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|  |  |  |
|  |  | National eResearch Collaboration Tools and Resources (**NeCTAR**)  SUB-CONTRACTOR AGREEMENT |
|  |  | Cloud-based Bioinformatics Tools |
|  |  |  |
|  |  | The University of Melbourne  The University of Western Australia |

NeCTAR Sub-contractor Agreement

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**Details**

|  |  |
| --- | --- |
| Date | [***INSERT***] |

**PARTIES**

|  |  |
| --- | --- |
| Name | **The University of Melbourne**, a body corporate and politic established pursuant to the *University of Melbourne Act 2009* (Vic) |
| ABN | 84 002 705 224 |
| Short form name | **University of Melbourne** |
| Notice details | Grattan Street Parkville 3010 in the State of Victoria |
| Email | [andrew.stahmer@nectar.org.au](mailto:andrew.stahmer@nectar.org.au) |
| Attention | Andrew Stahmer |

|  |  |
| --- | --- |
| Name | ***University of Western Australia*** |
| ABN | 37 882 817 280 |
| Short form name | **Sub-contractor** |
| Notice details |  |
| Email | paul.white@uwa.edu.au |
| Attention | Paul White |

**Background**

1. The National eResearch Collaboration Tools and Resources (**NeCTAR) Project** is a national research infrastructure initiative funded by the Commonwealth of Australia (**Commonwealth**).
2. The NeCTAR Project is comprised of four (4) component programs that are collectively intended to deliver information and communication technology infrastructure that facilitates collaborative research between publicly-funded researchers.
3. The University of Melbourne is the lead agent for the delivery of the NeCTAR Project.
4. The University of Melbourne entered into a Funding Agreement with the Commonwealth dated 10 June 2010 setting out the terms on which funding for the NeCTAR Project will be provided to the University of Melbourne. The Funding Agreement permits the University of Melbourne to engage sub-contractors to create or develop the Assets as part of the NeCTAR Sub-Project to meet the requirements of the NeCTAR Project.
5. The University of Melbourne issued a Request for Proposal (**RFP**) and the Sub-contractor represented to the University of Melbourne in its Proposal that it has the skills, expertise and resources to create or develop the Assets.
6. The University of Melbourne wishes to engage the Sub-contractor to create or develop the Assets and the Sub-contractor agrees to create or develop the Assets on the terms set out in this Agreement.
7. AGREED TERMS
   1. Defined terms

In this Agreement:

|  |  |
| --- | --- |
| 1. **Acceptance Criteria** | means the criteria for complying with the Specifications of an Asset as specified in Schedule 2. |
| 1. **Acceptance Date** | has the meaning given to it in clause 4.3(a)(iii). |
| 1. **Acceptance Test** | means the tests to be performed by the Sub-contractor as specified in section 4.3 or some other test(s) agreed between the Sub-contractor and the University of Melbourne Nominated Representative, in order for the Assets to be accepted. |
| **Asset** | means any item of tangible property including but not limited to Deliverables and associated services purchased or created in whole or in part by the Sub-contractor for the purpose of the NeCTAR Sub-Project. |
| 1. **Asset Register** | means a register maintained by the University of Melbourne identifying each Asset and showing the owner, location and value of each Asset. |
| 1. **Business Day** | means a day that is not a Saturday, Sunday, public holiday appointed under the Public Holidays Act 1993 (Vic) or University of Melbourne holiday as indicated on the University of Melbourne calendar (as amended from time to time) in Melbourne, Australia. |
| **Business Hours** | means from 9.00am to 5.00pm on a Business Day. |
| **Claim** | includes any claim, proceeding, cause of action, action, demand or suit (including by way of contribution or indemnity). |
| **Co-investment** | means any investment including but not limited to cash contribution, equipment provision and Support Services to be provided by the Sub-contractor from the Commencement Date to three (3) years from the Acceptance Date or some other date as agreed in writing between the Parties. |
| **Commencement Date** | means the start date of this Agreement specified in Schedule 1 |
| 1. **Commonwealth** | means the Commonwealth of Australia, represented by and acting through the Department. |
| 1. **Completion Date** | means the end date of this Agreement specified in Schedule 1. |
| **Confidential Information** | of a Disclosing Party means all information:   * 1. treated by the Disclosing Party as confidential; and   2. disclosed by the Disclosing Party to the Receiving Party or of which another party becomes aware, whether before or after the date of this Agreement;   except information:   * 1. another party creates (whether alone or jointly with any third person) independently of the Disclosing Party; or   2. that is public knowledge, except as a result of a breach of confidentiality by the other party or any of its permitted discloses;   3. That is required to be disclosed by law; or   4. That is already known to the Receiving Party prior to receipt from the Disclosing Party. |
| **Conflict** | means a conflict of interest, or risk of a conflict of interest, or an apparent conflict of interest arising through the Sub-contractor engaging in any activity or obtaining any interest that is likely to interfere with or restrict the Sub-contractor in creating or developing the Assets. |
| **Defect** | means the failure of any Asset to operate in accordance with the Specifications or any error or malfunction in an Asset. |
| **Delay Risk** | has the meaning given to it in clause . |
| **Deliverables** | means any applicable document, data, database, manual, handbook, diagram, report, plan, drawings, calculations, software (including source code, object code, object libraries development tools and software design data), test cases, test results, prototype, machine, hardware, equipment, tool or any other item created and developed by the Sub-contractor under this Agreement. |
| **Department** | means the Department of Industry, Innovation, Science, Research and Tertiary Education and its successors. |
| **Disclosing Party** | has the meaning given to it in the definition of Confidential Information. |
| 1. **Funding Agreement** | means the funding agreement signed on 10 June 2010 between the Commonwealth and the University of Melbourne for the funding of the NeCTAR Project. |
| 1. **Funding Agreement Completion Date** | means 30 June 2014 or some other date as agreed to between the University of Melbourne and the Commonwealth. |
| **GST** | has the meaning given to it in the GST Act. |
| **GST Act** | means the A New Tax System (Goods and Services Tax) Act 1999 (Cth). |
| **High Performance** | means the adding of value by the Sub-contractor to the NeCTAR Sub-Project by delivering any one or more of increased scope, higher Service Levels, higher quality Asset or delivering the Assets more quickly or at a lower cost than as specified in the Proposal as determined by the University of Melbourne in accordance with the objectives of the NeCTAR Project. |
| **Insolvency Event** | in respect of a party, means:   * 1. that party ceases to be able to pay its debts as they become due;   2. any step is taken by a mortgagee to take possession or dispose of the whole or part of that party's assets, operations or business;   3. any step is taken to enter into any arrangement between that party and its creditors;   4. any step is taken to appoint a receiver, a receiver and manager, a trustee in bankruptcy, a provisional liquidator, a liquidator, an administrator or other like person of the whole or part of that party's assets, operations or business;   5. a petition is presented against that party (that is not discharged or withdrawn within 10 Business Days of its presentation), an order made, a resolution passed or a meeting summoned or convened to consider a resolution for the winding up of that party; or   6. having regard to the varying corporate and legislative structures of the parties, any event analogous to any of the events set out in paragraphs to occurs. |
| **Intellectual Property Rights** | means all property rights in the nature of intellectual or industrial property rights including:   * 1. all rights in relation to patents, inventions, utility models, copyright, circuit layouts, plant varieties, designs, trade and service marks (including goodwill in those marks), trade names and domain names, indications of source or origin, Know How and any right to have information kept confidential;   2. any application or right to apply for registration of any of the rights referred to in paragraph (a); and   3. all rights or forms of protection of a similar nature or having equivalent or similar effect to any of the rights in paragraphs (a) or (b) which may subsist anywhere in the world (including Australia),   whether or not such rights are registered or are capable of registration. |
| **Key Personnel** | means any person nominated in the Proposal including any person employed in any manner by the Sub-contractor to undertake a primary role in completing the NeCTAR Sub-Project and specifically listed in Schedule 2. |
| **Know How** | means all information not in the public domain including inventions, drawings, designs, circuit diagrams, computer programs, data, formulae, specifications, design procedures and procedures for experiments and tests, results of experiments and tests, and information relating to the design, assembly, manufacture, supply or use of any products or services. |
| **Liability** | means any obligation, debt, fine, penalty, Loss or compensation of any kind, including those that are prospective or contingent and those the amount of which is not ascertained or ascertainable. |
| **Loss** | includes any direct or indirect costs, expenses, losses, damages, charges or liabilities whether present or future, ascertained, unascertained, actual, prospective or contingent. |
| **Milestone Payments** | means the payment schedule set out in Schedule 3. |
| **NeCTAR Project** | has the meaning set out in Background A. |
| **NeCTAR Project Completion Date** | means 31 December 2013 or some other date as agreed to between the University of Melbourne and the Commonwealth. |
| **NeCTAR Sub-Project** | means the sub-project of the NeCTAR Project as described in this Agreement. |
| **Parties** | means the parties to this Agreement and their respective successors and permitted assigns, and party means any one of them. |
| **Personal Information** | has the same meaning given to it in the Privacy Act 2001 (Cth) or the Information Privacy Act 2000 (Vic) and includes any sensitive information. |
| **Personnel** | means the employees, officers, agents or consultants of a Party involved in the performance of this Agreement. |
| **Project Completion Certificate** | means a certificate signed by a Managing Director, Chief Executive Officer or Chief Financial Offer of the Sub-contractor attesting to the matters set out in clause 4.6. |
| 1. **Proposal** | means the Sub-contractor’s response to the Request for Proposal (RFP) agreed to by the NeCTAR Directorate and in Attachment 1. |
| 1. **Receiving Party** | means a Party who receives Confidential Information. |
| **Request for Change or RFC** | has the meaning given to it in clause 4.5 and in a form set out in Schedule 5. |
| 1. **Request for Proposal or RFP** | means request for proposal for the creation and development of Assets issued by the University of Melbourne. |
| **Service Levels** | means the level of service set out in Schedule 4 at which the Sub-contractor agrees to provide and maintain the Assets for the use by Users. |
| **Specifications** | means the technical or descriptive specifications of the functional, operational, performance or other characteristics required of each Asset in Schedule 2. |
| **Statement of Departures** | means the departures from this Agreement as agreed between the Parties and set out in Part D Section 3.1 and 3.4. |
| **Sub-contractor Nominated Representative** | means the person set out in the Schedule 1 or any replacement person notified in writing to the University of Melbourne. |
| **Support Services** | means any operational support, ongoing maintenance, User technical support, engagement and outreach, other associated assistance and training relevant to the performance of the Assets to be provided by the Sub-contractor as part of its Co-investment contribution. |
| **Term** | means the period specified in clause 3. |
| **Timetable** | means the timetable set out in Schedule 2 for the provision of the Assets to meet the timeline of the NeCTAR Project or such other time as agreed between the Parties. |
| **University of Melbourne Nominated Representative** | means the person set out in Schedule 1 or any replacement person notified in writing to the Sub-contractor. |
| **User** | means a person (including but not limited to the Commonwealth and the University of Melbourne) entitled to use or access the Assets. |

**1.2 Construction**

In this Agreement, the following rules apply except where the context requires otherwise:

1. the singular includes the plural and conversely;
2. if a word or phrase is defined, its other grammatical forms have a corresponding meaning;
3. a reference to a clause, paragraph, schedule or annexure is a reference to a clause or paragraph of, or schedule or annexure to, this Agreement, and a reference to this Agreement includes any schedule or annexure;
4. a reference to a document or instrument includes the document or instrument as novated, altered, supplemented or replaced from time to time;
5. a reference to writing includes a facsimile transmission, an email receipt and any means of reproducing words in a tangible and permanently visible form;
6. a reference to A$, $A, dollar or $ is to Australian currency;
7. a reference to time is to Melbourne, Australia time;
8. a reference to the Sub-contractor includes, where the context so admits, its employees, agents and authorised sub-contractors;
9. a reference to a person includes a natural person, partnership, body corporate, association, governmental or local authority or agency or other entity;
10. a reference to a statute, ordinance, code or other law includes regulations and other instruments under it and consolidations, amendments, re-enactments or replacements of any of them;
11. the meaning of general words is not limited by specific examples introduced by including, for example or similar expressions;
12. any agreement, representation, warranty or indemnity by two or more parties (including where two or more persons are included in the same defined term) binds them jointly and severally;
13. any agreement, representation, warranty or indemnity in favour of two or more parties (including where two or more persons are included in the same defined term) is for the benefit of them jointly and severally;
14. if a day on or by which an obligation must be performed or an event must occur is not a Business Day, the obligation must be performed or the event must occur on or by the next Business Day; and
15. headings are for ease of reference only and do not affect interpretation.

In the event of any inconsistency, the documents will be read in the following order of precedence:

1. A Request for Change;
2. this Agreement;
3. Schedule 2;
4. the Proposal in Attachment 1;
5. the remaining Schedules;
6. attachments to this Agreement and any other supporting documentation.
7. APPOINTMENT

**2.1 Appointment as Sub-contractor to NeCTAR Project**

The University of Melbourne appoints the Sub-contractor to perform the NeCTAR Sub-Project on the terms of this Agreement. The appointment is to provide Assets for the use of Users. The Sub-contractor accepts the appointment.

**2.2 Promotion of NeCTAR Project’s objectives**

The Sub-contractor agrees to deliver in a manner consistent with the objectives of the NeCTAR Project, which includes:

* + 1. enhancing research collaboration through the development of eResearch infrastructure capable of having national impact and, through this, enhancing national research outcomes;
    2. deploying eResearch infrastructure and services not otherwise available to publicly-funded researchers; and
    3. extending the use of these eResearch capabilities to a wider cross-section of publicly-funded researchers more quickly than would otherwise occur.
  1. Funding Agreement

(a) The Sub-contractor acknowledges that the University of Melbourne’s receipt of the funding (or any part of the funding) from the Commonwealth may be conditional on the University of Melbourne fulfilling its obligations under the Funding Agreement. Accordingly, the Sub-contractor agrees to use its best endeavours to promptly:

* + - 1. provide the University of Melbourne with any assistance reasonably requested by it to meet its obligations (including its reporting obligations) under the Funding Agreement to the extent that such obligations relate to the NeCTAR Sub-Project; and
      2. provide any information and assistance reasonably required by the University of Melbourne in relation to the NeCTAR Sub-Project for the preparation of documentation required by the Commonwealth.
    1. If the Funding Agreement expires or terminates before the Funding Agreement Completion Date or the funding is redirected or reallocated for any reason, the Parties shall, without limiting the University of Melbourne’s rights under clause 17.3 negotiate in good faith to amend, replace or terminate this Agreement. The Sub-contractor shall have no rights or remedies against the University of Melbourne by reason of this decision. The University of Melbourne shall promptly notify the Sub-Contractor when it is formally advised by the Commonwealth to terminate the Funding Agreement or to redirect or reallocate the funding.

1. TERM

This Agreement is effective on and from the Commencement Date and continues until Completion Date subject to earlier termination under clause 17, with the exception of the following:

* clause 4.2(c) continues for three (3) years from the Acceptance Date;
* clause 4.2(d)(i) continues for three (3) years from the Acceptance Date;
* clause 4.2(f) continues until the Funding Agreement Completion Date;
* clause 5(c) continues for three (3) years from the Acceptance Date or such other period as agreed between the Parties;
* clause 7(c) continues for three (3) years from the Acceptance Date or such other period as agreed between the Parties:
* clause 14.1(c) continues for two (2) years after the Funding Agreement Completion Date; and
* clauses 14.2(c) and (d) continues for seven (7) years after the NeCTAR Project Completion Date.

1. DELIVERY OF NeCTAR SUB-PROJECT

**4.1 General requirements for Creation and Development of Assets**

The Sub-contractor:

* + 1. will provide the Assets in accordance with the Timetable and in a timely, efficient and professional manner;
    2. must exercise all due care, skill and judgment and in a cost effective manner and in accordance with accepted professional and business practices in the creation or development of the Assets;
    3. will provide the Assets in accordance with this Agreement;
    4. will cooperate with other sub-contractors or any third party as reasonably directed by the University of Melbourne Nominated Representative; and
    5. will provide additional documentation relevant to the Assets which are:
       1. of reasonable standard in terms of presentation, accuracy and scope;
       2. the most current, accurate and up-to-date version available; and
       3. published in English with all key terms, words and symbols adequately defined; and
    6. is deemed to have conducted due diligence prior to the Commencement Date and shall ensure that it has the capacity to meet and provide any services, functions or responsibilities incidental to the Assets which are required for the proper performance of the Assets and provided to the University of Melbourne at no additional cost.
  1. Specific provisions on Assets

**(a) Ownership**

* + 1. Ownership of Assets will be identified and recorded in the Asset Register.

**(b) Asset Register**

* + 1. The University of Melbourne will maintain the Asset Register identifying each Asset and showing the owner, location and value of each Asset.
    2. The Sub-contractor must provide the University of Melbourne with all information reasonably requested by the University of Melbourne for the purposes of maintaining the register.
    3. The Sub-Contractor may inspect their own entries in the Asset Register at any time on reasonable notice.

**(c) Use and maintenance**

For each Asset, the Sub-contractor must ensure that, from the date of the purchase or creation of the Asset until at least three (3) years following the Acceptance Date for that Asset, it:

* + - 1. uses the Asset in accordance with this Agreement and for the purposes of the NeCTAR Project;
      2. does not encumber or dispose of the Asset, or deal with or use the Asset, other than in accordance with this clause 4, without the prior written consent of the University of Melbourne;
      3. safeguards the Asset against theft, Loss, damage or unauthorised use;
      4. maintains the Asset in good working order;
      5. maintains all appropriate insurances for the Asset to their full replacement value, and provide satisfactory evidence of this on request from the University of Melbourne;
      6. if required by law, maintain registration and licensing of each Asset; and
      7. is fully responsible for, and bears all risks relating to, the use of and disposal of the Asset.

**(d) Repayment**

The University of Melbourne under instruction of the Commonwealth may issue a written notice requiring the Sub-contractor to repay the Commonwealth’s contribution to a proportion of the market value of an Asset equal to the amount of the Milestone Payments expended on that Asset if:

(i) the Sub-contractor sells or otherwise disposes of the Asset within three (3) years from Acceptance Date;

(ii) the Commonwealth reduces the scope of the Funding Agreement and the Asset is not required for the continuation of the NeCTAR Project; or

(iii) this Agreement is terminated before NeCTAR Project Completion Date.

**(e) Loss of or damage**

In the event that an Asset is lost, damaged or destroyed, the Sub-contractor must (unless the Parties agree otherwise in writing) promptly:

(i) replace or repay the Asset so as to fully restore it; and

(ii) claim, if appropriate, on any applicable insurance policy and apply the proceeds to the replacement or repair of the Asset. Any surplus from these proceeds must be notified in writing to the University of Melbourne and accounted for as a Milestone Payment received under this Agreement (i.e. it will be deducted from the next Milestone Payment payable to the Sub-contractor, but if the next Milestone Payment is less than the surplus, the surplus must be paid by the Sub-contractor to the University of Melbourne).

**(f) Future use**

The University of Melbourne may require the Sub-contractor to deal with the Assets as agreed in writing:

(i) if the scope of this agreement is reduced by the Commonwealth under clause 17; or

(ii) on termination of this agreement before the end of the NeCTAR Project Completion Date.

On the Funding Agreement Completion Date or the earlier termination of this Agreement the Commonwealth may, at its sole discretion, require by direction in writing that the Sub-contractor makes the Assets available for use pursuant to any subsequent agreement supporting the NeCTAR Project.

* 1. Acceptance

**(a) Acceptance Test**

1. The Sub-contractor must conduct an Acceptance Test on each Asset to determine if that Asset satisfies and conforms to the Acceptance Criteria specified for that Asset.
2. The Sub-contractor must record and approve the results and provide these to the University of Melbourne Nominated Representative within three (3) Business Days of the Acceptance Test.
3. If, following the Acceptance Tests under clause 4.3(a)(i), the Asset satisfies the Acceptance Criteria, the University of Melbourne will issue a written notice of acceptance to the Sub-contractor (**Acceptance Date**).

(b) Failure to pass Acceptance Test

* + 1. If the Asset does not satisfy the Acceptance Criteria, the University of Melbourne will provide a written notice to the Sub-contractor specifying the grounds on which the failure was determined and a reasonable timeframe in which a re-test must occur.
    2. On receipt of the notification, the Sub-contractor must immediately re-test each Asset within the time specified in the notice and invite the University of Melbourne Nominated Representative to witness the performance of the repeated Acceptance Test.
    3. Clause 4.3(a) applies to the re-submitted Asset in the same way as they apply to the original version of the Asset.

**(c) Re-testing**

If following completion of re-testing referred in clause 4.3(b) the Asset, as modified, does not conform to the Acceptance Criteria, the University of Melbourne will have the right to:

* + - 1. accept the Asset subject to a reduction in the Milestone Payments to reflect the deficiencies in the Asset (as reasonably determined by the University of Melbourne); or
      2. after three (3) recurrences of the Asset not satisfying the Acceptance Criteria as determined by the University of Melbourne at its full discretion due to the same root cause terminate or reduce the scope of the Agreement without liability to the Sub-contractor. The Sub-contractor agrees to retest within a timeframe as determined by the University of Melbourne. Without limiting the University of Melbourne’s rights, the Sub-contractor must then promptly refund any Milestone Payments paid by the University of Melbourne in relation to the Asset.
  1. Timetable and Delay
     1. The Sub-contractor must do all things necessary to meet the Timetable in order to meet the requirements of the NeCTAR Project.
     2. The Sub-contractor acknowledges that any failure to meet the Timetable may result in the University of Melbourne suffering Loss or damage.
     3. If the Sub-contractor considers, or the University of Melbourne advises the Sub-contractor, that the Timetable may not be met (**Delay Risk**), on reasonable demand by the University of Melbourne, the Sub-contractor must give the University of Melbourne a report within five (5) Business Days identifying:
        1. the nature of the Delay Risk;
        2. the cause;
        3. whether the Delay Risk is within the reasonable control of the Sub-contractor;
        4. the anticipated duration; and
        5. the procedures and resources the Sub-contractor will apply to ensure:
           1. the Delay Risk is overcome and rectified within a reasonable time (which must not exceed the anticipated duration of the delay);
           2. the impact of the Delay Risk is minimised; and
           3. future performance (including satisfying the Timetable) is not adversely affected.
  2. Change Management

(a) Either Party may, in writing, request a reasonable variation (**the** **Request for Change**) to this Agreement in a form set out in Schedule 5.

(b) The Sub-contractor must as soon as practicable following the issue of a Request for Change by either Party, provide a written response to the University of Melbourne within five (5) Business Days following the Request for Change with the following information:

* + - 1. the time within which the Request for Change can be implemented;
      2. an analysis of the impact or likely impact of the Request for Change on the delivery of the NeCTAR Sub-Project;
      3. the skill type and the days of effort the Sub-contractor proposed to use to implement the Request for Change; and
      4. the cost of implementing the Request for Change.

(c) If both Parties agree to the variation contained in the Request for Change, the University of Melbourne will instruct the project manager of the Sub-contractor in writing via email to that effect.

(d) This Agreement will be varied to reflect the changes outlined in the Request for Change and the response to the Request for Change in accordance with the variation provisions in clause 21.3.

**4.6 Project Completion Certificate**

On Completion Date, theSub-contractor must provide to the University of Melbourne a Project Completion Certificate certifying:

(a) all Assets have passed the Acceptance Test and been delivered to the University of Melbourne in accordance with the terms of this Agreement;

(b) all funding received by the Sub-contractor from the University of Melbourne under this Agreement was expended on the NeCTAR Sub-Project and in accordance with the Funding Agreement; and

(c) a detailed statement of income and expenditure in respect of the funding obtained from the University of Melbourne and the Co-investments made by the Sub-contractor, together with a statement from an authorised representative of the Sub-contractor certifying the true and fair view of the accounts of the Sub-contractor.

**4.7 Annual Reporting**

By July 31 each year, the Sub-contractor must provide to the University of Melbourne and Annual Report containing for the preceding twelve (12) months:

(a) a project summary;

(b) a summary of the Assets delivered and the Users of those Assets with some reasonable information for Commonwealth statistical reporting including the types and locations (National, International) of the organisations and Users of the Assets as far as can be reasonably determined and disclosed in accordance with the Sub-contractor’s obligations under the Privacy Act, including in relation to the Sub-contractor’s collection of personal information; and

(c) a detailed statement of income and expenditure in respect of the funding obtained from the University of Melbourne and the Co-investments made by the Sub-contractor, together with a statement from the authorised representative of the Sub-contractor certifying the true and fair view of the accounts of the Sub-contractor.

5. SERVICE LEVELS FOR USERS

(a) The Sub-contractor:

1. agrees to create or develop the Assets that provide services to Users in accordance with the Service Levels or any other performance measures specified in Schedule 4; and
2. agrees to report to the University of Melbourne Nominated Representative quarterly in respect of the Service Levels.
   * 1. On each occasion when the Sub-contractor fails to meet any Service Level, the Sub-contractor must within fourteen (14) days:
        1. promptly investigate the cause of the failure and report it to the University of Melbourne Nominated Representative;
        2. remedy the failure as soon as practicable and within the applicable time period (if any) specified and resume meeting the Service Levels;
        3. advise the University of Melbourne Nominated Representative of the status of remedial efforts; and
        4. certify to the University of Melbourne Nominated Representative that all reasonable action has been taken to prevent any recurrence of such failure.
     2. The Sub-contractor must maintain the Service Levels for at least three (3) years from Acceptance Date or such other period as agreed between the Parties.
     3. The Sub-contractor acknowledges that a failure to comply with the Service Level is a breach of this Agreement for the purposes of clause 17.1 and may trigger the imposition of additional obligations on the Sub-contractor at the University of Melbourne’s reasonable discretion in order for the Sub-contractor to comply with the relevant Service Level.

6. PAYMENTS FOR NeCTAR SUB-PROJECT

6.1 Payments

(i) The University of Melbourne will pay the Sub-contractor the Milestone Payments in accordance with Schedule 3.

(ii) Notwithstanding clause 6.1(i), and subject to clause 4.3(c), the University of Melbourne has the right to withhold the final 10% of the Milestone Payment if in its reasonable opinion the Assets do not meet the Specifications.

(iii) Neither the University of Melbourne nor the Commonwealth are responsible for the provision of additional money to meet any expenditure in excess of the Milestone Payments.

**6.2 Milestone Payments and High Performance**

(a) Each Milestone Payment will be paid by the University of Melbourne upon:

(i) the University of Melbourne receiving the funding allocated to that Milestone Payment from the Commonwealth;

(ii) the Sub-contractor meeting its obligations under clause 7; and

(iii) the Sub-contractor achieving the relevant milestone applicable to that Milestone Payment in accordance with the Timetable (or such other date as may be agreed by the University of Melbourne in writing).

(b) Each Milestone will only be taken to have been achieved by the Sub-contractor if the relevant Asset is accepted by the University of Melbourne in accordance with clause 4.3, unless agreed in writing by the Parties.

(c) The Sub-contractor must ensure that the Milestone Payments are held in an account in the Sub-contractor’s name and is under the Sub-contractor’s sole control. The Sub-contractor must identify the receipt and expenditure of the Milestone Payments separately within the Sub-contractor’s accounting records so that at all times the Milestone Payments are identifiable.

(d) In relation to the Milestone Payments, if:

(i) the Commonwealth revokes the funding that has not been expended or any portion of it or requires any refund of any of the Milestone Payments already paid to the Sub-contractor for any reason;

(ii) any overpayment is made to the Sub-contractor by the University of Melbourne; or

(iii) subject to any Request for Change, the Sub-contractor does not expend or commit all of the Milestone Payments,

then on a written request from the University of Melbourne, the Sub-contractor must refund such amounts to the University of Melbourne.

* + 1. The Sub-contractor must refund the amounts under clause 6.2(d) (as calculated from the date of notification) within ten (10) Business Days of receiving the written notice. If payment is not made within ten (10) Business Days, the Sub-contractor must pay interest on the unpaid amount from the end of the ten (10) Business Day period until such payment is made at the interest rate published by the Reserve Bank of Australia on the date the refund became due.
    2. Without limiting the operations of clause 6.2(e), the Sub-contractor’s obligation to refund under clause 6.2(d)(iii) can be exempted if the Sub-contractor achieves High Performance as determined under clause 6.2(g).
    3. The Sub-contractor must within the first ten (10) Business Days referred to in clause 6.2(e) submit a written notice including supporting materials to the University of Melbourne to demonstrate an achievement of High Performance.
    4. The University of Melbourne will in its sole discretion determine that:

1. if High Performance is achieved, it will inform the Sub-contractor of the decision within ten (10) Business Days; or
2. if High Performance is not achieved, the Sub-contractor must refund the amounts under clause 6.2(d) in accordance with the terms of clause 6.2(e).

**6.3 Use of Milestone Payments**

(a) The Sub-contractor must only expend the Milestone Payments on creating and developing the Assets and must not use the Milestone Payment to:

(i) provide any Co-investment;

(ii) purchase or create any Asset other than those described under this Agreement;

(iii) provide security for, or act in satisfaction of, any form of loan, credit, payment or other interest; or

(iv) prepare or fund any litigation.

**6.4 GST**

* + - 1. Words or expressions used in this clause 6.4 which are defined in the GST Act have the same meaning in this clause.
      2. Any consideration to be paid or provided for a supply made under or in connection with this Agreement, unless specifically described in this Agreement as 'GST inclusive', does not include an amount on account of GST.
      3. Despite any other provision in this Agreement, if a party (Supplier) makes a supply under or in connection with this Agreement on which GST is payable (not being a supply the consideration for which is specifically described in this Agreement as 'GST inclusive'):
         1. the consideration payable or to be provided for that supply under this Agreement but for the application of this clause (**GST exclusive consideration**) is increased by, and the recipient of the supply (**Recipient**) must also pay to the Supplier, an amount equal to the GST exclusive consideration multiplied by the prevailing rate of GST (**GST Amount**); and
         2. subject to clause 6.4(vi), the GST Amount must be paid to the Supplier by the Recipient without set off, deduction or requirement for demand, at the same time as the GST exclusive consideration is payable or to be provided.
      4. If a payment to a party under this Agreement is a reimbursement or indemnification or otherwise calculated by reference to a Loss incurred by that party, then the payment will be reduced by the amount of any input tax credit to which that party, or the representative member of the GST group that party is a member of (as the case may be), is entitled in respect of that Loss, cost or expense.
      5. If an adjustment event arises in respect of a supply made under or in connection with this Agreement, then:
         1. if the Suppliers corrected GST amount is less than the previously attributed GST amount, the Supplier will refund the difference to the Recipient; or

(b) if the Suppliers corrected GST amount is greater than the previously attributed GST amount, the Recipient will pay the difference to the Supplier; and

(c) the Supplier must issue an adjustment note to the Recipient.

(vi) The Recipient need not pay the GST amount in respect of a taxable supply made under or in connection with this Agreement until the Supplier has given the Recipient a tax invoice in respect of that taxable supply.

7. CO-INVESTMENTS BY SUB-CONTRACTOR

(a) The Sub-contractor acknowledges that:

1. under the terms of the Funding Agreement, the funding must only be used for the creation or development of Assets; and
2. accordingly, other associated costs must be funded by the Sub-contractor through Co-investments.

(b) The Sub-contractor must make the Co-investments in the form set out in Schedule 3.

(c) The Sub-contractor acknowledges and agrees to provide Co-investments to provide services to Users for a period of three (3) years from the Acceptance Date or such other period as agreed between the Parties.

8. GENERAL OPERATING REQUIREMENTS OF THE SUB-CONTRACTOR

**8.1 Compliance with Laws**

At all times, the Sub-contractor must:

1. hold all authorisations, permits and licences required under any law to create and develop the Assets;
2. comply with the requirements of all laws of any kind to create and develop the Assets; and
3. comply with all reasonable instructions or directions given by the University of Melbourne Nominated Representative in relation to the creation and development of the Assets.

**8.2 Ethics requirement**

(a) The Sub-contractor must, in the provision of the Assets and through the conduct of Subcontracted activities, notify its Personnel and all Users of the requirements to observe and comply with every respect with all applicable Commonwealth, State and Territory legislation relating to biological, ethical or radiation safeguards and all appropriate ethics, codes and guidelines adopted by the National Health and Medical Research Council, the Office of the Gene Technology Regulator and all other relevant regulatory agencies operating in Australia.

(b) The Sub-contractor agrees to provide assistance as part of its Co-investment to the University of Melbourne to monitor and ensure continued compliance by Users of clause 8.2(a) in using the Assets.

(c) Subject to clause 8.2(e), the Sub-contractor must nominate to the University of Melbourne one or more higher education institution(s) or Commonwealth or State research organisation with a relevant ethics committee constituted in accordance with the legislation, codes and guidelines referred to in clause 8.2(a) to oversee all ethical clearances which may be required under that legislation, codes and guidelines.

(d) If more than one ethics committee is nominated, the Sub-contractor must indicate the respective areas of responsibility in such a way as to ensure no activity of the NeCTAR Sub-Project is overseen by more than one ethics committee.

(e) Clause 8.2(c) only applies if the Sub-contractor does not already have an ethics committee constituted in accordance with the legislation, codes and guidelines referred to in clause 8.2(c).

(f) When conducting or permitting the conduct of research pursuant to the field of research undertaken at facilities or services related to the NeCTAR Sub-Project which involves the use of ionising radiation, the Sub-contractor must ensure that persons performing the procedures involving ionising radiation are appropriately trained and hold a relevant current licence from the appropriate State authority.

(g) The Sub-contractor must, whenever reasonably required by the University of Melbourne, provide written evidence of compliance with this clause 8.2.

**8.3 Insurance Requirements**

The Sub-contractor agrees to take out and maintain:

1. public liability insurance of at least ten million dollars ($10,000,000) per claim;
2. professional indemnity insurance of at least ten million dollars ($10,000,000) per claim;
3. workers' compensation insurance in accordance with applicable State or Territory legislation; and
4. such other insurance as required to adequately cover the Sub-contractor’s performance under this Agreement.

The Sub-contractor will, on request, produce to the University of Melbourne Nominated Representative satisfactory evidence that the Sub-contractor has all valid insurances policy.

**8.4 Acknowledgement and Publicity**

The Commonwealth and University of Melbourne reserve the right to publicise and report the funding.

(a) The Sub-contractor must acknowledge in all publications, promotional and advertising materials, public announcements and activities relating to the NeCTAR Sub-Project, in a prominent place:

(i) the financial and other support received from the Commonwealth;

(ii) the NeCTAR Project is an initiative of the Commonwealth being conducted as part of the Super Science Initiative and financed from the Education Investment Fund; and

(iii) the role of University of Melbourne in the Project.

(b) The Sub-contractor acknowledges that the NeCTAR Project and the Commonwealth each have the right to publicise and report on the awarding of the Project to the Sub-contractor, including the amount of funds provided to it, the title and a brief description of the activities covered.

(c) The Sub-contractor must:

(i) advise the NeCTAR directorate at least thirty (30) Business Days prior to any significant promotional event in connection with the NeCTAR Sub-Project to be held by the Sub-contractor so that the NeCTAR directorate may invite the Minister, or any person nominated by the Minister, to partake in the event;

(ii) allow the NeCTAR directorate, the Minister, or any other person nominated by the Minister or the NeCTAR directorate, to speak at, or play any role in the relevant promotional event; and

(iii) obtain written consent from the NeCTAR directorate, which will not be unreasonably withheld, prior to using names, trademarks or logos of the Commonwealth, University of Melbourne or any associated entity in any public document published in connection with the NeCTAR Sub-Project.

9. PERSONNEL

9.1 Obligations relating to Personnel

The Sub-contractor must ensure that all of its Personnel:

1. are adequately trained, skilled and licensed to create and develop the Assets;
2. act with all proper diligence and in good faith throughout the creation and development of the Assets;
3. are available to create and develop the Assets during the Term;
4. perform the Sub-contractor’s obligations under this Agreement with due care and skill and in accordance with good practice; and
5. comply with all reasonable directions and instructions of the University of Melbourne.

9.2 Key Personnel

To the extent that Key Personnel is specified, the Sub-contractor must ensure that the Key Personnel create or develop the Assets.

9.3 Replacing Key Personnel

(a) The Sub-contractor must not replace Key Personnel without the University of Melbourne’s prior written approval unless the relevant person is unable to create or develop the Assets due to ill health or incapacity or because the person has left the employment of the Sub-contractor; and

(b) If any Key Personnel are replaced, the Sub-contractor must do so with another appropriately qualified, knowledgeable and experienced person reasonably acceptable to the University of Melbourne.

10. SUBCONTRACTING

10.1 No subcontracting without consent

Notwithstanding the participants detailed in Section 2 of the Proposal, The Sub-contractor may not subcontract the performance of all or any part of the Assets to a value greater than $50,000 without the prior written approval of the University of Melbourne.

10.2 Compliance by subcontractors

The Sub-contractor must ensure that any subcontractor it engages to perform and create or develop the Assets will comply with the Sub-contractor’s obligations under this Agreement.

10.3 Sub-contractor’s obligation in relation to its subcontractors

Notwithstanding the grant of consent by the University of Melbourne in respect of a given subcontractor, the Sub-contractor:

1. remains responsible for the performance of its obligations subcontracted and for all costs incurred with respect to its subcontractors and liable for all acts and omissions of its subcontractors as though they were actions of the Sub-contractor itself;
2. must ensure any subcontractor it engages to create and develop the Assets will comply with the Sub-contractor’s obligations under this Agreement; and
3. must on the University of Melbourne's request, give the University of Melbourne a copy of any subcontract entered into by the Sub-contractor in connection with this Agreement.

11. INTELLECTUAL PROPERTY

11.1 Assets and licence

1. All right, title and interest (including all Intellectual Property Rights) in any Asset created by the Sub-contractor in the course of fulfilling its obligations under this Agreement vest absolutely in the Sub-contractor upon its creation unless otherwise agreed by the Parties in writing.
2. The Sub-contractor must permit Users to have use of and have access to the Assets.
3. Subject to the requirements of any open source arrangements, the Sub-contractor grants the University of Melbourne and the Commonwealth with a non-exclusive, irrevocable, perpetual royalty-free and world-wide licence to use the Deliverables, including the reports specified in clause 14.2 for the objectives of the NeCTAR Project.

11.2 Pre-existing materials

This Agreement does not affect any change in ownership of the Intellectual Property Rights in any materials that existed prior to the date of this Agreement.

**11.3 Third Party Intellectual Property**

Unless otherwise agreed by the University of Melbourne and subject to the requirements of any open source arrangements, the Sub-contractor must, at its own cost and expense, procure all necessary licences and consent required from any third party to permit the Commonwealth, University of Melbourne and the Users to access and use the Assets.

12. INDEMNITY

12.1 Sub-contractor’s indemnity

The Sub-contractor indemnifies the University of Melbourne and its employees, officers and agents (**Affected Persons**), and will keep the Affected Persons indemnified, against all Claims made against and Liabilities incurred by any Affected Persons arising out of or in connection with the University of Melbourne to the extent caused by:

1. any negligent act or omission by the Sub-contractor, its Personnel or Key Personnel in the performance of its obligations under this Agreement;
2. any material breach by the Sub-contractor, its Personnel or Key Personnel of obligations or warranties under this Agreement;
3. any third party Claims arising from a breach of this Agreement by the Sub-contractor;
4. injury to, or death of, any person caused by any negligent act or omission of the Sub-contractor, any of its Personnel or any of the Key Personnel;
5. Loss of, or damage to, any real property or tangible property or intangible property caused by any negligent act or omission of the Sub-contractor, any of its Personnel or any of the Key Personnel; or
6. a breach of clause 15 by the Sub-contractor.

The Sub-contractor’s liability to indemnify the University of Melbourne will be reduced proportionately to the extent that any negligence or breach of this Agreement on the University of Melbourne’s part contributed to the relevant Liability.

12.2 Survival of indemnities

Clause 12 will survive termination or expiry of this Agreement.

13. WARRANTIES

**13.1** The Sub-contractor warrants that:

* + 1. it has the right and authority to enter into this Agreement;
    2. it is entitled to create and develop the Assets for the benefit of, the Commonwealth, the University of Melbourne and Users;
    3. it will use its reasonable endeavours to ensure the use of the Assets will not infringe any third party’s rights (including Intellectual Property Rights);
    4. it will create and develop the Assets in compliance with all applicable Laws, regulations and standards;
    5. it has the necessary resources, skills and Know-how to undertake the creation or development of the Assets;
    6. the Assets will be created and developed with due care and skill, in a proper and professional manner;
    7. no conflict exists or is likely to arise in the creation and development of the Assets under this Agreement;
    8. the Assets will be created and developed in a timely and professional manner by Personnel and/or Key Personnel who are suitably qualified and experienced;
    9. the Assets will be of good and merchantable quality and fit for the intended use;
    10. the Assets will comply with Specifications;
    11. all relevant and current licences, approvals, consents, permissions, filings, registrations and permits necessary to perform this Agreement have been obtained by the Sub-contractor;
    12. all applicable building and construction activities relating to creating and developing Assets will be performed in compliance with the National Code of Practice for the Construction Industry;
    13. the appointment of the Sub-contractor to create and develop the Asset does not constitute a breach of a sanction imposed by the Minister for Employment and Workplace Relations;
    14. the Sub-contractor does not have any outstanding judgment debts relating to employee entitlements except where such debts are currently under appeal;
    15. the Sub-contractor is not named by the Director of Equal Opportunity for Women in the Workplace Agency as an employer currently not complying with the *Equal Opportunity for Women in the Workplace Act* 1999; and
    16. all statements and representations in the Proposal and this Agreement were true, complete and accurate when made and are, on the Commencement Date, true, complete and accurate.

**13.2 Survival of Warranties**

Clause 13 will survive termination or expiry of this Agreement for a period of three (3) years.

14. GOVERNANCE AND MANAGEMENT

14.1 Liaison and Monitoring

The Sub-contractor must assist the University of Melbourne in the management of the NeCTAR Project by:

* + 1. liaising with and providing information to the University of Melbourne in relation to the Assets;
    2. complying with all reasonable request, directions or monitoring requirements received from the University of Melbourne Nominated Representative; and
    3. assisting with any review or other evaluation undertaken by the Commonwealth within the Term until two (2) years from Funding Agreement Completion Date.

14.2 Record Keeping and Audit

1. The Sub-contractor must keep full and accurate records on the provision of the Assets including:
2. progress against the milestones;
3. the receipt and use of Milestone Payments and any other funding provided by the University of Melbourne;
4. the application of Co-investment funding provided by the Sub-contractor;
5. the acquisition of Assets;
6. the performance of the Sub-contractor against the Service Levels; and
7. compliance with the National Code of Practice for the Construction Industry (if applicable).
8. Without limiting clause 14.2(a), the Sub-contractor must keep financial records relating to the Assets to enable:
   * + 1. all income and expenditure related to the Assets to be identified in the Sub-contractor’s accounts;
       2. the preparation of financial statements in accordance with Australian Accounting Standards; and
       3. the audit of those records in accordance with Australian Auditing Standards if requested by the University of Melbourne.
9. The Sub-contractor must provide the University of Melbourne with copies of any records created under clause 14.2 within ten (10) Business Days of receiving a reasonable written request made during or within the seven (7) years after the NeCTAR Project Completion Date.
10. Subject to the Sub-contractor’s obligations under clause 16, the records referred to in clause 14.2 must be retained for seven (7) years after the NeCTAR Project Completion Date.
11. Upon request from the University of Melbourne on behalf of the Commonwealth, the Sub-contractor must provide reasonable access and assistance to the University of Melbourne to conduct an audit on the funding of the NeCTAR Sub-Project.

14.3 Reporting

1. The Sub-contractor must, within ten (10) Business Days from the end of each quarter, provide a written report to the University of Melbourne setting out:
2. the progress against relevant milestones during that quarter (including an explanation of any failures to comply with the Timetable and proposed remedial action);
3. details of Assets acquired or created and those that remain outstanding;
4. expenditure of the Milestone Payments and any other funding provided by the University of Melbourne during that quarter;
5. co-investment funding applied by the Sub-contractor during that quarter; and
6. any other information the University of Melbourne may reasonably request for the purpose of the NeCTAR Project.
7. Notwithstanding clause 14.3(a), the University of Melbourne reserves the right to reasonably request the Sub-contractor to provide the University of Melbourne with additional written reports including but not limited to ad-hoc reports, Defect reports and Service Level reports at no cost to the University of Melbourne.
8. The University of Melbourne may use, reproduce, publish, and adapt the information or reports provided by the Sub-contractor under clauses 14.3(a) or 14.3(b) for the NeCTAR Project purposes only.
9. Subject to clauses 14.3(a)-(c), the Sub-contractor must provide a financial summary of NeCTAR Sub-project expenditure and Co-investment against the Sub-contractor’s budget for the NeCTAR Sub-project, including any other information reasonably requested, on or before 31 July of each year for the previous financial year to assist in reporting to the Department.

14.4 Access to Premises and Records

1. As required under the Funding Agreement, on provision of reasonable written notice from the University of Melbourne and subject to the Sub-contractor’s reasonable security procedures, the Sub-contractor must at all reasonable times provide access and reasonable assistance under clause 14.4(b) to the following persons:
2. the Commonwealth Auditor-General;
3. the Privacy Commissioner;
4. the General Manager, Research Infrastructure Branch of the Department;
5. University of Melbourne delegates; and
6. Any other person authorised by the Secretary to the Department.
7. The Sub-contractor must provide reasonable access and assistance to the persons and on the basis specified in paragraph (a) inspect the performance of the Assets and locate, inspect and make copies of any materials relevant to the Assets.
8. The requirement to provide the Sub-contractor with reasonable notice under clause 14.4(a) does not apply if the matter being investigated may, in the opinion of any person authorised in writing by the Secretary to the Department, involve an actual or apprehended breach of any law.

15. CONFIDENTIALITY

15.1 Identification of Confidential Information

The Disclosing Party must clearly identify any Confidential Information to the Receiving Party as being Confidential Information at the time of disclosure.

15.2 Use and disclosure

Each Receiving Party:

1. may use and reproduce Confidential Information of a Disclosing Party only to perform its obligations under, and enjoy the benefit of rights granted under this Agreement; and
2. must keep confidential all Confidential Information of the Disclosing Party except to the extent the Receiving Party is required by law to disclose any Confidential Information.

15.3 Permitted disclosure

A Receiving Party may disclose Confidential Information of a Disclosing Party to persons who:

1. have a need to know for the purposes of this Agreement (and only to the extent that each has a need to know); and
2. before disclosure:
3. in the case of the Receiving Party's officers and employees, have been directed by the Receiving Party to keep confidential all Confidential Information of the Disclosing Party; and
4. in the case of other persons, have agreed in writing with the Receiving Party to comply with substantially the same obligations in respect of Confidential Information of the Disclosing Party as those imposed on the Receiving Party under this Agreement (each a Direction).

15.4 Receiving Party's obligations

A Receiving Party must:

1. ensure that each person to whom it discloses Confidential Information of a Disclosing Party under clause 15 complies with its Direction; and
2. notify the Disclosing Party of, and take all steps to prevent or stop, any suspected or actual breach of a Direction.

15.5 Non-disclosure undertakings

* + 1. The University of Melbourne may at any time require the Sub-contractor to request for any person involved in the performance or management of this Agreement to provide a written undertaking relating to the non-disclosure of the University of Melbourne’s Confidential Information.
    2. Such written undertakings must be in the form reasonably required by the University of Melbourne and must be requested promptly.
    3. This clause will survive the termination of this Agreement.

16. PERSONAL INFORMATION

1. Personal information created, received, collected and otherwise obtained by a Party pursuant to this Agreement must be:
   * + 1. Only used for the purposes of meeting the Party’s obligations under this Agreement; and
       2. Handled in accordance with the Information Privacy Principles as if the Party were an agency as defined under the Privacy Act.
2. Nothing in this clause 16(a) limits a Party’s obligation to comply with its other obligations under the Privacy Act or any other applicable law.

17. TERMINATION

* 1. Termination for Cause

The University of Melbourne may immediately terminate this Agreement, by sending the Sub-contractor a written notice if:

1. an Insolvency Event occurs in respect of the Sub-contractor;
2. the Sub-contractor ceases business or to undertake research and development activities relevant to the Agreement;
3. the Sub-contractor fails to remedy any breach of this Agreement within fifteen (15) Business Days after the date on which the University of Melbourne issues the Sub-contractor a written notice requiring the Sub-contractor to remedy that breach; or
4. in the opinion of the University of Melbourne, the Sub-contractor, any of its Personnel or any of the Key Personnel is guilty of fraud, dishonesty or any other serious misconduct.

17.2 Termination for Convenience

1. If directed by the Commonwealth in accordance with the Funding Agreement, the University of Melbourne may, in its opinion in performing its obligations, at any time terminate this Agreement in whole or reduce the scope of the NeCTAR Sub-Project by giving the Sub-contractor not less than sixty (60) days prior written notice.
2. Upon receiving the notice under clause 17.2(a), the Sub-contractor must
3. Stop work;
4. Take steps to minimise losses from the termination or reduction of the scope of the NeCTAR Sub-Project and protect all Sub-Project materials; and
5. continue work on any part of the Asset(s) not affected by the notice.
6. If the Agreement is terminated or the NeCTAR Sub-Project reduced in scope, the University of Melbourne’s liability to the Sub-contractor will be limited to:
   * + 1. the Milestone Payments that were due and payable before that effective date of termination; and
       2. any reasonable costs incurred by the Sub-contractor that are directly attributable to the termination of this Agreement and cannot reasonably be avoided by the Sub-contractor.
   1. Termination of Funding Agreement or withdrawal of approval

The University of Melbourne may immediately terminate this Agreement by written notice to the Sub-contractor if:

* + - 1. The Funding Agreement expires or is terminated for any reason; or
      2. The Commonwealth withdraw its approval of the Sub-contractor under the Funding Agreement for any reason.

17.4 Mutually agreed termination

The Parties may mutually agree in writing to terminate this Agreement prior to the expiry of the NeCTAR Project Completion Date.

17.5 Consequences of termination

(a) Any termination or expiry of this Agreement will not prejudice any right of action or remedy which may have accrued to either Party prior to termination.

(b) Notwithstanding anything in this Agreement, the University of Melbourne will not be liable to pay compensation for Loss of prospective profits or other benefits that would or may have been conferred if this Agreement had not been terminated.

(c) No later than within thirty (30) days of the termination of this Agreement:

* + - 1. the Sub-contractor must deliver to the University of Melbourne any Deliverables that continue to create and develop the Assets it was required to create and develop under this Agreement to the extent that such things have been created and developed by the Sub-contractor as at the date of termination; and
      2. each Party must return or take reasonable steps to procure that return of any property of the other party (including all of the other Party’s Confidential Information) to that other Party, except for one file copy that may be retained for the party’s records.

17.6 Consequences of reduction in scope

If there is a reduction in scope of the Sub-contractor’s obligations under this Agreement, the University of Melbourne’s obligation to pay any remaining Milestone Payments will be proportionately reduced. The Parties shall record this variation in writing.

18. CONFLICT OF INTEREST

(a) If during the Term a Conflict arises or is likely to arise, the Sub-contractor must:

1. immediately provide the University of Melbourne Nominated Representative with a written notice setting out the details of the Conflict and the steps that the Sub-contractor proposes to take to address the Conflict;
2. on request by the University of Melbourne Nominated Representative, provide all relevant information relating to the Conflict; and
3. resolve or otherwise deal with the Conflict by complying with any reasonable directions given by the University of Melbourne Nominated Representative.

(b) Failure to comply with this clause 18(a) will be deemed a material breach of the Sub-contractor’s obligations under this Agreement.

19. DISPUTE RESOLUTION

19.1 Restriction on litigation

A Party must not start court proceedings (except proceedings seeking interlocutory relief) unless it has complied with this clause 19.

* 1. Notification

A Party claiming that a dispute has arisen under this Agreement (**Dispute**) must notify the other Party giving written details of the Dispute.

* 1. Referral of Dispute to Nominated Representatives

Within seven (7) days (or any longer period agreed between the parties) after a Notification is given, the parties must refer the Dispute to the Parties respective nominated representatives, who must attempt to resolve the Dispute in the spirit of good faith on a commercially realistic basis by negotiation within thirty (30) Business Days from the date of the Notification.

* 1. Referral to Senior Representatives

If the nominated representatives cannot resolve the Dispute within thirty (30) days after the Notification is given (or any longer period agreed between the parties), the Dispute must be referred to the University of Melbourne's Chief Information Officer and the Sub-contractor’s Chief Executive Officer (or their respective nominees) (**Senior Representatives**), who must attempt to resolve the Dispute in the spirit of good faith on a commercially realistic basis within thirty (30) Business Days from the date of referral of the Dispute to them under this clause 19.

* 1. Parties not relieved from obligations under this Agreement

The Parties must continue to perform their respective obligations under this Agreement pending the resolution of a Dispute.

* 1. Confidentiality

Any information or documents disclosed by a Party under this clause 19 must be kept confidential and may only be used to attempt to resolve the Dispute.

* 1. Costs

Each Party must bear its own costs of complying with this clause 19. The Parties must equally pay the costs of any mediator.

20. NOTICES

20.1 Form of notice

A notice, demand, consent, approval or communication under this Agreement must be:

1. in writing, in English and signed by a person authorised by the sender; and
2. hand delivered, sent by prepaid post, facsimile or email to the addresses referred to in Schedule 1 or as varied by any notice given by the recipient to the sender from time to time.

20.2 When notice is given

A notice given in accordance with clause 20.1 takes effect when taken to be received (or at a later time set out in it), and is taken to be received:

1. if hand delivered, on delivery;
2. if sent by prepaid post, on the second Business Day after the date of posting (or on the seventh Business Day after the date of posting if posted to or from a place outside Australia);
3. if sent by facsimile, when the sender’s facsimile system generates a message confirming successful transmission of the entire notice unless, within eight (8) Business Hours after the transmission, the recipient informs the sender that it has not received the entire notice;
4. if sent by email, when the recipient issues a return receipt, or the next business day, whichever is earlier;

but if the delivery, receipt or transmission is not on a Business Day or is after 5.00pm on a Business Day, the notice is taken to be received at 9.00am on the next Business Day.

21. MISCELLANEOUS

21.1 Governing law and jurisdiction

The laws that are applicable in Victoria, Australia govern this Agreement and each Party submits to the jurisdiction of the courts of that state and any courts which may hear appeals from those courts.

* 1. Entire Agreement

This Agreement and the Schedules constitutes the entire agreement between the Parties in connection with its subject matter and supersedes all previous agreements or understandings between the Parties in connection with its subject matter.

* 1. Variation

This Agreement may only be varied in writing signed by the Parties.

* 1. Assignment

The Sub-contractor must not assign this Agreement or a right under this Agreement unless it has the prior written consent of the University of Melbourne acting in its absolute discretion.

* 1. Waiver

A Party does not waive a right, power or remedy if it fails to exercise or delays in exercising the right, power or remedy. A single or partial exercise of a right, power or remedy does not prevent another or further exercise of that or another right, power or remedy. A waiver of a right, power or remedy must be in writing and signed by the Party giving the waiver.

* 1. Severance

A term or part of a term of this Agreement that is illegal or unenforceable may be severed from this Agreement and the remaining terms or parts of the term of this Agreement continue in force.

* 1. Execution in counterparts

This Agreement may be executed in counterparts, including facsimile counterpart. All executed counterparts constitute one document.

* 1. Effectiveness

Each Party must do, at its own expense, everything reasonably necessary (including executing documents) to give full effect to this Agreement and any transaction contemplated by it.

* 1. Payment of taxes and charges

Any stamp duty, duties or other taxes of a similar nature (including fines, penalties and interest) in connection with this Agreement or any transaction contemplated by this Agreement, must be paid by the Sub-contractor.

* 1. Relationship of parties

1. This Agreement is not intended to create and does not create an employment, a partnership, a joint venture or an agency relationship between the parties.
2. Each Party must not represent itself (and must ensure that its Personnel do not represent themselves) as being an employee, partner, a joint venture or an agent of the other Party or the Commonwealth.
   1. Survival

Any rights or obligations which are expressed to, or by their nature, survive expiry or termination of this Agreement shall be unaffected by the expiration or termination of this Agreement.

**SCHEDULE 1: GENERAL CONTRACT MATTERS**

**SUB-CONTRACTOR DETAILS**

|  |  |
| --- | --- |
| **Name:** | **The University of Western Australia** |
| **ABN:** | **37 882 817 280** |
| **Postal address:** | **Paul White**  **Centre for Genetic Epidemiology & Biostatistics**  **University of Western Australia**  **35 Stirling Highway**  **Nedlands WA 6009**  **AUSTRALIA** |
| **Fax:** | **+61 8 6488 6750** |
| **Email:** | **paul.white@uwa.edu.au** |
| **Nominated Representative** | **Paul White** |

**AGREEMENT DETAILS**

|  |  |
| --- | --- |
| **Commencement Date:** | **15 March 2012** |
| **Acceptance Date:** | **[*INSERT DETAILS*]** |
| **Completion Date:** | **[*INSERT DETAILS*]** |
| **NeCTAR Project Completion Date:** | **(31 Dec 2013) or such other date as determined by the Commonwealth** |
| **Funding Agreement Completion Date:** | **30 June 2014 or such other date as determined by the Commonwealth** |
| **University of Melbourne Nominated Representative:** | **Name**: Associate Professor Glenn Moloney  **Position**: Director, NeCTAR  Room 3.11, Level 3, Doug McDonell Building  The University of Melbourne, VIC 3010  **Contact**:(03) 9035 4172 |

**SCHEDULE 2: ASSETS**

1. **Assets Specifications: [*INSERT DETAILS*]**
2. **Acceptance Criteria and Acceptance Test**

|  |  |
| --- | --- |
| **Key Deliverable** | **Acceptance Criteria** |
| Support tools & processes | Appropriate tools and processes are documented and deployed.  Support staff is suitably trained. |
| Software integrated with AAF authentication | User creation and maintenance functionality is integrated with AAF authorisation service  User authentication is implemented through AAF interfaces |
| Initial production Research Cloud deployment | Software is available in a production environment in the Research Cloud or on National Server Program infrastructure (we currently have access to 2 NSP virtual servers)  Software has passed user acceptance using real data. |
| Integrated Invoicing & Billing | Resource utilisation for internal and external service provision can be tracked  Cost recovery processes are supported |
| Data Extraction for Analysis module | Users can specify criteria for subject and data selection by applying customised filters to demographic, pedigree, phenotypic (questionnaire) and biospecimen data.  Selected data elements for filtered subjects can be extracted in specified formats, including .csv and popular statistical analysis package formats.  Extracted data can be de-identified as appropriate |
| Pedigree Storage & Visualisation Module | Relationships between participants is easily captured and maintained by identifying a specified individual as the proband for a family and establishing the family relationships between subjects in the subject management module.  Relationships between subjects can also be defined by loading a file specifying the proband for a family and the mother/father relationships between the subjects within that family.  Pedigrees can be visualised and explored |
| Enhanced Data Linkage & Reporting capability | Data sets matching chosen criteria can be identified using criteria that span multiple data sources and types |
| Registry Management module | Access to and usage of subjects and data by third parties can be captured, controlled and monitored |
| Genotypic Data Management capability | Genotypic data can be aggregated and stored efficiently  Genotypic data can be accessed easily for analysis |

1. **Key Personnel: Paul White, Chris Ellis, Nik Zeps**
2. **Timetable of delivery 30 March 2012 – 30 September 2013**

|  |  |  |
| --- | --- | --- |
| **No.** | **Milestone** | **Due Date** |
| 1 | Sub-contract | When contract signed |
| 2 | Linked to Milestone 1 | When contract signed |
| 3 | Support Tools & Processes | 30 Mar 2012 |
| 4 | *Communications plan prepared and sent to NeCTAR (Signed contract + two months).* | 15 Apr 2012 |
| 5 | Integrate existing application with AAF Authentication Services | 15 May 2012 |
| 6 | Linked to Milestone 3, 4 and 5 | 15 May 2012 |
| 7 | Integrated Invoicing & Billing Module | 15 July 2012 |
| 8 | Initial Production Research Cloud Deployment | 15 July 2012 |
| 9 | *Linked to Milestone 7 and 8* | 15 July 2012 |
| 10 | Data Extraction for Analysis Module | 31 Aug 2012 |
| 11 | Pedigree Storage & Visualisation Module | 15 Sept 2012 |
| 12 | *Linked to Milestone 10 and 11* | 15 Sept 2012 |
| 13 | Enhanced Data Linkage & Reporting Module | 15 Dec 2012 |
| 14 | Registry Management Module | 15 Dec 2012 |
| 15 | Integrate Genotypic Data Management Capability | 15 Jan 2013 |
| 16 | **Linked to Milestone 13, 14 and 15**  **Note that all development should be completed by 15 Jan 2013** | 15 Jan 2013 |
| 17 | *Post-implementation Review (PIR) conducted and sent to NeCTAR.*  *Practical Completion Certificate accepted by NeCTAR.* | 30 Sep 2013 |
| 18 | *Service Levels met and reported to NeCTAR as defined.* |  |

1. **Special conditions: N/A**

**SCHEDULE 3: PAYMENT**

**PAYMENT MILESTONES**

Subject to meeting the Specifications for each Asset and satisfying the Acceptance Test, the University of Melbourne shall pay the Sub-contractor the fees pursuant to the following table:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **No.** | **Milestone** | **Due Date** | **Milestone Payment** | **Achieved value of delivery (funded)** | **Achieved value of delivery (Co-investment)** |
| 1 | Funding Milestone 1 | When contract signed When contract signed | $52,000 | $0 | $0 |
| 2 | Funding Milestone 2 | 15-May-12 | $52,000 | $27,777 | $3,736 |
| 3 | Funding Milestone 3 | 15 Jul-12 | $52,000 | $89,293 | $53,361 |
| 4 | Funding Milestone 4 | 15-Sep-12 | $52,000 | $174,772 | $66,426 |
| 5 | Funding Milestone 5 | 15 Jan 13 | $52,000 | $290,598 | $114,892 |
| 6 | Funding Milestone 6 - Final Admin Closure | 30Sept-13 | $29,000 | $290,598 | $323,892 |

**CO-INVESTMENT BY SUB-CONTRACTOR**

In-kind co-investment **$303,892**

Cash co-investment **$20,000**

**SCHEDULE 4: SERVICES AND SERVICE LEVELS**

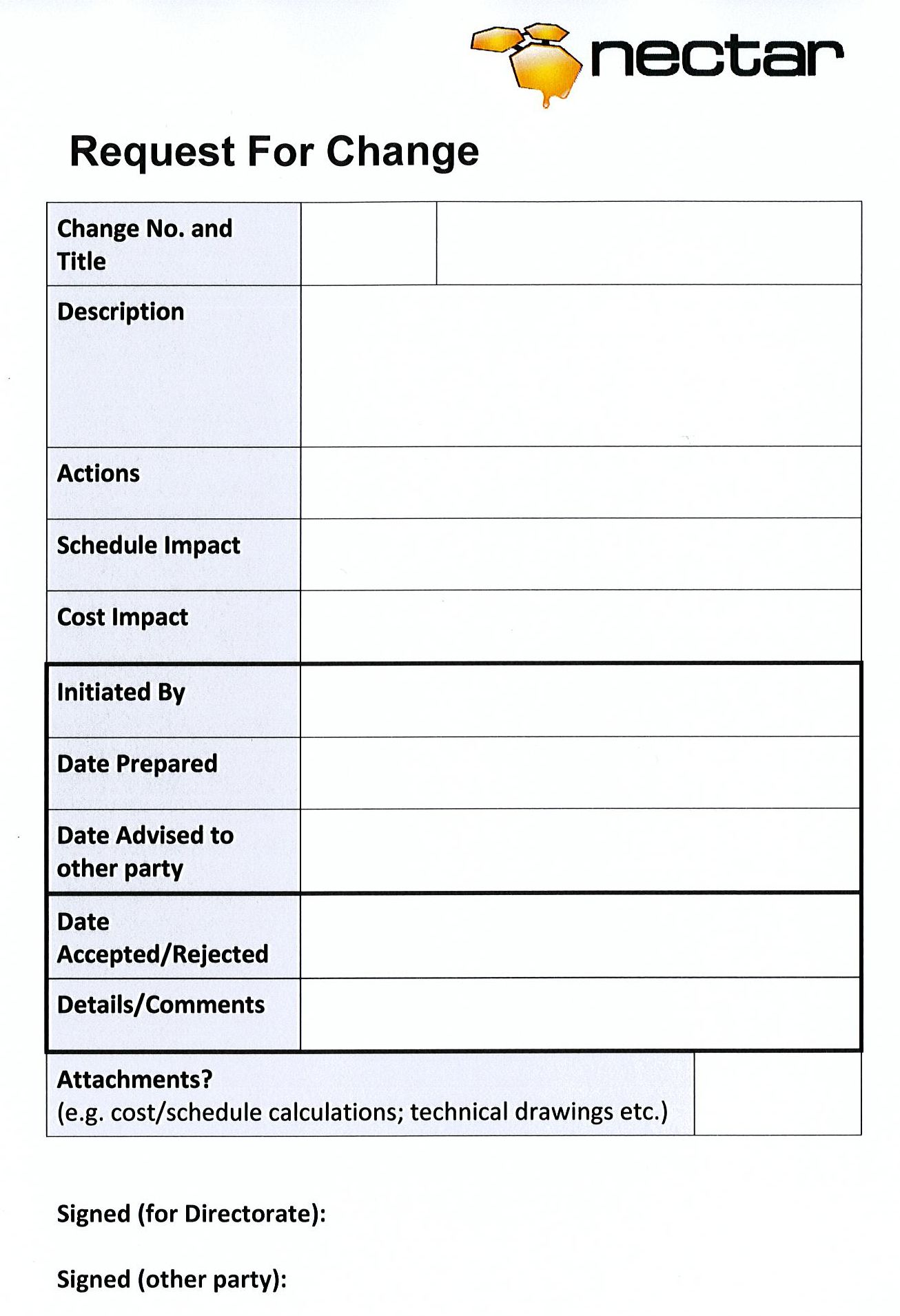
The Ark service desk personnel will primarily be located at the Centre for Genetic Epidemiology at the University of Western Australia with additional support being provided from the Centre for MEGA Epidemiology at the University of Melbourne. This will ensure that support personnel will be available from 9am to 5pm Monday to Friday for all Australian locations.

All The Ark users will have access to an instance of the Jira issue tracking software application hosted in the Research Cloud to enable them to log and then follow the progress of issues, including bugs, enhancements and requests for assistance with tasks like project configuration and data migration.

Customer support will primarily be provided through the Jira issue management software with response times by support staff of less than 24 hours on average.

The service levels provided by The Ark software will be dependent on the service levels being offered by the NeCTAR Research Cloud as it is intended that all The Ark software will be hosted in the cloud. Independent of the Research Cloud availability, The Ark will endeavour to provide access to the application software at a 95% level between the hours of 9am EST time to 5pm WST time. All major software upgrades will be conducted after 3pm WST time to ensure maximum availability for Eastern States users.

**SCHEDULE 5: REQUEST FOR CHANGE**



**ATTACHMENT 1: PROPOSAL**

**EXECUTED AS AN AGREEMENT**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Executed** by an authorised representative for the **University of Melbourne** in the presence of | |  |  | |  |
|  | | ← |  | | ← |
| Signature of witness | |  | Signature of authorised representative | |  |
| Name of witness (print) | |  | Name of authorised representative (print) | |  |
| Date | |  | Date | |  |
| Executed by [**INSERT FULL CORPORATE NAME AND ACN or ABN**] acting by the following persons or, if the seal is affixed, witnessed by the following persons: | | | | |
| . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Signature of director | | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Signature of director/company secretary | | |
| . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . Name of director (print) | | . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . .  Name of director/company secretary (print) | | |