SourceIT User Notes
General Requirements

Licence and Support Contract – Commercial off-the-shelf Software

Hardware Acquisition and Maintenance Contract

IT Consultancy Services Contract
SourceIT User Notes – General Requirements

General Requirements

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General Requirements

Introduction

1. Using these notes

These User Notes contain an explanation of the purpose of the clauses contained in Part 2 ‘General Requirements’ sections for the:

(a) Licence and Support – Commercial off-the-shelf Software Contract;
(b) Hardware Acquisition and Maintenance Contract; and
(c) IT Consultancy Services Contract,

(together, the model Contracts).

Where relevant, hints for use and a description of the risks and issues with specific clauses are also provided.

For guidance on specific clauses or Schedules of a particular model Contract, please see the SourceIT website for the corresponding User Notes (User Notes – Specific Clauses and User Notes – Schedules).

The explanations in these User Notes appear in the same order in which the clauses appear in Part 2 of each model Contract. References to the relevant clause number in each model Contract are inserted as footnotes in these User Notes. Capitalised words have the same meaning as the Definitions in each model Contract.

Further advice can be obtained from the Department of Finance by email at ictprocurement@finance.gov.au or through the Help Desk on (02) 6215 1597. Advice can also be sought from your legal or procurement adviser and should be sought on issues particularly relevant to your organisation.

2. Using the correct version

The most recent version of the model Contracts are available at the SourceIT website. Only the most recent version of a model Contract should be used. Finance advises against modifying or using a modified version of a model Contract without consulting your legal or procurement adviser. Finance recommends that users download the model Contracts from the website each time such a contract is required, to ensure users have the most up-to-date version.

Where a model Contract is modified and included in tender documentation, Finance recommends that the modified clauses be identified in a table (or similar format) or that the amendments be marked up or tracked. This may assist tenderers in the preparation of their tenders.
Guidance on general requirements

1. Payment

**Purpose**

This clause sets out the Customer's payment obligations under the Contract. The Customer is only obliged to pay Service Charges in respect of:

(a) Services that have been Accepted (Software Contract);
(b) Hardware and Services that have been Accepted (Hardware Contract); and
(c) Services that have met the Performance Criteria (Consultancy Contract).

The Contractor must provide the Customer with a correctly rendered invoice that meets the requirements set out in Schedule 3 (refer to the relevant section of the User Notes - Schedules). Unless otherwise specified in Schedule 3, the Customer must make payment of a correctly rendered invoice within 30 days after receiving the invoice.

Support Fees (under the Software Contract), and Hardware Maintenance Fees (under the Hardware Contract) are not payable during the Warranty Period.

The clause also outlines the payment procedures regarding incorrect invoices, under/over payment and expenses. It is important that the specific payment and invoicing requirements are carefully detailed in Schedule 3.

**Hints for use**

Customers should refer to procurement guidance and circulars released by the Australian Government as well as their own Agency's policies in relation to payment obligations and invoicing requirements.

Government policy requires that *Public Governance, Performance and Accountability 2013* (Cth) (*PGPA Act*) entities adopt maximum payment terms 'not exceeding 30 days' from the date of receipt of the correct products or services and a correctly rendered invoice when contracting with small businesses.

Government policy requires that PGPA Act entities pay simple interest to small business on any unpaid amount exceeding the 30-day payment period. Refer to the *Supplier Pay on Time or Pay Interest Policy*.

1. This policy applies to the procurement of goods and services from departmental items only.
2. This policy does not apply to:

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1 Clause 21 of the Licence and Support – Commercial off-the-shelf Software Contract (*Software Contract*); clause 29 of the Hardware Acquisition and Maintenance Contract (*Hardware Contract*); clause 15 of the IT Consultancy Services Contract (*Consultancy Contract*)

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a. procurement of real property including leases and licences;
b. procurement from administered items;
c. where the nature of the goods and services or the structure of the procurement, would make it impractical for the policy to be applied. This might be the case, for example, where the procurement occurs under standard terms and conditions put forward by the contractor rather than the agency; or
d. procurements where prior to the date of this policy, a written contract or standing offer was already in place or in the process of being negotiated.

3. This policy does not prevent agencies from agreeing to the payment of interest in other circumstances or constrain the arrangements in those circumstances.


2. GST

Purpose
This clause allows any party to the Contract to charge GST in addition to the agreed charges. It is only appropriate if all payments are agreed and stated in the Contract on a 'GST exclusive' or 'plus GST' basis. If any GST inclusive amounts have been stated in the Contract, seek tax advice as this clause is not suitable.

2.1 Interpretation

Purpose
The purpose of this clause is to ensure that the GST terminology used in the clause is consistent with their meaning in the GST legislation.

2.2 GST gross up

Purpose
This is the key provision in the GST clause. It gives either party the right to charge an additional amount for GST on any taxable supplies made under the Contract.

2.3 Reimbursements

Purpose

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2 Clause 22 of the Software Contract; clause 30 of the Hardware Contract; clause 16 of the Consultancy Contract
3 Clause 22.1 of the Software Contract; clause 30.1 of the Hardware Contract; clause 16.1 of the Consultancy Contract
4 Clause 22.2 of the Software Contract; clause 30.2 of the Hardware Contract; clause 16.2 of the Consultancy Contract
5 Clause 22.3 of the Software Contract; clause 30.3 of the Hardware Contract; clause 16.3 of the Consultancy Contract

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This clause applies where one party reimburses another for any third party costs. The clause requires reimbursement amounts to be reduced by the amount of any input tax credits to which the payee is entitled to prevent 'double charging' of GST.

2.4 **Exclusion of GST from calculations**

*Purpose*

This clause applies where payments under the Contract are calculated by reference to a formula or percentage (eg. amounts calculated by reference to hourly rates). It requires the payments to exclude the GST component of the base figures used in the calculations. Similar to the reimbursements clause described at section 2.3 above, the objective is to prevent 'double charging' of GST.

2.5 **Adjustments**

*Purpose*

This clause applies where the amount of GST charged by the supplier to the recipient differs from the GST amount payable to the Australian Taxation Office on the supply. This may occur because:

(a) the supplier made an error and charged the wrong amount of GST; or

(b) an 'adjustment event' arises for GST purposes. An 'adjustment event' is any event which has the effect of:

(i) cancelling a supply or acquisition;

(ii) changing the consideration for a supply or acquisition; or

(iii) causing a supply or acquisition to become, or stop being, a taxable supply or creditable acquisition.

The clause requires a payment to be made between the parties to reflect the adjustment and requires the supplier to issue appropriate documentation (i.e. adjustment notes).

2.6 **Tax invoice**

*Purpose*

This clause makes payment to a supplier conditional on receipt of a valid tax invoice. This is because under the GST law, a recipient can only claim an input tax credit if it holds a valid tax invoice by the time it lodges its GST return. The

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6 Clause 22.4 of the Software Contract; clause 30.4 of the Hardware Contract; clause 16.4 of the Consultancy Contract

8 Clause 22.5 of the Software Contract; clause 30.5 of the Hardware Contract; clause 16.5 of the Consultancy Contract

9 Clause 22.6 of the Software Contract; clause 30.6 of the Hardware Contract; clause 16.6 of the Consultancy Contract

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purpose of this clause is to ensure that the recipient can claim its input tax credits on a timely basis.

3. **Indemnity**\(^{10}\)

*Purpose*

The purpose of this clause is to outline a pre-agreed contractual risk regime under which the Contractor (the indemnifier) agrees to compensate the Customer (the indemnified) against specified losses which arise in specified circumstances. The indemnity is a third party indemnity only, meaning that the Customer is only indemnified under this clause for loss arising out of or in connection with a claim made or threatened by a third party.

*Hints for use*

Indemnification is important to the management of the Customer's risk under a Contract. Customers should consider the range of indemnities provided, together with the liability provisions of the Contract (see section 4 of these User Notes), as part of its procurement risk management process. The Australian Government should generally not accept risks which another party is better placed to manage - the general principle is that risks should be borne by those best placed to manage them.

Under the clause, the Customer must permit the Contractor to handle all negotiations for settlement and to control and direct any settlement negotiation or litigation that may follow, subject to the Contractor agreeing to comply, as if the Contractor were the Customer, with:

(a) relevant government policy and obligations (including the Legal Services Directions); and

(b) any direction issued by the Attorney General to the Commonwealth or delegate.

The Contractor should, in particular, be aware of the following provisions of the Legal Services Directions:

(a) paragraph 4.2 and Appendix B – which provide that claims are to be handled and litigation is to be conducted as a model litigant;

(b) paragraph 4.3 – which provides that claims and litigation are to be conducted in accordance with legal principle and practice (as that expression is amplified in paragraph 2 of Appendix C); and

(c) paragraph 8 – which requires reliance on statutory limitation periods unless approval otherwise is given.

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\(^{10}\) Clause 23 of the Software Contract; clause 31 of the Hardware Contract; clause 17 of the Consultancy Contract

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4. Liability

Purposes

Under this clause, the liability of both parties for claims arising out of or in connection with the Contract (including under any indemnity) is limited to the amount specified in the Contract Details. The clause operates by limiting all such liability other than liability that is expressly excluded from the limit. Claims in relation to the following are excluded from the limit:

(a) personal injury (including sickness and death);
(b) loss, or damage to, tangible property;
(c) infringement of Intellectual Property Rights;
(d) a breach of any obligation of confidentiality, security matter or privacy; or
(e) a breach of any statute or any wilfully wrong act or omission, including, in the case of the Contractor, any act or omission that constitutes repudiation of the Contract,

unless the Contract Details specify that liability in relation to any one of the above types of liability is to be limited.

The limitation of liability will apply to each single occurrence or a series of related occurrences arising from a single cause, except where specified otherwise in the Contract Details. Where the Contractor fails to achieve a Service Level it may become liable to the Customer for an amount of Service Rebate. Failure to achieve a Service Level is a breach of the Contract, and therefore the amount of Service Rebates that may be payable should usually be taken into account in determining any Losses which are subject to any limitation of liability, unless specified otherwise in the Contract Details.

Customers should be careful to ensure that, where the Service Rebates are included in Losses subject to a limitation of liability (which is the default position), the limitation of liability in the Contract Details should not be less than the limits on the amount of Service Rebates claimable under the Service Rebates clause\(^{12}\) plus any other damages that the Contractor may become liable for under the Contract.

\(^{11}\) Clause 24 of the Software Contract; clause 32 of the Hardware Contract; clause 18 of the Consultancy Contract

\(^{12}\) Clause 17.2 of the Software Contract; clause 24.2 of the Hardware Contract

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Hints for use

A guide to limiting supplier liability in ICT contracts with Australian Government agencies was approved by the then Minister for Finance and Administration and the Minister for Communications, Information Technology and the Arts on 16 August 2006. The Guide to limiting supplier liability in ICT contracts requires agencies subject to the PGPA Act to, in most cases, limit the liability of ICT suppliers at appropriate levels, and identifies specific types of liability for which it is particularly appropriate to limit. Unlimited liability should only be required when there is a compelling reason.

The Guide to limiting supplier liability in ICT contracts also identifies a number of types of liability for which it is generally appropriate not to limit. Consistent with the Guide to limiting supplier liability in ICT contracts, the liability clause sets out the following types of liability for which it is generally appropriate not to limit. Customers should seek advice from their legal and procurement advisers prior to agreeing to limit the Contractor's liability through the Contract Details of these types of liability:

(a) personal injury;
(b) loss, or damage to, tangible property;
(c) infringement of third party Intellectual Property Rights;
(d) a breach of any obligation of confidentiality, security matter or privacy; or
(e) a breach of any statute or any wilfully wrong act or omission including any act or omission that constitutes repudiation of the Contract.

Customers should be aware that 'repudiation' should be explicitly excluded from the liability limitation because it is manifested by an intention not to further perform the Contract or only to perform it in a manner substantially inconsistent with the Contractor's obligations. Repudiation can therefore be characterised as a wilfully wrongful act. For example, a Contractor may repudiate the Contract because, due to a change in market circumstances, the Contractor might be able to make a greater profit from more lucrative commercial opportunities that may arise (e.g. because of a significant increase in the cost/value of ICT projects/skills). Such repudiation would be an abuse of the liability limitation, which is not the intention of Guide to limiting supplier liability in ICT contracts.

The Commonwealth Procurement Rules (CPRs) set out the Australian Government’s overarching policy on risk management. The CPRs provide that:

(a) risks should be borne by the party best placed to manage them;
(b) if there is a compelling reason to limit a Contractor's liability, any indemnity, liability limitation or similar arrangement should be of limited scope and with specified maximum liabilities;
(c) as part of considering such a limit, PGPA Act agencies should refer to the requirements set out in:
(i) **Guide to limiting supplier liability in ICT contracts**;

(ii) **Contingent liabilities: indemnities, guarantees, warranties on behalf of the Commonwealth** at the Finance web site; and

(iii) **Commitments to spend public money (PGPA Rule Sections 18, 23 and 71)**.

(d) for each proposal to limit a Contractor's liability to the Australian Government, including a proposal for the limitation of liability to apply in aggregate through the Contract Details, a risk management process must be undertaken, including undertaking a risk assessment and obtaining legal advice where appropriate, having regard to the complexity of the purchase and the level of risk. Where a set-off or payment of Service Rebates is to be taken into account in determining Losses subject to a limitation of liability, this should be factored into any risk assessment conducted by the Agency for the purpose of setting an appropriate limit.

Reference should be made, by Customers, to the *Guide to limiting supplier liability in ICT contracts*, which (amongst other things) includes guidance on undertaking risk assessments.

Customers should also refer to their agency’s Accountable Authority’s Instructions for further guidance on risk assessment and procurement procedures and to section 3 of these User Notes.
5. **Insurance**

**Purpose**

This clause sets out the insurances the Contractor must maintain for the Contract Period. The Contractor is required to maintain and provide confirmation of valid and enforceable insurance policies as set out in the table below:

<table>
<thead>
<tr>
<th>Contract</th>
<th>Insurance required</th>
</tr>
</thead>
<tbody>
<tr>
<td>Licence and Support Contract – Commercial off-the-shelf Software</td>
<td>Public liability&lt;br&gt;Either professional indemnity or errors and omissions&lt;br&gt;Product liability&lt;br&gt;Workers' compensation&lt;br&gt;Any additional type specified in the Contract Details</td>
</tr>
<tr>
<td>Hardware Acquisition and Maintenance Contract</td>
<td>Public liability&lt;br&gt;Either professional indemnity or errors and omissions (this is only required where Maintenance Services are being provided)&lt;br&gt;Product liability&lt;br&gt;Workers' compensation&lt;br&gt;Any additional type specified in the Contract Details</td>
</tr>
<tr>
<td>IT Consultancy Services Contract</td>
<td>Public liability&lt;br&gt;Either professional indemnity or errors and omissions&lt;br&gt;Workers' compensation&lt;br&gt;Any additional type specified in the Contract Details</td>
</tr>
</tbody>
</table>

The Contractor must maintain either professional indemnity or errors and omissions insurance for a period of seven years following expiry or termination of the Contract. (Under the Hardware Contract, professional indemnity or errors and

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13 Clause 25 of the Software Contract; clause 33 of the Hardware Contract; clause 19 of the Consultancy Contract
omissions insurance is not required unless Maintenance Services are being provided.) This is to ensure that the Contractor has professional indemnity or errors and omissions insurance cover for the period during which a claim may be made against it, up until the expiration of the statutory limitation period.

A Contractor that is named under an insurance policy held and maintained by its parent entity or another related entity as a person to whom the insurance cover extends may (depending on the terms of the applicable insurance policy) comply with the above requirements even if the Contractor is not a party to the insurance contract directly.

The parties must specify the amounts of the insurances in the Contract Details.

**Hints for use**

As insurance is a method of managing risk under a contract, it is important for Customers to set appropriate levels of insurance for each Contract. The level of insurance required should be based on an assessment of the risk involved with the procurement. It is good practice for the Customer, prior to executing the Contract, to request and review certificates of currency for the insurance policies held by the Contractor.

6. **Confidentiality and privacy**\(^{14}\)

**Purpose**

This clause outlines the confidentiality obligations of the parties. It is the Department of Finance's model clause for confidentiality. For further guidance on this clause, refer to *Confidentiality throughout the Procurement Cycle - Principles* and *Confidentiality throughout the Procurement Cycle - Practice*. The clause enables the parties to insert a written confidentiality and privacy undertaking in the form of a deed into a Schedule to the Contract prior to execution.\(^{15}\) Where an undertaking is inserted into a Schedule to the Contract, that undertaking will be used where a party requests the other party to arrange for its Advisers or other third parties to give a confidentiality and privacy undertaking.

**Hints for use**

The definition of Confidential Information includes information which is by its nature confidential and is specified in the Designated Confidential Information Schedule.\(^{16}\) While the definition of Confidential Information is not exclusively limited to the information set out in the Designated Confidential Information Schedule, the parties should include all information that they specifically require.

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\(^{14}\) Clause 26 of the Software Contract; clause 34 of the Hardware Contract; clause 20 of the Consultancy Contract.  
\(^{15}\) Clause 26.2 and Schedule 9 of the Software Contract; clause 34.2 and Schedule 9 of the Hardware Contract; clause 20.2 and Schedule 8 of the Consultancy Contract.  
\(^{16}\) Schedule 4 of each Contract.  

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to be treated as confidential in the Schedule to avoid any later disagreements as to the nature of the information.

Where a Contractor requests certain information to be treated as confidential, Government policy requires PGPA Act entities to consider whether that information should be subject to a contractual confidentiality obligation and to apply specified tests. Refer to Confidentiality throughout the Procurement Cycle – Principles and Confidentiality throughout the Procurement Cycle - Practice when completing the Designated Information Schedule 4 (refer to the relevant section of the User Notes – Schedules).

7. **Protection of personal information**

   **Purpose**

   This clause is the model privacy clause provided and managed by the Office of the Privacy Commissioner. It assists Commonwealth Agencies in discharging their responsibilities under section 95B of the Privacy Act 1988 (Cth).

   For further information on this clause, refer to section 95B of the Privacy Act 1988 at the Comlaw website.

8. **Conflict of interest**

   **Purpose**

   This clause is aimed at ensuring that the Contractor does not have a conflict of interest in performing its obligations under the Contract. In general terms, a conflict of interest is a relationship or interest that might prejudice, or be seen to prejudice, the Contractor’s impartiality or performance of the Contract. For example, if a Contractor recommends the Customer purchase an item from a third party supplier, and the Contractor is a director of that third party supplier but has not advised the Customer of this relationship, this could be perceived to be a conflict of interest.

   During the term of the Contract, if a conflict arises or appears likely to arise, the Contractor must notify the Customer and take such steps as the Customer reasonably requires to resolve or deal with the conflict.

   **Hints for use**

   General guidance on conflicts of interest as part of the procurement process can be found at Ethics and Probity in Procurement – Principles, and Ethics and Probity in Procurement - Practice.

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17 Clause 27 of the Software Contract; clause 35 of the Hardware Contract; clause 21 of the Consultancy Contract

18 Clause 28 of the Software Contract; clause 36 of the Hardware Contract; clause 22 of the Consultancy Contract

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9. Security

9.1 Compliance with Customer requirements

**Purpose**

This clause requires the Contractor to comply with the Customer's security requirements including those:

(a) contained in the Commonwealth Protective Security Policy Framework;
(b) set out in the Contract Details; and
(c) notified in writing by the Customer to the Contractor.

**Hints for use**

If the Contractor is required to comply with parts of the Commonwealth Protective Security Policy Framework, the Customer should provide these parts to the Contractor. Further information on the Protective Security Policy Framework can be found at the website of the Attorney-General's Department.

If the Customer notifies the Contractor of additional security requirements during the Contract Period, the Contractor should be allowed an adequate amount of time, in the circumstances, to comply.

9.2 Secure Information

**Purpose**

This clause requires the Contractor to comply with, and acknowledge that:

(a) no Personnel or subcontractors will access secure information without the appropriate clearance level;
(b) if Personnel or subcontractors without the appropriate clearance level access secure information the contractor must notify the Customer immediately; and
(c) it will ensure its Personnel and subcontractors handle and store secure information appropriately.

9.3 Official Information

**Purpose**

This clause requires the Contractor to comply with, and acknowledge that:

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19 Clause 29 of the Software Contract; clause 37 of the Hardware Contract; clause 23 of the Consultancy Contract
20 Clause 29.1 of the Software Contract; clause 37.1 of the Hardware Contract; clause 23.1 of the Consultancy Contract
21 Clause 29.2 of the Software Contract; clause 37.2 of the Hardware Contract; clause 23.2 of the Consultancy Contract
22 Clause 29.3 of the Software Contract; clause 37.3 of the Hardware Contract; clause 23.3 of the Consultancy Contract
(a) upon request by the Customer ensure its Personnel or subcontractors sign a deed of non-disclosure relating to information pertained in the contract;

(b) its Personnel or subcontractors must declare any conflicts of interest;

(c) it will promptly and regular inform its Personnel and subcontractors of the Customer’s security requirements;

(d) its Personnel and subcontractors have access to and correctly utilise systems that meet the Standards under the Australian Government Information Security Manual;

(e) its Personnel and subcontractors will inform the Customer immediately of any breaches of security in relation to the Contract; and

(f) it will ensure its Personnel and subcontractors upon expiration of the Contract delete all official information from its ICT systems and return all necessary assets to the Customer.

9.4 Security clearance

Purpose

This clause addresses the issue of security clearances for the Contractor's subcontractors or Personnel (including its employees, officers agents) performing the Services. It allows the Customer to notify the level of security and access clearance which the Contractor needs to obtain and with which its subcontractors and Personnel must comply.

Hints for use

The Customer is obliged to notify the Contractor of the security clearances it requires. If the Customer notifies the Contractor during the Contract Period that additional security clearance is required, the Contractor should be allowed an adequate amount of time, in the circumstances, to comply.

As a default the Contractor will bear the costs in relation to the required security clearances. Where the parties agree some other arrangement in relation to these costs this should be set out in the Contract Details.

When the Customer is giving a notice under this clause it should bear in mind the 'Notices and other communications clause', which specifies the requirements for the giving and receipt of notices (refer to section 16 of these User Notes).
9.5 Customer Data and Customer Material

**Purpose**

The purpose of this clause is to:

(a) ensure the Contractor, its Personnel and subcontractors, complies with all security requirements under the Contract;

(b) ensure the Contractor notifies the Customer immediately of any contraventions of security requirements in relation to Customer Data/Material;

(c) prevent unauthorised removal of Customer Data from the Customer's premises;

(d) prevent unauthorised taking or sending of Customer Data overseas; and

(e) report breaches of Customer Data and Customer Material to the Customer and CERT Australia.

**Hints for use**

In some circumstances, there may be benefits in allowing the Contractor to take or send Customer Data outside Australia or removing it from the Customer's premises, for example, to seek expert advice. However, this needs to be balanced against the privacy issues and security risks of removing the Customer Data or taking the Customer Data outside Australia. If such action is required, Customers should consider placing restrictions around the removal of Customer Data, such as:

(f) return of Data within a specified timeframe;

(g) allowing access of Data by specified restricted personnel; or

(h) other specific security or confidentiality requirements.

(i) CERT Australia is Australia’s official national computer emergency response team - [https://www.cert.gov.au/](https://www.cert.gov.au/)

10. Books and records

**Purpose**

This clause requires the Contractor and its subcontractors to keep adequate books and records relating to amounts payable by the Customer, and to retain those books and records for a period of seven years following the termination or expiration of the Contract.

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24 Clause 29.5 of the Software Contract; clause 37.5 of the Hardware Contract; clause 23.5 of the Consultancy Contract

25 Clause 30 of the Software Contract; clause 38 of the Hardware Contract; clause 24 of the Consultancy Contract

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11. Audit and access\textsuperscript{26}

\textit{Purpose}

This clause sets out the types of audits which may be conducted in connection with the Contractor's performance of the Contract, and the Contractor's obligations to provide the Customer and the Auditor General with access to its premises and records. As the model Contracts are intended to apply to simple IT procurements, the Australian National Audit Office has approved an abridged version of the Department of Finance’s standard clause for audit and access requirements for use in these model Contracts. Users may find it useful to refer to the Department of Finance’s guidance on \textit{ANAO Access to Contractors' Information}.

12. Unforeseen events\textsuperscript{27}

\textit{Purpose}

This clause provides a mechanism for either party (\textit{Affected Party}) to be excused from its obligations under the Contract where circumstances beyond its reasonable control prevent it from performing those obligations. For example, a Contractor which is unable to meet a Milestone because its office has been damaged by a cyclone may be excused from its obligation to meet that Milestone. An unforeseen event does not include a lack of funds or any labour dispute which only affects the Contractor's organisation.

The clause provides a right of termination if the Affected Party's non-performance or diminished performance of its obligations continues for a period of more than 14 consecutive days (or such other period specified in the Contract Details). On termination, each party will bear its own costs and neither party will incur further liability to the other (existing claims are unaffected).

\textit{Hints for use}

Customers should consider whether the 14 consecutive day default under this clause is suitable bearing in mind the nature of the Services being provided, any critical timeframes, the importance of the Services to the Customer's operations and the effect non-performance or diminished performance could have on its operations. Customers can specify an alternative period in the Contract Details.
The Affected Party must give notice to the other party when the circumstances described in this clause arise or when the Affected Party reasonably perceives that they may arise. When giving notice, the Affected Party should bear in mind the 'Notices and other communications' clause which specifies the requirements for notice.

13. Dispute resolution

*Purpose*

This clause sets out the process the parties must follow if a dispute arises under the Contract. The clause facilitates settling disputes at management level, without litigation. The parties must comply with the clause before commencing arbitration or any court proceedings other than interlocutory relief such as injunction. If a party breaches this clause, the other party is not required to comply with this clause.

The parties must bear their own costs of complying with the dispute resolution process and bear equally the costs of a mediator. All information disclosed under the dispute resolution process must be kept confidential and used only for the purpose of resolving the dispute.

*Hints for use*

Users should be aware of the notice requirements and time frames set out in this clause. In providing notice, reference should be made to the 'Notices and other communications' clause which specifies the requirements for notice.

14. Termination

14.1 Termination and reduction for convenience

*Purpose*

The purpose of this clause is to provide the Customer with rights to terminate the Contract, either for default or convenience.

The Customer may terminate the Contract for convenience or reduce the scope of Services (and Deliverables in the case of the Hardware Contract) provided under the Contract at any time by giving notice to the Contractor. If the Contract is terminated for convenience the Customer:

(a) will be liable for the Service Charges and expenses (but only where charging for expenses is permitted under the payment clause) incurred prior to the effective date of termination; and

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28 Clause 33 of the Software Contract; clause 41 of the Hardware Contract; clause 27 of the Consultancy Contract
29 Clause 34 of the Software Contract; clause 42 of the Hardware Contract; clause 28 of the Consultancy Contract
30 Clause 34.1 of the Software Contract; clause 42.1 of the Hardware Contract; clause 28.1 of the Consultancy Contract
31 Clause 21.5 of the Software Contract; clause 29.5 of the Hardware Contract; clause 15.5 of the Consultancy Contract
(b) will be liable for the reasonable costs incurred by the Contractor and attributable to the termination.

The Customer will not be liable for costs which, when combined with any amounts paid or due under the Contract, exceed the total amount of Service Charges payable under the Contract. The Contractor is not entitled to loss of prospective profits.

14.2 Termination for default

Purpose

These clauses set out the grounds on which either party may terminate for the default of the other party. The clauses also set out the Contractor's obligations on termination.

Hints for use

A party should seek legal advice if it considers that the other party has breached the Contract, as wrongful termination of a Contract under these clauses could result in a claim for damages being made against the terminating party.

14.3 After termination

Purpose

This clause sets out the obligations on the Contractor after termination of the Contract with respect to the Services, Deliverables (in the case of the Hardware Contract), Customer Material and Customer's Confidential Information.

14.4 Survival

Purpose

This clause lists the clauses of the Contract that survive termination or expiry of the Contract. The obligations under these clauses continue irrespective of the termination or expiry of the Contract.

14.5 Termination does not affect accrued rights

Purpose

Termination does not affect any accrued rights or remedies of a party. This means that any right a party has before termination, for example:

(a) a Customer's right to claim Services Rebates; or

32 Clauses 34.2 and 34.3 of the Software Contract; clauses 42.2 and 42.3 of the Hardware Contract; clauses 28.2 and 28.3 of the Consultancy Contract

33 Clause 34.4 of the Software Contract; clause 42.4 of the Hardware Contract; clause 28.4 of the Consultancy Contract

34 Clause 34.5 of the Software Contract; clause 42.5 of the Hardware Contract; clause 28.5 of the Consultancy Contract

35 Clause 34.6 of the Software Contract; clause 42.6 of the Hardware Contract; clause 28.6 of the Consultancy Contract

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(b) a Contractor's right to be paid for Services already delivered and Accepted, is not affected by the subsequent termination or expiry of the Contract.

15. **Knowledge transfer**

**Purpose**

The purpose of this clause is to facilitate the transition of the Services to a new service provider or to bring the services in-house through the transfer of information and knowledge.

On termination or expiration of the Contract, the Contractor is required to transfer, or provide access to, the information it stores or controls in connection with the Contract and must make Specified Personnel and the Contractor's Personnel listed in the Contract Details, available to meet with the Customer.

**Hints for use**

The type of Services that could be required by a Customer could include transfer of information relevant to the Services (eg, Problem logs and fixes for Software) or training in aspects of the provision of the Services. Although the time, length and subject of discussions with Specified Personnel is at the sole discretion of the Customer, the Customer is obliged under clause 5 of each model Contract to act reasonably in exercising its rights under the Contract.

16. **Notices and other communications**

**Purpose**

This clause sets out the requirements for giving notice under the Contract. It is important that these requirements are followed, as failure to do so will mean that notice has not properly been given, which may invalidate the notice or cause delays. The clause sets out the form the notice must take and specifies when a notice will take effect.

**Hints for Use**

A notice must be delivered to the recipient's address for notice specified in the Contract Details. This address may be varied by notice.

When providing notice under the Contract, the parties should take into consideration the time frames for when a notice will be deemed to have been received.

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36 Clause 35 of the Software Contract; clause 43 of the Hardware Contract; clause 29 of the Consultancy Contract

37 Clause 36 of the Software Contract; clause 44 of the Hardware Contract; clause 30 of the Consultancy Contract
17. Miscellaneous

17.1 Ownership of Contract

Purpose

The clause specifies that the Customer owns all copyright and other Intellectual Property Rights in the Contract. This means that the Contractor cannot use or copy the Contract for purposes not related to the provision of the Services.

17.2 Varying the Contract

Purpose

The purpose of this clause is to specify how the Contract can be varied. The clause provides that the Contract can only be varied in writing signed by each party.

Hints for use

A party that wishes to vary the executed Contract should be aware of the procedures under the Contract in relation to variation of the Services. The procedures specified under those clauses will need to be followed where either party wants to vary the Services.

Risk

Despite this clause, it is possible for parties to vary a Contract through oral agreement and subsequent conduct. This can introduce difficulties for management of a Contract, as the agreement of the parties may be subject to dispute. There is a risk, should there be a later dispute, of a party being unable to substantiate the oral agreement reached between the parties.

Parties should strictly observe this clause in varying the Contract and avoid variation by oral agreement or conduct.

17.3 Approvals and consents

Purpose

The purpose of this clause is to clarify that unless expressly stated otherwise, a party has a discretion to withhold its approval or consent or give it conditionally or unconditionally. Parties need to be aware of their obligation to act reasonably in exercising their rights under clause 5 of each model Contract.

17.4 Assignment and novation

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**Purpose**

As a result of this clause, neither party may assign its rights or novate its rights and obligations without the consent of the other party.

Assignment is an arrangement in which a party to a contract assigns his or her benefits in the contract to a third party. Novation is a means of releasing a party from its future obligations under a contract and replacing that party with a new party from a specified date or event.

Novation is usually achieved by a deed of novation between the original parties to the contract and replacing party. Obligations cannot be transferred without the consent of the other party.

**Hints for use**

Parties should seek legal advice before deciding whether to allow a party to assign its rights or transfer its obligations under the Contract to a third party. In determining whether to give consent to the assignment or novation of the Contract, the party should consider whether the third party has the capacity to fulfil the obligations under the Contract.

**17.5 Costs**

**Purpose**

The clause provides that each party must pay its own costs of negotiating, preparing and executing the Contract.

**17.6 Counterparts**

**Purpose**

This clause provides that the Contract can be signed in counterparts. This means that the parties do not need to sign the same copy of the Contract but can each execute an identical copy of the Contract and provide that executed copy to the other party. The executed copies (counterparts) will together constitute the one document.

**Hints for Use**

When executing the Contract in counterparts, caution must be taken to ensure that each counterpart of the Contract is identical. Each party must insert the date they execute the Contract on their counterpart copy of the Contract. The date of the Contract will be the latest of these dates.
17.7 **No merger**\(^{46}\)

*Purpose*

The purpose of this clause is to ensure that the parties' rights and obligations under the Contract continue despite completion of any transaction under the Contract. This means, for example, that the Contractor's obligations in respect of Confidential Information continue despite the completion of the Contractor's obligations for delivery of items under the Contract.

17.8 **Entire agreement**\(^{47}\)

*Purpose*

This clause provides that the Contract is the entire agreement between the parties and overrides all previous agreements or understandings between the parties on the subject matter.

Despite this clause, some rights and obligations may exist between the parties so that the Contract does not, in fact, represent the entire agreement between the parties. For example, terms or representations may be implied into the Contract, because of the operation of the Trade Practices Act 1974 (Cth), even though the parties may not have consciously included them. Such implied terms or representations cannot be overridden by this clause or otherwise.

*Hints for use*

Users of the Contract should ensure that their requirements are clearly detailed in the Contract. Incorporation of documents into a Contract by reference should be avoided, as there is a risk of inconsistency between the referenced document and the Contract terms.

Where pre-contractual representations are made and a party considers that it may later seek to rely on such representations (for example, in a response to a request for tender), these should also be incorporated into the Contract.

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\(^{46}\) Clause 37.7 of the Software Contract; clause 45.7 of the Hardware Contract; clause 31.7 of the Consultancy Contract

\(^{47}\) Clause 37.8 of the Software Contract; clause 45.8 of the Hardware Contract; clause 31.8 of the Consultancy Contract
17.9 Further action

Purpose

This clause imposes an obligation on the parties to do all things necessary, at their own cost, to give effect to the Contract and any transaction contemplated by it. For example, the signing of Confidentiality Undertakings or the assignment of Intellectual Property Rights.

17.10 Severability

Purpose

The purpose of this clause is to ensure that if any term, or part of a term, of the Contract is illegal or unenforceable it may be severed from the Contract, and the remaining terms, or parts of the terms, of the Contract continue to operate. This is to prevent the entire Contract from being found illegal or unenforceable if a term, or part of a term, is found to be illegal or unenforceable.

17.11 Waiver

Purpose

This clause provides that a party may only waive (i.e. relinquish) a right or rights that it has under the Contract by doing so expressly and in writing. This means that a party cannot be taken to have waived a right simply because it has not exercised that right. For example, a decision by the Customer not to claim a Service Rebate on a particular occasion or occasions will not mean that the Customer has waived the right to claim a Service Rebate in the future, unless that right is expressly waived in writing in accordance with the clause.

Hints for use

Before relying on a waiver by the other party, steps should be taken to ensure that the waiver is in the form required by this clause.

17.12 Relationship

Purpose

The purpose of this clause is to make it clear that the Contract does not create a relationship of employment, agency or partnership between the parties. The parties must not represent themselves, and must ensure that their officers, employees, agents and subcontractors do not represent themselves, as being able to bind or represent the other party.

48 Clause 37.9 of the Software Contract; clause 45.9 of the Hardware Contract; clause 31.9 of the Consultancy Contract

49 Clause 37.10 of the Software Contract; clause 45.10 of the Hardware Contract; clause 31.10 of the Consultancy Contract

50 Clause 37.11 of the Software Contract; clause 45.11 of the Hardware Contract; clause 31.11 of the Consultancy Contract

51 Clause 37.12 of the Software Contract; clause 45.12 of the Hardware Contract; clause 31.12 of the Consultancy Contract

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17.13 Announcements

Purpose

The purpose of this clause is to outline when and how the parties may make public announcements in connection with the Contract or any transaction contemplated by it.

Hints for use

The Contractor must obtain the consent of the Customer to any public announcement it wishes to make unless it is required by law to make the announcement, in which case it must consult with the Customer and take into account the reasonable requirements of the Customer.

Where reasonably practicable, the Customer must provide notice to the Contractor of the general nature of any public announcement which it intends to make, but is not required to obtain the consent of the Contractor to make the announcement. The Customer can give the Contractor notice either before or contemporaneously with the making of the announcement.

In preparing and reviewing public announcements, parties should ensure they are comfortable with the release of the information contained in the announcement; in particular, careful consideration should be had to whether the personal information or confidential information is being disclosed.

17.14 Governing law and jurisdiction

Purpose

The Contract is governed by the law specified in the Contract Details (for example, the law of the Australian Capital Territory). This means that the law of that jurisdiction will be used for any interpretation of the Contract and if a dispute arises in connection with the Contract, the parties agree that it will be dealt with in the courts of that jurisdiction.

Hints for use

When deciding the appropriate jurisdiction, users should consider that it can be more convenient and cost effective to obtain legal advice or manage a dispute from the jurisdiction in which the user primarily operates. Stamp duty legislation may be relevant to determining the most appropriate jurisdiction and parties should consider seeking tax advice.
18. Signing page

Purpose

This page contains the execution blocks for the Customer and Contractor. The Customer should sign at the first execution block; typically by inserting the words, for example, 'the Commonwealth of Australia represented by Agency X'. Refer to section 4.2 of the User Notes - Specific Clauses for further information on correctly describing the parties to the Contract.

For the Contractor, a choice should be made between one of the two displayed execution blocks:

(a) **Option 1**: This option is appropriate where the Contractor is a company registered under the *Corporations Act 2001* (Cth). Users can ascertain whether a company is registered under the *Corporations Act 2001* (Cth) by searching the [ASIC database](https://www.asic.gov.au). This execution block should be signed by either two directors or a director and the company secretary. When the Contract is signed in this manner, it is signed in accordance with section 127 of the *Corporations Act 2001* (Cth), and entitles the Customer to assume that the Contract has been duly (ie, properly) executed by the company.

As an alternative to this option, if the Contractor is a company registered under the *Corporations Act 2001* (Cth), but has one person who is the sole director and sole company secretary, the following execution block should be used rather than either of the execution blocks shown on the Signing page:

*Executed by [insert name of company]*

[[Signature of sole director and sole company secretary] who states that he or she is the sole director and the sole company secretary of the company.]

[[Name of sole director and sole company secretary (print)]]

(b) **Option 2**: If the Contractor is not a company registered under the *Corporations Act 2001*, the second execution block (as shown on the Signing page of each Contract) should be used.