

# Testing Within Government (TWiG) Program Terms and Conditions

## 1. Recipient Obligations

1.1 The Recipient agrees to undertake the Program in accordance with this Agreement.

1.2 In undertaking the Program, the Recipient must:

- (a) exercise reasonable diligence, care and skill;
- (b) provide required information and reports detailed in the Application and the Agreement;
- (c) achieve the Program milestones by the relevant milestone dates, as detailed in the Application;
- (d) not assign, transfer or subcontract its obligations, subject to clause 21;
- (e) only spend the Funding for the purpose of undertaking the Program and in accordance with the Agreement;
- (f) notify the State of any breach of these terms or any matter that may affect the performance of the Program; and
- (g) comply with all relevant laws.

## 2. State Obligations

2.1 The State agrees to assist the Recipient in undertaking the Program in accordance with this Agreement.

2.2 The State will assist by:

- (a) contributing in-kind resources such as staff time;
- (b) facilitating Product testing and refinement; and
- (c) paying the Funding subject to clause 6.

2.3 For the avoidance of doubt, the Recipient is responsible for acquiring or providing any additional funds or other resources (in excess of the Funding) required to perform the Program. The State has no obligation to provide further funding or assistance.

## 3. Notices

3.1 The Parties agree to notify the other Party of anything reasonably likely to affect the performance of the Program or otherwise required under this Agreement.

3.2 A notice under this Agreement must be in writing, and sent to the Party at their address specified in the Application or Fact Sheet.

## 4. Relationship between the Parties

4.1 A Party is not by virtue of this Agreement the employee, agent or partner of the other Party and is not authorised to bind or represent the other Party.

4.2 The Recipient acknowledges that it is responsible for all obligations required by law with respect to its employees for work done in connection with this Agreement, including obligations relating to employee entitlements, superannuation, deductions for taxation, and industrial awards and related agreements.

## 5. Payment

5.1 The State agrees to pay the Funding to the Recipient in accordance with the Application upon the Recipient:

- (a) achieving the relevant Program milestone;
- (b) providing any reports, surveys and financial statements due in accordance with the Agreement;
- (c) providing the State with a correctly rendered invoice, and
- (d) complying with this Agreement;

to the State's reasonable satisfaction.

5.2 The State may by notice withhold payment of any amount where it reasonably believes the Recipient has not complied with this Agreement or is unable or unwilling to undertake the Program.

5.3 A notice under clause 5.2 will contain the reasons for any payment being withheld and the steps the Party can take to address those reasons.

5.4 The State will pay the withheld amount once the Party has satisfactorily addressed the reasons contained in a notice under clause 5.2.

## 6. Warranties and Acknowledgement

6.1 The Recipient warrants that it has not provided incorrect, misleading or fraudulent information to the State in connection with this Agreement.

### Intellectual Property Rights and Moral Rights

6.2 The Recipient warrants that it owns the Intellectual Property Rights in the Product, and/or is licensed or otherwise permitted to exercise and/or grant all rights in the Product as contemplated under this Agreement.

6.3 The Recipient warrants that the Product, its refinement and testing under this Agreement and any use of the Product contemplated under this Agreement, does not and will not infringe the Intellectual Property Rights or Moral Rights of any other person;

#### **Commissions, Incentives and Anti-competitive Conduct**

6.4 The Recipient warrants that it and its personnel have not offered or given any inducement, gift or reward to the State's personnel or their immediate family members in connection with this Agreement;

6.5 The Recipient warrants that it has not consulted or communicated with another applicant, in developing and submitting its Application, on or before the commencement of this Agreement.

6.6 Clause 6.5 does not apply if applicants engage in collaboration or exchange of ideas with the prior written approval of the State.

#### **Conflict of Interest**

6.7 The Recipient warrants that, to the best of its knowledge, it and its personnel do not, and are not likely to have, any Conflict of Interest in the performance of this Agreement.

6.8 The Recipient must not, and must take all reasonable measures to ensure its Personnel do not, engage in any activity or obtain any interest in conflict with the performance of this Agreement.

6.9 The Recipient must immediately give notice to the State of any Conflict of Interest arising in respect of the Recipient or its personnel.

6.10 If the State is given notice of a Conflict of Interest pursuant to clause 6.9, or if the State otherwise identifies a Conflict of Interest exists, the State may:

- (a) direct the Recipient as to how to manage the Conflict of Interest and the Recipient must comply with any reasonable direction so given by the State: or
- (b) terminate this Agreement in accordance with clause 16.

6.11 The Recipient acknowledges that the State does not provide any promise or guarantee whatsoever that following the Program, the State will purchase the Product.

6.12 All warranties and acknowledgements in this Agreement are provided on an ongoing basis. The Recipient warrants that it will immediately notify the State if the Recipient becomes aware that any warranty made in this Agreement was or becomes inaccurate,

incomplete, out of date or misleading in any way.

## **7. Repayment**

7.1 If any of the Funding has been spent other than in accordance with this Agreement or any amount of the Funding is additional to the requirements of the Program, the Recipient agrees to repay that amount to the State.

7.2 The amount to be repaid under clause 7.1 may be deducted by the State from subsequent payments of the Funding.

## **8. Reporting, Record keeping, access and audit**

8.1 The Recipient agrees to:

- (a) maintain records of the expenditure of the Funding;
- (b) provide surveys, on the relevant milestone dates;
- (c) if requested by the State, provide a financial acquittal in relation to expenditure of the Funding;
- (d) provide any information reasonably requested by the State; and
- (e) allow the State's employees, contractors and agents to access the premises and inspect records and Program documentation and/or audit the performance of the Agreement, upon reasonable notice;

to the satisfaction of the State.

## **9. Intellectual Property**

9.1 The Recipient owns the Intellectual Property Rights in the Product, and/or is licensed or otherwise permitted to exercise all rights in the Product as contemplated under this Agreement.

9.2 The Parties agree that all Intellectual Property Rights in the Product created during the Agreement and all Program Material vest upon creation in the Recipient.

9.3 Intellectual Property Rights in State Material vest upon creation in the State.

9.4 The Recipient and its personnel consent to the use, adaption and publication of State Material (including any personal information) by the State for the purpose of this Program or in connection with similar programs and initiatives.

9.5 Nothing in this Agreement affects the ownership of Intellectual Property Rights in Material produced prior to, or independently

of, this Agreement.

9.6 Each Party grants the other a non-exclusive, royalty-free licence to use and adapt the Product and Program Material for the sole purpose of the Program and this Agreement, and limited to the term of this Agreement.

9.7 In the event that the State provides live data or other information to the Recipient, such data is provided under a non-exclusive, royalty-free licence to use and adapt for the sole purpose of the Program and this Agreement, and limited to the term of this Agreement, in addition to any further conditions applied by the State.

9.8 The State shall not, in contravention of the Copyright Act 1968 (Cth), reverse assemble or reverse compile the Product.

## 10. Privacy

10.1 When dealing with Personal Information in performing their obligations, the Parties agree not to do anything which, if done by the State, would be a breach of an Information Privacy Principle.

10.2 The Recipient consents and must ensure its personnel consent to their personal information being used and disclosed by the State as detailed in clause 9.3 and 9.4.

10.3 The Recipient and its personnel must immediately notify the State on becoming aware of any potential or actual breach of clause 10.1.

10.4 On request from the State, the Recipient must obtain from its personnel an executed deed of privacy in a form acceptable to the State.

## 11. Confidentiality

11.1 A Receiver (of Confidential Information):

- (a) must not, without the prior approval of the Discloser, use, make public or disclose to any person any Confidential Information;
- (b) must immediately notify the Discloser if it becomes aware of any unauthorised use of disclosure of the Confidential Information;
- (c) must keep all Confidential Information in a secure location so that no unauthorised person is able to gain access to it;
- (d) may disclose Confidential Information only:
  - (i) to its personnel who are aware that the Confidential Information is confidential and are subject to the same obligations of

confidentiality as the Receiver and only to the extent necessary to exercise its rights and perform its obligations under this Agreement;

(ii) to the extent required by law, provided that the Receiver must use its best endeavours to immediately notify the Discloser prior to the information being disclosed; and

(iii) to the Receiver's professional advisers;

- (e) will ensure that its personnel comply with any obligations of confidentiality in relation to the Confidential Information and will enforce those obligations in case of breach;
- (f) acknowledges that unauthorised use or disclosure of Confidential Information will cause the Discloser harm that cannot be adequately compensated by damages, and that the Discloser may obtain interlocutory injunctions and any other orders necessary to restrain the disclosure of any Confidential Information;
- (g) must immediately upon request by the Discloser, or otherwise at the termination or expiry of this Agreement, deliver to the Discloser the Discloser's Confidential Information, or where the Confidential Information is stored in electronic form on any systems in the recipient's control:

(i) destroy the Confidential Information (including by permanent erasure of electronic form information) and permit a Discloser's representative to witness the destruction; or

(ii) certify by letter signed by a senior representative of the Receiver that the Confidential Information has been destroyed or permanently erased;

subject to compliance with the law.

11.2 On request from the State, the Recipient must obtain from its personnel an executed deed of confidentiality in a form acceptable to the State.

11.3 The Recipient may require the State to sign a deed of confidentiality in relation to the Product and Program Material.

## 12. Insurance

The Recipient agrees to maintain adequate insurance, (including at least \$10 million public liability insurance, and workers

compensation insurance) for the duration of this Agreement and provide the State with proof when requested.

### **13. Indemnity and Liability**

13.1 Subject to clause 13.3, the State's liability in connection with this Agreement is limited in aggregate to the Funding amount.

13.2 The Recipient is liable for and indemnifies the State against any claim, loss or damage arising in connection with:

- (a) the Program;
- (b) the Recipient's and its employees, contractors and agents act or omission; or
- (c) the Recipient's breach of the Agreement.

13.3 The Recipient's obligation to indemnify the State will reduce proportionally to the extent any act or omission involving fault on the part of the State contributed to the claim, loss or damage.

13.4 The Parties will not in any circumstances be liable for any loss of, revenue, profit, opportunity, goodwill, reputation, business interruption or any indirect or consequential loss in connection with the Agreement.

13.5 The Parties agree that the Program and the refinement of the Product is speculative and its outcomes are not certain or guaranteed. The State will not be liable to the Recipient for any loss or damage arising through the conduct of testing or failure to achieve an improvement to the Product or particular outcome in the Program.

### **14. Dispute resolution**

14.1 The Parties agree not to initiate legal proceedings in relation to a dispute unless they have tried and failed to resolve the dispute by negotiation.

14.2 The Parties agree to continue to perform their respective obligations under this Agreement while a dispute exists.

14.3 The procedure for dispute resolution does not apply to action relating to termination or urgent interlocutory relief.

### **15. Termination for default**

15.1 The State may terminate this Agreement immediately by notice where it reasonably believes the Recipient:

- (a) has breached this Agreement, if the State reasonably considers such breach is not capable of remedy;
- (b) has submitted information in support of the Application or in the Application itself

which is found to have been false or misleading in a material particular;

- (c) has failed to maintain satisfactory progress towards completion of the Program;
- (d) has become ineligible for Funding;
- (e) has withdrawn from the Program;
- (f) has breached a warranty given under this Agreement; or
- (g) has become bankrupt or insolvent, entered into a scheme of arrangement with creditors, or come under any form of external administration.

15.2 The State may immediately terminate the Agreement by notice, if the Recipient has failed to remedy a breach of the Agreement within 15 business days of service of a notice upon the Recipient detailing the breach.

15.3 Upon termination of the Agreement pursuant to clause 15.1 or 15.2, the Recipient must deliver to the State (within 20 business days):

- (a) all reports due under this Agreement at the date of termination or expiration; and
- (b) the Recipient must repay the amount of Funding received up to the date of termination, which will be a debt due to and recoverable by the State.

### **16. Termination for convenience or by mutual agreement**

16.1 The State may terminate this Agreement by 15 business days' notice, due to:

- (a) a change in government policy; or
- (b) a Conflict of Interest arises under clause 6.10, which in the reasonable opinion of the State cannot be managed by the Recipient, or has not been managed as the State has directed.

16.2 The Recipient agrees on receipt of a notice of termination under clause 16.1, to stop the performance of its obligations as specified in the notice, and take all available steps to minimise loss resulting from that termination.

16.3 In the event of termination under clause 16.1, the State will be liable only to:

- (a) pay any part of the Funding due and owing for activities satisfactorily performed, to the Recipient under this



- Agreement at the date of the notice; and
- (b) reimburse any reasonable expenses the Recipient unavoidably incurs that relate directly to the termination and are not covered by 16.3(a).

16.4 The State's liability to pay any amount under this clause is subject to:

- (a) the Recipient's compliance with this Agreement; and
- (b) the total amount of the Funding.

16.5 The Parties may agree to terminate this Agreement by mutual written agreement.

16.6 In the event of termination under clause 16.5, or by termination for breach by the State where the State has failed to remedy the breach within 15 business days of notice, then:

- (a) Recipient must deliver to the State (within 20 business days) all reports due under this Agreement at the date of termination or expiration; and
- (b) the Recipient must repay (within 20 business days) any unspent or legally uncommitted Funding at the date of termination, and any Funding not spent in accordance with this Agreement, which will be a debt due to and recoverable by the State.

## 17. Survival

17.1 Clauses 7, 8, 9, 10, 11, 13, 15, 16, 17, 18, 22 & 23 survive termination or expiry of this Agreement.

## 18. GST

18.1 Unless otherwise stated, all amounts payable are exclusive of GST.

18.2 A Party need not make a payment for a taxable supply until it receives a tax invoice (or adjustment note) for that supply.

18.3 The Parties agree to use all reasonable endeavours to assist each other in meeting their lawful obligations under the GST law.

## 19. Security and Access

19.1 The Recipient must ensure that all of its personnel, when on the State's premises or when accessing the State's facilities, systems and information, comply with the reasonable policies, requirements and directions of the State with regard to their conduct, behaviour, safety and security.

19.2 Access to the State's premises, facilities, systems and information may be temporarily

denied or suspended by the State, at its sole discretion.

19.3 The Recipient must maintain, and ensure that its personnel maintain such secrecy and security measures:

- (a) as are reasonably necessary and within the Recipient's control, to ensure the security of the State's information technology infrastructure, systems and data;
- (b) are required by the State's relevant policies and procedures regarding the security of the State's information technology infrastructure, systems and data; and
- (c) as are reasonably notified by the State to the Recipient from time to time;
- (d) during the Agreement term.

## 20. Acknowledgements

20.1 The Recipient agrees to acknowledge the State's support in Material published in connection with this Agreement.

20.2 The State may publically disclose the Recipient, Funding and Program details and outcomes (subject to notified commercial in confidence restrictions).

20.3 The Parties agree to make their officers available for media opportunities.

## 21. Subcontracting

21.1 The Recipient must not transfer, assign or subcontract its obligations without the prior written approval of the State, which approval may be given subject to conditions.

21.2 In subcontracting pursuant to approval under clause 21.1, the Recipient

- (a) must ensure that its subcontractor is bound under substantially the same terms and conditions as this Agreement; and
- (b) at all times retains responsibility for the performance of its obligations under this Agreement.

## 22. General

22.1 **Governing Law** – The Agreement is governed by the law of the State of Queensland and the Parties agree to submit to the jurisdiction of the courts of the State of Queensland.

22.2 **Entire Agreement** – The Agreement constitutes the entire agreement between the parties and supersedes all communications and negotiations (oral or written) between the

Parties.

**22.3 Waiver** – No right under the Agreement will be deemed to be waived except by notice in writing agreed by the waiving Party. A failure by a Party to enforce any provision of the Agreement will not constitute a waiver of that Party's rights.

**22.4 Severability** – The invalidity or unenforceability of any provision of the Agreement does not invalidate the remaining provisions. Any illegal or invalid provision will be severable and all other provisions will remain in effect.

**22.5 Variation** - This Agreement may be varied in writing only, signed by the Parties.

## 23. Definitions

23.1 In this Agreement, unless the contrary appears:

**Agreement** means these Terms and Conditions, the Fact Sheet, the FAQs and the Application. The Terms and Conditions prevail over the other documents to the extent of any inconsistency.

**Application** means the funding application document.

**Completion Date** means the date or event specified in the Application for completion of the Program.

**Confidential Information** of a Party ("the Discloser") means information belonging to the Discloser and its activities of which the other Party ("the Receiver") becomes aware in connection with this Agreement or in the course of the Program that by its nature is confidential, is communicated as confidential or the Receiver knows or ought to know is confidential and includes information:

- (a) relating to any Intellectual Property Rights of the Discloser;
- (b) relating to the internal management and structure of the Discloser or the personnel, internal policies and strategies of the Discloser;
- (c) that is of actual or potential commercial value to the Discloser; or
- (d) concerning the commercial operations, financial arrangements or affairs of the Discloser;
- (e) concerning the clients, affiliates and suppliers of the Discloser;

but does not include information

- (f) which is publically known, other than by breach of this Agreement; or

- (g) is lawfully received from a third party, from the Discloser prior to any obligation of confidentiality, or independently developed by a Party; or

- (h) that a Party is required by law, or by this Agreement, to disclose.

**Conflict of Interest** means having an interest (whether personal, financial or otherwise) which conflicts, or may reasonably be perceived as conflicting, with the ability of the Party or its personnel to perform its obligations under this Agreement fairly and objectively.

**Fact Sheet** means the funding program fact sheet document published by the State.

**FAQs** means the frequently asked questions document published by the State.

**Funding** means the money, or any part of it, payable by the State to the Recipient as specified in the Application.

**Information Privacy Principle** has the same meaning as in the *Information Privacy Act 2009*.

**Intellectual Property Rights** means all copyright, patents, registered and unregistered trademarks (including service marks), registered designs, and other rights resulting from intellectual property (other than moral rights under the *Copyright Act 1968*).

**Material** includes documents, equipment, software (including source code and object code versions), goods, information and data stored by any means including all copies and extracts of them.

**Moral Rights** means the moral rights of attribution of authorship, right not to have authorship falsely attributed and rights of integrity of authorship specified in Part IX of the Copyright Act 1968 (Cth).

**Party** means the Recipient or the State, as the context requires, and **Parties** means both of them.

**Personal Information** has the same meaning as in the *Information Privacy Act 2009*.

**Product** means the product being refined and tested for the Program, and includes any modifications or improvements to the product.

**Program** means the program activities described in the Application.

**Program Material** means any Material (other than State Material) created or developed as a result of or during the Program.

**Recipient** means the legal entity specified in the Application to carry out the Program and includes, where relevant, its officers,



employees, contractors and agents.

**State** means the State of Queensland as represented by the Department of Science, Information Technology and Innovation, and includes, where relevant, its officers, employees, contractors and agents.

**State Material** means:

- (a) reports, presentation and publicity Material; and
- (b) Material created by the State and not containing Product information or other commercial in confidence information of the Recipient;

created or developed as a result of or during the Program.

**Terms and Conditions** means the terms and conditions contained in this document.

23.2 In these Terms and Conditions, except where the context otherwise requires:

- (a) a reference to a Party, includes the Party's executors, administrators, successors, and substitutes;
- (b) the meaning of general words is not limited by specific examples;
- (c) a reference to a government entity includes any successor or replacement government entity;
- (d) a reference to a document includes the document as altered, amended or replaced from time to time;
- (e) a rule of construction does not apply to the disadvantage of a Party because that Party drafted the Terms and Conditions;
- (f) where an obligation must be performed on a day that is not a business day, the obligation must be performed on or by the next business day.