



INDUSTRY  
CAPABILITY  
NETWORK  
New Zealand

**Understanding Public Sector Procurement Processes  
A Supplier's Guide to the Procurement of ICT Goods and Services**

# **CONTRACT AWARD**

**Booklet 5**

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## PREFACE

This booklet series has been developed by the Industry Capability Network (ICN) to assist suppliers of information and communications technology (ICT) services in the public sector.

It is intended to provide a practical understanding of the policies, rules and processes that agencies follow when undertaking the procurement of ICT goods and services. By understanding these policies, rules and processes, suppliers are able to communicate with agencies in a more informed manner and are better positioned to respond to an agency's requirements.

Whilst every effort has been made to ensure these booklets reflect current best practice, readers should refer to the Ministry of Economic Development web site [www.med.govt.nz](http://www.med.govt.nz) for current government procurement policy and rules.

These booklets have been developed in parallel with the training material taught to public sector procurement practitioners as part of the Ministry of Economic Development's procurement training programme.

### Structure of the Booklets

- Booklet 1 provides an introduction to the framework governing public sector procurement and the procurement life cycle model.
- Booklets 2 to 6 detail the activities and processes that occur within each of the five phases of the procurement life cycle model:
  - Planning
  - Requesting and Receiving Offers
  - Evaluation of Offers
  - Contract Award
  - Contract Management

### Procurement Life Cycle Model

This diagram shows the five phases of the procurement life cycle model.



## INTRODUCTION

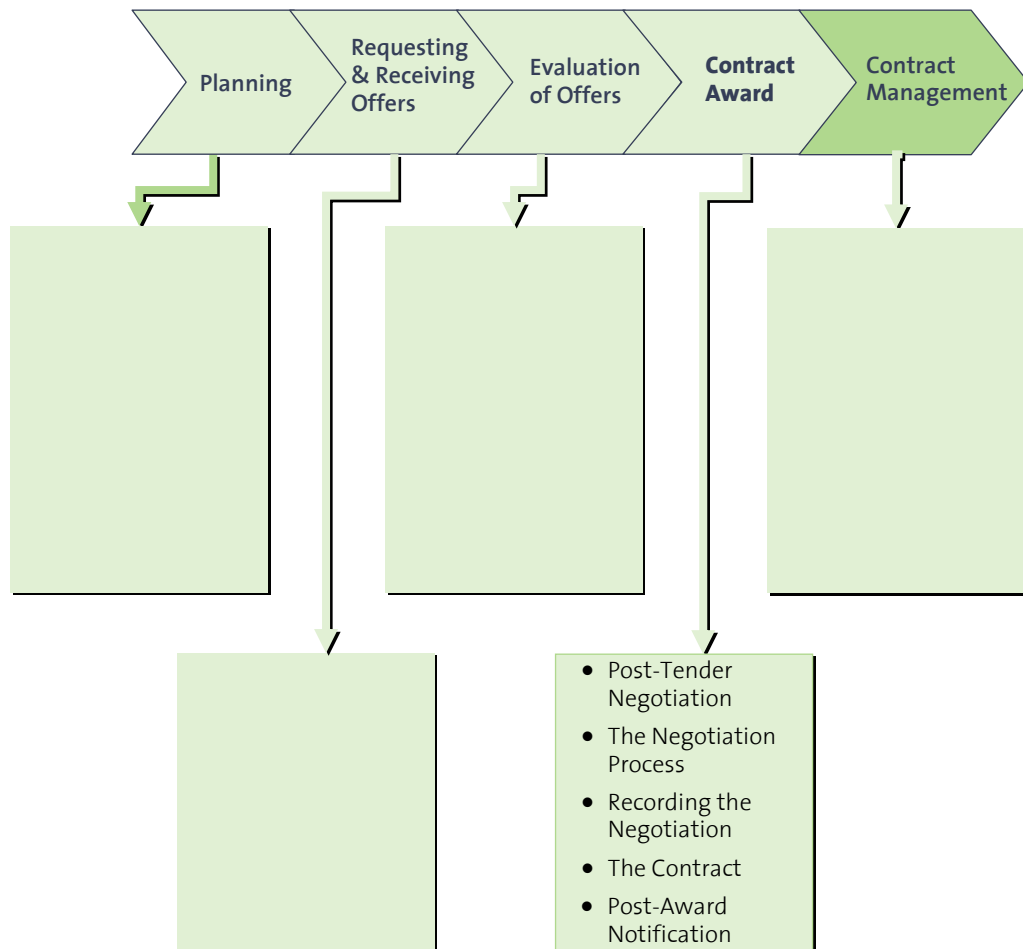
This booklet is number 5 in the ICN ICT procurement series and covers the contract award phase. The topics covered in this booklet are:

- post-tender negotiation
- development of the contract
- post-award notification to ICN

## CONTRACT AWARD ACTIVITIES

This diagram shows the activities and processes in the contract award phase of the procurement life cycle model.

This diagram shows the activities and processes in the planning phase of the procurement life cycle model.



## POST-TENDER NEGOTIATION

Post-tender negotiation is an effective risk management tool. From the buyer agency's perspective, the primary objectives of negotiation are to:

- test the underlying understandings and assumptions that have influenced a tenderer in preparing its costings
- achieve cost reductions through operational refinements or enhancements

During negotiation, you (the supplier) should be prepared to discuss openly the assumptions you made when developing your proposed solution and pricing. Unless otherwise informed, do not believe that you are the only supplier entering this negotiation.

Negotiation is a process where at least two parties move from their own stated positions to a new position where both are satisfied with the outcome. If only one party were to move, the process could not be called negotiation and it is unlikely that both parties would be satisfied with the outcome.

Negotiation is most likely to be viewed as successful by both parties when the risks associated with arriving at the agreed end position are shared between them. If either party tries to load all of the risks onto the other party, the level of service to be delivered and the future business relationship may be compromised.

There are a number of phases in any negotiation and each is as important as the other. During the planning phase it is important that each party to the negotiation has an understanding of the position that they wish to reach i.e. the negotiated outcome that would be considered acceptable.

There are at least two other positions that should be understood. The first is the negotiated outcome, where you have reached the best possible position obtainable, and the other position is the least acceptable point, where anything below this will force you to break off the negotiation.

By understanding these three different positions, you have decided on the range within which you are prepared to negotiate, and as long as there is some positional overlap between the two parties a successful outcome is possible for both. Where one party's starting point is below the other party's least acceptable position, it is unlikely that a mutually successful conclusion will be reached.

There will be areas where neither party is prepared to move from its stated position. You should try to identify these points in the early stage of the negotiation if possible, as it can save a lot of unproductive time being spent by both parties later on.

Most negotiations will have only a few major areas that will require detailed discussions. It is advisable to identify these areas as soon as possible and agree that both parties need to reach agreement on these if a successful outcome is to be reached. If some of these points relate to legal issues, such as liability and intellectual property (IP), it may be advisable to have specialists in these areas discuss and propose an agreed outcome rather than tie up the rest of the negotiation teams.



Negotiations are usually spread over a number of weeks, or even months, and as such it is important that each party agree on progress being made and document it accordingly. One party should take responsibility for document control and, as contractual agreement is reached stage by stage, the master document should be updated by that party using a method so that changes can easily be identified and then distributed to the other party(s) in the agreed timeframe.

When finally reaching a negotiated outcome, remember that if it is too one sided the other party will have to live with the outcome for the term of the agreement and will most likely feel more uncomfortable as time goes on. Likewise, if the negotiated outcome is too flexible and unstructured, neither party will have a defined list of responsibilities, which may lead to an uncomfortable position being reached during the term of the agreement. The best outcome from negotiation is one where each party understands its responsibilities and has agreed and is happy to live with the outcomes, and a dispute process has been defined.

If both the agency and the supplier are in agreement as to the projected business outcomes, the contract negotiation need not be adversarial. Extended contract negotiations can impact on project timelines, be costly and seriously impact on the agency/supplier relationship and ultimately the success of the project.

During negotiations the agency will ensure that:

- all negotiations are conducted ethically, and they do not use their position in a manner that might be considered unfair
- they do not potentially disadvantage other bidders by negotiating an agreement that is materially different in scope from what was proposed in the Request for Offer documents
- the negotiated agreement is sustainable and does not compromise quality

It is important to remember that the negotiation process is an opportunity to build the relationship with the agency, and should be conducted with that consideration in mind.

The agency is also trying to reach a position where it can be assured of receiving that which it set out to procure. Be open and up-front with your requirements; you may think that the agency understands where you are coming from, but you can never be sure. Spend time agreeing how the contract will work rather than waiting for a dispute to arise and then trying to decide what to do. Think about how you will want to manage change control and contract management.

## Recording the Negotiations

By the end of negotiations, both the agency and the supplier should have the same expectations as to their respective obligations and a clear understanding of how the contract will operate. All substantive issues that might impact on price, performance, quality and performance monitoring should be agreed before the contract is signed.

The final outcome of the negotiations should be recorded in writing and incorporated in the contract.

## DEVELOPMENT OF THE CONTRACT

The contract documents the agreement between the agency and supplier. Accordingly, it should be a complete, clear and unambiguous record of each party's obligations. A key source of contractual disputes is a failure to document each party's responsibilities in this manner. "Understandings" from any clarification or negotiation should be included in the contract – particularly where they may relate to obligations later in the contract period, for example at termination.

The size of the contract will be based on a number of factors, including the level of risk associated with the procurement. While the level of risk will vary for individual procurements, different procurements of a similar type (e.g. hardware purchases) often have a similar risk profile. A generic risk profile model based on procurement type is at [Appendix 1](#).

It is important that, while protecting each party's interests, the terms and conditions of the contract are fair to both parties and pass the "sense test". This requirement particularly relates to clauses covering indemnities, warranties and IP, where a limited understanding of these areas and the resulting risks can result in the adoption of unnecessarily conservative contractual positions, which can limit the opportunities that may evolve from a project. One area where the buyer agency will often take a firm position relates to the ownership by the agency of any IP that is developed during the contract. While this is a "safe" position from the agency's perspective, supplier's may wish to consider and explore any future benefits that might accrue to the agency, the supplier and the sector from allowing you (the supplier) to commercialise any resulting IP. This does not mean ownership of IP should be transferred, however options to explore the licensing of the IP for commercialisation or other purposes might be appropriate.

The following section provides a brief legal overview of indemnities, limitation of liability, warranties, IP and confidentiality. [Appendix 2](#) contains some examples of clauses that are used in ICT agreements:

### Indemnity

An indemnity is an obligation to pay an amount of money. It should not be confused with any liability that may arise for breach of contract that may enable a party to recover damages. An indemnity may be useful to protect against the liability of third parties, or a particular event or situation that may arise that is not due to the fault of the indemnifying party. An example of where a third party claim may arise is liability for a breach of confidentiality or third party IP rights.

Except for limited circumstances the Crown, whether being a ministry, department or a Crown entity, cannot give an indemnity without ministerial approval. Regulation 14(2) of the Crown Entities Financial Powers Regulations 2005 sets out what indemnities can be given. These address contracts that are entered into by a Crown entity in the ordinary course of its operations for the sale and purchase of goods, contracts for the procurement of services and contracts to purchase an intangible such as IP.



## Limitation of Liability

Often the existence of an indemnity raises questions about limitation of liability. A limitation of liability clause, as with any exclusion clause, attempts to exclude a party from exercising certain rights and remedies or limits the availability of those remedies to certain financial thresholds, or provides procedural or time limitations calling on such remedies. Such clauses must always be considered in light of the commercial risk and financial return of each party, which often will not be the same for both parties.

Care must be taken to consider what is included or excluded in such clauses and whether it is intended to include any indemnities that are given. Often indemnities relating to breaches of confidentiality and IP rights are excluded from any cap on liability. It is very common for parties to attempt to exclude consequential loss (including indirect or special loss) as well as losses such as loss of profit or loss of business. As a general rule, if the loss is such that it may fairly and reasonably be considered as arising naturally from the breach of contract, it is a direct loss. Where the loss does not flow naturally from the breach but may reasonably have been contemplated by both parties at the time of entering the contract, it is an indirect or consequential loss.

There are statutory provisions that will limit a party's ability to exclude totally all liability or be indemnified for all losses it may incur. The Fair Trading Act 1986 (which cannot be contracted out of) preserves rights against a party that makes misleading statements or misrepresentations or behaves deceptively. Similarly the Consumer Guarantees Act 1993 establishes certain guarantees in relation to consumer-based goods and services that cannot be contracted out of unless the contract is recognised as a business-to-business transaction. Another example is the Health and Safety in Employment Act 1992, which imposes obligations to ensure a safe working environment and work practices and prohibits any party being indemnified for any penalty or fine imposed on it under the Act.

## Warranties

In general terms, when a person gives a warranty they are making a statement that is intended to be relied upon by the other party about the nature or the quality of a particular matter. The Sale of Goods Act 1908 contains certain statutory warranties (for example that the goods are owned and unencumbered), but can be excluded by agreement of the parties. A warranty should not be given, or indeed accepted, if the subject matter is outside the control or knowledge of the person giving it or if the warranty is incapable of being satisfied. It is therefore important to consider the reasons for giving or demanding a warranty, as well as fully understand the consequence or damages that may arise as a result of any breach of a warranty.

## Intellectual Property

The parties to the contract should discuss and agree who has ownership, control and protection of IP being developed under the agreement. There is more than one method of managing IP. Sometimes it may be unacceptable to commercialise or share the resultant IP, and in other cases it may be in the parties' interest to either license or share the IP with others.

Contracts may provide for, or address, multiple owners or levels of ownership, royalty terms and the required consent before using, publishing or making knowledge



available if appropriate. The contract should also recognise the different concepts that form IP and identify who owns what going into the agreement, during the agreement and when it is completed. Is what is being protected subject to copyright, trademark, a patent or design? In many situations user rights to certain IP may need to be granted to facilitate the ongoing obligations of a party that is not the owner of that IP. In the case of software, an escrow arrangement can ensure that the ownership of the IP or source code is preserved as well as providing a workable mechanism to give the other party access to IP if specified events such as default or insolvency on the part of the owner arise.

## Confidentiality

The advantage of entering into a contractual obligation of confidentiality (rather than merely relying on the equitable obligation) is that the nature and extent of what the parties consider “confidential information” can be determined in advance.

For example, a contractual obligation may require that any information resulting from research remains confidential between the parties. This is a purely contractual issue. If the parties agree to such a term it will be binding. However, in general, any information that a party uncovers on its own (i.e. without assistance from the other party’s information) will be that party’s property to do with as it wishes.

It must also be recognised that public sector entities (government or local authorities) are subject to official information disclosure requirements (the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987) and cannot give an absolute assurance to keep all information they hold confidential. Specific provisions need to deal with these situations. At a minimum the words “unless required by law” need to be included to ensure the public entity is able to meet its statutory obligations without being in breach of its contractual obligations if disclosure is required by the Ombudsman. In many cases it is advisable to put in place procedures that the parties will follow to ensure that any disclosure required to be made is done on an informed basis between the parties to the contract.

## Contract Structure

In an ICT services contract it is usual to specify the services in a separate service level schedule. In some cases this service level schedule is structured as a Service Level Agreement (commonly referred to as an SLA) under a Master Services Agreement (MSA). This approach is common where a number of separate services might be provided by the supplier, so rather than negotiating the main terms and conditions for each separate package of work, a single MSA containing those generic terms and conditions is negotiated. The SLA is then only required to contain the terms and conditions unique to that package of work e.g. the term, termination provisions and any specific warranties as well as the pricing, service description and applicable service levels.



## Service Levels

The service levels are the part of the contract against which the service requirements are specified, monitored and reported. Considerable care and attention needs to be taken by both parties in their development.

Service level structures may vary depending on the writers' preferences, however as a general rule they should contain the following five components:

- key performance indicators (KPIs) (business activity)
- performance required
- performance measure
- performance target
- reporting requirement

The service levels should always link back to the project output.

### Example

An example service level structure is shown in the figure below.

Business Activity (KPI)	Service Level (Standard of performance required)	Performance Measure	Performance Target	Reporting Requirement
Surveying satisfaction	Service provider to undertake biannual customer survey to ascertain the satisfaction of the customer's staff. The survey will be conducted using criteria agreed with the customer.	Two surveys to be conducted in every calendar year at approximately six-monthly intervals.	100%	Customer satisfaction survey
		Results to be reported within one month of survey completion.	Score of 7.5 or more is the goal for each of the areas surveyed	
Help desk	Supplier to provide a serviced 24-hour 0800 number.	Calls answered within 20 seconds.	100%	Monthly call-logger report
		X% of help desk calls resolved by the help desk within 30 minutes.	95%.	Help desk activity report.

## Types of Service Levels

There are generally two types of service levels:

- **Milestone:**  
Achieve something by a certain date;  
e.g. on-line fault reporting system is operational by x date
- **Measure:**  
Meet a target on a defined measure;  
e.g. answer the telephone within 20 seconds

For ease of monitoring and reporting, it is recommended that milestone and measurement service levels are not combined *e.g. establish an 0800 number by x date and answer calls within 20 seconds.*

## Characteristics of Good Service Levels

Well structured service schedules lead to well managed contracts. With that in mind, consideration should be given to the following characteristics of good service levels:

- **Completeness**  
All significant aspects of the goods/services should be included in the measurement of performance
- **Clarity**  
The agency and the supplier should have the same understanding of the performance measures to be used
- **Measurability**  
Performance requirements should be expressed in measurable terms and should be based on data that it is possible to gather in a cost-effective manner (ideally close to real time and using external benchmarks against which to base the performance targets where appropriate)
- **Focus**  
Should be focused on the agency's objectives, not on the processes (i.e. make sure they are relevant)
- **Controllable**  
i.e. within the supplier's control
- **Not too many**  
As a rough guide it is recommended there should be no more than 12-15 high-level service levels that are regularly monitored. While there might be more service levels required, it is recommended they are structured under the high-level service levels and are only analysed when a problem is identified



## POST-AWARD NOTIFICATION

Agencies covered by the *Mandatory Rules for Procurement by Departments* are required to report contract award details on the *Government Electronic Tenders Service (GETS)* for procurements over \$100,000, and all procurements below \$100,000 that were openly tendered. Other agencies are encouraged to comply with this requirement.

Suppliers are able to view post-award details on the *GETS* web site.

### Ethical Considerations

The key ethical consideration for both buyer agencies and suppliers during this phase is to negotiate based on good faith.

### Risks

Generic risks identified relating to the contract award phase of the procurement life cycle include:

- if both the agency and supplier do not reach a mutually agreed negotiated outcome, it is likely that a dispute will arise during the term of the contract. Parties should spend the time needed to reach this agreement up-front and ensure that the contract includes an agreed disputes resolution process where each party is comfortable to abide by the outcome. Issues not resolved during the negotiation process will not just go away during the term of the contract
- parties should take care in determining the areas on which they are prepared to move during negotiation. Once one party has given a concession to the other party, it is very difficult to withdraw it later on
- service levels should be unambiguous and both parties should have the same understanding of the KPIs, performance targets, measures and reporting requirements. This will reduce the probability of future disputes over understanding and expectations



# APPENDIX 1: RISK BASED ON PROCUREMENT TYPE

Many ICT procurement projects are perceived, by default, to be high risk. This can lead to agencies adopting a very risk-averse approach in terms of the contracting strategy, supplier selection process and contract structure and content. While this might be appropriate for most software customisation and application development projects, many other ICT procurements are relatively low or medium risk. The following table provides a model for the consideration of ICT procurement risk levels based on project value and type.

Note: This table is a generic guide only, and is not intended to be used as a replacement for a structured risk management process such as detailed in the risk management standard AS/NZS 4360:2004.

	Hardware	Operational Software	Application Software		Application Outsource	Infrastructure Outsource		Application Development
			Base	Customised		Centralised	Desktop	
\$5M	Low	Low	Low	High	Medium	Medium	High	Medium
\$1M	Low	Low	Low	High	Medium	Medium	High	Medium
\$0.5M	Low	Low	Low	High	Low	Medium	High	Medium
\$0.2M	Low	Low	Low	Medium	Medium	Low	High	Medium
0	Low	Low	Low	Low	Low	Low	High	Medium

**Risk:** Low  Medium  High



## APPENDIX 2: EXAMPLE CLAUSES

There are numerous examples of clauses relating to confidentiality, limitation of liability and indemnities that you will find in a wide range of ICT contracts.

The following are examples of the clauses you might expect to see, or include, in these types of agreement.

These example clauses are not intended to replace professional legal advice.

### CONFIDENTIALITY CLAUSES

#### Confidentiality

It is important to define the parameters of what is confidential information. A definition of confidential information is usually found in the definitions part of an agreement.

#### Example 1: Comprehensive Confidentiality Clause

This is reasonably comprehensive

**Confidential Information** means information (whenever it was obtained) in relation to the Principal's, or a Related Entity's:

- a. business, operations or strategies;
- b. intellectual or other property; or
- c. actual or prospective Customers, Suppliers or competitors.

The information must be one of the following:

- a. confidential in fact
- b. reasonably regarded by the Principal as confidential
- c. information that a written notice from the Principal to the Customer states is confidential.

Information is not confidential if:

- d. it is in the public domain, unless it came into the public domain by a breach of confidentiality;
- e. it is already known by the Customer at the time this document is entered into;
- f. it is obtained lawfully from a third party without any breach of confidentiality; or
- g. it is developed independently by the Customer.

**The agreement will contain the primary obligation.**

#### Duty to preserve confidentiality

- 1.1 The Licensee must not disclose any of the Licensor's Confidential Information to any third party unless:
  - 1.1.1 the disclosure is necessary to comply with the Licensee's obligations under this document or under any other agreement between the parties;
  - 1.1.2 the disclosure is required by law; or
  - 1.1.3 the Licensor consents in writing to the disclosure.



- 1.2 The Licensee must take reasonable steps to ensure that any Representative to whom a disclosure is made does not do anything which, if done by the Licensee, would be a breach of this clause.

### Example 2: Simple Confidentiality Clause

A simple form of confidentiality clause that may be suitable for very low-risk contracts is as follows:

#### Confidentiality

The Contractor must keep confidential and secure any information of the Client which would reasonably be expected to be commercially sensitive or confidential. No disclosures or use of that information by the Contractor is allowed without the Client's prior written consent. The Contractor will not advertise that it supplies goods or services to the Client without the Client's consent.

## WARRANTY CLAUSES

There is a range of warranties that are sought from suppliers. These clauses need to be considered in light of the products and services being provided. Consideration should also be given to the appropriateness of any limit on liability and advice sought in relation to any insurance cover and associated risks.

### Example 1: Supplier Warranty

#### Warranties

- 1.1 The Supplier warrants that:
  - 1.1.1 the Support Services will be performed:
    - (a) as requested or needed by the Client during the Coverage Period throughout the Term;
    - (b) with reasonable skill and care by Personnel who are appointed in accordance with the standards set out in clause [ ];
    - (c) in accordance with the highest professional standards attained by companies offering Hardware support of the type offered by the Supplier;
    - (d) in such a way as not to cause any fault or malfunction in the Hardware (or any related Hardware or system of the Client); and
    - (e) in such a way as not to cause any interruption to the business of the Client (other than any agreed and unavoidable interruption which is required in order to perform the Support Services in a proper and efficient manner);
    - (f) so as to restore the Hardware to good working order and operating condition in accordance with the Specifications, Response Times and Restoration Times if the Hardware is not in such working order and operating condition even if the Hardware is not the current version or current release;



- 1.1.2 the use or possession by the Client of the Updates, New Product or Work Product (as contemplated by this Agreement) will not infringe the Intellectual Property Rights of any third party;
- 1.1.3 it shall (and shall procure that its employees, agents and sub-contractors shall) during the term of this Agreement comply with all applicable law, regulations, regulatory requirements, codes of practice and the Client's policies including (without limitation) the Client's information security and privacy policies, in carrying out its obligations under this Agreement;
- 1.1.4 the Hardware (including all Modifications) complies with, and will continue to comply with the Specifications and will operate on, be compatible with, and not cause degradation of the Client's systems;
- 1.1.5 it has and will at all times maintain and allocate sufficient resources to fully discharge all of its obligations under this agreement, including adequate skilled staff, tools, spare parts, consumables, service software, working capital, communications facilities and administrative support;
- 1.1.6 no fact or circumstance exists which may materially affect the Supplier's ability or willingness to perform this agreement which has not been fully disclosed to the Client;
- 1.1.7 the Client will be able to use the Hardware without disturbance from the Supplier or any third party;
- 1.1.8 the Supplier will test and service all software, Hardware and equipment to be used in the Support Services to ensure its equipment is Virus free;
- 1.1.9 the Supplier will execute the Remote Access Deed on or about the Effective Date.

### **Example 2: Short Form Supplier Warranty**

A short form limited warranty and exclusion clause.

#### **Supplier warranties**

- 1.1 Supplier warrants that it has the right and authority to grant the licence of the Product and Documentation to the Customer.
- 1.2 Supplier Software does not warrant that:
  - 1.2.1 the Product is error free;
  - 1.2.2 the use of the Product shall be uninterrupted; or
  - 1.2.3 the Product shall provide any function not designated in the Documentation.

#### **Exclusion or limitation of other conditions and warranties**

- 1.1 All other conditions and warranties of any type in relation to the Product and Documentation are excluded to the maximum extent allowed by law.



### Example 3: Software Limitation of Liability

A brief limitation-of-liability clause that may appear in a software licence.

#### Limitation of liability

The liability of either Party for breach of the Contract or for any other common law or statutory cause of action arising out of the operation of the Contract will be determined under the relevant law in New Zealand that is recognised. Liability in aggregate is limited to \$[00.00] or two times the Contract value, whichever is the greater for each 3 year period, during the term.

### Example 4: Comprehensive Warranty for Services

This is an example of a more comprehensive warranty for implementation and ongoing support services.

#### Warranties

- 1.1 The Contractor represents and warrants that:
  - 1.1.1 it has, and the Contractor Personnel have, and they will both continue to have and to use, the skills, qualifications and experience to provide the Services and deliver any Deliverables in a skilful, diligent, responsive, efficient and controlled manner, with a high degree of quality and to a standard that complies with the Contract and meets the Client's requirements in full;
  - 1.1.2 it will meet, and seek to exceed, the KPIs at all times during the Term;
  - 1.1.3 it will provide the necessary resources to provide the Services and use those resources or services to provide the Services; and
  - 1.1.4 it will maintain all relevant Documentation and all Software used for the purposes of the Services in good operating condition.
- 1.2 The Contractor represents and warrants that:
  - 1.2.1 it has full corporate power and authority to enter into, perform and observe its obligations under the Contract;
  - 1.2.2 the execution, delivery and performance of the Contract has been duly and validly authorised by all necessary corporate action; and
  - 1.2.3 the Contractor's signing, delivery and performance of the Contract does not constitute:
    - (a) a violation of any judgment, order or decree;
    - (b) a material default under any contract which relates in any way to the delivery of the Services by which it or any of its assets are bound; or
    - (c) an event that would, with notice or lapse of time, or both, constitute such a default.
- 1.3 The Contractor warrants that it has disclosed in writing to the Client prior to the Commencement Date:
  - 1.3.1 any litigation or proceeding whatsoever, actual or threatened, against the Contractor; and



- 1.3.2 matters relating to the commercial, technical or financial capacity of the Contractor or of any subcontractor proposed to be engaged in respect of the Contract including the existence of any breach or default or alleged breach or default of any agreement, order or award binding upon the Contractor, being matters affecting the Contractor's ability to perform any of its obligations under the Contract and the Contractor must promptly notify and fully disclose to the Client in writing any event or occurrence actual or threatened during the Term which would materially affect the Contractor's ability to perform any of its obligations under the Contract.
- 1.4 The Contractor warrants that:
  - 1.4.1 during the Term, each Service and Product will conform with the Contract including the Statement of Work and any Additional Statements of Work, or, where relevant and subject to clause [ ], any third party warranties specified in the Statement of Work or any Additional Statements of Work;
  - 1.4.2 if and to the extent ownership of a Product is to pass to the Customer, the Product will be free from any charge or encumbrance;
  - 1.4.3 it has the right to grant all licences including to the Licensed Software granted pursuant to the Contract; and
  - 1.4.4 no virus will be introduced into the Client's systems as a result of the supply by the Contractor of a Product or as a result of any negligent or wilfully wrong act or omission by the Contractor in providing a Service.
- 1.5 In addition to the Contractor's Global Warranty obligations under the Contract, the Contractor must at no cost to the Client, diagnose and correct any Latent Defect in the Services if the Latent Defect is notified to it in writing by the Client within the period of 36 months commencing on the date of Acceptance or delivery of that Service, whichever is the later.
- 1.6 Each Service and Product supplied by the Contractor must comply with the applicable New Zealand or Australian standards or, if there are no applicable New Zealand or Australian standards, any applicable international standards.
- 1.7 Where the Contractor supplies Products that have been procured from a third party, the Contractor assigns to the Client, to the extent practicable and to the extent permitted by law, the benefits of the warranties given by the third party. This assignment does not in any way relieve the Contractor of the obligation to comply with warranties offered directly by the Contractor under the Contract.
- 1.8 The Contractor must promptly notify and fully disclose to the Client in writing any event or occurrence actual or threatened during the Term, which would materially affect the Contractor's ability to perform any of its obligations under the Contract.
- 1.9 The Contractor warrants that it will provide spare parts and maintenance services to maintain any Product it supplies to the Client for at least 5 years from the date of Acceptance at a reasonable and market competitive price.
- 1.10 The Client warrants that it has authority to enter into the Contract.



## INDEMNITY CLAUSES

Before requesting or accepting any indemnity it is important to determine whether it is permitted under the Public Finance Act 1989 or Crown Entities Act 2004. Consideration should be given to what the indemnity is to cover, who gives the indemnity or whether it should be mutual. These clauses need also to take into account other clauses in the agreement such as any limitations of liability.

### Example 1: Supplier's indemnity to the Customer

This example provides for the supplier to indemnify the buying agency against certain events or breaches.

#### Indemnity

- 1.1 The Supplier will at all times indemnify and will continue to indemnify, hold harmless and defend the Client and each of its members, partners, principals, agents, servants and employees (in this clause referred to as 'those indemnified') from and against all liabilities, costs and expenses suffered or incurred by any of those indemnified including without limitation, all legal fees incurred by those indemnified, arising out of or in connection with any of the following:
  - 1.1.1 any infringement, or an allegation that any Work Product infringes the Intellectual Property Rights or any other proprietary right of any third party;
  - 1.1.2 any unauthorised use or disclosure of the Client's data or any confidential information of the Client by the Supplier or its Personnel;
  - 1.1.3 any personal injury, death or damage to tangible property;
  - 1.1.4 any breach of this Agreement (including breach of any warranty, representation or covenant of the Supplier); and
  - 1.1.5 any act or omission of the Supplier or its Personnel.

### Example 2: Customer's Indemnity to Supplier

This indemnity is given by the buying agency to the supplier and is similar to the previous indemnity.

#### Customer's indemnity to Supplier

- 1.1 The Customer must indemnify the Supplier against any claim or proceeding that is made or commenced, and against any liability, loss, damage or expense that is incurred or suffered arising from any of the following:
  - 1.1.1 a breach of this Agreement by the Customer, including any warranty;
  - 1.1.2 a wilful, unlawful or negligent act or omission by the Customer or an officer, employee, agent or subcontractor of the Customer;
  - 1.1.3 damage to or loss of any of the Supplier's property;
  - 1.1.4 personal injury or death of any of the Supplier's or the Customer's employees;



- 1.1.5 a failure by the Customer to give the Supplier all reasonable assistance in connection with dealing with a possible or alleged infringement of a third party's Intellectual Property Rights; or
- 1.1.6 an infringement of any Intellectual Property Rights or moral rights of a third party, where the alleged infringement relates to the modifications or adoptions of the Product or Documentation by the Customer or by the Supplier where the modification or adaptation was based on information provided by the Customer.

### Example 3: Indemnity

The last example illustrates how an indemnity will cross-refer other clauses in the agreement.

#### Indemnity

- 1.1 The Contractor must at all times indemnify the Client and the Client Personnel (**those indemnified**) from and against any:
  - 1.1.1 loss or liability incurred by those indemnified;
  - 1.1.2 loss of or damage to property of those indemnified; or
  - 1.1.3 loss or expense incurred by any of those indemnified arising from any claim, suit, demand, action or proceeding by any person against any of those indemnified including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used or disbursements paid by those indemnified,arising from:
  - 1.1.4 any act or omission of the Contractor in connection with the Contract;
  - 1.1.5 any breach by the Contractor of its obligations or warranties under the Contract;
  - 1.1.6 any use or disclosure by the Contractor of Personal Information held or controlled in connection with the Contract; or
  - 1.1.7 the use or provision of, or access to, the Services or any Product or Deliverable.
- 1.2 The Contractor's liability to those indemnified under **clause [ ]** will be reduced proportionally to the extent that any unlawful, wilfully wrongful or negligent act or omission of those indemnified caused or contributed to the loss or liability, loss or damage, or loss or expense.
- 1.3 The right of those indemnified to be indemnified under **clause [ ]** is in addition to, and not exclusive of, any other right, power or remedy provide by Law.
- 1.4 The Contractor acknowledges and agrees that 'the Client Personnel' is defined widely in **clause [ ]** to include, among other people, employees of the Client and its contractors (but not the Contractor).
- 1.5 This indemnity will survive the expiration or termination of the Contract.
- 1.6 It is not necessary for the Client to have incurred any expense or made any payment before enforcing an indemnity under the Contract.



- 1.7 For the purpose of this **clause [ ]**, the Client is deemed to be acting as agent or trustee for and on behalf of the Client Personnel from time to time and may exercise the rights in this **clause [ ]** for the Client Personnel on their behalf.

#### **Example 4: Liability and Indemnities**

It is common for software suppliers to limit their liability and obtain an indemnity from the client for breach of the licence. An example is set out below.

#### **Liability and Indemnities**

##### **No warranties**

- 1.1 The Licensor does not represent or warrant that the Software is or will be suitable for any particular purpose, including the Purpose.
- 1.2 The Licensor does not represent or warrant that the Software, or any part of it, will not infringe the Intellectual Property rights of any third party.
- 1.3 All conditions and warranties of any other type implied by law in relation to the Software are excluded to the maximum extent allowed by the law.

##### **Limitation of liability**

- 1.4 The Licensor will not be liable for any Loss that the Licensee incurs or suffers as a result of, or in connection with, the Software or this Agreement.
- 1.5 Where the Licensor's liability cannot be lawfully excluded, it is limited at the option of the Licensor, to:
  - 1.5.1 the replacement of the Software or the supply of equivalent Software;
  - 1.5.2 the repair of the Software;
  - 1.5.3 the payment of the cost of replacing the Software or of acquiring equivalent Software; or
  - 1.5.4 the payment of the cost of having the Software repaired.

##### **Licensee's indemnity to Licensor**

- 1.6 The Licensee continually indemnifies the Licensor against any Loss that is incurred or suffered by the Licensor arising from any of the following:
  - 1.6.1 A breach of this Agreement by the Licensee.
  - 1.6.2 A failure by the Licensee to give the Licensor all reasonable assistance in connection with dealing with a possible or alleged infringement of Intellectual Property and defending any claim in respect of it.
  - 1.6.3 An infringement of any Intellectual Property rights of a third party by the Licensee as a result of modifying or merging the Software.

**Note:** These clauses are examples and should not be used out of context, or in place of professional legal advice.