Participating Agency will treat as confidential and not disclose to any third party nor use for its own benefit any Confidential Information that is the Confidential Information of the other (or, in the case of the Provider, that is the Confidential Information of any Participating Agency).

(b) The Provider will:

(i) ensure that all Confidential Information of the CoE or any other Participating Agency (and any backup archives containing such Confidential Information) in the possession or control of the Provider from time to time is kept secure and managed and protected and only disclosed or otherwise dealt with in accordance with this Agreement;

(ii) not use any Agency Information for its own purposes or for any purposes different from those contemplated by this Agreement; and

(iii) advise the CoE in writing if any Confidential Information of the CoE or any other Participating Agency will be transferred or stored outside New Zealand before such information is transferred and will confirm that the requirements of this clause 9.1 will be met while such Confidential Information is stored outside New Zealand.

(c) Clause 9.1(a) does not prevent the disclosure of Confidential Information:

(i) if that information was known, or becomes known, to the public through no act or default of the recipient;

(ii) that the recipient is required by Law or parliamentary practice (including parliamentary questions) to disclose, or to a Select Committee or to a Minister of the Crown, so long as the recipient provides notice of the required disclosure promptly upon receipt of notice of the required disclosure (if it is permitted to do so by Law);

(iii) that was lawfully known to the recipient prior to the date it was received;

(iv) that becomes available to the recipient from a source other than a party to this Agreement or a Participating Agency, provided that the recipient has no reason to believe such source is itself bound by an obligation of confidence to the person that disclosed that information or is otherwise prohibited under Law from disclosing such information,

(v) to any Professional Adviser for the purposes of rendering professional services to a party in relation to this Agreement;

(vi) to the extent that such disclosure is authorised by this Agreement; or

(vii) if such disclosure is approved for release with the consent of the party from whom the Confidential Information is first received.

9.2 **Limited disclosure**

(a) The Provider may, subject to clause 9.2(d), disclose the Confidential Information of a Participating Agency to its Subcontractors, Personnel, Related Entities and Professional Advisers who need to know the same for the sole purpose of enabling the Provider to perform its obligations and exercise its rights under this Agreement.

(b) A Participating Agency may, subject to clause 9.2(d), disclose the Confidential Information of the Provider to its third party suppliers, Personnel and Professional Advisers and any other Participating Agency (including the CoE) who need to know the same in connection with the Services.

(c) The Provider will not disclose a Participating Agency's Confidential Information to any of its Subcontractors, Related Entities or Professional Advisers, and a Participating Agency will not disclose the Provider's Confidential Information to any of its third party suppliers or Professional Advisers, unless the recipient has given a written confidentiality undertaking to the disclosing party in terms substantially similar to those set out in this clause 9.

(d) Any undertaking given pursuant to clause 9.2(c) will be provided to the other party to this Agreement or the relevant Participating Agency on request.

10. Intellectual Property

10.1 **Intellectual Property owned by Provider**

(a) The CoE acknowledges that all:

(i) Intellectual Property held by the Provider before the Commencement Date;

(ii) Intellectual Property developed independently from this Agreement by the Provider, and that is not developed, commissioned or created under or in connection with this Agreement; and

(iii) adaptations and modifications to the Intellectual Property described in clauses 10.1(a)(i) and (ii),

remains the Provider's sole and exclusive property (Provider IP).

(b) To the extent that a Participating Agency needs to use any of the Provider IP to receive the full benefit of the Services, the Provider grants to the Participating Agency a royalty-free, non-exclusive licence (including, if agreed in a Consultancy Services Order, the right to sublicense) to use, copy, modify and distribute during the Term any Provider IP provided to a Participating Agency by or on behalf of the Provider.

10.2 **Intellectual Property owned by Participating Agencies**

(a) The Provider acknowledges that each Participating Agency or its licensor has, and continues to have, sole and exclusive ownership of all Intellectual Property rights in all of the Agency Information together with all adaptations and modifications of such Agency Information (Pre-contract Participating Agency IP).

(b) All Intellectual Property created or developed by the Provider or its employees or Subcontractors in performing the Services and developing the Documentation will be owned by the Participating Agency that issued the Consultancy Services Order for those Services from the date the Intellectual Property is created or developed (Post-contract Participating Agency IP and, together with the Pre-contract Participating Agency IP, the Participating Agency IP).

(c) If the Provider (or any of its Subcontractors) has under any Law any right in or claim to any of the Participating Agency IP or holds any of the Participating Agency IP, the Provider (by itself and for its Subcontractors):

(i) assigns to the Participating Agency all of its rights, title and interest in and to that Participating Agency IP from the date it was created or developed; and

(ii) waives all right of lien or similar rights as may now or later be claimed in that Participating Agency IP; and

(iii) waives all of its moral rights under Part 4 of the Copyright Act 1994 in that Participating Agency IP,

and the Provider will sign all documents and do all acts and things that are necessary to give effect to this clause 10.2(c).

(d) To the extent that the Provider needs to use any of the Participating Agency's IP for the purpose of performing its obligations under this Agreement, the CoE will use its reasonable endeavours to procure the grant by the Participating Agency to the Provider, subject to any written direction given by the CoE or the Participating Agency, of a royalty-free, non-exclusive, non-transferable licence to use and store that Participating Agency's IP for the sole purpose of performing its obligations under this Agreement during the Term.

10.3 **Intellectual Property owned by third parties**

(a) To the extent that the Provider needs to use any Intellectual Property held or owned by a third party (Third Party IP) in performing the Services under a Consultancy Services Order issued by a Participating Agency, the Provider will use its best endeavours to obtain the fullest rights of use and licence of that Third Party IP (on terms and at a cost to be agreed with the Participating Agency) as are necessary for the performance of those Services for the benefit of the Participating Agency.

(b) The CoE acknowledges that the Provider may have limited ability to obtain rights and/or a licence to use any Third Party IP and, where the Provider, using its best endeavours, cannot obtain appropriate rights and/or a licence for a Participating Agency to use that Third Party IP, the warranty in clause 8.2(e) applies.

11. Liability

11.1 **Indemnity**

(a) The Provider will, to the extent permitted by Law, indemnify the Participating Agency who issued a Consultancy Services Order against all Losses suffered or incurred by that Participating Agency as a result of any:

(i) unlawful, malicious or negligent act or omission by the Provider;

(ii) personal injury, sickness, death or loss of, or damage to, tangible property due to an act or omission of the Provider; or

(iii) any other breach by the Provider of its obligations under this Agreement.

(b) The Provider will, subject to clause 11.1(c), indemnify the CoE and the Participating Agencies against all Losses suffered or incurred by the CoE or a Participating Agency as a result of any claim that the possession or use of any Intellectual Property supplied or licensed by the Provider, or the use of any Intellectual Property used to provide the Services, infringes any third party's rights.

(c) The Provider will have no liability under clause 11.1(b) to the extent that any IP Claim arises from any:

(i) modification by the Participating Agency of any item of Intellectual Property supplied or licensed by the Provider without the approval of the Provider;

(ii) use by a Participating Agency of Intellectual Property supplied or licensed by the Provider for any purpose disallowed by this Agreement or the applicable Intellectual Property licence (but only if the licence has been provided to the Participating Agency prior to such use); or

(iii) use of Intellectual Property used to provide the Services if and to the extent that Intellectual Property was supplied by a Participating Agency or the CoE.

11.2 **IP Claims**

(a) In the event of a claim under clause 11.1(b) (an IP Claim):

(i) the affected Participating Agency will give the Provider notice of the IP Claim as soon as practicable and, to the extent permissible by Law, permit the Provider (at the Provider's cost) to handle all negotiations for settlement and to control and direct any litigation that may follow (Control of the IP Claim);

(ii) if the Provider has Control of the IP Claim:

(A) the affected Participating Agency will provide all reasonable assistance to the Provider (at the Provider's cost) in the handling of any negotiations and litigation; and

(B) the Provider will keep the affected Participating Agency informed of the defence or negotiations of the IP Claim and diligently conduct any litigation or negotiations, using competent counsel and in a manner that does not adversely affect the name or reputation of the CoE or any Participating Agency;

(iii) the Provider will not enter into any settlement or compromise in relation to the IP Claim without the prior written consent of the affected Participating Agency (which will not be unreasonably withheld); and

(iv) the Provider will notify the CoE of the IP Claim, and the outcome within 5 Business Days of the claim being concluded.

(b) If any IP Claim disrupts a Participating Agency's use or enjoyment of a Service, the Provider will (unless otherwise requested by the CoE), at its own expense and at its option, immediately:

(i) obtain for the Participating Agency the legal right to continued use of the infringing materials; or

(ii) replace, modify or resupply the infringing materials so that there is no further infringement, without adversely affecting the performance or functionality of those materials.

11.3 **Maximum liability of Participating Agency**

In addition to its obligation to pay the Charges, the maximum aggregate liability of each Participating Agency to the Provider under or in connection with a Consultancy Services Order will be, in respect of all Losses, limited to the total Charges paid and payable under the Consultancy Services Order.

11.4 **Maximum liability of the Provider**

The maximum liability of the Provider to the CoE and a Participating Agency for all Losses under or in connection with a Consultancy Services Order in respect of all claims will not exceed:

(a) in relation to the sub-categories for which the Provider has been appointed as a Tier 1 Provider in the Appointment Letter, the greater of:

(i) 10 times the total Charges paid and payable under the Consultancy Services Order;

(ii) $5,000,000; and

(iii) any greater amount or multiple set out in the Consultancy Services Order; and

(b) in relation to the sub-categories for which the Provider has been appointed as a Tier 2 Provider in the Appointment Letter, the greater of:

(i) 10 times the total Charges paid and payable under the Consultancy Services Order;

(ii) $2,000,000; and

(iii) any greater amount or multiple set out in the Consultancy Services Order.

11.5 **Exclusions on liability**

The limitations on liability set out in clauses 11.3 and 11.4 will not limit the liability of:

(a) the Provider under clauses 11.1(a) and 11.1(b) (other than in respect of negligent acts or omissions under clause 11.1(a)(i) and breach by the Provider of its obligations under this Agreement under clause 11.1(a)(iii), which are subject to the limitations of liability in clauses 11.3 and 11.4);

(b) the Provider for any fraudulent act or omission; or

(c) either party for any breach of confidentiality.

11.6 **Categories of loss**

(a) Irrespective of how liability arises, neither the CoE, the Provider nor any Participating Agency who issued any Consultancy Services Order to the Provider will, under any circumstances, be liable for any indirect loss or damage (including consequential loss) arising under or in connection with this Agreement.

(b) Neither the CoE nor any Participating Agency will, under any circumstances, be liable for any loss of profits or loss of revenue suffered by the Provider in connection with this Agreement.

(c) Losses relating to administration, operations, fines and penalties arising from the Provider's act or omission will be considered direct loss or damage that the CoE is not prevented from recovering by any term of this Agreement.

(d) For the avoidance of doubt, clause 11.3(a) will not preclude the CoE taking action to recover any unpaid Administration Fee.

11.7 Force majeure

(a) The CoE, the Provider and any Participating Agency who issues a Consultancy Services Order to the Provider (in this clause 11.7, referred to as a party) will not be liable to the other for any failure to perform its obligations under this Agreement during the time and to the extent that such performance is prevented, wholly or substantially, by reason of any Force Majeure Event.

(b) The party subject to the Force Majeure Event (the non-performing party) must:

(i) notify the other party (and, if the non-performing party is the Provider, all affected Participating Agencies) as soon as practicable after the Force Majeure Event occurs and provide full information concerning the Force Majeure Event, including the extent of its inability to perform, an estimate of the time likely to be required to overcome the Force Majeure Event and the steps the non-performing party will take to comply with clauses 11.7(b)(ii) and 11.7(b)(iii);

(ii) use all reasonable endeavours to mitigate and remedy the effect of the Force Majeure Event and minimise the impact of the event on the other party (including, if the non-performing party is the Provider, on the Participating Agencies); and

(iii) use all reasonable endeavours to perform its obligations under this Agreement as far as is practicable,

and a Participating Agency will not be required to pay Charges to the extent that the Provider fails to perform its obligations to that Participating Agency due to a Force Majeure Event.

(c) If the non-performing party affected by the Force Majeure Event is the Provider, each affected Participating Agency may, to the extent that any Service requested by the Participating Agency under a Consultancy Services Order has not been delivered and delivery has, or will be, delayed by the Force Majeure Event, terminate the Consultancy Services Order for the supply of that Service, by notice to the Provider within five Business Days following receipt by the Participating Agency of notice of the Force Majeure Event, at no cost to the Participating Agency, subject to the Participating Agency paying for Services delivered up to the date of the Force Majeure Event.

11.8 Insurance

(a) During the Term and for a period of two years following the termination of this Agreement, the Provider will, at its own expense, ensure that it maintains adequate insurance in respect of its potential liability for loss or damage under this Agreement in accordance with Industry Best Practice, but as a minimum the Provider must hold professional indemnity insurance and public liability insurance in respect of the Services provided under this Agreement and other insurance to cover standard commercial risks (including in respect of Documentation which is the property of a Participating Agency and in the Provider's possession or control).

(b) The Provider will, at the CoE's request, promptly provide satisfactory evidence that it has complied with its obligations in this clause 11.8.

12. Dispute resolution

12.1 Dispute

In the event of any dispute, difference or question arising out of, or in connection with, this Agreement or its formation (a dispute):

(a) the relevant Participating Agency and the Provider will each use its best efforts to resolve the dispute through good faith negotiations and informal dispute resolution techniques, and will continue to perform its obligations under this Agreement as far as possible as if the dispute had not arisen, pending final settlement of the dispute; and

(b) neither the Participating Agency nor the Provider will commence any formal proceedings relating to the dispute unless it has complied with clause 12.2.

12.2 Escalation

(a) The Participating Agency and the Provider will each advise its respective Representative (or equivalent person) of a dispute on the day that the dispute arises.

(b) The Representatives will use their best efforts to resolve the dispute in accordance with clause 12.1(a).

(c) If the dispute is not resolved:

(i) within 10 Business Days, the dispute will be escalated to senior representatives of the Provider and the Participating Agency with delegated authority to resolve the dispute;

(ii) within a further 10 Business Days, the dispute will be escalated to the CoE's Manager, All-of-Government Contracts and the Provider's Chief Executive.

12.3 Mediation

(a) If a dispute is not resolved under clause 12.2, either party may, by written notice to the other, refer the dispute to mediation, or they may agree in writing to refer the dispute to mediation.

(b) The mediation will be conducted by a single mediator in accordance with the terms of the LEADR New Zealand Inc Standard Mediation Agreement and at a fee to be agreed by the parties.

(c) If the parties fail to agree on the identity of the mediator and/or the mediator's fee within five Business Days of referral of the dispute to mediation, the mediator will be chosen, and the mediator's fee determined, by the chairperson for the time being of LEADR New Zealand Inc (or his or her nominee).

12.4 Urgent relief

Nothing in this clause 12 will preclude either party from taking immediate steps to seek urgent relief before a New Zealand court.

13. Termination

13.1 Termination of Consultancy Services Order

The Participating Agency may terminate a Consultancy Services Order:

(a) for convenience by giving the Provider at least one month's prior written notice;

(b) by notice to the Provider with immediate effect on the date of termination specified in that notice, if the Provider commits a Material Breach which is:

(i) not capable of being remedied (and, for the avoidance of doubt, paragraphs (a) and (b) of the definition of "Material Breach" are deemed incapable of being remedied); or

(ii) capable of being remedied but which is not remedied to the satisfaction of the Participating Agency within 10 Business Days following the date of receipt by the Provider of the Participating Agency's notice of the Material Breach;

(c) in accordance with clause 3.1(e) (Conflict of Interest); or

(d) in accordance with clause 11.7(c) (Force Majeure Event).

13.2 Consequences of termination or expiry

(a) In the event of termination or expiry of this Agreement, no Participating Agency will be obliged to make any payment to the Provider except for any Charges payable for Services supplied pursuant to a Consultancy Services Order entered into on or before the effective date of expiry or termination.

(b) Termination or expiry will not, unless otherwise provided in this Agreement, affect:

(i) any rights and remedies available to either party which have accrued up to and including the date of termination or expiry; and

(ii) the provisions of this Agreement which expressly, or by their nature, survive termination or expiry, including clauses 14 (Entire agreement), 1.4 (Precedence – *refer to the Agreement*), 9 (Confidentiality), 10 (Intellectual Property), 15 (Audit - *refer to*

the Agreement), 11 (Liability), 12 (Dispute Resolution), 13 2 (Consequences of termination or expiry) and 19 (General - *refer to the Agreement*) and Schedule 1 (Definitions).

(c) After expiry or termination of this Agreement for any reason, each party will, within five Business Days of receiving notice from the other party, return all Documentation, Confidential Information or other property belonging to the party and (in the case of the Provider) to each Participating Agency that issued a Consultancy Services Order to the Provider (or destroy such Confidential Information, if requested), except if such Documentation, Confidential Information or other property is required to be retained by any Law.

14. Entire agreement

14.1 Entire agreement

(a) No other terms or conditions, including any conditions of sale, invoices or any other communication not included in a Consultancy Services Order (Communication), will be incorporated into this Agreement, even if at some later date the other party (including, in the case of the CoE, any other Participating Agency) signs or otherwise purports to accept those terms and conditions or the terms of that Communication.

(b) For the avoidance of doubt, and without limiting clauses 1 3(a) to 1.3(c) – *refer to the Agreement*:

(i) any Communication which is expressed or intended to operate as an indemnity, warranty, representation, undertaking, condition or other term of such a nature is hereby disapplied and excluded from this Agreement; and

(ii) any part of a Consultancy Services Order which describes the nature, scope, price or manner of delivery of Services will, subject to clause 14.1(b)(i), form part of this Agreement, but only to the extent that it does not conflict with any other part of this Agreement.

SCHEDULE 1: DEFINITIONS

In this Agreement, unless the context otherwise requires.

Administration Fee means the amount referred to in clause 11 8 of the Base Agreement – *refer to the Agreement*;

Agency Information means all:

(a) information and records belonging to a Participating Agency that are supplied to or collected by the Provider for the purpose of enabling the Provider to perform its obligations under this Agreement;

(b) compilations of data created by a Participating Agency or the Provider for the purposes of this Agreement, but excluding the Provider's working papers; and

(c) legal names, logos, trademarks, brands or images of a Participating Agency, including all related Intellectual Property of the Participating Agency and the New Zealand Coat of Arms or any other coat of arms or emblem used by the Participating Agency;

Agreement is described in clause 1.3(a) of the Base Agreement – *refer to Agreement*;

Annexure means any document physically attached to a Schedule and identified as such and any other document incorporated by reference in any part of this Agreement (other than an Annexure);

Appointment Letter means the letter issued to the Provider by the CoE, as amended or reissued from time to time, confirming (among other things) the Provider's appointment as an All-of-Government provider of consultancy services and detailing the terms and conditions of the appointment (including the Services and the applicable Tier(s));

Base Agreement means clauses 1 to 19 (inclusive, in each case) of, and Schedule 1 (Definitions) to, this Agreement;

Business Day means any day of the year other than a Saturday, a Sunday or a public holiday (as defined in section 44 of the Holidays Act 2003), provided that:

(a) in relation to any Consultancy Services Order, public holiday means a public holiday observed at the location of the Participating Agency who issued the Consultancy Services Order; and

(b) in all other cases, public holiday means a public holiday observed in Wellington, New Zealand;

Business Hours means the hours between 8.30 a.m. and 5.00 p.m. on any Business Day;

Change means any change to this Agreement made in accordance with clause 10.1 of the Base Agreement – *refer to Agreement*;

Charges means the amount payable by Participating Agencies for Services and includes Expenses, as described in Schedule 2 (Pricing) and agreed in a Consultancy Services Order;

Commencement Date is the date on which this Agreement is signed by both parties or, if two dates, the later date;

Confidential Information means:

(a) all information and trade secrets already communicated or subsequently communicated under or in connection with this Agreement, including information obtained during the negotiation of this Agreement or in the performance of this Agreement and information on the Provider Database;

(b) any information about the business or property of either party or a Participating Agency including any information:

(i) relating to the financial position of that party or Participating Agency;

(ii) concerning that party's or Participating Agency's suppliers and customers; or

(iii) relating to that party's or Participating Agency's internal management, structure, Personnel or strategies;

(c) the terms of this Agreement; and

(d) Agency Information;

Conflict of Interest means any matter, circumstance, interest or activity of the Provider, its Personnel or Subcontractors, arising by whatever means that directly or indirectly conflicts with:

(a) the duties of the Provider and any of its Personnel or Subcontractors to the Participating Agency who issued the Consultancy Services Order; or

(b) the interests of any Participating Agency in relation to this Agreement (including any Consultancy Services Order) or otherwise in respect to the provision of consultancy services to the Participating Agency either before or after the Commencement Date;

or otherwise impairs or might appear to impair the ability of the Provider (or any of its Personnel or Subcontractors) to provide the Services to any Participating Agency under a Consultancy Services Order diligently, independently, impartially and in the best interests of the Participating Agency;

Consultancy Services Order means a service order relating to the supply of Services issued by a Participating Agency in accordance with clause 1.4 and substantially in the form attached as Schedule 2 (Consultancy Services Order – *refer to the Agreement*) and, if agreed between the Participating Agency and the Provider or required under the Appointment Letter, may contain additional information or further particularity in respect of the Services to be provided under the service order to that contained in the Appointment Letter;

Contract Quarter means a period of three consecutive months commencing on 1 January, 1 April, 1 July or 1 October, provided that:

(a) the first Contract Quarter will begin on the Commencement Date and end on the date specified in the Appointment Letter; and

(b) the final Contract Quarter will end on the effective date of expiry or termination of this Agreement;

Control means, in relation to the Provider or any ultimate or intermediate holding company or Holding Entity of the Provider, the power to:

(a) manage, directly or indirectly, the operation of the business; or

(b) control, directly or indirectly, the composition of the board of directors or board of management or equivalent governing body,

of the Provider or such ultimate or intermediate holding company or Holding Entity, whether through the ownership of voting securities, by contract or otherwise, and for these purposes "holding company" will have the same meaning as in section 5 of the Companies Act 1993;

Documentation means all advice, communications, documentation (including information on the Provider Database) and reports (whether in paper, electronic, audio or audio-visual format) relating to, or provided as part of, the Services together with additions, modifications to and replacements of, that documentation, but excludes the Provider's working papers;

Eligible Agency means:

(a) each Public Service department, as defined in section 27 of the State Sector Act 1988;

(b) the New Zealand Defence Force, the New Zealand Police, the New Zealand Security Intelligence Service, the Parliamentary Counsel Office, the Office of the Clerk of the House of Representatives and the Parliamentary Service;

(c) each Crown Entity, as defined in section 7 of the Crown Entities Act 2004;

(d) each organisation listed in the fourth schedule to the Public Finance Act 1989;

(e) the Reserve Bank of New Zealand;

(f) the Office of the Controller and Auditor-General, the Office of the Ombudsmen, and the Office of the Parliamentary Commissioner for the Environment;

(g) each corporation listed in the first schedule to the State Owned Enterprises Act 1986;

(h) each local authority, as defined in section 5 of the Local Government Act 2002; and

(i) any other, person, organisation or entity that does not fall within the above categories but which the CoE determines should be treated as an Eligible Agency for the purposes of this Agreement;

Estimate means an estimate of the total Charges for the Services required by the Participating Agency;

Expense means any actual and reasonable out-of-pocket costs incurred by the Provider in the delivery of the Services and agreed to in any Consultancy Services Order, and includes any freight and related costs, travelling and incidental expenses and other costs, disbursements, fees, charges and expenses directly or indirectly incurred by the Provider;

Fees means the amount payable by the Participating Agency to the Provider for its time spent delivering the Services calculated on the basis of the Rates, excluding Expenses;

Fit for Purpose means, in relation to any Service or Documentation to be provided by the Provider to a Participating Agency, that such Services or Documentation are, in descending order of priority, fit for the purpose(s):

(a) expressly made known in writing by that Participating Agency to the Provider (including in a Consultancy Services Order); or

(b) for which the Provider, given its knowledge of that Participating Agency and understanding why the Services or Documentation are required, has reason to expect such Services or Documentation to be used;

Force Majeure Event means an event or circumstance beyond the reasonable control of either party which makes it impossible or illegal to perform, or prevents compliance with, or the performance of, a party's obligations under this Agreement, including:

(a) fire, floods, tsunami, storms, tempest, earthquake or other act of God;

(b) any act of a public enemy, war, riot, or act of civil or military authority;

(c) nuclear, chemical or biological contamination; and

(d) subject to paragraph (g) of this definition, any act of a third party engaged in subversive or terrorist activity or sabotage,

but does not include an event to the extent that:

(e) the effect of that event could have been substantially prevented, avoided or overcome or mitigated by:

  (i) implementation of any contracted business continuity or disaster recovery service, or any contingency plans agreed between the parties or which a party has represented it has in place; or

  (ii) exercising a reasonable standard of care; or

  (iii) using information provided by the other party or which is available in the public domain; or

(f) it is an event for which the party affected is or was directly responsible; or

(g) that event is constituted or caused by any act or omission of Personnel or a Subcontractor unless and to the extent that the Personnel or Subcontractor was itself affected by an event, which if it occurred in relation to either party would have been a Force Majeure Event; or

(h) that event is constituted or caused by an Insolvency Event or the insolvency of a Subcontractor or lack of funds for any reason;

GST means goods and services tax under the Goods and Services Tax Act 1985;

Holding Entity means a trust, unit trust, partnership, limited partnership, unincorporated joint venture or other body corporate or unincorporated body of persons that Controls the Provider, and includes any natural person that Controls the Provider;

Industry Best Practice means the high professional standard that would reasonably be expected from a prudent and experienced provider of Services in New Zealand having regard to market practice at the relevant time,

Insolvency Event means, in relation to the Provider:

(a) the presentation of an application for its liquidation that is not discharged within 30 days of its filing or which is not demonstrated to the CoE prior to the expiry of that 30 day period as being an application that is frivolous or vexatious;

(b) any step taken in or toward the making of any compromise, proposal or deed of arrangement with all or some of its creditors;

(c) the appointment of a liquidator, receiver, statutory manager, administrator or similar official, to it;

(d) the suspension or threatened suspension by it of the payment of its debts;

(e) cessation by it of a whole or any relevant part of its business in New Zealand;

(f) the enforcement of any security against the whole or a substantial part of its assets; or

(g) any other insolvency event or proceedings analogous to any of the foregoing occurring in any relevant jurisdiction;

Intellectual Property means copyright, all rights in relation to inventions (including patents), registered and unregistered trademarks, registered and unregistered designs, trade or other proprietary rights or rights derivative of those rights (including licence rights) anywhere in the world as well as any other rights in intellectual property which are recognised or protected under Law;

Law means:

(a) any statute, regulation, bylaw, ordinance or subordinate legislation in force from time to time to which a party is subject;

(b) the common law and the law of equity as applicable to the parties from time to time;

(c) any binding court order, judgment or decree;

(d) any applicable industry code of practice or conduct, convention, policy, rule or standard to which a party is bound; or

(e) any applicable direction, policy, permission, consent, licence, rule or order that is binding on a party and that is made or given by any governmental or regulatory body having jurisdiction over a party or any of that party's assets, resources or business,

in any jurisdiction that is applicable to this Agreement;

Losses means liabilities, expenses, losses, damages and costs (including legal costs on a full indemnity basis);

Material Breach means any material breach by the Provider of the terms of this Agreement or the occurrence of any event having a material effect on the ability of the Provider to perform its obligations under this Agreement (other than a Force Majeure Event), including:

(a) the occurrence of an Insolvency Event in relation to the Provider or the likely occurrence of an Insolvency Event;

(b) the occurrence of a change in Control of the Provider or any ultimate or intermediate holding company or Holding Entity of the Provider that the CoE has not previously approved (acting reasonably);

(c) any representation or warranty made by the Provider in terms of this Agreement being found to be untrue or incorrect; and

(d) any failure on the part of the Provider to comply with, observe or perform any of the terms of this Agreement in circumstances where that contract breach or that contract breach together with other contract breaches is considered by the CoE on reasonable grounds to cause the Provider to be unable or unwilling, or be likely to be unable or unwilling, to perform its obligations under this Agreement;

Panel means the All-of-Government panel of providers who provide consultancy services to Participating Agencies, including any sub-panel, as detailed on www.procurement.govt.nz;

Participating Agency means each of the CoE and every other Eligible Agency that is a party to the Participation MoU in relation to the Services;

Participation MoU means the memorandum of understanding between the CoE and all other Participating Agencies relating to the management of their relationship with each other and with the Provider in relation to the Services, as amended from time to time;

Personnel includes partners, principals, directors, employees, agents, officers and individual independent contractors;

Professional Adviser means any accounting, legal, procurement or technical professional;

Provider Database means the IT platform described in Schedule 7 (Provider Database – *refer to the Agreement*);

Quote means a fixed price, capped price or other pre-agreed basis for establishing the Charges for Services required by the Participating Agency where the Provider is prevented from increasing the Charges without the prior written consent of the Participating Agency;

Rates means the maximum rates (whether hourly, daily or weekly or other time-related basis) payable to the Provider for providing the Services, determined in accordance with Schedule 2 (Pricing), excluding Expenses;

Related Entity means a related company under the Companies Act 1993 (New Zealand) or a related body corporate under the Corporations Act 200, provided that any reference in the Companies Act 1993 to a "company" is deemed to include any partnership, body corporate, association or other entity, whether corporate or unincorporated, irrespective of the place of incorporation or registration of that partnership, body corporate, association or other entity;

Reports mean the reports generated by the Provider specified in Schedule 6 (Reporting), as amended from time to time by the CoE – *refer to the Agreement*;

Representative has the meaning given in paragraph 3.1 of Schedule 5 (Governance – *refer to the Agreement*);

RFP means the request for proposals in relation to the supply of the Services to Participating Agencies, issued by the CoE as described in the Appointment Letter;

RFP Response means the Provider's original response to the RFP, as clarified and amended by subsequent oral and written correspondence (including questions and answers) between the CoE and the Provider prior to the Commencement Date;

Service Level means a required standard for the Provider's performance of its obligations under this Agreement, as described in Schedule 3 (Performance Management);

Service Level Default means a failure by the Provider to meet one or more Service Levels;

Services means the consultancy services provided from time to time under the terms of this Agreement, including any Consultancy Services Order, as more particularly described in the Appointment Letter;

Subcontractor means any person to whom the Provider has subcontracted any part of its obligations under this Agreement or who is a supplier to the Provider in respect of this Agreement and includes the employees and subcontractors of that person and Subcontract will be construed accordingly;

Term means the term specified in clause 3 – *refer to the Agreement*; and

Tiers means any of Tiers 1 and Tiers 2 for which members of the Panel are appointed and, in respect of the Provider, means the Tier(s) the Provider is appointed to as detailed in the Appointment Letter – *refer to the Agreement*.

SCHEDULE 2: PRICING

1. Introduction

This Schedule sets out general principles underlying the Charges.

2. Principles

2.1 **Participating Agencies will only pay for Services ordered**

(a) The Provider will invoice each Participating Agency for the Charges applicable to that Participating Agency in accordance with clause 7.3 of the Base Agreement – *refer to the Agreement*.

(b) A Participating Agency will only pay for Services that it orders in accordance with this Agreement.

2.2 **No minimum volume**

Neither the CoE nor any Participating Agency is required to meet a minimum aggregate expenditure or volume level for any Services.

2.3 **No interest**

No interest will be payable on any amount due to the Provider under this Agreement.

2.4 **Rates**

(a) The Fees are calculated on the Rates that are recorded Provider Database.

(b) The Rates are the maximum amounts payable by a Participating Agency for the Services.

3. Charges

The Charges payable by a Participating Agency for Services must not include any Fees invoiced at Rates higher than those recorded in the Provider Database.

SCHEDULE 3: PERFORMANCE MEASUREMENT

1. Introduction

1.1 **This Schedule describes:**

(a) the Service Levels; and

(b) how performance against Service Levels will be measured and reported.

2. Service Levels

2.1 **Format**

Each Service Level is described in Annexure A using the following format:

Parameter	Description
Description	Description of what the Service Level will measure
Purpose	Why it is important to Participating Agencies that the Service Level is met
Calculation	Method for calculating the Service Level
Service Level	The performance standard that the Provider is required to meet or exceed

2.2 **Service Levels must be met**

(a) At all times during the Term, the Provider will perform its obligations to meet or exceed the Service Levels.

(b) The Provider acknowledges that any failure to meet the Service Levels may have a significant impact on Participating Agencies.

2.3 **Changes to Service Levels**

(a) From time to time during the Term, the CoE and the Provider may negotiate in good faith to add, delete or modify then-existing Service Levels to reflect changes in the Participating Agencies' requirements or objectives.

(b) Any changes to Service Levels will be effected in accordance with clause 10 of the Base Agreement – *refer to the Agreement*.

3. Performance measurement

3.1 **Implement tools**

The CoE will implement appropriate measurement, monitoring and management tools and procedures to enable it to measure the Provider's performance against the Service Levels.

3.2 **Measure performance**

The CoE will measure the performance of the Provider under this Agreement against the Service Levels recorded in Annexure A to this Schedule.

3.3 **Measurement period**

(a) Except for the Service Levels set out in paragraph 3.3(b), each Service Level will be measured by reference to performance over a Contract Quarter.

(b) Service Levels one and five will be measured by reference to performance biannually.

3.4 **Failure to meet Service Levels**

If the Provider fails to achieve one or more of the Service Levels in any Contract Quarter, it will:

(a) take such steps and do all things necessary, as soon as possible, to correct the failure; and

(b) notify the CoE and the Participating Agency(s) who issued the Consultancy Services Order(s), the subject of the Service Level Defaults, of the reasons for the failure and the steps that the Provider is taking to ensure that the failure is not repeated; and

(c) consider whether the Charges for the Services that are subject to the Service Level Default should be reduced to reflect the lower value of the Services provided.

3.5 **Respond to feedback on performance**

The Provider will respond constructively to the CoE's feedback on Service Level performance, and to all other reasonable requests from the CoE for additional metrics, analyses and reports relating to performance against Service Levels from time to time during the Term, at no additional cost to the CoE.

3.6 **Reporting on Provider performance**

The CoE may report, at any time, on poor performance by the Provider against the Service Levels to all Participating Agencies and any Eligible Agencies.

Annexure A: Service Levels

Parameter	1. Services Fit for Purpose
Description	Were the Services subject to each Consultancy Services Order Fit for Purpose?
Purpose	To ensure Services provided are Fit for Purpose.
Calculation	The Participating Agency will advise whether the Services are Fit for Purpose as part of the Agency Satisfaction Survey.
Service Level	100% of Services delivered to a Participating Agency must be Fit for Purpose.

Parameter	2. Timely Performance of Services
Description	Did the Provider perform the Services subject to each Consultancy Services Order within the timeframe recorded in that Consultancy Service Order (or as amended by agreement from time to time)?
Purpose	To ensure on-time provision of Services requested under a Consultancy Services Order.
Calculation	The Provider is required to report on this metric as part of the reporting requirements in Schedule 6 (Reporting).
Service Level	The Provider must deliver all Services subject to a Consultancy Services Order within the agreed timeframe for delivery recorded in the Consultancy Services Order including any variation to the timeframe recorded in Part D of the Consultancy Services Order.

Parameter	3. Services Performed to budget
Description	Were the Charges for the Services subject to each Consultancy Services Order within the Estimate or Quote recorded in that Consultancy Services Order?
Purpose	To ensure Services requested under a Consultancy Services Order are performed on or under the Provider's Estimate or Quote.
Calculation	The Provider is required to report on this metric as part of the reporting requirements in Schedule 6 (Reporting).
Service Level	The Provider must deliver all Services subject to a Consultancy Services Order within the agreed Estimate or Quote recorded in the Consultancy Services Order including any variation to the Estimate recorded in Part D of the Consultancy Services Order.

Parameter	4. Reporting Provided
Description	Did the Provider submit the information required of it as detailed in Schedule 8 (Reporting) accurately, in the required format and on time?
Purpose	To ensure the reporting information is provided accurately, regularly and on time.
Calculation	The CoE will receive the reporting information each Contract Quarter.

Parameter	4. Reporting Provided
Description	Did the Provider submit the information required of it as detailed in Schedule 8 (Reporting) accurately, in the required format and on time?
Purpose	To ensure the reporting information is provided accurately, regularly and on time.
Service Level	All reporting information must be completed accurately and submitted on time.

Parameter	5. Results of Agency Satisfaction Survey
Description	Each Participating Agency is satisfied with the overall level of service it received from the Provider.
Purpose	To ensure that the Participating Agencies are satisfied with the service of the Provider.
Calculation	The Provider's biannual average score from the Agency Satisfaction Survey will be calculated as the mean (average) of the Provider's individual scores for the survey period.
Service Level	The Provider's average score for each survey must exceed 5/10.