



Australian Government  
Department of Finance

# SourceIT User Notes

## Specific Clauses

Hardware Acquisition and Maintenance Contract

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# SourceIT User Notes – Specific Clauses

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# Hardware Acquisition and Maintenance Contract

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## Introduction

### 1. Using these notes

These User Notes contain an explanation of the purpose of the specific clauses of the Hardware Acquisition and Maintenance 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](mailto: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 hardware and hardware related services, such as the provision of preventative and remedial maintenance.

By making provision in the Statement of Work and Contract Details, this model Contract may be used for the provision of Hardware only or both Hardware and the provision of Maintenance Services. It is not necessary for a separate contract to be executed for integrated software as the model Contract includes licensing provisions to cover this circumstance.

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

- (a) the model Contract relates to the provision of hardware and hardware maintenance services. It is not intended to be used for the supply of:
  - (i) equipment other than hardware (i.e. equipment such as overhead projectors and electronic whiteboards that do not have network capability);
  - (ii) software (other than as part of Hardware);
  - (iii) services other than hardware maintenance services or services related to the supply of hardware; or
  - (iv) complex or multifaceted hardware supply or maintenance arrangements such as the roll out of hardware and associated infrastructure across multiple sites;
- (b) the model Contract is not a deed of standing offer and, as a result, is not suitable for panel arrangements or as an arrangement facilitating the supply of hardware or maintenance services from specified providers on an ad hoc basis;
- (c) the model Contract does not apply to the acquisition of hardware by leasing arrangement and should only be used where hardware will be purchased;

- (d) the model Contract assumes contracting between a Commonwealth Agency and one service provider, in contrast to multiple contractors. The terms and suitability of the model Contract will need to be carefully considered if arrangements are to involve more than one contractor. Advice should be sought in such circumstances;
- (e) the model Contract assumes contracting between a Commonwealth Agency and a non-government service provider. Some of the provisions of the document may not be appropriate to an arrangement between two or more non-government entities or between two or more Commonwealth Agencies. Advice should be sought in these circumstances;
- (f) except where specifically provided, the Agreed Terms of the model Contract are not intended to accommodate variations and are not designed for alteration without appropriate procurement and legal advice. Where appropriate, provision is made in Schedule 1 (Contract Details) for variables to be inserted and in some cases, limited departure from the Agreed Terms is accommodated. Users should ensure that relevant variables are included in the Contract Details, where required;
- (g) the clauses in the model Contract relating to confidentiality, audit, and privacy are publicly available clauses recommended for use by the Department of Finance, the Australian National Audit Office and the Office of the Australian Information Commissioner respectively; and
- (h) it is strongly recommended that users of the model Contract refer to these User Notes, the User Notes – General Requirements and User Notes – Schedules.

### 3. Using the correct version

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

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

## Guidance on the specific clauses

### 4. Contract information

#### 4.1 Date

##### *Purpose*

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

##### *Hints for use*

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

#### 4.2 Parties

##### *Purpose*

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

##### *Hints for use*

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

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

2001 (Cth)	company searches)	
An incorporated association (i.e. an association incorporated under the relevant legislation of a State or Territory)	The name of the incorporated association including the words 'incorporated'	<i>ABC Incorporated</i>
A trust	The name of the trustee and the trust	<i>ABC Pty Ltd as trustee for the ABC Trust</i>
A partnership	The name of the partnership and, where practicable, the full names of each of the partners	<i>ABC Partners comprising Fred Smith, Margaret Jones and Sarah Johnson</i>
An individual person	The name of the individual person	<i>Mary Smith</i>

### 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 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 'Hardware 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 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 44 specifies the requirement for notices and determines when a notice is taken to be received (for further information refer to the guidance on clause 44 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. Deliverables and Services to other Agencies (clause 4)

### *Purpose*

This clause allows a Commonwealth 'Nominated Agency' to obtain Deliverables and Services (substantially the same as those 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 Deliverables and 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.

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

### ***Purpose***

This clause caters for the situation where the Hardware to be supplied by the Contractor includes software that is licensed under an open source software arrangement.

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 Hardware includes any software that 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.

#### ***Hints for use***

For this clause to have operational effect, the terms of the Open Source Licence agreement need to be inserted in Schedule 8 of the model Contract (refer to the User Notes - Schedules).

## **11. Supply and Delivery of Hardware (clause 7)**

### **11.1 Supply of Hardware by way of sale (clauses 7.1 – 7.2)**

#### ***Purpose***

These clauses set out certain obligations of the Contractor with respect to the nature of the supply and the standard of Hardware to be provided to the Customer.

Clause 7.2 makes it clear that under this Contract, Hardware is intended to be supplied by way of sale rather than under a leasing agreement.

#### ***Hints for use***

Details of the Hardware to be provided should be set out in the Statement of Work as should the details of the Customer's particular specifications (functional and technical requirements) for the Hardware (refer to the User Notes - Schedules). Customers should refer to the [Guide for sustainable procurement of services](#) issued by the [Department of the Environment](#) when preparing the Specifications for the Hardware.

A default requirement under clause 7.1(b) is that the Hardware be newly manufactured. If recycled Hardware or components is allowable, this requirement can be modified by inserting a statement to that effect in the relevant item of the Contract Details.

This model Contract is intended to apply to simple IT procurement and does not accommodate leasing arrangements. If the Customer wishes to lease Hardware it will need to seek appropriate financial and legal advice.

## **11.2 Delivery of Hardware (clause 7.3)**

### ***Purpose***

This clause deals with the Contractor's obligations in respect of supply and delivery of the Hardware.

### ***Hints for use***

Details of the location to which the Hardware must be delivered should be set out in the Statement of Work. If Hardware is to be delivered to multiple Delivery Places, each of these should be set out in the Statement of Work.

## **12. Timetable for supply and Installation (clause 8)**

### **12.1 Compliance with Delivery Dates and Installation Dates (clause 8.1 – 8.2)**

#### ***Purpose***

These clauses set out the Contractor's obligations in relation to the timing of delivery and Installation of the Hardware.

#### ***Hints for use***

Details of:

- (a) the date for delivery of the Hardware and any other requirements in relation to delivery should be set out in the Statement of Work; and
- (b) the dates for Installation of the Hardware and any other requirements in relation to Installation of the Hardware should be set out in the Statement of Work.

### **12.2 Delay (clause 8.3)**

#### ***Purpose***

This clause requires the Contractor to notify the Customer if it is unable to meet a Milestone and provides that Service Rebates (refer to section 29.2 of these User Notes) will apply in the event of such a delay.

#### ***Hints for use***

In giving notice under this clause the Contractor should be aware of clause 44 which sets out requirements in relation to the giving and receipt of notices.

## **13. Removal of equipment (clause 9)**

### ***Purpose***

As a default position, this clause specifies that the Contractor is not required to remove equipment being replaced by the Hardware.

### ***Hints for use***

If removal of equipment by the Contractor is required, this will need to be specified in the Contract Details. If the Customer requires the Contractor to remove equipment, regard should be given to the [Guide for sustainable procurement of services](#) issued by the Department of the Environment.

In any arrangement involving the removal of the Hardware, the Customer should ensure that all data on the hard drives is properly removed or destroyed.

## **14. Transfer of title and risk (clause 10)**

### ***Purpose***

This clause details the point of time at which the Customer:

- (a) takes ownership of the Hardware, which occurs on Acceptance; and
- (b) bears the risk of any loss or damage to the Hardware, which occurs on delivery.

### ***Hints for use***

Refer to clause 24 of the model contract and section 28 of these User Notes for details of when Acceptance will occur. Customers should ensure they have adequate insurance coverage (or are able to self-insure) as of the time risk transfers to the Customer.

## **15. Warranty Period (clause 11)**

### ***Purpose***

This clause requires the Contractor to remedy any defects in the Hardware at its cost, except to the extent that such defects have been caused by the negligence of the Customer. The obligation continues for a period of 90 days from the Acceptance Date (the Warranty Period) for the Hardware or part of the Hardware.

### ***Hints for use***

Refer to clause 24 of the model contract and section 28 of these User Notes for details of when Acceptance will occur.

## **16. Third party product warranties (clause 12)**

### ***Purpose***

The purpose of this clause is to cater for the situation where standard manufacturer or other third party warranties apply to the Hardware. This may, for example, occur where the Contractor is not the manufacturer of the Hardware or a component of the Hardware. The clause requires the Contractor to provide the Customer with the benefit of any such warranty and to ensure the Customer is aware of the terms and approves any such warranties.

## 17. Provision of Deliverables and Services (clause 13)

### 17.1 General obligations and Service obligations (clauses 13.1 and 13.2)

#### *Purpose*

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

#### *Hints for use*

Some of the aspects of this clause (including clause 13.1(d) in relation to Commonwealth policies and specific requirements) are dealt with in more detail in other sections of the User Notes (see the User Notes – Schedules specifically).

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

- (a) clause 13.1(b) makes provision for any specifically identifiable standards, best practice measures or guidelines which will apply to the Deliverables and Services to be set out in the relevant section of the Contract Details;
- (b) clause 13.1(d) 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 13.1(e) requires the Contractor to perform the Services in accordance with the Milestones. All significant Milestones should be specified in the Statement of Work.

Clause 13.2 includes obligations that apply only where the Contractor is providing Maintenance Services under the Contract. This means that they will not apply when the Contractor is providing Hardware only.

### 17.2 Contractor warranties (clauses 13.3 to 13.5)

#### *Purpose*

These clauses set out a range of warranties which must be given by the Contractor in respect of the Hardware and Services.

The warranties are separated between 3 clauses. Clause 13.3 includes warranties that apply generally (i.e. to the provision of both Hardware and Services). The warranties in clause 13.4 apply only where the Contractor supplies Hardware. Clause 13.5 applies only where the Contractor supplies Maintenance Services.

#### *Hints for use*

Under clause 13.4, the Contractor is required to warrant that the Hardware is newly manufactured. To the extent that this is not the case, for example when wholly or partly recycled or second hand Hardware or Hardware components is to be provided, that fact should be stated in the relevant item of the Contract Details.

### **17.3 Access to Customer's premises (clause 13.6)**

#### ***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 provide the Deliverables and Services. This clause will not apply if the Contractor is supplying Hardware only and will not require access to the Customer's premises.

### **17.4 Conduct at Customer's premises (clause 13.7)**

#### ***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 Hardware 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.

### **17.5 Subcontracting (clause 13.8)**

#### ***Purpose***

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

The clause prohibits the Contractor from subcontracting:

- (a) any part of the Deliverables or 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 13.8(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 Quality 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.

## **17.6 Work Health and Safety (clause 13.9)**

### ***Purpose***

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

### ***Hints for use***

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

## **17.7 Australian Government ICT Sustainability Plan (clause 13.10)**

### ***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).

## **18. Maintenance Services (clause 14)**

### **18.1 Support Period (clause 14.1)**

#### ***Purpose***

The purpose of this clause is to identify the period during which the Contractor is required to provide Maintenance Services. The default position is for Maintenance Services to commence on the expiry of the 90 days from the Acceptance Date and continue until the end of the Contract Period. The Maintenance Services must be provided at no charge during the Warranty Period.

***Hints for use***

The Customer should consider whether the default position is appropriate in the circumstances of each procurement. It is open to the parties to change the default position through the Contract Details.

**18.2 Provision of Maintenance Services (clause 14.2)**

***Purpose***

This clause specifies the Contractor's general requirements in the provision of the Maintenance Services.

***Hints for use***

This clause is closely linked to the Statement of Work, for example, the Contractor is required to provide the Maintenance Services specified in the Statement of Work for the Supported Hardware (clause 14.2(a)). As a result, the parties need to give careful consideration to the completion of the Statement of Work (refer to the User Notes - Schedules).

**18.3 Replacement parts (clause 14.3)**

This clause requires the Contractor to ensure that replacement parts for the Hardware are available for 3 years from the delivery of the Hardware or another period agreed by the parties in writing.

**19. Preventative Maintenance (clause 15)**

***Purpose***

This clause outlines the Contractor's obligations for Preventative Maintenance. Preventative Maintenance is scheduled maintenance undertaken to ensure that the Supported Hardware remains in good working order and conforms to the Specifications.

The Contractor must provide the Preventative Maintenance as and at the times set out in the Statement of Work. Clause 15(b) makes provision for users to specify in the Statement of Work what Preventative Maintenance is to encompass. However, the clause provides the minimum requirements which will apply if no further details are specified in the Statement of Work.

The Customer is entitled to postpone Preventative Maintenance on 5 Business Days notice to the Contractor and reschedule it to occur as soon as practicable, at no charge.

***Hints for use***

As with clause 14.2, this clause 15 is closely linked to the Statement of Work. This means that Customers need to have regard to what Preventative Maintenance

is required, the periods at which it is required, what it is to encompass and whether the minimum requirements in clause 15(b) are adequate.

## 20. Remedial Maintenance (clause 16)

### *Purpose*

Remedial Maintenance is unscheduled maintenance to address a Problem following a request from the Customer. This clause requires the Contractor to provide the Remedial Maintenance, for the Supported Hardware, as set out in the Statement of Work. This clause also provides for the following:

- (a) technical support (clause 16.2). Technical support requirements are specified in the clause, as a default position. They can be altered through the Contract Details;
- (b) in reporting Problems, the Customer is to follow the procedures and methods in the Statement of Work (clause 16.3);
- (c) the Contractor is to follow the requirements in clause 16.4 after the Customer has reported a Problem; and
- (d) the Customer is entitled to require the Contractor to undertake diagnostic tests to show the Maintenance Services have been successful or explain and demonstrate the effect of the Services (clause 16.5).

### *Hints for use*

Customers should consider their requirements for Remedial Maintenance and clearly specify them in the Statement of Work. This should include the methods and procedures for reporting Problems. Consider also whether the technical support specified in clause 16.2 is necessary or sufficient or whether it requires amendment through the Contract Details. Refer to the User Notes - Schedules for guidance on completing the Statement of Work.

## 21. Exclusions (clause 17)

### *Purpose*

This clause details specific exclusions from the Maintenance Services.

### *Hints for use*

Customers should consider whether the exclusions are appropriate for each procurement and amend them through the Contract Details if required.

## 22. Maintenance records (clause 18)

### *Purpose*

Under clause 18, the Contractor is required to keep full records of the Maintenance Services provided to the Customer and must provide the records to the Customer within 5 Business Days (or other agreed timeframe) of request. This clause facilitates performance management of the Contract and, when the time arises, transition from the Contract.

## 23. Engineering changes and upgrades (clause 19)

### ***Purpose***

Under this clause, as a default position, the Contractor is required to implement all engineering changes and upgrades designed to improve the safety, performance and reliability of the Supported Hardware.

The Customer is not required to accept an engineering change or upgrade, except where it has been classified by the manufacturer as mandatory for safety reasons. To enable the Customer to decide whether to proceed with an engineering change or upgrade, the Contractor must provide the information specified in clause 19.1(c).

The Customer is entitled to conduct Acceptance tests in respect of any proposed engineering change or upgrade. Under the default position in clause 19.3, a refusal to accept an engineering change or upgrade will not affect the Customer's entitlement to ongoing Maintenance Services.

### ***Hints for use***

Customers should consider whether engineering changes and upgrades are appropriate or necessary for the Hardware being purchased and if not, specify in the Contract Details that they are not required.

The default position under clause 19.3 (i.e. that a refusal of an engineering change or upgrade will not affect ongoing Maintenance Services) may be amended through the Contract Details. The Contract Details could, for example, state that a refusal to accept an engineering change or upgrade will not affect the Customer's entitlement to ongoing Maintenance Services until the expiry of 18 months from the date the engineering change or upgrade was rejected.

Before changing the default position, Customers should carefully consider:

- (a) their requirements for Maintenance Services;
- (b) the likelihood of an engineering change or upgrade being made available;  
and
- (c) the potential impact on the Customer of an engineering change or upgrade, particularly if installation will require system downtime which may affect business operations.

## 24. Documentation (clause 20)

### *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 clearly 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.

## 25. Varying the Deliverables or Services (clause 21)

### *Purpose*

This clause sets out a procedure for effecting a change to the scope of the Deliverables or 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 Deliverables or 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 Deliverables or 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, Deliverables or Services, 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 44, which specifies the requirements for the giving and receipt of notices (for further information refer to User Notes - General Requirements relevant to clause 44).

Changes to the Agreed Terms of the Contract should only be made in accordance with clause 45.2 (refer to User Notes - General Requirements relevant to clause 45.2).

### ***Risk***

It is important to ensure that any variation to the Deliverables or 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.

## **26. Co-operation with Personnel and contractors (clause 22)**

### ***Purpose***

Under this clause the Contractor, in providing the Deliverables and 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.

## **27. Monitoring progress (clause 23)**

### ***Purpose***

This clause governs how the parties will monitor the progress of delivery of Deliverables and Services under the Contract. It provides for progress meetings to be conducted between the parties to discuss any issues in relation to provision of the Deliverables and 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 phases, and then quarterly or six monthly, depending on the nature and complexity of the Maintenance Services being provided and the operational significance of the Hardware.

## 28. Acceptance testing (clause 24)

### 28.1 Acceptance (clause 24.1)

#### *Purpose*

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

The default position is that the Hardware is deemed to have been Accepted by the Customer when the Contractor delivers the Hardware. This default position can be varied through the Contract Details. If applicable, the Services will be Accepted tested in accordance with the Acceptance test procedures set out in clauses 24.2 to 24.6.

#### *Hints for use*

Customers should consider whether deemed Acceptance for Hardware 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 Hardware, for example, does the Hardware 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 Hardware or Services before the payment will be made to the Contractor under clause 29.

#### *Risk*

The default position under this clause means that the Customer will Accept the Hardware when it is delivered even if that Hardware is not operating in accordance with its Specifications. If the Hardware 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.

### 28.2 Acceptance testing process (clause 24.2-24.6)

#### *Purpose*

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

Acceptance testing is conducted in order to demonstrate that the Hardware 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 Hardware or 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 Hardware or Services fail to meet the Acceptance Criteria, the Contractor will be required to rectify the Hardware or Services and allow the Customer to repeat the Acceptance tests within five Business Days (or another time period agreed by the parties).

If the Hardware or Services fails the Acceptance tests two or more times the Customer has the right to terminate the Contract immediately under clause 42.2.

### ***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; and
- (b) the timeframes which will apply in relation to the preparation for Acceptance testing (refer to clause 24.2).

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 Hardware will be subject to an Acceptance test procedure (rather than the deemed Acceptance provided for in clause 24.1, refer to section 28.1 of these User Notes) the required Acceptance test procedure for the Hardware should be specified in the Statement of Work.

## **29. Measuring performance (clause 25)**

### **29.1 Measuring and monitoring tools (clause 25.1)**

#### ***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 25.1 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.

## **29.2 Service Rebates (clause 25.2)**

### ***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 40.1).

### ***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.

## **30. Personnel (clause 26)**

### ***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 26.3) 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 44, which specifies the requirements for the giving and receipt of notices (for further information refer to the User Notes - General Requirements relevant to clause 44).

## 31. Intellectual Property Rights (clause 27)

### *Purpose*

Clause 27 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 31.3, 31.4 and 31.5 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](#).

### 31.1 Auxiliary Material (clause 27.1)

#### *Purpose*

Clause 27 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 31.2 and 31.6 of these User Notes).

### 31.2 Third Party Material (clause 27.2)

#### *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.

### **31.3 Intellectual Property Rights in Contract Material – choosing an ownership model (clause 27.3)**

#### ***Purpose***

This clause (together with clauses 27.4 and 27.5) 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 27.4 and 27.5 represent two alternative ownership models – Contractor ownership of Intellectual Property Rights in Contract Material (clause 27.4) and Customer ownership of Intellectual Property Rights in Contract Material (clause 27.5). Clause 27.3 provides the contractual mechanism for selection of an ownership model.

Users are to select a model (i.e. either clause 27.4 or 27.5) through the Contract Details. Under clause 27.3(b), if no model is selected, the first model (clause 27.4) will apply and the second model (clause 27.5) will not apply to the Contract.

Clause 27.3 is not intended to suggest that clause 27.4 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 27.4 (Contractor ownership) or adopt the position in clause 27.5 (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 27.4 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.

### **31.4 Contractor ownership of Intellectual Property Rights in Contract Material (clause 27.4)**

#### ***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 31.1 of these User Notes regarding Auxiliary Material) and the Contract Material (refer to section 31.3 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 27.4(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.

### **31.5 Customer ownership of Intellectual Property Rights in Contract Material (clause 27.5)**

#### ***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 31.1 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 31.3 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 27.5(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 27.4 to apply will need to specifically select clause 27.5 to apply through the Contract Details. If it is not selected, clause 27.5 will not apply because of the operation of clause 27.3.

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.

### **31.6 Warranty and remedy for breach (clause 27.6 – 27.7)**

#### ***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 31).

## 32. Moral Rights (clause 28)

### *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,

in relation to the Customer using the Contract Material for the Specified Acts set out in clause 28.2.

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

### ***Hints for use***

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

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

- (a) specify the Material to which the consent relates; and
- (b) specify the acts or omissions covered by the consent.

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

The Contract enables the Customer to, through the Contract Details, change or add to the Specified Acts in clause 28.2. In the majority of circumstances where the Contract Material involves hardware, or IT services and software, this will not be necessary. However, in situations where the Contract Material includes multimedia content (such as film, interviews with people or art works), or if a particular individual's reputation is closely and/or publicly aligned with the Contract Material, the Customer should consider whether the anticipated uses of the Contract Material may require a more specific consent from the author(s) of the works. Some examples of where it may be necessary to include more detail in the Specified Acts are:

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

- (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.