

CreateSmart Initiative

Project Agreement

(Ref: {Ref_No})

THIS AGREEMENT is made on DD MM of {Year}

PARTIES:

- (1) **THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION** as represented by the Permanent Secretary for Culture, Sports and Tourism /Head of Create Hong Kong (the “Government”), and
- (2) An organisation / A limited liability company incorporated in Hong Kong* whose name and other details are set out in paragraph 1 of Schedule 1 (the “Recipient”).

** Delete as appropriate*

RECITALS:

- (1) The Government has set up the CreateSmart Initiative (the “Initiative”) which aims to provide financial support to promote the development of creative industries in Hong Kong.
- (2) On the date set out in paragraph 2 of Schedule 1, the Recipient submitted a proposal in respect of the Project to the Government for financial assistance from the Initiative.
- (3) Subject to the terms and conditions contained in this Agreement,
 - (a) the proposal referred to in paragraph 2 of the Recitals is approved and accepted by the Government, a copy of which is annexed hereto as Appendix I which also contains the approved budgeted items (“Approved Budget”), as may be amended from time to time by mutual agreement between the parties (“**Approved Project Proposal**”);

- (b) the Government has approved the provision of the sum set out in paragraph 5 of Schedule 1 (“**Funds**”) to the Recipient; and
- (c) the Government has agreed to grant, and the Recipient has agreed to accept, the Funds for the purpose of carrying out the Project.

OPERATIVE PART:

1 Definitions

1.1 In this Agreement, unless the context requires otherwise or expressly provided otherwise, the following expressions shall have the following meanings respectively:

Approved Project Proposal Completion Date means the date set out in paragraph 4 of Schedule 1 or such other date as the parties may agree in writing.

Appendix means the appendix of this Agreement.

Associate of any person means:
(a) a Relative or partner of that person; or
(b) any body of persons (corporate or unincorporate) one or more of whose Directors is in common with one or more of the Directors of that person.

Associated Person in relation to another person means:
(a) any person who has Control, directly or indirectly, over the other; or
(b) any person who is Controlled, directly or indirectly, by the other; or
(c) any person who is Controlled by, or has Control over, a person at (a) or (b) above.

Auditor	means a person who for the time being is registered under the Professional Accountants Ordinance (Cap. 50) and holds a practicing certificate within the meaning of that Ordinance.
Audited Account	means any statement of account in respect of the Project containing an income and expenditure account and a balance sheet, prepared in accordance with the relevant laws of Hong Kong and the accounting standards as in effect from time to time and consistently applied in Hong Kong (including the Accounting Standards and Accounting Guidelines as the Hong Kong Institute of Certified Public Accountants may issue and update from time to time) and duly audited, dated and signed by a practice unit as defined under the Professional Accountants Ordinance (Cap. 50) who is not in any way connected with the Project.
Commencement Date	means the date set out in paragraph 3 of Schedule 1 or if none, the date of this Agreement.
Completion of the Project	means completion of the Project to the satisfaction of the Government.
Completion Report	means the completion report to be submitted by the Recipient under Clause 13.

Control	<p>in relation to another person means the power to secure:</p> <ul style="list-style-type: none">(a) by means of the holding of shares or interests or the possession of voting power in or in relation to that or any other person; or(b) by virtue of any powers conferred by any constitution, memorandum or articles of association, partnership, agreement or arrangement (whether legally enforceable or not) affecting that or any other person; or(c) by virtue of holding office as a Director in that or any other person; <p>that the affairs of the first-mentioned person are conducted in accordance with the wishes of that other person.</p>
CreateHK	Means Create Hong Kong under the Culture, Sports and Tourism Bureau of the Government.
CSI	means CreateSmart Initiative.
CSI Guide	means the "CreateSmart Initiative Guide" available at https://csi.createhk.gov.hk .
D.Aud.	means the Director of Audit of the Government or anyone acting on his behalf.
Designated Bank Account	means an interest-bearing HK\$ account established and maintained with a licensed bank in Hong Kong under the Banking Ordinance (Cap. 155) solely and exclusively for the purpose of the Project.
Director	means any person occupying the position of director by whatever name called, including a de facto or shadow director and any person in charge of the day-to-day management or operation of a body of persons (corporate or unincorporate).

Equipment	means the asset, equipment, instrument or machinery listed as equipment in the Approved Project Proposal to be used for carrying out the Project.
Event of Default	means any event described in Clauses 40.1 to 40.11.
Force Majeure	means: (a) any supervening outbreak of war affecting Hong Kong (whether war be declared or not), hostilities, invasion, acts of foreign enemies, rebellion, terrorism, revolution, military or usurped power, overthrow (whether by external or internal means) of the Government, civil war, riot, civil disturbances, fire, civil commotion and acts of God; or (b) any supervening catastrophic event which is similar to the foregoing, and which (1) is not caused or contributed to by the Recipient, its Associates or Associated Persons or any employee or agent or ex-employee or ex-agent thereof and (2) prevents the performance of the Recipient's duties and obligations under this Agreement.
Head of CreateHK	means the Head of Create Hong Kong of the Government or anyone acting on his/her behalf.
HK or Hong Kong	means the Hong Kong Special Administrative Region of the People's Republic of China.
HK\$	means Hong Kong Dollars, the lawful currency of Hong Kong.
Income	means the revenue generated out of or in relation to the Project during the Project period.
Interest	means all interest which accrues or shall accrue to the Designated Bank Account.

Intellectual Property Rights/IPRs	means patents, trademarks, service marks, trade names, design rights, copyright, domain names, database rights, rights in know-how, new inventions, designs or processes and other intellectual property rights (of whatever nature and wheresoever arising, whether now known or hereafter created) and in each case whether registered or unregistered and including applications for the grant of any such rights.
OSO	means the Official Secrets Ordinance (Cap. 521).
PDPO	means the Personal Data (Privacy) Ordinance (Cap.486).
Potential Event of Default	means any event which would become (with the passage of time or the giving of notice or both) an Event of Default.
Post-Project Evaluation Questionnaire	means the post-project evaluation questionnaire to be submitted by the Recipient under Clause 18.
Private Sponsor	means a private sector sponsor who has agreed to support the Project by making contribution thereto in manner as herein provided.
Progress Reports	means progress reports to be submitted by the Recipient to the Government in accordance with Clause 12.
Project	means a CSI Project, the details of which are set out in the Approved Project Proposal.
Project Coordinator	means the project coordinator employed or engaged by the Recipient to carry out the Project including as of the date hereof the individual named in paragraph 1 of Schedule 3.
Project Cost	means the estimated cost of the Project in HK\$.
Project Result	means Progress Reports, Completion Reports and the targeted achievements and deliverables mentioned in the Approved Project Proposal.

Relative	means the spouse, parent, child, brother or sister of the relevant person, and, in deducing such a relationship, an adopted child shall be deemed to be a child both of the natural parents and the adopting parent and a step child to be a child of both the natural parents and of any step parent.
Sponsor	means any organization who has agreed to support the Project by making contribution thereto in the manner as provided in the Approved Project Proposal.
Third Party Materials	means any Project Result in respect of which any IPRs therein are vested in a third party.
this Agreement	means this agreement, including all schedules and appendices hereto all of which shall form and be read as an integral part of this agreement.
Use	means to do the “acts restricted by the copyright” within the meaning of sections 22 to 29 of the Copyright Ordinance (Cap. 528) and acts restricted by IPRs other than copyright subsisting in the Project Result.

1.2 In this Agreement, except where the context otherwise requires:

1.2.1 headings to Clauses are for convenience only and do not affect the interpretation of this Agreement;

1.2.2 a reference to any statute, order, regulation or other similar instrument shall be construed as a reference to the same as it may have been, or may from time to time be, amended, modified, extended, re-enacted or replaced (whether before or after the date of this Agreement) and including all subsidiary legislation from time to time made under it;

1.2.3 any act, default, neglect or omission of any employee, licensee, agent or contractor of either party hereto shall be deemed to be the act, default, neglect or omission of that party;

1.2.4 words denoting the singular shall include the plural and vice versa; words denoting any gender shall include the other genders; references to any person shall include references to an individual,

- firm, body corporate or unincorporate (wherever established or incorporated);
- 1.2.5 words importing the whole shall be treated as including a reference to any part of the whole;
- 1.2.6 the words “include” and “including” shall be construed without limitation to the words following; and
- 1.2.7 all references to “any” shall be construed to mean “any and all”.
- 1.3 Any agreement, consent or approval to be given by the Government may be given or withheld in its discretion, and subject to any conditions as the Government may consider appropriate, must be in writing, given before the act or matter or thing for which agreement, consent or approval is required and signed by the Government or a duly authorized person on its behalf to be effective. Failure by the Government to give any agreement, consent or approval shall be deemed a denial or refusal.
- 1.4 Any opinion to be given by the Government must be in writing and signed by the Government or a duly authorized person on its behalf to be effective.
- 1.5 Except as expressly provided otherwise, all obligations to be performed by the Recipient under this Agreement shall be performed at the cost and expense of the Recipient.
- 1.6 If there is any conflict or inconsistency between Clauses 1 to 58 of this Agreement and the Schedules or Appendices to this Agreement, Clauses 1 to 58 of this Agreement shall prevail.

Commencement and Term; and Project Commencement and Completion Dates

- 2.1 Subject to earlier termination pursuant to other provisions of this Agreement, this Agreement shall commence on the Commencement Date and shall expire on the Completion of the Project.
- 2.2 The Recipient shall commence the Project on the Commencement Date and complete the Project on or before the Approved Project Proposal Completion Date, of which time shall be of the essence.

Recipient's Obligations

- 3 In consideration of the Government agreeing to provide the Funds for the Project in accordance with this Agreement, the Recipient shall:
- 3.1 carry out and complete the Project in accordance with this Agreement (including the directives of the Government set out in Appendix II hereto or given from time to time), the Approved Project Proposal (Appendix I) and the CSI Guide;
 - 3.2 deliver and make available the Project Result to the Government and any other persons / organization / industry on the terms and conditions hereinafter appearing; and
 - 3.3 grant the licences to Use the Project Result to the Government and any other persons / organization / industry on the terms and conditions hereinafter appearing.

Recipient's Warranties and Undertakings

- 4 The Recipient hereby warrants and undertakes and with continuing effect that:
- 4.1 the Project shall be carried out and completed in an impartial, timely and diligent manner and the Recipient and its Directors, employees, agents and sub-contractors who are engaged to carry out or otherwise involved in the Project have all the necessary experience, skill and expertise to carry out the Project on the terms and conditions set out in this Agreement;
 - 4.2 it shall use the Funds solely and exclusively for the purpose of the Project and in such manner as specified in the Approved Project Proposal and the Approved Budget, and that it shall not change the Approved Project Proposal or the Approved Budget without the Government's prior written approval;
 - 4.3 it shall use the Equipment solely and exclusively for the purpose of carrying out the Project;
 - 4.4 it shall hold, operate and use the Equipment in a proper way and keep and maintain the same at all times in good repair and condition (fair wear and tear excepted);

- 4.5 it shall, upon request, allow the Government or any person on its behalf to enter at all reasonable times into and upon any premises of or controlled by the Recipient where any document or record pertaining to the Project is kept or any item arising out of the Project is experimented, manufactured or stored by the Recipient for the purpose of inspection or copying, or for verifying the accuracy of any information given by the Recipient to the Government, or otherwise verifying that the Recipient has complied with its obligations under this Agreement;
- 4.6 it shall comply in all respects, including the giving of all notices, the paying of all fees and the obtaining of all consents and approvals, with the provisions of all legislation, regulations and by-laws affecting or in any way relating to the Project;
- 4.7 it shall, where applicable, account for all income and apply all such income to offset approved expenditures in accordance with this Agreement and any directive as the Government may issue from time to time;
- 4.8 the obligations expressed to be assumed by the Recipient in this Agreement are legal and valid obligations binding on it and enforceable against it in accordance with the terms thereof;
- 4.9 the execution of this Agreement and the exercise of its rights and performance of its obligations under this Agreement do not and shall not (i) contravene any agreement, mortgage, bond or other instrument or treaty to which it is a party or which is binding upon it or any of its assets; (ii) conflict with any judicial order or any applicable law. It has the power to enter into this Agreement and all action required to authorize the execution of this Agreement and the performance of its obligations under this Agreement has been duly taken;
- 4.10 it is able to pay its debts as they fall due and has not commenced negotiations with any one or more of its creditors with a view to the general readjustment or rescheduling of its indebtedness or made a general assignment for the benefit of or a composition with its creditors;
- 4.11 no actions or steps have been taken or legal proceedings have been started or threatened against the Recipient for its winding up, dissolution, insolvency, administration, reorganization or reconstruction (whether by voluntary arrangement, scheme of arrangement or otherwise) or for the appointment of a receiver, administrator, administrative receiver, conservator, custodian, trustee or similar officer of the Recipient or of any or all of the Recipient's assets or revenues;

- 4.12 all information supplied, and statements and representations made by or on behalf of the Recipient in relation to the Project, the Approved Project Proposal, the Approved Budget or this Agreement are true, accurate and complete in all respects; and
- 4.13 it shall notify the Government immediately upon any of its Director becoming aware of the occurrence of any Event of Default or Potential Event of Default.

Recipient Indemnity

- 5 The Recipient shall indemnify and keep indemnified each of the Government, its employees and authorized persons fully and effectively against (i) all actions, claims (whether or not successful, compromised, settled, withdrawn or discontinued) and demands threatened, brought or established against the Government and (ii) all costs (including all legal fees and other awards, costs, payments, charges and expenses), losses, damage and liabilities suffered or incurred by the Government, which in any case arise directly or indirectly in connection with, out of or in relation to:
 - 5.1 a breach of Clause 39 or a breach of the duty of confidence under general law by the Recipient, or any of its employees, sub-contractors and agents (or any person acting on its or their behalf) (each a “**Relevant Person**”);
 - 5.2 the use by the Recipient or any Relevant Person of any personal data in contravention of PDPO;
 - 5.3 the performance or breach of this Agreement by the Recipient;
 - 5.4 the negligence, recklessness, wilful misconduct, unauthorized act or omission of the Recipient or a Relevant Person; or
 - 5.5 any allegation or claim that the use, operation or possession of the Project Result or the exercise of any rights granted under this Agreement infringes any IPRs of any persons.

The provisions in this Clause 5 shall survive the expiry or termination of this Agreement (howsoever occasioned) and shall continue in full force and effect notwithstanding such expiry or termination.

Probity Clause

- 6 The Recipient shall observe the Prevention of Bribery Ordinance (Cap. 201) and shall advise its employees, subcontractors, agents and other personnel who are in any way involved in the Project that they are not allowed to offer to or solicit or accept from any person any money, gifts or advantages as defined in the Prevention of Bribery Ordinance in relation to the Project.
- 7 If the Recipient, its employees, subcontractors, agents or other personnel who are in any way involved in the Project commit any offence under the Prevention of Bribery Ordinance in relation to the Project, the Government shall be entitled to terminate this Agreement, as the case may be, and shall hold the Recipient liable for any loss or damages the Government may thereby sustain.

Project Coordinator

- 8 The Recipient shall appoint a Project Coordinator for the Project and he/she shall have the following responsibilities:
 - 8.1 to oversee the carrying out of the Project generally to ensure that all the provisions set out under this Agreement and the CSI Guide are complied with and that all the requirements relating to the Project as may from time to time be prescribed or made by the Government in writing are met;
 - 8.2 to monitor the proper use of the Funds to ensure that the Funds are expended in accordance with the Approved Budget of the Project set out in the Approved Project Proposal;
 - 8.3 to ensure the accuracy and completeness of the information provided in the Progress Report(s), Completion Report and other reports submitted to the Government pursuant to this Agreement;
 - 8.4 to liaise with the Government on matters relating to the Project;
 - 8.5 to attend meetings on the Project as may be convened by Government from time to time; and
- 9 The Government reserves the right to require replacement of the Project Coordinator. Any proposed change of the Project Coordinator initiated by the Recipient must be subject to the prior written approval of the Government.

- 10 In the event of the death, incapacity or termination of employment of the Project Coordinator before the Completion of the Project, the Recipient shall, immediately or within such period as may be approved by the Government, arrange to substitute or replace the outgoing individual.
- 11 For the avoidance of doubt, the appointment or replacement of the Project Coordinator to undertake any part of the Project shall not relieve the Recipient from any liability or obligation under this Agreement.

Report

- 12 For projects to be completed more than one (1) year from the Commencement Date, the Recipient shall submit Progress Report(s) in respect of the Project (in the form set out in the funding application system at <https://csi.createhk.gov.hk>) in accordance with paragraph 6 of Schedule 1 to the Government, unless otherwise directed by the Government. For projects to be completed within one (1) year from the Commencement Date, Progress Reports are normally not required.
- 13 Within four (4) months of Completion of the Project or earlier termination of this Agreement, the Recipient shall submit to the Government a Completion Report in the form as set out in the funding application system at <https://csi.createhk.gov.hk>.
- 14 If the Government is not satisfied with the Progress Report or Completion Report submitted by the Recipient, the Government shall give reasons therefor and may specify any remedial action and the period within which it is to be performed by the Recipient. The Recipient shall perform all such remedial action within that period.
- 15 Upon request of the Government, the Recipient shall immediately provide clarification and additional information on the contents of any Progress Report or the Completion Report, and shall make available for inspection, verification or copying by the Government or any persons on its behalf all documents and records relating to the Progress Report, the Completion Report or the Project. Such documents and records shall be kept by the Recipient for at least seven (7) years from the date of Completion of the Project.
- 16 Without prejudice to the generality of the foregoing, the Government will not accept the Completion Report in the event that it is not satisfied that the Recipient has conducted the Project in accordance with the Approved Project Proposal (including, without limitation, the Project Milestones set out therein), this

Agreement, the CSI Guide, or any requirements relating to the Project as may from time to time be prescribed or made by the Government in writing, or that the final audited account report contains statements to this effect by the Auditors, whereupon the Government shall be entitled to terminate this Agreement pursuant to Clauses 40 to 41.

- 17 The Recipient shall keep proper records of all information that relates to the Project and all reports on the progress of the Project including without limitation the Completion Report up to the expiry of at least seven (7) years from the date of Completion of the Project or earlier termination of this Agreement or up to the date as otherwise specified by the Government within seven (7) years after the Completion Date or earlier termination of this Agreement and shall upon request by the Government produce the same for inspection by the Government at all reasonable times. This clause shall survive the termination or expiration of this Agreement.
- 18 Whenever so required by the Government, the Recipient shall complete and return to the Government a Post-Project Evaluation Questionnaire within six (6) months from the date of Completion of the Project or earlier termination of this Agreement. The Recipient shall report in the Post-Project Evaluation Questionnaire the efforts in publicizing the Project, and provide quantitative measurement on the adoption of the Project achievements by the industry.
- 19 Whenever so required by the Government, the Recipient shall forthwith provide clarification and/or additional information on the contents of the Completion Report and any Post-Project Evaluation Questionnaire.

Financial and Budgetary Control

- 20.1 The Recipient shall use the Funds and the Interest wholly and exclusively for funding the Project and in accordance with the Approved Budget only.
- 20.2 The Government shall not make or be liable for any payment in excess of the Funds. To the maximum extent permitted by law, the Government accepts no liabilities for any injury (including death) or any loss, deficit, damage or liability incurred in respect of or arising from the Project. The Government is entitled in its sole discretion to reject any applications for supplementary grant for the Project.
- 20.3 Notwithstanding Clause 20.1, the Recipient may reallocate the funds from one approved item of the Approved Budget to another from time to time provided that: -

- (a) any internal reallocation of funds shall be among the approved items of the Project as stated in Approved Budget;
 - (b) (i) the actual expenditure for any individual item must not exceed the original budgeted expenditure for that item for more than 15% of the latter ;
(ii) the overall total approved project cost and the total amount of CSI project funds requested remain unchanged; and (iii) all expenditure follows the relevant requirements as set out in the CSI Guide;
 - (c) the reallocation shall not adversely affect the quantity and quality of the deliverables under the Project; and
 - (d) the Recipient shall disclose in each Progress Report, Completion Report and Audited Account referred to in Clauses 12, 13 and 36 justification for such reallocation of funds and any other information relating thereto as the Government may require.
- 20.4 Notwithstanding Clause 20.3 above, prior written approval is required to be sought from the Government if budgeted expenditure is to be transferred to any unbudgeted expenditure item. The Government may in its sole discretion determine whether or not to grant its approval, and approval will only be granted in exceptional circumstances where there is no mismanagement or change in the objectives of the Project as stated in the Approved Project Proposal.
- 20.5 The Recipient shall keep a Designated Bank Account and keep the Funds separate from other monies belonging to the Recipient. The Recipient shall cause the Funds and all other receipts relating to the Project to be paid into and all payments relating to the Project to be paid out of the Designated Bank Account, and ensure that all receipts and payments in respect of the Project are properly and timely recorded. The Recipient shall keep all unspent balance of the Funds at all times in the Designated Bank Account.
- 20.6 All Income and Interest shall be reflected in the financial statements and Audited Accounts referred to in Clause 36.

Terms of Payment

- 21 In consideration of and subject to the Recipient carrying out the Project and performing all its services and obligations in accordance with the provisions of this Agreement to the satisfaction of the Government, the Government shall make available the Funds to the Recipient in the manner set out in Schedule 2 hereto.

Conflict of Interest

- 22 The Recipient shall, during the continuation of this Agreement and for six (6) months thereafter:
- 22.1 ensure that it (including its Associates and Associated Persons, each of its Directors, employees, agents and contractors and their respective Associates and Associated Persons) shall not undertake any service, task or job or do anything whatsoever for or on behalf of the Recipient or any third party (other than in the performance of this Agreement) which conflicts, or which may be seen to conflict, with the Recipient's duties to the Government under this Agreement unless and to the extent the Government permits otherwise and before giving such permission, the Government has been fully informed by the Recipient in a timely fashion of all the circumstances in which the permission is sought; and
 - 22.2 immediately notify the Government in writing of all or any facts which may reasonably be considered to give rise to a situation where the financial, professional, commercial, personal or other interests of the Recipient or any of its Directors, employees, agents and contractors, or any of their respective Associates or Associated Persons, conflict or compete, or may conflict or compete, with the Recipient's duties to the Government under this Agreement.
- 23 The Recipient shall notify the Government in writing immediately upon knowing of any financial, professional, commercial, personal or other interest (whether actual or potential, direct or indirect) that the Recipient or any of its Directors, employees, agents and contractors, or any of their Associates or Associated Persons may have in, or of any association or connection which the Recipient or the aforesaid persons may have with, any person, product, service or Equipment proposed or recommended or to be acquired or procured by the Recipient under this Agreement.
- 24 The Recipient shall ensure that each of its Associates and Associated Persons, each of its Directors, employees, agents and contractors and their respective Associates and Associated Persons shall keep themselves informed and shall inform the Recipient and keep it informed regularly of all facts which may reasonably be considered to give rise to a situation where the financial, professional, commercial, personal or other interests of such persons, conflict or compete, or may conflict or compete, with the Recipient's duties to the Government under this Agreement.

Procurement of Equipment, Goods, Services etc.

- 25 With the objectives of ensuring openness, fairness and value for money, the Recipient shall ensure that all purchases of all goods, services and Equipment of any value in relation to or for the purposes of the Project are made on an open, arms' length and competitive basis, in accordance with the prudent commercial principles and only from suppliers who are not Associates or Associated Persons of the Recipient, unless the Government agrees otherwise. Without prejudice to the strict observance of these objectives and requirements, the Recipient shall adhere to the following additional procurement procedures and practices unless the Government agrees otherwise:
- 25.1 For every procurement of the goods, services or Equipment in relation to or for the purposes of the Project, the aggregate value of which is more than HK\$5,000 but below HK\$10,000, the Recipient shall obtain quotations in writing from at least **two** suppliers or service providers;
 - 25.2 For every procurement of the goods, services or Equipment in relation to or for the purposes of the Project, the aggregate value of which is more than HK\$10,000 but below HK\$500,000, the Recipient shall obtain quotations in writing from at least **three** suppliers or service providers; and
 - 25.3 For every procurement of the goods, services or Equipment in relation to or for the purposes of the Project, the aggregate value of which is HK\$500,000 or above, the Recipient shall obtain quotations in writing from at least **five** suppliers or service providers.
 - 25.4 In all the three scenarios mentioned in Clauses 25.1, 25.2 and 25.3 above, the supplier or service provider (as the case may be) that has submitted the lowest bid should be selected. If the lowest bid is not selected, full justifications must be given.
 - 25.5 Where the Recipient intends to procure goods or services from one supplier, it shall first seek Government's written approval and submit for Government's consideration details including without limitation its relationship with the supplier concerned and justifications for not following the open procurement process set out in Clauses 25.1 - 25.3 above.
- 26.1 All quotations and tendering documents in relation to or for the purposes of the Project shall be kept by the Recipient for a period of at least seven (7) years from the Completion of the Project or the date of termination of this Agreement,

whichever is later, and shall be made available without delay for inspection by the Government upon request.

- 26.2 The Recipient shall manage its procurement to the extent that it can disqualify a tenderer/terminate a contract upon the occurrence of any of the following events:
- (a) the Tenderer/Contractor has engaged or is engaging in acts or activities that are likely to constitute or cause the occurrence of offences endangering national security or which would otherwise be contrary to the interest of national security;
 - (b) the continued engagement of the Contractor or the continued performance of the Contract is contrary to the interest of national security; or
 - (c) the Recipient reasonably believes that any of the events mentioned above is about to occur.

Project Result

- 27.1 The Recipient hereby grants for the benefit of the Government, its authorized users, assigns and successors-in-title an unconditional, irrevocable, non-exclusive, perpetual, royalty-free and world-wide licence to Use the Project Result (and in relation to any Third Party Materials in respect of which the Recipient is not empowered to grant licence(s), the Recipient hereby undertakes to procure the grant of such licence(s) (on similar terms as those being granted by the Recipient under this Clause 27.1) for the benefit of the Government, its authorized users, assigns and successors-in-title in respect of such Third Party Materials prior to their Use by the Recipient) by any means and in any manner.
- 27.2 The Recipient shall keep the Government informed in writing of any Third Party Materials which the Recipient is not empowered to grant any licence(s) pursuant to Clause 27.1 above and any restrictions whatsoever affecting the Use thereof.
- 27.3 The Recipient shall produce to the Government for inspection within seven (7) days upon the Government's request all proper licences in writing obtained or procured pursuant to Clause 27.1 in respect of the Third Party Materials.
- 27.4 The Recipient hereby irrevocably waives, and undertakes to procure all relevant authors of the Project Result to irrevocably waive all moral rights (whether past, present or future) in the Project Result. Such waiver shall operate in favour of the Government and its authorized users under Clause 29 as from the date the relevant licence takes effect.

- 28 The Recipient shall at all times during the validity of this Agreement exercise due diligence in software asset management and, as and when required by the Government, furnish to the Government satisfactory evidence that this clause has been complied with.
- 29 The Recipient shall, whenever required or at intervals and in the manner prescribed in the Approved Project Proposal or as may be directed by the Government, give such briefings, seminars, presentations or otherwise publicize the Project Result to such persons as the Government shall direct.

Intellectual Property Rights

- 30 The Recipient shall ensure that it is, or shall become upon creation, and shall remain for any purposes contemplated by this Agreement either the absolute legal and beneficial owner of any IPRs in the Project Result (other than the Third Party Materials), or co-owner of any IPRs in the Project Result in the circumstance that such IPRs in the Project Result are co-owned by the Recipient and the collaborating parties (including Sponsors). To that end, the Recipient shall make it a condition of its contracts with any of its Sponsors, employees, contractors, agents or other personnel who have in any way contributed towards or are in any way involved in the Project that the Recipient shall be, or shall become upon creation, and shall remain either the absolute legal and beneficial owner of any IPRs, or co-owner of any IPRs in the circumstance that such IPRs in the Project Result are co-owned by the Recipient and the collaborating parties (including Sponsors), created as aforesaid for any purposes contemplated by this Agreement.
- 31 The Recipient further warrants and undertakes to the Government that:
- 31.1 it has or shall have the full capacity, power and authority, or in case any IPRs in the Project Result are co-owned by the Recipient and the collaborating parties (including Sponsors), the Recipient shall grant and procure other co-owners of the relevant IPRs in the Project Result to grant the licences referred to in Clause 27.1 upon the terms and conditions of, and for any purposes contemplated by, this Agreement;
- 31.2 the provision of the Project Result (including the Third Party Materials) or any of the services by the Recipient under this Agreement, the Use, operation or possession by the Government, its authorized users, assigns and successors-in-title of the Project Result (including the Third Party

Materials) pursuant to this Agreement do not and shall not infringe any IPRs of any persons;

31.3 the use of any software by the Recipient for the purpose of or otherwise in connection with the performance of this Agreement does not and shall not infringe any IPRs of any persons;

31.4 the exercise of any of the rights granted under or pursuant to this Agreement by the Government, its authorized users, assigns and successors-in-title shall not infringe any IPRs of any persons;

31.5 in respect of any Third Party Materials in the Project Result : -

(a) the Recipient has or shall have a valid and continuing licence under which it is entitled to sub-license the relevant Third Party Materials and the third party IPRs for itself and for the benefit of Government, its authorized users, assigns and successors-in-title to Use such Third Party Materials for any purposes contemplated by this Agreement; or

(b) prior to the Use and incorporation of such Third Party Materials in performing this Agreement, the Recipient shall have obtained the grant of all necessary clearances for itself and for the benefit of Government, its authorized users, assigns and successors-in-title authorizing the Use of such Third Party Materials for any purposes contemplated by this Agreement; and

31.6 it shall take all reasonable steps to recognize and protect all IPRs in the Project Result and all other works created in respect of or during the course of the Project and shall promptly inform the Government of all allegations, claims, actions and proceedings in respect of infringement of any such IPRs and any progress thereof from time to time. The Recipient shall apply for registration of the IPRs (to the extent that they are registrable) or take similar steps for their protection in Hong Kong and in such parts of the world as the Government may reasonably request from time to time.

Risk in and Title to the Equipment

32 The risk in the Equipment shall be borne by and remain with the Recipient at all times.

- 33 The title to all equipment procured under the Project shall vest with the Recipient. Upon the completion or termination of the Project under Clauses 40 to 43 below, the Government may require the Recipient to dispose of the equipment at market price or make other arrangements for disposal in accordance with the procedure agreed by the Government. The Recipient shall comply with such requirement. The sales proceeds from such disposal shall be apportioned between the Recipient and the Government in proportion to their contributions to the total project cost.

Return of Residual Funds

- 34 The Recipient should return to the Government all residual CSI funds remaining in the Designated Bank Account mentioned in Clause 20.5 above upon completion of the Project or earlier termination of the Project Agreement within two months after such completion or earlier termination. The Government may take such action as may be deemed necessary in the event of any delay in the return of residual funds and interest income to the Government.

Books and Records

- 35 The Recipient shall maintain, during the continuance of this Agreement and for a minimum period of seven (7) years after the termination of this Agreement, full and proper books of accounts and records in respect of the Project (including all matters in respect of the receipt, expenditure and custody of the Funds and any other public funds which may be provided for any purposes relating to the Project and all income (of whatsoever description) derived therefrom (“**Public Funds**” collectively)). The Recipient shall procure that its Associates and Associated Persons to whom any Public Funds are passed or diverted, directly or indirectly (“**Relevant Third Parties**”) shall keep full and proper books of accounts and records in respect of such Public Funds. The Recipient shall ensure that the Government, the D.Aud. and their respective authorized representatives shall be allowed access to all or any of the aforesaid books and records for conducting audit (including value for money audit), inspection, verification and copying from time to time upon reasonable notice during the continuance of this Agreement and the seven-year period mentioned above. In this connection, the Recipient shall, and shall procure that each Relevant Third Parties, and each of the Relevant Third Parties’ and the Recipient’s respective employees and agents shall, explain to the Government, the D.Aud. and their respective authorized representatives any matters relating to the receipt, expenditure and custody of the Public Funds upon request.

- 36 The Recipient shall submit to the Government within four months after the expiry or termination of this Agreement an Audited Account which covers the period from the Commencement Date to the date of expiry or termination of this Agreement.
- 37 Each Audited Account shall contain statements by an Auditor expressing its opinion on whether the Recipient has complied with, in all material respects, the requirements set by the Government (including the requirements to keep a designated bank account solely and exclusively for the purpose of the project, to keep proper books and records, to prepare proper Project Accounts), and all the terms and conditions of the CSI funding.

Change of Control or Ownership

- 38 The Recipient shall notify the Government in advance of any proposed change in the management or control, including any change in directors or any change in legal or beneficial interest in the share capital of the Recipient representing more than 50% of total issued share capital of the Recipient at the time of the proposed change or 50% in aggregate of any prior and proposed change of total issued share capital at the time of the proposed change.

Confidentiality

- 39.1 The Recipient shall treat as confidential all information, drawings, specifications, documents, contracts, design materials and all other data (including any personal particulars, records and personal data (as defined in the PDPO) and materials of any nature (in or on whatever media)) accessible by the Recipient under this Agreement or which the Government has for the purposes of or in the course of performing this Agreement disclosed, supplied, made available or communicated to the Recipient, provided that this Clause 39.1 shall not extend to any information which was rightfully in the possession of the Recipient prior to the commencement of the negotiations leading to this Agreement or which is already in the public knowledge or becomes so at a future date (otherwise than as a result of a breach of this Clause).
- 39.2 The Recipient hereby agrees that it shall use the confidential information described in Clause 39.1 solely for carrying out the Project in accordance with this Agreement, and that it shall not, at any time whether during or after the completion, expiry or termination of this Agreement, use or allow to be used the same for any other purposes without the Government's prior written consent.

- 39.3 The Recipient undertakes to take all necessary security measures to protect the information, documentation and materials which it is obliged by Clause 39.1 to treat as confidential.
- 39.4 The Recipient shall ensure that each of its Associates and Associated Persons, each of its Directors, employees, agents, contractors, consultants and their respective Associates and Associated Persons, and any other persons engaged in any work in connection with this Agreement are aware of and comply with the provisions of this Clause 39 and the OSO.
- 39.5 The Recipient shall ensure that each of its Associates and Associated Persons, each of its Directors, employees, agents, contractors, consultants and their respective Associates and Associated Persons and any other person engaged in any work in connection with this Agreement to whom any confidential information is to be disclosed will sign without delay a separate, legally binding, confidentiality agreement (in a form prescribed by the Government) if so requested by the Government.
- 39.6 The Recipient shall promptly notify the Government in writing of any breach of confidence, the PDPO or the OSO by any of the persons referred to in this Clause 39 and give the Government all reasonable assistance in connection with any proceedings which the Government may institute against any such person for any such breach.

Termination and Termination Consequences

- 40 Without prejudice to any other rights or remedies which the Government may have, the Government may at any time on the occurrence of any of the following events terminate this Agreement immediately by giving written notice to the Recipient with immediate effect:
- 40.1 the Recipient fails to comply with any terms, conditions or undertakings in this Agreement and (in the case of a breach capable of being remedied) the Recipient fails to remedy the breach to the satisfaction of the Government within seven (7) days after receipt of a notice in writing from the Government requiring it to do so or within such other period as the Government may in its sole discretion allow;
- 40.2 the Recipient persistently or flagrantly fails to comply fully and punctually with its obligations and duties under this Agreement;
- 40.3 the Recipient abandons this Agreement;

- 40.4 the Recipient fails to submit any reports, financial accounts or other documents in accordance with this Agreement, or any of the data, facts or information represented to or provided by the Recipient to the Government about the Project or this Agreement is incomplete, incorrect, untrue, inaccurate or misleading;
- 40.5 the Recipient or any of its Directors, employees, agents, consultants or contractors engaged for the performance of its obligations under this Agreement commits an offence under the Prevention of Bribery Ordinance (Cap. 201) or any other criminal offence which in the opinion of the Government has affected the Recipient's abilities to perform this Agreement or other Government contracts;
- 40.6 there shall be any change referred to in Clause 38 which, in the opinion of the Government, substantially prejudices any of the Government's rights or powers under this Agreement or the Recipient's ability to carry out the Project or its obligations under this Agreement;
- 40.7 the Recipient engages in any conduct which is reasonably considered by the Government to be prejudicial to the Project;
- 40.8 the Recipient stops or suspends payment to its creditors generally or is unable or admits its inability to pay debts generally as they fall due or is declared or becomes bankrupt or insolvent;
- 40.9 the passing of any resolutions, the initiation of any proceedings, or the making of any order which may result in the winding up, dissolution, insolvency, administration, reorganization or reconstruction of the Recipient (otherwise than a solvent reorganization or reconstruction which the Government has approved in advance prior to its implementation) or the appointment of a receiver, administrator, administrative receiver, conservator, custodian, trustee or similar officer of the Recipient or of any or all of the Recipient's assets or revenues or the Recipient makes an assignment for the benefit of or composition with its creditors generally or threatens to do any of the above or any event occurs under the laws of any jurisdiction that has a similar or analogous effect;
- 40.10 wherever applicable, the Recipient fails or is unable to produce documentary evidence of the contribution by the Sponsor to the satisfaction of the Government upon the Government's request;

- 40.11 the Recipient's Use of any IPRs for the purpose of or otherwise in connection with the performance of this Agreement is held by a court to constitute an infringement of any IPRs of any persons;
 - 40.12 the Recipient has engaged or is engaging in acts of activities that are likely to constitute or cause the occurrence of offences endangering national security or which would otherwise be contrary to the interest of national security;
 - 40.13 the continued engagement of the Recipient or the continued performance of this Agreement is contrary to the interest of national security; or
 - 40.14 the Government reasonably believes that any of the events mentioned above is about to occur.
- 41 Notwithstanding anything provided herein to the contrary, the Government may at any time at its option terminate this Agreement by giving the Recipient not less than 30 days' prior written notice. In such event, the Recipient shall be entitled to receive payment for such part of the Project carried out up to the date of termination. Any amount paid in respect of such part of the Project which has not been performed at the date of termination shall be refunded to the Government. The Government shall not be responsible for any claim, legal proceeding, liability, loss, damages or any cost or expense, suffered or incurred by the Recipient arising out of or in relation to such termination.
- 42 On the expiry or termination of this Agreement:
- 42.1 this Agreement shall be of no further force and effect (but without prejudice to all accrued rights, liabilities and remedies and any provisions of this Agreement which expressly or by implication are intended to come into or continue in force on or after such expiry or termination);
 - 42.2 immediately return to the Government all amount paid by the Government in respect of such part of the Project which has not been performed by the Recipient at the date of expiry or termination of this Agreement;
 - 42.3 upon the Government's request, immediately assemble or compile (as the case may be) in an intelligible and orderly manner and deliver all or any materials relating to the Project Result to the Government; and
 - 42.4 immediately make available for removal by the Government or its nominees such part of the Equipment in which the Government retains title.

- 43 If this Agreement is terminated by the Government pursuant to Clause 40, without prejudice to any of the Government's other rights and remedies, the Government may require the Recipient:
- 43.1 to repay immediately all or any sums provided by the Government pursuant to this Agreement together with all administrative, legal and other costs and interest accrued up to the date of repayment; and
 - 43.2 to, upon the Government's request, (I) provide the Government with information relating to all or any contracts entered into by the Recipient in relation to the Project so as to enable the Government (or its nominees) to take over the Project; (II) assign to, or as the case may be, procure the assignment to, the Government (or its nominees) of the rights of the Recipient in all or any such contracts entered into by the Recipient in relation to the Project; and (III) do and execute any further things and documents (or procure that the same be done or executed) as may be required by the Government to give full effect to sub-clause (II) and provide all such documents and materials to the Government within fourteen (14) days of the date of the Government's request.
 - 43.3 If the Recipient fails to pay any sum pursuant to any provision of this Agreement when due (whether legally or formally demanded or not and both before and after judgment), the Recipient shall, without prejudice to any rights or remedies of the Government under this Agreement or otherwise, pay interest at the average best lending rates quoted by the note-issuing banks in Hong Kong. Such interest shall accrue on a daily basis and in a year of 365 days from the date of disbursement by the Government of the project funds up to the date of actual payment in full by the Recipient.

No Double Emoluments

- 44 Unless otherwise agreed by the Government:-
- 44.1 no emoluments shall be paid out of the Funds to any person working on or otherwise involved in the Project who is or becomes remunerated or rewarded on a full-time basis by the Government or any person who receives any grant, subvention or financial subsidy, assistance or support from the Government; and
 - 44.2 the Recipient shall not be entitled to make any claims against the Funds in respect of remuneration or reward payable to any person other than

remuneration or reward wholly, exclusively and necessarily attributable to that person's service or services in the performance of the Project.

Force Majeure

- 45 A party prevented by an event of Force Majeure may be excused from performance of the obligations under this Agreement for so long as such event shall continue. The party so prevented shall as soon as possible give notice in writing to the other party of the occurrence of the event of Force Majeure.
- 46 Should the performance by the Recipient of its obligations under this Agreement be prevented by Force Majeure for 14 days (either consecutive or in the aggregate) or longer, the Government shall be entitled, at the expiration of such period, to terminate this Agreement by not less than seven (7) days' notice in writing to the Recipient and in which case, Clause 42 shall apply.
- 47 Subject to Clause 46, in the event that performance of obligations under this Agreement is delayed by Force Majeure, the parties shall diligently endeavour to achieve expeditiously the normal pursuit of this Agreement and to make up for the time lost.

Governing Law and Jurisdiction

- 48 This Agreement shall be governed by and construed in accordance with the laws of Hong Kong and each party agrees to submit to the exclusive jurisdiction of Hong Kong courts.

General

Notice

- 49 Each notice, demand or other communication given or made under this Agreement shall be in writing and delivered or sent to the relevant party at its address or facsimile number or e-mail address set out below (or such other address or facsimile number as the addressee has by five (5) days' prior written notice specified to the other party):

To the Government : **Head of Create Hong Kong**
Create Hong Kong
Room 3014, 30/F, Immigration Tower
7 Gloucester Road
Wanchai, Hong Kong
Facsimile Number: {Fax_No}
E-mail: XXX@createhk.gov.hk
Attention: {Mr. / Ms. XXX}

To the Recipient: *{Contact_person}*
{address_line1}
{address_line2}
Facsimile Number: {Fax_No}
E-mail: {Email_Address}
Attention: {Mr. / Ms. XXX}

50 Such notices, demands or other communications shall be addressed as provided in Clause 49 and, if so addressed, shall be deemed to have been duly given or made as follows, whichever is earlier:

- 50.1 if sent by personal delivery, upon delivery at the address of the relevant party;
- 50.2 if sent by post, two (2) business days for local post and five (5) business days for overseas post after the date of posting;
- 50.3 if sent by facsimile, when dispatched with confirmed receipt as evidenced by the transmission report generated at the end of the transmission of such facsimile by the facsimile machine used for such transmission;
- 50.4 if sent by e-mail, upon transmission to the e-mail address of the relevant party, without mail delivery failure notice.

Time of Essence and Waiver

51 Time shall be of the essence for the purpose of performance of the Recipient's obligations under this Agreement, but no failure by either party to exercise and no delay by either party in exercising any right or remedy available to it under this Agreement or in law or in equity shall operate as a waiver of such right or remedy, nor shall any single or partial exercise of any such right or remedy preclude any other or further exercise thereof nor shall any such failure to exercise, or delay in exercising, or single or partial exercise of, any such right or remedy preclude the

exercise of any other right or remedy. The rights and remedies of each party herein contained shall be cumulative and not exclusive of any other rights or remedies provided by law or in equity.

Modifications

- 52 Subject to the provisions of this Agreement, no amendment or modification or addition to this Agreement shall be valid unless made in writing and signed by both the authorized signatories of the Government and the Recipient.

Entire Agreement

- 53 This Agreement constitutes the entire agreement between the parties in relation to the provision of the Funds by the Government to the Recipient and supersedes all prior agreements (whether oral or in writing), letters and other documents in whatever form concerning the same. The parties confirm that they have not entered into this Agreement upon the basis of any statements, undertakings, warranties or representations that are not expressly stated in this Agreement.

Severability

- 54 If any provision of this Agreement or its application to any circumstances shall, to any extent, be invalid, illegal or unenforceable, the remainder of this Agreement and the application of that provision to other circumstances shall not be affected thereby, and each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

Execution of Further Documents

- 55 The Recipient shall do and execute any further things and documents (or procure that the same be done or executed) as may be required by the Government to give full effect to Clauses 27 to 31 and 39 and shall provide all such documents and materials to the Government within fourteen (14) days of the date of the Government's written request or such longer period as may be agreed by the Government in writing.

Assignment

- 56.1 Save as provided in Clause 56.2 below, the Recipient shall not assign, transfer, sub-contract or otherwise dispose of any or all of its interests, rights, benefits or obligations under this Agreement.
- 56.2 The Recipient may, subject to the approval of the Government, engage the services of independent contractors of its own to assist it with its duties under this Agreement, provided that the Recipient:
- (a) shall not be relieved from any of its obligations and duties under this Agreement by engaging any such independent contractor and shall remain fully liable to the Government for the performance of such obligations and duties;
 - (b) shall remain liable for any act or omission of any such independent contractor as if such act or omission were its own; and
 - (c) shall secure binding obligations from all such independent contractors so as to ensure that the Recipient can comply with its obligations under this Agreement.

Relationship of the Parties

- 57 Nothing contained or implied in this Agreement or in the arrangements contemplated by it is intended or shall create a partnership, joint venture or association of any kind between the parties hereto and, save as expressly provided in this Agreement, neither party shall enter into or have authority to enter into any engagement or make any representation or warranty on behalf of, or pledge the credit of or otherwise bind or oblige the other party hereto. Nothing contained or implied in this Agreement shall be so construed as to constitute either party to be the agent of the other.

Saving

- 58 Nothing in this Agreement shall be taken to restrict, derogate from or otherwise interfere with any powers, discretions or duties, or the exercise or performance of any powers, discretions or duties, conferred or imposed by or under any law upon the Government, any Government bureau or department or any public officer or other person in the employ of the Government.

Schedule 1

1. Recipient's Name: [·]
Recipient's Certificate of Incorporation No. : [·]
Address of Recipient's Registered Office: [·]
2. Submission date: [·]
3. Commencement Date: [·]
4. Approved Project Proposal Completion Date: [·]
5. Approved sum: a maximum sum of Hong Kong Dollars [·] (HK\$[·]) Only
6. Submission Date of Progress Report: [·]
(Covering the period from XXX to XXX)

Schedule 2

Payment of Funds

Payment by Instalments

<u>Instalment</u>	<u>Amount payable</u> <u>(percentage of the Funds)</u>	<u>Due Date for Payment</u>
First	HK\$[·] ([·]%)	Paid upon signing of the Agreement provided that the Recipient shall promptly refund to the Government the whole or any part of the Funds in the Recipient's possession which remain unspent by the Recipient upon the request of the Government.
Second	HK\$[·] ([·]%)	The remainder to be paid only upon the Government's receipt and acceptance of the final Audited Account and Completion Report from the Recipient referred to in Clauses 36 and 13 and subject to the Recipient's compliance with all its obligations under this Agreement, provided that the Government shall have power to withhold any further payment under this Agreement if in the reasonable opinion of the Government, at the material time a large amount of the Funds in the Recipient's possession remains unspent by the Recipient.

Schedule 3

Project Coordinator

Project Coordinator: [name]

Sample

Appendix I

Approved Project Proposal

Sample

Appendix II

Government's Directives

(Note: A copy of the Offer letter is attached)

Sample