SourceIT User Notes – Specific Clauses

Licence and Support Contract – Commercial off-the-shelf Software Contract 3

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Introduction

1. Using these notes

These User Notes contain an explanation of the purpose of the specific clauses of the Licence and Support – Commercial off-the-shelf Software model 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 to be used for the provision of COTS (commercial off-the-shelf) software and related support services, such as the provision of updates and new releases and technical support. If a Customer is procuring software only, with no service component, the SourceIT Licence for Commercial COTS Off-the-Shelf Software should be used.

By making provision in the Statement of Work and Contract Details, this model Contract may be used for the licensing of Software only or both Software licensing and the provision of Support Services.

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, installation, support and maintenance of standard commercial off-the-shelf software products;

(b) the model Contract is not intended to be used for software development, complex licensing, installation, support and maintenance arrangements, managed services or hosted licence and support 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) 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;

(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 or Services, 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, 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

(j) 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*

<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 <em>Public Governance, Performance and Accountability Act 2013</em> (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>A Corporate Commonwealth Entity (CCE) subject to the <em>Public Governance, Performance and Accountability Act 2013</em> (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 <em>Corporations Act 2001</em> (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 company searches)</td>
<td>ABC Pty Limited</td>
</tr>
<tr>
<td>An incorporated association (i.e. an association incorporated under the relevant legislation of a State or Territory)</td>
<td>The name of the incorporated association including the words 'incorporated'</td>
<td>ABC Incorporated</td>
</tr>
<tr>
<td>A trust</td>
<td>The name of the trustee and the trust</td>
<td>ABC Pty Ltd as trustee for the ABC Trust</td>
</tr>
</tbody>
</table>
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 and Support Hours) 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 Trustee Contractor

**Purpose**

This clause addresses issues associated with entering into contracts with Contractors who act as a trustee to a trust.

**Hints for use**

Trusts can have complex structures, and it is recommended that this clause be considered closely. Further legal consultation may be necessary should there be any uncertainty or where extensive complexity exists.
5.4 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 '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 11 of these User Notes)) 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 36 specifies the requirement for notices and determines when a notice is taken to be received (for further information refer to the guidance on clause 36 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).
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.

In regards to Subcontractors, Customers should ensure obligations are imposed on the Contractor under clauses – 9.2(c), 9.6, 9.7(a)&(d), 9.8(b), 18.3, 24.4, 27.2(g), 27.3, 27.4, 29.1, 29.2, 29.3, 30.1, 31.2, 31.8, 37.12, where appropriate.

10. **Software licence (clause 6)**

10.1 **Grant of Licence (clause 6.1)**

*Purpose*

This clause sets out the scope of the licence that the Contractor grants to the Commonwealth for the Software and the related Documentation. The Commonwealth is:

(a) granted a broad licence to:

   (i) install the Software, should the Commonwealth wish to do so rather than have the Contractor provide installation services;

   (ii) adapt and modify the Software but only to the extent necessary to allow it to be used on the Customer's existing IT systems;

   (iii) use and communicate the Software and Documentation. Communication includes making any part of the Software or Documentation available online;

   (iv) make copies of the Software and Documentation but only as required by the Customer for backup and security purposes;

(b) authorised to assign the rights in clause 6.1(a) (referred to above) to other Agencies that require the Software because of an Administrative Arrangements Order; and

(c) authorised to sub-licence or transfer the rights in clause 6.1(a) to a third party but only so that the third party may exercise the rights for the benefit of the Commonwealth. This may include, for example, granting or transferring such rights to another service provider who is providing services to the Commonwealth which may involve access to the Software and/or Documentation. This is related to clause 6.3 which deals with outsourcing (refer to section 10.3 of these User Notes).

*Hints for use*

This clause sets out the default licensing position. It is possible to amend the default provision by including the details of any such amendment in the relevant section of the Contract Details.

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.

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 further to section 11 of these User Notes.

Users should also refer to section 23 of these User Notes which deals with Intellectual Property issues.
10.2 Source Materials to be held in escrow (clause 6.2)

**Purpose**

This clause sets out the requirements regarding escrow of the Source Materials. Source Materials include the Software source code and all relevant documentation, and other material required to support the Software.

In general, escrow arrangements involve the Contractor depositing a copy of the Source Materials for that software with an independent third party (i.e., the escrow agent). An escrow agreement governs the arrangement, generally setting out the materials to be deposited in escrow, the terms for such deposit and the circumstances (usually called triggering events) in which the escrow agent can release the Source Materials to the Customer. The Customer may require access to the Source Materials if the Contractor ceases or is unable to continue to support the Software, for example, due to insolvency, liquidation or other such circumstances.

This clause requires the Contractor to deposit the Source Materials with an escrow agent approved by the Commonwealth on terms approved by the Commonwealth or add the Commonwealth to a master escrow agreement where the Contractor already has a master escrow agreement in place. The escrow agent must release the Source Materials to the Commonwealth for its use if a triggering event occurs.

**Hints for use**

Many information technology companies will have a pre-established arrangement (master escrow agreement) with an escrow agent, which Customers may join. It is preferable for the escrow agent to be located in Australia and be independent of the Contractor.

Parties will rely on the escrow agent to give effect to the escrow arrangements under this clause. These arrangements will be governed by the escrow agreement approved by the Commonwealth. Customers should have particular regard to:

(a) the triggering events set out in the escrow agreement to ensure that they will allow the access to the Software that they require to ensure business continuity; and

(b) any upfront establishment fees and ongoing fees.

If the Customer does not require the Source Material to be placed in escrow this can be specified in the relevant section of the Contract Details, which means that clause 6.2 will not be activated.

Customers should be aware that some providers of commercial off-the-shelf Software may be reluctant to put Source Materials in escrow.

10.3 Outsource supplier (clause 6.3)

**Purpose**

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

The Customer is permitted to sublicense or transfer its rights to use the Software licensed under clause 6.1 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.

The Contractor is required to provide free (unless specified otherwise in Schedule 3), reasonable assistance to the Customer or any outsource supplier where the Customer outsources its IT services or such outsourcing arrangements end.
Hints for use

Where users negotiate for assistance to the Customer, or any outsource supplier, to be provided at a charge, it is recommended that the rates for such assistance are inserted in Schedule 3.

10.4 Restrictions on use (clause 6.4)

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 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 6.1 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.

10.5 Audit of use (clause 6.5)

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.

11. Open Source Software (clause 7)

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. 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.

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 10 of the model Contract (refer to the User Notes - Schedules).

12. Delivery and installation of Software (clause 8)

Purpose

This clause governs the delivery, installation and implementation of the Software by the Contractor. The Contractor is required to ensure that the Software, once installed and implemented, and while being maintained under the Contract, complies with the relevant Specifications and Documentation.

Hints for use

The details of the Contractor's obligations with respect to delivery, installation and implementation should be set out in the Statement of Work, including the details of any Milestones date for delivery installation and implementation.

This clause sets out the default position with respect to delivery, installation and implementation. Where necessary the clause can be amended or made non-applicable by inserting details to that effect in the relevant item of the Contract Details.

13. Provision of Services (clause 9)

13.1 Service obligations (clause 9.1)

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 9.1(b) and (d) in relation to Service Levels, and Specified Personnel respectively) are dealt with in more detail in other clauses of the Contract (see User Notes for clauses 17 and 18 below).

The parties should be aware of the following features of this clause:

(a) clause 9.1(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 9.1(f) makes provision for 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 9.1(h) requires the Contractor to perform the Services in accordance with the Milestones. All significant Milestones should be specified in the Statement of Work.
13.2 Contractor warranties (clause 9.2)

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 and Software as well as the quality and fitness for purpose of the Services and Software.

Hints for use

In addition to the obligations in this clause in relation to Harmful Code, the Contractor has a broader obligation under clause 9.1 to supply the Services with due skill and care.

13.3 Customer obligations (clause 9.3)

Purpose

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

13.4 Access to Customer's premises (clause 9.4)

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 is supplying Software only and will not require access to the Customer's premises.

13.5 Conduct at Customer's premises (clause 9.5)

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 work health and safety and security in operation at the premises or facilities.

Hints for use

This clause will not apply if the Contractor is supplying Software only and 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.

13.6 Subcontracting (clause 9.6)

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 9.6(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.

In regards to Subcontractors, Customers should ensure obligations are imposed on the Contractor under clauses – 9.2(c), 9.6, 9.7(a)&(d), 9.8(b), 18.3, 24.4, 27.2(g), 27.3, 27.4, 29.1, 29.2, 29.3, 30.1, 31.2, 31.8, 37.12, where appropriate.

### 13.7 Work Health and Safety (clause 9.7)

**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**

This clause will not apply if the Contractor is supplying Software only and will not require access to the Customer's premises.

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

### 13.8 Australian Government ICT Sustainability Plan (clause 9.8)

**Purpose**

This clause imposes an obligation on the Contractor to comply with the Australian Government ICT Sustainability Plan 2010-2015 (ICT Sustainability Plan) for provision of any hardware and, where relevant, for the provision of services.

**Hints for use**

When inviting tenderers, Customers should be receptive to the notion of inviting the Contractor to provide its ICT Sustainability plans. As specified in the clause itself, this clause could be useful when no other disposal arrangements are specified. There are a number of cartridge collection programs available of which suppliers can avail themselves (Close The Loop, CartCollect and Planet Ark). Mobile devices recycling is also prevalent throughout Australia (eg The Australian Mobile and Telecommunications Association’s Mobile Muster program).
14. Support Services (clause 10)

14.1 Support Period (clause 10.1)

Purpose

This clause applies only if the Customer is purchasing Support Services from the Contractor.

Clause 10 broadly specifies the Contractor's obligations in relation to the Support Services. Clause 10.1 provides the period during which the Support Services are provided, if applicable.

The default position is for Support Services to commence on the Production Date and continue until the end of the Contract Period and to be provided at no charge for a period of 90 days from the Production Date. The Production Date is either the date on which the Software has been Accepted, rolled out for production and is ready for use or, where implementation and ancillary services are not being provided under the Contract, the date the Software is supplied to the Customer.

Hints for use

Users should consider whether this default position in relation to the Support Services Period is appropriate in the circumstances. For example, Support Services could commence after the expiry of the Warranty Period.

Any variation to the default position should be set out in the Contract Details.

14.2 Obligation to provide Support Services and exclusions (clauses 10.2 and 10.3)

Purpose

Clause 10.2 requires the Contractor to provide the Support Services during the Support Hours. The term 'Support Hours' is defined as Business Hours unless otherwise specified in the Statement of Work. Business Hours is defined as 8.00am to 6.00pm on a Business Day at the place where Services are to be provided, unless specified otherwise in the Contract Details.

Clause 10.2 provides the minimum requirements for Support Services, which can be amended or expanded by the parties in the Statement of Work.

Exclusions from the Support Services, being services that the Contractor is not required to provide to the Customer, are included in clause 10.3.

Hints for use

Consider the definition of Support Hours, in particular, whether support is required for more or less than 8.00am to 6.00pm on Business Days. Requiring Support outside of these hours (for example, 24 x 7) is likely to result in higher Support Service charges.

Careful consideration should also be given to the minimum requirements for Support Services specified in clause 10.2. If some of the minimum requirements are not necessary, users should state this in the Statement of Work.

If additional requirements are necessary, these should be clearly set out in the Statement of Work. For example, if training is required as part of the Support Services, details of the training requirements should be included in the Statement of Work. If assistance for user difficulty or user inexperience is required, this needs to be specified both in the Contract Details and the Statement of Work.
14.3 Remote access to Customer systems (clause 10.4)

**Purpose**

This clause applies if the Contractor will, or is likely to, require to remote access the Customer's system(s) to provide the Support Services. The protocols set out in this clause are minimum standards which may be added to the Statement of Work to meet the specific Customer requirements.

15. Information regarding Updates and New Releases (clause 11)

**Purpose**

This clause only applies to the extent that users select, through the Contract Details, that the clause is to apply in relation to Updates and/or New Releases. Under this clause (to the extent it applies), during the Support Period, the Contractor is required to promptly provide specified information to the Customer for any Update or New Release it may make or has made available to the Customer or other customers.

Under the default position in clause 11.2, a refusal by the Customer to install an Update or New Release will not affect its entitlement to ongoing Support Services. Under the default position in clause 11.3, the Customer must destroy versions of the Software that are superseded by a New Release where those versions are no longer required by the Customer.

**Hints for use**

This clause will not apply, and the Contractor will not be required to provide Updates or New Releases, unless the parties select to receive either or both through the Contract Details. The parties are able to change the default position under clause 11.2 through the Contract Details. The parties could, for example, state that a refusal to accept an Update or New Release will not affect the Customer's entitlement to ongoing Support Services until:

(a) the expiry of 18 months from the date the Update or New Release was rejected; or  
(b) the time the version the Customer is using has been superseded by 2 successive versions of the Software and the most recent version of the Software is materially different to the version being used by the Customer.

Before changing the default position, Customers should carefully consider:

(a) their requirements for Support Services;  
(b) the likelihood of an Update or New Release being made available; and  
(c) the potential impact on the Customer of having to install an Update or New Release, particularly if installation will require system downtime which may affect business operations.

A Customer which wishes to retain a superseded version of the Software could seek to agree this in writing with the Contractor.

16. Documentation (clause 12)

**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 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.

17. Varying the Services (clause 13)

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 36, which specifies the requirements for the giving and receipt of notices (for further information refer to User Notes - General Requirements relevant to clause 36).

Changes to the Agreed Terms of the Contract should only be made in accordance with clause 37.2 (refer to User Notes - General Requirements relevant to clause 37.2).

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.
18. Co-operation with Personnel and contractors (clause 14)

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.

19. Monitoring progress (clause 15)

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 installation and implementation phases, and then quarterly or six monthly, depending on the nature and complexity of the Support Services being provided and the operational significance of the Software.

20. Acceptance testing (clause 16)

20.1 Acceptance (clause 16.1)

Purpose

This clause sets out when the Software and Services will be Accepted by the Customer.

The default position is that the Software is deemed to have been Accepted by the Customer when the Contractor delivers the Software. This default position can be varied through the Contract Details. If applicable, the Services will be Acceptance tested in accordance with the Acceptance test procedures set out in clauses 16.2 to 16.7.

Hints for use

Customers should consider whether deemed Acceptance for Software is appropriate in the circumstances of their procurement. Whether or not Acceptance testing should be required under the Contract will depend on the importance and complexity of the Software, for example, does the Software have to integrate into the Customer's other systems? Is configuration required? The Customer may stipulate in the Contract Details that Acceptance testing is required. The details of the Acceptance tests to be conducted should also be set out in the Statement of Work.

The Customer must Accept the Software or Services before the payment will be made to the Contractor under clause 21.

Risk

The default position under this clause means that the Customer will Accept the Software when it is delivered even if that Software is not operating in accordance with its Specifications. If the Software which is Accepted by the Customer proves to be faulty or does not comply with
the Specifications, the Customer may address the issue through other clauses of the Contract, for example, warranty provisions.

20.2 Acceptance testing process (clause 16.2-16.7)

Purpose

The purpose of this clause is to outline the Acceptance testing process the Software and Services must undergo before they are Accepted by the Customer. These clauses will only apply to Software if so specified in the Contract Details.

Acceptance testing is conducted in order to demonstrate that the Software and Services meet the Acceptance Criteria. The Contractor will be required to prepare for and conduct the Acceptance testing, unless otherwise provided in the Statement of Work.

As a default, the Customer must Accept or reject the Services within 5 Business Days of completion of the Acceptance Testing. A list of defects or deficiencies must be given to the Contractor at the time of rejection.

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

The Customer must not use the Software in a production environment until it is Accepted or unless otherwise agreed in writing.

If the Software or Services fail the Acceptance tests two or more times the Customer has the right to terminate the Contract immediately under clause 34.2.

Hints for use

The effective operation of these clauses is dependent on the detail set out in the Statement of Work. The Statement of Work should set out the details of:

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

(b) the facilities that the Contractor is required to provide for the purpose of Acceptance testing (refer to clause 16.2); and

(c) the timeframes which will apply in relation to the preparation for Acceptance testing (refer to clause 16.2).

The parties might also wish to specify in the Statement of Work the extent to which the Customer will be (if at all) responsible for conducting the Acceptance tests. The default provision is that the obligation to conduct the Acceptance testing rests with the Contractor.

Further, if the Software will be subject to an Acceptance test procedure (rather than the deemed Acceptance provided for in clause 16.1, refer to section 20.1 of these User Notes) the required Acceptance test procedure for the Software should be specified in the Statement of Work.
21. Measuring performance (clause 17)

21.1 Measuring and monitoring tools (clause 17.1)

Purpose

The Contractor is required to perform the Services in accordance with the Service Levels (as a minimum performance standard) and where no Service Levels are specified, in accordance with reasonably expected levels of performance for the Service.

Clause 17.1 requires the Contractor to implement and maintain measuring and monitoring tools capable of measuring its performance against the Service Levels. However, only those measuring and monitoring tools specified in the Statement of Work are required to be implemented and maintained.

Where the Contractor fails to meet a Service Level, the Contractor is required to investigate the failure and report its findings to the Customer.

Hints for use

Customers should consider the minimum level of performance they require. 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.

If specific measuring and monitoring tools are required, these should be set out in the Statement of Work; otherwise, the Contractor will not be required to maintain or implement such tools.

21.2 Service Rebates (clause 17.2)

Purpose

The purpose of this clause is, as a default position, to provide the Customer with a right to claim Service Rebates (or pre-agreed damages) to the extent that the Contractor is responsible for any failure to achieve a Service Level. Under the clause, the amount of Service Rebates will not exceed the total amount of the Service Charges payable by the Customer.

Service Rebates will not be payable if the failure to meet the Service Level arose because of the Customer's failure to fulfil its obligations under the Contract or as a result of an unforeseen event (see clause 32.1).

Hints for use

If users wish to alter the default position in relation to Service Rebates, this will need to be done in Schedule 3. Careful consideration needs to be given to the completion of the Service Rebates section of Schedule 3. If this is not completed, the clause will be ineffective.

For further discussion regarding Service Rebates and an example please refer to the User Notes - Schedules.

22. Personnel (clause 18)

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 18.3) 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 36, which specifies the requirements for the giving and receipt of notices (for further information refer to the User Notes - General Requirements relevant to clause 36).

### 23. Intellectual Property Rights (clause 19)

**Purpose**

Clause 19 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, trade marks and designs. Refer to clause 1.1 of the model Contract for the definition of Intellectual Property Rights.

Sections 23.3, 23.4 and 23.5 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](#).

#### 23.1 Auxiliary Material (clause 19.1)

**Purpose**

Clause 19 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 23.2 and 23.6 of these User Notes).

23.2 Third Party Material (clause 19.2)

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.

23.3 Intellectual Property Rights in Contract Material – choosing an ownership model (clause 19.3)

Purpose

This clause (together with clauses 19.4 and 19.5) 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 19.4 and 19.5 represent two alternative ownership models – Contractor ownership of Intellectual Property Rights in Contract Material (clause 19.4) and Customer ownership of Intellectual Property Rights in Contract Material (clause 19.5). Clause 19.3 provides the contractual mechanism for selection of an ownership model.

Users are to select a model (ie, either clause 19.4 or 19.5) through the Contract Details. Under clause 19.3(b), if no model is selected, the first model (clause 19.4) will apply and the second model (clause 19.5) will not apply to the Contract.

Clause 19.3 is not intended to suggest that clause 19.4 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 19.4 (Contractor ownership) or adopt the position in clause 19.5 (Customer ownership) without considering which option is most appropriate or without considering whether 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.

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 19.4 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 (Customer 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.

23.4 Contractor ownership of Intellectual Property Rights in Contract Material (clause 19.4)

Purpose

Under this clause, Intellectual Property Rights in the Contract Material vests in the Contractor. 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 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 23.1 of these User Notes regarding Auxiliary Material) and the Contract Material (refer to section 23.3 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 19.4(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 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 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 users or to particular territorial boundaries, 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.

23.5 Customer ownership of Intellectual Property Rights in Contract Material (clause 19.5)

Purpose

As stated above, under this clause, the Customer will own the Intellectual Property Rights in Contract Material. This clause will apply only where it is expressly selected in 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 23.1 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 23.3 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 19.5(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 who do not want clause 19.4 to apply will need to specifically select clause 19.5 to apply through the Contract Details. If it is not selected, clause 19.5 will not apply because of the operation of clause 19.3.

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 users or to particular territorial boundaries, 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.

### 23.6 Warranty and remedy for breach (clause 19.6 – 19.7)

**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 23).

### 24. Moral Rights (clause 20)

**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 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 (ie. 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 20.2. 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;

(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.