

Gain Procurement Terms and Conditions of Engagement

1. Parties

1.1 Gain Enterprises Pty Limited (ACN: 139 732 853) trading as Gain Procurement and the organisation whose name and address is specified in the Engagement Letter ('the Client').

2. Terms of Engagement

These provisions set out the standard terms and conditions of engagement of Gain Procurement and any of its directors and employees (collectively referred to as "Gain Procurement"). The Engagement Letter and these terms and conditions, including any written variation (together called 'this Agreement') will apply to all work to be performed for the Client.

This Agreement constitutes the entire agreement between Gain Procurement and the Client. Where there is any inconsistency between the Engagement Letter and these terms, the Engagement Letter shall prevail.

The Client acknowledges that Gain Procurement is engaged under this Agreement as an independent contractor.

The offer contained in the Engagement Letter may only be accepted by written, verbal or email confirmation within 28 days from the date of issue, unless otherwise indicated, otherwise it will lapse.

3. Definitions

3.1 For the purposes of this Agreement, the following definitions apply:

'Commencement Date' means the date of commencement of this Agreement specified in the Engagement Letter;

'Consultant's Premises' means the address of Gain Procurement specified in the Engagement Letter;

'Consultancy Services' means the services to be performed by Gain Procurement under this Agreement specified in the Engagement Letter;

'Confidential Information' means information that is by its nature confidential but does not include:

(a). information already known to the receiving party at the time of disclosure by the other party; or

(b). information in the public domain other than as a result of disclosure by a party in breach of its obligations of confidentiality under this agreement;

'Client's Site' means the address of the Client as specified in the Engagement Letter;

'Engagement Letter' means the letter setting out the further terms of the engagement between Gain Consultancy and the Client;

'Force Majeure' means an act, omission or circumstance over which Gain Procurement could not reasonably have exercised control.

'GST' means:

(c). the same as in the GST Law;

(d). any other goods and services tax, or any tax applying to this agreement in a similar way; and

(e). any additional tax, penalty tax, fine, interest or other charge under a law of such a tax.

'GST Law' means the same as 'GST law' in A New Tax System (Goods and Services Tax) Act 1999 (Cth);

'Intellectual Property Rights' means all present and future rights conferred by statute, common law or equity in or in relation to any copyright, trade marks, designs, patents, circuit layouts, business and domain names, inventions, and other results of intellectual activity in the industrial, commercial, scientific, literary or artistic fields;

'Moral Rights' means:

(f). a right of attribution of authorship; or

(g). a right not to have authorship falsely attributed; or

(h). a right of integrity of authorship; or

(i). a right of a similar nature;

which is conferred by statute, and which exists or comes to exist anywhere in the world in a deliverable form comprised within this Agreement.

3.2. In this Agreement unless the contrary intention appears:

(a). a reference to this Agreement or another instrument includes any variation or replacement to them;

(b). a reference to a statute, ordinance code or other law includes regulations and other enactments under it and consolidations, amendments, re-enactments or replacements of any of them;

(c). the singular includes the plural and vice versa;

(d). the expression “person” includes an individual, the estate of an individual, a body politic, a corporation and a statutory or other authority or association (incorporated or unincorporated);

(e). a reference to a person includes a reference to the person’s executors, administrators, successors and assigns.

4. Scope of Agreement

The Client shall employ Gain Procurement and Gain Procurement shall serve the Client as a consultant to perform the Consultancy Services as set out in the Engagement Letter.

5. Duration

This agreement will commence on the Commencement Date and will continue in effect for the period stated in the Engagement Letter or until otherwise terminated under this Agreement whichever is the earlier.

6. Obligations of Gain Procurement

6.1 Gain Procurement shall provide the Consultancy Services using a standard of care normally exercised by professional consulting firms providing comparable service under similar conditions.

6.2 Gain Procurement will use best endeavours to complete the Consultancy Services in the timeframe set out in the Engagement Letter, subject to a Force Majeure event.

7. Charges and payment

7.1 The Client shall pay Gain Procurement the consultancy fee specified in the Engagement Letter for the Consultancy Services.

7.2 The Client shall pay the consultancy fee within 14 days after the date of Gain Procurement’s invoice. Invoices will be issued fortnightly and on completion.

7.3 If the Client is in arrears in any payment due to Gain Procurement under this agreement, the Client shall pay, in addition to the arrears, interest at the rate of 12 per cent per annum on all arrears for each day during which the default continues.

7.4 If the Client disputes the whole or any part of the amount claimed in an invoice submitted by the supplier pursuant to this agreement, the Client will pay the undisputed portion on the due date. The dispute regarding the remainder may be referred to the dispute resolution procedure prescribed by this Agreement. If it is subsequently resolved that a further amount is payable, the Client will pay that amount together with interest at the rate of 12 per cent per annum.

7.5 Words defined in the GST Law have the same meaning in this clause, unless the context makes it clear that a different meaning is intended.

7.6 In addition to paying the consultancy fee and any other amount payable in connection with this Agreement (which is exclusive of GST), the Client will pay to Gain Procurement an amount equal to any GST payable as required under the GST Law for any supply by Gain Consultancy in respect of which the consultancy fee or any other amount is payable under this Agreement.

8. Expenses

8.1 The Client shall reimburse Gain Procurement the amount of all expenses reasonably and properly incurred by it in the performance of its duties under this Agreement, including but not limited to travel expenses between Gain Procurement's Premises and the Client's Site, accommodation and subsistence expenses, and all other expenses incurred or required to be incurred by Gain Procurement to promptly and efficiently provide the Consultancy Services.

9. Title and use

9.1 The Client agrees that any works, items, materials or information of whatever nature produced or developed by Gain Procurement or under Gain Procurement's direction pursuant to or in the course of providing the Consultancy Services shall remain the sole and complete property of Gain Procurement, whether such property is tangible or is in the nature of industrial and Intellectual Property Rights (including copyright and rights of confidential information).

9.2 If the Client has fully complied with this Agreement and if the works, items, materials or information referred to in clause 9.1 have been produced by Gain Procurement as part of the Consultancy Services, Gain Procurement grants the Client a non-exclusive and non-transferable licence to use such works, items, materials and information for such purposes as the parties reasonably contemplate at the commencement date.

9.3 There is no assignment of Intellectual Property Rights by Gain Procurement to the Client pursuant to this agreement.

Nothing in this agreement affects the Moral Rights in any works, items, materials or information supplied pursuant to this Agreement.

All communications by Gain Procurement with the Client, its employees or agents, whether written or oral are provided solely for the use of the Client in connection with the engagement. No other party is entitled to rely on Gain Procurement's reports or advice for any purpose whatsoever. Gain Procurement disclaims any responsibility to any such third party who has had the report or advice communicated to them.

Where the Client receives electronically any report or correspondence containing opinions or advice, Gain Procurement will not be responsible for any unauthorised copying, interception, interference or delivery failure of the transmission. Gain Procurement also does not warrant that the electronic transmission is virus free or will not harm the Client's computer systems.

The Client should not rely upon any opinions or advice transmitted electronically unless confirmed by letter signed by a director of Gain Procurement.

Written advice and final reports shall take precedence over any oral advice and

interim reports. Gain Procurement is not responsible for updating any opinions, advice or reports subsequent to the issue of a final version, unless specifically agreed otherwise.

10. Confidentiality

10.1 A party will not, without the prior written approval of the other party, disclose the other party's Confidential Information.

10.2 A party will not be in breach of clause 10.1 in circumstances where it is legally compelled to disclose the other party's Confidential Information.

10.3 Each party will take all reasonable steps to ensure that its employees and agents, and any sub-contractors engaged for the purposes of this Agreement, do not make public or disclose the other party's Confidential Information.

Notwithstanding any other provision of this clause, a party may disclose the terms of this Agreement (other than Confidential Information of a technical nature) to its related companies, solicitors, auditors, insurers and accountants.

This clause will survive the termination of this Agreement.

11. Privacy

11.1 Gain Procurement will not use or disclose any personal information for a purpose other than discharging its obligations under this Agreement. Gain Procurement further agrees to comply at all times with the National Privacy Principles contained in Sch 3 to the Privacy Act 1988 (Cth) (or an applicable privacy code approved by the Federal Privacy Commissioner pursuant to that Act) in the same way and to the same extent as the Client would have been required to comply had it been directly responsible for performing the act or practice concerned. Gain Procurement will take all necessary steps to protect personal information in its possession against misuse or loss and it will return all such information to the Client (or if requested by the Client, destroy or de-identify such information) upon termination or expiry of this Agreement. This clause will survive the termination or expiry of this Agreement.

11.2 For the purpose of this clause, 'personal information' means information or an opinion about an individual as defined in s 6 of the Privacy Act 1988 (Cth) which is collected, used, disclosed, stored or handled by the supplier for the purposes of this Agreement.

12. Liability of Gain Consultancy

12.1 In no event will the Gain Procurement be liable for any special, incidental, punitive or consequential damages whatsoever, including loss of profits, whether arising in contract, tort or otherwise, even if Gain Procurement has been advised of the possibility of such damages.

12.2 Notwithstanding anything herein to the contrary the limit of Gain Procurement's liability (whether in contract, tort, warranty, negligence, strict liability, by statute or otherwise) concerning Gain Procurement's performance or non-performance, or in any manner related to this Agreement, for any and all claims will not in total exceed the fees the Client has paid to Gain Procurement under this Agreement.

13. Implied terms

13.1 Subject to clause 13.2, any condition or warranty which would otherwise be implied in this Agreement is hereby excluded.

13.2 Where legislation implies in this Agreement any condition or warranty, and that legislation avoids or prohibits provisions in a contract excluding or modifying the application of or liability under such condition or warranty, the condition or warranty will be deemed to be included in this Agreement. However, the liability of Gain Procurement for any breach of such condition or warranty will be limited, at the option of Gain Procurement, to one or more of the following:

(j). if the breach relates to goods:

(i). the replacement of the goods or the supply of equivalent goods;

(ii). the repair of such goods;

(iii). the payment of the cost of replacing the goods or of acquiring equivalent goods;
or

(iv). the payment of the cost of having the goods repaired; and

(k). if the breach relates to services:

(v). the supplying of the services again; or

(vi). the payment of the cost of having the services supplied again.

14. Indemnities

The Client agrees to indemnify Gain Procurement and its directors and employees against all liabilities, claims, costs or expenses incurred by Gain Procurement in respect of any claim or action by a third party in connection with the provision of the Consultancy Services. This indemnity does not apply to any liabilities, costs or expenses incurred in defending a claim by a third party which results from any wilful misconduct by Gain Procurement or its directors and employees, except when the Client is in breach of clause 9.5.

Gain Procurement shall not be liable for any losses, damages, costs or expenses arising out of errors due to the provision to it of false, misleading or incomplete information or documentation or due to any acts or omissions of any other person. The Client indemnifies Gain Procurement from any liability it may have to the Client or any third party as a result of any information supplied to Gain Procurement by the

Client or any of its agents, where such information and documentation is false, misleading or incomplete in a material respect.

15. Force Majeure

15.1 Gain Procurement shall not be liable for any delay or failure to perform its obligations if such failure or delay is due to Force Majeure.

15.2 Gain Procurement shall notify the Client as soon as practical be of any anticipated delay due to Force Majeure. The performance of Gain Procurement's obligations under this Agreement shall be suspended for the period of the delay due to Force Majeure.

15.3 If a delay due to Force Majeure exceeds 30 days, the Client may terminate this agreement immediately on providing notice to Gain Procurement. If the Client gives such notice to Gain Procurement:

(a) Gain Procurement shall refund moneys previously paid by the Client under this Agreement for which no services have been provided; and

(b) the Client shall pay Gain Procurement a reasonable sum in relation to services rendered or costs and expenses incurred prior to termination for which no payment has been made by the Client.

16. Termination

16.1 Without limiting the generality of any other clause in the agreement, Gain Procurement may terminate this Agreement and any licence granted pursuant to this Agreement immediately by notice in writing if:

(l). any payment due from the Client to Gain Procurement pursuant to this Agreement remains unpaid for a period of 14 days; or

(m). the Client breaches any clause of this Agreement and such breach is not remedied within seven days of written notice by Gain Procurement.

16.2 Notwithstanding the preceding clause Gain Procurement may terminate this agreement and any licence granted pursuant to this agreement immediately on notice in writing to the Client if:

(n). the Client becomes, threatens or resolves to become or is in jeopardy of becoming subject to any form of insolvency administration;

(o). the Client, being a partnership, dissolves, threatens or resolves to dissolve or is in jeopardy of dissolving;

(p). the Client, being a natural person, dies; or

(q). the Client ceases or threatens to cease conducting its business in the normal matter.

16.3 Notwithstanding the preceding paragraphs, Gain Procurement may terminate this agreement by giving 30 days' notice to the Client.

16.4 If notice is given to Client pursuant to the preceding clauses, Gain Procurement may, in addition to terminating the Agreement:

(r). retain any moneys paid;

(s). charge a reasonable sum for work performed in respect of work which no sum has been previously charged;

(t). retake possession of all property of Gain Procurement in the possession of the Client;

(u). be regarded as discharged from any further obligations under this agreement; and

(v). pursue any additional or alternative remedies provided by law.

16.5 The Client may terminate this agreement if Gain Procurement breaches any term of this Agreement and such breach is not remedied within 14 days of written notice by the Client.

17. Assignment

17.1 Neither party shall assign, whether in whole or part, the benefit of this agreement or any rights or obligations hereunder, without the prior written consent of the other party.

18. Sub-contracts

Gain Procurement may sub-contract for the performance of this Agreement or any part of this Agreement.

19. Waiver

No forbearance, delay or indulgence by a party in enforcing the provisions of this agreement shall prejudice or restrict the rights of that party, nor shall any waiver of those rights operate as a waiver of any subsequent breach.

20. Variation and change control

20.1 The provisions of this Agreement may not be varied except by agreement in writing signed by both parties.

20.2 If a proposed variation relates to the scope of this Agreement (including but not limited to specifications, performance levels, key dates or charges), the proposing party must include in its submission a change control report which addresses in full detail:

- (w). a description of the proposed change;
- (x). an assessment of the benefits and risks to each party associated with the proposed change;
- (y). a time frame for the proposed implementation;
- (z). a description of any disruption which may result from the change;
- (aa). any consequential changes which may be required; and
- (bb). such other matters as are specified in the schedule in relation to change control.

21. Entire agreement

This Agreement supersedes all prior agreements, arrangements and undertakings between the parties and constitutes the entire Agreement between the parties relating to the Consultancy Services. No addition to or modification of any provision of this Agreement shall be binding upon the parties unless made by written instrument signed by a duly authorised representative of the party.

22. Headings

Headings used in this Agreement are for convenience and ease of reference only, are not part of this Agreement and shall not be relevant to or affect the meaning or interpretation of this Agreement.

23. Severability

23.1 Should any part of this Agreement be or become invalid, that part shall be severed from this Agreement. Such invalidity shall not affect the validity of the remaining parts of the Agreement.

24. Governing law

This Agreement shall be governed by and construed in accordance with the laws for the time being in force in the State of New South Wales Australia and the parties agree to submit to the jurisdiction of the courts and tribunals of that State.

25. Disputes

Any dispute or difference arising in connection with this agreement shall be submitted to arbitration in accordance with, and subject to, the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators, Australia. During such arbitration, both parties may be represented by a duly qualified legal practitioner.