

**NSW ICAC  
EXHIBIT**



**Professional Services Agreement**

**Between**

**NSW State Emergency Service**

**And**

**Karoshi Pty Limited**

**VERSION: FEBRUARY 2012**

**EB/0824/3/2**

**TRIM D10304853**

# NSW ICAC EXHIBIT

## Professional Services Agreement

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**THIS AGREEMENT** is made on the date on which SES signs and executes this Agreement, or if the Service Provider signs and executes this Agreement on a later date, that date.

### **PARTIES**

**STATE EMERGENCY SERVICES** (ABN 88 712 649 015) a NSW Government emergency services organisation (NSW State Emergency Service Act 1989) of 6-8 Regent Street Wollongong 2500 (**SES**)

### **AND**

The party specified in Item 2 of the Schedule (**SERVICE PROVIDER**)

### **THE PARTIES AGREE:**

#### **I INTERPRETATION**

##### **1.1 Definitions**

The following words have these meanings in this Agreement:

**"ABN"** means Australian Business Number.

**"Agreement"** means this agreement between SES and the Service Provider, including the Schedule and all schedules and annexures.

**"Authority"** means any public or other authority which has jurisdiction in relation to the Services.

**"Business Day"** means any day other than a Saturday, Sunday, public holiday in New South Wales or 27, 28, 29, 30 and 31 December.

**Confidential Information** means information or know-how that:

- (a) relates to the business, assets or affairs of SES, including SES's processes; and
- (b) is made available by or on behalf of SES to the recipient of the information, or is otherwise obtained by or on behalf of the recipient; and
- (c) is by its nature confidential or the recipient knows, or ought to know, is confidential.

Confidential Information may be made available or obtained directly or indirectly, and before, on or after the date of this Agreement.

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### Confidential Information includes:

- (a) information created by the Service Provider for SES as part of the Services;
- (b) information concerning the existence and terms of this Agreement;
- (c) information that is specifically designated by SES as confidential;
- (d) all Derived Information; and
- (e) information that is personal information as defined by the *Privacy & Personal Information Protection Act 1998 (NSW)*.

### Confidential Information does not include information that:

- (a) is in or enters the public domain (other than through a breach of this Agreement or an obligation of confidence owed to discloser of that information);
- (b) the recipient can prove was already known to it at the time of disclosure by the discloser (unless such knowledge arose from a disclosure of information in breach of an obligation of confidence);
- (c) is or was made available to the recipient by a person (other than SES) who is not or was not then under an obligation of confidence to SES in relation to that information; or
- (d) is or was developed by the recipient without the recipient relying on, referring to or incorporating any of the Confidential Information.

**"Conflict of Interest"** refers to the Service Provider or its Personnel engaging in any activity or having any interest (including providing services to other clients) likely to conflict with the interest of SES or performance of this Agreement by the Service Provider or which may reasonably be perceived to do so or to create such a risk and includes situations where there is a perceived reasonable risk that SES Confidential Information might be used by the Service Provider for the benefit of another client of the Service Provider

**"Contract Documents"** means those documents listed in Item 7 of the Schedule.

### Derived Information means:

- (a) information which is derived or produced wholly or partly from Confidential Information by or on behalf of the recipient or any person whom has been given access to Confidential Information, for example, an analysis, note, calculation, report, conclusion or summary; and

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- (b) a record (including a copy) in any form or medium (whether or not visible) containing, referring to or based on any Confidential Information which is made by or on behalf of the recipient or any person who has been given access to Confidential Information.

**"Documents"** means all documents, reports, plans, drawings, computer disks, specifications and all other materials in both hard and electronic formats.

**"Exit Plan"** has the meaning given in clause 23.1.

**"Expenses"** means the reasonable "at cost" expenses which the Service Provider incurs at the express direction of SES in respect of the items shown in Item 13 of the Schedule or any other expenses which SES has provided prior written authority to the Service Provider to incur.

**"Good Industry Practice"** means the care, skill, diligence, prudence and foresight reasonably or ordinarily expected of a competent, qualified, skilled and experienced professional providing similar services to an organisation like SES, seeking to comply with its contractual and legal obligations and having regard to the requirements of the Project, and any other circumstances affecting the carrying out of the Services.

**"Insolvent"** means:

- (a) where the Service Provider is an individual or partnership including an individual person, is made bankrupt;
- (b) where the Service Provider is a company, where:
- (i) a liquidator has been appointed;
  - (ii) an administrator has been appointed (voluntarily or otherwise);
  - (iii) the Service Provider enters into a scheme or other arrangement with its creditors;
  - (iv) a winding-up order is made in respect of the Service Provider;
  - (v) a mortgagee of any property of the Service Provider takes possession of that property; or
  - (vi) the Service Provider enters into any other form of insolvency administration.

**"Insurance Schedule"** means the document attached at Annexure B.

**"Intellectual Property Rights"** means all present and future industrial and intellectual property rights conferred by statute, common law or equity and includes copyright, trade marks, patents, designs, circuit layout rights, trade

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(b) variation to the Services under this Agreement.

**"Service Provider's Representative"** means the person named in Item 9 of the Schedule, and any other person consented to by SES.

**"Services End Date"** means the first to occur of:

(a) the date stated in Item 4 of the Schedule, as may be varied or extended by SES in accordance with clause 12 or 3.4 of this Agreement or

(b) the date when this Agreement is terminated in accordance with clause 21.

**"Services Start Date"** means the date shown in Item 3 of the Schedule.

**"Specified Insurances"** means the insurances specified in the Insurance Schedule.

**"Statutory Requirement"** means the requirements of any Authority in respect of the Services.

**"Variation"** means a change to the Services by notice given under clause 12.

### 1.2 Interpretation

In this Agreement:

- (a) headings are for convenience only and do not affect the interpretation of this Agreement;
- (b) words importing the singular include the plural and vice versa;
- (c) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency;
- (d) a reference to any statute, regulation or law includes a variation, consolidation or replacement and a reference to any statute or law includes all regulations, ordinances, proclamations and by-laws issued under that statute or law;
- (e) a reference to a party includes their successors and permitted assigns;
- (f) where the day on which something is to be done is not a Business Day, that thing must be done on the next Business Day;
- (g) if a party comprises more than one person, the rights and obligations of that party are joint and several; and

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- (h) rights under this Agreement are contractual rights only and if a party has a right which may be exercised for its sole convenience and absolute discretion, such a right may be exercised without any obligation of procedural fairness, good faith or reasonableness.

## 2 TERMS OF ENGAGEMENT

- 2.1 **(Contract Documents)** The documents listed in Item 7 of the Schedule ("Contract Documents") apply to the provision of the Services, except to the extent that they are inconsistent with this Agreement.
- 2.2 **(Precedence)** The Contract Documents listed in Item 7 of the Schedule are given precedence in the order they appear and where any internal inconsistency occurs in the documents then the higher standard prevails.
- 2.3 **(Contract Documents Form Part Of Agreement)** The documents listed in Item 7 of the Schedule and this Agreement together form this Agreement.
- 2.4 **(Other Agreements Excluded)** The provisions of any other previous agreements, proposals, correspondence or discussions will not apply in relation to the Service Provider providing any of the Services.
- 2.5 **(Prior Services)** If the Service Provider starts providing the Services before the execution of this Agreement then this Agreement applies to those Services.

## 3 SCOPE OF SERVICES

- 3.1 **(Performance)** The Service Provider is to provide the Services in accordance with this Agreement.

The omission of any non-material details in the description of the Services or the misdescription of any non-material details which the Service Provider knows or reasonably should have known in accordance with Good Industry Practice and based on information available to the Service Provider at the date of this Agreement are necessary to carry out the Services and should have been included in the description of the Services in this Agreement will not relieve the Service Provider from performing such omitted or misdescribed portion of the Services. Those tasks must be performed as if fully and correctly described in this Agreement, without entitlement to a Variation under this Agreement.

- 3.2 **(Services Start Date)** The Service Provider will commence providing the Services on the Services Start Date.
- 3.3 **(End of Services)** This Agreement will end when the Services are complete or on the Services End Date, whichever occurs first.

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- 3.4 **(Option to Extend)** Where the Services End Date provides that the Services are to be performed for a fixed period, SES for its sole convenience and at its absolute discretion may, by written notice to the Service Provider not later than 1 month prior to the Services End Date, extend the period during which the Services are to be performed for the period or periods (if any) specified in Item 5 of the Schedule. Where a notice is provided pursuant to this clause, the terms of this Agreement will continue to apply for the duration of the extended period.
- 3.5 **(No Exclusivity)** Nothing in this Agreement grants the Service Provider any right of exclusivity to provide the Services nor prevents SES from obtaining services from third parties which are identical or similar to the Services.
- 3.6 **(Co-operation with Others)** SES may also engage other contractors. The Service Provider must cooperate with those other contractors and coordinate the provision of the Services with their services to the extent SES may reasonably require.
- 4 **THE RELATIONSHIP**
- 4.1 **(Independent Contractor)** In providing the Services, the Service Provider acts as SES's independent contractor and does not have any authority to act as SES's agent or on SES's behalf, unless SES expressly authorises the Service Provider to do so in writing. In particular, the Service Provider has no authority to enter into contracts, make representations or incur liabilities on behalf of SES.
- 4.2 **(No Other Relationship)** This Agreement does not create any relationship of employment, partnership or joint venture between the Service Provider and SES.
- 4.3 **(No Employee Entitlements)** The Service Provider acknowledges that its engagement to carry out the Services does not entitle it to any employee benefits or entitlements other than as expressly set out in this Agreement.
- 4.4 **(No Licence)** No licence or right is created to the benefit of the Service Provider other than as expressly set out in this Agreement.
- 5 **REQUIREMENTS FOR SERVICES**
- 5.1 **(Standard of Services)** The Service Provider must satisfy itself as to SES's requirements for the Services. The Service Provider must carry out the Services using Good Industry Practice.
- 5.2 **(Warranty)** The Service Provider warrants that the Services and any Documents provided as part of the Services will be fit for the purposes

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contemplated in this Agreement. This warranty will continue to apply after the Services are completed or this Agreement is terminated for any reason.

- 5.3 **(Reliance by Others)** The Service Provider acknowledges that SES and others engaged by SES may rely on the Services carried out by the Service Provider in carrying out further work or services relating to the Project.
- 5.4 **(Resources and Personnel)** The Service Provider must provide everything necessary to perform the Services and comply with its obligations under this Agreement at its own expense. The Service Provider must use the Nominated Personnel (or other personnel acceptable to SES) to provide the Services, and ensure that those persons have the skill, experience, reliability, honesty and ability necessary to perform the Services.
- 5.5 **(Removal of Personnel or Subcontractors)** SES may direct the Service Provider to cease using any Personnel or subcontractor in respect of any activity relating to the Services on the basis that it considers that person's performance to be unsatisfactory. The Service Provider must remove that person within the time directed by SES.
- If, after a person starts to be involved in the provision of the Services, the Service Provider becomes aware that the person involved in the provision of the Services has been charged with or has been convicted of a Relevant Offence the Service Provider must immediately notify SES and must take such action as SES requests in relation to the person in respect of the Services, including replacing that person.
- 5.6 **(Licensing)** The Service Provider must ensure that for the term of this Agreement, the Service Provider and its Personnel are registered or licensed to perform the Services in accordance with the requirements of any Authority.
- 5.7 **(Legal Compliance)** The Service Provider must comply with, and ensure the Services comply with, all laws, Statutory Requirements, standards, codes, directions and manufacturer's recommendations (as applicable).
- 5.8 **(Contractual Compliance)** The Service Provider must comply, and ensure the Services comply, with any agreements binding on SES to the extent SES discloses any such agreements and to the extent they are not directly inconsistent with this Agreement.
- 5.9 **(Responsibility Preserved)** The Service Provider will remain fully responsible for the Services despite SES, SES's Representative's, or any of SES's contractors' comment on, review of, approval of, acceptance of, or certificate issued in connection with the Services (or SES's failure to do so).
- 5.10 **(Service Provider's Representative)** The Service Provider must always ensure that it has a nominated representative (who is notified and acceptable to SES acting reasonably) who has full authority to act on behalf of the Service

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Provider. An instruction or direction given to the Service Provider's Representative will be deemed to be an instruction or direction given to the Service Provider.

5.11 (Access) The Service Provider must access the Premises subject to the following conditions:

- (a) The Service Provider must ensure that its Personnel and subcontractors comply with SES's access, security, and health and safety requirements when performing the Services.
- (b) If required by SES, the Service Provider must give SES accurate information about the identity and job history of its Personnel and subcontractors. The Service Provider must not permit a person to perform any of the Services unless SES has approved the person.
- (c) SES may deny access to the Premises to any person who does not comply with its access, security and health and safety procedures.
- (d) The Service Provider must ensure that all Personnel and subcontractors engaged to perform the Services return all security devices issued by SES to the location nominated by SES either at the end of each day or such other period as SES may require and in any case when each such person has ceased to provide the Services.

5.12 (Documentation)

- (a) The Service Provider must:
  - (i) prepare all Documents reasonably necessary for SES to use and understand, use, enjoy and maintain the Services (for example, user manuals); and
  - (ii) provide a copy (in both hardcopy and electronic form) to SES at no additional cost on completion of the Services and at such other times before completion as SES may reasonably require.
- (b) The Service Provider must deliver to SES, upon request (including after termination of this Agreement for any reason), all Documents:
  - (i) provided by or on behalf of SES in connection with the Services; or
  - (ii) prepared by the Service Provider or others as part of the Documents to be provided to SES in connection with, or as part of, the Services;

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but the Service Provider may retain one copy of its own working notes created in the course of providing the Services to the extent necessary to comply with any legal requirement or to maintain compliance with any recognised quality assurance system provided:

- (iii) the Service Provider securely and safely stores such working notes, marks them as confidential;
- (iv) continues to comply with the confidentiality provisions of this Agreement in respect of them; and
- (v) securely destroys them no later than 7 years after the Service Provider completes the provision of the Services.

5.13 **(Reporting)** The Service Provider must keep SES fully informed as to any matters affecting the cost, timing or quality of the Services or the Project (including as to any matters on which SES may specifically request that the Service Provider report) immediately upon the Service Provider becoming aware of such matters.

5.14 **(Meetings)** Where requested by SES, the Service Provider must meet with SES at least once every 3 months during the term of this Agreement (or such other time period as SES may, acting reasonably, require) to discuss:

- (a) the progress of the performance of the Services;
- (b) the standard of the performances of the Services; and
- (c) such other matters as SES from time to time may require.

5.15 **(Identification of the Services)** The Service Provider must co-operate with SES in connection with SES's use of the Service Provider's name in any marketing or promotion associated with the Project to the extent SES may reasonably require.

5.16 **(SES Policies)** The Service Provider must comply with the ethical and occupational health and safety other policy requirements of SES relating to the provision of the Services or the Project including:

- (a) the SES Statement of Business Ethics;
- (b) the SES Code of Conduct and Ethics;
- (c) other policies notified by SES to the Service Provider from time to time.

## 6 INFORMATION PROVIDED BY SES

- 6.1 **(Provision of Information)** For the convenience of the Service Provider, SES (or others acting for SES) may provide (or may have provided) the Service Provider with information relevant to the Project for the provision of the Services. The Service Provider must:
- (a) **(Reasonable Care)** act with reasonable care in relying upon or using that information in connection with the provision of the Services; and
  - (b) **(Non-Reliance)** not rely on or use any part of that information for any purpose to the extent that SES notifies the Service Provider that it is not to be so relied upon or used (including for the provision of the Services).
- 6.2 **(Inadequacy of Information)** The Service Provider must promptly notify SES if it becomes aware that any information which SES provided is inaccurate, or inadequate for the Service Provider to provide the Services.
- 6.3 **(No claim)** SES has no liability in respect of any information which SES advised the Service Provider it should not rely on or to the extent that the Service Provider failed to exercise reasonable care in using the information.

## 7 FEES PAYABLE FOR SERVICES

- 7.1 **(Lump Sum Fee)** Where Item 15 of the Schedule specifies that the Service Provider is to be paid a lump sum fee, SES will pay the Service Provider the amount specified in Item 15 of the Schedule, which is a lump sum covering all of the Services.
- 7.2 **(Rates)** Where Item 15 of the Schedule specifies that the Service Provider will be paid at rates per hours spent performing the Services, SES will pay the Service Provider, the amount calculated by applying the rates specified in Item 15 of the Schedule to the time properly spent directly by the Service Provider in providing the Services, in accordance with clause 10.
- 7.3 **(Variations)** These amounts will only be varied as expressly provided in this Agreement.
- 7.4 **(GST)** These amounts are exclusive of GST (unless the contrary is expressly stated).

## 8 EXPENSES

- 8.1 **(Outlays)** SES will reimburse the Service Provider for Expenses only if:

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- (a) **(Agreed Items)** those Expenses relate to items for which SES have specifically agreed to reimburse; and
- (b) **(Agreed Amounts)** SES has agreed in writing to the amount which it will reimburse the Service Provider prior to the outlays being incurred.

- 8.2 **(Cost Reimbursement)** Unless otherwise agreed, Expenses will be reimbursed on the basis of cost to the Service Provider without allowance for any profit or overhead.
- 8.3 **(Allowance for Credits)** SES will not reimburse any Expenses to the Service Provider to the extent that it is entitled to any discount, refund, credit (including goods and services tax credit), reimbursement or other allowance in relation to those Expenses.

## 9 TAXES AND CHARGES

- 9.1 **(GST Payments)** To the extent that the amounts payable to the Service Provider under this Agreement are expressly stated to exclude GST, SES will also pay the Service Provider the goods and services tax which applies to the supply of the Services on provision of a valid tax invoice.
- 9.2 **(Other Taxes)** Other than as provided by clause 9.1, the Service Provider must pay all taxes and charges payable in connection with the provision of the Services or this Agreement.
- 9.3 **(GST on Supply by SES)** Where SES incurs any goods and services tax attaching to any payment which the Service Provider may, for any reason, become liable to make to SES under or in connection with this Agreement or the Services, the Service Provider must pay SES that goods and services tax on provision of a valid tax invoice.
- 9.4 **(Tax Withholding)** The Service Provider acknowledges that, despite any other provision of this Agreement, SES will be entitled to withhold any payment otherwise due to the Service Provider until it has been provided with the Service Provider's Australian Business Number and satisfied any other conditions which the law requires be satisfied prior to SES making a payment or to ensure SES does not become liable for any taxes or charges for which the Service Provider is primarily liable.

## 10 PAYMENTS

- 10.1 **(Invoices)** Throughout the term of this Agreement, on each Invoice Date the Service Provider may provide to SES an Invoice in respect of the Services provided during the period since the previous Invoice, or if there has been no

previous Invoice, during the period since the Services Start Date setting out either the:

- (a) portion of the fee payable where clause 7.1 applies; or
- (b) amount payable following the calculation of the rates used and hours applied where clause 7.2 applies,

and any Expenses payable by SES incurred during the period which is the subject of the Invoice, in each case as supported by such information as SES requires to substantiate the claim,

less:

- (c) any amount claimed by SES from the Service Provider on account pursuant to the terms of this Agreement; and
- (d) the value of any of the Services for which payment is claimed that SES considers have not been performed in accordance with this Agreement.

10.2 **(Milestones)** Where Item 14 of the Schedule specifies that Milestones are to be achieved, the Service Provider is entitled to include a claim in respect of that Milestone:

- (a) only where SES has confirmed in writing that the Milestone has been achieved; and
- (b) in an Invoice submitted on the first Invoice Date following the achievement of the Milestone.

10.3 **(Condition Precedent to Payment)** The Service Provider is not entitled to any payment for the Services until it has provided SES with:

- (a) an Invoice;
- (b) such information as SES requires to substantiate an Invoice; and
- (c) a properly completed and signed Contractor Statement.

10.4 **(No Other Claims)** The Service Provider agrees that this Agreement is the entire contract for the provision of all the Services and all claims for payment must be made in accordance with this Agreement. If this Agreement is terminated, the Service Provider will not be entitled to any payment other than as calculated in accordance with this Agreement.

10.5 **(Payment Times)** SES will pay the Service Provider within 15 business days of receiving a valid Invoice which is not in dispute.

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- 10.6 **(Set Off)** SES will be entitled to deduct from any payment otherwise due to the Service Provider any amount the subject of a bona fide claim against the Service Provider by SES in respect of the Services.
- 10.7 **(Effect of Payment)** Any payment for the Services is not an approval by SES of the Service Provider's compliance with this Agreement, nor evidence of the value of the Services.

## 11 TIME FOR PROVISION OF SERVICES

- 11.1 **(Time Requirements)** The Service Provider must provide the Services diligently and in accordance with:
- (a) **(Milestones & Service End Date)** the Milestones and the Service End Date; and
  - (b) **(Program)** the agreed Program; or
  - (c) **(Other Requirements)** If no Program has been agreed, SES's reasonable requirements (including, where applicable, SES's program for the Project to which the Services relate) notified to the Service Provider from time to time.
- 11.2 **(Program)** On SES's request, the Service Provider must provide a program for the provision and completion of the Services for SES's approval, including dates by which instructions, information or approvals are required.
- 11.3 **(Suspension of Services)** SES may at any time on written notice, for its sole convenience and at its absolute discretion, immediately suspend the provision of the Services and payments relating to those suspended Services for SES's convenience and regardless of whether there has been any default on the Service Provider's part. SES may only suspend payment in relation to those Services yet to be performed. Clause 10 will continue to apply in respect of previously performed Services.
- 11.4 **(Force Majeure & Extension of Time)** If the Services are suspended by SES under this Agreement, or the Service Provider is unavoidably delayed in providing the Services for any reason beyond the reasonable control of the Service Provider and its subcontractors, then the Program or any other program applying to the Services will be extended by the reasonable period in which the Services were suspended or delayed, which SES may notify to the Service Provider at any time. Insolvency, lack of funds and labour disputes involving that party's employees only, are not reasons beyond a party's control. The Service Provider will have no claim against SES for any delay or other costs unless otherwise agreed in writing.

## 12 VARIATIONS

- 12.1 **(Variation of Services)** SES may require the Service Provider to vary the Services or to provide additional services in accordance with this clause.
- 12.2 **(Approval of Variations)** If SES requires the Service Provider to vary the Services or to provide additional services SES will pay the Service Provider for such additional or varied services only if before the additional or varied services are provided:
- (a) **(Notice of Variations)** the Service Provider notifies SES that the services sought by SES (or proposed to be provided by the Service Provider) are additional or varied;
  - (b) **(Price Agreed)** SES and the Service Provider have agreed either a lump sum fee for, or rates to apply to, the additional or varied services in accordance with clause 12.3; and
  - (c) **(Services Agreed)** SES and the Service Provider have agreed to the scope of the additional or varied services including any:
    - (i) specifications;
    - (ii) amendments to the Program; and
    - (iii) amendment to the Services End Date.
- 12.3 **(Valuation of Variations)** Any Variation will be priced as follows:
- (a) **(Quote)** The Service Provider will provide a Quote to SES and:
    - (i) the Quote will constitute an offer by the Service Provider to comply with the Variation;
    - (ii) SES is not be obliged to accept the Quote; and
    - (iii) if SES accepts the Quote, SES will issue a written notice for the Variation incorporating the terms of the Quote.
  - (b) **(Schedule of Services)** If the Service Provider does not provide a Quote or SES does not accept the Quote, SES will make a valuation of a proposed Variation as follows:
    - (i) SES must apply any relevant prices and rates contained in the Schedule or in Annexure A.
    - (ii) SES must take into account any increase or decrease in costs incurred by the Service Provider but not for loss of profit on

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omitted work or on other business or contracts foregone by the Service Provider, as a result of carrying out the Variation.

- (iii) If SES makes a valuation, it will issue a written notice for the Variation based on its valuation.

12.4 **(Omissions)** SES may, for its sole convenience and at its absolute discretion, omit at any time by written notice any of the Services for its convenience and regardless of whether there has been any default by the Service Provider under this Agreement. If Services are omitted:

- (a) **(Reduced Price)** SES will be entitled to a reasonable adjustment (which includes profit and overhead) of amounts payable to the Service Provider which will be agreed or, failing agreement, reasonably determined by SES;
- (b) **(Exclusion of Claims)** the Service Provider will have no claim (including for loss of profit) arising from the omitted Services; and
- (c) **(Others May Provide)** SES may provide, or use others to provide, the omitted Services.

## 13 INSURANCE

13.1 **(Insurances)** Prior to performing the Services the Service Provider must effect and maintain the policies of insurance listed in the Insurance Schedule:

- (a) on the terms;
- (b) for the risks identified;
- (c) for the period of time; and
- (d) for the amounts,

specified in the Insurance Schedule ("**Specified Insurances**").

13.2 **(Evidence of Insurance)** On or before signing this Agreement and thereafter whenever requested by SES (but not more than once in every 12 months), the Service Provider must provide to SES evidence that the Specified Insurances are effective (normally by way of a suitable certificate of currency).

13.3 **(Notification of claims)** Within 5 Business Days of the Service Provider becoming aware of any claims against any of the Specified Insurances in connection with the Services or which may impact upon the provision of the Services, the Service Provider must:

- (a) notify SES in writing of the claim; and

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- (b) give SES any further information regarding the claim as SES may require.

### 14 LIABILITY

- 14.1 **(Indemnity)** The Service Provider is liable for, and indemnifies SES against, all Liability arising out of or in connection with the breach of this Agreement by the Service Provider or its Personnel or the negligence or default of the Service Provider or its Personnel.

- 14.2 **(Exceptions to Indemnity)** The liability and indemnity in clause 14.1 will not apply to the extent that such Liability:

- (a) is incurred as a result of the negligent act, omission or default of SES; or
- (b) consists of Consequential Loss.

### 14.3 (Consequential Loss Definition)

- (a) Subject to (b) Consequential Loss

- (i) means any loss, not arising naturally, that is according to the usual course of things, from the relevant breach act or omission, whether or not such loss may reasonably be supposed to have been in the contemplation of the parties, at the time they entered the agreement, as the probable result of the relevant breach; and

- (ii) includes loss of profit or revenue or loss of anticipated savings.

- (b) Consequential Loss does not include:

- (i) additional internal administrative and management costs and expenses;
- (ii) expenditure or fees rendered unnecessary;
- (iii) costs of procuring replacement Services;
- (iv) legal fees.

### 14.4 (Exclusion of Civil Liability Act)

- (a) It is agreed that to the extent permitted by law the operation of Part 4 of the Civil Liability Act 2002 (NSW) (or the operation of any equivalent statutory provisions in any other state or territory) is excluded in relation to all and any rights, obligations and liabilities under this Agreement whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or a claim in tort or otherwise.

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- (b) To the extent permitted by law:
  - (i) the Service Provider must not seek to apply the provisions of Part 4 of Civil Liability Act 2002 (NSW) in relation to any claim by SES against the Service Provider whether such rights, obligations or liabilities are sought to be enforced as a breach of contract or in tort or otherwise; and
  - (ii) if the provisions of Part 4 of Civil Liability Act 2002 (NSW) are applied in relation to any claim by SES against the Service Provider, then the Service Provider will indemnify SES against any loss or damage SES is not able to recover from the Service Provider because of the operation of those provisions in relation to the application of apportionment of liability to third parties.

## 15 OWNERSHIP OF DOCUMENTS AND INTELLECTUAL PROPERTY

- 15.1 **(Licence to Use Intellectual Property)** At no additional cost to SES, the Service Provider irrevocably licenses SES to use or develop the Intellectual Property Rights in those aspects of the Services and the Documents which were created by the Service Provider prior to the date of this Agreement for SES's purposes including making or completing improvements to, developing, using, maintaining, valuing or otherwise dealing with any property or projects to which the Services relate. That licence may be assigned by SES to any entity becoming entitled to any interest in the Project or property to which the licence extends.
- 15.2 **(Ownership of Existing Intellectual Property Rights)** All Intellectual Property Rights in those aspects of the Services and the Documents which were created by the Service Provider prior to the date of this Agreement or are developed independently of this Agreement and the Services remain the property of the Service Provider.
- 15.3 **(Ownership of New Intellectual Property Rights)** All Intellectual Property Rights which are created or developed by the Service Provider in connection with the provision of the Services will vest absolutely in SES from the date it is created or developed. The Service Provider agrees to do all acts and reasonably required by SES to assure or perfect SES's title including signing an assignment.
- 15.4 **(Indemnity)** The Service Provider must indemnify SES against any Liability arising from others making any claims against SES in respect of the ownership of, or rights to use, intellectual property the Service Provider uses, develops or creates in connection with the provision of the Services including Intellectual

Property Rights licensed to SES under clause 15.1 or vesting in SES under clause 15.3.

- 15.5 **(Ownership of Documents)** All Documents, surveys, investigations and any other documents provided to SES by the Service Provider in connection with the Services will become SES's property when provided, and the Service Provider must not use them or any information (about or belonging to SES) contained in them without SES's prior written consent other than for the purposes of providing the Services to SES under this Agreement.

## 16 MORAL RIGHTS

- 16.1 **(Warranty)** The Service Provider warrants to SES that:

- (a) **(Consent)** all individuals who may have "moral rights" (as that expression is defined in the *Copyright Act 1968* (Cth)) in any Documents provided as part of the Services or any works constructed in accordance with that material have validly provided their written consent (pursuant to sections 195AW and 195AWA of that Act); and
- (b) **(Form of Consent)** the consent referred to in paragraph (a) allows SES (or others) to deal with that material or those works (including by way of destruction or alteration and without attribution of authorship) in such manner as SES may decide without being held to have infringed any moral right of the individual;

and indemnifies the SES from all loss and liability in relation to any breach of such warranties.

- 16.2 **(Existing Moral Rights)** Where the Services relate to any change to or the use of any material in relation to which moral rights may exist, the Service Provider must, in providing the Services, consider the obligations imposed by the *Copyright Act 1968* (Cth) in relation to "moral rights" and ensure that nothing is done which may place SES in breach of those obligations.

## 17 SUBCONTRACTING

- 17.1 **(Consent to Subcontracting)** The Service Provider must not subcontract the provision of any of the Services without the prior written consent of SES.
- 17.2 **(Responsibility Preserved)** Subcontracting of the Services by the Service Provider:
- (a) will not relieve it from the full responsibility for all the Services;
  - (b) must be on terms which are consistent with its obligations to SES; and

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## Professional Services Agreement

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- (c) will result in the Service Provider being liable to SES for acts or omissions of its subcontractors as if they were its own acts or omissions.

17.3 **(Co-ordination)** The Service Provider must ensure that the services of all subcontractors are co-ordinated to meet SES's requirements for the Services and that such subcontractors comply with all obligations imposed on the Service Provider in this Agreement.

## 18 ASSIGNMENT

18.1 **(Service Provider)** The Service Provider must not assign or novate its rights or obligations in relation to the Services without the written consent of SES.

18.2 **(Deemed Assignment)** The Service Provider will be taken to have assigned or to have attempted or purported to assign its rights and obligations under this Agreement if at any time the power (whether formal or informal, whether or not having legal or equitable force and whether or not based on legal or equitable rights):

- (a) to exercise or control the right to vote attached to 50% or more of the issued shares or stock (whether fully, partly or nil paid) in the Service Provider;
- (b) to dispose of or exercise a right of disposal in respect of 50% or more of the issued voting shares or stock (whether fully, partly or nil paid) in the Service Provider; or
- (c) to dominate or control the party or the financial or operating policies of the Service Provider (whether alone or in concert with others, and whether by any act or omission or otherwise),

resides with any persons other than those holding that power on the date of this Agreement.

18.3 **(SES Assignment to other Government Body)** SES may, for its sole convenience and at its absolute discretion, assign, novate or otherwise deal with its rights and obligations at its absolute discretion and without the Service Provider's consent to any other government agency or statutory state owned corporation and the Service Provider must execute any document reasonably required to give effect to the assignment, novation or other dealing.

18.4 **(Other SES Assignment)** Subject to clause 18.3, SES must not assign or novate its rights or obligations under this Agreement or in relation to the Services without the written consent of the Service Provider which is not to be unreasonably withheld or delayed

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- 18.5 **(Piggybacking)** If a public sector service agency (as defined in the Public Sector Employment and Management Act 2002) requests the Service Provider to provide services to it of the same nature as the Services then the Service Provider agrees that it will enter into a separate agreement with that other agency on terms no less favourable than the terms of this Agreement having regard to any necessary changes (including scope and service levels).

## 19 SES REPRESENTATIVES

- 19.1 **(SES's Representative)** The Service Provider must deal with SES's Representative nominated in Item 8 of the Schedule, or such other representative as may be notified by SES to the Service Provider from time to time.
- 19.2 **(SES's Representative's Directions)** SES's Representative may give written directions to the Service Provider with regard to the Services. The Service Provider must comply with all such directions given by SES's Representative to the extent that such directions are not inconsistent with the terms of this Agreement.
- 19.3 **(SES's Representative Authority)** SES's Representative has full authority to act on behalf of SES in respect of the subject matter of this Agreement. An instruction or written direction given by SES's Representative will be deemed to be an instruction or direction given by SES.

## 20 CONFLICT OF INTEREST & PROBITY

- 20.1 **(Warranty)** The Service Provider warrants that it is not aware of any reason why the provision of the Services will, or may, give rise to a Conflict of Interest.
- 20.2 **(Disclosure)** The Service Provider must fully disclose to SES any such actual suspected or potential Conflict of Interest immediately upon becoming so aware and take all such action as SES may reasonably require to resolve them (including ceasing to provide services to one or more persons).
- 20.3 **(Avoidance)** The Service Provider will not act for any third party where that may give rise to a Conflict of Interest.
- 20.4 **(Probity Event Notice by Service Provider)** The Service Provider must give notice to SES as soon as it becomes aware that a Probity Event has occurred or is likely to occur (Probity Event Notice).
- 20.5 **(Probity Event Notice by SES)** SES may give notice to the Service Provider if SES becomes aware that a Probity Event has occurred or is likely to occur (Probity Event Notice).

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- 20.6 **(Content of Notice)** The Probity Event Notice must describe the nature of the Probity Event and the circumstances giving rise to the actual or likely occurrence of the Probity Event.
- 20.7 **(Probity Investigations)** Following the issue of a Probity Event Notice, the Service Provider must promptly comply with any reasonable request from SES for access to its personnel for the purpose of undertaking any investigations that SES may wish to carry out in relation to the actual or likely occurrence of the Probity Event. The Service Provider must use reasonable endeavours to ensure that its personnel (and where relevant any Related Entity and its personnel) co-operate with SES and comply with any reasonable requests for information that SES may make in the course of its investigations.
- 20.8 **(Remedial Action to be Agreed)** Upon the issue of a Probity Event Notice the parties must meet at a time nominated or agreed by SES to discuss the occurrence of the Probity Event. During any such meeting, the parties must use reasonable endeavours to agree on the actions to be taken by the Service Provider to reverse the effect of the Probity Event.
- 20.9 **(SES May Direct Remedial Action)** If the parties are unable to agree within 5 Business Days of such meeting (or any longer period SES may agree) SES may give notice to the Service Provider setting out the action it must take to address the adverse effect of the Probity Event, and the Service Provider must comply with any such notice as soon as possible and in any event within 5 Business Days of receiving the notice.
- 21 **TERMINATION**
- 21.1 **(Termination for Convenience)** SES may immediately terminate this Agreement at any time prior to the Services End Date for its convenience and in its absolute discretion and regardless of whether there has been any default by the Service Provider by 90 days' prior written notice, in which case SES will pay the Service Provider in respect of the Services rendered up until termination. The Service Provider will have no claim against SES for any expenses or losses (including loss of profit) arising from the termination.
- 21.2 **(Termination for Breach by Service Provider)** SES may terminate this Agreement or any part of the Services, immediately by notice to the Service Provider if:
- (a) **(Breach of agreement)** the Service Provider breaches this Agreement and:
- (i) the breach is not capable of remedy;
- (ii) the breach is capable of remedy and the Service Provider fails to remedy the breach within 5 Business Days (or such longer time

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## Professional Services Agreement

- (c) **(Nomination of Expert)** If no person appears on both lists, the parties must request the President of the NSW Chapter of the Institute of Arbitrators and Mediators of Australia to nominate a person to act as the expert.
  - (d) **(Expert Determination Agreement)** SES and the Service Provider must enter into an agreement with the expert on such reasonable terms as the expert may require.
  - (e) **(Determination of the Expert)** The determination of the expert must be given to the parties in writing and will be final and binding upon the parties.
  - (f) **(Costs)** The parties must bear their own costs in connection with the expert determination proceedings and must pay an equal portion of the cost of the expert.
- 25.4 **(Continued Performance)** The Service Provider must continue to perform the Services despite any dispute between the parties.

## 26 GENERAL

### 26.1 (Inspection & Audit)

- (a) The Service Provider keep and maintain all necessary records and documentation relating to this Agreement and the Services including records required to be retained by the State Records Act 1998 as if it was bound by that Act, and any other law ("Records") and must permit SES to inspect the Service Provider's records or other Documents at any time on reasonable notice to ensure compliance with the Service Provider's obligations under this Agreement.
- (b) SES may appoint from time to time an independent third party auditor or appoint its internal auditors ("Auditor") to conduct regular or one-off audits of the Service Provider's performance in providing the Services and complying with its other obligations under this Agreement ("Audits").
- (c) The Service Provider must make available for inspection for an Audit all such records as the Auditor may reasonably require regardless of where they are located or the manner in which they are stored. The Auditor will be entitled to take copies of records as may reasonably be required for the purposes of the Audit.
- (d) The Service Provider must provide all appropriate resources and all reasonable assistance required by the Auditor and fully co-operate in good faith.

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- (e) Each party will bear its own costs in respect of an Audit. SES will bear the Auditor's costs except if the Audit reveals a material non-compliance with this Agreement in which case the Service Provider must pay the Auditor's costs.
  - (f) If the Audit reveals any non-compliance with this Agreement then the Service Provider must remedy that non-compliance within such time as SES reasonably requires and must advise SES in writing what steps the Service Provider has taken to ensure that the identified non-compliance will not re-occur.
  - (g) Nothing in the clause permits SES to have access information concerning the Service Provider's cost base, profits or margins.
- 26.2 **(Waiver)** The Service Provider acknowledges that no waiver by SES of a breach of any term of this Agreement will be a waiver of any other breach of that or any other term.
- 26.3 **(Applicable Law)** The law of New South Wales applies.
- 26.4 **(Clauses Survive Termination)** Unless otherwise stated in this Agreement, any clause capable of continuing to apply after the Services are completed or terminated for any reason will do so.
- 26.5 **(Notice)**
- (a) A notice or document must be:
    - (i) in writing;
    - (ii) sent to the party by certified mail to the relevant address of the party in Item 11, as varied by notice; or
    - (iii) sent by facsimile to the party's facsimile number in Item 11, as varied by notice.
  - (b) A notice or approval is taken to be given:
    - (i) if delivered to or left at the address of the party, on that day;
    - (ii) if posted by certified mail, on the day which it is certified as having been delivered;
    - (iii) if sent by facsimile, on that day if it is sent before 5 pm or otherwise on the next Business Day

unless the sender is aware that transmission is impaired.

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- 26.6 **(Severability)** If any provision of this Agreement is illegal, void, invalid or unenforceable for any reason, all other provisions which are self-sustaining and capable of separate enforcement will, to the maximum extent permitted by law, be and continue to be valid and enforceable.
- 26.7 **(No Poaching)** Neither party may solicit for employment, or independent contract for the provision of services, any employee of the other party who is involved in the performance of that party's obligations under this Agreement until the expiration of 12 months after the Services End Date (but nothing in this clause prevents a party from employing a person who applies for an advertised position).

### SCHEDULE

<b>Item 1</b> (clause 1.1)	<b>Project name</b> SES Operational Vehicle Fleet Project and as more fully described in Annexure A.
<b>Item 2</b> (clause 1.1)	<b>Service Provider's details</b>
	<b>Full legal name:</b> Karoshi Pty Limited
	<b>Trading name:</b> Fleet Admin Systems
	<b>ABN:</b> 46 094 705 183
	<b>ACN:</b> 094 705 183
	<b>Address:</b> 72 Carranya Road, Riverview NSW 2066
<b>Item 3</b> (clause 3.2)	<b>Services Start Date</b> 4 <sup>th</sup> June 2012
<b>Item 4</b> (clause 3.3)	<b>Services End Date</b> 30 <sup>th</sup> June 2013
<b>Item 5</b> (clause 3.4)	<b>SES Option to Extend</b> The SES reserves the option to extend this contract past the original Services End Date for a period of One (1) year if deemed necessary for the successful completion of the project
<b>Item 6</b> (clause 5)	<b>Premises</b> 6-8 Regent Street, Wollongong NSW 2500
<b>Item 7</b> (clause 2.1)	<b>Contract Documents</b> <ul style="list-style-type: none"> <li>• Annexure A - Services</li> <li>• Cabinet submission budget allocation for this project</li> <li>• Business Case and Economic Appraisal – Command and Control of SES Operational Vehicle Fleet (Aug 2011)</li> <li>• NSW Government Code of Practice for Procurement and Implementation Guidelines</li> <li>• NSW Government Motor Vehicle Fleet Policy</li> </ul>

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## Professional Services Agreement

	<ul style="list-style-type: none"><li>• Australian Design Rules (ADR)</li><li>• Australian Vehicle Standards Rules (AVSR)</li></ul>						
Item 8 (clause 19.1)	<b>SES's Representative</b> Steve Pearce, Deputy Commissioner Corporate Services and Planning						
Item 9 (clause 5.10)	<b>Service Provider's Representative</b> Frank Eggert, Director						
Item 10 (clause 5.4)	<b>Nominated Personnel</b> Not Applicable						
Item 11 (clause 26.5)	<b>Notices</b> <b>SES:</b> PO Box 6126, Wollongong, NSW 2500 Fax: <b>Service Provider:</b> PO Box 1204 Lane Cove NSW 2066 Fax: 02 9428 2463						
Item 12 (clause 10.1)	<b>Invoice Date</b> <ul style="list-style-type: none"><li>• On the last Friday of each calendar month</li></ul>						
Item 13 (clause 8.1)	<b>Expenses</b> Nil unless pre-agreed and pre-approved by SES Representative						
Item 14 (clause 10.2)	<b>Milestones</b> As per agreed and published Project Plan						
Item 15 (clause 7)	<b>Fees and Rates</b> <ul style="list-style-type: none"><li>• June 2012 @ \$1,250 per day plus GST</li><li>• July 2012 - June 2013 @ \$20,000 per month plus GST</li></ul> <b>n.b. Monthly charge based on 4 days per week for 48 weeks</b>						
Item 16 (clause 23.1)	<b>Exit Plan &amp; Handover</b> <table><tr><td>Exit Plan</td><td>Yes</td><td><input checked="" type="checkbox"/></td></tr><tr><td>Required?</td><td>No</td><td><input type="checkbox"/></td></tr></table>	Exit Plan	Yes	<input checked="" type="checkbox"/>	Required?	No	<input type="checkbox"/>
Exit Plan	Yes	<input checked="" type="checkbox"/>					
Required?	No	<input type="checkbox"/>					

## Professional Services Agreement

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### C. Where the Service Provider is a Partnership:

**SIGNED** for and on behalf of  
the **SERVICE PROVIDER**  
by its authorised representative

\_\_\_\_\_  
Witness' signature

\_\_\_\_\_  
Authorised Representative Partner's Signature

\_\_\_\_\_  
Print Name

\_\_\_\_\_  
Print Name

Date: \_\_\_\_\_

### D. Where the Service Provider is a "sole director" corporation:

**SIGNED** by the **SERVICE PROVIDER**  
in accordance with section 127 of the  
Corporations Act

E. Troiani  
\_\_\_\_\_  
Witness's signature

E. TROIANI  
\_\_\_\_\_  
Print Name

Date: 13/6/2012

Frank Ebert  
\_\_\_\_\_  
Sole Director & Company Secretary's signature

FRANK EBERT  
\_\_\_\_\_  
Print Name

I am the sole Director and Company Secretary  
of the Service Provider and I occupy both offices

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### Definitions and Notes:

1. Approved insurer means:

- (a) An Australian registered insurance company which is approved by the Australian Prudential Regulatory Authority (APRA) to conduct general insurance business in Australia;
- (b) Lloyds Underwriters;
- (c) A Treasury Managed Fund Insurance scheme with the NSW State Government; or
- (d) The Comcover insurance scheme for the Australian Federal Government.

Note that where the insurance risk is insured by a insurer not listed in Note 1(a) or 1(b) then a 'fronting' placement is acceptable from an insurer listed in Note 1(a) or 1(b).

2. Insurances policies must be subject to the laws of Australia (or an Australian State or Territory) and their courts.