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| Clause Bank for ‘go-to-market’ and contract documents |
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**INSTRUCTIONS FOR USING THIS DOCUMENT**

This document provides a list of alternative clauses that can be used in the new suite of standard contracts for general goods and services available on the [Department of Housing and Public Works website](http://www.qld.gov.au/gov/general-goods-and-services-templates).

The clauses below have been reviewed by Department of Housing and Public Works Internal Legal.

If a customer wants to change any of the standard clauses in the new contracts, then alternative clauses (like those listed in this Clause Bank) can be inserted in the Contract Details or SOA Details document in the section “Customer changes”.

Customers should check with their internal legal teams if it is necessary for the customer’s internal legal team to be consulted about changes to the standard terms and conditions, where a customer is using one of the clauses from this clause bank without amendment.

### INSTRUCTIONS FOR USING THIS DOCUMENT (TO BE DELETED BEFORE SENDING TO SUPPLIER):

### This is a Confidentiality, Privacy and Conflict of Interest Deed for use with the standard form Government contract for the purchase of Goods and Services.

### This Deed assumes that the Customer and Supplier have entered into a contract, and that the Supplier’s Personnel (e.g. an individual or company that is working for, or as a subcontractor of the Supplier) is required to sign a Confidentiality, Privacy and Conflict of Interest Deed. It is to be executed by the Supplier’s Personnel, on request by the Customer.

### The Customer needs to fill out all yellow highlighted sections with details of the Customer’s requirements.

**The Customer is to delete all highlighting before giving the Supplier the Confidentiality Deed.**

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## Document history

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| --- | --- | --- | --- | --- | --- |
| **Version** | **Date** | **Status** | **Key changes made** | **Author(s)** | **Reviewer(s)** |
| V1.0 | 12/12/2014 | Published | Release #1 | Sam Mathers (PTD) | Kerry Harding (DHPW Legal) |
| V1.1 | 06/03/2015 | Updated | New precedents included | Sam Mathers (PTD) | Kerry Harding (DHPW Legal) |
| V1.2 | 15/09/2015 | Updated | New precedent, updated hyperlinks, minor changes to consequential loss clause | Sam Mathers (PTD) | Kerry Harding (DHPW Legal) |

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| **Customer must provide the following at these markers:** | |
| *<<X>>* | Clause number |
| **[highlight]** | Specific details |

# Exclusion of Consequential Loss

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| **Commentary:** | This clause can be used if you wish to limit the liability of both parties, so that consequential loss is excluded. |
| **Suggested clause:** | *Neither party is liable to the other party for any Consequential Loss suffered or incurred by, or claimed against, the other party. This provision does not apply to the Supplier’s indemnity in clause <<X>>.*  ***Consequential Loss*** *means:*  *(a) any special, indirect or consequential loss;*  *(b) any economic loss in respect of any claim in tort;*  *(c) any loss of profits, loss of production, loss of use, loss of contract, loss of opportunity, loss of reputation, loss of goodwill, wasted overheads or any damage to credit rating whatsoever; and*  *(d) any loss arising out of any Claim by a third party,*  *whether arising in contract, in tort (including negligence), under any law, as a consequence of fraud or otherwise and whether present or future, fixed or unascertained, actual or contingent.*  ***Consequential Loss*** *does not include any loss:*  *(e) (including a loss arising out of a Claim by a third party) concerning:*   1. *the cost of repairing, replacing or reinstating any real or personal property owned or leased by any person (including a Party) that has been lost, damaged or destroyed; or* 2. *personal injury to or death of any person; or*   *(e) concerning any personal injury claim, special loss or economic loss, as those terms are used in the context of personal injury claims.* |

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# Ownership of Intellectual Property Rights

## 2.1 Customer own IP rights with limited licence back to the Supplier

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| **Commentary:** | If this clause is used, the Customer will own newly developed IP, even if the new IP is based on existing IP of the Supplier. Customers should note that if deliverables under the Contract include both existing IP of the Supplier and new IP owned by the Customer under this clause, the Customer will not be free to use the deliverables for all purposes, because the Customer must comply with the Supplier’s licence in relation to the existing IP. Accordingly, this option will not be of much benefit to the Customer if the Supplier will be providing significant existing IP and only a relatively small amount of new IP will be created.  If this clause is used, the Supplier cannot use the newly developed IP commercially, including by reusing that IP for the benefit of its other customers. The Supplier may therefore charge a higher price for the deliverables where this option applies, because the Supplier will not have any opportunity to share development costs between the Customer and third parties who may otherwise be interested in licensing the new IP from the Supplier. Accordingly, it may be disadvantageous for a Customer to use this option where the Customer’s objectives can be achieved by utilising the “Supplier owns IP rights with broad licence back to the Customer” or “Customer owns IP rights with a limited licence back to the Supplier” options.  Subject to the potential pricing disadvantage, this clause will be appropriate for all Government contracts. However, it is likely to be a less attractive licensing option for Suppliers. |

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| **Suggested clause:** | Replace ***New Intellectual Property Rights***clause[[1]](#footnote-1) with the following:  *Subject to clause <<X>>**(“Customer Data”), new Intellectual Property Rights created or developed in performing the Contract will be owned by the Customer.  The Customer grants the Supplier an irrevocable, unconditional (subject to this clause), perpetual, royalty-free, non-exclusive, worldwide, transferable and sub licensable licence to exercise all such newly developed Intellectual Property Rights, for any purpose of the Customer, the Queensland Government and Queensland Government Bodies.* |

## Supplier owns IP rights with a broad licence back to the Customer

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| **Commentary:** | If this clause is used, the Supplier will own newly developed IP, and the Customer will have a very broad licence to use that IP for purposes of Government. The Customer can grant sublicences (including to its other service providers) on the same terms, transfer the licence, and use the new IP commercially (provided that the use is for Government purposes).  This clause will be appropriate for most Government contracts. This clause will not be appropriate if:  • the Customer needs an exclusive licence – because the Supplier is free to grant licences to third parties; or  • the Customer intends to grant a sublicence to the new IP on commercial terms where the sublicensee may require the Customer to give a warranty that the Customer owns the licensed IP.  (These considerations may not be relevant to budget sector agencies, but may be relevant to GOCS and non-Government bodies.)  Customers should note that the confidentiality obligations in the Contract still apply. The Customer cannot freely disclose the Supplier’s IP and must not disclose Confidential Information of the Supplier as part of any sublicence. |
| **Suggested clause:** | Replace ***New Intellectual Property Rights***clause[[2]](#footnote-2) with the following:  *Subject to clause <<X>> (“Customer Data”) new Intellectual Property Rights created or developed in performing the Contract will be owned by the Supplier. The Supplier grants (and must procure that relevant third parties grant) the Customer an irrevocable, unconditional (subject to this clause), perpetual, royalty-free, non-exclusive, worldwide, transferable and sub licensable licence to exercise all such newly developed Intellectual Property Rights, for any purpose of the Customer, the Queensland Government and Queensland Government Bodies.* |

## Joint ownership of IP rights between Supplier and Customer

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| **Commentary:** | Obtain specific advice from Legal if you wish to put in place arrangements for joint ownership of intellectual property rights. |

# Price review based on Consumer Price Index (CPI)

## Annual price increase

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| **Commentary:** | If you agree to increase pricing in accordance with CPI you may wish to insert the following clause in “Schedule 2 – Pricing” under the heading “Price Reviews”.  The draft clause assumes that price will increase each year of the term. If this is not appropriate you may need to make some amendments (e.g. if pricing is fixed for an initial term of 2 years then subject to annual CPI increases after that): |
| **Suggested clause:** | ***2.2 Price Reviews***   1. *In this clause CPI means the [weighted average of the All Groups Price Index Numbers for the eight capital cities of the states and territories of Australia] published from time to time by the Australian Bureau of Statistics or, if that index number is no longer published, its substitute as a cumulative indicator of the inflation rate in Australia.* 2. *The Price (exclusive of GST) will be increased on each anniversary of the term of this agreement to an amount calculated by multiplication of the then current Price by a fraction, the denominator of which is the CPI current one year previously and the numerator of which is the then current CPI.*   You can use a different index if appropriate (delete the red text and replace with the index you are using). Alternatively, you can insert a formula (instead of words) to explain the calculation if you prefer. |

## Customer has discretion to accept or reject CPI price increase

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| **Commentary:** | If you wish to give the Supplier an opportunity to propose a price increase or decrease in accordance with CPI which can be accepted or rejected by the Customer in its discretion, then you may wish to insert the following clause in “Schedule 2 – Pricing” under the heading “Price Reviews”. |
| **Suggested clause:** | ***2.2 Price Reviews***  *After the initial term of [x] years, the Supplier may seek to increase or decrease the GST exclusive Price for the Goods and/or Services to take into consideration movements in the relevant published Australian Bureau of Statistics (ABS) Index (e.g. consumer price or producer price index), as its affects the Goods and/or Services, as specified below:*  *[Insert details of consumer price index used, for example:*   1. *Name of the Australian Bureau of Statistics (ABS) Index (e.g. Consumer Price Index Brisbane (All Groups))* 2. *ABS Index Table Number* 3. *Name of Index Group, Column Number, etc within the Table* 4. *Quarter and Year on which Pricing is based.]*   *If the Supplier’s request to increase or decrease the Price for the Goods and/or Services is:*   1. *accepted by the Customer, the variation must be agreed in writing; or* 2. *rejected by the Customer, the Contract will remain unvaried.* |

# Insurance

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| **Commentary:** | The following clauses may be useful for higher value, higher risk contracts where it is most important that the reliability of the Supplier’s indemnity be supported by insurance. |
| **Suggested clause:** | There is an existing clause in the Comprehensive Contract Conditions, General Contract Conditions and SOA Conditions setting out the Supplier’s obligation to obtain and maintain insurance. Any of the following clauses are additional clauses that can be added to the existing insurance clauses identified above, if required:  ***Insurance continued …***  *#1 The Supplier must ensure that any insurance it takes out and maintains is with an insurer having an insurance financial strength rating of “A” or better by Standard & Poor’s or, if Standard & Poor’s ceases to exist or to provide such ratings, the rating which most closely corresponds to that rating by another agency or person which is recognised in global financial markets as a major ratings agency.*  *#2 The Supplier must ensure that, to the extent permitted by Law, all insurances taken out and maintained according to this clause <<X>> must:*  *(a) note the interests of the Customer; and*  *(b) not contain any exclusions, endorsements or alterations to the accepted policy wording that adversely amend the cover provided without the Customer’s written consent (which must not be unreasonably withheld or delayed).*  *#3 The Supplier:*  *(a) must pay when due all premiums, charges and other expenses necessary to take out and maintain the insurances; and*  *(b) is responsible for the payment of all policy deductibles or excesses for insurances.*  *#4 The Supplier must not do or permit anything to be done (including any omission) which :*  *(a) may result in any insurance being vitiated or rendered voice or voidable; or*  *(b) would give rise to an entitlement by the insurer to avoid payment of part or all of any claim.*  *#5 The Supplier must at all times comply with the terms of all insurances taken out under this clause <<X>>.*  *#6 In addition to any other obligation, the Supplier must:*  *(a) notify the Customer as soon as practicable after the occurrence of any claim, or an event that may give rise to a claim, under any insurance taken out according to this clause <<X>> (including providing reasonable details of the claim or the event); and*  *(b) keep the Customer informed of subsequent developments concerning any claim.*  *#7 The Supplier’s compliance with any insurances does not limit the Supplier’s liabilities or obligations under this agreement.* |

# Liquidated Damages

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| **Commentary:** | If you negotiate that liquidated damages are payable by the Supplier for a delay in providing the Deliverables, then the following clause can be inserted as a special condition. Schedule 2 – Price and Payment Terms will need a new clause to be added identifying specific information about the amount of liquidated damages, how it is calculated, and which Deliverables/ milestones liquidated damages apply to.  As liquidated damages is very complex, legal advice should be sought prior to the commencement of negotiations. |
| **Suggested clause:** | ***[new clause no.] Liquidated damages***  *(a)* ***Liquidated Damages****” means an amount agreed between the parties as a genuine pre-estimate of damages to be recoverable by the Customer should the Supplier be in breach of the Contract, as specified in Schedule 2 – Price and Payment Terms.*  *(b) Subject to clause <<X(e)>> the Supplier must, pay Liquidated Damages for a delay in delivering the Goods and/or providing the Services (as identified in Schedule 2 – Price and Payment Terms), to the extent the delay was caused or contributed to by the Supplier.*  *(c) Each Party acknowledges that the Liquidated Damages amount is a genuine and realistic pre-estimate of the loss and damage the Customer will suffer as a result of a delay.*  *(d) Subject to clause <<X(b)>>, Liquidated Damages are payable by the Supplier until the earliest of the following:*   1. *completion of the Deliverable by the Supplier, which is the subject of the delay;* 2. *a period of ninety (90) days (or other period specified in Schedule 2), has expired; or* 3. *some other period as otherwise agreed in writing between the Customer and Supplier.*   *(e) Where the Customer has granted an extension of time, no Liquidated Damages are payable for the period of extension. However, if the Supplier has paid Liquidated Damages prior to the extension of time being granted, then the Customer must repay the Supplier any Liquidated Damages for the period during which the extension has been granted.*  *(f) During any period where Liquidated Damages shall be the sole measure of the Customer’s loss and damage for the Supplier’s delay in performing or completing the Deliverables.*  *(g) Exercise of rights pursuant to this clause <<X>> shall be without prejudice to any other right of action or remedy, which has accrued or may accrue to the Customer.*  *In* ***“Schedule 2 – Price and Payment Terms”****, specify the amount of Liquidated Damages payable by inserting a new heading “****Liquidated Damages****”**and insert the following table:*   |  |  | | --- | --- | | ***Amount of Liquidated Damages payable by the Supplier*** | *$[insert amount] per day* | | ***Deliverables, milestones or stages do Liquidated Damages apply to*** | *[identify what LD’s are attached to, i.e. which Deliverables, milestones, stages etc].* | | ***(Maximum) period for which Liquidated Damages are calculated (see clause X(d))*** | *90 days [or if a different period applies delete “90 days” and replace with other period.]* | |  |  | |

# Project Manager

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| **Commentary:** | This clause is based on a clause that was previously contained in the ‘Long Form Conditions of Contract’ called ‘Role of the Project Manager’. If it is relevant to your Contract, insert it as a new clause: |
| **Suggested clause:** | ***[new clause no.]******Project manager***  *The Customer may appoint a project manager as the Customer’s technical representative responsible for the detail and accuracy of the Requirements in the Contract. The project manager is not authorised to amend or enter into, any Contract on behalf of the Customer.*  *If the Customer appoints a project manager, the Supplier must:*   1. *liaise with and report to the project manager about the supply and performance of the Deliverables, including the Supplier’s performance against any performance measures specified in the Details and any actions to address any failures of a performance measure;* 2. *attend meetings with, and provide briefings to, the project manager, as responsibly requested by the Customer; and* 3. *promptly comply with any reasonable request or direction given by the project manager in accordance with performance of the Contract.* |

# Trustee provisions

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| **Commentary:** | If the Supplier is entering into the contract as trustee of a trust, then insert the following clauses: |
| **Suggested clause:** | ***[new clause no.] Trustee warranty***  *If the Supplier has entered into the Contract as trustee of a trust (“Trust”), the Supplier:*   1. *enters into the Contract personally and in its capacity as trustee; and* 2. *warrants that:* 3. *the Trust is validly constituted and has not terminated, no action has been taken to wind up, terminate or resettle the trust, and no date or event has occurred for the vesting of the assets of the Trust;* 4. *it is the only trustee of the Trust and is not aware of any action to remove it as trustee of the Trust and will not take any action to resign as trustee before the completion of all obligations of the Supplier under the Contract;* 5. *the trust deed of the Trust discloses all of the terms of the Trust;* 6. *it has power under the trust deed of the Trust to enter into and observe its obligations under this Contract and has formed the view that it is prudent to enter into this Contract;* 7. *it has in full force and effect the authorisations necessary to enter into this Contract, perform obligations under this Contract and allow this Contract to be enforced;* 8. *it is not in material default under the trust deed of the Trust and is not aware of any action proposed to terminate the Trust;* 9. *the entry into and the performance of this Contract is for the benefit of the beneficiaries of the Trust, whose consents (if necessary) have been obtained; and* 10. *it has a right to be indemnified fully out of the trust assets concerning all of the obligations and liabilities incurred by it under this Contract, the assets of the Trust are sufficient to satisfy that right in full, and it has not released or disposed of its equitable lien over the assets of the Trust; and* 11. *it has disclosed to the Customer full particulars of the Trust and of any other trust or fiduciary relationship affecting the assets of the Trust, and has given the Customer a complete, up to date copy of the Trust Deed.* 12. *makes the warranties in clause <<X>>(b) on the date that the [Contract/SOA] is formed and on the last Business Day of each month after that date.*   ***[new clause no.]* Trustee to provide information**  *If the Supplier has entered into the Contract as trustee of a Trust, the Supplier must give the Customer promptly on request:*  *(a) any information concerning the financial condition (including the financial accounts), business, assets and affairs of the Trust that the Customer reasonably requests; or*  *(b) a statement from the duly appointed auditors of the Trust attesting to the solvency and financial soundness of the Trust and the trustee of the Trust.* |

# Other precedents

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| **Commentary:** | The following documents (as precedents) will be developed in the coming months and made available on the Department of Housing and Public Works website when finalised. |
| **Document** | 1. Letter of acceptance of Offer 2. **Letter of variation (now available)** 3. **Deed of novation (now available)** 4. **Confidentiality, Privacy and  Conflict of Interest Deed (one-way) (now available)** 5. **Financial Security (now available)** 6. **Performance Guarantee (now available)** |

## 8.2 Letter of variation

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| **Commentary:** | This template can be used where the parties wish to record in writing any changes to the terms and conditions of a contract.  Variations must be confirmed in writing and acknowledged by both parties. Save a copy of the signed letter of variation (or alternatively, the correspondence between the parties confirming the variation is agreed) in Q-Contracts (or wherever else you keep your contract records).  The letter of variation template is available on the [Dept. Housing and Public Works website](http://www.hpw.qld.gov.au/SiteCollectionDocuments/LetterofVariation.docx). |

## 8.3 Deed of novation

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| **Commentary:** | This template can be used to novate a contract from one supplier to another supplier. The template includes some guidance notes about things to consider when novating a contract.  The Deed of Novation template is available on the [Dept. Housing and Public Works website.](http://www.hpw.qld.gov.au/SiteCollectionDocuments/DeedofNovation.doc) |

## 8.4 Confidentiality, Privacy and Conflict of Interest Deed (one-way)

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| **Commentary:** | This template can be used with the standard form Government contract for the purchase of Goods and Services. It is to be executed by the Supplier’s Personnel, on request by the Customer.  The Deed template is available on the [Dept. Housing and Public Works website](http://www.hpw.qld.gov.au/SiteCollectionDocuments/ConfidentialityPrivacyandConflictofInterestDeedOneWay.doc). |

## 8.6 Financial security

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| **Commentary:** | This template can be used if the Customer requires financial security to be provided by the supplier (e.g. a bank guarantee). The Comprehensive Contract Conditions contain a clause about financial security to be provided by the Supplier.  The Financial Security template is available on the [Dept. Housing and Public Works website](http://www.hpw.qld.gov.au/SiteCollectionDocuments/Financial%20Security%20v1.0.doc). |

## 8.7 Performance guarantee

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| **Commentary:** | This template can be used if the Customer requires a performance guarantee from the Supplier. There are strict requirements in the *Financial and Performance Management Standard* 2009 about obtaining performance guarantees. The template includes some guidance notes about this. It is recommended that you speak to your legal advisors if you intend to obtain a performance guarantee from the Supplier.  The Comprehensive Contract Conditions contain a clause about performance guarantees.  The Performance Guarantee template is available on the [Dept. Housing and Public Works website](http://www.hpw.qld.gov.au/SiteCollectionDocuments/Performance%20Guarantee.doc). |

1. Clause 14.2 of the General Contract Conditions, clause 15.2 of the Comprehensive Contract Conditions, or clause 16.2 of the SOA Conditions. If using for SOA Conditions, replace “Customer” with “Principal”. [↑](#footnote-ref-1)
2. Clause 14.2 of the General Contract Conditions, clause 15.2 of the Comprehensive Contract Conditions, or clause 16.2 of the SOA Conditions. If using for SOA Conditions, replace “Customer” with “Principal”. [↑](#footnote-ref-2)