



## **Ibis Business Intelligence Solutions Ltd Standard Supply Terms and Conditions for the provision of Computer Systems and Services (Supply Terms and Conditions)**

**Effective 1<sup>st</sup> October, 2023**

### **IMPORTANT INFORMATION – PLEASE READ**

The Standard Supply Terms and Conditions are comprised of the following parts, which together constitute a single legally binding contract relating to your use of any services, software or other products supplied by Ibis Business Intelligence Solutions Ltd:

- Part A – General Terms and Conditions
- Part B – Terms and Conditions for Ostendo Software
- Part C – Terms and Conditions for Professional Services
- Part D – Terms and Conditions for Technical Services
- Part E – Terms and Conditions for Custom Business Intelligence and Developments
- Part F – Terms and Conditions for Ibis Software or Business Intelligence Developments

These Standard Supply Terms and Conditions are to be read in conjunction with the 'Computer Systems and Services Proposal' or any 'Specific Supply Terms and Conditions' provided to the Customer by Ibis. Together, these documents record the contractual agreement in relation to the Products and Services to be provided to the Customer by Ibis Business Intelligence Solutions Ltd (**Agreement**) between the Customer and Ibis Business Intelligence Solutions Ltd. These documents (Agreement) constitutes the complete and exclusive statement between the Customer and Ibis Business Intelligence Solutions Ltd and no statement or representation not contained in this Agreement will be binding on Ibis Business Intelligence Solutions Ltd as a warranty or otherwise.

# Part A – General Terms and Conditions

## Definitions

“**Customer**” means the person or legal entity identified in a Proposal, or Specific Supply Terms and Conditions or Invoice who purchases a Product or Services from Ibis.

“**Custom Business Intelligence or Development**” means any customisation written, developed and supplied by Ibis Business Intelligence Solutions Ltd to the Customer.

“**Proposal**” means the ‘Computer Systems and Services Proposal’ agreed between the Customer and Ibis setting out the Products supplied to the Customer by Ibis and the applicable Price, licence period, and other details.

“**Effective Date**” means the date and time that the Customer accepts the Proposal or Specific Supply Terms and Conditions (and therefore these Standard Supply Terms and Conditions), by either, accepting or signing the Proposal or Specific Supply Terms and Conditions (electronically or otherwise) or by verbal confirmation of the Proposal or Specific Supply Terms and Conditions, by clicking “I accept” or by installing or using or accepting the Services or Products supplied by Ibis (whichever occurs first).

“**Fixed Price**” means the Fixed Price for the Professional Services specified in the Proposal for a software implementation project. Some services are specifically excluded and will be charged in addition to the Fixed Price as a Variation.

“**Force Majeure**” means any circumstance beyond the reasonable control of a party which result in a party being unable to perform an obligation due under this Agreement. Such circumstances include any act of God, earthquakes, floods, storms, explosions, fires and/or any natural disaster but exclude any workforce or industrial action;

“**Ibis**” means Ibis Business Intelligence Solutions Ltd.

“**Partners**” means third party developers and subcontractors that Ibis works with to write a Custom Development.

“**List Price**” means the price recommended by the supplier of the Software or Goods, set out in the Proposal or Specific Supply Terms and Conditions as changed from time to time;

“**Product**” means any Software, Custom Development, Hardware or Equipment supplied by Ibis to the Customer.

“**Ostendo Software**” means any software system developed by Development-X Ltd, including but not limited to, “Ostendo Operations”, “Ostendo Freeway”, “Ostendo Work” and “Ostendo Curo”.

“**Specific Supply Terms and Conditions**” means any Supply Terms and Conditions specifically agreed between the Customer and Ibis that take precedence over the ‘Standard Supply Terms and Conditions’ setting out the Products and Services supplied to the Customer by Ibis and the applicable Price, licence period, and other details.

“**Price**” means the price specified in the Proposal;

“**Requirements Analysis**” means the analysis of the Customer’s requirements as set out in the Proposal.

“**Project Plan**” will mean all project documentation including scope of objectives and requirements, information, plans, tasks and issues lists.

“**Ibis Software or Business Intelligence Development**” will mean any Software, report, script, trigger, procedure, table, module, web development, or software developed by Ibis as a proprietary product for resale to the Customer “as is.”.

“**Software**” will mean any Software, Software Licences, Software Subscription or Ibis Software or Business Intelligence Development supplied by Ibis Business Intelligence Solutions Ltd to the Customer.

“**Software Developer**” means a software developer who provides Ibis with Software to provide pursuant to the Software Developer’s Licence Agreement.

**“Software Licence Agreement”** means the licence agreement of a Software Developer.

**“Goods”** will mean any Software, Custom Development, Hardware or Equipment supplied by Ibis to the Customer.

**“Services”** will mean any Professional Services or Technical Services provided by Ibis to the customer for software implementation projects, software support or consultancy.

**“Support”** will mean any Professional Services or Technical Services provided by Ibis to the customer for software support.

**“Bug”** will mean a fault in the Software that prevents the Software from performing according to the Software’s manual. A lack of a specific function will not be deemed a Bug if the Software was not designed to perform that function.

**“Ibis Internal Ostendo Backup System”** means the installation and setup of a system whereby Scripts written by Ibis are run at regular intervals throughout the day by the Windows Task Scheduler to run the Firebird Gbak backup system to create backup files of the specified Ostendo database safely while it is running, into specified backup file folders. This is an internal backup system only with the sole function to create backup files of the specified Ostendo database in specified backup file folders in order for them to be backed up the Customer’s own backup of their Computer system. The Ibis Internal Ostendo Backup System only backs up the specified Ostendo database and does not backup the Ostendo directory or any other files such as Ostendo Report files or Ostendo Workflow files.

**“Ibis Monitoring System”** means a third party system owned and installed by Ibis for monitoring that the Ibis Internal Ostendo Backup System and all installed Ostendo Services (API, Queue and Web Services) are running. This system also helps keep all installed Ostendo Services (API, Queue and Web Services) running in case of events on the Customer’s computer system that may normally stop them running.

### **General Term and Conditions**

1. All Computer systems, Products and Services supplied by Ibis are supplied to the Customer on the following terms and conditions, including (for the avoidance of any doubt), the terms and conditions of the Proposal or Specific Supply Terms and Conditions to the Customer.
2. This Agreement commences from the Effective Date.
3. Upon acceptance of this Agreement by the Customer, Ibis reserves the right to vary the Agreement in the event that the Customer details, ownership or requirements change.
4. The Customer’s acceptance of the Proposal or Specific Supply Terms and Conditions acknowledges the indebtedness and waives any right to dispute the account at a later date.
5. Any information published or otherwise about the Software and Goods is by way of information only and cannot be considered a parallel contract.
6. The most recent “Specific Supply Terms and Conditions for the provision of Computer Systems and Services” accepted by the Customer will take precedence over the “Proposal” and “Standard Supply Terms and Conditions for the provision of Computer Systems and Services” and in the case of any conflict between these terms and conditions, the most recent “Proposal” or “Specific Supply Terms and Conditions for the provision of Computer Systems and Services” accepted by the Customer will prevail.
7. Apart from the Specific Supply Terms and Conditions for the provision of Computer Systems and Services with the Customer, these Supply Terms and Conditions will take precedence over any oral terms or terms printed on any Proposal or Order form and in the case of any conflict between these terms and conditions and any other document that may exist, these Supply Terms and Conditions will prevail.
8. Where Ibis fails to enforce any terms and conditions of this Agreement or fails in any way to exercise its rights under this Agreement, Ibis will not be deemed to have waived these rights with respect to any term or condition or right.

### **Amendments to these Supply Terms**

9. Ibis may amend any terms of this Agreement at any time, in its sole discretion.
10. An amendment will be notified to the Customer either:
  - a. At the time the Customer permits or purchases Product updates; or
  - b. By email notification at any time.

11. Subject to clause Part A.14, an amendment will apply and come into effect on the earlier of:
  - a. 30 days after it is notified to the Customer; and
  - b. When the Customer indicates acceptance on any notification of an amendment.
12. The Customer is deemed to have consented to any amendment requested by Ibis by continuing to use the Product or Services 30 days after an amendment has been notified to the Customer, without notifying Ibis of an objection to the amendment.
13. If the Customer does not consent to an amendment notified by Ibis, the Customer must inform Ibis of this in writing no later than 30 days after receiving notification of the amendment.
14. If the Customer does not consent to the amendment of a material term of this Agreement, the Customer may request termination of this Agreement by notice to Ibis provided all fees and charges owing by the Customer have been paid to Ibis.

### **Pricing**

15. Software and Goods are sold at the List Price (i.e. the recommended price set by the Supplier) current at the date of invoice.
16. Software and Goods priced in foreign currency will be invoiced in New Zealand dollars at the currency exchange rate on the date of invoice. If the invoice is unpaid after the due date a new invoice will be issued for the supply of Software and Goods.
17. Any expenses incurred by Ibis in respect of the sale transaction (including but not limited to bank fees) will be on-charged to the Customer.
18. Pricing for Software does not include software installation, system setup and configuration, training, professional services, support, hardware, devices, wiring etc.
19. Ibis Business Intelligence Solutions Ltd reserves the right to change the rates for Professional Services from time to time with thirty (30) days prior notice in writing.

### **GST**

20. Unless otherwise expressly stated, the Price and other sums payable or consideration to be provided under this Agreement are exclusive of GST.
21. If GST is payable by the Customer on any supply made by Ibis under this Agreement, the Customer must pay to Ibis an additional amount that is equal to the amount payable by the Customer for the relevant supply multiplied by the prevailing GST rate. This additional amount is payable at the same time as the Price or other consideration for the relevant supply to which the additional amount relates.

### **Security Interest**

22. Risk in the Software and Goods will pass to the Customer on delivery. Delivery is deemed to be effected upon delivery of the Goods to the Customer's premises or upon collection of the Goods by or on behalf of the Customer.
23. Ownership of all Software and Goods supplied to the Customer by Ibis Business Intelligence Solutions Ltd will not pass on delivery but will remain with Ibis Business Intelligence Solutions Ltd until Ibis Business Intelligence Solutions Ltd has received total payment in clear funds of all monies owing by the Customer to Ibis Business Intelligence Solutions Ltd (whether relating to those Goods, to the supply of Services or to any other person or property supplied). Ibis Business Intelligence Solutions Ltd holds a Security Interest in all Goods supplied to the Customer for payment of those monies.
24. Until all monies due to Ibis Business Intelligence Solutions Ltd are paid by the Customer, the Customer agrees to act as a fiduciary of Ibis Business Intelligence Solutions Ltd and the Customer
  - a. will not sell, charge or part possession of the Goods, otherwise then for their full values in the ordinary course of business;
  - b. will not alter, obliterate or deface the Goods and will not alter, obliterate, deface, cover up or remove any identity mark to indicate that the Goods are our property;
  - c. will store the Goods in such manner that they are clearly identifiable as our property and will keep separate records of the Goods;
  - d. will hold any proceeds of the resale of the Goods in trust for Ibis Business Intelligence Solutions Ltd in a separate and identifiable manner.
25. Where the Customer is in default, the Customer agrees to Ibis Business Intelligence Solutions Ltd entering the Customer's premises or any other place where the Goods are located or where Ibis Business Intelligence Solutions Ltd reasonably believes that the Goods are located and taking possession of and selling the Goods even if Ibis Business Intelligence Solutions Ltd does not have priority over other persons having a security interest in the Goods. Sections 108, 109 and 120(1) of the

Personal Property Securities Act, 1999 do not apply to the extent that they are inconsistent with this clause.

26. The customer waives any right to receive a verification statement under the Personal Property Securities Act, 1999.
27. Nothing in Sections 114(1)(a), 117(1)(c), 113 and 134 of the Personal Property Securities Act 1999 shall apply to these Terms and Conditions.
28. The customers rights as a debtor under Sections 116, 119, 120(2), 121, 125-127, 129, 131 and 132 of the Personal Property Securities Act 1999 shall not apply to these Terms and Conditions.
29. Ibis Business Intelligence Solutions Ltd shall be entitled at any stage during the continuance of this Agreement to request such security or additional security as Ibis Business Intelligence Solutions Ltd shall in its discretion think fit and shall be entitled to withhold supply of Goods or credit arrangements until such security or additional security shall be obtained.
30. Ownership in the Goods will not pass to the Customer and any proceeds of the sale of the Goods will belong to and be held in trust for Ibis Business Intelligence Solutions Ltd until the Customer has paid for the Goods in full.
31. the Customer grants to Ibis Business Intelligence Solutions Ltd a security interest in the Goods as security for payment of the contract price and all other monies payable from time to time to Ibis Business Intelligence Solutions Ltd by the Customer, and for the performance by the Customer or all the Customer's other obligations from time to time to Ibis Business Intelligence Solutions Ltd, (together the "the Customer's indebtedness and obligations"). For the purposes of Section 36(1)(b) of the Personal Properties Securities Act 1999 and to ensure maximum benefit and protection for Ibis Business Intelligence Solutions Ltd by virtue of Section 36(1)(b)(iii) of the Personal Properties Securities Act 1999 the Customer confirms and agrees that the Purchaser intends to and does grant to Ibis Business Intelligence Solutions Ltd as security for the Purchaser's indebtedness and obligations, a security interest in all of the Customer's present and after-acquired property except only for any such property which is or comprises items or kinds of personal property ("Excepted Property")
  - a. In or to which the Customer has rights; and
  - b. that has not been supplied by Ibis Business Intelligence Solutions Ltd to the Customer other than any Excepted Property which is or comprises proceeds of any of that present and after-acquired property which has been supplied by Ibis Business Intelligence Solutions Ltd to the Customer.
32. the Customer agrees to do anything that Ibis Business Intelligence Solutions Ltd requires to ensure that Ibis Business Intelligence Solutions Ltd has a perfected security interest and (if applicable) a purchase money interest in the Goods.
33. Ibis Business Intelligence Solutions Ltd may allocate all amounts received from the Customer in any manner it determines including any manner required to preserve any purchase money security interest in the Goods notwithstanding any purported allocation by the Customer.
34. While the Goods continue to secure the Customer's indebtedness and obligations the Customer must store the Goods separately and clearly identify the Goods as being subject to Ibis Business Intelligence Solutions Ltd's security interest.
35. the Customer agrees that nothing in Sections 114(1)(a), 133 and 134 of the Personal Properties Securities Act 1999 will apply in this contract or the security under this contract and waives the Customer's rights under Sections 121, 125, 131 and 132 of the Personal Properties Securities Act 1999.
36. the Customer must keep Ibis Business Intelligence Solutions Ltd fully informed of all relevant information regarding it and its activities, including by providing not less than 14 calendar days notice in writing of any proposed change in its name or contact details, and immediately advising Ibis Business Intelligence Solutions Ltd of material changes in its business activities.
37. the Customer waives the right to receive a copy of the verification statement confirming registration of a financing statement or financing change statement relating to the security interest under this contract.
38. the Customer must advise Ibis Business Intelligence Solutions Ltd immediately if the Customer commits any of the acts specified in clause 66 or of any action by third parties (including any of its creditors) affecting Ibis Business Intelligence Solutions Ltd's security interest in the Goods.
39. The legal and beneficial ownership in any Goods from time to time supplied by Ibis Business Intelligence Solutions Ltd remains with Ibis Business Intelligence Solutions Ltd until all Goods have been paid for. The risk in any Goods supplied passes to the Customer on delivery.

## **Licensed Software**

40. All Software must be used strictly in accordance with the terms of the Software Licence Agreement with the Software Developer. The Customer will ensure that its employees, subcontractors or agents who have authorised access to the Software read, understand and agree to comply with the Software Licence Agreement. The Customer takes full responsibility for any breach or alleged breach of the terms of the Software Licence Agreement by the Customer or any of its employees, subcontractors or agents and indemnifies Ibis in respect of any claim, costs or damages suffered by Ibis as a result of any such breach or alleged breach.
41. All rights, title or interest in respect of the intellectual property rights in the Software remain with Ibis, or the Software Developer at all times.

## **Payment Terms**

42. Full payment of invoices without set-off or deduction or retention is due and payable by the due date on the invoice. Payment terms are detailed in the 'Computer Systems and Services Proposal' or the 'Specific Supply Terms and Conditions' sent to the Customer.
43. Ibis will apportion payments to outstanding accounts as it thinks fit.
44. Ibis is under no obligation to supply goods and services on credit to the Customer.
45. If payment is not made by the due date, Ibis is entitled to charge the Customer interest on the unpaid overdue balance at the rate of five percent (5%) per annum above the current rate charged by Ibis' bank, calculated from the due date of payment down to the actual date of payment, and Ibis may at its discretion suspend its supply of Goods or Services until the overdue amounts are paid in full.
46. Should any invoice be unpaid after thirty (30) days from the due date of the invoice, Ibis reserves the right to withhold the supply of further Goods and Services and change the Customer's credit terms to payment in advance for Goods and Services.
47. If at any time Ibis deems the credit of the Customer to be unsatisfactory, it may require the Customer to provide at its cost, security for payment and/or Ibis may suspend performance of its obligations under this Agreement until satisfaction of security is provided.

## **Confidentiality and Intellectual Property**

48. Each party undertakes to keep confidential any information (written or oral) concerning the business and affairs of the other which was obtained during the negotiation of the Proposal, or during the provision of Products or Services unless such information:
  - a. is already known by that party;
  - b. has been lawfully obtained by that party from another source;
  - c. becomes publicly known other than by unauthorised disclosure; or
  - d. must be disclosed pursuant to a legal obligation.
49. Ibis undertakes to treat the Customer's data with the utmost integrity and confidentiality and not to utilise it for any other purpose than to service the Customer.
50. All rights, title, ownership or interest in respect of the intellectual property in ideas, techniques, concepts, inventions, processes used or developed or created by Ibis in the course of providing the Services to the Customer remain with Ibis at all times.
51. All rights, title, ownership or interest in respect of the intellectual property in Custom Business Intelligence and Developments provided by Ibis remain with Ibis at all times. The Customer is granted a non-exclusive licence to use them.

## **Supplier Warranty and Guarantees**

52. The Customer is responsible for determining whether the Software will satisfy their requirements. Ibis does not guarantee or warrant that the Software will satisfy all of the requirements of the Customer. Ibis gives no performance warranties. Ibis excludes, and expressly disclaims, all express and implied warranties of merchantability or fitness for a particular purpose.
53. Ibis will not be held liable for any changes in the Software made by the developers.
54. Ibis does not warrant that the Software will be compatible with every computer system, network environment or device. It is the Customer's responsibility to ascertain whether the Software is compatible with their computer system, network environment or device. Ibis expressly disclaims any representation, warranty or guarantee that the Software will function as intended while running on any particular computer, computer network, network file server, device or with other hardware or software.

55. Ibis does not warrant that the Software is free of "Bugs" or is error free. Ibis will not be responsible to the Customer for costs or damages incurred as a result of any such "Bugs", errors or defects. The existence of such errors will not constitute a breach of this Agreement.
56. Fixes for any "Bugs" in the Software may be provided as Software Updates by the Software Developer.
57. The Customer is responsible for processing data accurately in the Software and for financial data posted to third party accounting systems. Ibis expressly disclaims any responsibility or liability for financial data that is posted from the Software to any third party accounting system. Any Services provided by Ibis to investigate financial data that is posted from the Software to any third party accounting system will be charged at the normal rates for Professional Services.
58. Except for any limited warranty provided by the Software Developer, there are no other warranties, either expressed or implied, concerning the Software. The Customer understands that the Software is licenced to the Customer "as is".
59. Ibis will not be held liable for economic loss, consequential loss or any other form of loss whatsoever where:
  - a. the defect or failure of Goods and Services is due to or resulting from damage or misuse, negligent maintenance or care while in possession of the Customer or the Customer's failure to follow care instructions or recommended processes for Goods and completed Services.
  - b. the defect or failure of Goods and Services is outside the control of Ibis or due to situations Force Majeure.
60. The Customer acknowledges and understands that Ibis does not make or provide any express warranties or guarantees regarding the Goods or Services.
61. To the maximum extent permitted by law, Ibis excludes all warranties, terms, conditions and guarantees regarding the Goods, the Services and any other goods or services supplied or provider under this document which are implied by law (including the general law) or custom.
62. To the maximum extent permitted by law, Ibis's liability to the Customer for a breach or default by Ibis Business Intelligence Solutions Ltd in respect of any goods or services provided to the Customer under this document (including but not limited to the Goods and Services) is limited to any one of the following, at the option of Ibis:
  - a. in the case of goods, replacement of the goods or the supply of equivalent goods, repair of the goods, payment of the cost of replacing the goods or acquiring equivalent goods, or payment of the costs of having the goods repaired; and
  - b. in the case of services, the supply of the services again, or payment of the cost of having the services supplied again.

#### **Disclaimer**

63. To the maximum extent allowed by law, Ibis disclaims all liability, whether in contract or tort, for any loss or damage arising from the Customer's use of the Software. Such disclaimer applies to direct, indirect, special and consequential damages including loss of profit, business revenue, goodwill, loss of production, loss of product, losses resulting from down-time of the Customer's domain or e-mail system, losses resulting from system crashes, loss of data or e-mails, or failure to achieve anticipated savings or efficiencies.

#### **Workplace Health and Safety**

64. The parties (and their employees, agents and subcontractors) must comply with all applicable workplace health and safety laws and all safety instructions (including any Health & Safety policies) reasonably issued by the other party from time to time.

#### **Consumer Guarantees Act 1993**

65. The parties agree that Goods and Services supplied by Ibis Business Intelligence Solutions Ltd under this Agreement are acquired for business purposes only and that the conditions of the Consumer Guarantees Act 1993 will not apply to the extent permitted by the Act, for Goods and Services purchased under this Agreement.

#### **No Waiver**

66. All the original rights, powers, exemptions and remedies of Ibis will remain in full force notwithstanding any neglect, forbearance or delay in the enforcement thereof. Ibis will not be deemed to have waived any condition unless such waive will be in writing under signature of Ibis or an authorised officer thereof and any such waiver, unless the contrary will be expressly stated, will apply to and operate only in a particular transaction, dealing or matter.

## **Default and Termination**

67. This Agreement may be terminated by Ibis in the event the Customer is in breach of any of the foregoing terms and conditions without any further liability whatsoever on the part of Ibis.
68. This Agreement may be terminated by Ibis immediately on written notice to the Customer, if an Event of Default of payments due to Ibis by the Customer occurs.
69. Default will also mean, if the Customer:
  - a. Will commit any act of bankruptcy, or enter into any composition or arrangement with creditors.
  - b. Where the Customer is a Company do any act which would render it liable to be liquidated or if a resolution is passed or proceedings commenced for the liquidation of Ibis Ltd or if a Receiver is appointed in respect of all or any assets of Ibis.
70. Termination of this agreement will not relieve the Customer of its obligations to pay all money owed by it to Ibis on any account whatsoever, which money will be payable immediately notwithstanding that the date for payment of the money may not have arrived. Termination of this agreement will not relieve the Customer from liability arising from any antecedent breach of the terms of this agreement.
71. Upon the termination of this Agreement in the event of default or cessation of Services by the Customer all rights of the Customer granted by this Agreement will terminate and the Customer will not be entitled to receive any rebate or refund of the whole or any part of the money paid pursuant to this Agreement and the Customer will return any Goods and Services remaining unpaid (meaning Software and Goods) to Ibis.
72. The provisions of clauses 48 to 51 shall remain in force upon the termination of this Agreement and remain binding on the relevant parties.

## **Notices**

73. Any notice required to be given by the Customer must be delivered to 'Ibis Business Intelligence Solutions Ltd' at PO Box 20194, Bishopdale, Christchurch 8543, or given by email to admin@ibisbis.co.nz or otherwise to the last known place of business by registered letter.

## **Dispute Resolution**

74. A party will as soon as reasonably practicable give the other party notice of any dispute arising between them under this agreement.
75. If there is a dispute, the parties to the dispute will endeavour to resolve the dispute within a maximum of ten (10) business days of receiving notice of the dispute in accordance with clause 74.
76. If, following the dispute resolution process set out in clause 75, the parties do not resolve the dispute, then the parties will endeavour to settle their dispute by mediation. Either party may initiate mediation by giving written notice to the other party. Such mediation process will not (unless otherwise agreed by the parties), extend beyond a period of ten (10) business days following the appointment of a mediator. If the parties cannot agree on a mediator within a maximum of three (3) business days of the notice, then the mediator will be selected by the President for the time being of the Canterbury District Law Society.
77. Any dispute or difference arising between the parties under this Agreement which cannot be resolved pursuant to clauses 75 or 76 within the both of the respective periods referred to in those clauses may be referred to arbitration in accordance with this clause and the Arbitration Act 1996.
78. Arbitration will take place using either a single or three arbitrators. On a referral to arbitration, the parties will appoint a single arbitrator if they can agree on one. If they cannot agree, the parties will appoint one arbitrator each. These two arbitrators will then appoint a third arbitrator.
79. If, in accordance with clause 78 either party fails to appoint an arbitrator within three (3) business days after the other has appointed its arbitrator, then the party who has appointed an arbitrator may serve notice to the defaulting party that the defaulting party has defaulted on its right to appointment. On service of this notice, the party who has already appointed an arbitrator will be entitled to appoint that arbitrator as the sole arbitrator in the dispute.
80. Any arbitrator
  - a. will be suitably qualified for this purpose in matters relevant to the dispute;
  - b. will be as independent from either party as possible;
  - c. will not be an ex-employee of either party; and
  - d. will not have entered into significant contracts or arrangements with either party.
81. Any arbitration will be by majority decision of the arbitrators.

82. Pending resolution of any dispute, the parties will continue to perform their obligations in this Agreement which are not directly at issue in the dispute.

**Severance**

83. Any illegality, unenforceability or invalidity in this Agreement will not affect the rest of this Agreement which will remain in full force and effect unless the commercial interests of either party are materially and adversely affected.

**General**

84. This Agreement is governed by and construed according to the law in force in New Zealand. The parties submit to the non-exclusive jurisdiction of the courts of New Zealand.

## Part B - Terms and Conditions for Ostendo Software

1. Ostendo Software will be invoiced at the List Price set by the Supplier current at the date of invoice plus GST as applicable. Software is supplied as an installation file without any media or printed material.
2. Pricing for Ostendo Operations or Ostendo Freeway Software does not include software installation, system setup and configuration, customisations, training, professional services, support, hardware, devices, wiring etc.
3. User count is based on concurrent licensing, ie the number of users that can be simultaneously logged in to Ostendo at any one time. There is no restriction on the number of computers Ostendo can be installed on or the number of users that can be setup in Ostendo.
4. A dedicated Ostendo Operations Software Licence per service is required to run any of the following services. Such licences will not be available for end users while running the respective service.
  - a. A special Technology Licence must be purchased to run the API Service Connector for connecting to the Freeway range of apps or third party programmes.
  - b. Queue Services for running events on a fixed or scheduled basis.
  - c. One licence enables unlimited Ostendo client installations running custom data screens only in Ostendo, such as the Time Capture Lite screen that comes with Ostendo.
  - d. Web Services for remote access to connect or enquire into the database via the internet, or to assign incoming emails from Microsoft Outlook for viewing in Ostendo.
5. Custom or third party developed modules are not included in the Software Licence Fee.
6. The Software must be installed on Microsoft Windows® server based networks by qualified and experienced technicians.
7. The Ostendo Software Licence grants the Licensee the right to use the Ostendo Operations Software for one (1) company database, (i.e. on the same physical premises, on the same server, with the same computer users and with the same business owners). Multi-Company licence pricing is available on request.
8. The Ostendo Software Licence Agreement requires that Ostendo Software licences must be renewed annually. This fee is due 12 months after the purchase of the software and every year thereafter. The Software Annual Licence Renewal Fee is due every year on the purchase anniversary date of the original first licence. This 20% fee is calculated on the day of the annual anniversary purchase date of the original first licence by using the retail price of the day multiplied by the number of issued licences. This Annual Licence Renewal Fee includes upgrades and updates released during that year via internet download. It does not include any Software Support.
9. The Ostendo Software licence renewal is due 12 months after the first purchase date of an Ostendo Software licence. The due date of the Ostendo Software licence renewal is not related to any go-live date or the Customer's use of Ostendo Software.
10. The Customer is responsible for determining whether the Software will satisfy their requirements. Ibis does not guarantee or warrant that the Software will satisfy all of the requirements of the Customer. Ibis gives no performance warranties. Ibis excludes, and expressly disclaims, all express and implied warranties of merchantability or fitness for a particular purpose.
11. Except for any limited warranty provided by the Software Developer (thirty (30) day "Limited Warranty and Disclaimer of Other Warranties" in the Development-X Ltd "Software Licence and Maintenance Agreement"), there are no other warranties, either expressed or implied, concerning the Software. The Customer agrees that the Software is licensed to the Customer "as is".
12. The Customer is responsible for processing data accurately in Ostendo Software and for financial data posted to third party accounting systems. Ibis expressly disclaims any responsibility or liability for financial data that is posted from Ostendo Software to any third party accounting system. Any Services provided by Ibis to investigate financial data that is posted from Ostendo Software to any third party accounting system will be charged at the normal rates for Professional Services.
13. The Customer is responsible for the security of the Ostendo API and the Ostendo API key in any connection between Ostendo Software and Ostendo Freeway or any third party system including spreadsheets and websites. Ibis expressly disclaims any responsibility or liability for any security breach that results from the Customer's use of the Ostendo API or the Ostendo API key.
  - a. The Customer is responsible for correctly installing a valid and current security certificate signed by a trusted Certifying Authority (CA) and for correctly configuring port forwarding on their computer system before using the Ostendo API.

- b. The Customer is responsible for ensuring that the Ostendo API key is not published to, or exposed in any URL or exposed in any spreadsheet, script, code or custom software.
  - c. The Customer is responsible for keeping the Ostendo API key secure and confidential.
  - d. The Customer is responsible to whom it provides the Ostendo API key or who it requests Ibis to provide it to.
  - e. The Customer is responsible for managing user security setup in Ostendo Software to ensure that only authorised users have access to the Ostendo API key.
14. The Customer is responsible for the security of any Firebird ODBC driver or any Firebird database utility installed on its computer system that can be used to make a connection to an Ostendo Software database. Ibis expressly disclaims any responsibility or liability for any security breach that results from the Customer's use of the Firebird ODBC driver or any Firebird database utility.
15. All Software must be used strictly in accordance with the terms of the "[Software Licence and Maintenance Agreement](#)" with the Software Developer available on this [link](#). The Customer will ensure that its employees, subcontractors or agents who have authorised access to the Software read, understand and agree to comply with the Software Licence Agreement. The Customer takes full responsibility for any breach or alleged breach of the terms of the Software Licence Agreement by the Customer or any of its employees, subcontractors or agents and indemnifies Ibis in respect of any claim, costs or damages suffered by Ibis as a result of any such breach or alleged breach.
16. All rights, title or interest in respect of the intellectual property rights in the Software remain the Software Developer at all times.

## Part C - Terms and Conditions for Professional Services

1. Professional Services are provided by Ibis for;
  - a. Implementation and ongoing support for Ostendo Operations (ERP) and Ostendo Freeway Mobility App Software.
  - b. Consultancy for business process improvement and continuous improvement.
2. Professional Services will be provided online and onsite as agreed between Ibis and the Customer.
3. Professional Services will be provided by Ibis during the time period of 9:00am to 5:00pm, Monday to Friday, but excluding public holidays as defined in the legislation relating to public holidays. Coverage of Professional Services may be extended by agreement in writing.
4. Professional Services provided by Ibis are subject to the availability of Consultants.
5. Professional Services requested or accepted by the Customer will be provided on a do and charge basis at the agreed Professional Services Rate.
6. Any expenses, including parking fees, will be charged at cost.
7. The Customer undertakes;
  - a. to ensure that appropriate staff are available during the implementation.
  - b. to maintain the Software to the requirements advised or published by the Software Developer.
  - c. to implement a backup and disaster recovery plan, and regularly backup its data and ensure the verification of its backed up data with a retention policy of at least one month.
  - d. to ensure a full backup of data, applications and operating software has been performed prior to a Consultant from Ibis Ltd performing Professional Services.
8. Unattended remote access to the Customer's server with full Administrator rights and use of TeamViewer on client computers is required in order for Ibis to provide online services and support.
9. The Customer will clearly identify and define their objectives, requirements and current procedures and any other pertinent information to Ibis.
10. The Customer is required to sign off at intervals for project reviews during the implementation.
11. The Customer will appoint a project manager who is responsible for managing and driving the project to complete implementation tasks in a timely manner. The project manager must be knowledgeable about the business, be given the authority to make decisions, assign tasks to others and be able to spend sufficient time on the project.
12. The Customer will appoint a project team who are responsible for managing and completing implementation tasks in a timely manner.
13. The Customer is responsible for performing the implementation tasks assigned to its staff and the timeframe in which they are completed.
14. The Customer will follow the processes and procedures set by Ibis for managing and documenting the implementation project.
15. The role of Ibis in the implementation project is to oversee the management of the project in conjunction with the Customer's project manager and provide guidance and direction to the Customer's project team.
16. Ibis will take all reasonable endeavours to perform the implementation tasks assigned to it in a timely manner but does not guarantee meeting estimated timeframes.
17. The Customer is responsible for checking the accuracy of data prepared and provided to Ibis for import into the live database.
18. Ibis will provide training to the project team and system champions who will conduct the training of other staff and will be the first line of support for staff support queries. The project team and system champions must attend all relevant training and prototyping sessions.
19. The Customer agrees to Go-Live on the system only when the setup and data in the system is ready and staff are sufficiently trained and ready.
20. Ibis does not guarantee meeting estimated Go-Live dates.
21. Ibis and The Customer will work together to avoid and mitigate risks by:
  - a. At the project outset identifying and documenting risks and potential risks to the project and formulating a plan to manage them.
  - b. Regularly reviewing risks to the project and the plan to manage them.

- c. Informing the other party immediately of any unforeseen changes, new developments or any other issues or risks which may impact on the project so that a plan to manage them can be formulated.
  - d. Setting realistic and unambiguous goals, expectations and estimated timeframes at the project outset.
  - e. The Customer being responsible for handling any in house culture issues that may need to be addressed or may cause issues to this project, including any resistance to change.
  - f. The Customer committing adequate time and resource to the project.
  - g. The Customer appointing a suitable project manager and suitable staff to the project team.
22. The Customer will give Ibis forty-eight (48) hours notification of cancellation of an onsite appointment otherwise a fee of two (2) hours consulting time may be applicable.
  23. The Customer will pay for service time if Ibis has presented itself to commence services at pre-arranged times, but where the Customer, its employees or agents have caused delays by appropriate staff not being available or implementation tasks are not completed or in the readiness of the site or readiness of computer equipment with which services are to be applied.
  24. The Customer will follow the procedure for submitting Software Support queries as set by Ibis. If this procedure is not followed Ibis does not guarantee a response to Software Support queries.
  25. Ibis aims to respond to Software Support queries by the end of the next business day. Response time means how long it takes to respond to Software Support queries, it does not mean how long it will take to resolve Software Support queries. While all reasonable endeavours will be taken to resolve Software Support queries in a timely fashion commensurate with the urgency of such requests, Ibis cannot guarantee how long it will take to resolve Software Support queries, or guarantee that all Software Support queries can be resolved.
  26. It is agreed by the parties that the Customer is responsible for diagnosing whether Software Support issues are caused by Hardware or Software and that if Ibis is requested to investigate and diagnose faults in order to advise the Customer of corrective action the Professional Services costs applicable will be met by the Customer.
  27. Professional Services may not be available for some versions of the Software, at the sole discretion of Ibis.
  28. It is agreed by the parties that in no event will Ibis be liable for: any delay, damage, loss, injury, failure or breakdown that the Customer may suffer as a consequence of any errors or omissions in the provision of Professional Services, including any delay, damage, loss, injury, failure or breakdown to Customer's other programmes and equipment, and in general any, special, indirect, or consequential damages, including but not limited to, loss of business, loss of operations, loss of profits, loss or corruption of information, data or records, re-procurement costs, statute penalties or loss of use from any cause whatsoever.
  29. To provide efficient and effective Professional Services, Ibis may assign this Agreement or sub-contract some or all of its obligations hereunder.

## Part D - Terms and Conditions for Technical Services

1. Technical Services are provided by Ibis for;
  - a. Installation of Ostendo software including Firebird SQL.
  - b. Installation of the Ostendo API, Queue and Web Services.
  - c. Installation of the **“Ibis Internal Ostendo Backup System”** which means the installation and setup of a system whereby Scripts written by Ibis are run at regular intervals throughout the day by the Windows Task Scheduler to run the Firebird Gbak backup system to create backup files of the specified Ostendo database safely while it is running, into specified backup file folders. This is an internal backup system only with the sole function to create backup files of the specified Ostendo database in specified backup file folders in order for them to be backed up the Customer’s own backup of their Computer system. The Ibis Internal Ostendo Backup System only backs up the specified Ostendo database and does not backup the Ostendo directory or any other files such as Ostendo Report files or Ostendo Workflow files.
  - d. Installation, setup and use of the **“Ibis Monitoring System”** which is a third party system owned and installed by Ibis to provide ongoing monitoring that the Ibis Internal Ostendo Backup System and all installed Ostendo Services (API, Queue and Web Services) are running on the Customer’s computer system. This system also helps keep all installed Ostendo Services (API, Queue and Web Services) running in case of events on the Customer’s computer system that may normally stop them running
  - e. Installation of the Firebird ODBC driver for reporting purposes only.
  - f. Network and system troubleshooting support for Ostendo and Firebird.
2. Technical Services will be provided by Ibis during the time period of 9:00am to 5:00pm, Monday to Friday, but excluding public holidays as defined in the legislation relating to public holidays
3. Technical Services are provided online only.
4. Technical Services are provided on a do and charge basis at the normal Professional Services Rate.
5. Technical Services will be provided by qualified and experienced technicians.
6. Support for installation of Software is limited to user queries and troubleshooting. Training for Software installation or Technical Services is not provided by Ibis.
7. Technical Services provided by Ibis are subject to the availability of Technicians.
8. Remote access to the Customer’s file server with full Administrator rights and remote access to client computers is required in order for Ibis to provide Technical Services.
9. The cost of setting up remote access systems as specified by the Customer will be charged for.
10. Ownership of the Ibis Monitoring System remains with Ibis.
11. Ongoing remote access to the Customer’s file server with full Administrator rights and remote access to client computers is required for Ibis to install and maintain the Ibis Internal Ostendo Backup System and the Ibis Monitoring System.
12. The Customer undertakes to implement a backup system and disaster recovery plan, and be responsible for regularly backing up its data and ensuring the verification of its backed up data, with a sound backup copy retention policy.
13. The Customer will ensure that a full backup of data, applications and operating software has been performed prior to a Technician from Ibis performing Technical Services.
14. The Customer understands and acknowledges that the Ostendo Firebird database is not VSS aware and that it has been advised by Ibis not to backup the Ostendo database using a backup system that uses a VSS service.
15. The Technical Services charged by Ibis to install Ostendo on the Customer’s computer system will include;
  - a. Installation of the Ibis Internal Backup System.
  - b. One-off price for the use of the Ibis Monitoring Service system.
  - c. Ongoing annual subscription for the use of the Ibis Monitoring Service.
16. The Technical Services charged by Ibis to install the Ibis Internal Backup System, API Service, Queue Services or Web Services on the Customer’s computer system will include;
  - a. One-off price for the use of the Ibis Monitoring Service system.

- b. Ongoing annual subscription for the use of the Ibis Monitoring Service.
17. Technical Services to update and maintain the Ibis Monitoring System will be charged from time to time to keep these systems up to date with the latest versions. Non current versions of these systems may not be supported by Ibis.
  18. The Customer understands and acknowledges that the Ibis Internal Ostendo Backup System is an internal backup system only, with the sole function to create backup files of the Customer's Ostendo database in order for them to be backed up by the Customer's own backup of their Computer system, and that;
    - a. It is not a full backup system and is only intended to supplement the Customer's own backup of their Computer system.
    - b. It only backs up the specified Ostendo database and does not backup the Ostendo directory or any other files such as Ostendo Report files or Ostendo Workflow files.
  19. If the Ibis Internal Ostendo Backup System is installed on the Customer's Computer system, the Customer accepts responsibility for regularly checking that the Ibis Internal Ostendo Backup System is running and that it is creating backup files in the specified backup folders.
  20. Ibis will not be responsible or liable to the Customer for costs or damages incurred as a result of the Ibis Internal Ostendo Backup System, API Service, Queue Services or Web Services stopping for any reason, or for any subsequent failure of backups of the Ostendo database.
  21. If the Ibis Internal Ostendo Backup System API Service, Queue Services or Web Services stop running on the Customer's computer system for any reason the Customer shall pay for the cost of reinstating them.
  22. Ibis does not warrant that the Ibis Internal Ostendo Backup System, API Service, Queue Services or Web Services will be compatible with every computer system, network environment or device. Ibis expressly disclaims any representation, warranty or guarantee that the Ibis Internal Ostendo Backup System, API Service, Queue Services or Web Services will function as intended while running on any particular computer, computer network, network file server, device or with other hardware or software.
  23. It is agreed by the parties that the Customer is responsible for diagnosing whether support issues are caused by Hardware or Software and that if Ibis is requested to investigate and diagnose faults in order to advise the Customer of corrective action the Technical Services costs applicable will be met by the Customer.
  24. It is agreed by the parties that in no event will Ibis be liable for: any delay, damage, loss, injury, failure or breakdown that the Customer may suffer as a consequence of any errors or omissions in the provision of Technical Services, including any delay, damage, loss, injury, failure or breakdown to Customer's other programmes and equipment, and in general any, special, indirect, or consequential damages, including but not limited to, loss of business, loss of operations, loss of profits, loss or corruption of information, data or records, re-procurement costs, statute penalties or loss of use from any cause whatsoever.
  25. To provide efficient and effective Technical Services, Ibis may assign this Agreement or sub-contract some or all of its obligations hereunder.

## Part E - Terms and Conditions for Custom Business Intelligence and Developments

1. Custom Business Intelligence and Developments provided by Ibis may include, but are not limited to;
  - Ostendo forms, reports, scripts, database triggers and procedures, additional tables or modules, interfaces or data exchange with other systems or any other customisation.
  - Ostendo Freeway Inquiries
  - Power BI and Klipfolio or similar reports, insights or KPI's
  - Data warehousing, OLAP Cubes, Balanced Scorecards and any other customised Business Intelligence
  - Sharepoint developments
  - Any customised software developments
2. Any Custom Business Intelligence and Development that is requested by the Customer and is accepted by Ibis will follow the process outlined below.
  - a) Custom Business Intelligence and Developments requested by the Customer will be provided on a do and charge basis only
  - b) Custom Business Intelligence and Developments will be specified in writing by Ibis and the Customer. This specification may be chargeable even if the Customer does not proceed with the Custom Development.
  - c) Once the specification is signed off by Ibis and the Customer, then Ibis may provide the Customer with an Indicative Price. This Indicative Price is not a Quotation or an Estimate. Ibis may not be able to provide an Indicative Price for some Custom Business Intelligence and Developments.
  - d) Some Custom Business Intelligence and Developments may require testing and prototyping to be done in order to determine if the Custom Business Intelligence or Development is viable and technically possible and/or to provide an Indicative Price. This will be done on a do and charge basis. The Customer will pay for this testing and prototyping even if the result is that the Custom Business Intelligence or Development is not viable.
  - e) If a Custom Business Intelligence and Development project is started and unexpectedly is not viable and technically possible, the Customer will pay Ibis for the work done on it.
  - f) Any changes to the specification will be a Variation specified in writing. Once a Variation is signed off by Ibis and the Customer, Ibis may provide the Customer with an Indicative Price for the Variation.
  - g) Custom Business Intelligence and Developments will be completed by Ibis as soon as practicable. Ibis does not guarantee meeting deadlines.
  - h) Ibis may require, at its sole discretion, that some Custom Business Intelligence and Developments must be tested on a test copy of the Customer's data before it is installed on the Customer's live database.
  - i) The Customer will sign off the Custom Business Intelligence and Development as complete when tests and trials verify that it is functioning as specified.
  - j) Ibis may supply the customer with the Source Code of a Custom Business Intelligence and Development as soon as full payment of all invoices for that Report or Customisation has been received and cleared. However, Ibis reserves the right to encrypt some or all code that contains intellectual property that is proprietary to Ibis or its Partners.
  - k) Any further work on the Custom Business Intelligence and Development, including fixing bugs or issues, during testing or after completion will be invoiced on a do and charge basis per month.
3. Ibis has developed some standard customisations that are sold as a product in their own right. These will always be provided encrypted and the source code not provided.
4. Pricing for Custom Business Intelligence and Developments does not include installation, testing, system setup and configuration, training, professional services, support, hardware, devices, wiring etc.
5. All rights, title, ownership or interest in respect of the intellectual property in Custom Business Intelligence and Developments provided by Ibis remain with Ibis or its Partners at all times. The Customer is granted a non-exclusive licence to use them.
6. Training or Software Support for the Customer on how to develop their own Custom Business Intelligence and Developments falls outside the scope of services offered by Ibis.

7. Source Code that is the Intellectual Property of Ibis or it's Partners used in any Custom Business Intelligence or Development shall not be provided to the Customer.

## Part F - Terms and Conditions for Proprietary Ibis Software or Business Intelligence Developments

1. Ibis Software or Business Intelligence Developments may comprise any Business Intelligence development, report, script, trigger, procedure, table, module, web development, or software developed by Ibis as a proprietary product for resale to the Customer "as is." These may be standalone or integrate with Ostendo Operations (ERP), Ostendo Freeway, Online Webstore Systems, Microsoft Power BI, Klipfolio, Microsoft Excel, Microsoft Sharepoint, Data Exchange with third party systems, or other Software.
2. Ibis Software or Business Intelligence Developments will be invoiced at the price set by Ibis current at the date of invoice plus GST as applicable.
3. Pricing for Ibis Software or Business Intelligence Developments does not include installation, testing, customisations, system setup and configuration, training, professional services, support, hardware, devices, wiring etc.
4. Some Ibis Software or Business Intelligence Developments may require a dedicated Ostendo Software Licence to run any of the following services. Such licences will not be available for end users while running the respective service.
  - a. A special Technology Licence must be purchased to run the API Service Connector for connecting to the Freeway range of apps or third party programmes.
  - b. Queue Services for running events on a fixed or scheduled basis.
  - c. One licence enables unlimited Ostendo client installations running custom data screens only in Ostendo, such as the Time Capture Lite screen that comes with Ostendo.
  - d. Web Services for remote access to connect or enquire into the database via the internet, or to assign incoming emails from Microsoft Outlook for viewing in Ostendo.
5. Ibis Software or Business Intelligence Developments may be supplied as an installation file without any media or printed material.
6. Updates and upgrades for Ibis Software or Business Intelligence Developments will be invoiced and supplied from time to time.
7. Some Ibis Software or Business Intelligence Developments may require annual licence renewal.
8. The Customer is responsible for determining whether Ibis Software or Business Intelligence Developments will satisfy their requirements. Ibis does not guarantee or warrant that Ibis Software or Business Intelligence Developments will satisfy all of the requirements of the Customer. Ibis gives no performance warranties. Ibis excludes, and expressly disclaims, all express and implied warranties of merchantability or fitness for a particular purpose.
9. Ibis does not warrant that any Ibis Software or Business Intelligence Developments will be compatible with every computer system, network environment or device. It is the Customer's responsibility to ascertain whether Ibis Software or Business Intelligence Developments is compatible with their computer system, network environment or device. Ibis expressly disclaims any representation, warranty or guarantee that any Ibis Software or Business Intelligence Developments will function as intended while running on any particular computer, computer network, network file server, device or with other hardware or software.
10. Any customisation to any Ibis Software or Business Intelligence Developments requested by the Customer will be treated as a Custom Development.
11. All rights, title, ownership or interest in respect of the intellectual property in Ibis Software or Business Intelligence Development remains with Ibis or its Partners at all times. The Customer is granted a non-exclusive licence to use them.
12. Ibis will not provide the Source Code of proprietary Ibis Software or Business Intelligence Developments to the Customer.