SourceIT User Notes - Schedules

Hardware Acquisition and Maintenance Contract

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Hardware Acquisition and Maintenance Contract

Introduction

1. Using these notes

These User Notes contain an explanation of the purpose of the Schedules to the Hardware Acquisition and Maintenance model Contract (model Contract). Where relevant, hints for the use of Schedules are also included. For guidance on the 'Specific clauses' and 'General requirements' sections of the model Contract, please see the SourceIT website for the corresponding User Notes (User Notes – Specific Clauses and User Notes - General Requirements).

The explanations in these User Notes appear in the same order in which the Schedules appear in the model Contract. Capitalised words in these User Notes refer to defined terms in the model Contract.

Further advice, additional to that contained in these User Notes, can be obtained from the Department of Finance by email to 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 Contract is available at the SourceIT website. Only the most recent version of the model Contract should be used. Finance advises against modifying or using a modified version of the model Contract without consulting your legal or procurement adviser. Finance recommends that users download the model Contract from the website each time such a contract is required, to ensure users have the most up-to-date version of the model Contract.

3. Purpose and structure of the Schedules

3.1 Purpose

The purpose of the Schedules to a Contract is to set out the specific requirements for the procurement. The Agreed Terms of the Contract have been drafted to be used with minimum or no alteration for the majority of procurements, with any variations to the default positions to be set out in the Schedules. This design allows procurement officers and suppliers to focus on the requirements specific to their particular project rather than the standard terms and conditions.

3.2 Priority

The order of priority of the documents which comprise a Contract is set out in clause 2 of the Agreed Terms (for further information, refer to the User Notes – Specific Clauses). The Agreed Terms of this model Contract override the Schedules, to the extent of any inconsistency, with the exception of the Open Source Licence provisions.
Guidance on the specific Schedules

4. Schedule 1 – Contract Details

**Purpose**

This Schedule sets out the variables for the Contract, including any variation from the default position set out in the Agreed Terms. Each item in the Contract Details refers to a specific clause in the Contract and has brief user notes to assist parties to complete the items appropriately.

**Hints for use**

Customers should carefully consider the default position of each clause before agreeing to vary the clause, and be mindful of the fact that a variation agreed to for one project or purchase may not be appropriate for another. The variation of the default position of a clause may have a significant impact on a project and should be considered in the context of the business requirements of the Customer in respect of that project. Please also refer to the User Notes for each of the clauses referenced in the Contract Details.

Items which require careful consideration prior to amending include:

(a) **Removal of equipment (item 12)**

This item is linked to clause 9 (Removal of Equipment) – please refer to the relevant User Note for this clause.

The default position expressed in clause 9 is that the Contractor is not required to remove any equipment from the Customer's premises. If the Customer requires the Contractor to remove equipment:

(i) this must be stated in this item; and

(ii) regard should be given to the *Environmental Purchasing Guide*.

(b) **Intellectual property rights in Contract Material (item 26 to 29)**

Refer to User Notes - Specific Clauses for further guidance in relation to Intellectual Property Rights.

Customers are encouraged to seek advice from their legal or procurement advisers before deciding on appropriate Intellectual Property Rights clauses.

The Statement of Intellectual Property Principles for Australian Government agencies is a whole of government approach to the management of intellectual property by government agencies. Further information on the Statement of Intellectual Property Principles can be found at the *Attorney General's Department website*.

(c) **Capping of Liability (items 30 to 33)**

These items are linked to clause 32 (refer to the relevant section of the User Notes – General Requirement). Before setting a cap on liability
through item 30, Customers should have regard to the guidance on this issue provided in:

(i)  *A guide to limiting supplier liability in ICT contracts with Australian Government agencies*;

(ii)  *Commonwealth Procurement Rules*;

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

(iv)  *Contingent liabilities: indemnities, guarantees, warranties on behalf of the Commonwealth* at the Finance web site.

Users should also seek advice from their legal and procurement advisers prior to agreeing to limit liability through item 31 of the Contract Details in relation to:

(i)  personal injury;

(ii)  loss or, or damage to, tangible property;

(iii)  infringement of Intellectual Property Rights;

(iv)  a breach of any obligation of confidentiality, security matter or privacy; or

(v)  unlawful or wilfully wrong acts or omissions.

Through the Contract Details, users can make choices in relation to whether the limitation on liability should apply on an aggregate basis or per occurrence and whether set-off or payment of Service Rebates should be included in the cap on liability. Again, it is recommended that you seek advice on these issues.

(d)  **Insurance (items 34 and 35)**

A Customer cannot directly access the insurance monies payable under a contract of insurance held by the Contractor. The Contract requires the Contractor to hold certain types of insurance against which the Contractor can claim if the Customer makes a successful claim against the Contractor. The amount of insurance required to be held under each policy is dependent on the level of risk that the Customer assesses for a particular contract.

5.  **Schedule 2 – Statement of Work**

**Purpose**

The purpose of this Schedule is to include the details of all Services and Deliverables, including the Hardware, to be provided by the Contractor under the Contract. It is important that all Services and Deliverables are clearly set out in this Schedule, along with the relevant Milestone dates and Acceptance Criteria to help to ensure that both parties have a shared understanding of each other's obligations under the Contract.

**Hints for use**
This Schedule is divided into sections for ease of use and general guidance. However, the format of this Schedule is provided as an example only and may be varied to suit the requirements of each project. Customers may need to attach additional pages to the Schedule, which can be done by way of an Annexure. It is not recommended that documents are incorporated into a Contract by reference.

The parties should have particular regard to the following items:

(a) **Hardware**

Details of all Hardware to be provided should be inserted in section 2. If the Contractor is to deliver and install the Hardware, the relevant columns should be completed.

(b) **Specifications**

The technical, functional and performance specifications for each Deliverable (including the Hardware) should be set out at section 3 or attached as an Annexure to this Schedule, along with any particular system requirements.

In many instances, the parties will negotiate the Specifications to be included in the Contract, based on a combination of:

(i) the statement of functional and technical requirements (or similar) that was released by the Customer in its approach to market; and

(ii) the response received from the Contractor to that statement of requirements.

It is important that both parties work together to clearly define the functional and technical requirements of each Deliverable to help avoid future disputes.

If the Specifications are likely to vary over the Contract Period (for example, additional functionality is added), this should be clearly stated. Any variation to the Specification should be agreed via the change control process set out in clause 21 of the model Contract.

(c) **Services**

A description of each Service to be provided should be included in section 4. Details of the Maintenance Services should be included in the tables in section 5, with additional pages added as an Annexure, if required.

Service Levels apply in respect of Preventative and Remedial Maintenance. As the definition of Service Levels refers specifically to those set out in the Statement of Work, sections 5.2 and 5.3 must be completed for the Service Level clauses to be effective.

If payments are to be linked to the achievement of Milestones, the Milestone dates specified for Services or Deliverables in this Schedule should be the same as those specified in Schedule 3 – Payment.
(d) **Acceptance testing**

This section of the Statement of Work is linked to clauses 19.2 and 24 of the Contract. As this is a simple Hardware procurement, under clause 24 the Hardware will be deemed to be Accepted by the Customer on delivery. If the Customer requires Acceptance testing of Hardware to occur, this must be stated in the Contract Details and the details set out in the Statement of Work, such as:

(i) any Acceptance Criteria which will apply beyond the requirements set out in the Specifications. Such criteria should be consistent with the Specifications;

(ii) the facilities that the Contractor is required to provide for the purpose of Acceptance testing;

(iii) the timeframes which will apply in relation to the preparation for Acceptance testing; and

(iv) the role of each party in conducting the Acceptance tests.

The above is also applicable for the Acceptance testing of Services.

**Example:**

<table>
<thead>
<tr>
<th>Service/Deliverable</th>
<th>Acceptance Criteria</th>
<th>Acceptance testing date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Project plan</td>
<td>Project plan must meet the requirements set out in item YY of the Statement of Work</td>
<td>5 February 2016</td>
</tr>
<tr>
<td>2. Installation of Hardware</td>
<td>Hardware must be installed at each Delivery Place and set-up tests successfully run</td>
<td>19 March 2016</td>
</tr>
</tbody>
</table>

6. **Schedule 3 – Payment**

**Purpose**

This Schedule is linked to clause 29 (Payment) and clause 30 (GST) and sets out:

(a) a summary of the Service Charges (including for the supply of Hardware, and Hardware Maintenance Charges) to be paid to the Contractor;

(b) Hardware Charges;

(c) Hardware Maintenance Charges – fixed fee components;

(d) hourly and daily rates which may be payable during the Contract Period;

(e) Milestone payments due on the achievement of a Milestone;

(f) Service Rebates;

(g) invoicing requirements; and
(h) the basis on which expenses will be paid.

Hints for use

Each of the sections of this Schedule should be either completed with the appropriate information or marked as 'Not Applicable'.

Items which require careful consideration when drafting include:

(a) GST

All Service Charges and rates are expressed to be GST exclusive. If payments are to be made on a GST inclusive basis, tax advice should be sought as clause 30 is not appropriate for use with GST inclusive amounts (refer to the relevant User Note - General Requirements for this clause).

(b) Summary of Service Charges

This table provides a summary of each of the Charges payable to the Contractor under the Contract, including Installation, Hardware and Maintenance Charges. This table should reflect, in summary form, the details set out in each of the tables at sections 2, 3 and 4 of this Schedule.

(c) Hardware Charges

The per unit costs of the Hardware should be inserted into this section 2, which allows for specific volume variations. These volume variations can be amended by the parties to suit the requirements of the project.

(d) Hardware Maintenance Charges - fixed charge components

The table in section 4 should be used if the parties have agreed a fixed charge for the Services. A fixed charge for particular Services will not change unless the scope of the Services changes. This type of charge arrangement is appropriate where Services or components of Services are clearly definable.

A fixed charge arrangement has the advantage of enabling both parties to understand the level of charges payable under the Contract. If a fixed charge arrangement is agreed, both parties are responsible for managing the scope of the Services and any dependencies. Any variation to the Services (and to the fixed charge) should be agreed through the change control process set out in clause 21 of the Contract.

Fixed charges may be broken down into Milestone payments and set out in section 7 of this Schedule.

(e) Hourly and daily rates

Time and materials arrangements are appropriate where the scope of the Services or components of Services required are not readily definable at the time of signing the Contract. A Contract may contain both fixed fee and time and materials components.

If the parties have agreed that the Services will be provided on a time and materials basis, relevant hourly and/or daily rates for each personnel
category (or for all Key Personnel) should be included in the tables in sections 5 and 6, as appropriate.

Where time and materials is agreed as the payment basis, it is in the interests of both parties that expectations as to costs are managed. This can be achieved in part by including in both tables a maximum work effort for each personnel category or Key Personnel member.

**Example:**

<table>
<thead>
<tr>
<th>Personnel</th>
<th>Daily Rate [ex GST]</th>
<th>GST Component</th>
<th>Maximum Work Effort (Days)</th>
<th>Charges [ex GST]</th>
<th>GST Component</th>
</tr>
</thead>
<tbody>
<tr>
<td>Project manager</td>
<td>1200</td>
<td>120</td>
<td>10</td>
<td>12,000</td>
<td>1,200</td>
</tr>
<tr>
<td>Technician</td>
<td>800</td>
<td>80</td>
<td>17</td>
<td>13,600</td>
<td>1,360</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>Sub total</strong></td>
<td><strong>25,600</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>Add GST</strong></td>
<td><strong>2,560</strong></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>TOTAL</strong></td>
<td><strong>$28,160</strong></td>
</tr>
</tbody>
</table>

Any changes to the estimated work effort should be managed through the change control process in clause 21 of the Contract.

**Milestone payments**

Payment of Service Charges against Milestones is a common way to help ensure that the Contractor delivers the Services and/or Deliverables consistent with the requirements of the Contract. It also has the advantage for the Contractor of knowing precisely what it has to achieve in order to receive payment. If Milestone payments are linked to the delivery of particular Services or Deliverables, the Milestone dates set out in section 7 should be consistent with those set out in the Statement of Work.

**Example**

<table>
<thead>
<tr>
<th>Milestone date</th>
<th>Milestone/Deliverable</th>
<th>Milestone Payment</th>
<th>GST Component</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 February 2016</td>
<td>Project plan Accepted by Customer</td>
<td>12,000</td>
<td>1,200</td>
</tr>
<tr>
<td>19 March 2016</td>
<td>Hardware Accepted by Customer</td>
<td>30,000</td>
<td>3,000</td>
</tr>
<tr>
<td>25 March 2014</td>
<td>Hardware Installed and operational at all sites</td>
<td>40,000</td>
<td>4,000</td>
</tr>
<tr>
<td></td>
<td><strong>Sub total</strong></td>
<td><strong>82,000</strong></td>
<td><strong>8,200</strong></td>
</tr>
</tbody>
</table>
(g) Service Rebates

This section is linked to clause 25.2 of the Contract (refer to the User Notes -Specific Clauses, for this clause). If Service Rebates are to be applied to this Contract, the methodology for calculating the amount should be set out in this section.

Service Rebates are a form of liquidated damages, that is, they are a genuine pre-estimate of damages likely to be suffered by the Customer as a result of a breach by the Contractor. In order to be legally recoverable a Customer must be able to quantify its foreseeable damages arising out of a failure by the Contractor to comply with its obligations under the Contract. The Service Rebates can be recovered by a Customer as a debt.

Under this Contract, Service Rebates are applicable to the failure of the Contractor to comply with the Service Levels or to meet certain Milestone dates. The advantage of the Service Rebate provision is that a Customer does not have to prove the loss that is suffered without proof of the actual loss. However, if the amount stipulated bears little resemblance to the loss that could occur, it may be classified as a penalty, which is not enforceable under contract law.

If a Customer requires the ability to claim Service Rebates, it must set the Service Rebates at level that reflects a genuine estimate of the impact of the failure. To this end, Customers should consider applying Service Rebates only to those Service Levels which are critical to business operations.

It is recommended that both parties document how the estimate of the impact of failure was made. If challenged, a Customer must bear the burden of demonstrating that the level of Service Rebates was based on a reasonable pre-estimate of actual loss.

Customers should seek legal advice or advice from a procurement officer as appropriate prior to drafting the Service Rebate provisions in this Schedule.

Example:

<table>
<thead>
<tr>
<th>Services to be delivered under the Contract</th>
<th>Services to be delivered under the Order</th>
</tr>
</thead>
<tbody>
<tr>
<td>Problems resolved or workaround in place within 2 days of notification of Problem</td>
<td>Service Rebates = Daily Rate x number of days in excess of 2 where Problem remains unresolved or a workaround has not been provided;</td>
</tr>
<tr>
<td></td>
<td>Where:</td>
</tr>
<tr>
<td></td>
<td>Daily Rate is the charge for each whole day or</td>
</tr>
</tbody>
</table>

Add GST | 8,200

TOTAL | $90,200
(h) Invoicing

This section is linked to clauses 29.2 and 29.4 of the Contract. Customers should include in this section any specific requirements they have for invoices.

For example:

(i) The Contractor must provide a single invoice for each month that sets out the, Hardware, Installation charges, Hardware Maintenance Charges and Milestone Payments, and any other amounts payable by or the Customer under this Contract for that month. Each invoice must be in a format that:

(A) is a tax invoice;

(B) enables the Customer to identify and allocate the amounts invoiced including payments for Services and Milestone payments.

(ii) where the invoice is for variable charges based on daily or hourly rates, include detail of the:

(A) Contractor Personnel who have provided the Services;

(B) the applicable hourly or daily rates; and

(C) the Services performed by those personnel during the invoice period.

(iii) Invoices must be addressed and sent to the Customer Representative at the address set out in the Contract Details.

7. Schedule 4 – Designated Confidential Information

Purpose

This Schedule is linked to the confidentiality and privacy clause 34 in the Contract (refer to the User Note – General Requirements, for that clause) and the definition of Confidential Information in clause 1.1.

Hints for use

The parties should set out in this Schedule any information they require to be designated as 'confidential' and the period of confidentiality applicable to each item. This could include any particular clauses of the Contract or Schedules or any Contract related Material, for example, Customer Data or information relating to Personnel.

Where a Contractor requests certain information to be designated as confidential, Australian Government policy requires Customers which are PGPA Act entities to consider whether that information should be subject to a contractual
confidentiality obligation and to apply specified tests. Reference should be made to Confidentiality throughout the Procurement Cycle. - Principles when completing this Schedule.

While the definition of Confidential Information is not exclusively limited to the information set out in this Schedule, the parties should include all information that they specifically require to be treated as confidential in this Schedule to avoid any later uncertainty as to the confidential nature of the information.

8. Schedule 5 – Customer Requirements

Purpose

This Schedule is linked to the 'Provision of Deliverables and Services' clause 13 in the Contract (refer to the User Note – Specific Clauses, for that clause) and allows Customers to set out any particular policies or legislative requirements that apply to contracts which they enter, for example, secrecy provisions.

Hints for use

Customers should only set out particular legislative and policy requirements which are applicable to the particular transaction and which are not already covered in the Agreed Terms. Examples could include:

(a) specific secrecy provisions contained in Customer specific legislation; or
(b) specific Customer requirements set out in the Customer's Accountable Authority’s Instructions.

9. Schedule 6 – Change Order

Purpose

This Schedule is linked to the 'Varying the Deliverables or Services' clause 21 in the Contract (refer to the User Note – Specific Clauses, for that clause) and allows either party to request a change to the Services and/or Deliverables and, subject to agreement of the other party, provides for the Contract to be amended accordingly.

This form has been designed to streamline operational changes minimising the need for legal review. It is important to note that the Change Order form, once executed by both parties, serves to vary the Contract. This being the case, the Change Order form should not be used to vary the Agreed Terms of the Contract. Such changes should be dealt with by way of a formal Deed of Variation.

Hints for use

This form should be completed by the parties once the scope of the variation to the Services has been agreed through the process set out in the relevant Contract clause. If a section on the form is not applicable, this should be marked 'Not Applicable'. Particular care should be taken when completing the details of the change, effect on Service Levels and Service Charges.

Once a Change Order is executed by both parties, the Contract is varied to give effect to that Change Order.
Original signed copies of all Change Orders should be provided to both parties and kept together in date order in a secure place with the original signed Contract.

10. **Schedule 7 – Agency Order Form**

*Purpose*

This Schedule is linked to clause 4 of the Contract (refer to the relevant User Note – Specific Clauses, for that clause) and allows a Nominated Agency to procure Services substantially the same as those provided under the Contract on the same terms and conditions set out in the Contract. The Agency Order Form creates a contract between the Contractor and the Nominated Agency on execution by both parties.

*Hints for use*

Nominated Agencies are required to complete the form set out in this Schedule. Particular care must be taken when completing item 8 of the Order to ensure that the Services and/or Products to be delivered under the Order are substantially the same as those to be delivered under the Contract:

*Example:*

<table>
<thead>
<tr>
<th>Services to be delivered under the Contract</th>
<th>Services to be delivered under the Order</th>
<th>Allowed under clause 4?</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,000 model YY Satellite Phones at set price, with ability to upgrade to model YY over the term</td>
<td>2,000 model YY Satellite Phones at the same set price</td>
<td>Yes, the upgraded model formed part of the original request for tender and has been assessed as representing value for money</td>
</tr>
<tr>
<td>5,000 routers, per unit price</td>
<td>2,000 switches</td>
<td>No, the colour printer has not been market tested</td>
</tr>
</tbody>
</table>

11. **Schedule 8 – Open Source Licence**

*Purpose*

This Schedule is linked to the 'Open Source Software' clause 6 in the Contract (refer to the relevant User Note – Specific Clauses, for that clause) and allows for the provisions of an Open Source Licence to be inserted. The inserted provisions will apply to any Hardware that includes any software that is licensed to the Customer under an open source software arrangement.

The terms of this Schedule will prevail over the Agreed Terms of the Contract to the extent that there is any inconsistency between them.

*Hints for use*

Only provisions of an open source licence agreement acceptable to the Customer should be inserted in this Schedule.
Where the provisions of an open source licence agreement are obtained online, the Customer should ensure that the licence is printed off and inserted into Schedule 8 prior to execution of the Contract.

12. Schedule 9 – Confidentiality and Privacy undertaking

*Purpose*

This Schedule is linked to clause 34 of the Contract (refer to the relevant section of the User Notes – General Requirements) and allows the parties to insert a written confidentiality and privacy undertaking into Schedule 9 to the Contract prior to execution.

*Hints for use*

Each party should consider whether the other party's Advisers or employees are likely to have access to confidential or personal information in the course of performing services under the Contract that requires them to personally sign an undertaking. Insertion of an undertaking in Schedule 9 can provide certainty to the parties and avoid the need for negotiations on the form of an undertaking after execution of the Contract.