

Module 6 – Contractor Services

Version 3.1

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[Use Guidelines

This Module should be used when the Customer is buying the services of personnel with IT related skills on a “body shop” or “contractor” basis where the Customer is supervising the persons work on a regular basis.

See the Procure IT User Guide for more details.

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

1. Agreed Terms and Interpretation

AGREED TERMS

The terms and conditions included in this **Module 6** form part of the Customer Contract when the Parties state that the Contractor Services 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 Contractor Services** means the services that are supplied to the Customer by the Contractor to perform the Role, such services to be performed by certain IT Personnel selected by the Customer.
- 1.2 IT Personnel** means the person(s) that is performing the Contractor Services.
- 1.3 Role** means a position that is required by the Customer that is defined by the key criteria for that role, including:
- (a) the description of the Role;
 - (b) the skills, experience and competencies required of the person fulfilling the Role; and
 - (c) the reporting structure and stakeholders relating to the Role;

as are agreed by the Parties under clause 3.2, and as may be varied under clause 3.4 or otherwise as agreed in writing.

INTERPRETATION

- 1.4** Other capitalised words and expressions used in this Module are defined in Part 3 of the Agreement.

2. Period of Contractor Services

- 2.1** The Contractor Services must be provided during the Contract Period or such other period agreed in writing.
- 2.2** The Customer may terminate the supply of the Contractor Services by giving 10 Business Days' Notice in Writing to the Contractor.
- 2.3** Notwithstanding any other provision in the Customer Contract, the Contractor acknowledges and agrees that the Customer's obligations to make any payments under the Customer Contract for the provision of the Contractor Services or any associated expenses related to the provision of the Contractor Services shall cease after expiry of the notice period stated in clause 2.2.

CHANGE REQUESTS

- 2.4** The Customer may request a variation of the Contractor Services, including an extension of the Contract Period, by issuing a Change Request and following the procedure in Schedule 4 – Variation Procedure.

3. Scope of Contractor Services

SCOPE

- 3.1** The Contractor agrees to supply the Contractor Services to the Customer in accordance with the Customer Contract.

CONTRACTOR SERVICES

- 3.2** The Parties will agree the details of the Contractor Services on the Module Order Form, including:
- (d) the details of the Role(s);
 - (e) how long the Contractor has to identify potential IT Personnel;
 - (f) whether the Contractor is being engaged to provide the Contractor Services for that Role on an exclusive basis;
 - (g) the arrangements for advertising for the Role, including:
 - (i) what type of advertising is to be conducted by the Contractor and/or the Customer, if any;
 - (ii) who is responsible for the costs of any advertising, and when those costs will be paid;
 - (iii) if the Customer gives its consent to the Contractor to allow the Contractor to refer to the Customer or use the trademarks or branding or otherwise disclose the Customer's identity in any advertisement. The Contractor must not refer to the Customer or use the trademarks or branding or otherwise disclose the Customer's identity in any advertisement without such consent;
 - (h) the details of the:
 - (iv) period of the Contractor Services; and
 - (v) Price (e.g. whether the Price is calculated on an hourly or daily basis, and any minimum periods) and any expenses; and
 - (i) whether the Contractor is required to undertake the reference checks of short listed potential IT Personnel.
- 3.3** Unless stated otherwise on the Module Order Form, the Contractor must:
- (j) comply with the Service Levels (if any) when responding to a Customer request for IT Personnel;
 - (k) use its best efforts to source and nominate IT Personnel that the Contractor believes are suitable for the Role;
 - (l) act as the liaison between the IT Personnel and the Customer to arrange interviews, meetings and other communications;
 - (m) use reasonable efforts (which may be met by obtaining written confirmation from the IT Personnel concerned) to verify for each IT Personnel that is put forward by the Contractor that:

- (vi) to the best of the Contractor's knowledge, the IT Personnel has not been convicted of a crime which carries a jail term of more than 5 years, and which is not a spent conviction;
 - (vii) the IT Personnel is under no contractual or other restriction which might prohibit or inhibit their capacity to perform the Contractor Services;
 - (viii) the IT Personnel is lawfully entitled to provide the Contractor Services;
 - (ix) the IT Personnel, in the reasonable opinion of the Contractor, holds all necessary qualifications, skills and experience necessary to fill the Role;
- (n) interview each potential IT Personnel and form a view as to the person's suitability for the Role, such interview may be conducted by telephone unless stated otherwise on the Module Order Form;
- (o) submit a current resume for each potential IT Personnel that the Contractor is putting forward to the Customer for consideration and any additional information that the Contractor considers relevant to the application; and
- (p) provide the Customer with a written report describing the IT Personnel for any particular Role and addressing the requirements stated in the Customer's requirements for the Role.
- 3.4** The Customer must promptly provide the Contractor with written notice stating whether potential IT Personnel is suitable to perform the Contractor Services for the Role. If either Party wants to vary the Role and/or the Price, then the Parties will use their best efforts agree a revised Role and/or Price. If a new Role and/or Price is agreed, the Contractor will document the new Role and/or Price and provide the Customer with a copy of the updated Role and/or Price, and this updated Role and/or Price will supersede the previously agreed description of the Role and/or Price.
- 3.5** If the Customer provides the Contractor with written notice that the IT Personnel is suitable to provide Contractor Services for the Role then:
- (q) the Contractor will use its best efforts to engage the IT Personnel so that the Contractor may supply the IT Personnel to the Customer to provide the Contractor Services. Under no circumstances is the Contractor liable to the Customer if the IT Personnel is no longer available or refuses to accept the Role (at a fee agreed between the Contractor and the IT Personnel) with the Customer;
 - (r) where the IT Personnel agrees to accept the Role and perform the Contractor Services (at a fee agreed between the Contractor and the IT Personnel), the Contractor must supply the IT Personnel to perform the Contractor Services during the remainder of the Contract Period for the Price. For the avoidance of doubt, the IT Personnel who is providing the Contractor Services will be employed by, or subject to a subcontract with, the Contractor, and the Contractor will supply the IT Personnel to the Customer under the Customer Contract;
 - (s) the Contractor must require that any IT Personnel who is performing the Contractor Services complies with any directions of the Customer as to the nature and scope of the Contractor Services, including working during normal working hours of the Customer, unless otherwise notified by the Customer;
 - (t) the Contractor must require that the IT Personnel supplied to perform the Contractor Services use their best efforts to promote the interests and welfare of the Customer;
 - (u) the Customer must diligently control, manage and supervise the work performed by the IT Personnel throughout the Contract Period, and must promptly provide written notice to the Contractor concerning:

- (x) the performance of the IT Personnel; and
- (xi) any issues that may impact the relationship of employer and employee, or prime contractor and subcontractor, between the Contractor and the IT Personnel;
- (v) the Contractor and the Customer must not represent that the IT Personnel are the employees, officers and/or agents of the Customer or the Contract Authority;
- (w) the maximum daily billable hours of engagement of the IT Personnel for Contractor Services will be stated in the Module Order Form;
- (x) except to the extent otherwise provided in the Module Order Form, the Price will be the total charges payable by the Customer for the Contractor Services; and
- (y) the Module Order Form must state the extent to which any expenses incurred by the IT Personnel in the performance of the Contractor Services will be reimbursed by the Customer, including any expenses policy that must be complied with or approvals that must be obtained.

SALARY AND WAGES

- 3.6** The Contractor undertakes to comply with all Statutory Requirements in relation to itself and any IT Personnel who are performing Contractor Services, including in relation to workers compensation, payroll tax, income tax, fringe benefits tax, PAYG tax, group tax, superannuation contributions, annual leave, long service leave and personal leave awards, industrial instruments and any other employment entitlement, and the Contractor acknowledges and agrees that it is solely responsible for these obligations.

GENERAL TERMS

- 3.7** The Customer must not interfere, whether by act or omission, directly or indirectly, with the relationship between the Contractor and IT Personnel, whether that relationship be one of employer and employee, or prime contractor and subcontractor or any other arrangement, without the written consent of the Contractor.
- 3.8** Where the IT Personnel Services include providing information relating to IT Personnel to the Customer, this information is obtained from the IT Personnel and other third party sources (if for example the Customer requests that the Contractor seeks a reference in respect of IT Personnel), and the Contractor Services do not include the verification of any information, whether provided to the Contractor by the IT Personnel or any other person or whether it is obtained by the Contractor from any other source. The Contractor relies on the good faith and integrity of the IT Personnel and any other person to provide the Contractor with correct, up to date and relevant information, and to make full disclosure of all relevant facts. The Customer must independently verify all information provided to it by the Contractor and the Customer agrees to hold harmless and releases the Contractor from any claims in respect of any information provided or representation made by, on behalf of, the Contractor relating to the IT Personnel.
- 3.9** The Customer is not obliged to interview or select any IT Personnel who has been introduced to the Customer by the Contractor. However the Customer must interview the relevant IT Personnel prior to any Contractor Services commencing and the Customer is responsible for determining whether the IT Personnel is suitable to perform the Role.

4. Payment and Invoicing

PRICE AND EXPENSES

- 4.1 The Customer must pay the Price for the Contractor Services every two weeks, or other period agreed on the Module Order Form, (the **Payment Period**) in arrears. The amount that is payable in respect of the Payment Period is calculated by multiplying the hourly/daily Price by the amount of time (calculated hourly or daily, and subject to any minimum periods, as applicable) that the Contractor Services have been performed in the previous Payment Period. The Customer must also pay any expenses that have been properly incurred in accordance with this Customer Contract during any prior Payment Period.
- 4.2 The Contractor shall provide to the Customer a Correctly Rendered Invoice in respect of the Contractor Services that:
- (z) states the applicable Customer Contract number, identifies the Contractor Services performed, the name of any IT Personnel involved, and the time worked by the IT Personnel;
 - (aa) is supported by records of time spent by the IT Personnel performing the Contractor Services; and
 - (bb) states the details of any expenses that have been properly incurred, together with supporting records of such expenses.
- 4.3 Payment of the Price for the supply of the IT Personnel to perform Contractor Services shall be subject to the satisfactory performance of the IT Personnel of the Contractor Services in accordance with the Customer Contract.
- 4.4 The Customer must give the Contractor Notice in Writing:
- (cc) immediately, if it is dissatisfied with any Contractor Services or the performance of any IT Personnel performing the Contractor Services;
 - (dd) within 2 Business Days of receipt of an invoice, if the Customer disputes any time or expense claim or otherwise disputes the invoice.
- Any dispute arising under this clause shall be dealt with in accordance with clause 11.11 of Part 2.
- 4.5 In absence of the Customer providing Notice in Writing under clause 4.4, the Customer is deemed to have accepted the Contractor Services as having been performed in accordance with Customer Contract and must pay the invoice by the due date.

5. Confidentiality

- 5.1 The Contractor shall take all reasonable steps to ensure that the IT Personnel performing Contractor Services do not make public or disclose the Customer's Confidential Information or use such Confidential Information other than for the purposes of performing the Contractor Services.
- 5.2 The Customer may at any time notify the Contractor to require any IT Personnel who are performing Contractor Services to promptly execute a Deed of Confidentiality substantially in the form of Schedule 8 relating to the Customer's Confidential Information.
- 5.3 The Price and any information from which the Price can be calculated is the Contractor's Confidential Information. The Customer must not disclose to the IT Personnel, or to any other person, the Price or any information from which any person could calculate the Price, without the prior written consent of the Contractor.

6. Restraint

- 6.1** The Customer must not, without the prior written consent of the Contractor, whether on its own behalf or on behalf of any other person and in any capacity:
- (a) encourage any of the IT Personnel who provide the Contractor Services, to:
 - (i) stop working for or providing services to the Contractor; or
 - (ii) work for or provide services to the Customer, any Agency or Department or any other person;
 - (b) employ, contract, or enter into any arrangement, to receive the benefit of the services of the IT Personnel who provide the Contractor Services,
- for the following restraint periods:
- (c) during the period that the Contractor Services are provided by the IT Personnel and a period of 12 months thereafter;
 - (d) during the period that the Contractor Services are provided by the IT Personnel and a period of 9 months thereafter;
 - (e) during the period that the Contractor Services are provided by the IT Personnel and a period of 6 months thereafter;
 - (f) during the period that the Contractor Services are provided by the IT Personnel and a period of 3 months thereafter;
 - (g) during the period that the Contractor Services are provided by the IT Personnel.
- 6.2** Clause 6.1 is to be construed and have effect as the number of separate restraints that arise by separately combining each of the subclauses in 6.1 (a) and (b)(i) and (ii) above with the restraint periods listed in each of the subclauses in (c) to (g) above. Each of the covenants that result from a combination of the restraints in subclauses 6.1(a), (b)(i) and (ii) with the restraint periods in subclauses (c) to (g), constitute and are to be construed as having effect as separate, distinct, severable and independent provisions from the other covenants, but cumulative in overall effect. If any of the covenants or parts of the covenants resulting from the operation of this clause, are unenforceable they will be severed from the remaining enforceable covenant or part thereof.
- 6.3** The Customer agrees that the remedy of damages may be inadequate to protect the interests of the Contractor from a breach of the Customer's obligations under this clause 6 and the Contractor is entitled to seek and obtain injunctive relief, or any other remedy, in any court.
- 6.4** A general solicitation for employment which is placed in good faith such as a newspaper advertisement shall not constitute a breach of clause 6.1.
- 6.5** The Parties agree that the restrictions in clauses 6.1 to 6.4 are necessary to protect the legitimate interests of the Contractor.

7. Indemnity

- 7.1** The Contractor must indemnify and hold harmless the Customer, its officers and employees against any loss or expense which any of them pays, suffers, incurs or is liable for (including legal costs on a solicitor and client basis) to the extent it is a result of:
- (a) any proceedings brought by the Contractor or an IT Personnel for the purpose of changing the status of the IT Personnel that is performing the Contractor Services to that of an employee of the Customer during the period that IT Personnel is performing the Contractor Services; and
 - (b) any proceedings brought by any IT Personnel against the Customer arising out of the Customer's termination of the Contractor Services under clause 2.2.
- 7.2** The Customer must promptly, and in any event within 5 Business Days of being notified of a claim for which it is seeking an indemnity under clause 7.1, provide the Contractor with Notice in Writing of the details of the claim. The Customer must (unless there is any government policy that prohibits the Contractor from handling the process for the settlement of the claim) permit the Contractor, at the Contractor's expense, to handle the process for the settlement of such claim and, as permitted by law, to control and direct any litigation that may follow a claim under clause 7.1 (including selecting solicitors and counsel), subject to the Contractor agreeing to comply at all times with the government policy relevant to the conduct of the litigation.
- 7.3** If the Customer does not permit the Contractor to handle the process for the settlement of such claim under clause 7.2 and, as permitted by law, to control and direct any litigation that may follow a claim under clause 7.1, then the Customer must promptly and fully defend the claim (whilst complying with government policy), and not settle the claim without the Contractor's prior written consent, such consent not to be unreasonably withheld. The Customer must keep the Contractor fully informed throughout the period of the claim, including providing copies of all relevant documents.
- 7.4** The Customer must, upon the Contractor confirming its obligations under the indemnity in clause 7.1, provide the Contractor with reasonable assistance in defending, settling or otherwise conducting the negotiations or litigation, at the Contractor's expense, including providing all relevant documents, permitting its Personnel to testify for the Contractor if requested by the Contractor and using any defence that might be available to the person being indemnified.
- 7.5** The Contractor's liability in respect of the indemnity provided under this clause is subject to clauses 18.1 to 18.7 of Part 2.
- 7.6** The Customer must give the Contractor 10 Business Days' Notice in Writing of an intention to claim a liability, loss or expense in accordance with clause 7.1, including in that notice an explanation of how that liability or expense was assessed and the Contractor's proposed share of that liability.