

Part 1: General Terms

INTRO

These Purchase Terms are in 5 Parts. The parties acknowledge that Parts 2 to 4 will only apply to the extent Goods, Services and/or Software are actually being supplied and acquired. Definitions and interpretation are contained in Part 5.

1 AGREEMENT

- 1.1 **Formation** From time to time Spark NZT and Supplier may enter into an Agreement for the supply of one or more Deliverables, incorporating these Purchase Terms. These Purchase Terms do not create any rights or obligations except as part of such an Agreement.
- 1.2 **No other terms** Except to the extent the parties expressly agree otherwise in writing, the Agreement will exclude all other terms, including any terms appearing on Supplier's invoices or other paperwork. No conduct by Spark NZT will constitute acceptance of any other terms put forward by Supplier in relation to the Deliverables.
- 1.3 **Precedence** Subject to clause 1.4, the various parts of the Agreement will be read in the following descending order of precedence: first, if applicable, the Letter Agreement; then, if applicable, the PO; then Parts 2 to 4 of these Purchase Terms; and then Part 1 of these Purchase Terms.
- 1.4 **Modifications** The provisions of a Letter Agreement or PO will not detract from the rights or remedies that Spark NZT would otherwise have under or in connection with these Purchase Terms, except to the extent that the Letter Agreement or PO clearly identifies the specific clauses in these Purchase Terms that are to be modified or overridden.

- 1.5 **Acknowledgement** The Agreement is not an exclusive supply arrangement. Except where the Agreement expressly provides otherwise, Spark NZT makes no purchase commitment, whether in terms of dollar value, volume of deliverables, or otherwise.

2 SUPPLIER OBLIGATIONS

- 2.1 **Deliverables** Supplier agrees to supply, and Spark NZT agrees to acquire, the Deliverables subject to and in accordance with the terms of the Agreement.
- 2.2 **Performance standards** Supplier will perform its obligations under the Agreement in a timely manner and in accordance with Good Industry Practice.
- 2.3 **Laws, licences and approvals** In carrying out its activities in connection with this Agreement, Supplier will comply with all applicable Laws and will not commit any act or omit to do anything that causes or has the potential to cause Spark NZT to breach any Laws. Supplier will have all the licences, consents and approvals needed to supply the Deliverables and perform and observe its other obligations in accordance with the Agreement.
- 2.4 **Requirements** Supplier will provide the Deliverables to Spark NZT free of Defects and in accordance with all applicable Requirements, Service Levels and timeframes for delivery set out in a Side Letter or PO.
- 2.5 **Co-operation** Supplier will co-operate in good faith and in a timely manner with other Spark NZT suppliers, and if reasonably requested by Spark NZT, will provide information and assistance as necessary to facilitate the supply of goods or services to Spark NZT by those suppliers. A breach of this clause will be deemed a material breach of the Agreement.
- 2.6 **Policies** Supplier will use its best endeavours to follow Spark NZT's applicable policies as provided to Supplier in writing from time to time, and a persistent or material breach of any of those policies will constitute a material breach of the Agreement. Supplier will advise Spark NZT immediately that it becomes aware that it has breached or

is likely to have breached any of Spark NZT's policies including if Spark NZT's security has been compromised.

- 2.7 **Key Personnel** Supplier will assign the Key Personnel to the corresponding roles specified in the Agreement, and will not re-assign those Key Personnel without Spark NZT's prior written consent, not to be unreasonably withheld or delayed.
- 2.8 **Documentation** Accompanying each Deliverable, Supplier will provide Spark NZT with corresponding Documentation. Supplier will ensure that the Documentation includes a complete set of operating, technical and user manuals with a level of specificity to enable a reasonably competent user to make effective use of each Deliverable. If Spark NZT discovers any error in the Documentation, Spark NZT may notify Supplier in writing of the error and Supplier will promptly correct it and provide Spark NZT with amended Documentation at no additional cost to Spark NZT. Spark NZT may copy Documentation as reasonably necessary to enable Spark NZT to enjoy the benefit of the Deliverables in accordance with the Agreement.
- 2.9 **Information** Supplier will prepare, and retain during the term of the Agreement and for a reasonable period afterwards, accurate records and accounts in relation to all material aspects of its activities under the Agreement, including the Charges and Deliverables, in each case to a level of detail, completeness and accuracy consistent with Good Industry Practice and any relevant terms in this Agreement.
- 2.10 **Audit Rights** On receipt of 5 Working Days' prior written notice from Spark NZT, Supplier will promptly provide Spark NZT with any access or assistance Spark NZT reasonably requires to audit Supplier's compliance with its obligations under the Agreement, subject to Spark NZT agreeing to comply with Supplier's reasonable confidentiality and security requirements.

3 HEALTH AND SAFETY

3.1 Obligations of both parties

- (a) Each party will comply with the Health and Safety in Employment Act 1992 (and any successive health and safety legislation) in all respects in performing its obligations under or in connection with this agreement.
- (b) Supplier warrants that prior to execution of this Agreement it has provided to Spark NZT, and Spark NZT has approved in writing, Supplier's health and safety policy (including such reasonable recommendations as Telecom may suggest).
- (c) Each party will use reasonable efforts to promptly advise the other party of changes to its relevant health and safety policies, programmes and identifiable hazards, to assist the other party to comply with this clause 3.1.

3.2 Supplier's obligations: Subject to the provisions of this clause 3, Supplier will be responsible for the health and safety performance of its Personnel. Without limiting the foregoing, Supplier will:

- (a) comply with any Spark NZT health and safety policy notified to Supplier (or of which Supplier is aware) from time to time;
- (b) have in place, implement and operate an appropriate safety programme which is compliant with all relevant legislation and which shall have the following features (as a minimum):
- (i) it provides systems and procedures for the identification, control and elimination of existing and potential hazards in the workplace and for the development of appropriate control measures;
 - (ii) it identifies the training and experience of staff who will perform the work and the supervision arrangements for those staff;
 - (iii) it provides systems and procedures for monitoring the compliance of its Personnel;
 - (iv) it identifies equipment to be used;

- (v) it provides procedures for dealing with on-site emergencies;
- (c) ensure that safety information Spark NZT provides to Supplier is conveyed to, and implemented by Supplier's Personnel;
- (d) provide health and safety training to its employees, agents and sub-contractors involved in the performance of this Agreement;
- (e) promptly notify Spark NZT if any hazard exists at our sites, whether due to activities of Supplier's personnel and/or those of Supplier's third party providers or otherwise. This obligation does not apply to hazards which are already identified in our health and safety policies or plan; and
- (f) implement management systems to achieve the safety outcomes required by this agreement or applicable law.
- 3.3 Health and Safety Audit:** Supplier will, at Spark NZT's request, provide Spark NZT access to all material and documents relevant to Supplier's performance of this clause 3. Spark NZT may, on 30 days' notice, audit:
- (a) Supplier's health and safety policies; and
- (b) Supplier's implementation of those policies,
- and make reasonable recommendations to Supplier with respect to those policies. If Spark NZT makes any such recommendations, then Supplier will use all reasonable endeavours to promptly comply with the recommendations.
- 3.4 Incident reporting:** Supplier will:
- (a) notify Spark NZT immediately it becomes aware of any near miss incident or accident relating to performance of its obligations under this Agreement; and
- (b) assist in or carry out any reasonable subsequent investigation relating to that accident, as and when reasonably required by Spark NZT and provide a copy of its investigation report to Spark NZT.
- 3.5 Entering Spark NZT premises:** Supplier will ensure that any of its Personnel who enter any Spark NZT premises comply with all health and safety, security and any other processes and procedures notified to Supplier from time to time.
- 4 CONTRACT CHANGES**
- 4.1 Change Request** From time to time either Party may give notice to the other requesting a Contract Change (**Change Request**). If requested by Spark NZT, following submission of a Change Request, Supplier will promptly prepare and provide to Spark NZT a report outlining the likely impact of the Contract Changes, along with any charges and/or terms and conditions required for the implementation of that Change (**Change Impact Report**). Supplier will prepare each Change Impact Report with due skill and care, and in so doing will use best endeavours to mitigate any adverse price consequences or delays, and Spark NZT will be entitled to rely on the Change Impact Report in deciding whether to approve or reject a Contract Change.
- 4.2 Approval, rejection or withdrawal** Spark NZT will consider each Change Request submitted by Supplier, and each Change Impact Report. In the case of a Change Request submitted by Supplier, Spark NZT may approve or reject the Change Request at any time, by giving written notice to Supplier. In the case of a Change Request submitted by Spark NZT, Spark NZT may withdraw the Change Request at any time, by giving written notice to Supplier. Supplier will not unreasonably withhold or delay its agreement to a Change Request from Spark NZT, whether by demanding unreasonable charges, imposing unreasonable terms and conditions, or otherwise.
- 4.3 Implementation** Neither Party will be bound by a Change Request unless and until approved in writing by both Parties, after which the Agreement will be deemed to have been amended in accordance with the approved Change Request.
- 5 CHARGES AND EXPENSES**
- 5.1 Charges** Supplier will ensure that all Charges are calculated and applied in accordance with the Agreement. Unless otherwise agreed in writing by Spark NZT, no other fees or charges will be payable by Spark NZT in connection with the Agreement or Deliverables.
- 5.2 Expenses** Supplier may not charge Spark NZT for any expenses or disbursements in connection with this Agreement (**Expenses**), unless agreed otherwise with Spark NZT in writing before the Expenses are incurred, and then only to the extent incurred in accordance with Spark NZT's standard expenses policy, a copy of which Supplier confirms receipt.
- 5.3 Minimise costs** Supplier will complete each task that is to be charged (in whole or in part) on a time and materials basis in as reasonably economical and expeditious a manner as possible so as to minimise the associated Charges.
- 5.4 Supporting information** Supplier will provide Spark NZT with all information Spark NZT may reasonably require from time to time to validate the time spent and charges for time and materials work, and the overall computation of the Charges and Expenses. Supplier acknowledges that Spark NZT will not be obliged to make payment for any Charges or Expenses for which Supplier fails to provide appropriate timesheets, third party invoices and/or any other supporting documentation reasonably required by Spark NZT for the purpose of verifying the Charges and Expenses.
- 5.5 Taxes** All amounts set out in the Agreement are exclusive of GST, unless otherwise specified. Amounts specified in the Agreement as payable are inclusive of all other government taxes, value added taxes, withholding taxes, duties, imposts and levies of a similar nature (**Other Taxes**), however designated, assessed or levied on Supplier and including penalties thereon, and no further amounts shall be payable for these Other Taxes. If any amounts paid by Spark NZT to Supplier are subsequently assessed by the relevant taxation or other authority to be subject to Other Taxes, Spark NZT may in its discretion:
- (a) withhold an amount equal to the Other Taxes assessed so as to set off those amounts against any future payments to be made by Spark NZT; or
- (b) require Supplier to pay an amount equal to the Other Taxes assessed in which case Supplier must pay the amount to Spark NZT on request and Spark NZT will pay the amount to the relevant authority.
- 5.6 Rebates** Supplier will notify Spark NZT as and when Spark NZT is entitled to any rebates and/or commissions under the Agreement.
- 6 INVOICING AND PAYMENT**
- 6.1 GST invoices** Supplier will ensure that each invoice which it issues under the Agreement is a valid tax invoice complying with the requirements of the Goods and Services Tax Act 1985.
- 6.2 Invoices to be itemised** Supplier will ensure that each invoice which it issues under the Agreement is fully itemised and includes all information reasonably required by Spark NZT in order to establish the accuracy of the invoice, including: (a) reference to the Letter Agreement or PO under which the invoice is issued; (b) full details of any pre-approved Expenses incurred by Supplier, together with copies of invoices for Expense items over \$1,000 plus GST; and (c) a separate line item for sums due in respect of GST.
- 6.3 Addressing** Supplier will send each invoice directly to Spark NZT's Accounts Payable team at PO Box 1800, Wellington or via email to invoices@spark.co.nz, copied to the Spark NZT Personnel who requested the Deliverables.
- 6.4 Payment** Subject to clauses 6.6 and 6.7, Spark NZT will pay each invoice correctly issued by Supplier in accordance with this Agreement, no later than the 20th of the month that is two months following the month of Spark NZT receiving the Supplier's valid invoice.

- 6.5 **Effect of payment** Payment of an invoice will be taken only as payment on account and is not evidence or an admission that any Deliverable has been provided in accordance with the Agreement or otherwise accepted by Spark NZT, or that Spark NZT agrees with any claim or allegation made by Supplier.
- 6.6 **Disputed invoices** If Spark NZT disputes in good faith any invoice submitted by Supplier, in whole or in part, Spark NZT may withhold payment of the amount in dispute. Spark NZT will pay the undisputed amount in accordance with clause 6.4. Supplier will continue to perform its obligations under the Agreement until the dispute is resolved. Disputed amounts finally determined to be payable will be paid within 30 days of that determination. Where finally determined that Spark NZT has overpaid Supplier, Supplier will immediately repay the amount of that overpayment to Spark NZT.
- 6.7 **Set off** Spark NZT may set off any amounts it owes Supplier under the Agreement against any amounts owed to Spark NZT by Supplier under the Agreement, including any service level credits and liquidated damages.
- 7 **CONFIDENTIALITY**
- 7.1 **Confidentiality obligations** The Recipient will not use Confidential Information for any purpose other than to perform the Agreement. The Recipient will not disclose Confidential Information to anyone other than: (a) the Recipient's Personnel, authorised Subcontractors or Affiliates who have a need-to-know for the purposes of the performance of the Agreement; or (b) to the Recipient's professional advisors, after obtaining from them an undertaking of confidentiality consistent with the requirements of this clause 7.
- 7.2 **Exceptions** The Recipient's obligations of confidentiality under this Agreement will not prevent:
- (a) any use or disclosure by the Recipient undertaken with the prior written approval of the Discloser, and in accordance with the terms of that approval; or
 - (b) any use or disclosure by Spark NZT that is necessary to obtain the full intended benefit of the Agreement and/or any Intellectual Property or other rights acquired by Spark NZT under the Agreement;
 - (c) any disclosure required by law, by a competent authority pursuant to a power conferred by legislation or regulation, or by the listing rules of any applicable stock exchange, so long as before making the disclosure the Recipient (if permitted by law) notifies the Discloser of the requirement for disclosure and, where practical, provides any assistance reasonably requested by the Discloser for the purpose of obtaining an order or ruling protecting the relevant information; or
 - (d) the Recipient from disclosing information to a bona fide potential purchaser of a significant portion of the assets or shares of the Recipient or any of its Affiliates, as reasonably required for the purposes of a due diligence exercise conducted by that purchaser, provided that purchaser signs a confidentiality agreement in favour of the Discloser on terms consistent with this clause 7.
- 7.3 **Precautions** The Recipient will treat, and ensure that its relevant Personnel, Subcontractors and Affiliates treat, the Confidential Information in strictest confidence, applying at least the same standard of care as the Recipient exercises for its own information of a similar nature and sensitivity.
- 7.4 **Press releases** Regardless of the other provisions of this clause 7 (Confidentiality), Supplier will not make any media comment or issue any press release in connection with the Agreement without Spark NZT's prior written consent.
- 7.5 **References** If a reference is sought from Spark NZT by an existing or potential customer of Supplier, Spark NZT may freely disclose information regarding the Deliverables and Supplier's performance under the Agreement, but Spark NZT may not disclose information regarding Supplier's charges or expenses.
- 8 **INTELLECTUAL PROPERTY**
- 8.1 **Pre-existing IP** Except where this clause 8 or the other provisions of the Agreement expressly provide otherwise, nothing in the Agreement will confer on either Party any rights, title, or interest in the Pre-existing IP.
- 8.2 **Supplier Developed IP** Subject to clause 88.3 and the provisions of the Letter Agreement and/or PO, all Supplier Developed IP will vest in Supplier or its nominee(s) as and when that Intellectual Property comes into existence, and if for any reason some or all of that Supplier Developed IP vests in Spark NZT despite this clause 8.2, Spark NZT hereby assigns that Supplier Developed IP to Supplier.
- 8.3 **Spark NZT Derivative IP** Subject to the provisions of the Letter Agreement and/or PO, all Spark NZT Derivative IP will vest in Spark NZT or its nominee(s) as and when that Intellectual Property comes into existence, and if for any reason some or all of that Spark NZT Derivative IP vests in Supplier or its Affiliates or Subcontractors despite this clause 88.3, Supplier hereby assigns that Spark NZT Derivative IP to Spark NZT.
- 8.4 **Licence to Supplier** Subject to the provisions of the Agreement, Spark NZT grants to Supplier a non-exclusive, non-transferable, fully paid-up, irrevocable licence to any and all Intellectual Property owned or controlled by Spark NZT in any and all Spark NZT Materials, as required by Supplier from time to time to use, copy, modify and adapt those Spark NZT Materials, but only to the extent necessary for Supplier to perform its obligations in accordance with the Agreement, and subject to any restrictions which Spark NZT notifies to Supplier at the time those Spark NZT Materials are provided to Supplier.
- 8.5 **Licence to Spark NZT** Subject to any restrictions expressly set out in the Agreement, Supplier grants Spark NZT and its Affiliates a non-exclusive, non-transferable, fully paid up, perpetual, irrevocable licence to any and all Intellectual Property owned or controlled by Supplier in Supplier Materials (excluding Third Party Software), as required by Spark NZT from time to time to use, copy, modify and adapt those Supplier Materials, but only for the purposes of: (i) performing Spark NZT's obligations under the Agreement; (ii) operating, repairing, maintaining, enhancing and/or extending any Deliverables; (iii) integrating any Deliverables with other components of Spark NZT's systems and/or (iv) enjoying the benefit of the Deliverables; in each case, subject to any restrictions expressly set out in the Agreement.
- 8.6 **Further assurances** Each party will at its own expense execute and deliver any document and do all things as may reasonably be required, in respect of matters within that party's control, in order to assist the other party to obtain the full benefit of this clause 8.
- 8.7 **Exercise by Spark NZT contractors** Spark NZT and its Affiliates may exercise any rights licensed to them under the Agreement through their respective contractors and subcontractors.
- 9 **IP INDEMNITY**
- 9.1 **Indemnity** Subject to clause 99.4, Supplier will indemnify Spark NZT and its Affiliates on demand against all actions, proceedings, losses, liabilities, damages, claims, demands, costs and expenses (including reasonable legal expenses) suffered or incurred in relation to any actual or threatened third party claim that expressly or by implication alleges that Spark NZT's use, copying, modification, distribution, compilation, sale, hire, import and/or export (together, **Use**) of a Deliverable infringes or will infringe the Intellectual Property rights of any third party (each a **Claim**).
- 9.2 **Notice and control** The party that first receives notice of a Claim must promptly notify the other party in writing providing reasonable details of the Claim. Except where Spark NZT has expressly waived its right to be indemnified under clause 9.1 in respect of a particular Claim, Spark NZT must not make any admission of liability or purport to settle that Claim without Supplier's prior written consent, and at Supplier's request and expense Spark NZT must allow Supplier to conduct and/or settle all negotiations and litigation resulting from the Claim, provided that:

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- (a) Spark NZT will be entitled to be represented at, and consulted on, all such negotiations and litigation;
 - (b) Supplier will not be entitled to make any admission of wrongdoing on Spark NZT's behalf;
 - (c) unless Spark NZT specifically agrees otherwise in writing, Supplier will not be entitled to compromise or settle the Claim on any basis that does not involve a complete release by the claimant(s) in favour of Spark NZT, in respect of any and all liability in connection with the Claim; and
 - (d) at Supplier's request, Spark NZT will provide reasonable assistance with such negotiations or litigation, and Supplier must reimburse Spark NZT for its reasonable staff costs and out of pocket expenses incurred for that purpose.
- 9.3 **Remedies** If any Claim prevents or threatens to prevent the supply or Use of any Deliverable, then Supplier must (at its own election and expense): (a) obtain for Spark NZT the right to continue Using the Deliverable in accordance with the rights granted in the Agreement; or (b) modify the relevant Deliverable so that it becomes non-infringing; or (c) replace the relevant Deliverable with another non-infringing item; but in each case Supplier must ensure that the remedy does not adversely affect any Deliverables under the Agreement or any other Agreement, or Spark NZT's use of them, except after consultation with Spark NZT and with Spark NZT's prior written consent (at Spark NZT's absolute discretion).
- 9.4 **Exclusions** Supplier has no obligation under clause 99.1 (Indemnity by Supplier) or clause 1010(g), to the extent that a Claim arises from:
- (a) Spark NZT's Use of a Deliverable in a manner that breaches this Agreement, or Use of Third Party Software in a manner not permitted by the Third Party Licence Terms;
 - (b) additions or enhancements to a Deliverable, carried out by a person other than Supplier or its Affiliates or Subcontractors;
 - (c) Spark NZT unreasonably refusing to implement a modification if provided in accordance with clause 99.3, where Supplier is able to demonstrate that the fix or modification would have prevented the Claim and would have no discernable impact on pre existing use or operation;
 - (d) combination, operation, or use of Deliverables with any good, software, product, data or business method that Supplier did not know of, provide, recommend or approve or was not within the reasonable contemplation of the Supplier.
- 10 **SUPPLIER WARRANTIES**
- Supplier represents and warrants that:
- (a) all factual information provided by Supplier under the Agreement will be accurate and complete, and all advice provided by Supplier under the Agreement will be provided with reasonable skill, care and diligence;
 - (b) Supplier will have and apply all the expertise, experience, personnel, premises and other resources necessary to supply the Deliverables in accordance with the Agreement;
 - (c) on delivery to Spark NZT, the Deliverables will be free from defects in design, materials and workmanship, and free of any other Defects;
 - (d) the Deliverables will comply with all relevant laws, regulations and standards including any applicable national or international standards and applicable safety regulations;
 - (e) where the Agreement or Documentation contemplates that a Deliverable will or can be used in combination with other Deliverables or particular software, hardware or firmware (or where the Supplier ought reasonably to contemplate such combination), the Deliverable will be fully capable of interoperating with the relevant Deliverables, software, hardware or firmware (as applicable);
- (f) on delivery to Spark NZT, the Deliverables will be free from any charge, security, lien or other encumbrance; and
 - (g) subject to clause 99.4, Spark NZT's Use of any Deliverable or Supplier Material in accordance with the Agreement will not infringe the Intellectual Property of any third party.
- 11 **LIABILITY**
- 11.1 **Exclusion of liability** Subject to clause 11.3, neither party will be liable to the other (under the law of contract, tort, equity or otherwise) for any damages of any kind arising out of or in connection with the Agreement that are indirect or consequential, regardless of the cause of such damages or whether the other party had been advised of the possibility of such damage.
- 11.2 **Limitation of liability** Subject to clause 11.3 and 11.4, each party's liability to the other party for damages (under the law of contract, tort including negligence, equity or otherwise) arising out of or in connection with the Agreement, and all other Agreements with Spark NZT, will be limited in aggregate to the greater of: (a) 120% of the total combined amounts paid and/or payable to Supplier under all those Agreements; or (b) NZD\$2 million.
- 11.3 **Exceptions to exclusions and limitations** Nothing in these Purchase Terms will limit or exclude any liability Supplier may have to Spark NZT under clause 9.1 (Intellectual Property Indemnity).
- 11.4 **Exceptions to limitations** Subject to clause 11.1, nothing in these Purchase Terms will limit any liability either party may have to the other: (a) for wilful default, damage to tangible physical property, or fraud; or (b) for any unauthorised use of the other party's Intellectual Property or Confidential Information.
- 11.5 **Liquidated damages and service level credits** Where the Agreement entitles Spark NZT to claim service level credits and/or liquidated damages from Supplier, this will be without prejudice to any other right or remedy Spark NZT may have. The service credits and/or liquidated damages are genuine pre-estimates of the minimum loss that Spark NZT expects to incur or suffer in connection with Supplier's failure to comply with its relevant obligations, and Supplier acknowledges that those service level credits or liquidated damages (as applicable) are fair and reasonable.
- 12 **INSURANCE**
- 12.1 **Required insurance** Supplier will maintain for the term of the Agreement, and for six months following its termination or expiry, public liability and professional indemnity insurance cover with a reputable insurance company. Except where the Letter Agreement specifies a lower limit or a different type of insurance, each policy must have a limit of no less than NZD\$10 million or the maximum amount of Supplier's limitation of liability under clause 11.2, whichever is greater, for any one claim or series of claims arising out of one event.
- 12.2 **Notice of claims** Supplier will promptly notify Spark NZT in writing if any material claims have been made on Supplier's insurance policy that may affect the ability of Supplier to claim under the insurance required under this clause 12.
- 12.3 **Insurance by Spark NZT** If Supplier fails to provide Spark NZT with reasonable evidence showing that Supplier has in place the insurance required by this clause 12, within 20 Working Days of Spark NZT requesting such evidence, Spark NZT may obtain that insurance on Supplier's behalf, and Spark NZT may either deduct the associated insurance premiums from amounts payable to Supplier under the Agreement or require that Supplier promptly reimburses Spark NZT for those premiums.

13 TERMINATION

13.1 **Default events** Either party may on written notice to the other party terminate the Agreement, if the other party:

- (a) has materially breached any of its obligations or breaches a material obligation under the Agreement, where either the breach is not capable of being rectified or has not been rectified within 20 Working Days of the first party giving written notice specifying that it has the right to terminate under this clause if the breach is not rectified;
- (b) has purported to assign its rights or obligations otherwise than in accordance with clause 16 (Assignment and Subcontracting);
- (c) goes into liquidation or has a receiver, administrator, statutory manager or similar officer appointed in respect of it (other than for the purpose of a solvent amalgamation or reconstruction);
- (d) is or is deemed to be unable to pay its debts as they become due, or proposes or enters into any arrangement, compromise or composition with its creditors; or
- (e) is subject to an event of Force Majeure that materially affects its performance of the Agreement and continues for more than 20 Working Days.

13.2 **Change of Control** Spark NZT may terminate the Agreement at any time on 14 days' notice, if any person acquires or relinquishes Control of Supplier.

13.3 **Convenience** Spark NZT may terminate the Agreement at any time on 20 Working Days' written notice to Supplier. In the event of such termination, after completing its obligations under clause 14.1 (Transition assistance), Supplier may invoice Spark NZT for: (a) a charge for all time reasonably expended by Supplier in relation to the Services provided under the Agreement up to the date of termination, less any amounts already charged or chargeable to Spark NZT for those Services; (b) a charge for all outstanding unavoidable, demonstrated reasonable expenses reasonably and necessarily incurred or committed by Supplier up to the date of termination. Supplier will take all reasonable steps to reduce the Charges under this clause 13.3, including by re-assigning its Personnel to other work wherever practicable. The total Charges payable to Supplier under this clause 13.3 will not exceed the total Charges and Expenses that Supplier could reasonably have expected to recover under this Agreement in the absence of the termination under this clause 13.3.

13.4 **Partial termination** Where Spark NZT has the right to terminate the Agreement, Spark NZT may, at its discretion, partially terminate the Agreement in respect of those parts which have not yet been performed by Supplier and can reasonably be severed from the remainder of the Agreement.

14 DISENGAGEMENT

14.1 **Transition assistance** Leading up to the expiry or effective date of termination of all or any part of the Agreement and for a reasonable time after, Supplier will provide such assistance and information as is reasonably necessary and requested by Spark NZT for an orderly transition of the Deliverables to Spark NZT or its nominated third party provider, and/or an orderly replacement of the Deliverables by Spark NZT or its nominated third party provider, including performing any transition or disengagement services specified in the Letter Agreement and/or PO. Except where Spark NZT terminates under clause 13.1 or 13.2, Spark NZT will reimburse Supplier its reasonable and demonstrable out-of-pocket costs and expenses in providing such information and assistance, and will pay Supplier at reasonable hourly rates for the work carried out by Supplier's employees for that same purpose such rates not to exceed the time and materials rates (if any) contracted for under the Agreement.

14.2 **Consequences of termination** Following the expiry or termination of all or any part of the Agreement:

- (a) subject to clauses 66.6 and 66.7, all Charges and other payments outstanding or incurred before the date of expiry or termination

under the terminated part of the Agreement will become immediately due and payable;

- (b) each party will either promptly deliver to the other or, at the other's option, destroy and certify the destruction of, all that other party's property and Confidential Information (in any reasonable format requested by the other party) under the terminated part of the Agreement, as and when reasonably requested in writing by the other party, although Spark NZT may retain any Confidential Information that Spark NZT reasonably considers will be required for it to obtain the full intended benefit of the Agreement and/or any Intellectual Property or other rights acquired by Spark NZT under the Agreement; and
- (c) except in the case of termination by Supplier under clause 13.1 (Default events), Supplier will promptly deliver to Spark NZT all work in progress on any Deliverables in the possession or control of Supplier or its Subcontractors under the terminated part of the Agreement.

14.3 **Survival** The expiry or termination of all or any part of the Agreement will not affect the rights of the parties accrued up to the date of expiry or termination. The following clauses will survive any termination or expiry: clauses 2.9 (Information), 2.10 (Audit Rights), 7 (Confidentiality), 8 (Intellectual Property), 8.7 (IP Indemnity), 11 (Liability), 12 (Insurance), 13 (Termination), 14 (Disengagement), 18 (Dispute Resolution), 19 (General), 21 (Title and licence), 28 (Software Licence), 29 (Maintenance), 31 (Defined Terms) and 32 (Construction).

15 FORCE MAJEURE

15.1 **Relief** Non-performance by either Party of any of its obligations under the Agreement will be excused, without liability, during the time and to the extent that performance of the obligation is delayed or prevented, wholly or substantially, by a Force Majeure Event.

15.2 **Notice** The party claiming relief under this clause 15 must promptly give written notice to the other party, outlining the nature and expected duration of the Force Majeure Event, its likely impact on the Agreement, and the measures which that party proposes to adopt to remedy, abate or mitigate the Force Majeure Event.

15.3 **Mitigation and resumption** The party claiming relief must take all reasonable steps to remedy, abate or mitigate the effects of the Force Majeure Event. Performance of affected obligations must be resumed as soon as reasonably possible, unless the Agreement has been terminated.

16 ASSIGNMENT, NOVATION, TRANSFER AND SUBCONTRACTING

16.1 **No assignment, novation or transfer** Subject to the other provisions of this clause 16, neither party will directly or indirectly assign, novate, transfer or otherwise dispose of any of its rights or obligations under the Agreement, except with the prior written consent of the other party, not to be unreasonably withheld or delayed.

16.2 **Assignment, novation or transfer to Spark NZT Affiliates** Spark NZT may assign, novate or otherwise transfer all or part of the benefits and burdens of this Agreement to any Spark NZT Affiliate or any third party providing services to Spark NZT, provided that the assignee/novatee/transferee undertakes to Supplier to perform and be bound by the relevant terms of the Agreement and the assignee/novatee/transferee is not a competitor of Supplier and is able to pay any Charges as they become due and payable.

16.3 **Subcontracting by Supplier** Supplier may not subcontract any part of the Agreement (except for minor details, purchases of materials, and any Service for which the Subcontractor is named in the Agreement), except with Spark NZT's prior written consent. Supplier will be responsible and liable for all acts and omissions of any Subcontractor.

17 SPARK NZT AFFILIATES

17.1 **Affiliates** Supplier acknowledges that any Spark NZT Affiliate may enter into an Agreement with Supplier, in which case all references to Spark NZT in these Purchase Terms (whether as a "party" or "Spark NZT" or otherwise) will be read as references to that Spark NZT Affiliate, except in this clause 17.

17.2 **Privity** Wherever this Agreement is expressed as conferring rights on one or more Spark NZT Affiliates, those rights will be enforceable by each Spark NZT Affiliate under the Contracts (Privity) Act 1982, provided that those Spark NZT Affiliates will not be entitled to bring proceedings against Supplier except with Spark NZT's written consent. Where a Spark NZT Affiliate enters into an Agreement with Supplier, only the Spark NZT Affiliate incurs any obligation or liability to Supplier with respect to that Agreement.

18 DISPUTE RESOLUTION

18.1 **Notice and negotiation** If a dispute, disagreement, question, difference or claim arises between the parties in connection with the Agreement, or in relation to any question regarding its existence, breach, termination or validity (**Dispute**), either party may give the other written notice requiring that the Dispute be determined in accordance with this clause 18 (**Dispute Notice**). Within 10 Working Days of the Dispute Notice, the parties will enter into good faith negotiations with a view to resolving the Dispute.

18.2 **Arbitration** If the Dispute has not been resolved within 20 Working Days of the Dispute Notice being issued, either party may give notice referring the Dispute to arbitration by a sole arbitrator under the Arbitration Act 1996 (**Arbitration Notice**). The arbitration will be conducted in Wellington, New Zealand. If the parties cannot agree on an arbitrator within five Working Days of the Arbitration Notice, the arbitrator will be appointed at the request of either party by the president for the time being of the New Zealand Law Society or his/her nominee. Clauses 3 (Powers relating to conduct of arbitral proceedings) and 6 (Costs and expenses of an arbitration) of the Second Schedule of the Arbitration Act 1996 will apply. No other clauses in the Second Schedule will apply.

18.3 **Urgent relief** Nothing in the Agreement will prevent either party seeking or obtaining any order or relief by way of injunction or declaration or other equitable or statutory remedy against the other party where such party believes such order or relief is necessary for the urgent protection of its rights or property.

19 GENERAL

19.1 **Notices** Any notice or other communication to be given under the Agreement will be in writing and delivered by hand, registered mail or email to the relevant party at the addresses specified in the Letter Agreement and/or PO. If no such address is specified for Spark NZT, the address is: Spark New Zealand Trading Limited, Level 2, Spark City, 167 Victoria Street West, Auckland, 1142, New Zealand; Email: general.counsel@spark.co.nz; Attention: General Counsel. Where email is used the party receiving the email will acknowledge receipt however if receipt is not acknowledged within 1 Working Day of email transmission, a hardcopy of the email will also be posted to the above address. Receipt of notices under this clause will be presumed on delivery by hand, three Working Days after posting within New Zealand, or within 1 Working Day of email transmission unless during that time the sender receives an automated message advising that email may not have been delivered (whichever is applicable).

19.2 **Severability** If any provision of the Agreement is invalid, void, illegal or unenforceable, it will be amended to the minimum extent necessary to ensure it is not invalid, void, illegal or unenforceable, and, as far as is possible, to ensure that it is consistent with the intent and effect of the provision. If it is unable to be so amended, the provision will be severed and the validity, existence, legality and enforceability of the remaining provisions will not in any way be affected.

19.3 **Waiver** No term or condition of the Agreement will be deemed to have been waived in part or in full and no delay, breach or default will be deemed to have been excused in part or in full unless the waiver or excuse is in writing and signed by an authorised representative of

the relevant party. No waiver will constitute the waiver of any other breach of the same or any other term or condition.

19.4 **Entire agreement** The Agreement is the entire understanding between Spark NZT and Supplier concerning its subject matter and supersedes all previous agreements and understandings between the parties on its subject matter.

19.5 **Contract variations** The Agreement may not be modified or amended except in writing signed by a duly authorised representative of each party and no other act, document, usage, or custom will be deemed to amend or modify the Agreement.

19.6 **No agency** Nothing in the Agreement will be deemed to constitute either party as the agent, partner or joint venturer of the other. Supplier, in providing the Deliverables and Services to Spark NZT under the Agreement, is acting as an independent contractor.

19.7 **Counterparts** The Letter Agreement or PO may be executed in several counterparts (including facsimile copies), all of which when signed and taken together constitute a single agreement. A party can enter into the Agreement by signing any such counterpart.

19.8 **Further acts and documents** Each party will, at its own expense and when requested by the other party, promptly do, sign and deliver everything reasonably required for the purposes of and to give full effect to the Agreement, its provisions and any transactions contemplated by it.

19.9 **Governing law** The Agreement will be governed by the laws of New Zealand and, subject to clause 18 the parties submit to the non-exclusive jurisdiction of the New Zealand courts.

19.10 **Remedies** Unless otherwise provided in the Agreement, all rights and remedies of the parties whether under the Agreement, in law or at equity, are non-exclusive, cumulative, and may be exercised concurrently or separately.

Part 2: Goods

20 DELIVERY

20.1 **Packaging** Supplier must ensure that all Goods are adequately packed and protected for transport, and marked with identifying information as required by Spark NZT. Supplier will provide packing slips setting out detailed descriptions of the delivered Goods accompanying the delivery of any Goods.

20.2 **Delivery** Except where the Letter Agreement and/or PO expressly provide otherwise, Supplier will deliver the Goods to Spark NZT in accordance with Incoterm 2010 DDP (Delivered Duty Paid) on the delivery date specified in the Agreement (or if none is specified, on a date notified by Spark NZT, acting reasonably), and to the delivery location specified in the Agreement (or if none is specified, to a location within New Zealand notified by Spark NZT). Delivery to a carrier will not constitute delivery to Spark NZT. Supplier must promptly notify Spark NZT of likely delivery delays.

20.3 **Liquidated damages** Spark NZT will be entitled to liquidated damages from Supplier for the period from the agreed delivery date up to but excluding the date on which the Goods are actually delivered to Spark NZT in accordance with this Agreement, at the applicable rate(s) set out in the Letter Agreement and/or PO.

20.4 **Cancellation for delays** If Supplier fails to deliver the Goods within 5 Working Days' following the agreed delivery date, or it becomes clear that there is no reasonable prospect of Supplier delivering the Goods by that date, then (without prejudice to any other right or remedy) Spark NZT may give 5 Working Days' written notice of its intention to cancel, and unless the Goods are delivered before the end of that notice period, the purchase will be cancelled and Supplier must promptly refund to Spark NZT on demand any monies already paid to Supplier in respect of those Goods and Spark NZT may recover from Supplier any losses, costs or other expenses suffered or incurred as a direct result of Supplier's breach.

20.5 **Inspection** Spark NZT may inspect Goods at any time during the period of five Working Days following delivery. Without limiting any other rights or remedies Spark NZT may have, if Spark NZT finds any Goods are damaged or not in working order, Spark NZT may reject those Goods by notifying Supplier at any time during that period; and if more than 10% of the units in a single delivery are found to be damaged or not in working order, Spark NZT may reject the entire delivery by notifying Supplier at any time during that period.

20.6 **Return or refund** Spark NZT may return the rejected Goods to Supplier at Supplier's risk and cost, in which case Supplier must promptly refund to Spark NZT on demand all monies already paid to Supplier in respect of those Goods, or at Spark NZT's option, Supplier must promptly provide a replacement for the rejected Goods.

21 TITLE AND LICENCE

21.1 **Title** Without limiting clause 21.3, title to Goods will pass to Spark NZT on payment of the Charges for those Goods or on delivery of those Goods to Spark NZT, whichever occurs first. If Spark NZT rejects, or cancels the purchase of, any Goods in accordance with the Agreement, title and risk therein will remain with or revert (as the case may be) to Supplier.

21.2 **Undelivered Goods** Where title in Goods passes to Spark NZT while those Goods are still in the possession of the Supplier or its agents:

- (a) the Supplier will ensure that the Goods are clearly labelled as the property of Spark NZT, and are stored in a manner which clearly separates them from any other goods in the possession of the Supplier or its agents;
- (b) the Supplier will promptly notify Spark NZT where those Goods are being held pending delivery to Spark NZT; and
- (c) the Supplier acknowledges that it holds those Goods solely as bailee for Spark NZT.

The Supplier hereby grants Spark NZT an irrevocable licence to enter onto any premises owned or controlled by the Supplier or its agents for the purpose of uplifting those Goods, although Spark NZT may only exercise this right if the Supplier has become subject to one or more of the circumstances described in clauses 13.1(c) and 13.1(d), and has failed to deliver those Goods to Spark NZT within 5 days of Spark NZT requesting the same.

21.3 **Licence** Spark NZT acknowledges that all Intellectual Property in the Documentation and any firmware or other embedded software in the Goods will remain vested in Supplier or its licensors. Supplier grants Spark NZT and each subsequent owner of the Goods a perpetual, non-exclusive, transferable licence to: (i) use the firmware in combination with the Goods; (ii) use, copy and distribute the Documentation in connection with use of the Goods by any person; including through its contractors and personnel.

21.4 **Upgrades** Where the Goods include any firmware or other embedded software, Supplier will make available to Spark NZT, at no additional cost, all upgrades, updates and patches for that firmware or software that are released at any time during the 12 months following delivery of the Goods (or any longer period specified in the Letter Agreement or PO).

22 WARRANTIES AND REMEDIES

22.1 **Warranty Period** If one or more of the Goods are found to be Defective within the applicable Warranty Period, then without limiting Spark NZT's other rights or remedies, Spark NZT may give notice to Supplier requiring the Defect to be remedied, and Supplier will promptly remedy the Defect accordingly, at no cost to Spark NZT. If the Defect has not been remedied within 10 Working Days of Supplier receiving that notice from Spark NZT, then Spark NZT may reject the Defective Goods, and any other Goods that Spark NZT reasonably considers cannot be used without the Defective Goods, and return them to Supplier at Supplier's risk and expense. In that case, Supplier must immediately refund to Spark NZT all monies paid in respect of the returned Goods, and Spark NZT may recover from Supplier any

losses, costs or other expenses suffered or incurred as a direct result of Supplier's breach of warranty.

22.2 **Additional warranties** In addition to any other warranties and representations, Supplier warrants that:

- (a) at the time of delivery, the Goods will comply with the applicable Requirements, and will be new and unused;
- (b) the Goods will be fit for all purposes for which such items are normally acquired, and for all purposes which Spark NZT made known to Supplier before the date of the Agreement or which would have been within the reasonable contemplation of the parties, in each case subject to any limitations which Supplier advised to Spark NZT in writing prior to the date of the Agreement;
- (c) Supplier has the necessary rights and permissions to grant the licence in clause 21.3, Supplier has the right to sell the Goods to Spark NZT, and title in the Goods will pass to Spark NZT in accordance with the Agreement and free of any charge, lien or other encumbrance;
- (d) Spark NZT will enjoy quiet possession of the Goods free from any interference by Supplier and its Affiliates or any person claiming through them; and
- (e) Spark NZT will receive the full benefit of all manufacturers' licences and warranties available to Supplier in relation to the Goods.

Part 3: Services

23 SUPPLIER OBLIGATIONS

23.1 **Delivery** Supplier will deliver the Services to Spark NZT, in a manner that meets the Requirements, at the location specified in the Agreement, and on Working Days unless otherwise specified in the Agreement. Supplier will carry out the Services in a manner that does not interrupt Spark NZT's business, except for any interruptions approved in advance and in writing by Spark NZT.

23.2 **Rates** Except as otherwise provided in the Agreement, all Charges for Services will be calculated in accordance with a "Rates Schedule" set out in or attached to the Letter Agreement and/or PO. If no such "Rates Schedule" has been provided to Spark NZT, Spark NZT will not be liable for any Charges unless and until such a "Rates Schedule" has been provided by Supplier and approved by Spark NZT in writing.

23.3 **Service Levels** Supplier will deliver the Services so as to meet or exceed the Service Levels (if any), and otherwise in accordance with Good Industry Practice. If Supplier fails to meet a Service Level, Supplier will reduce the amount payable by Spark NZT under the Agreement by the amount equal to the corresponding service level credits (if any) calculated in accordance with the Letter Agreement and/or PO.

23.4 **Reporting** Supplier's Project Manager must report in writing to Spark NZT's Project Manager at the frequency specified by Spark NZT from time to time (**Regular Report**). Each Regular Report must set out to a reasonable level of detail Supplier's progress on the work required by the Agreement, key items of work for the next reporting period, notification of delays, issues, risks and proposed mitigations, a cost breakdown for the last reporting period, and a cost forecast for the next reporting period.

23.5 **Meetings** The parties' Project Managers will meet as required by Spark NZT's Project Manager from time to time, but no less than weekly, to discuss the Regular Report and any other matters requiring discussion relating to the Agreement.

24 CONTRACT MILESTONES

24.1 **Due Date** Supplier will meet each of its Contract Milestones on or before the corresponding Due Date, subject to any extensions allowed under clause 24.3 (Extensions of time).

- 24.2 **Slippage** If Supplier reasonably anticipates any delay (for any reason) in meeting any of its Contract Milestones, it will give Spark NZT written notice as soon as is reasonably practicable including the reasons for the delay. Both parties will then consult with a view to identifying ways to mitigate the delay. If this gives rise to a Change Request, the timeframe for preparation of a corresponding Change Impact Report will be no more than 2 Working Days. Notice under this clause will not excuse Supplier from its obligation to meet Contract Milestones or from any consequences of delay.
- 24.3 **Extensions of time** To the extent that a failure or inability of Supplier to meet a Contract Milestone is a direct result of a Force Majeure Event or Spark NZT's breach of contract or negligence, Supplier will be entitled to a reasonable extension of time for that Contract Milestone and any other Contract Milestones that are similarly affected. This will be Supplier's sole remedy for the effects of any Force Majeure Event or any Spark NZT act or omission in terms of the cost, resource, time and effort required in order for Supplier to supply the Deliverables in accordance with the Agreement.
- 24.4 **Remedies for delay** If Supplier fails to meet a Contract Milestone, then subject to clause 24.3 (Extensions of time), but without prejudice to any other right or remedy of Spark NZT:
- subject to the other provisions of the Agreement, Spark NZT will be entitled to claim liquidated damages from Supplier for the period from the Due Date of the relevant Contract Milestone up to but excluding the date on which the Contract Milestone is met, at the applicable rate(s) set out in the Letter Agreement and/or PO;
 - if Supplier fails to meet the Contract Milestone by the end of the Milestone Remedy Period, then at any time thereafter, unless and until Supplier has met that Contract Milestone, Spark NZT may terminate the Agreement with immediate effect by written notice to Supplier, in which case Spark NZT may also terminate any other related Agreement with Supplier;
 - wherever Spark NZT terminates the Agreement and/or any related Agreement under this clause 24.4:
 - Spark NZT will not be liable for any further charges under that Agreement;
 - Supplier must refund to Spark NZT on demand all charges for any deliverables that have not yet been provided to Spark NZT under that Agreement;
 - Spark NZT may (at its absolute discretion) return any deliverables already provided under that Agreement, in which case Supplier must refund to Spark NZT on demand all charges for those returned deliverables.
- 25 **ACCEPTANCE TESTING**
- 25.1 **Acceptance Tests** For each Stage, Spark NZT will be entitled to conduct such inspections and tests as Spark NZT reasonably considers necessary to satisfy itself that the Deliverables are suitable to be accepted and put into live operation for Spark NZT or its customers (**Acceptance Tests**). Spark NZT will ensure that the Acceptance Tests are objective, verifiable and compliant with any testing or acceptance requirements set out in the Letter Agreement and/or PO. Without limiting the foregoing, the Acceptance Tests may include any tests commonly conducted as a matter of Good Industry Practice for deliveries of comparable complexity, scale and risk.
- 25.2 **Factory testing** Supplier will not present a Stage to Spark NZT for Acceptance Testing unless Supplier is reasonably satisfied that the Stage is capable of passing its Acceptance Tests, and Supplier will carry out pre-delivery testing as necessary for that purpose.
- 25.3 **Submission and testing** Whenever Supplier considers that it has completed a Stage to the standard required by the Agreement, including after any re-submission under clause 25.4, Supplier will notify Spark NZT accordingly, and Spark NZT will perform Acceptance Tests on that Stage. Supplier will promptly provide any assistance and information reasonably requested by Spark NZT for the purpose of facilitating the Acceptance Tests.
- 25.4 **Test results and notification** Within 10 Working Days of the completion of Acceptance Tests for a Stage:
- if the Stage has passed all its Acceptance Tests, Spark NZT will notify Supplier accordingly, and the Stage will be taken to be accepted;
 - if the Stage has not passed all its Acceptance Tests, Spark NZT will give notice to Supplier outlining the failures, and Supplier will correct each failure and resubmit the entire Stage to Spark NZT under clause 25.3 as soon as reasonably practicable thereafter;
 - if the Stage has passed all its Acceptance Tests other than specified faults which Spark NZT (in its absolute discretion) considers sufficiently minor to allow Supplier to remedy after Acceptance, Spark NZT will give notice to Supplier to that effect, accompanied by a list of the outstanding items, in which case the Stage will be taken to be accepted, and Supplier will promptly remedy each outstanding item to Spark NZT's reasonable satisfaction, at no charge.
- 25.5 **Repeated failure** Without limiting any other rights or remedies Spark NZT may have, if a Stage fails its Acceptance Tests a second time after being resubmitted under clause 25.4(b), Supplier will be deemed to have missed a Contract Milestone and failed to remedy the delay within the Milestone Remedy Period, and Spark NZT will be entitled to terminate under clause 24.4 accordingly.
- 25.6 **Acknowledgement** Spark NZT will not in any circumstances be taken to have accepted any Stage except in accordance with this clause 25. Acceptance does not amount to acceptance by Spark NZT that Supplier has met its obligations under this Agreement, and Supplier will remain liable for the full period permitted by law for any unfulfilled obligations.
- ## Part 4: Software
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- 26 **SUPPLY OF SOFTWARE**
- 26.1 **Initial copies** Supplier will supply Spark NZT with the number of copies of the Software and Documentation listed in the Letter Agreement or PO by the date specified in the Letter Agreement or PO, or if no date is so specified, as soon as practicable following the execution of the Agreement.
- 26.2 **Installation** If the Letter Agreement or PO requires Supplier to perform any installation services, Supplier will provide the installation Services in accordance with Part 3 of these Purchase Terms and certify to Spark NZT in writing when the Software is ready for use in accordance with the Requirements.
- 26.3 **Access to Spark NZT's premises** Subject to Spark NZT's reasonable security and operational requirements, Spark NZT will provide Supplier with all necessary access to Spark NZT's premises for the purposes of carrying out the installation services required under the Agreement. In accessing those premises, Supplier will comply with all reasonable health and safety and security requirements notified to it by Spark NZT and/or the premises occupier.
- 27 **SOFTWARE REVIEW PERIOD**
- 27.1 **Testing** For Software that does not form part of a Stage for the purposes of clause 25, during the Software Review Period Spark NZT will be entitled to perform whatever tests it considers necessary to determine whether the Software is Defective.
- 27.2 **Remedy or rejection** If Spark NZT determines on reasonable grounds that this Software is Defective, then unless Spark NZT has already accepted the Software, Spark NZT may give notice to Supplier requiring that the Defect be remedied within 10 Working Days of that notice. If the Defect has not been remedied by the end of that period, Spark NZT may reject the Software by notice to Supplier. If Supplier

advises Spark NZT that the Defect has been remedied, the Software Review Period will restart.

- 27.3 **Return** If Spark NZT rejects the Software in accordance with this clause 27, Spark NZT will promptly return to Supplier all copies of the Software and associated Documentation in Spark NZT's possession. On Supplier's receipt of these items, the licence of that Software under the Agreement will be deemed to have ended, Spark NZT will not be liable for any Charges for that Software, and Supplier will refund to Spark NZT all amounts already paid for the licensing and/or installation of that Software under the Agreement and any other Agreement. This does not relieve Supplier from its other obligations under the Agreement.
- 27.4 **Deemed acceptance** For the purposes of this clause 27, Spark NZT will be taken to have accepted Software if and only if:
- (a) Spark NZT notifies Supplier in writing that the Software has been accepted; or
 - (b) Spark NZT uses the Software in a live operating production environment for a continuous period of 10 Working Days or more (other than for testing, limited piloting, training, conversion or data migration, as provided in the Agreement, or as otherwise agreed by Supplier); or
 - (c) at the end of the Software Review Period, Supplier gives notice to Spark NZT requesting that it accept or reject the Software and advising that the Software will otherwise be deemed accepted, and Spark NZT has not rejected the Software within 10 Working Days of receiving that notice.

28 SOFTWARE LICENCE

- 28.1 **Licence grant** From the Software Delivery Date, Supplier grants a non-exclusive, perpetual licence to use the Software in accordance with the terms and conditions specified in the Licence Model for that Software. If no specific Licence Model is specified in the Letter Agreement or PO, the Licence Model will include the right to install and use an unlimited number of instances of the Software, for Spark NZT's internal and external business purposes, although this does not include any right to issue installable copies of the Software to Spark NZT customers or allow those customers to install instances of the Software.
- 28.2 **Ancillary rights** Supplier acknowledges that Software may be required to interface and interoperate with Spark NZT's Operating Environment. Accordingly, Spark NZT may carry out any integration work necessary for that purpose, and Supplier will provide Spark NZT with any information or assistance reasonably necessary for this purpose. Spark NZT may make additional copies of any Software for the purposes of back-up, disaster recovery and archive purposes, in addition to the copying permitted by law.
- 28.3 **No security mechanism** Supplier will not at any time include in any Software any security mechanism (including password, CPU serial number validation or dependency, electronic initialisation protection and the like) that hinders Spark NZT's ability to physically and electronically transport that Software within Spark NZT's computing facilities (as permitted under the Agreement), or Spark NZT's ability to Use that Software in accordance with the Agreement.
- 28.4 **Right to modify** If under the Agreement Spark NZT is provided with the Source Code for any Software, Spark NZT will be entitled to copy, modify and use the Source Code (and any compiled or interpreted versions of the Source Code) for the purpose of repairing, maintaining, extending and/or enhancing the Software as it sees fit, so long as any Use of the resulting Software is within the bounds of the applicable Licence Model. As between the parties, Spark NZT will be entitled to ownership of all Intellectual Property arising from such repairs, maintenance, extensions and/or enhancements.
- 28.5 **Other Terms** Unless expressly provided otherwise in a written agreement signed by Spark NZT, Spark NZT will not be bound by any so called "click-wrap", "shrink wrap" or "browser wrap" terms and conditions put forward by Supplier in relation to the Software, and except in the case of Third Party Software, Supplier will ensure that

Spark NZT is able to Use the Software without any requirement to accept such terms and conditions.

- 28.6 **Open source software** Supplier will not incorporate into any Deliverable any Open Source Software, except with Spark NZT's specific written consent. If Supplier does intend to incorporate Open Source Software into the Deliverables, Supplier must provide Spark NZT with the licence terms for the Open Source Software, and details of which components of the Deliverables will incorporate the Open Source Software. On receipt of such information Spark NZT will assess the Open Source Software on a case by case basis to determine (at Spark NZT's absolute discretion) whether it is acceptable for incorporation into the Deliverables.
- 28.7 **Escrow Agreement** If requested by Spark NZT in relation to any particular Software, Supplier will promptly enter into an escrow agreement with Spark NZT and a reputable software escrow agent of Spark NZT's choosing, on terms consistent with Spark NZT's standard escrow agreement, a copy of which was provided to Supplier before it entered into this Agreement.

29 MAINTENANCE

- 29.1 **Maintenance Term** Except where the Letter Agreement or PO expressly provides otherwise, the Charges include a Maintenance Subscription for the first Maintenance Term, and the Maintenance Fee will be payable only for subsequent Maintenance Terms if and when taken up by Spark NZT.
- 29.2 **Renewal** Spark NZT may renew the Maintenance Subscription for an additional Maintenance Term, by giving notice to Supplier at any time, in which case Supplier may invoice Spark NZT for the Maintenance Fee for that renewed Maintenance Term, at any time after the start of that Maintenance Term.
- 29.3 **Reinstatement** Where the Maintenance Subscription has lapsed, Spark NZT may reinstate the subscription by giving notice to Supplier, in which case Supplier may invoice Spark NZT for the Maintenance Fee for the next Maintenance Term, and so long as the version of the Software in use at Spark NZT at the time is no more than two Major Releases behind the latest Major Release, Spark NZT will not be required to pay any additional Charge for that reinstatement.
- 29.4 **Releases** During each Maintenance Term, Supplier will notify Spark NZT promptly upon each new Release of the Software becoming generally available to Supplier's customer base. Supplier will promptly provide Spark NZT with a copy of the Release (including release notes and installation instructions) at no extra charge to Spark NZT. Each Release implemented by Spark NZT will be licensed to Spark NZT as part of the Software under this Agreement, at no extra charge to Spark NZT. Except where the Agreement expressly provides otherwise, Spark NZT will not be obliged to implement any future Release, and failure to do so will not affect any rights or remedies Spark NZT may have.
- 29.5 **Operating Environment** Supplier will ensure that each Release that becomes available during the first Maintenance Term will be compatible with the Operating Environment. Thereafter, Supplier will ensure that subsequent Releases require no more than one update of the Operating Environment in any rolling 12 month period.

30 WARRANTIES

Supplier warrants that:

- (a) upon installation in accordance with the Documentation, the Software will be ready to be operated in accordance with its standard user manuals and technical documentation;
- (b) the Software will contain no viruses, spyware or Trojan horses, or any other code which would have the effect of materially disrupting, impairing, disabling or otherwise adversely affecting, shutting down or denying Spark NZT or its Affiliates access to all or any part of any Software or any other Spark NZT software, hardware, network or system; and

- (c) the Software will be compatible with each other individual element or module of the Deliverables and the Operating Environment as described in the Agreement.

Part 5: Interpretation

31 DEFINED TERMS

In this Agreement, unless the context requires otherwise:

Affiliate of a person, means any other person directly or indirectly Controlling, Controlled by or under common Control with the first person at the relevant time.

Agreement means an agreement between Spark NZT and Supplier for the supply of goods, services and/or software, which expressly incorporates these Purchase Terms by reference. Such an agreement may take the form of a Letter Agreement or PO.

Change Request and **Change Impact Report** have the meanings given in clause 3 (Contract Changes).

Charges means amounts payable by Spark NZT to Supplier for the Deliverables, as specified in the Agreement.

Confidential Information of a party (**Discloser**) means all information (in any form) acquired by the other party (**Recipient**) in connection with the Agreement (whether before or after the date of the Agreement), in circumstances such that the Recipient ought reasonably to have regarded that information as confidential to the Discloser. For this purpose, all information acquired by Supplier in connection with the Agreement regarding Spark NZT's network, systems, products, premises, staff, suppliers, plans, business, procedures and methodologies is confidential to Spark NZT. However, Confidential Information excludes any information which the Recipient can show: (a) is in the public domain other than as a result of a breach of the Agreement or any other obligation of confidentiality; (b) is already or lawfully comes into the unrestricted possession of the Recipient without any breach of any obligations of confidentiality owed by a third party; (c) has been independently developed by the Recipient (as evidenced by records in its possession); or (d) is not intended to be confidential as evidenced by the written agreement of the Discloser.

Contract Change means a proposed change to the Agreement, including any change to the Agreement's specifications or requirements for the Deliverables.

Contract Manager in relation a party, means the "Contract Manager" appointed by that party from time to time and notified to the other party.

Contract Milestone means all or any of the delivery and/or performance milestones and their associated dates specified in the Agreement by which Supplier must complete them, as extended from time to time pursuant to clause 24 (Contract Milestones).

Control means the power to exercise 50% or more of the voting interests of an entity, or ownership of 50% or more of the beneficial interests in income or capital of an entity. Control may be direct or indirect, and where one entity Controls another, the first entity is deemed to Control each other entity Controlled by the second entity.

Controlled and **Controlling** shall have corresponding meanings.

Defect in relation to Deliverable, means a failure of the Deliverable to comply with a requirement of the Agreement, and **Defective** shall be construed accordingly.

Deliverable means any Goods, Services and/or Software provided or to be provided under the Agreement, including all items described as "Deliverables" in the Agreement. A Deliverable may also consist of an outcome described in the Agreement, which Supplier is required to bring about through performance of a Service.

Delivery Date:

- (a) in relation to Goods, means the date on which the Goods are delivered to Spark NZT in accordance with clause 20.2;
- (b) in relation to Services, means the date on which the Services are provided to Spark NZT; and
- (c) in relation to Software, means the date of delivery of a copy of the Software to Spark NZT (if Spark NZT is responsible for installing the Software), or the date on which Supplier provides the certification in accordance with clause 26.2 (if Supplier is responsible for installing the Software).

Documentation means all or any documentation that Supplier provides (or is required to provide) to Spark NZT pursuant to the Agreement.

Force Majeure Event means any event beyond the reasonable control of the party claiming relief, excluding: (a) any event which that party could have avoided or overcome by exercising a reasonable standard of care at a reasonable cost; (b) a lack of funds for any reason; and (c) a strike or other labour dispute involving that party or its agents, sub-contractors or suppliers.

Goods means the goods to be supplied under the Agreement, as described in the Letter Agreement and/or PO, and where relevant including any Hardware and Documentation.

Good Industry Practice means the application of at least the level of skill, care, diligence, experience, efficiency and judgement that would be expected from a skilled and experienced person engaged in the same type of undertaking under the same or similar circumstances, applying the best standards and practices currently applied in the New Zealand ICT industry.

GST means New Zealand goods and services tax, payable in accordance with the New Zealand Goods and Services Tax Act 1985.

Intellectual Property means all intellectual property rights and interests whether registered or unregistered, and whether conferred by statute, at common law or in equity, and all rights or forms of protection having equivalent or similar effect in any jurisdiction, whether those rights currently exist or arise in the future.

Key Personnel means the Supplier Personnel (if any) identified in the Letter Agreement and/or PO as "Key Personnel".

Laws means all applicable legislation, regulations and bylaws, and all mandatory codes, standards and orders having the force of law, in New Zealand and any other jurisdiction in which the Deliverables are delivered under the Agreement.

Letter Agreement means a letter agreement which has been signed by Spark NZT and Supplier, and states that it incorporates or is subject to these Purchase Terms.

Licence Model means the terms and conditions of use for any Software licensed to Spark NZT under the Agreement, as set out in these Purchase Terms and/or the Letter Agreement and/or PO.

Maintenance Fee means the fee required to renew the Maintenance Subscription for a further Maintenance Term, being the amount specified in the Letter Agreement or PO, or if none is specified, then Supplier's standard list price.

Maintenance Subscription means the right to receive and use subsequent Releases of the Software, on terms set out in the Agreement.

Maintenance Term means the term of the Maintenance Subscription, as specified in the Letter Agreement or PO, or if none is specified, a period of 12 months, commencing on the date of final acceptance of the Software under clause 25 (if applicable), and otherwise on the Software Delivery Date.

Major Release means a Release that adds significant new functions or features to the Software, as opposed to a Release which makes cosmetic changes or merely remedies defects or bugs from a previous Release.

Material means information or instructions stored in any medium, and includes software, firmware, databases and any other forms of computer code and electronic data, as well as reports, manuals, specifications, plans, layouts, schema, formulae, diagrams, video recordings, audio recordings, photographs, drawings and other images.

Milestone Remedy Period means the applicable "Milestone Remedy Period" specified in the Letter Agreement or PO, or if none is specified, then 5 Working Days for a Contract Milestone identified in the Letter Agreement or PO as "critical", and 15 Working Days for any other Contract Milestone.

Open Source Software means any software available on so called "open source" or "copyleft" licence terms, including any version of the GNU General Public License, the Apache or BSD licence, or any other any license granted, created or administered by the Free Software Foundation.

Operating Environment means the approved hardware and/or software environment for the operation of the Deliverables, as specified in the Agreement. The Operating Environment for subsequent Releases of the Software will be as notified by Supplier for its customer base from time to time, subject to clause 29.5.

Personnel of any entity means any director, officer, employee, or contracted staff member of that entity or that entity's Affiliates.

Pre-existing IP means Intellectual Property subsisting in Material which a Party has created or acquired wholly independently of the Agreement.

Project Manager means a party's project manager appointed under the Agreement.

PO or Purchase Order means a purchase order issued by Spark NZT and accepted by Supplier (acceptance may be express, or may be implied by Supplier confirming the underlying order or commencing work on the relevant deliverables).

Release means a subsequent version of the Software.

Requirements in relation to a Deliverable, means Spark NZT's applicable business, functional, non-functional, operational, performance and other requirements and specifications for that Deliverable, as set out or referred to in the PO or Letter Agreement.

Service Levels means the applicable "service levels" and "KPIs" (if any) specified in the Letter Agreement and/or PO.

Services means the services provided (or to be provided) by or on behalf of Supplier pursuant to the Agreement (including any incidental services), as described in the Letter Agreement and/or PO.

Software means all or any software provided (or to be provided) by Supplier to Spark NZT as described or referred to in the Letter Agreement and/or PO.

Software Review Period in relation to any Software, means the applicable "Software Review Period" specified in the PO and/or Letter Agreement or, if no such period is specified, the period of 90 days immediately following the Delivery Date for that Software.

Source Code in relation to Software, means that Software in the preferred form for making changes to that Software.

Stage means each Deliverable or group of Deliverables identified in the Letter Agreement and/or PO as a "Stage" to be subjected to "acceptance tests".

Subcontractor means any person that performs, or is engaged to perform, any of Supplier's obligations under the Agreement; but to avoid doubt excludes Supplier's employees.

Supplier means the party contracting with Spark NZT under the Agreement.

Supplier Developed IP means Intellectual Property that arises on the creation of Material created wholly or predominantly by Supplier: (i) in the course of, or for the purposes of, performing its obligations under the Agreement; (ii) or facilitating the performance of Spark NZT's obligations under the Agreement.

Supplier Material means any Material which Supplier provides, or has provided, to Spark NZT for the purposes of the Agreement, excluding any part of that Material which was originally obtained by Supplier from Spark NZT or its Affiliates.

Third Party Software means Software specifically identified in the Letter Agreement and/or PO as "Third Party Software".

Third Party Licence Terms means the licence terms for Third Party Software, as set out in or attached to the Letter Agreement and/or PO.

Spark NZT subject to clause 17.1, means Spark New Zealand Trading Limited.

Spark NZT Derivative IP means Intellectual Property arising on the creation of Material that is a derivative or adaptation of, or a modification or enhancement to, any Spark NZT Material, regardless of whether the new Material is created by Spark NZT or Supplier or its Subcontractors.

Spark NZT Material means any Material which Spark NZT provides, or has provided, to Supplier for the purposes of the Agreement, excluding any part of that Material which was originally obtained by Spark NZT from Supplier or its Affiliates or Subcontractors.

Use has the meaning set out in clause 99.1 (Indemnity by Supplier).

Warranty Period in relation to a Deliverable, means the applicable "Warranty Period" for that Deliverable as specified in the Letter Agreement and/or PO, or if none is specified, then a period of 12 months from the Delivery Date. To avoid doubt, Supplier's repair, correction or replacement of a Deliverable will give rise to a separate Warranty Period commencing on the completion of the repair or correction, or on delivery of the replacement (as the case may be).

Working Day means any day (other than a Saturday, Sunday or a public holiday observed in Wellington or Auckland, New Zealand) between the hours of 8:30am and 5:30pm New Zealand time.

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In the Agreement, unless the context requires otherwise:

- (a) a reference to any document, enactment or regulation includes a reference to that document as amended or replaced from time to time;
- (b) headings appear as a matter of convenience and do not affect the meaning or construction of the Agreement;
- (c) the word "includes" or "including" does not limit the meaning of words preceding it;
- (d) a reference to any monetary amount is a reference to New Zealand dollars;
- (e) a reference to a person includes a corporation sole and also a body of persons, whether corporate or unincorporated; and
- (h) the singular includes the plural and vice versa, and words importing one gender include the other genders.