

Module 5 – Software Support Services

Version 3.1

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[Use Guidelines

This Module should be used for software maintenance and support services which involve long term (as opposed to incident based) support contracts. It includes remote troubleshooting and support provided via the telephone and online channels, as well as installation assistance and basic usability assistance. In some cases, software support services may include new product installation services, installation of product updates, migrations for major releases of software and other types of on site services.

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 5** form part of the Customer Contract when the Parties state that the Software Support 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 Designated Equipment** means the hardware platform/operating system combination stated in the Module Order Form upon which the Supported Software is installed.
- 1.2 Developed Software** means software other than Licensed Software that is:
- (a) an adaptation, translation or derivative of the Licensed Software; or
 - (b) software that has been newly created by the Contractor under Module 4, or any other Module; or
 - (c) other software, including software that is already owned by or licensed to the Customer or open source software,
- that is stated in the Module Order Form.
- 1.3 Exception** means the reasons that excuse the Contractor from being in breach of the Customer Contract in respect of the Services provided under this Module, as stated in clause 7.
- 1.4 First Release** means a licence 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 is not generally available for supply to all of the Contractor's customers, but is to be licensed (or the New Release is to be made available) to the Customer in advance of general release to the market.
- 1.5 Help Desk Services** means any Services stated in clause 3.14.
- 1.6 Installed on Contractor Equipment** means where the Supported Software is to be installed on equipment (including in a virtual environment) and that equipment is owned or controlled by the Contractor, and is stated as being Installed on Contractor Equipment on the Module Order Form.
- 1.7 New Release** means software which has been produced primarily to extend, alter or improve the relevant part of Supported Software by providing additional functionality or performance enhancement (whether or not Defects in that Supported Software are also corrected) while still retaining the original designated purpose of that part of the Supported Software. New Release does not include any software that is generally licensed by the Contractor to its customers as a different product.
- 1.8 Problem Log** means a brief description of a Defect in a chronological record.
- 1.9 Reseller as Facilitator** means a Reseller who uses the business model describe in clause 4.1(a) to facilitate the supply of the Software Support Services to the Customer.
- 1.10 Reseller with Pass Through Warranties** means a Reseller who uses the business model describe in clause 4.1(b) to supply Software Support Services to the Customer.

- 1.11 Software Support Services** means the Services stated in the Module Order Form in respect of the Licensed Software and/or Developed Software and may consist of Help Desk Services, Updates, New Releases and/or ancillary services, all as set out on the Module Order Form.
- 1.12 Supported Software** means the software stated in the Module Order Form that is the subject of the Software Support Services and may include:
- (a) Licensed Software; and/or
 - (b) Developed Software.
- 1.13 Support Service Price** means the fees payable to the Contractor for supplying the Software Support Services stated in the Module Order Form, which may be on a monthly, quarterly or yearly basis or any other term that is stated in the Order Documents.
- 1.14 Technical Specifications** means the specifications relating to the performance and availability of the Supported Software, the technical requirements of any device that accesses the Supported Software and any other technical issues that relate to the Supported Software or the Customer Contract.
- 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 Supported Software without significantly altering the Contract Specifications whether or not that Supported 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 in Part 3 of the Agreement.

2. Support Period

- 2.1** Unless otherwise agreed in the General Order Form or the relevant Module Order Form, the Software Support Services must be provided for a Contract Period of 12 months commencing upon the AAD of the relevant Supported Software, unless the Customer Contract is terminated earlier in accordance with its terms.
- 2.2** If no Contract Period is stated in the General Order Form or the Module Order Form, then the Software Support Services will be provided from the AAD of the relevant part of the Supported Software until either party cancels the Software Support Services by providing 30 days prior Notice in Writing to the other.
- 2.3** At least 30 days or as otherwise agreed in the Module Order Form prior to the end of each Contract 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 Software Support Services for the Supported Software for an extended period of the Contract 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 agreement for Software Support Services.
- 2.4** Where the Customer has been given an option to extend the Contract Period in accordance with clause 2.3 above, the Customer may elect not to extend the Contract Period or elect not to enter into a new agreement, by providing the Contractor with written notice, such notice to be received at least 15 days prior to the date when the current Contract Period expires.
- 2.5** If the Contractor does not receive written notice under clause 2.4, then the Contract Period must be extended for the extended Contract Period and the Customer must pay the Price using terms and conditions and the payment arrangements, all as stated in the notice given under clause 2.3.

- 2.6** The Price for the Software Support Services for which the Contract Period exceeds 1 year may be varied annually upon 30 days written notice by the Contractor. If the Customer does not accept the proposed variation the Customer may terminate the Software Support Services by giving the Contractor 14 days Notice in Writing.
- 2.7** The procedures in clauses 2.3 to 2.6 will apply at the end of each Contract Period.

3. Scope of Support Services

SCOPE

- 3.1** The Parties will set out on the Module Order Form the details of the Software Support Services, including:
- (a) the Contract Period;
 - (b) the Supported Software that is to be the subject of the Software Support Services, being:
 - (i) Licensed Software;
 - (ii) details of any Developed Software;
 - (c) whether the Licensed Software is a First Release, or whether the First Release of New Release of any Licensed Software will be provided as part of the Software Support Services;
 - (d) the details relating to any of the following Services that the Contractor is to provide:
 - (i) Help Desk Services, including the hours of operation;
 - (ii) whether the Customer is entitled to receive Updates and/or New Releases if and when they become available from the Contractor during the Contract Period, for:
 - (A) the Licensed Software;
 - (B) any Developed Software;
 - (iii) any ancillary services;
 - (e) any applicable Service Levels;
 - (f) the particulars of any access to the Site and the Supported Software, including VPN access to the Supported Software required by the Contractor to effectively perform the Software Support Services;
 - (g) the Price and any expenses or other charges that apply for each Service.
- 3.2** If no Service Level Agreement is set out or referred to in the Order Documents, then if requested by the Customer, the Parties will use reasonable efforts to promptly negotiate Service Levels applicable to the Software Support Services, which may include committed response and resolution times and availability measures, and service credits that may be imposed where the Contractor fails to meet the Service Levels.
- 3.3** The Customer must provide access to the Site and the Supported Software, on-site storage of parts and equipment or other resources that may be needed in connection with the Services.

- 3.4** Nothing in this Module reduces the Contractor's obligation to correct Defects during a Warranty Period as specified in another Module, including Modules 3 and 4.
- 3.5** The Contractor agrees that the Software Support Services must as a minimum ensure that:
- (a) the relevant Supported Software conform to and perform in accordance with the Contract Specifications;
 - (b) the relevant Supported Software performs in accordance with any Service Levels; and
 - (c) the User Documentation for the Supported Software is provided and maintained in accordance with the Customer Contract.
- 3.6** If the Customer identifies and notifies the Contractor of a Defect in the Supported Software during the Contract Period, the Contractor will as soon as possible and, where relevant, within the Service Levels, remedy the Defect.
- 3.7** To remedy the Defect, the Contractor shall, before the response times and/or resolution times referred to in the Service Levels have expired, take such measures as are appropriate in all the circumstances (including providing a Workaround) to enable the Customer to continue to productively use the Supported Software.
- 3.8** On receipt of notice of a Defect by the Customer under clause 3.6, the Contractor must assign an identification number to the Defect, which will be used by the Parties to identify the Defect.
- 3.9** The Contractor must maintain an accurate Problem Log for the period of the Software Support Services of all reported Defects and provide the Customer with a call tracking number for problem identification and follow-up.
- 3.10** If the Contractor does not achieve the required minimum Service Levels, then the Customer shall be entitled to any performance rebates stated in the Service Level Agreement.
- 3.11** The Customer may conduct a review of the Service Levels on an annual basis or as otherwise agreed by the Parties in writing during the Customer Contract. The Contractor must not unreasonably refuse to agree to a Change Request to the Service Levels.
- 3.12** The Customer acknowledges that the inclusion of any Service Levels after the Customer Contract has been signed, or a variation to the Service Levels during the Contract Period, may result in an increase to the Price.
- 3.13** The Customer must if practicable during the Contract Period for the Support Services provide the Contractor with:
- (a) access to the Customer's premises during normal working hours or as otherwise agreed as is necessary for the Contractor to supply the Software Support Services; and
 - (b) information, in the Customer's possession or control that the Contractor reasonably requires to supply Software Support Services.
- 3.14** Where it is stated on a Module Order Form that transition out services are to be provided, on termination and/or expiry of the Support Services, the Contractor must render any reasonable assistance to the Customer to the extent necessary to effect an orderly assumption by a replacement contractor of the performance of the Contractor's obligations under the Customer Contract. The Customer must pay any Price stated on the Module Order Form for such transition out services.

HELP DESK

- 3.15** If Help Desk Services are stated in the Order Documents, the Contractor must, during the Contract Period, provide Help Desk Services during the times of operation and in accordance

with the Contract Specifications and any other requirements of the Customer Contract, including any Service Level, all as set out in the Order Documents.

UPDATES AND NEW RELEASES

- 3.16** The provisions of clauses 3.17 to 3.23 apply where it is stated that the Customer has the right to receive Updates and/or New Releases for:
- (a) the Licensed Software; and/or
 - (b) the Developed Software.
- 3.17** The Contractor must, at no additional charge to the Customer, make available to the Customer any Updates and New Releases for the relevant part of the Supported Software that the Contractor generally makes available to other of its customers during the Contract Period at no additional charge. These Updates and/or New Releases must be made available to the Customer if and when the Update or New Release becomes generally available to those other customers.
- 3.18** The Customer must provide written notice to the Contractor within 30 days from the date the Update or New Release is made available to the Customer if the Customer will not use the Update or New Release. The Customer must accept and use any Update that the Contractor advises addresses a security issue.
- 3.19** If the Customer accepts the Update or New Release:
- (a) the Contractor, if requested by the Customer, 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 Contract Specifications of the Supported Software will be deemed to be amended to the extent that the specifications for the Update or New Release supersede the existing Contract Specifications;
 - (d) the Customer must upon request return to the Contractor all copies of the original Supported Software or the part that has been superseded by the Update or New Release or otherwise deal with all such copies in accordance with the Contractor's directions.
- 3.20** Subject to clause 3.18, 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 Supported Software;
 - (b) the Contractor may cease to provide Software Support Services for that release of the Supported Software from the date that is 18 months (or such other period stated in the Order Documents) from the date of general release of a New Release, and thereafter:
 - (i) the Supported Software may have its usefulness reduced over time;
 - (ii) the Contractor may not be able to remedy any Defects in the Supported Software; and

- (iii) the Contractor is not responsible for any Defect in the Supported Software, nor any incident, outage or breach of any Service Level, which would not have occurred had the latest version of the Supported Software been used.

3.21 Where the Supported Software is Installed on Contractor Equipment and is provided from a common code base then the Customer acknowledges and agrees that:

- (a) the Supported Software is provided on a shared service basis to the Customer and other customers and the Contractor may from time to time, without the prior consent of Customer:
 - (i) at the Contractor's own cost, implement any change, addition, deletion, error correction, patch, Updates and/or New Releases and those changes, additions, deletions, error corrections, patches, Updates or New Releases may add or delete the functions, features, performance or other characteristics of the Supported Software, and when such changes, additions, deletions, error corrections, patches, Updates or New Releases are implemented the Contract Specifications of the Supported Software shall be amended accordingly;
 - (ii) amend the Technical Specifications;
- (b) the Contractor must provide prior notice (including via email) of major changes or New Releases to the relevant part of the Supported Software, and such notice may be given by posting the information on the Contractor's website;
- (c) the Contractor does not warrant or guarantee that any change, addition, deletion, error correction, patch, Update or New Release will be compatible with any data entered by the Customer or any person permitted to enter data by the Customer, third party application, other software or interface that connects to or interfaces with the Supported Software that has been made by or on behalf of Customer. The Contractor will not be liable for any loss, damage or expense which Customer may incur as the result of any change, addition, deletion, error correction, patch, Update or New Release in any circumstances.

ASSISTANCE

3.22 The Customer must provide reasonable assistance in remedying any Defect, including installing any Workarounds supplied by the Contractor and running any diagnostic tests. Where the Contractor requires remote access to the Supported Software to provide Software Support Services the Customer must provide that access, subject to the Contractor complying with the Customer security and privacy policies set out in Item 9 of the Head Agreement and Item 30 of the General Order Form. If the Customer does not permit such access then Customer must pay any additional costs incurred by the Contractor in attending the Customer's Site to provide the Software Support Services.

FIRST RELEASE

3.23 If the Licensed Software or 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 in the Order Documents or on a Change Request, as applicable.

4. Reseller Provision of Software Support Services

4.1 Where it is specified on the Module Order Form that the Software Support Services is to be supplied via a Contractor that is a Reseller, the provisions of this clause 4 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 Software Support Services:

- (a) **Reseller as Facilitator.** In this business model the Contractor provides reseller services which facilitate the supply of the Software Support Services 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 Software Support Services, and the provisions of the Customer Contract that relate to the supply of the Software Support Services, including provisions in this Customer Contract relating to intellectual property rights and the features, capabilities, performance or other characteristics of the Software Support Services and the other provisions of this Module (other than clause 5) 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 Software Support Services 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 agreement that is provided with the relevant part of the Supported 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) Software Support 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 Software Support Services 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 relevant part of the Supported Software; or
- (b) **Reseller with Pass Through Warranties.** In this business model, the Contractor will supply the Software Support Services 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 3, 6 and 7 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 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 in respect of any 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 in respect of any Licensed Software are utilised to the benefit of the Customer.

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

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

5. Ancillary Services

5.1 The Parties may agree that other services, including implementation of Updates or New Releases and training 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 Module Order Form 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.

6. Specific Warranties

SCOPE

6.1 The Contractor warrants that, subject to any Exception:

- (a) when providing the Software Support Services, it must:
 - (i) use appropriate materials of high quality;
 - (ii) employ appropriate techniques and standards;
 - (iii) exercise due care, skill and attention;
- (b) perform the Software Support Services in accordance with any Services Levels agreed in a Service Level Agreement, or if no Service Levels are agreed, it will perform Software Support Services in a reasonable time taking into account the impact of the Defect on the Customer's operations;
- (c) the specific Personnel that perform the Software Support Services are appropriately qualified and experienced Personnel, and have reasonable knowledge of the Supported Software;
- (d) the Software Support Services shall ensure the Supported Software conforms in all material respects to the Contract Specifications and other requirements of this Customer Contract including any Service Level Agreement.

7. Exceptions

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

- (a) modifications to the Supported Software that were effected or attempted by a person other than the Contractor or its authorised representative;
- (b) equipment maintenance not provided by the Contractor or its authorised representative;
- (c) software other than the Supported Software;
- (d) the act, error, fault, neglect, misuse or omission of the Customer;
- (e) the operation of the Supported 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 or the Contractor;
- (f) any Virus, denial of service attack or other malicious act that adversely affects the Supported 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;
- (g) improper use or mismanagement by the Customer; or
- (h) an Event.

7.2 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.