SourceIT User Notes

Licence – Commercial off-the-shelf Software Contract 3

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Licence – Commercial off-the-shelf Software Contract

Introduction

1. Using these notes

These User Notes contain an explanation of the purpose of the clauses and Schedules of the Licence Contract – Commercial off-the-shelf Software model Contract (model Contract). Where relevant, hints for the use of the clauses / Schedules and a description of the risks and issues with specific clauses are also included.

The explanations in these User Notes appear in the same order in which the clauses / Schedules appear in the model Contract. Words commencing in upper case 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 to be used for the provision and licensing of COTS (commercial off-the-shelf) software only. It is not for use where the Contractor is also supplying Support Services. In these circumstances the parties should use the SourceIT Licence and Support Contract.

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 is intended for use in relation to the licensing of standard commercial off-the-shelf software products only;
(b) the model Contract is not intended to be used for software development, installation, support and maintenance or for complex licensing arrangements;
(c) the model Contract is not a deed of standing offer and, as a result, is not suitable for panel arrangements;
(d) the model Contract does not apply to the acquisition of software by leasing arrangement and should only be used where software will be purchased;
(e) 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;

(f) 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;

(g) 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) and Schedule 2 (Scope of Licence) 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 and Scope of Licence, where required;

(h) the model Contract is an end user agreement. Therefore, users of the model Contract should not also execute, in respect of the same software, an end user agreement supplied by a software provider. Additionally, parties should not attach a supplier provided end user agreement as a schedule or attachment to the model Contract, as this is likely to result in inconsistency between the terms of the model Contract and the supplier's end user agreement;

(i) the clauses in the model Contract relating to confidentiality and privacy are based on publicly available clauses recommended for use by the Department of Finance; and

(j) it is strongly recommended that users of the model Contract refer to these User Notes.

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>Non-Corporate Commonwealth Entity of the Commonwealth government governed by the Public Governance, Performance and Accountability Act 2013 (Cth)</td>
<td>The name of the entity representing the Commonwealth and reference to the Commonwealth</td>
<td>The Commonwealth of Australia as represented by Geoscience Australia</td>
</tr>
<tr>
<td>A Corporate Commonwealth Entity governed by the Public Governance, Performance and Accountability Act 2013 (Cth)</td>
<td>Insert the name of the entity</td>
<td>Commonwealth Scientific and Industrial Research Organisation</td>
</tr>
<tr>
<td>Company incorporated under the Corporations Act</td>
<td>The name of the company (see <a href="http://www.asic.gov.au">www.asic.gov.au</a> for</td>
<td>ABC Pty Limited</td>
</tr>
</tbody>
</table>
2001 (Cth) | more information on company searches |
---|---|
An incorporated association (ie. 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 Warranty Period) provide a default definition but specifically allow for that definition to be varied in the Contract Details or Statement of Work.

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 guidance on the Schedules in these User Notes 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 provision in the Contract Details which seeks to exclude the warranty in the Agreed Terms that the 'Software 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 including an Open Source Licence, preparing Schedules, attaching documents to the Schedules or incorporating documents by reference.

The Agreed Terms will prevail over any Schedule (other than an Open Source Licence (refer to section 10 of these User Notes)) to the extent of any inconsistency.

In the context of acquisition of COTS products the Contractor may seek to attach or include reference to its own standard licence terms. It is preferable to not
adopt this approach. If that approach is adopted then it is strongly recommended that this clause not be amended.

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 Scope of Licence).

The Customer may extend the term of the Contract for further period(s) specified in the relevant item of the Scope of Licence. To extend the term of the Contract, the Customer must give 30 days written notice (or other period specified in the Scope of Licence) to the Contractor prior to the expiry of the current term. Clause 18 specifies the requirement for notices and determines when a notice is taken to be received (for further information refer to the guidance on clause 18 in these User Notes).

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 (or any extended 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.

It is common for COTS to be licensed on a 'perpetual' basis. If this scenario is applicable then 'perpetual' should be inserted into item 8 of Schedule 2 (Scope of Licence) and then Items 9 and 10 of Schedule 2 should be completed by inserting 'Not Applicable'.

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

*Purpose*

This clause allows a Commonwealth 'Nominated Agency' to obtain Deliverables (substantially the same as those Deliverables 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 Deliverables similar to those Deliverables 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 to the guidance on the Schedules set out in these User Notes, 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).
9. Software licence (clause 5)

9.1 Grant of Licence (clause 5.1)

Purpose

This clause and Schedule 2 (Scope of Licence) sets out the scope of the licence that the Contractor grants to the Commonwealth for the Software and the related Documentation. The Customer is:

(a) granted a broad licence to:
   (i) install the Software on the Customer’s Existing System (as defined in the Scope of Licence);
   (ii) use and copy the Software in accordance with certain terms set out in the Scope of Licence;
   (iii) adapt and modify the Software but only to the extent necessary to allow it to be used on the Customer's Existing Systems;
   (iv) use the Documentation in either hard copy or soft copy (including online); and
   (v) make copies of the Software and Documentation but only as required by the Customer for backup and security purposes; and

(b) authorised to assign the rights in clause 5.1(a) (referred to above) to other Agencies that require the Software because of an Administrative Arrangements Order.

Hints for use

This clause, together with the Scope of Licence sets out the licensing position.

In contrast to the COTS Licence and Support Contract, the Licence Contract provides that the licence is for a specified term and non-transferable as the default position as simple COTS licences are typically offered on this basis. If a transferable and/or perpetual licence is required, this can be specified in the Scope of Licence.

It is important that the Customer satisfy itself that the agreed licence terms are broad enough to cover everything that the Customer wishes to do with the Software and Documentation.

Users should refer to section 26 of these User Notes, which discusses Schedule 2 (Scope of Licence).

If the Customer is licensing Open Source, rather than proprietary Software, the grant of licence under this clause will be subject to the terms of the relevant Open Source Licence. For further information refer to section 10 of these User Notes.
9.2 Use by Customer's Contractors (clause 5.2)

*Purpose*

This clause allows the parties to nominate, via the relevant item in the Scope of Licence, whether the Customer’s contractors will be permitted to use the Software and Documentation. The Customer’s ability to allow its contractors to use the Software and documentation is limited by the restrictions set out in clause 5.2 and in the Scope of Licence.

This is related to clause 5.3, which deals with outsourcing (refer to section 9.3 of these User Notes).

*Hints for use*

Complete the relevant item in the Scope of Licence by ticking ‘Yes’ or ‘No’ to indicate whether the Customer’s contractors will be permitted to use the Software and Documentation. If such use will be permitted, consider whether any restrictions (additional to those set out in clause 5.2) will be imposed on that use. Such additional restrictions should be set out in the Scope of Licence.

9.3 Outsource supplier (clause 5.3)

*Purpose*

This clause governs the licensing arrangements and Contractor obligations if the Customer outsources (or has outsourced) some or all of its information technology services.

The Customer is permitted to sublicense or transfer its rights to use the Software licensed under clause 5.1 to any outsource supplier without consent of the Contractor or any additional cost, however, the Contractor must be informed of any such sublicense or assignment of rights.

9.4 Restrictions on use (clause 5.4)

*Purpose*

This clause sets out restrictions on the Customer’s use of the Software with the aim of providing comfort to the Contractor in relation to the protection of its Intellectual Property Rights in the Software. It also requires the Customer to maintain a log of the number and location of all originals and copies of the Software.

The clause sets out a number of prohibited activities including attempting to decompile or derive the Software source code in any fashion or transferring the Software to or permitting use of the Software by a third party. It also requires the Customer to use reasonable care to prevent the unauthorised use, copying, publication or dissemination of the Software. However, these restrictions on use are subject to the rights granted under the Licence in clause 5.1 and any actions permitted by Law.

*Hints for use*

The Customer will need to manage its obligations under this clause including making any of its subcontractors and Personnel, who use the Software, aware of their obligations with respect to its use.
9.5 **Audit of use (clause 5.5)**

*Purpose*

This clause gives the Contractor the right to audit the Customer's use of the Software annually or at other times agreed by the parties. At least 28 days notice of an audit must be given to the Customer.

*Hints for use*

As a default position, the Contractor can only conduct an audit while a representative of the Customer is present. The parties can agree in writing that a representative of the Customer is not required to be present.

9.6 **No transfer of ownership in Software (clause 5.6)**

*Purpose*

This clause makes it clear that there is no intention to transfer ownership in the Software to the Customer.

*Hints for use*

If the parties wish to transfer ownership in the Software, the Customer should seek legal advice to ensure the correct legal mechanism is applied.

10. **Open Source Software (clause 6)**

*Purpose*

This clause caters for the situation where the Customer will licence open source software under this Contract.

Open source software is computer software which is defined by several specific attributes that relate to its licensing and legal framework. For guidance on what constitutes open source software, refer to the [Open Source Initiative](https://opensource.org). The Initiative sets out various rights and obligations for developers, distributors and users of open source software. These rules define the basic licence conditions under which software must be released to be considered 'open source'. For more information on open source software refer to the [Guide to Open Source Software for Australian Government Agencies](https://www.ggdc.net/sofia/sofia111/guide_to_open_source_software_for_australian_government_agencies.pdf).

To the extent that the Software, or any part of it, is licensed under an open source software arrangement, the terms of the applicable Open Source Licence agreement will apply to the Software. The terms of the Open Source Licence will have priority over the Agreed Terms of the Contract to the extent of any inconsistency between them.
Hints for use

For this clause to have operational effect, the terms of the Open Source Licence agreement need to be inserted in Schedule 6 of the model Contract (refer to the relevant section of these User Notes).

11. Delivery of Software (clause 7)

Purpose

This clause governs the delivery of the Software by the Contractor, requiring delivery by the Delivery Date set out in the Contract Details.

Hints for use

The Delivery Date should be set out in the relevant item of the Contract Details.

12. Provision of Deliverables (clause 8)

12.1 General Contractor warranties (clause 8.1)

Purpose

This clause sets out a number of general representations and warranties given by the Contractor in relation to its ability and competency to enter the Contract, provide the Software and Documentation as well as the quality of the media on which the Software is provided.

12.2 Software warranties (clause 8.2)

Purpose

This clause sets out a range of general representations and warranties given by the Contractor in relation to the quality and fitness for purpose of the Software.

The Contractor is also required to warrant that the Customer's use of materials provided to it under the Contract will not infringe the Intellectual Property Rights of a third person.

12.3 Customer obligations (clause 8.3)

Purpose

Under this clause, the Customer has obligations, which are intended to mitigate the risk of the introduction of Harmful Code.

12.4 Remedy for breach of warranty (clause 8.4)

Purpose

These clauses address the issue of potential breach of the warranties given under clause 8.2, including infringement of third party Intellectual Property Rights.

In the event of such a breach, the Contractor must notify the Customer and is required to take certain steps to ensure that the Customer can continue to receive the benefit of the Deliverables.
12.5 Contractor not liable (clause 8.5)

*Purpose*

This clause limits the potential liability of the Contractor under clause 8.3 to the extent that any defect in a Deliverable occurs as the result of the Customer or another party using it in a manner not in accordance with the Specifications or Documentation.

12.6 Subcontracting (clause 8.6)

*Purpose*

This clause imposes obligations on the Contractor in relation to subcontracting under the Contract.

The clause prohibits the Contractor from subcontracting:

(a) any aspect of the provision of the Deliverables without the Customer's prior 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).

*Hints for use*

With respect to clause 8.6(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](#).

13. Documentation (clause 9)

*Purpose*

This clause details the Contractor's obligations regarding the provision of technical and operator 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 Scope of Licence. Accordingly, the details of the Customer's requirements with respect to the Documentation, including in relation to the name, format, version and number of copies should be set out in the Scope of Licence.

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.
Guidance on general requirements

14. Payment (clause 10)

Purpose

This clause sets out the Customer's payment obligations under the Contract. The Customer's obligation to pay the Licence Fees is subject to delivery of the Software.

The Contractor must provide the Customer with a correctly rendered invoice that meets the requirements set out in Schedule 4 (refer to the relevant section of these User Notes). Unless otherwise specified in Schedule 4, the Customer must make payment of a correctly rendered invoice within 30 days after receiving the invoice.

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 4.

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 Act 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. Refer to the Pay On Time Policy.

15. GST (clause 11)

**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.

15.1 Interpretation (clause 11.1)

**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.

15.2 GST gross up (clause 11.2)

**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.

15.3 Reimbursements (clause 11.3)

**Purpose**

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.

15.4 Exclusion of GST from calculations (clause 11.4)

**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 15.3 above, the objective is to prevent 'double charging' of GST.

15.5 Adjustments (clause 11.5)

**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 (ie. adjustment notes).

15.6 Tax invoice (clause 11.6)

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

16. Indemnity (clause 12)

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 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 17 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.

17. Liability (clause 13)

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 acts or omissions, 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.

Hints for use

The Guide to limiting supplier liability in ICT contracts with Australian Government agencies was approved by the then Minister for Finance and Administration and the then Minister for Communications, Information Technology and the Arts on 16 August 2006. It requires agencies to, in most cases, limit the liability of ICT suppliers at appropriate levels. It also 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, and 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) unlawful or wilfully wrong acts or conduct 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 a form of a wilfully wrongful act or omission (for example, where a Contractor repudiates 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 (eg 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 the 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 entities should refer to the requirements set out in:
   (i) Guide to limiting supplier liability in ICT contracts with Australian Government agencies;
   (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.

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 16 of these User Notes.
18. **Insurance (clause 14)**

*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 below:

(a) public liability;

(b) either professional indemnity or errors and omissions;

(c) product liability; and

(d) workers' compensation.

The Contractor must also maintain either professional indemnity or errors and omissions insurance for a period of seven years following expiry or termination of the Contract. This is to ensure that the Contractor has professional indemnity or errors and omission 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.

19. **Confidentiality and privacy (clause 15)**

*Purpose*

This clause outlines the confidentiality obligations of the parties. The Department of Finance's model clause for confidentiality has been modified as this is a licence agreement only and no services will be supplied under its terms. If services are to be supplied by the Contractor, the SourceIT Licence and Support Contract should be used. For further information on this clause, refer to *Confidentiality throughout the Procurement Cycle – Principles* and *Confidentiality throughout the Procurement Cycle - Practice*.

*Hints for use*
The definition of Confidential Information includes information that is by its nature confidential and is specified in item 4 of the Contract Details. While the definition of Confidential Information is not exclusively limited to the information set out in item 4 of the Contract Details, the parties should include all information that they specifically require to be treated as confidential in the Contract Details to avoid any later disagreements as to the nature of the information. Confidential Information could include any particular clauses of the Contract or the Schedules or any Contract related Material, for example, Customer data or information relating to Personnel.

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 item 4 of the Contract Details.

20. Dispute resolution (clause 16)

**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 urgent 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.

21. Termination (clause 17)

21.1 Termination for convenience (clause 17.1)

**Purpose**

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

The Customer may terminate the Contract for convenience at any time by giving notice to the Contractor. If the Contract is terminated for convenience the Customer:

(a) will be liable for the Licence Fees incurred prior to the effective date of termination; and
(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 Licence Fees payable under the Contract. The Contractor is not entitled to compensation for loss of prospective profits and must take all available steps to minimise loss resulting from termination.

21.2 Termination for default (clauses 17.2 and 17.3)

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.

21.3 After termination (clause 17.4)

Purpose

This clause sets out the obligations on the Contractor and the Customer after termination of the Contract with respect to the Customer's Confidential Information, the Software and the Documentation.

21.4 Survival (clause 17.5)

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.

21.5 Termination does not affect accrued rights (clause 17.6)

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 Contractor's right to be paid for Software already delivered, is not affected by the subsequent termination or expiry of the Contract.

22. Notices and other communications (clause 18)

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.

23. Miscellaneous (clause 19)

23.1 Ownership of Contract (clause 19.1)

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 Deliverables.

23.2 Varying the Contract (clause 19.2)

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

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

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.

23.3 Approvals and consents (clause 19.3)

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.

23.4 Assignment and novation (clause 19.4)

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.

### 23.5 Costs (clause 19.5)

**Purpose**

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

### 23.6 Counterparts (clause 19.6)

**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.

### 23.7 No merger (clause 19.7)

**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.

### 23.8 Entire agreement (clause 19.8)

**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.

23.9 Further action (clause 19.9)

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 securing rights for the Customer to use Deliverables in circumstances where a person claims that the Customer's use of the Deliverables infringes their Intellectual Property Rights.

23.10 Severability (clause 19.10)

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.

23.11 Waiver (clause 19.11)

Purpose

This clause provides that a party may only waive (ie 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 on a particular occasion or occasions not to terminate the Contract for the Contractor's breach of a material provision of the Contract where that breach is not capable of remedy will not mean that the Customer has waived that right, unless the 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.

**23.12 Relationship (clause 19.12)**

**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.

**23.13 Unforeseen events**

This clause provides a mechanism for either 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 an obligation by the date required under the Contract because its office has been damaged by a cyclone, may be excused from its obligation to meet the obligation by the required date. An unforeseen event does not include a lack of funds or any labour dispute that only affects the Contractor's organisation.

**23.14 Governing law and jurisdiction (clause 19.14)**

**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.

**24. 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 these User Notes 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](http://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 (i.e., 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]**

<table>
<thead>
<tr>
<th>Signature of sole director and sole company secretary</th>
<th>who states that he or she is the sole director and the sole company secretary of the company.</th>
</tr>
</thead>
</table>

| 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.
Guidance on the specific Schedules

25. Schedule 1 – Contract Details

*Purpose*

This Schedule sets out a range of details and variables for the Contract, including variations 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 (where applicable) for 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. Please also refer to the relevant sections of these User Notes for each of the clauses referenced in the Contract Details.

Items which require careful consideration include:

(a) **Confidential Information (item 4)**

The parties should set out in this item any information that they require to be designated as 'confidential'. This could include any particular clauses of the Contract or Schedules or any Contract related Material.

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 item.

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

(b) **Capping of Liability (items 9 to 11)**

These items are linked to clause 13 (refer to the relevant section these User Notes). Before setting a cap on liability through item 9, Customers should have regard to the guidance on this issue provided in:

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

(ii) *Commonwealth Procurement Rules*; and

(iii) *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 10 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. Again, it is recommended that you seek advice on these issues.

(c) Insurance (item 12)

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.

26. Schedule 2 – Scope of Licence

Purpose

The Purpose of this Schedule is to set out details relevant to the scope of the licence granted to use the Software and Documentation.

Hints for use

This Schedule will contain details that are essential for determining the scope of the Customer’s rights to use the Software and Documentation provided under the Contract. The Customer needs to ensure that the scope of the licence provided is adequate for its purposes.

The Contractor may supply one or more types of software. Schedule 2 may be completed as structured if all types of Software are being licensed on the same scope of licence. However, if a different scope of licence applies to the different types of Software then the provisions of Schedule 2 may need to be duplicated for each type of Software. Users should seek guidance on this issue if that situation is applicable.

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.
Please also refer to the relevant sections of these User Notes for each of the clauses referenced in the Scope of Licence.

Schedule 2 has been structured to address the most common issues that arise in the scope of licence for COTS products. Typically they are:

(a) version of Software and Documentation;
(b) format of Software and Documentation;
(c) the number of copies licensed;
(d) whether the Software is licensed to only be installed on a particular machine;
(e) whether the number and type of users is restricted;
(f) whether the Software can only be used at a specific location;
(g) whether or not the Customer’s contractors will be permitted to use the Software and Documentation. Insert at item 7 any restrictions (additional to those set out in clause 5.2) which will be imposed on that use; and
(h) duration of Contract Period, including the Initial Contract Period and any options to extend.

The Contractor may have other restrictions that form part of its standard scope of licence. If that is so the Customer should seek advice about how best to accommodate these issues in the Contract.

27. **Schedule 3 – Specifications**

*Purpose*

The purpose of this Schedule is to set out the Customer’s detailed functional and technical requirements for the Software provided by the Contractor under the Contract.

*Hints for use*

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 be incorporated into a Contract by reference.

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

(a) the statement of functional and technical requirements (or similar) that was released by the Customer in its approach to market; and
(b) the response received from the Contractor to that statement of requirements.
28. Schedule 4 – Payment

Purpose

This Schedule is linked to clause 10 (Payment) and clause 11 (GST) and sets out:

(a) Licence Fees;
(b) invoicing requirements;
(c) payment period; and
(d) 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 Licence Fees are expressed to be GST exclusive. If payments are to be made on a GST inclusive basis, tax advice should be sought as clause 11 is not appropriate for use with GST inclusive amounts (refer to the relevant section of these User Notes for this clause).

(b) Licence Fees

Item 1 of Schedule 4 is structured so that:

(i) an annual licence fee is specified; or
(ii) licence fees are paid over a period. The table allows for 3 years. If more years are applicable then additional columns should be added.

Many COTS software products have licence fees which are payable annually, this fee should be set out in the ‘Annual Licence Fees’ section. If a one off licence fee is agreed between the parties, this should be clearly stated in the ‘One Off Fixed Fee’ section.

(c) Invoicing

This section is linked to clauses 10.2 and 10.4 of the Contract. Customers should include in this section any specific requirements they have for invoices.

For example:

The Contractor must provide a single invoice for each month that sets out the Licence Fee, and any other amounts payable by the Customer under this Contract for that month. Each invoice must be in a format that:

(i) is a tax invoice; and
(ii) enables the Customer to identify and allocate the amounts invoiced including payments for Licence Fees, and expenses.

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

29. Schedule 5 – Agency Order Form

**Purpose**

This Schedule is linked to clause 4 of the Contract (refer to the relevant section of these User Notes for that clause) and allows a Nominated Agency to procure Deliverables 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 6 of the Order to ensure that the Deliverables to be provided under the Order are substantially the same as those to be delivered under the Contract

**Example:**

<table>
<thead>
<tr>
<th>Deliverables to be provided under the Contract</th>
<th>Deliverables to be provided under the Order</th>
<th>Allowed under clause 4?</th>
</tr>
</thead>
<tbody>
<tr>
<td>COTS software product AA, set licence fee for 1,000 users</td>
<td>COTS software product AA 200 users, pro rata licence fee</td>
<td>Yes, the products have been market tested and have been assessed as representing value for money</td>
</tr>
<tr>
<td>COTS software product AA</td>
<td>COTS software product YY,</td>
<td>No, the software product are different, and have not been market tested.</td>
</tr>
</tbody>
</table>

30. Schedule 6 – Open Source Licence

**Purpose**

This Schedule is linked to the 'Open Source Software' clause 6 in the Contract (refer to the relevant section of these User Notes for that clause) and allows for the provisions of an Open Source Licence to be inserted. The inserted provisions will apply to any open source software licensed to the Customer under the Contract.

The terms of this Schedule will prevail over the Agreed Terms of this model 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 6 prior to execution of the contract.