SourceIT User Notes
Specific Clauses
IT Consultancy Services Contract
SourceIT User Notes – Specific Clauses

IT Consultancy Services Contract

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IT Consultancy Services Contract

Introduction

1. Using these notes

These User Notes contain an explanation of the purpose of the specific clauses of the IT Consultancy Services Contract (model Contract). Where relevant, hints for the use of the clauses and a description of the risks and issues with specific clauses are also included. For guidance on the 'General requirements' section of the model Contract or the Schedules, please see the SourceIT website for the corresponding User Notes (User Notes - General Requirements, and User Notes - Schedules).

The explanations in these User Notes appear in the same order in which the clauses 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 model Contract

This model Contract is intended for the provision of IT consultancy services only. This includes IT professional services, for example, preparation of a report relating to the information technology systems of a Customer, preparation of a statement of work or specifications, assistance in an information technology procurement process and provision of information technology training.

Assumptions underlie the model Contract and users should ensure they fully understand and manage these. The following assumptions apply to this model Contract:

(a) the model Contract relates to the provision of information technology consultancy services only. It is not intended to be used for the provision of services other than services relating to information technology;

(b) the model Contract is intended to be used for simple information technology consultancy services. It is not intended to be used for the supply of complex or multifaceted information technology services, such as software development services;

(c) the model Contract is not a deed of standing offer and, as a result, is not suitable for panel arrangements or as an arrangement facilitating the hire of information technology contractor personnel;

(d) the model Contract assumes contracting between a Commonwealth Agency and one service provider, in contrast to multiple contractors. The terms and suitability of the model Contract will need to be carefully considered if arrangements are to involve more than one contractor. Advice should be sought in such circumstances;
(e) the model Contract assumes contracting between a Commonwealth Agency and a non-government service provider. Some of the provisions of the document may not be appropriate to an arrangement between two or more non-government entities or between two or more Commonwealth Agencies. Advice should be sought in these circumstances;

(f) except where specifically provided, the Agreed Terms of the model Contract are not intended to accommodate variations and are not designed for alteration without appropriate procurement and legal advice. Where appropriate, provision is made in Schedule 1 (Contract Details) for variables to be inserted and in some cases, limited departure from the Agreed Terms is accommodated. Users should ensure that relevant variables are included in the Contract Details, where required;

(g) the clauses in the model Contract relating to confidentiality, audit and privacy are publicly available clauses recommended for use by the Department of Finance, the Australian National Audit Office and the Office of the Australian Information Commissioner respectively; and

(h) it is strongly recommended that users of the model Contract refer to these User Notes, the User Notes – General Requirements and User Notes - Schedules.

3. 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.

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 the specific clauses

4. Contract information

4.1 Date

**Purpose**

Insertion of the date provides a record for the parties and users of the Contract of the date the Contract was executed (i.e. signed).

**Hints for use**

The actual date of signing of the Contract should be inserted where indicated. The date the Contract is to commence should not be inserted in this section of the Contract. There is provision in the Contract Details for the date of commencement of the Contract to be inserted. Where the parties sign on different days, the date the last party signs the Contract should be inserted.

4.2 Parties

**Purpose**

The purpose of this section is to correctly identify the parties entering into the Contract. Insert only the name of the Customer and Contractor. Items 1 and 2 of the Contract Details are the proper places for the parties’ Australian Business Numbers and street addresses.

**Hints for use**

The following table includes information that should be included and examples of some of the most common types of entities. It is important to be accurate when inserting the names of the parties.

<table>
<thead>
<tr>
<th>Entity type</th>
<th>Information to be included</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>A Non-Corporate Commonwealth Entity (NCCE) subject to the Public Governance, Performance and Accountability Act 2013 (Cth)</td>
<td>The name of the NCCE representing the Commonwealth and reference to the Commonwealth</td>
<td>The Commonwealth of Australia as represented by Geoscience Australia</td>
</tr>
<tr>
<td>Corporate Commonwealth Entity (CCE)subject to the Public Governance, Performance and Accountability Act 2013 (Cth)</td>
<td>Insert the name of the CCE</td>
<td>Commonwealth Scientific and Industrial Research Organisation</td>
</tr>
<tr>
<td>Company incorporated under the Corporations Act 2001 (Cth)</td>
<td>The name of the company (see <a href="http://www.asic.gov.au">www.asic.gov.au</a> for more information on</td>
<td>ABC Pty Limited</td>
</tr>
</tbody>
</table>

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An incorporated association (i.e. an association incorporated under the relevant legislation of a State or Territory) | The name of the incorporated association including the words 'incorporated' | ABC Incorporated

A trust | The name of the trustee and the trust | ABC Pty Ltd as trustee for the ABC Trust

A partnership | The name of the partnership and, where practicable, the full names of each of the partners | ABC Partners comprising Fred Smith, Margaret Jones and Sarah Johnson

An individual person | The name of the individual person | Mary Smith

4.3 Background

Purpose

This section of the Contract provides a brief explanation of the background leading up to the formation of the Contract.

Hints for use

A simple background is provided in the Contract Information section of each model Contract. The background provided will not require amendment in most cases. However, if there are unique or complicated circumstances leading up to the execution of the Contract, it may be useful to include a brief description of those circumstances in this section of the Contract.

5. Definitions and interpretation (clause 1)

5.1 Definitions

Purpose

This clause defines terms that are used consistently throughout the Contract.

Hints for use

Many of the definitions cross refer to information which should be set out in detail in the Schedules. If the parties do not insert this information or insert incorrect information in the relevant Schedule the definition may become meaningless or inaccurate.

Some of the definitions (for example Business Hours) provides a default definition but specifically allow for that definition to be varied in the Contract Details.
5.2 Interpretation

Purpose

This clause details general rules of interpretation that apply to the Contract and which assist with its legal interpretation. There should be no reason to amend this clause.

5.3 Completion of Schedules

Purpose

The clause makes it clear that if an item of a Schedule is not completed, it will be deemed not applicable.

Hints for use

Refer to the User Notes - Schedules for further information on completion of the Schedules.

6. Priority of Contract documents (clause 2)

Purpose

The clause resolves any inconsistency between parts of Contract (including documents incorporated by reference) by specifying an order of priority. Where there is inconsistency between parts of the Contract, those parts higher in the list prevail over those lower in the list to the extent of the inconsistency. For example, a clause in the Statement of Work which seeks to exclude the warranty in the Agreed Terms that the 'Services will comply with the Specifications and Documentation' would be ineffective.

Hints for use

Consideration needs to be given to the order of priority set out in this clause when preparing Schedules, attaching documents to the Schedules or incorporating documents by reference.

The Agreed Terms will prevail over any Schedule to the extent of any inconsistency.

7. Duration of Contract (clause 3)

Purpose

This clause governs how long the Contract is in effect. The Contract begins on the Commencement Date (the date specified in the relevant item of the Contract Details) and continues for the Initial Contract Period (the period specified in the relevant item of the Contract Details).

The Customer may extend the term of the Contract for further period(s) specified in the relevant item of the Contract Details. To extend the term of the Contract, the Customer must give 30 days written notice (or other period specified in the Contract Details) to the Contractor prior to the expiry of the current term.
Clause 30 specifies the requirement for notices and determines when a notice is taken to be received (for further information refer to the guidance on clause 30 the User Notes - General Requirements).

An Option Period (further extended period) takes effect from the end of the current Contract Period and the terms and conditions in effect during the current Contract Period apply to the Option Period.

**Hints for use**

Careful consideration needs to be given to the date the Contract is to commence, the period of time the Contract is to continue, the period of any extension and the period of notice for the exercise of any extension.

8. **Services to other Agencies (clause 4)**

**Purpose**

This clause allows a Commonwealth 'Nominated Agency' to obtain Services (substantially the same as those Services provided to the Customer) on the same terms and conditions as those set out in the Contract.

The clause caters for the situation where a Commonwealth Agency has:

(a) as part of its procurement planning process, identified other Agencies which may require Services similar to those Services to be provided under the Contract; and

(b) in its Request for Tender, or similar request documentation, (where such request documentation is required) alerted potential suppliers that other 'Nominated Agencies' may be able to 'piggyback' onto the Contract.

This 'piggybacking' mechanism facilitates the reduction of costs and duplication of procurement processes between Commonwealth Agencies through careful procurement planning. Refer to Cooperative Agency Procurement – Principles and Cooperative Agency Procurement – Practice for further information.

This clause is not intended to allow Agencies to act in a manner contrary to the Commonwealth Procurement Rules.

**Hints for use**

All Nominated Agencies should be listed in the appropriate item of the Contract Details. As discussed above, this list must be consistent with the list of Agencies identified in the Request for Tender (or similar request documentation) as being able to 'piggyback' on the Customer's Contract with the Contractor.

To make use of this clause a Nominated Agency must complete the Agency Order Form set out in the Contract Schedules and provide a copy of that form to the Contractor. Once the Contractor and Nominated Agency have agreed on the terms of the Agency Order Form and executed that document it creates a separate contract between the Customer and Nominated Agency. Refer further to the User
Notes - Schedules which includes examples of instances where this clause might be used.

**Risks**

Each Agency remains responsible for its own procurement process and its outcome and for compliance with the *Commonwealth Procurement Rules*. If this clause is used, for example, by an Agency 'piggybacking’ onto the Contract where:

(a) that Agency would otherwise be required under the *Commonwealth Procurement Rules* to make an open approach to the market in relation to provision of the Services; and

(b) its Request for Tender (or similar request documentation) for the Services did not cater for such 'piggybacking’ arrangements,

there is a risk that the relevant Agency will be acting inconsistently with the *Commonwealth Procurement Rules*. It is important that all Commonwealth officers and employees involved in procurement are aware of their obligations under the *Commonwealth Procurement Rules*.

Potential Contractors will need to take account of any possible 'piggybacking' arrangement when preparing their response (particularly their pricing) to any Request for Tender (or similar request documentation).

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9. **General obligations of the parties (clause 5)**

**Purpose**

This clause places a general obligation on the parties to conduct themselves in a reasonable manner and diligently perform their respective obligations under the Contract. It is intended to encourage a cooperative working arrangement between the Customer and Contractor.

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10. **Provision of Services (clause 6)**

10.1 **Service obligations (clause 6.1)**

**Purpose**

This clause sets out a range of obligations on the Contractor with respect to the nature, standards and timing of performance of the Services.

**Hints for use**

Some of the aspects of this clause (including clause 6.1(b) and (d) in relation to Performance Criteria, and Specified Personnel respectively) are dealt with in more detail in other clauses of the Contract (see User Notes for clauses 11 and 12 below).

The parties should be aware of the following features of this clause:
(a) clause 6.1(c) makes provision for any specifically identifiable standards, best practice measures or guidelines which will apply to the Services to be set out in the relevant section of the Contract Details;

(b) clause 6.1(f) makes provision for applicable Commonwealth policies and specific requirements of the Customer to be included in Schedule 5 of the Contract. Such additional requirements might include, for example, specific policies or legislative provisions of particular importance to the Customer; and

(c) clause 6.1(h) requires the Contractor to perform the Services in accordance with the Milestones. All significant Milestones should be specified in the Statement of Work.

10.2 Contractor warranties (clause 6.2)

Purpose

This clause sets out a range of general representations and warranties given by the Contractor in relation to its ability and competency to provide the Services as well as the quality and fitness for purpose of the Services.

Hints for use

In addition to the obligations in this clause in relation to Harmful Code, the Contractor has a broader obligation under clause 6.1 to supply the Services with due skill and care.

10.3 Access to Customer's premises (clause 6.3)

Purpose

The purpose of this clause is to facilitate the provision of the Services by the Contractor. It requires the Customer to provide access to its premises as necessary for the Contractor to deliver the Services. This clause will not apply if the Contractor will not require access to the Customer's premises.

10.4 Conduct at Customer's premises (clause 6.4)

Purpose

This clause outlines the Contractor's general obligations with respect to use or access to (where relevant) the Customer's premises or facilities. The Contractor is required to comply with the Customer's reasonable directions and procedures relating to occupational health and safety and security in operation at the premises or facilities.

Hints for use

This clause will not apply if the Contractor will not require access to the Customer's premises.

Wherever possible and practicable the Customer should draw significant work health and safety, security and other relevant procedures specifically to the
attention of the Contractor. This ensures greater certainty for both parties regarding the Contractor's obligations.

The Contractor is also required to comply with procedures which might reasonably be inferred from the circumstances.

10.5 Subcontracting (clause 6.5)

Purpose

This clause imposes obligations on the Contractor in relation to subcontracting any part of the Services under the Contract.

The clause prohibits the Contractor from subcontracting:

(a) any part of the Services without the Customer's approval; and
(b) with a person or organisation named by the Director of the Workplace Gender Equality Agency as an employer that is not complying with the reporting requirements of the Workplace Gender Equality Act 2012 (Cth).

In addition, it requires the Contractor to ensure that any approved subcontractor complies with certain conditions contained in the Contract. These conditions represent some of the key Commonwealth standard terms and conditions.

Hints for use

Where the Customer has pre-approved the use of any subcontractor in performance of the Services, that entity should be specified in the relevant item of the Contract Details. Pre-approved subcontractors must still comply with the other requirements of the Contract.

With respect to clause 6.5(b), further information on whether a subcontractor has been named as an employer currently not complying the reporting requirements of the Workplace Gender Equality Act 2012 (Cth) can be found at the Workplace Gender Equality Agency website.
10.6 Work Health and Safety (clause 6.6)

**Purpose**

This clause imposes an obligation on the Contractor to comply with and ensure their staff and subcontractors comply with the *Work Health and Safety Act 2011* (Cth) (WHS Act) and any ‘corresponding work health and safety law’ as defined in section 4 of the WHS Act.

**Hints for use**

Significant differences exist between the WHS Act and the Occupational Health and Safety Act it replaces. Consequently, the Customer should familiarise themselves with the obligations and responsibilities associated with the WHS Act when engaging a Contractor. All parties to the Contract should be provided with access to information regarding each party’s obligations and responsibilities. Further information is available at the [Safe Work Australia website](https://www.safeworkaustralia.gov.au).

11. Documentation (clause 7)

**Purpose**

This clause details the Contractor's obligations regarding the provision of Documentation to the Customer, and sets out certain standards that the Documentation must meet.

**Hints for use**

The Contractor is required to provide any documentation specified in the Statement of Work. Accordingly, the details of the Customer's requirements with respect to the Documentation, including in relation to the nature, format and timing for delivery, should be set out in the Statement of Work.

The parties may specify that the Document is written in a language other than English by stating this in the relevant section of the Contract Details.

12. Varying the Services (clause 8)

**Purpose**

This clause sets out a procedure for effecting a change to the scope of the Services to be performed by the Contractor. It is *not* intended to be a mechanism for changing the Agreed Terms. The procedure allows either the Customer or Contractor to request a change to the Services and, subject to agreement of the other party, provides for the Contract to be amended accordingly.

**Hints for use**

If a party wishes to change the scope of the Services it must request the variation in writing and the other party must respond within 14 days of receiving that request, unless another period is agreed. The procedure differs depending on which party requests the variation.
In either circumstance the Contractor is required to specify the impact the variations will have on the Contract, including the Service Charges, Services, or Deliverables, and the Contractor's ability to perform its obligations. The Customer is required to give the Contractor a written notice either accepting or rejecting the Contractor’s response or request for variation.

An agreed variation does not take effect until both parties have executed a completed Change Order form setting out the details of the variation. This form has been designed to streamline operational changes without necessarily requiring legal review.

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 terms of the Contract or any other Schedule to the Contract. Such changes should be dealt with by way of a formal Deed of Variation. For further information refer to the section of the User Notes - Schedules dealing with the Change Order form.

When giving a notice under this clause the parties should be mindful of clause 30, which specifies the requirements for the giving and receipt of notices (for further information refer to User Notes - General Requirements relevant to clause 30).

Changes to the Agreed Terms of the Contract should only be made in accordance with clause 31.2 (refer to User Notes - General Requirements relevant to clause 31.2).

**Risk**

It is important to ensure that any variation to the Services is agreed by the parties and clearly recorded in writing through the change control process set out in this clause. Failure to do so may lead to confusion as to the parties' respective obligations and be a potential source of dispute.

13. **Co-operation with Personnel and contractors (clause 9)**

**Purpose**

Under this clause the Contractor, in providing the Services, is required to cooperate with the Customer’s Personnel (including the Customer's employees, agents and any other contractors) and generally conduct itself in a manner that supports and facilitates the completion of work being performed for the Customer by another person.
14. Monitoring progress (clause 10)

**Purpose**

This clause governs how the parties will monitor the progress of Service delivery under the Contract. It provides for progress meetings to be conducted between the parties to discuss any issues in relation to provision of the Services and for the Contractor to provide reports to the Customer.

**Hints for use**

For this clause to have operational effect, details regarding when the progress meetings will be held and the nature and timing of any reports to be provided by the Contractor must be set out in the Statement of Work. Progress meetings could, for example, be held weekly during initial phases, and then quarterly or six monthly, depending on the nature and complexity of the Services being provided and the operational significance of the Deliverables being provided.

15. Performance assessment (clause 11)

**Purpose**

This clause requires the Services to meet a minimum level of performance. The Services are subject to assessment against Performance Criteria.

As a default, where the Services do not meet the Performance Criteria, the Customer must provide notice to the Contractor within 5 Business Days of completion of assessment of the Services (or other period specified in the Contract Details). Reasons for the Services not meeting the Performance Criteria must be included in the notice.

If all or part of the Services fail to meet the Performance Criteria, the Contractor will be required to take action to rectify the Services and allow the Customer to repeat the assessment within five Business Days (or another time period agreed by the parties).

If the Services fail the Performance Criteria two or more times, the Customer has the right to terminate the Contract immediately under clause 28.2.

The Customer must Accept the Services before the payment will be made to the Contractor under clause 15.

**Hints for use**

Customers should consider the minimum level of performance they require for each Service. If standards more specific or higher than 'reasonably expected levels of performance for the Services' are required, those standards should be specified in the Statement of Work.
16. Personnel (clause 12)

**Purpose**

This clause requires the Contractor to use certain Specified Personnel (if any) in providing the Services and provides a mechanism for dealing with circumstances where:

(a) the Specified Personnel are unavailable; or

(b) the Specified Personnel or other Contractor Personnel are no longer acceptable to the Customer.

In these circumstances the Contractor is required, on request from the Customer, to provide replacement personnel which are acceptable to the Customer.

**Hints for use**

If Specified Personnel are required in performance of the Services they must be listed in the relevant section of the Contract Details. Specified Personnel are generally named where the Customer would expect to rely on those individuals because of their particular expertise or skill set.

Where the Customer considers exercising its right (under clause 12.3) to require replacement of Specified Personnel or other Contractor Personnel it should ensure that such action is reasonable in the circumstances. Practically it can often be difficult for Contractors (particularly those in small organisations) to quickly provide a replacement and to redeploy personnel no longer required by the Customer.

When giving a notice under this clause the parties should bear in mind clause 30, which specifies the requirements for the giving and receipt of notices (for further information refer to the User Notes - General Requirements relevant to clause 30).

17. Intellectual Property Rights (clause 13)

**Purpose**

Clause 13 addresses a range of issues in relation to the Intellectual Property Rights of the parties. Intellectual property can be broadly described as the rights granted by law in relation to the fruits of human creative activity, including copyright, patents, trademarks and designs. Refer to clause 1.1 of the model Contract for the definition of Intellectual Property Rights.

Sections 17.3, 17.4 and 17.5 below of these User Notes provide guidance on the ownership models included in the model Contract.

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 Australian Government
agencies’ responsibilities in managing intellectual property can be found at the Attorney General's Department website.

17.1 Auxiliary Material (clause 13.1)

**Purpose**

Clause 13 does not transfer the ownership of any Intellectual Property Rights held by the Contractor, Customer or third party in Material which is made available by a party at the Commencement Date or during the Contract Period. This means that ownership rights of any Auxiliary Material which a party contributes to the performance of the Services remain unchanged.

**Hints for use**

If either the Contractor or Customer is making available Material belonging to a third party as part of the 'Auxiliary Material', it needs to make sure that it has the rights needed to provide that Material without infringing the rights of the third party (refer to sections 17.2 and 17.6 of these User Notes).

17.2 Third Party Material (clause 13.2)

**Purpose**

This clause is intended to ensure that the Intellectual Property Rights of a third party will not be infringed in the course of performance of the Contract.

The clause caters for the situation where the Contractor will make Material owned by a third party available as Auxiliary Material for the purpose of the Contract. The Contractor is required to obtain the permission of the relevant third parties before making such use of the Third Party Material.

17.3 Intellectual Property Rights in Contract Material – choosing an ownership model (clause 13.3)

**Purpose**

This clause (together with clauses 13.4 and 13.5) addresses the issue of ownership of the Intellectual Property Rights in the Contract Material (that is the Material which is created by the Contractor on or following the Commencement Date for the purpose of or as a result of performing its obligations under the Contract).

Clauses 13.4 and 13.5 represent two alternative ownership models – Customer ownership of Intellectual Property Rights in Contract Material (clause 13.4) and Contractor ownership of Intellectual Property Rights in Contract Material (clause 13.5). Clause 13.3 provides the contractual mechanism for selection of an ownership model.

Users are to select a model (ie, either clause 13.4 or 13.5) through the Contract Details. Under clause 13.3(b), if no model is selected, the first model (clause 13.4) will apply and the second model (clause 13.5) will not apply to the Contract.

Clause 13.3 is not intended to suggest that clause 13.4 is a default position for ownership of Intellectual Property Rights in all of the Contract Material. Government policy is that Customers should take a flexible approach to the issue
of ownership of Intellectual Property Rights created under a contract. The Customer should therefore not rely on the position set out in clause 13.4 without considering whether the second ownership model (clause 13.5) or another ownership model would be more appropriate.

Government policy with respect to ownership of Intellectual Property Rights, as set out in various policy statements by the Australian Government, is that Customers should be aware that there are a range of options for ownership of Intellectual Property Rights created under a contract, including allowing the Contractor to retain ownership of Intellectual Property Rights.

Users of the model Contract who do not consider either of the two ownership models to be appropriate for their requirements and who require another model (eg, joint ownership of Intellectual Property Rights in Contract Material) will need to consult their legal or procurement advisers.

**Hints for use**

The position under clause 13.5 recognises that a Customer may not need to own all Intellectual Property Rights in the Contract Material and that vesting Intellectual Property Rights in the Contractor might produce a result that in the long term more effectively meets the Customer's objectives.

However, Customers need to consider whether the second model (Contractor ownership of Intellectual Property Rights in Contract Material), or another ownership model, would achieve value for money and meet broader government policy and operational objectives. Customers should also have regard to their own policies and guidelines in respect of the ownership and management of Intellectual Property Rights.

**17.4 Customer ownership of Intellectual Property Rights in Contract Material (clause 13.4)**

*Purpose*

As stated above, under this clause, the Customer will own the Intellectual Property Rights in Contract Material. This clause applies where it is selected through the Contract Details and also where no selection is made by the parties through the Contract Details.

This clause also operates to grant licences to each party in relation to Intellectual Property Rights in certain Materials. The Customer is granted a licence in relation to the Contractor's Auxiliary Material (refer to section 17.1 of these User Notes regarding Auxiliary Material) as necessary to enable the Customer to receive the full benefit of the Services.

The Contractor is granted a licence in relation to the Customer Material and Contract Material (refer to section 17.3 of these User Notes regarding Contract Material) as necessary to enable the Contractor to perform its obligations under the Contract and subject to any conditions or restrictions specified in the relevant section of the Contract Details and any direction by the Customer.

Clause 13.4(c) clarifies that the licence granted to the Customer does not include a right to exploit the Auxiliary Material for the Customer's commercial purposes.
**Hints for use**

Users should ensure that they make a selection through the Contract Details. It is particularly important where users do not want this clause to apply.

The period of the Customer's licence for use of the Auxiliary Material provided by the Contractor should be inserted in the relevant section of the Contract Details. For example the licence may be perpetual, or for some other nominated period.

The terms of the licence provisions can be varied by inserting the details of any amendments in the relevant section of the Contract Details. Such amendments may be necessary where the Customer decides it requires a different scope of licence rights and/or the parties negotiate amendments to the terms. For example, if the scope of the licence were to be limited to a certain number of copies or for a particular purpose, the Contract Details will need to be completed to reflect the parties' agreement.

The parties should confirm that the agreed licence terms (including the licence period) will enable them to do everything required in relation to the relevant Materials.

17.5 **Contractor ownership of Intellectual Property Rights in Contract Material (clause 13.5)**

*Purpose*

Under this clause, Intellectual Property Rights in the Contract Material vest in the Contractor.

This clause will apply only where it is expressly selected in the Contract Details.

This clause also operates to grant each party a licence in relation to Intellectual Property Rights in certain Materials.

The Customer is granted a licence in relation to the Contractor's Auxiliary Material, (refer to section 17.1 of these User Notes regarding Auxiliary Material) and the Contract Material (refer to section 17.3 of these User Notes regarding Contract Material) as necessary to enable the Customer to receive the full benefit of the Services.

The Contractor is granted a licence in relation to the Customer Material as necessary to enable the Contractor to perform its obligations under the Contract and subject to any conditions or restrictions specified in the relevant section of the Contract Details and any direction by the Customer.

Clause 13.5(c) clarifies that the licence granted to the Customer does not include a right to exploit the Auxiliary Material or the Contract Material for the Customer's commercial purposes.

*Hints for use*

Users who do not want clause 13.4 to apply will need to specifically select clause 13.5 to apply through the Contract Details. If it is not selected, clause 13.5 will not apply because of the operation of clause 13.3.
The period of the Customer's licence for use of the Auxiliary Material provided by the Contractor and Contract Material should be inserted in the relevant section of the Contract Details. For example the licence may be perpetual, continue for the Contract Period or for some other nominated period.

The terms of the licence provisions can be varied by inserting the details of any amendments in the relevant section of the Contract Details. Such amendments may be necessary where the Customer decides it requires a different scope of licence rights and/or the parties negotiate amendments to the terms. For example, if the scope of the licence were to be limited to a certain number of copies or for a particular purpose, the Contract Details will need to be completed to reflect the parties' agreement.

The parties should confirm that the agreed licence terms (including the licence period) will enable them to do everything required in relation to the relevant Materials.

17.6 Warranty and remedy for breach (clause 13.6 – 13.7)

Purpose

These clauses further address the issue of potential infringement of third party Intellectual Property Rights.

The Contractor is required to warrant that the materials provided to the Customer under the Contract and the Customer's use of those materials will not infringe the Intellectual Property Rights of a third person, and that the Intellectual Property Rights may be vested in and licensed to the Customer as required under the Contract.

If a third party claims, or is likely to claim that their Intellectual Property Rights have been infringed in relation to the performance of the Contract, the Contractor is required to take certain steps to ensure that the Customer can continue to receive the benefit of the Services.

The Contractor is also required to give an indemnity in relation to the infringement of third party Intellectual Property Rights (see the User Notes - General Requirements relevant to clause 17).

18. Moral Rights (clause 14)

Purpose

Introduction to moral rights

This clause seeks to ensure that the Customer is able to make full use of the Contract Material provided by the Contractor, as permitted under the Contract, without infringing an individual's Moral Rights.

Moral rights are essentially personal rights of individuals who create copyright works (including literary, dramatic, musical and artistic works and cinematograph films). They relate to an individual author’s reputation and creativity and are separate from the 'economic rights' conferred by copyright.
There are currently three moral rights conferred under the Copyright Act 1968 (Cth):

(a) the right of attribution (the author's right to be identified as the author of a work);

(b) the right not to have authorship of a work falsely attributed (the author's right not to have the work falsely attributed to someone other than the author); and

(c) the right of integrity of authorship of a work (the author's right not to have the work subjected to derogatory treatment, such as mutilation, material distortion or anything else that is prejudicial to the author’s honour or reputation).

Note: As part of Australia’s implementation of the Free Trade Agreement with the United States of America, the Commonwealth Parliament has passed legislation that will grant moral rights to the performers of sound recordings. The provisions containing these new rights will commence on the day that an international copyright treaty (the World Intellectual Property Organisation Performers and Phonograms Treaty) comes into force in Australia. The moral rights clause in this Contract will be updated when this occurs.

Moral rights consents

Moral Rights are personal in nature, so they cannot be licensed or transferred to another party. Individuals can, however, give consent to the doing of acts which would otherwise be an infringement of their moral rights. In general, where consent is obtained it will mean that an otherwise infringing act will not be an infringement of an author's moral rights.

Under this clause the Contractor is required to:

(a) give written consent, where it is an individual; and

(b) use its best endeavours to obtain consents in writing from its Personnel (including its employees, officers, agents and subcontractors) involved in the creation of the Contract Material,


The Contractor is not required to otherwise give/obtain Moral Rights consents, for example in relation to Auxiliary Material or Third Party Material.
**Hints for use**

The consents obtained by the Contractor pursuant to this clause must be in writing and genuinely given (i.e. without duress or as the result of a false or misleading statement).

The detail of such consents will vary depending on the nature of the Material and the position of the person giving the consent. Broadly though, such consents should:

(a) specify the Material to which the consent relates; and

(b) specify the acts or omissions covered by the consent.

It is worth noting that in the case of employees, a general consent can be given with respect to all acts or omissions in relation to works created during the course of employment.

The Contract enables the Customer to, through the Contract Details, change or add to the Specified Acts in clause 14.2. In the majority of circumstances where the Contract Material involves hardware, or IT services and software, this will not be necessary. However, in situations where the Contract Material includes multimedia content (such as film, interviews with people or art works), or if a particular individual's reputation is closely and/or publicly aligned with the Contract Material, the Customer should consider whether the anticipated uses of the Contract Material may require a more specific consent from the author(s) of the works. Some examples of where it may be necessary to include more detail in the Specified Acts are:

(a) where multimedia material contains artwork or film content that may be used in a different context than originally intended by the artist/filmmaker; and/or

(b) where a person has a professional or public reputation in the Contract Material, and the Customer is able to specify in advance the intended uses of the Material.

Where in practice the Customer is deciding whether to attribute copyright material to a particular author, consideration should be given to whether the material still truly represents the work of that author. Where the material has been modified or added to it may be inaccurate to continue to represent it as the work of the author. This may be an important issue for Contractors, particularly in industries in which an individual's professional reputation is heavily dependent on the quality of their work.