

Standard Terms and Conditions (Version 1.03)

Contract**INTERPRETATION**

In this document, unless the context otherwise requires:

“Acceptance Certificate”	means the certificate or certificates to be issued by the Government pursuant to clause 8 of this Contract.
“Acceptance Date”	means the date on which an Acceptance Certificate is issued by the Government pursuant to clause 8 of this Contract.
“Acquisition Proposal”	means the Contractor's proposal in response to the Invitation of Quotations by the Government.
“Add-on Government Public Cloud Service”	means the public cloud service which is specified in the Acquisition Proposal.
“Completion Date”	means the completion date specified in the Implementation Plan by which the Contractor will provide the System Ready for Use.
“Contract”	means the contract made upon acceptance of the Contractor’s Acquisition Proposal.
“Contractor”	means the person who by the Contract undertakes to supply the Add-on Government Public Cloud Services and/or Government Public Cloud Related Services to the Government as provided by the Contract and where the Contractor is an individual or a partnership, the expression shall include the personal representatives or assignees of that individual or of the partners, as the case may be, and the expression shall also include any person to whom the benefit of the Contract may be assigned by the Contractor with the consent of the Government.
“Contractor Representative”	means the person duly authorised by the Contractor to act for and on behalf of the Contractor for the purposes of this Contract.
“Existing Hardware”	means existing computer and / or network equipment together with any of their additions or replacement which is used by the Government and which is supplied other than under the Contract.

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“Existing Software”	means the software which is used by the Government under licence as specified in the Specifications and which is supplied other than under the Contract.
“Function Tests”	means the tests proposed by the Contractor according to the requirements in the Specifications and clause 7.1.1 of this Contract.
“Government”	means the government of the Hong Kong Special Administrative Region Government.
“Government Data”	means all data, information, text, drawings, diagrams, images or sound embodied in any electronic or tangible medium, and which are supplied to the Contractor by the Government or in respect of which the Contractor has access pursuant to this Contract.
“Government Public Cloud Related Services”	means the Government Public Cloud Related Services to be provided by the Contractor pursuant to clause 15 of this Contract.
“Government Public Cloud Service Installation Date”	means the installation date or dates specified in the Implementation Plan by which the Contractor shall deliver and install the Add-on Government Public Cloud Service items ordered by the Government.
“Government Representative”	means the Commissioner for Digital Policy or the Head of the Department or any officer authorised by them from time to time to act on their behalf for the purposes of this Contract.
“Hong Kong”	means the Hong Kong Special Administrative Region of the People’s Republic of China.
“Implementation Plan”	means the time schedule and sequence of events for the performance of the Contract (the details of which are set out in the Acquisition Proposal) or such other implementation plan as may be agreed by the parties to the Contract in accordance with the Acquisition Proposal.

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“Intellectual Property Rights”	means patents, trade marks, service marks, trade names, design rights, copyright, rights in domain names, database rights, rights in know-how, new inventions, designs or processes and other intellectual property rights of whatever nature and wheresoever arising, whether now known or hereafter created, and in each case whether registered or unregistered and including applications for the grant of any such rights.
“Invitation of Quotations”	means a written request issued by a Government bureau/departement under the Direct Purchase Authority of the Stores and Procurement Regulations.
“Law”	means the law, including the Basic Law, of Hong Kong; any common and customary law; and any constitution, decree, judgment, legislation, code, order, ordinance, regulation, rule, rule of equity, statute, treaty or other legislative measures applicable to Hong Kong, and “lawful” shall be construed accordingly.
“month”	means calendar month.
“Parties”	means the Government and the Contractor; and “Party” (in upper or lower case) means any one of them.
“Performance Criteria”	means the performance criteria which the System shall fulfil as specified in the Specifications.
"person"	includes any body of persons, corporate or unincorporate.
“Price”	means the aggregate price for the Add-on Government Public Cloud Service and the Government Public Cloud Related Services to be carried out by the Contractor hereunder as specified in the Acquisition Proposal.
“Ready for Use”	means fully installed and tested and successfully completed the System Acceptance Tests in accordance with the provisions of the Contract.
“Reliability Levels”	means the minimum performance level specified in the Acquisition Proposal.
“Reliability Tests”	means the tests to be carried out by the Government pursuant to clause 7.1.2 of this Contract or such other tests proposed by the Contractor in the Acquisition Proposal according to the requirements in the Specifications.
“Specifications”	means a written request in the Invitation of Quotations issued by the Government to the Contractor specifying

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	details of the Government's requirements for the computer equipment and services.
“System”	means the Existing Hardware, the Existing Software and the Add-on Government Public Cloud Service as integrated.
“System Acceptance Tests”	means the Function Tests and the Reliability Tests to be carried out pursuant to clause 7 of this Contract.
“Unit Net Subscription Fee”	means the price for the subscription of each unit of Add-on Government Public Cloud Service as specified in the Acquisition Proposal.
“User Departments”	means bureaux and departments of the Hong Kong Special Administrative Region Government.
“Warranties”	has the meaning given to it in clause 12 of this Contract.
“Work”	means all the works, duties and obligations to be carried out by the Contractor pursuant to the provisions of the Contract.

Notes:

1. In the Contract, unless the context otherwise requires, the following rules of interpretation shall apply:
 - (a) unless otherwise specified, references to statutes or statutory provisions shall be construed as references to those statutes or statutory provisions as replaced, amended, modified or re-enacted from time to time; and shall include all subordinate legislation made under those statutes;
 - (b) words importing the singular shall include the plural and vice versa; words importing a gender shall include either gender; references to any person shall include references to any individual, firm, body corporate or unincorporate (wherever established or incorporated);
 - (c) clause headings are inserted for ease of reference only and shall not affect the construction of the Contract;
 - (d) references to a document shall include all schedules, appendices, and annexures attached to such document. References to a document shall mean the same as from time to time amended or supplemented in accordance with the terms of the Contract;
 - (e) references to “Contractor” shall include their respective permitted assigns, successors, or any persons deriving title under them; references to “Government” shall include its assigns, successors in title, and

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- persons deriving title under it, regardless of whether or not any of these persons are mentioned separately in the relevant provisions;
- (f) references to clauses and paragraphs in a document comprising the Contract shall, unless otherwise specified, mean the clauses and paragraphs of that document; references to Schedules shall mean the Schedules forming part of the Contract; and
 - (g) references to “laws and regulations” shall include any constitutional provisions, treaties, conventions, ordinances, subsidiary legislation, orders, rules and regulations having the force of law and rules of civil and common law and equity.
2. All rights and powers of the Government under the Contract may be exercised by the Digital Policy Office or User Departments.

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1. Government Public Cloud Services and Government Public Cloud Related Services to be Provided
 - 1.1 The Contractor hereby agrees to do the following all in accordance with the terms and conditions hereof to the satisfaction of the Government:
 - 1.1.1 provide the Add-on Government Public Cloud Services to the Government;
 - 1.1.2 deliver and commission the Add-on Government Public Cloud Services;
 - 1.1.3 provide the Government Public Cloud Related Services if required;
 - 1.1.4 provide the Add-on Government Public Cloud Service Ready for Use by the Completion Date; and
 - 1.1.5 provide the other services hereinafter described.
2. Contractor's Acknowledgement
 - 2.1 The Contractor acknowledges and agrees that when entering into the Contract, it has been supplied with sufficient information to enable it to supply to the Government the Add-on Government Public Cloud Service and/or provide the Government Public Cloud Related Services which shall comply fully with the requirements set out in the Specifications and other provisions of the Contract. The Contractor shall not be entitled to any additional payment nor be excused from any liability under the Contract as a consequence of any misinterpretation by the Contractor of any matter or fact relating to the Specifications, the said requirements or any other provisions of the Contract.
 - 2.2 The Contractor further acknowledges that the Government has wholly relied on the skill and advice of the Contractor in purchasing any of the services which forms part of the System (whether purchased directly from the Contractor or from third parties) and that the Government acting on the advice of the Contractor has entered into the Contract and purchased such service as recommended by the Contractor. Save to the extent expressly set out in the Contract, the Contractor does not expect, and the Contractor agrees that it is unnecessary for, the Government to do anything to facilitate or assist the Contractor's provision of the Add-on Government Public Cloud Service and/or provide the Government Public Cloud Related Services and the performance of its obligations under the Contract.
3. Conduct of the Work
 - 3.1 The Contractor shall carry out the Work with all due and reasonable diligence and despatch.
 - 3.2 The Contractor shall, through the Government Representative, keep the Government informed of all matters related to the Work within the actual or constructive

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knowledge of the Contractor and shall answer all reasonable enquiries received from the Government Representative.

3.3 The Contractor shall attend all meetings convened by the Government Representative to which it may be summoned and shall advise and assist the Government on all matters relating to the Works.

3.4 All equipment supplied to the Contractor by the Government for the purpose of this Contract shall remain the property of the Government and shall be returned in reasonable and functional conditions on or before the Completion Date or such later time as the Government Representative may agree.

4. Contractor's Representative

4.1 If any of the Contractor Representative or Contractor's employees employed on the Contract is found in the opinion of the Government Representative to be incompetent or inattentive or to conduct himself improperly, the Government Representative shall have the power to require his removal forthwith by giving notice to the Contractor and to require that an efficient and competent Contractor's representative or Contractor's employee be appointed in his stead. The Contractor shall make the replacement of the Contractor Representative or Contractor's employees available within five calendar days.

5. Implementation Plan

5.1 Subject to clause 5.2 below, the Contractor shall perform its obligations under the Contract in accordance with the Implementation Plan and shall complete each activity by the date specified in the Implementation Plan. All time stipulations in the Implementation Plan shall be of essence of this Contract.

5.2 The Government shall be entitled to postpone any of the dates in the Implementation Plan for any further period provided that the Government shall give the Contractor at least 30 days' written notice prior to the date to be postponed and the remaining dates of the Implementation Plan shall remain in full force and effect unless the Government shall otherwise determine or unless the postponement is of a material length and the Contractor provides justifications to the satisfaction of the Government that there shall be corresponding postponement of the remaining dates.

6. Delivery and Installation of the Add-on Government Public Cloud Service

6.1 On the Government Public Cloud Service Installation Date, the Government Representative shall be able to access and use the Add-on Government Public Cloud Service ordered by the Government via a public network and if any hardware and/or software is bundled with the Add-on Government Public Cloud Service, the Contractor shall deliver and install it to the location as specified in the Specifications.

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7. Acceptance Tests for the Add-on Government Public Cloud Service
- 7.1 The Acceptance Tests consist of the following Function Tests and the Reliability Tests:
- 7.1.1 Function Tests
- 7.1.1.1 Following the successful delivery and installation of the Add-on Government Public Cloud Service, the Government Representative shall submit the Add-on Government Public Cloud Service to the Function Tests to assess whether the Add-on Government Public Cloud Service is operating in accordance with the Specifications and the Performance Criteria.
- 7.1.1.2 If the Add-on Government Public Cloud Service shall fail to conform fully to the Specifications and Performance Criteria, then the Contractor shall rectify such failure forthwith and repeat tests shall be carried out on the same terms and conditions.
- 7.1.1.3 If the Add-on Government Public Cloud Service shall fail the Function Tests after 2 weeks from the date on which such System was first submitted to the tests specified in clause 7.1.1.1, then the Government may by written notice to the Contractor elect at its sole option:
- 7.1.1.3.1 to accept such Add-on Government Public Cloud Service subject to an abatement of the Price, such abatement to be in an amount which, taking into account the circumstances, is reasonable. In the absence of written agreement as to abatement within 2 weeks after the date of such notice the Government shall be entitled to reject such Add-on Government Public Cloud Service in accordance with clause 7.1.1.3.2 below; or
- 7.1.1.3.2 to reject such Add-on Government Public Cloud Service as not being in conformity with this Contract in which event the Contractor shall (without prejudice to the Government's other rights and remedies) forthwith refund to the Government all the Price previously paid to the Contractor for such Add-on Government Public Cloud Service under this Contract. Upon rejection as aforesaid, the Government Representative shall be entitled to terminate this Contract by notice.
- 7.1.2 Reliability Tests
- 7.1.2.1 Upon successful completion of the Function Tests, the Government shall carry out the Reliability Tests for the duration as specified in the written order to determine whether the Add-on Government Public Cloud Service is in conformity with the Reliability Levels.
- 7.1.2.2 If the Add-on Government Public Cloud Service fails to conform fully to the Reliability Levels during the said duration, then such tests shall be extended on a week to week basis and on the same terms and conditions.

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- 7.1.2.3 If the Add-on Government Public Cloud Service fails to reach the Reliability Levels after 8 weeks from the date on which the Add-on Government Public Cloud Services was first submitted to the tests specified in clause 7.1.2.1, then the Government may by written notice to the Contractor elect at its sole option:
- 7.1.2.3.1 to accept such Add-on Government Public Cloud Service subject to an abatement of the Price, such abatement to be in an amount which, taking into account the circumstances, is reasonable. In the absence of written agreement as to abatement within 4 weeks after the date of such notice the Government shall be entitled to reject such Add-on Government Public Cloud Service in accordance with clause 7.1.2.3.2 below; or
- 7.1.2.3.2 to reject such Add-on Government Public Cloud Service as not being in conformity with the Contract in which event the Contractor shall (without prejudice to the Government's other rights and remedies) forthwith refund to the Government all the Price previously paid to the Contractor for such Add-on Government Public Cloud Service under the Contract. Upon rejection as aforesaid the Government Representative shall be entitled to terminate the Contract by notice.
- 7.2 From the date of commencement of the Acceptance Tests, the Government shall be entitled to use the Add-on Government Public Cloud Service at no cost until such Add-on Government Public Cloud Service is accepted by the Government Representative.
8. Acceptance Certificate
- 8.1 When the Add-on Government Public Cloud Service or any part thereof has passed the Acceptance Tests, the Government shall, within 2 weeks thereafter, either:
- 8.1.1 accept such Add-on Government Public Cloud Service or any part thereof by issuing an Acceptance Certificate of the Add-on Government Public Cloud Service or that part of the Add-on Government Public Cloud Service to the Contractor; or
- 8.1.2 give instructions in writing to the Contractor specifying all the work which is required to be done under this Contract before such Acceptance Certificate can be issued, in which case the Contractor shall not make any further request for an Acceptance Certificate until such work is completed to the Government Representative's satisfaction.
9. Delays
- 9.1 The Contractor shall provide the Add-on Government Public Cloud Service Ready for Use on or before the Completion Date.
- 9.2 If the Contractor shall fail to provide the Add-on Government Public Cloud Service Ready for Use by the Completion Date then the Contractor shall pay the Government as and by way of liquidated damages for any loss or damages sustained by the

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Government resulting from delay during the period from the Completion Date to the date on which the Contractor provides such Add-on Government Public Cloud Service Ready for Use the sum of 0.1% of the Price for each day or part of the day of such delay up to a total maximum of 15% of the Price. Subject to the provisions of clause 13.3 below the payment of such sums shall be in full satisfaction of the Contractor's liability for such delay only. The payment of liquidated damages shall not relieve the Contractor from its obligation to provide the Add-on Government Public Cloud Service Ready for Use or from any other liability or obligation under this Contract.

- 9.3 If the Contractor shall fail to provide the Add-on Government Public Cloud Service Ready for Use within 30 days after the Completion Date then notwithstanding anything else contained in this Contract, the Government Representative shall be entitled to terminate this Contract forthwith on giving written notice to the Contractor and to recover from the Contractor the amount of all damages and loss suffered by the Government resulting from such failure. Upon such termination the Contractor shall (without prejudice to the Government's right to recover the amount of such damages and loss as aforesaid) forthwith refund to the Government all moneys previously paid to the Contractor under this Contract.

10. Licence

- 10.1 The Contractor hereby grants for the benefits of the Government, its authorised users (whether explicitly or by implication), assigns and successors in title a non-exclusive right to use the Add-on Government Public Cloud Service for all (or any one or more) purposes contemplated by the Contract.

11. Documentation

- 11.1 On the date specified in the Implementation Plan, the Contractor shall provide, at its own costs and expenses, documentation containing sufficient information for the proper use of the Add-on Government Public Cloud Service.

12. Warranties

- 12.1 The Contractor warrants that the Add-on Government Public Cloud Service is of merchantable quality and will be fit for the purpose for which they are intended under the Specifications.
- 12.2 The Contractor warrants that the Add-on Government Public Cloud Service will conform fully to the Specifications and will provide the facilities and functions set out in the Acquisition Proposal and that the documentation will provide adequate instructions to enable the Government to make proper use of such facilities and functions.
- 12.3 The Contractor warrants that it has the right to sell the Add-on Government Public Cloud Service as may be ordered by the Government and that such items of the Add-

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on Government Public Cloud Service are free from any charge or any encumbrances before the Contract is made.

- 12.4 The Contractor further warrants that the Add-on Government Public Cloud Service will, for as long as the Add-on Government Public Cloud Service is maintained by the Contractor, conform fully to the Reliability Levels and the Performance Criteria.
- 12.5 If the Contractor receives written notice from the Government Representative of any breach of the said warranties then the Contractor shall, without prejudice to any other rights or remedies the Government may have, at its own costs and expenses and as soon as possible after receiving such notice, modify or, at its option, replace such Add-on Government Public Cloud Service or otherwise remedy such defect.
- 12.6 The Contractor further warrants that:
- 12.6.1 The Contractor undertakes not to employ any illegal workers in the execution of any Contract made thereunder or any other Government's contract. Should the Contractor be found to have employed illegal workers, the Government Representative may, by notice in writing, terminate the Contracts and the Contractor shall not be entitled to any compensation.
- 12.6.2 The Contractor's employees that are engaged in the performance of the Work shall possess the qualifications and experience specified in the Specifications. The Contractor shall, upon request by the Government Representative or regularly as directed by the Government Representative, provide documentary proof of the manpower strength deployed and maintained, and the qualifications of the staff deployed to carry out the contractual obligations;
- 12.6.3 The Work shall be performed and completed in a professional manner and the Contractor, the Contractor's employee and any person employed or engaged by it and any sub-contractor or agent of the Contractor or person concerned with the same shall use all necessary skill, care and diligence in the discharge of the duties and obligations under the Contract.
- 12.7 The Contractor hereby undertakes to inform the Government in writing immediately if any claim, allegation, demand, action, arbitration and/or proceedings in relation to any infringement of Intellectual Property Rights or any other rights of any person is made, lodged or threatened against it in respect of the Add-on Government Public Cloud Service and all the items supplied under this Contract.
- 12.8 The warranties, representations and undertakings contained in this clause 12 and other provisions of the Contract (collectively "Warranties" and each a "Warranty") shall be true without limitation in time.
- 12.9 Each of the Warranties shall be separate and independent and without prejudice to any other Warranty and, except where expressly stated otherwise, shall not be limited by reference to or inference from any other Warranty or any other provision of the Contract.

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12.10 The provisions of this clause 12 shall survive the termination of the Contract (howsoever occasioned) and shall continue in full force and effect notwithstanding such termination.

13. Reliability

13.1 The Contractor shall warrant that the Add-on Government Public Cloud Service shall achieve at least the minimum performance level as stated in the Specifications.

13.2 The service availability, which is defined in the Specifications, shall be measured on the last day of each month in accordance with the procedures set out thereunder.

13.3 In the event that the Committed Service Level for Service Availability, which is defined in the Acquisition Proposal, cannot be achieved, i.e. the actual service availability is less than the Committed Service Level for Service Availability for any month, the Contractor shall pay to the Government liquidated damages for the month (the Current Month) as follows:

$$\sum_{i=1 \dots n} \left\{ \frac{A}{C} \times \frac{B_i}{60} \times D_i \right\}$$

where \sum = the arithmetic summation of the amount of the liquidated damages incurred from each incident of the Current Month

i = the index of a particular incident of the Current Month

n = the total number of incidents of the Current Month

A = the total services charges incurred to the Government for the Current Month

B_i = the Unscheduled Downtime (in minutes) caused by the incident i of the Current Month. The Unscheduled Downtime is defined in the Specifications

C = Total Scheduled Uptime (in hours) within the Current Month, as defined in the Specifications.

D_i = the percentage of users affected by unscheduled service unavailability of the incident i of the Current Month.

13.4 The liquidated damages shall be calculated under clause 13.3 on a monthly basis on the last day of every month. The Contractor agrees that the Government may set off the liquidated damages against any further payment for the Add-on Government Public Cloud Services.

13.5 Notwithstanding any provisions in this Contract which may be construed to the contrary, it shall be regarded as a serious breach of the Contract and the Government shall be entitled to terminate this Contract in accordance with clause 26.4 if a

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Contractor fails persistently to achieve the Committed Service Level for Service Availability.

14. Terms of Payment

14.1 The Unit Net Subscription Fee of Add-on Government Public Cloud Service, and the unit price of the Government Public Cloud Related Services as specified in the Acquisition Proposal shall become payable to the Contractor on the Acceptance Date.

14.2 Any payment payable by the Government hereunder will be paid within 30 days after any such payment is payable and receipt by the Government of the Contractor's invoice thereof. For the purpose of this clause, no valid invoice may be issued before such payment is payable.

14.3 All invoices and correspondence concerning payment should be addressed to the Government Representative of the relevant Government bureaux/departments. The Government shall not be held responsible for any delay in payment if invoices and correspondence are not so addressed or presented in the prescribed manner.

15. Government Public Cloud Related Services

15.1 The Contractor of each Service Category shall provide the Government Public Cloud Related Services at the rates set out in the Acquisition Proposal upon request by the Government.

15.2 The Government Public Cloud Related Services performed in pursuance of the Contract shall be subject to inspection and shall not be deemed to have been accepted unless the Government Representative shall so certify in writing.

16. Title and Risk

16.1 Title and risk in any facilities and other tangible property supplied by the Contractor for the performance of this Contract shall remain with the Contractor.

16.2 Title and risk in any facilities and other tangible property provided by the Government for the performance of this Contract by the Contractor shall remain with the Government.

17. Intellectual Property Rights

17.1 The ownership of all Intellectual Property Rights of whatever nature in compilation of data, reports, plans, models, documents and other materials developed by the Contractor in performing the Add-on Government Public Cloud Service and the Government Public Cloud Related Services under the Contract shall be and at all times remain vested in the Government upon the creation of such items.

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- 17.2 The Contractor shall waive or procure all relevant authors to irrevocably waive all moral rights (whether past, present or future) in the materials in which the Intellectual Property Rights either have been or will be vested in the Government under this Contract, such waiver to take effect upon vesting of the Intellectual Property Rights in the Government.
- 17.3 The provisions of this clause 17 shall survive the expiry, completion or termination of this Contract (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiry, completion or termination.
18. Independent Contractor
- 18.1 For the purpose of the Work to be performed under the Contract, the Contractor is an independent contractor. The Contractor is not an agent or partner of the Government and has no power to bind the Government to any obligation or whatsoever.
- 18.2 The Contractor shall have complete control of the Work and it shall efficiently direct and supervise the Work to the full extent of its ability and with its full attention.
19. Offering Gratuities
- 19.1 If the Contractor, its employees and agents or any one of them offer or give or shall be found to have offered or given any advantage, gratuity, bonus, discount, bribe or loan of any kind or in kind in whatever form to any employee or agent of the Government (disregarding whether a criminal offence was committed under the Prevention of Bribery Ordinance (Chapter 201 of the Laws of Hong Kong) or any law of such similar nature), the Government shall be at liberty forthwith to terminate the Contract and to hold the Contractor liable for all losses, damages, costs and expenses howsoever incurred or sustained by the Government.
20. Assignment
- 20.1 The Contractor shall not assign or otherwise transfer the Contract or any of its rights and obligations hereunder whether in whole or in part without the prior written consent of the Government.
- 20.2 The parties agree that the Government is entitled to assign, novate, sub-contract or otherwise dispose of any or all of its rights and/or obligations under the Contract to any person.
21. Admission of Contractor's Personnel to Government Premises
- 21.1 The Government Representative reserves the right to refuse admission to any premises of the Government any person employed or engaged by the Contractor, whose admission would be, in the sole and absolute opinion of the Government Representative, undesirable.

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- 21.2 If and when directed by the Government Representative, the Contractor shall provide to the Government a list of the names, addresses and telephone numbers of all Contractor personnel who may at any time require admission on behalf of the Contractor to any premises of the Government (including in particular any of the locations) for performing the services. Such list shall specify the capacities in which these persons are employed or appointed by or otherwise connected with the Contractor and shall contain such other particulars as the Government Representative may reasonably require.
- 21.3 The Contractor shall procure that all its Contractor personnel who have been given access to any premises of the Government (including in particular any of the locations) comply with any security, health and safety or other policies and regulations that apply to such premises. The Contractor shall also ensure that its operation does not disrupt the orderly operation at the Government's premises.
- 21.4 In the event that the Contractor fails to comply with clause 21.2 or clause 21.3 and the Government Representative determines that such failure is prejudicial to the interests of the Government, the Government Representative may thereupon terminate the Contract.
22. Warranties and Indemnities
- 22.1 The Contractor shall indemnify the Government and keep the Government fully and effectively indemnified against any loss of or damage to any property or injury to or death of any person caused by any negligent act or omission or wilful misconduct of the Contractor, its employees, agents or sub-contractors or by any defect in the design, material, workmanship or installation of the Add-on Government Public Cloud Services.
- 22.2 The Contractor warrants and undertakes:
- 22.2.1 in respect of any software and other materials supplied or used by the Contractor, its employees, agents or sub-contractors in the performance of this Contract and in respect of which any Intellectual Property Right is vested in a third party:
- (a) the Contractor has or shall have a valid and continuing licence under which it is entitled to use the relevant software and other materials and the third party Intellectual Property Rights for itself and for the Government, its authorised users, assigns and successors-in-title to use such software and other materials for any of the purposes contemplated by this Contract; or
 - (b) prior to the use of such software and other materials, the Contractor will have obtained the grant of all necessary clearances for itself and for the Government, its authorised users, assigns and successors-in-title to use such software and other materials for any of the purposes contemplated by this Contract;
- 22.2.2 in the event that the Contractor does not have the right to assign or novate the equipment rental or lease agreements, licences of Intellectual Property Rights, or

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- any other contracts which are necessary for the performance of the Add-on Government Public Cloud Service, the Contractor shall use its best endeavours to procure the assignment or novation of such agreements, licences or contracts for the benefit of the Government or its authorized users;
- 22.2.3 the performance of this Contract by the Contractor, its employees, agents or sub-contractors, the use operation or possession by the Government, its authorised users, assigns and successors-in-title of the Government's information system and/or the Contractor supplied software and documentation for all (or any one or more) of the purposes contemplated by this Contract does not and will not infringe any Intellectual Property Rights of any party; and
- 22.2.4 the exercise by the Government, its authorised users, assigns and successors-in-title of any of the rights granted to the Government under this Contract shall not infringe any Intellectual Property Rights of any party.
- 22.3 The Contractor shall indemnify the Government and keep the Government fully and effectively indemnified against all costs, claims, demands, expenses and liabilities of whatsoever nature arising out of or in connection with any claim that the use of the Add-on Government Public Cloud Service or any part thereof or any items supplied under this Contract infringes the Intellectual Property Rights of any third party (hereinafter collectively referred to "Affected Items").
- 22.4 If the Government's use of any of the Add-on Government Public Cloud Service or possession of any items supplied under this Contract is held by a court to constitute an infringement of a third party's Intellectual Property Rights or if such use or possession is likely to constitute such an infringement then the Contractor shall, without prejudice to any other rights or remedies the Government may have, promptly and at its own expense:
- 22.4.1 procure for the Government the right to continue using and/or possessing the Affected Items; or
- 22.4.2 modify or replace the Affected Items (without detracting from its overall performance) so as to avoid the infringement (in which event the Contractor shall compensate the Government for the amount of any loss and/or damage sustained or incurred by the Government during such modification or replacement); or
- 22.4.3 if neither clause 22.4.1 nor clause 22.4.2 can be accomplished, remove the Affected Items from the Government and refund the Price to the Government.
- 22.5 The Contractor shall indemnify, keep the Government fully and effectively indemnified and hold the Government harmless against all losses, claims, costs, demands and expenses whatsoever and howsoever arising which the Government may sustain or incur as a result of a breach of the obligations in clause 32.
- 22.6 The provisions of this clause 22 shall survive the expiry, completion or termination of the Contract (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiry, completion or termination.

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23. Publicity

- 23.1 The Contractor shall submit to the Government all advertising or other publicity material relating to the Contract or any Add-on Government Public Cloud Service supplied or other work done in connection with the Contract wherein the Government's name is mentioned or language used from which a connection with the Government can reasonably be inferred or implied. The Contractor shall not publish or use any such advertising or other publicity material without the prior written consent of the Government Representative.
- 23.2 The Government shall have absolute discretion to refuse consent without any reason being given and the Contractor shall not be entitled to make any claim against the Government.
- 23.3 The provisions of this clause 23 shall survive the expiry, completion or termination of the Contract (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiry, completion or termination.

24. Subcontracts

- 24.1 The Contractor shall not, without the prior written consent of the Government, enter into any subcontract with any person for the performance of any part of the Contract provided that this provision shall not apply to:
- 24.1.1 the purchase by the Contractor of equipment and materials; and
- 24.1.2 the subcontract(s) (if any) specified in the Acquisition Proposal.
- 24.2 The Contractor shall not be relieved of any of its obligations hereunder by entering into any subcontract for the performance of any part of the Contract. The Contractor shall be responsible for all acts, omissions, defaults and neglects of each subcontractor, and the agents and employees of such sub-contractor as fully as if they were the acts, omissions, defaults or neglects of the Contractor. If requested by the Government, the Contractor shall promptly provide the Government with copies of any subcontracts.

25. Joint and Several Liability

- 25.1 Where the Contractor is comprised of more than one person, the liability of the Contractor under the Contract shall be joint and several.

26. Termination of the Contract

- 26.1 Without prejudice to other rights and claims of the Government under the Contract or at law, the Government shall be entitled to terminate the Contract:

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- 26.1.1 if a petition is presented or a proceeding is commenced or an order is made or an effective resolution is passed for the winding-up, insolvency, bankruptcy, administration, reorganisation, reconstruction, or dissolution of the Contractor other than for the purpose of a solvent reconstruction or amalgamation previously approved by the competent authority in writing, or the Contractor makes any composition or arrangement with creditors; or a receiver, administrator, trustee or similar officer has been appointed in respect of the Contractor or all or any part of its business or assets; or
- 26.1.2 the Contractor or sub-contractor has engaged or is engaging in acts or activities that are likely to constitute or cause the occurrence of offences endangering national security or which would otherwise be contrary to the interest of national security; or
- 26.1.3 the continued engagement of the Contractor or sub-contractor or the continued performance of the Contract is contrary to the interest of national security; or
- 26.1.4 the Government reasonably believes that any of the events mentioned above is about to occur; or
- 26.1.5 on Government's election to terminate the Contract under any express provisions of the Contract.
- 26.2 The Government may, at its absolute discretion, terminate the Contract without compensation by notice of not less than two months to the Contractor.
- 26.3 Any termination under clause 26.1 or 26.2 above shall discharge the parties from any liability for further performance of the Contract and shall entitle the Government to be repaid forthwith any sums previously paid in respect of such Add-on Government Public Cloud Service and Work which are not yet accepted by the Government under the Contract (whether paid by way of deposit or otherwise) and to recover from the Contractor the amount of any loss or damage sustained or incurred by the Government as a consequence of such termination.
- 26.4 Subject to any other express provisions of the Contract, either party shall have the right to terminate the Contract if the other party commits any fundamental breach of any term of the Contract and (in the case of a breach capable of being remedied) shall have failed, within 30 days after the receipt of a request in writing from the innocent party so to do, to remedy the breach, such request to contain a warning of the innocent party's intention to terminate.
- 26.5 Any termination of the Contract (howsoever occasioned) shall not affect any accrued rights or liabilities of either party nor shall it affect the coming into force or the continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.
27. Service of Notice

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27.1 All notices which are required to be given hereunder shall be in writing and shall be sent to the address of the recipient set out in the Contract or such other address as the recipient may designate by notice given in accordance with the provisions of this clause. Any such notice may be delivered (a) by hand or (b) by pre-paid letter or (c) by facsimile and shall be deemed to have been served (a) if by hand when delivered, (b) if by post 48 hours after posting and (c) if by facsimile when dispatched.

28. Foreign Exchange

28.1 The Contractor shall not be entitled to any increase of the Price by reason of foreign market exchange fluctuation.

29. Dispute Resolution and Jurisdiction

29.1 In the case where the Contractor whose place of business is in Hong Kong or the Mainland of the People's Republic of China:-

(i) the Parties shall first refer any dispute or difference arising out of or in connection with the Contract to mediation in accordance with The Government of the Hong Kong Special Administrative Region Mediation Rules prevailing at the time ("Mediation Rules"); and

(ii) if the said dispute or difference is not settled by mediation according to Clause 29.1(i) above, a Party may institute litigation in respect of the said dispute or difference. The Parties agree that the courts of Hong Kong shall have exclusive jurisdiction in respect of the said dispute or difference.

29.2 In the case where the Contractor whose place of business is not in a jurisdiction which is Hong Kong or the Mainland of the People's Republic of China:-

(i) the Parties shall first refer any dispute or difference arising out of or in connection with the Contract to mediation in accordance with the Mediation Rules; and

(ii) if the said dispute or difference is not settled by mediation according to Clause 29.2(i) above, the said dispute or difference shall be adjudicated by arbitration to be held in accordance with the Hong Kong International Arbitration Centre Domestic Arbitration Rules prevailing at the time when a notice of arbitration is issued by a Party ("Arbitration Rules") except that regardless of whether the Arbitration Rules providing anything to the contrary, unless the Parties otherwise agree in writing: (i) the arbitration hearing must be held in Hong Kong and that the Arbitration Ordinance (Chapter 609 of the Laws of Hong Kong) shall apply to the arbitration (including the whole of Schedule 2); and (ii) without prejudice to section 18(2) of the Arbitration Ordinance, the Government may on its own disclose any information relating to (1) the arbitral proceedings under the arbitration agreement; and (2) an award made in those arbitral proceedings.

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30. Waiver
- 30.1 No forbearance, delay or indulgence by either party in enforcing the provisions of this Contract shall prejudice or restrict the rights of that party nor shall any waiver of its rights operate as a waiver of any subsequent breach and no right, power or remedy herein conferred upon or reserved for either party is exclusive of any other right, power or remedy available to that party and each such right, power or remedy shall be cumulative.
31. Severability
- 31.1 If any provision or part of a provision of the Contract shall be, or be found by any authority or court of competent jurisdiction to be, illegal, invalid or unenforceable, such illegality, invalidity or unenforceability shall not affect the other provisions or parts of such provisions of the Contract, all of which shall remain in full force and effect.
32. Compliance with Specifications
- 32.1 The Contractor shall perform the obligations set out in and comply with the Specifications.
33. Year 2000 Compliance Warranty
- 33.1 The Contractor warrants that it has responsibility for ensuring Year 2000 compliance in all equipment to be used/supplied by the Contractor under this Contract and undertakes fully to indemnify the Government against all losses, costs, damages and expenses (including legal fees on an indemnity basis) arising from whatsoever which the Government may sustain or incur as a result of any breach of this warranty.
- 33.2 The Contractor further warrants that no work on Year 2000 compliance is to be carried out in respect of this Contract without the prior written consent of the Government Representative.
- 33.3 For the purposes of this Contract, Year 2000 compliance shall mean that neither performance nor functionality is affected by dates prior to, during and after the Year 2000. In particular:
- (i) no value for current date will cause any interruption in operation;
 - (ii) date-based functionality must behave consistently for dates prior to, during and after the Year 2000;
 - (iii) in all interfaces and data storage, the century in any date must be specified either explicitly or by unambiguous algorithms or inferencing rules; and
 - (iv) Year 2000 must be recognised as a leap year.

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34. Software Asset Management

- 34.1 The Contractor shall at all times during the validity of the Contract exercise due diligence in software asset management and as and when required by the Government, furnish to the Government satisfactory evidence that this clause 34.1 has been complied with.
- 34.2 The Contractor warrants and undertakes that the use of any software by the Contractor for the purpose of or otherwise in connection with the performance of the Contract shall not infringe any Intellectual Property Rights of any party.
- 34.3 The Contractor shall notify the Government immediately in writing of any allegation, claims, actions and/or proceedings in respect of such infringement and any progress thereof from time to time.
- 34.4 If the Contractor's use of the software for the purpose of or otherwise in connection with the performance of this Contract is held by a court to constitute an infringement of a third party's Intellectual Property Rights, the Government may, without prejudice to any other rights and remedies that it may be entitled to under this Contract, terminate this Contract.
- 34.5 The Contractor shall indemnify the Government and keep the Government fully and effectively indemnified against all costs, claims, demands, expenses (including without limitation the fees and disbursements of lawyers, agents and expert witnesses) and any awards and costs which may be agreed to be paid in settlement of any proceedings and liability of whatsoever nature arising out of or in connection with any claim that the use or possession of any software needed or installed for the purposes of the Contract infringes Intellectual Property Rights of any party.

35. Right of Deduction, Set-off and Recovery of Sums Due

- 35.1 If any sum of money shall be due or payable from the Contractor to the Government under the Contract, the same may be deducted from or set off against any sum then due or payable or which at any time thereafter may become due or payable to the Contractor by the Government under the Contract or any other contract with the Government.
- 35.2 All damages (including liquidated damages), costs, charges, expenses, debts or sums for which the Contractor is liable to the Government under the Contract may be deducted or set-off by the Government from monies due to the Contractor hereunder or otherwise.
- 35.3 Exercise by the Government of its rights under this clause shall be without prejudice to any other rights or remedies available to the Government whether under the Contract, at law or in equity.

36. Exchange of Correspondence

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- 36.1 Correspondence on contractual and technical matters may be exchanged between the Contractor and User Departments.
37. Confidential Information
- 37.1 The Contractor shall treat as confidential all information, drawings, specifications, documents, contracts, design materials and all other data (including without limitation any personal particulars records and Personal Data (as defined in the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong)) and materials of any nature (in or on whatever media) which the Government has for the purposes of or in the course of performing the Contracts supplied, made available or communicated to the Contractor or are otherwise accessible by the Contractor and which the Government has designated as confidential provided that this clause 37.1 shall not extend to any information which was rightfully in the possession of the Contractor prior to the issue of the request for information relating to the Contracts or which is already public knowledge or becomes so at a future date (otherwise than as a result of a breach of this clause).
- 37.2 The Contractor shall indemnify and keep the Government, its employees and authorised persons fully and effectively indemnified against all costs, claims, demands, expenses (including without limitation the fees and disbursements of lawyers, agents and expert witness) and any awards and costs which may be agreed to be paid in settlement of any proceedings and liabilities of whatsoever nature arising from or incurred by reason of any actions and/or claims made in respect of information subject to the Personal Data (Privacy) Ordinance (Chapter 486 of the Laws of Hong Kong) which action and/or claim would not have arisen but for the negligence or omission of the Contractor, any of its employees, sub-contractors or agents (or any one acting on its/their behalf) in connection with the Contracts.
- 37.3 The Contractor hereby agrees that it will use such confidential information solely for the purposes of the Contracts and that it will not, at any time before, during or after the completion, expiry or termination of the Contracts: (a) disclose or divulge the same or allow the same to be disclosed or divulged whether directly or indirectly, to any third party; or (b) use or allow to be used the same for any other purposes and shall use its best endeavours to prevent any such disclosure thereof.
- 37.4 The Contractor undertakes to take all necessary security measures for the protection of the information, documentation and materials which it is obliged by clause 37.1 to keep secret and treat as confidential.
- 37.5 The Contractor shall ensure that each of its employees, agents, associates, sub-contractors, or any other persons engaged on any work in connection with the Contract are aware of and comply with the provisions of clause 37.1 and the Official Secrets Ordinance (Chapter 521 of the Laws of Hong Kong) and the Contractor shall indemnify and keep the Government fully and effectively indemnified against all costs, claims, demands, expenses (including without limitation the fees and disbursements of lawyers, agents and expert witnesses) and any awards and costs which may be agreed to be paid in settlement of any proceedings, loss, damage and

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liabilities which the Government may suffer, incur or sustain as a result of any breach of confidence under the general law by any such persons.

- 37.6 The Contractor undertakes, if so requested by the Government, to sign the Government's separate confidentiality agreement in a form prescribed by the Government and to procure each of its employees, agents, associates, sub-contractors, consultants and any other persons engaged in any work in connection with the Contracts to whom any confidential information requires to be disclosed to do so.
- 37.7 The Contractor further agrees that it will not at any time itself or through any subsidiary or agent use, sell, license, sub-license, create, develop or otherwise deal in any confidential information supplied to it by the Government or obtained while performing the Contract.
- 37.8 The Contractor shall promptly notify the Government and give the Government all reasonable assistance in connection with any proceedings instituted against any persons pursuant to any of the provisions in this clause 37.
- 37.9 The provisions of this clause 37 shall survive the expiration or termination of the Contract (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiration or termination.

38. Government Data

- 38.1 The Contractor shall take reasonable precautions to preserve the integrity of Government Data and to prevent any corruption or loss of Government Data.
- 38.2 The Contractor shall:
- (a) take such steps as are necessary to ensure that, in the event of any corruption or loss of Government Data howsoever caused, it is in a position to restore or procure the restoration of Government Data; and
 - (b) at the request of the Government in the event of any corruption or loss of Government Data and without prejudice to any other remedies that may be available to it either under this Contract or otherwise, restore or procure the restoration of Government Data to its state immediately prior to the said corruption or loss.
- 38.3 The Contractor shall bear the cost of restoration set out in clause 38.2.

39. Termination

- 39.1 The following events of default shall be deemed a fundamental breach of the Contract. Upon occurrence of any of the following events of default, the Government may terminate the Contract immediately by giving written notice to the Contractor:

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- (a) Failure on the part of the Contractor to provide the Add-on Government Public Cloud Service and/or the Government Public Cloud Related Services;
- (b) Failure on the part of the Contractor to observe any obligation under the Contract not requiring notice to be served and in the case of obligations requiring notice to be served, failure to comply with the terms of any notice;
- (c) The levying of any distress or execution against the Contractor or the making by it of any composition or arrangement with creditors or being a company if the Contractor shall pass a resolution, or the court shall make an order that the company be wound up otherwise than for the purposes of reconstruction or amalgamation, or if a receiver or manager on behalf of a creditor shall be appointed, or if circumstances shall arise which entitle a court or a creditor to appoint a receiver or manager or which entitle the court otherwise than for the purposes of amalgamation or reconstruction to make a winding up order;
- (d) The Contractor offering or giving any advantage, gratuity, commission, bonus, discount, bribe or loan of any sort or in any form whether directly or indirectly to any agent or employee of the Government;
- (e) The Contractor offering any advantage to any other person as an inducement to or reward for the withdrawal of an Acquisition Proposal or refraining from the making of such Acquisition Proposal;
- (f) Finding by a court of law that there is possession or use of any unlicensed software by the Contractor in its business including but not limited to the delivery of any services under any of the Contracts; and
- (g) Finding by a court of law that the Contractor, in performing any of the Contracts, has infringed the Intellectual Property Rights of any party.

39.2 Without prejudice to clause 39.1, the Government may at its option terminate the Contract by giving the Contractor two months' prior written notice of such termination.

39.3 Upon expiry, completion or termination of this Contract, the Contractor shall at the sole option of the Government, either return to the Government or destroy all records, documentation, data, backup tapes, and any other information and all copies thereof which are owned by the Government and shall certify to the Government that no copies of such information or data have been retained and used for other purposes from that time/moment onwards.

40. **Entire Agreement**

40.1 The Contract constitutes the whole agreement between the parties thereto and supersedes any previous agreements or arrangements between them relating to the subject matter hereof. The Contractor acknowledges that in entering into the

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Contract, it has not relied on any statements, warranties, or representations given or made by the Government. On the other hand, the Government has relied on the Warranties when entering into the Contract.

41. Headings

41.1 The headings to the clauses of the Contract made thereunder are for ease of reference only and shall not affect the interpretation or construction of the Contract.

42. General

42.1 Nothing in the Contract made thereunder shall render either party an agent or partner of the other and neither party shall hold itself out as such. Neither party shall have any right or power to bind the other to any obligation. This Contract made thereunder constitutes the entire understanding between the parties concerning the subject matter hereof and shall be governed by and construed in accordance with the laws of Hong Kong. No waiver or amendment of any provision of the Contract made thereunder shall be effective unless made by a written instrument signed by both parties.

43. Governing Laws

43.1 This Contract shall be governed, construed and interpreted in all respects in accordance with the laws of Hong Kong.

44. Contracts (Rights of Third Parties) Ordinance

44.1 It is noted that there is no provision in Contracts (Rights of Third Parties) Ordinance (Chapter 623 of the Laws of Hong Kong) ("Chapter 623") which states that Chapter 623 applies to the Government or contracts entered into by the Government.

44.2 Notwithstanding clause 44.1, it is hereby declared that no person, who or which is not a party to the Contract, may enforce any term of the Contract under or pursuant to or for the purposes of Chapter 623 (including section 4 of Chapter 623).

44.3 Nothing in clause 44.2 is intended to affect the following:

- (a) the power of the Government Representative to act for the Government including the exercise of any right under, or the enforcement of any claim or remedy, arising from or in connection with or in relation to, this Contract;
- (b) the power of a public officer under any law or regulation including any ordinance or subsidiary legislation or any other legal instrument;
- (c) the power of a public officer to act by his own title or for the Government Representative or for the Government in any legal proceedings arising from

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or in connection with or in relation to the Contract (including the Secretary for Justice);

- (d) the rights and obligations of any personal representative, administrator or other successor-in-title of the Contractor;
- (e) the rights and obligations of any assignee or transferee of the Contractor under any assignment or transfer which has been approved by the Government pursuant to clause 20 but not otherwise;
- (f) the rights and obligations of any Government's successor-in-title and person deriving title under any of them, and the Government's assignee and transferee (and in the case of assignee or transferee, in accordance with the terms of the assignment and transfer agreed by the Government); and
- (g) the rights of the Government and the Government Representative under any guarantee or undertaking or insurance policy or other collateral contract granted or issued or entered into by any person other than the Contractor pursuant to the terms of the Contract.

45. United Nations Convention on Contracts for the International Sale of Goods not applicable

4.51 The Government and the Contractor agree that the provisions of the United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Contract.

- End of Appendix B -