

Module 3 – Licensed Software

Version 3.1

TABLE OF CONTENTS

| | |
|---|----|
| 1. AGREED TERMS AND INTERPRETATION | 2 |
| 2. LICENSE TERMS..... | 3 |
| 3. SUPPLY OF LICENSED SOFTWARE..... | 8 |
| 4. UPDATES AND NEW RELEASES | 9 |
| 5. OPEN SOURCE SOFTWARE..... | 10 |
| 6. ANCILLARY SERVICES..... | 11 |
| 7. RESELLER PROVISION OF LICENSED SOFTWARE..... | 11 |
| 8. SPECIFIC WARRANTIES..... | 12 |
| 9. EXCEPTIONS..... | 13 |
| 10. AUDIT | 14 |

[\[Use Guidelines](#)

This Module should be used when the Customer is buying and/or installing both proprietary and open source software which is to be used either without modification or some minor modification to suit the Customer's business requirements. There are a variety of different types of software licences. Some are based on the number of machines on which the licensed programme can be run or based on the number of users that can use the programme.

Licences may be able to be sublicensed to outsourcers. If software is to be adapted or customized for the Customer's use Module 4 should be used.

See the Procure IT User Guide for more details.

This text is not to be used in interpreting the Module.]

Agreed Terms and Interpretation

AGREED TERMS

The terms and conditions included in this **Module 3** form part of the Customer Contract and apply when the Parties state that the Licensed Software Module forms part of the Customer Contract in Item 8 of the General Order Form.

In this Module, unless the contrary intention appears:

- 1.1 Approved Purpose** means to use the Licensed Software for a purpose described in the Module Order Form and in absence of a purpose being stated on the Module Order Form, for the internal processing of the Customer's own data.
- 1.2 Class** means specific rights that are granted by the Contractor to the Customer to use the Licensed Software that are stated in the Module Order Form, and may include the License Period, number and type of Permitted Users, number, type or capacity of any hardware on which the Licensed Software may be used, or other attribute which defines the Customer's right to use the Licensed Software.
- 1.3 Designated Equipment** means the hardware platform/operating system combination stated in the Module Order Form upon which the Licensed Software is installed.
- 1.4 Exception** means the reasons that excuse the Contractor from being in breach of the Customer Contract in respect of the Licensed Software and Services provided under this Module, as stated in clause 9.
- 1.5 First Release** means a license that is for a release (as denoted by the integer to the left of the decimal point in the release number e.g. release version 3.0) of the Licensed Software, which although is generally available for supply to all of the Contractor's customers in the Australian market, that release has not been licensed (or the New Release has not been made available) to any other customer in the Australian market at the time the license is granted to the Customer for that release of the Licensed Software or New Release.
- 1.6 License** means the license granted by the Contractor to the Customer in respect of the Licensed Software under this Module 3 to the Customer Contract.
- 1.7 License Period** means the period that the License is granted and is:
 - (a) stated in the Class of License; or
 - (b) in absence of a Class of License, perpetual.
- 1.8 New Release** means software which has been produced primarily to extend, alter or improve the Licensed Software by providing additional functionality or performance enhancement (whether or not Defects in that Licensed Software are also corrected) while still retaining the original designation of the Licensed Software. New Release does not include any software that is generally licensed by the Contractor to its customers as a different product.
- 1.9 Open Source License** means a license that governs the use of open source code, which is included with the open source code, examples of which include the GNU General Public License v2.
- 1.10 Permitted User** means each person the Customer has permitted to use the Licensed Software for the Approved Purpose, in accordance with the Customer Contract.
- 1.11 Reseller as Facilitator** means a Reseller who uses the business model described in clause 7.1(a) to facilitate the supply of the Licensed Software to the Customer.

- 1.12 Reseller with Pass Through Warranties** means a Reseller who uses the business model describe in clause 7.1(b) to supply Licensed Software to the Customer.
- 1.13 Software Support Services** means the Services the Contractor agrees to provide for the Licensed Software under Module 5 when the Parties agree that Module 5 forms part of the Customer Contract.
- 1.14 Third Party Component** means software components, plug-ins and other programs that are owned by third parties and are stated on the Module Order Form as being Third Party Components. The term **Third Party Component** does not include open source software.
- 1.15 Update** means software which has been produced primarily to overcome Defects in, or to improve the operation of, the relevant part of the Licensed Software without significantly altering the Contract Specifications whether or not that Licensed Software has also been extended, altered or improved by providing additional functionality or performance enhancement.

INTERPRETATION

- 1.16** Other capitalised words and expressions used in this Module are defined and interpreted in Part 3 of the Procure IT Framework.

2. Licence Terms

CLASS OF LICENSE

- 2.1** The Contractor grants to the Customer a non-exclusive License to use the Licensed Software on the Designated Equipment on the terms of the Class of License stated in the Module Order Form.
- 2.2** If there is no Class of License stated in the Module Order Form, the Contractor grants the Customer a non-exclusive License to:
- (a) install the Licensed Software on the Designated Equipment in accordance with the User Documentation;
 - (b) if the General Order Form states that the Licensed Software is to undergo Acceptance Tests; to carry out Acceptance Tests in respect of the Licensed Software;
 - (c) run (but not modify or adapt) the Licensed Software from the AAD on the Designated Equipment and use the Licensed Software solely for the Approved Purpose for the License Period;
 - (d) use, adapt and/or reproduce the Licensed Software to the extent permitted under the *Copyright Act 1968* (Cth) ("**the Act**"), including rights granted under sections 47B(3) and sections 47C, 47D, 47E or 47F of the Act;
 - (e) allow the use of the Licensed Software and User Documentation by the Customer's contractors solely for the Approved Purpose for the License Period, provided that:
 - (i) the use of the Licensed Software and User Documentation is restricted to the same Class of usage granted to the Customer. For clarity, any usage by such persons must be included within the Class of License (by way of example, if the Class of License is based on the number of users then the number of contractor's users is included in the number of users acquired by the Customer); and

- (ii) unless otherwise required by the Contractor, the Customer's contractor first signs an agreement or undertaking in a form reasonably acceptable to the Contractor that protects the use and disclosure of the Licensed Software in the same manner as stated in the Customer Contract;
- (f) make such number of copies of the Licensed Software as are reasonably required for operational use, backup, archive and security.

SUBSTITUTION, CHANGE AND TRANSFER

2.3 If the License restricts the use of the Licensed Software to specific Designated Equipment, the Customer may:

- (a) transfer the Licensed Software to alternative equipment of substantially the same purpose, capacity and performance standards; and
- (b) install and run the Licensed Software on any back-up hardware while the Designated Equipment is for any reason temporarily inoperable,

with the Contractor's prior written consent, such consent not to be unreasonably withheld. Any transfer, change or substitution may be documented using a Change Request.

2.4 If the Customer requires the Contractor to assist with the transfer of the Licensed Software to other equipment, then a Change Request must be agreed by the Parties.

LICENSE PERIOD

2.5 Unless earlier terminated in accordance with the Customer Contract or otherwise surrendered by the Customer, the License remains in force for the duration of the License Period.

2.6 Where the License Period is not perpetual then:

- (a) at least 30 days or as otherwise agreed in the Module Order Form prior to the end of each License Period, the Contractor may at the Contractor's sole discretion either provide the Customer with written notice of the Price and the payment arrangements that will apply for the License for the Licensed Software for an extended period of License Period or provide a new Customer Contract, including a new General Order Form and Module Order Form with the Price and payment arrangements that will apply for a new License;
- (b) where the Customer has been given an option to extend the License in accordance with clause 2.6(a), the Customer may elect not to extend the License or elect not to enter into a new License by providing the Contractor with written notice, such notice to be received at least 15 days prior to the date when the current License Period expires;
- (c) if the Contractor does not receive written notice under clause 2.6(a), then the License Period must be extended for the extended License Period and the Customer must pay the Price using the terms and conditions and the payment arrangements, all as stated in the notice given under clause 2.6(a); and
- (d) the procedures in clause 2.6 will apply at the end of each License Period.

THIRD PARTY COMPONENTS

2.7 If Third Party Components are associated with the Licensed Software then:

- (a) the Contractor is acting as a Reseller for the Third Party Components and the provisions of clause 7 apply; or

- (b) if stated on the Module Order Form, the Third Party Components are licensed as part of the Licensed Software, in which case they will be deemed to be part of the Licensed Software and the provisions of the Customer Contract, including the warranties and indemnities in this Module 3 and in Part 2 will apply to the Third Party Components to the same extent as they apply to Licensed Software.

INTELLECTUAL PROPERTY RIGHTS

- 2.8** The Customer acknowledges that ownership in the Licensed Software does not pass to the Customer and the Customer must use the Licensed Software only in accordance with the Customer Contract.
- 2.9** Unless stated otherwise in the Class of License, the Customer must not itself, nor permit any other person to:
- (a) copy, adapt, translate, publish, communicate to the public, or create any adaptation, translation or derivative of the Licensed Software or the User Documentation, unless expressly permitted by law;
 - (b) disclose or sub-license, lease, rent, loan, assign or otherwise transfer the Licensed Software or User Documentation to any third person (other than as permitted under clauses 2.2(e), 2.14 and 2.17);
 - (c) reverse engineer, reverse compile, de-compile or disassemble the object code of any part of the Licensed Software, or otherwise attempt to derive the source code of the Licensed Software, except to the extent permitted by law; or
 - (d) do anything that would prejudice the Contractor's right, title or interest in the Licensed Software. For clarity, use in accordance with this Customer Contract is not prejudicial to the Contractor's rights, title or interest in the Licensed Software.
- 2.10** All Intellectual Property Rights, including adaptations, translations and derivative works in the Licensed Software or other material provided under this Customer Contract are the exclusive property of the Contractor (or the Contractor's licensor, if applicable), and must vest in or must be transferred to the Contractor immediately upon creation, as the case may be.
- 2.11** At the request of the Contractor, the Customer must assign or transfer the Intellectual Property Rights (and must procure the granting of consent for the unfettered use of Moral Rights) to any adaptations, translations or derivative works of the Licensed Software or other materials provided under this Customer Contract to the Contractor or its designee and must sign (or procure any person to sign) any document reasonably required to assign or transfer any such Intellectual Property Rights to the Contractor or its designee, and/or consent to the unfettered use of any Moral Rights, (at the Contractor's cost).
- 2.12** The Customer must not remove, alter, obscure or deface any:
- (a) trade mark, service mark, get up, logo or branding, proprietary or restricted use legend; or
 - (b) any disclaimer, warning, instruction or advisory notice,
- on the Licensed Software, User Documentation, on any other materials provided under the Customer Contract or on any packaging.

PERMITTED USERS

- 2.13** The Customer is liable for the acts and omissions of all Permitted Users to the same extent as if they were the acts or omissions of the Customer.

MACHINERY OF GOVERNMENT CHANGES

- 2.14** The License granted to the Customer under this Module is non-transferable, subject only to the Customer having a right to transfer the License to another Eligible Customer as part of a machinery of government change implemented by law and in accordance with clause 2.17.
- 2.15** If a License is transferred in accordance with clause 2.14, the Contractor:
- (a) must immediately notify the Customer of any proposed reductions in costs which may occur; and
 - (b) may notify the Customer of any proposed additional fees for any additional:
 - (i) overall usage arising from the Machinery of Government Change, to the extent that such usage is greater than any limits on usage specified in the Customer Contract; and
 - (ii) costs directly incurred as a result of the provision of additional overall Services.
- 2.16** The Contractor agrees to negotiate with the Customer in good faith to vary or consolidate the Customer Contract to:
- (a) adjust the Price as a result of the notification of the matters raised in clause 2.15; and/or
 - (b) comply with any specific requirements of the Departments, Agencies and Eligible non-Government Bodies to which the Customer Contract is transferred following the Machinery of Government Change.

Any agreement that arises from this clause must be documented via a Change Request.

TRANSFER TO OUTSOURCER

- 2.17** The Customer may sublicense any of the rights granted under the License without additional charge, (on one or more occasions) on a limited time basis to a contractor that is providing outsource services to the Customer that includes the operation of the Licensed Software, provided that:
- (a) the Licensed Software is used solely for use of the Customer as is permitted under this Customer Contract, is limited to the period of the outsource arrangement and the sublicense automatically terminates at the end of the period of the outsource arrangement;
 - (b) the contractor's use of the Licensed Software is included within the Class of License (e.g. if the Class of License is based on the number of users, then the number of the contractor's users is included within the number of users acquired by the Customer); and
 - (c) unless otherwise required by the Contractor, the contractor first signs an agreement or undertaking in a form reasonably acceptable to the Contractor that protects the use and disclosure of the Licensed Software in the same manner as stated in the Customer Contract.

TERMINATION

2.18 The Customer may terminate the License for convenience at any time during the License Period by providing the Contractor with 30 days Notice in Writing. If the License is terminated under this clause the Customer must immediately pay any installments of the Price that have not been paid, and the Customer is not entitled to a refund of any Price that has been paid.

2.19 Where the Customer wishes to terminate the License and:

- (a) convert to a different Class of License that is offered by the Contractor in respect of the Licensed Software on the Designated Equipment; and
- (b) the Price agreed for the new License is equal to or greater than the Price that applies to the terminated License,

the Parties must follow the procedure set out in clause 26 of Part 2 of the Customer Contract to vary the Customer Contract and the Contractor must allow the Customer to set-off against the Price of the new License the Price that has been received by the Contractor for the current License.

OBLIGATIONS UPON TERMINATION OR EXPIRY

2.20 The Customer, after termination or expiry of the License:

- (a) subject to sub-clause (b), must destroy (and provide such evidence of such destruction as the Contractor may reasonably require) or return to the Contractor all copies of the Licensed Software that are in its possession or control;
- (b) may retain a copy of the Licensed Software and its related User Documentation where it is reasonably required by the Customer to comply with any Statutory Requirement relating to record keeping and retention. Such copies may only be used by the Customer to comply with those Statutory Requirements and the Customer must not use, and must not permit to be used, such Licensed Software and related User Documentation for any other purpose. Such copy may not be used to process any data that is not in the Licensed Software on the last day of the License Period.

EXPORT

2.21 Export laws and regulations of Australia and the United States may apply to the Licensed Software and User Documentation under this Module. The Customer agrees:

- (a) that such export laws govern the use of the Licensed Software and User Documentation (including technical data related to them) and any other Deliverables provided under this Customer Contract;
- (b) to comply with all such export laws and regulations (including "deemed export" and "deemed re-export" regulations); and
- (c) that no data, information, Licensed Software and User Documentation, Deliverable and/or materials resulting from this Customer Contract (or any direct product of any of them) will be:
 - (i) exported, directly or indirectly, in breach of these export laws; or
 - (ii) used for any purpose prohibited by these export laws, including nuclear, chemical, or biological weapons proliferation, or development of missile technology.

3. Supply of Licensed Software

INSTALLATION

- 3.1** Where the Module Order Form specifies that the Contractor is to install (or grant access to) the Licensed Software, the Contractor must install (or grant access to) the Licensed Software by the date stated in the Module Order Form.
- 3.2** Unless the Module Order Form specifies that the Contractor is responsible for installing the Licensed Software, the Customer is responsible for downloading (if applicable) and/or installing the Licensed Software on the Designated Equipment. The Customer must perform the installation in accordance with any instructions in the User Documentation or other instructions provided by the Contractor, and provided it does so the act of installing the Licensed Software will not invalidate any warranty provided by the Contractor under the Customer Contract or any applicable statutory guarantee.
- 3.3** Where the Contractor makes the Licensed Software and User Documentation available for download from a website, the Contractor must provide the Customer with the relevant access codes promptly following the date the Parties enter into the Customer Contract, or such other time stated in the Module Order Form.
- 3.4** If the Customer requests installation to be postponed or to be made in advance of the date nominated in the Module Order Form, the Contractor must use its reasonable efforts to re-schedule installation accordingly. The Customer is responsible for any costs incurred by Contractor in re-scheduling the installation, such costs to be calculated using the rates set out in the Customer Contract, or if none, are stated at the Contractor's then current commercial rates.
- 3.5** If the Contractor provides (or provides access to) any:
- (a) software or documentation for which the Contractor is acting as a Reseller as Facilitator under clause 7.1(a); or
 - (b) software that is subject to an open source license,

the Contractor provides this software as a convenience only and without liability.

USER DOCUMENTATION

- 3.6** At the time of delivery of (or the grant of access to) the Licensed Software, the Contractor must provide the Customer with the User Documentation in the quantities that are stated in the General Order Form.
- 3.7** The Contractor must from time to time and in any event as soon as practicable give the Customer access to copies of any amended, revised or supplementary User Documentation during the License Period. This information must be provided:
- (a) without additional charge, if the Contractor provides such information to its other customers generally without charge; or
 - (b) in all other cases, at the Contractor's then current fees.

BACK UP

- 3.8** Unless the Contractor has an obligation under another Module to take back ups of data that is loaded into in a Deliverable, the Customer must take and maintain adequate backups of any data that is loaded into any Deliverable so that there is no loss of data in the event that any failure of any Deliverable causes damage to, or loss of, any data.

FIRST RELEASE

- 3.9** If the Licensed Software is a First Release:
- (a) this must be stated and agreed on the Module Order Form; and
 - (b) the Parties may agree additional terms and conditions or services that are required for that First Release, such agreement to be documented in the Order Documents.

4. Updates and New Releases

- 4.1** To the extent that it is stated on the Module Order Form that the Contractor provides the Customer the right to receive Updates and/or New Releases for Licensed Software as part of the License, and not as part of a separate agreement for Software Support Services or other arrangement, then the provisions of clauses 4.2 to 4.4 apply to the Customer Contract.
- 4.2** The Contractor must, at no additional charge to the Customer, make available to the Customer any Updates and New Releases for the Licensed Software if and when the Contractor makes these generally available to its other customers during the License Period at no additional charge.
- 4.3** The Customer must notify the Contractor within 90 days from the date that the Update or New release is made available to Customer if the Customer decides not to use the Update or New Release. The Customer must accept and use any Update that the Contractor advises addresses a security issue.
- 4.4** If the Customer accepts the Update or New Release:
- (a) if requested by the Customer, the Contractor must install the Update or New Release, coordinating and scheduling such installation with the Customer. The Customer must pay the Contractor the costs for such installation at the Contractor's then current time and materials rates, unless agreed otherwise. This arrangement may be documented by way of a Change Request;
 - (b) if the Customer installs the Update or New Release, the Customer must do so in accordance with any instructions provided by the Contractor, and the Customer is responsible for all testing, including testing for interoperability with other software programs;
 - (c) the License Price must not be increased, unless agreed otherwise on a Module Order Form;
 - (d) the Contract Specifications of the Licensed Software will be deemed to be amended to the extent that the specifications for the Update or New Release supersede the existing Contract Specifications; and
 - (e) following installation of the Update or New Release, the Customer must destroy or return to the Contractor all copies of the original Licensed Software or otherwise deal with all such copies in accordance with the Contractor's directions, provided that the Customer may retain a copy of the superseded Licensed Software and its related User Documentation where:
 - (i) it is necessary to create an effective back up of the Licensed Software; or
 - (ii) it is reasonably required by the Customer to comply with any Statutory Requirement relating to record keeping and retention. Such copies may only be used by the Customer to comply with those Statutory Requirements.

The Customer must not use, and must not permit to be used, such superseded Licensed Software and related User Documentation to be used for any other purpose. Such copy may not be used to process any data.

4.5 Subject to clause 4.3, if the Customer decides not to use the Update or New Release then the Customer acknowledges and agrees that:

- (a) subsequent Updates or New Releases may not operate with the Licensed Software; and
- (b) the Licensed Software may have its usefulness reduced over time;
- (c) the Contractor may not be able to remedy any Defects in the Licensed Software; and
- (d) the Contractor is not responsible for any Defect in the Licensed Software, nor any incident, outage or breach of any Service Level, which would not have occurred had the latest version of the Licensed Software been used.

For clarity, nothing in this clause reduces the Contractor's obligations under clauses 8 and 9.

4.6 The Contractor must not provide a New Release that is a First Release without notifying the Customer that a New Release is a First Release. If a New Release is a First Release, the Parties may agree additional terms and conditions or services that are required for that First Release, such agreement to be documented on a Change Request.

5. Open Source Software

5.1 Nothing in this Customer Contract overrides the terms of any Open Source License. Any open source code is available only under the terms of the relevant Open Source License.

5.2 To the extent that open source code is associated with any Licensed Software:

- (a) the open source code is supplied and licensed under the Open Source License and not under Module 3;
- (b) if stated on the Module Order Form and subject to clause 5.2(c), any open source code that is incorporated into the Licensed Software is deemed to be part of the Licensed Software solely for the purpose of the warranty under clauses 8 and 9 under this Module, and/or any statutory guarantee under the CCA;
- (c) it is agreed by the Parties that the Contractor excludes any warranty or indemnity whatsoever in respect of the Intellectual Property Rights in any open source code to the maximum extent permitted by law;
- (d) the Customer must remove any of the Contractor's trademarks, service marks, logos, get up or other branding from any open source code if:
 - (i) the Customer creates any new software that is a work based on the open source code; or
 - (ii) the Customer seeks to distribute any open source code that has been provided to it with Contractor's trademarks, service marks, logos, get up or other branding; and
- (e) the Customer warrants to the Contractor that it will comply with the terms of the Open Source License.

6. Ancillary Services

TRAINING

- 6.1 Where stated on the Module Order Form, the Contractor must provide the training for the Prices stated in the Module Order Form.

OTHER SERVICES

- 6.2 Where stated on the Module Order Form, the Contractor must:
- (a) provide the necessary services to install the Licensed Software;
 - (b) provide any ad hoc issue resolution or support service for the Licensed Software as part of the License and not as part as Software Support Services,
- at the times and for the Prices set out in the Module Order Form.
- 6.3 The Parties may agree that other services are to be provided by the Contractor during the Contract Period. The details of those Services, including the scope of the Services and the Prices that are payable for them, must be set out in the Order Documents or if the Services are requested after the Commencement Date, on a Change Request and the Variation Procedures in Schedule 4 – Variations Procedures will apply.

7. Reseller Provision of Licensed Software

- 7.1 Where it is specified on the Order Documents that the Licensed Software is to be supplied via a Contractor that is a Reseller, the provisions of this clause 9 apply, and the Customer and the Contractor must agree on the Module Order Form which of the business models, Reseller as Facilitator or Reseller with Pass Through Warranties, applies to the supply of the Licensed Software:
- (a) **Reseller as Facilitator.** In this business model the Contractor provides reseller services which facilitate the supply of the Licensed Software by the original IP owner or its authorised distributor to the Customer, in which case:
 - (i) the Contractor will procure that the original IP owner or its authorised distributor enters into a contract directly with the Customer for the supply of the Licensed Software (and/or any Updates and New Releases), and the provisions of the Customer Contract that relate to the supply of the Licensed Software, including provisions in this Customer Contract relating to intellectual property rights and the features, capabilities, performance or other characteristics of the Licensed Software and the other provisions of this Module (other than clause 6) do not apply. The terms of the contract between the original IP owner or its authorised distributor and the Customer for the supply of the Licensed Software will be:
 - (A) attached to the Customer Contract;
 - (B) available for the Customer to accept online from a website nominated by the Contractor (including the website of the original IP owner or authorised distributor); or
 - (C) in the form of a shrinkwrap license or license document that is provided with the Licensed Software (a copy of which is available in advance of delivery, upon request from the Customer)

and such contract will be deemed to have been reviewed by the Customer and entered into by the Customer and the original IP owner or authorised distributor (as stated in the contract) on the date when the Customer enters into the Customer Contract;

- (ii) the Contractor will co-ordinate and manage the provision of the original IP owner's or distributor's (as applicable) warranty service, if any, that is to be provided in respect of any Defect or alleged Defect that is reported by the Customer to the Contractor;
- (iii) the Customer must pay the Contract Price for the Licensed Software to the Contractor, and the Contractor must pay the amount agreed between the Contractor and the original IP owner or its authorised distributor for the Licensed Software; or

(b) **Reseller with Pass Through Warranties.** In this business model, the Contractor will supply the Licensed Software to the Customer on the terms and conditions of the Customer Contract, except that:

- (i) clause 19.1(c) of Part 2 does not apply;
- (ii) clauses 5, 8 and 9 of this Module do not apply;
- (iii) the warranties or guarantees that are provided under this Module are limited to any warranties and guarantees that cannot be excluded by law and any warranties that are provided by the original IP owner or its authorised distributor permits the Contractor to assign to the Contractor's customers; and
- (iv) the Contractor must use best efforts to ensure that:
 - (A) all benefits of the warranty to the Customer for that Licensed Software are utilised to the benefit of the Customer; and
 - (B) all benefits of any original IP owner or its authorised distributor warranty services for that Licensed Software are utilised to the benefit of the Customer.

7.2 The Customer warrants to the Contractor that the Customer and all of the Customer's Permitted Users will comply with the terms of any contract between the Customer and the original IP owner or its authorised distributor (as applicable).

7.3 The Contractor must provide any value added services that are set out in the Order Documents.

8. Specific Warranties

SCOPE

8.1 The Contractor warrants that the Licensed Software will meet the requirements of the Contract Specifications in all material respects when operating on the Designated Equipment during the Warranty Period, subject to the Exceptions.

8.2 Owing to the nature of the subject matter, the Contractor expressly excludes any warranty that:

- (a) the Licensed Software will be error free;
- (b) the Licensed Software will operate without interruption;

- (c) it will correct all program errors;
- (d) the Licensed Software will be compatible with any hardware, software or data not supplied by the Contractor (except for the Designated System);
- (e) any Licensed Software or User Documentation will meet the Customer's requirements.

8.3 If an unmodified version of the Licensed Software fails to perform in accordance with the requirements of the Customer Contract and the Customer provides the Contractor with written notice of the Defect within the Warranty Period, then the Contractor must, at its option, promptly remedy those Defects, implement a Workaround or replace the Licensed Software, at its own expense, or provide a refund of the Price paid for the License. Any remedy that is implemented is warranted only during the remainder of the Warranty Period.

8.4 The Customer must provide reasonable assistance to the Contractor in order to assist the Contractor to identify and resolve the Defect, including installing patches and Workarounds.

9. Exceptions

9.1 The Contractor is not liable for any breach of the Customer Contract which arises as the result of:

- (a) modifications to the Licensed Software that were effected or attempted by a person other than the Contractor or its authorised representative;
- (b) any act, error, fault, neglect, misuse or omission of the Customer;
- (c) damage caused by the operation of the Licensed Software other than in accordance with recommended operating procedures, User Documentation or otherwise than in accordance with the directions or recommendations of the original IP owner, authorised distributor or the Contractor;
- (d) any Virus, denial of service attack or other malicious act that adversely affects the Licensed Software, except to the extent that;
 - (i) the attack or malicious act is an attack or malicious act of the Contractor; or
 - (ii) the Contract Specifications include a requirement to protect against Viruses, denial of service attacks or other malicious acts, and the Customer's damages are caused solely by a failure to meet that obligation in the Contract Specification;
- (e) improper use or mismanagement by the Customer; or
- (f) an Event.

9.2 Where the Contractor has been requested to provide any remedy and the item that was requested to be remedied is determined not to be a Defect then the Contractor is entitled to charge the Customer for the costs and expenses (calculated using the rates set out in the Customer Contract, or if none are stated, at the Contractor's then current commercial rates) that arise out, of or in connection with identifying and attempting to remedy that item.

10. Audit

RECORDS

10.1 The Customer must:

- (a) if and to the extent stated on the Module Order Form maintain records of:
 - (i) the location of all copies of the Licensed Software;
 - (ii) the usage of the Licensed Software as measured against the Class of License;
- (b) provide copies of the records kept under this clause to the Contractor every six months, or such other frequency stated on the Module Order Form; and
- (c) ensure that, prior to the disposal of any media or other storage device, any Licensed Software contained on it has been erased or destroyed.

AUDIT AND VERIFICATION

10.2 The Customer must, upon reasonable written notice from the Contractor, allow the Contractor to make investigations in any reasonable manner to verify the Customer's compliance with the License.

10.3 The costs of the review in clause 10.2 must be borne by the Contractor unless the review shows that the Customer has not used the Licensed Software in accordance with the Customer Contract and as a result has underpaid the Contractor. If this occurs then the costs of the review must be paid in accordance with the sliding scale below:

| Proportion of reviewer's fees to be borne | Difference between License Fee paid and payable |
|---|---|
| \$0 | 95% of payable License Fee was paid |
| 50% of audit and other costs | 75-95% of payable License Fee paid |
| 75% of audit and other costs | 50-75% of payable License Fee paid |
| 100% of audit and other costs | less than 50% of payable License Fee paid |

10.4 If the review shows that the Customer has not used the Licensed Software in accordance with the Customer Contract and as a result has underpaid the Contractor then, in addition to any costs that payable under clause 10.3, the Customer must pay to the Contractor the unpaid license fees and fees for in respect of Software Support Services that would have been payable had the correct license been acquired at the time that it was acquired.