



Everyone  
by Smart Cities Council

## Engagement Agreement

### Background

- A You wish for Smart Cities to provide the Benefits as outlined in a Proposal has been provided, then those services selected for this project from the website [smartcitiescouncil.com](http://smartcitiescouncil.com).
- B The parties have agreed that Smart Cities will provide the Benefits to you on the terms of this agreement.

### Agreed Terms

#### 1 Acceptance of Terms

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By accepting the Proposal, accepting these terms through the website or otherwise accessing or accepting the Benefits, you agree to the terms of this agreement.

#### 2 Supply of the Benefits

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- 2.1 Subject to you paying the Fees in accordance with clause 4 and otherwise complying with the terms and conditions hereof, Smart Cities must use its commercially reasonable endeavours to provide the Benefits to you in the manner reasonably determined by Smart Cities during the Term.
- 2.2 You agree to:
- (a) perform your obligations and provide Smart Cities with Your Material as contemplated by each Proposal;
- (b) ensure that you and each of your end users comply with the [Smart Cities Activator Default End User License \(EULA\)](#);
- (c) ensure that you and each of your end users comply with the [Smart Cities Academy Agreement \(Academy Agreement\)](#);
- (d) the [Smart Cities Council Privacy Policy](#); and
- (e) cooperate with Smart Cities and act reasonably in connection with this agreement and receipt of the Benefits.
- 2.3 You acknowledge and agree that:
- (a) if you do not comply with clause 2.2 then Smart Cities is not obliged to supply the Benefits to you; and
- (b) any time frames provided by Smart Cities are indicative only, and are not intended to be binding on Smart Cities.

#### 3 Events

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- 3.1 Where the Benefits include you sponsoring or otherwise participating in an event, you acknowledge and agree that Smart Cities' provision of Benefits in connection with that event is conditional and dependent on your performance of your obligations in connection with that event.
- 3.2 If a Force Majeure Event occurs in relation to an event or Smart Cities otherwise reasonably considers that an event should be held on a different date or at a different location than that previously scheduled, then without limiting clause 8.1, Smart Cities may:

- (a) reschedule and/or relocate the event, in which case Smart Cities will provide similar Benefits at the newly scheduled event; or
- (b) apply the Fees paid for the Benefits to be provided at that event, or otherwise the portion of the Fees that Smart Cities reasonably attributes to the portion of the Benefits for that event as a proportion of the overall Benefits, to your credit against future Fees that may be payable for future Benefits.

3.3 Provision of similar Benefits under clause 3.2(a) or application of a credit under 3.2(b) is your sole remedy in connection with the circumstances contemplated by clause 3.2.

3.4 You represent and warrant that use of Your Material by Smart Cities in accordance with this agreement will not infringe the Intellectual Property Rights of any third party.

#### 4 Fees

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##### Fees

- 4.1 You must pay the Fees to Smart Cities on or before the applicable due dates.
- 4.2 If there is a dispute about whether a Fee or other amount contemplated by this agreement is payable or available, you may only withhold the disputed amount, and must pay any undisputed amounts. Upon resolution of any bona fide dispute over Fees, you must pay the amounts as resolved as promptly as reasonably possible after resolution.
- 4.3 The Fees may change during the Term in the manner contemplated by the Proposal and clause 5.2.

##### Invoices

- 4.4 Smart Cities must invoice you from time to time for the Fees.
- 4.5 You must pay an invoice issued under clause 4.4 within the terms issued on the invoice.

##### Deferral of performance

4.6 If you fail to pay the Fees in accordance with this agreement and Smart Cities has given you seven days written notice of your failure, then without limiting any other remedies available to Smart Cities, Smart Cities may defer performance of all Benefits until the outstanding Fees are paid.

#### 5 Term and termination

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##### Term

- 5.1 This agreement commences on the Commencement Date and continues for the Initial Period and, if this agreement is extended under clause 5.2, that further period unless terminated earlier in accordance with clause 5.
- 5.2 You and Smart Cities may agree to extend the agreement for a further period to commence at the end of the Initial Period or then current further period, in which case this agreement for continue for the new further period. You acknowledge and agree that the Fees may increase in respect of any further period agreed under this clause 5.2.

5.3 Smart Cities will invoice you for the Fees payable in respect of each further period or Benefit agreed under 5.2, in accordance with clause 4.

#### **Termination for breach**

5.4 If:

(a) a party commits a material breach of this agreement and fails to remedy that breach within seven days of receiving notice from the other party specifying the breach in reasonable detail and requiring or requesting the breaching party to remedy said breach;

(b) the party is unable to pay its debts when they become due and payable, the party ceases to carry on business in relation, the party files for protection in bankruptcy or for administration or dissolution, or a petition in bankruptcy or for administration is filed against the party and the party does not or is unable to have such petition dismissed within 60 days; or

(c) in your case, you do anything that brings Smart Cities or any aspect of the Benefits into dispute,

then the other party may terminate this agreement by written notice to that party, in which case this agreement will terminate immediately.

#### **Termination for convenience**

5.5 Either party may terminate this agreement at any time by giving one month's written notice to the other party.

#### **No refund of Fees for early termination**

5.6 Benefits are organised and provided on a forward-planned basis, with Fees paid in advance for the relevant period of Benefits. Accordingly, if you terminate this agreement under clause 5.5, you will not be entitled to any refund of Fees already paid for Benefits.

#### **Waiver and acknowledgment**

5.7 Each party expressly waives any rights it may have to terminate this agreement other than as contemplated by this clause 5.

5.8 Each party acknowledges that the other party may terminate this agreement under clause 5 without considering the impact of the termination on the other party.

#### **After termination or expiration**

5.9 On termination or expiration of this agreement:

(a) accrued rights or remedies of a party are not affected; and

(b) you must deliver to Smart Cities the Smart Cities Material or other property of Smart Cities in your care, custody or control.

#### **Survival**

5.10 Termination or expiry of this agreement will not affect clauses 3.4, 5.9, 6.4, 7 or 11.2 or any provision of this agreement which is expressly or by implication intended to come into force or continue on or after the termination or expiry.

## **6 Intellectual property**

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#### **No assignment**

6.1 Smart Cities Material remains the property of Smart Cities and except to the extent expressly licensed under the EULA or Academy Agreement, nothing in this agreement grants you any licence to exercise any Intellectual Property Rights in:

(a) Smart Cities Material; or

(b) other Intellectual Property Rights of Smart Cities.

#### **Licence of Smart Cities Material**

6.2 Subject to clauses 2.2, 6.1 and 6.6, Smart Cities grants to you a non-exclusive, revocable licence to use the Intellectual Property Rights in the Smart Cities Material for the sole purpose of you receiving the Benefits during the Term.

6.3 The licence granted under clause 6.2 does not include the right to sublicense to third parties.

#### **Licence of Your Material**

6.4 You grant to Smart Cities a non-exclusive, irrevocable, global licence to exercise the Intellectual Property Rights in Your Material for the purpose of Smart Cities' business, promoting Smart Cities and providing the Benefits to you.

6.5 The licence granted under clause 6.4 includes the right to sublicense to third parties.

#### **No use of Smart Cities' marks**

6.6 You must not, and must ensure that your end users, officers, employees, agents and subcontractors do not, use the trade marks or logos of Smart Cities except with the prior written consent of Smart Cities.

## **7 Disclaimer of Warranties; Limitation of liability**

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#### **Disclaimer of Warranties**

7.1 EXCEPT AS EXPRESSLY PROVIDED IN THESE TERMS, SMART CITIES AND ITS AFFILIATES MAKE NO REPRESENTATIONS AND SPECIFICALLY DISCLAIM ALL WARRANTIES (EXPRESS, IMPLIED OR STATUTORY) WITH RESPECT TO THE BENEFITS AND ANY OTHER GOODS AND SERVICES PROVIDED BY SMART CITIES OR ITS AFFILIATES, INCLUDING WITHOUT LIMITATION THE WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. THE BENEFITS AND ANY OTHER GOODS AND SERVICES PROVIDED BY SMART CITIES OR ITS AFFILIATES ARE PROVIDED "AS IS". WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SMART CITIES AND ITS AFFILIATE DOES NOT WARRANT THAT THE SERVICE OR ANY REPORT WILL SATISFY CLIENT'S REQUIREMENTS OR BE UNINTERRUPTED OR ERROR-FREE.

#### **Limitation**

7.2 SUBJECT TO CLAUSE 7.7, ANY LIABILITY OF EITHER PARTY FOR ANY LOSS OR DAMAGE, HOWEVER CAUSED (INCLUDING BY THE NEGLIGENCE OF THE PARTY), SUFFERED BY THE OTHER PARTY IN CONNECTION WITH THIS AGREEMENT IS LIMITED, AT THE ELECTION OF THE PARTY TO:

(a) THE FEES PAID BY YOU TO SMART CITIES UNDER THIS AGREEMENT IN THE 12 MONTHS BEFORE THE PARTY FIRST SUFFERED LOSS OR DAMAGE IN CONNECTION WITH THIS AGREEMENT; OR

(b) RE-PERFORMANCE OF THE BENEFITS (IF APPLICABLE).

7.3 THE LIMITATION SET OUT IN CLAUSE 7.2 IS AN AGGREGATE LIMIT FOR ALL CLAIMS, WHENEVER MADE.

#### **Consequential Damages and Excluded Loss**

7.4 SUBJECT TO CLAUSE 7.6, IN NO EVENT SHALL SMART CITIES OR ITS AFFILIATES BE LIABLE TO YOU OR ANY OF YOUR USERS OR OTHER THIRD PARTIES FOR ANY REASON WHATSOEVER, WHETHER IN CONTRACT OR TORT, FOR ANY FORM EXCLUDED LOSS IN CONNECTION WITH OR ARISING OUT OF THE FURNISHING, FUNCTIONING, OR USE OF ANY BENEFITS OR OTHER GOODS OR SERVICES PROVIDED BY SMART CITIES OR ITS AFFILIATES UNDER THIS AGREEMENT OR ANY PROPOSAL, EVEN IF SUCH PARTY HAS BEEN ADVISED OF THE POSSIBILITY THEREOF.

## Seriousness or nature

7.5 For clarity, and without limiting clauses 7.2 and 7.4, the parties agree that clauses 7.2 and 7.4 are to apply in connection with a breach of this agreement, anticipated breach of this agreement and other conduct regardless of the seriousness or nature of that breach, anticipated breach or other conduct.

## Liability for consumer guarantees

7.6 To the extent that any law, rule or regulation applicable to the Benefits provided hereunder (including the *Competition and Consumer Act 2010* (Cth) of Australia, for example) states that there is a statutory guarantee or warranty in relation to any good or service supplied by Smart Cities or its affiliate in connection with this agreement, and Smart Cities' or its affiliate's liability for failing to comply with that guarantee cannot be excluded but may be limited, clauses 7.2 and 7.4 do not apply to that liability and instead Smart Cities' (or such affiliate's) liability for such failure is limited to (at the election of Smart Cities), in the case of a supply of goods, Smart Cities or such affiliate replacing the goods or supplying equivalent goods or repairing the goods, or in the case of a supply of services, Smart Cities or such affiliate supplying the services again or paying the cost of having the services supplied again.

## 8 Force majeure

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8.1 Neither party will be:

- (a) in breach of this agreement as a result of; or
- (b) liable for,

any failure or delay in the performance of that party's obligations under this agreement to the extent that such failure or delay is wholly or partially caused, directly or indirectly, by a Force Majeure Event or any act or omission of that party.

8.2 Clause 8.1 does not apply to any obligations of you to pay money under this agreement.

## 9 Costs and taxes

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9.1 Each party bears its own costs in relation to the preparation and signing of this agreement.

9.2 Where the laws of any jurisdiction require you to withhold any portion of the Fees or other amount on account of withholding tax or similar, you must pay to Smart Cities such additional amount as is required to ensure that Smart Cities receives the full amount of the Fees, in the same manner and at the same time as the consideration otherwise payable for the relevant Benefits.

9.3 You must pay, subject to clause 9, all taxes, duties and government charges imposed or levied in connection with the performance of this agreement.

## 10 General

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10.1 The laws of California, North America govern this agreement.

10.2 Each party irrevocably submits to the non-exclusive jurisdiction of the courts of California, North America and courts competent to hear appeals from those courts.

10.3 You may not assign, in whole or in part, or novate your rights and obligations under this agreement without the prior written consent of Smart Cities.

10.4 Smart Cities may assign, in whole or in part, or novate its rights and obligations under this agreement and, if requested by Smart Cities, you must enter into a deed of novation to give effect to this clause.

10.5 Time is not of the essence in the performance of obligations under this agreement except in relation to the payment of the Fees.

10.6 Unless expressly stated otherwise, this agreement does not create a relationship of employment, trust, agency or partnership between the parties.

10.7 A clause or part of a clause of this agreement that is illegal or unenforceable may be severed from this agreement and the remaining clauses or parts of the clause of this agreement continue in force.

10.8 If any provision is or becomes illegal, unenforceable or invalid in any jurisdiction, it is to be treated as being severed from this agreement in the relevant jurisdiction, but the rest of this agreement will not be affected.

10.9 This agreement supersedes all previous agreements about its subject matter. This agreement embodies the entire agreement between the parties.

10.10 You may only subcontract the performance of all or any part of your obligations under this agreement with the prior written consent of Smart Cities. Smart Cities may subcontract the performance of all or any part of its obligations under this agreement.

10.11 The failure of a party to require full or partial performance of a provision of this agreement does not affect the right of that party to require performance subsequently.

10.12 A single or partial exercise of or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.

10.13 A right under this agreement may only be waived in writing signed by the party granting the waiver, and is effective only to the extent specifically set out in that waiver.

10.14 To the extent of any conflict or inconsistency between the terms of this agreement, and other documents to which it refers, such conflict or inconsistency will be interpreted in the following descending order of priority to the extent of any inconsistency:

- (a) the Agreed Terms;
  - (b) the documents referred to in clause 2.2
  - (c) the Proposal;
  - (d) any other documents which are referred to in this agreement,
- except to the extent that Smart Cities and you specifically agree otherwise in writing.

## 11 Definitions and interpretations

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### Definitions

11.1 In this agreement:

**Benefits** means the services and benefits Smart Cities provides to you as specified in the Proposal or, where you accept these terms on the website [smartcitiescouncil.com](http://smartcitiescouncil.com), the relevant services and benefits Smart Cities specifies on that website.

**Commencement Date** means the commencement date specified in the Proposal, or if no commencement date is specified, then the earlier of the date you accept the Proposal and the date you first access the Benefits.

**Excluded Loss** means any form of punitive, indirect, special, consequential or incidental loss, damage or expense, including without limitation any liabilities or damages based upon any of the following:

- (a) loss of revenues;

- (b) loss of reputation;
- (c) consequential loss;
- (d) indirect loss;
- (e) loss of profits;
- (f) loss of bargain;
- (g) loss of actual or anticipated savings;
- (h) lost opportunities, including opportunities to enter into arrangements with third parties; and
- (i) loss or corruption of data.

**Fees** means the fees specified in each Proposal.

**Force Majeure Event** means any occurrence or omission outside a party's reasonable control, as a direct or indirect result of which the party relying on the event is prevented from or delayed in performing its obligations under this document (other than a payment obligation), and includes:

- (a) a physical natural disaster including fire, flood, lightning or earthquake;
- (b) war or other state of armed hostilities (whether war is declared or not), insurrection, riot, civil commotion, act of public enemies, national emergency (whether in fact or in law) or declaration of martial law;
- (c) epidemic or quarantine restriction;
- (d) ionising radiation or contamination by radioactivity from any nuclear waste or from combustion of nuclear fuel;
- (e) confiscation, nationalisation, requisition, expropriation, prohibition, embargo, restraint or damage to property by or under the order of any government agency;
- (f) law taking effect after the date of this agreement;
- (g) failure of a third party supplier or service provider; and
- (h) strike, lock-out, stoppage, labour dispute or shortage including industrial disputes that are specific to a party or the party's subcontractors.

**Tax** means *A New Tax System (Goods and Benefits Tax) Act 1999* (Cth).

**GST or Tax Supplier** means the entity making the Supply.

**Initial Period** means the initial period for the provision of Benefits contemplated by the Proposal or relevant invoice for the Fees.

**Intellectual Property Rights** means all intellectual property rights, both in the U.S. and throughout the world, and includes any registered or unregistered copyright, patent, registered or unregistered trade mark, registered or unregistered design, registered or unregistered plant breeder's right, trade secret, knowhow, right in relation to semiconductors and circuit layouts, trade or business or company name, indication or source or appellation of origin or other proprietary right, moral right, or right of registration of such rights.

**Progressive or Periodic Supply** means a Taxable Supply that satisfies the requirements of section 156-5 GST Act.

**Proposal** means each proposal provided by Smart Cities to you in writing from time to time to provide certain Benefits to you, including the proposal provided by Smart Cities to you on or around the date of this agreement.

**Smart Cities** means Smart Cities Council Inc. (a Virginia corporation), or if otherwise specified in the Proposal or relevant invoice for the

Fees, Smart Cities Council Australia New Zealand Pty Ltd ACN 619 159 625.

**Smart Cities Material** means any material provided by or to which access is given by Smart Cities to you or any of your end users for the purposes of this agreement including documents, equipment, reports, technical information, studies, plans, charts, drawings, calculations, tables, schedules and data stored by any means.

**Term** means the term contemplated by clause 5.1.

**you** means the entity specified in the Proposal and **your** has a corresponding meaning.

**Your Material** means any material provided by or to which access is given to Smart Cities by you, any of your end users or anyone acting on behalf of you or any of your end users for the purposes of this agreement including documents, equipment, reports, technical information, studies, plans, charts, drawings, calculations, tables, trade marks, logos, schedules and data stored by any means.

### Interpretation

11.2 In this agreement:

- (a) the meaning of any general language is not restricted by any accompanying example, and the words 'includes', 'including', 'such as' or 'for example' (or similar phrases) do not limit what else might be included;
- (b) this agreement is not to be interpreted against the interests of a party merely because that party proposed this agreement or some provision in it or because that party relies on a provision of this agreement to protect itself; and
- (c) a reference to a party is a reference to Smart Cities or you, and a reference to the parties is a reference to both Smart Cities and you.