

THE HIRE OF COMPUTER STAFF

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1. DEFINITIONS

- 1.1 'Contract' shall mean the agreement between the Customer and the Contractor for the execution of the Service, including all documents expressly incorporated therein.
- 1.2 'Contractor' shall mean the person, firm or company named as such in the Contract as responsible for providing the Service and shall include its legal personal representatives, successors and permitted assigns.
- 1.3 'Customer' shall mean the person, firm or company named as such in the Contract for whom the Service is to be carried out and shall include its legal personal representatives, successors and permitted assigns.
- 1.4 'Expert Determination' is defined in Clause 19.
- 1.5 'Force Majeure' is defined in Clause 15.
- 1.6 'Premises' shall mean the place or places where the Staff are to be located, as described in the Contract.
- 1.7 'Service' shall mean the provision of Staff to carry out the duties as detailed in the Contract.
- 1.8 'Staff' shall mean the person or persons provided by the Contractor under this Contract.

2. CONTRACTOR'S LIABILITIES

- 2.1 The Contractor shall provide to the Customer the Staff specified in the Contract and shall ensure that such Staff have the necessary skills, competence, experience and qualifications to fulfil the Contract.
- 2.2 The Contractor shall ensure that the Staff understand and comply with the requirements of the Contract and with the Customer's site regulations and general rules provided these are expressly incorporated into the Contract. Without prejudice to the generality of the foregoing, the Contractor shall ensure that each member of the Staff signs the forms of undertaking specified in the Contract before commencing work and complies with all reasonable directions of the Customer.
- 2.3 The Contractor shall appoint a person to act as its representative for the purpose of the Contract and notify the Customer in writing.

3. CUSTOMERS RESPONSIBILITIES

Unless otherwise specified in the Contract:

- 3.1 The Customer shall provide for the Staff all reasonable supplies and services necessary to perform their duties under the Contract without prejudice to the Contractor's obligation to bear all its own expenses including without limitation travelling subsistence and accommodation expenses unless the Contract provides otherwise.
- 3.2 The Customer shall permit Staff to use catering and first aid facilities to the extent that such facilities are provided at the Premises by the Customer for its comparable employees. The Customer reserves the right to charge the Staff for the use of catering facilities.
- 3.3 The Customer shall appoint a person to act as its representative for the purpose of the Contract and notify the Contractor in writing.

4. **CHARGES AND PAYMENT**

- 4.1 The Contractor shall be entitled to claim payment at the time and in the manner stated in the Contract. Claims for payment shall be at the rates and prices contained in the Contract.
- 4.2 Unless otherwise stated in the Contract the rates and prices contained therein shall remain fixed for a minimum period of twelve (12) months. If the Contract is for a longer period than twelve (12) months, either party may at any time after the first nine (9) months give at least three (3) months written notice to the other party requesting a revision of the rates and prices to be effective for a further minimum period of twelve (12) months commencing at the end of the notice period. In the event of the parties failing to agree revised rates and prices, then, notwithstanding the provisions of Clause 11, either party shall have the right to terminate the Contract at the end of this notice period.
- 4.3 The Contractor shall submit invoices in respect of all charges and payments due under the Contract in accordance with the procedures in the Contract. The Customer shall make due payment within thirty (30) days of receipt of the invoice by the Customer or as otherwise specified in the Contract.
- 4.4 Notwithstanding Sub-Clause 4.3 above, the Customer reserves the right to withhold payment against any invoice which is not in accordance with the Contract or which covers or purports to cover Staff which have not been provided in accordance with the Contract, and shall notify the reasons to the Contractor in writing forthwith.
- 4.5 If the payment of any sum due under the Contract shall be delayed by the Customer other than in accordance with Sub-Clause 4.4, the Contractor shall have the right to suspend the provision of the Service until such payment is received, subject to the Contractor giving the Customer fourteen (14) days notice in writing of its intention so to do.
- 4.6 All sums payable under this Agreement shall be exclusive of value added tax, if any, which shall be paid by the Customer to the Contractor in addition, with the Contract Price as provided above.

5. **INDEMNITY AND INSURANCE**

- 5.1 The Contractor shall indemnify and keep indemnified the Customer for the duration of the Contract, against death or injury to any person or loss of or damage to any property which may arise out of the act, default or negligence of the Staff, the Contractor, its employees or agents in consequence of the Contractor's obligations under the Contract and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto, provided that the Contractor shall not be liable for nor be required to indemnify the Customer against any compensation or damages for or with respect to death, injuries or damage to persons or property to the extent that such death, injuries or damage arise wholly from any act, default or negligence on the part of the Customer, its employees or contractors (not being the Contractor or employed by the Contractor).
- 5.2 The Customer shall indemnify and keep indemnified the Contractor for the duration of the Contract against death of or injury to any person or loss of or damage to any property which may arise out of the act, default or negligence of the Customer or any contractor employed by the Customer (other than the Contractor) and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.
- 5.3 Without thereby limiting their responsibilities under Sub-Clause 5.1 and 5.2 each party shall insure with a reputable insurance company against all loss of and damage to property and death of or injury to persons arising directly out of its obligations under the Contract and against all actions, claims, demands, costs, charges and expenses in respect thereof. Documentary proof of such insurance cover shall be made available on demand by either party.

- 5.4 Nothing in the Contract shall purport to exclude or restrict the liability of the defaulting party for death or personal injury arising out of acts or omissions of that party, its agents, employees, servants and subcontractors.
- 5.5 Save as expressly stated elsewhere in the Contract and except as regards liability for death or personal injury caused by its negligence, neither party shall be liable to the other for consequential loss or damage, loss of revenue, opportunity or contract or goodwill.

6. **OWNERSHIP AND RIGHTS**

- 6.1 Copyright and all other intellectual property rights in all software, documents, designs and other materials produced as part of the Service shall belong to and vest in the Customer. The Contractor shall ensure it and all Staff execute any intellectual property assignment documentation necessary to effect such ownership of rights and shall not itself or through any Staff register any domain names, trade marks, patents or any other registered right over any such materials produced as part of the Service. The Contractor shall ensure any copyright notices required to be included on the materials are included as provided in the Contract. All moral rights in such materials are hereby waived. The Contractor shall ensure it contracts with all Staff to ensure the vesting of rights as provided herein.
- 6.2 The Contractor shall fully indemnify the Customer and hold it harmless against all damages (including legal fees on an indemnity basis), costs, charges and expenses arising from or incurred by reason of any infringement or alleged infringement of any intellectual property rights in materials or software supplied under the Contract arising from the provision of the Service by the Contractor, subject to the following:
- (a) the Customer shall promptly notify the Contractor in writing of any alleged infringement of which the Customer becomes aware
 - (b) the Customer must make no admissions without the Contractor's prior written consent
 - (c) if the Contractor so requests, the Customer shall allow the Contractor to conduct any negotiations or litigation and/or settle any claim. The Customer shall give the Contractor all reasonable assistance. All costs shall be borne by the Contractor.
- 6.3 If at any time an allegation of infringement of rights is made in respect of the Service or if in the Contractor's reasonable opinion such an allegation is likely to be made, the Contractor may, at its own expense, modify or replace the Service so as to avoid the infringement, without detracting from overall performance, the Contractor making good to the Customer any loss of use during modification or replacement.
- 6.4 The Customer shall use its reasonable endeavours to ascertain what licences are required from third party software licensors to enable the Contractor to work on any software used by the Customer.

7. **REMOVAL AND REPLACEMENT OF STAFF**

The Customer shall afford to the Staff at all reasonable times and with prior agreement, such access to the Premises (but not necessarily sole access) as may be necessary for the provision of the Service, provided always that the Customer shall have the right to refuse to admit to, or to order the removal from, the Premises of Staff who in the reasonable opinion of the Customer are not fit and proper persons to be on the Premises. Action taken under this Clause shall forthwith be confirmed in writing to the Contractor by the Customer. Such action shall not relieve the Contractor of its obligations under the Contract and the Contractor shall use its best endeavours to provide, as soon as possible, Staff who meet the requirements of the Customer as specified in the Contract.

8. **STATUTORY REGULATIONS**

- 8.1 Both parties shall in all matters arising in the performance of the Contract conform with all Acts of Parliament and with all orders, regulations and bye-laws made with statutory authority by Government Departments or by local or other authorities that shall be applicable to the Contract. The Contractor shall not in the performance of the Contract in any manner endanger the safety or unlawfully interfere with the convenience of the public. Except as provided under Sub-Clause 8.2 and 8.3, the cost to each party in meeting the requirements of this sub-clause shall be borne by that party.
- 8.2 If the cost to the Contractor of the performance of the Contract shall be increased or decreased by reason of the making after the date of the Contract of any law or any order, regulation or bye-law having the force of law that shall be applicable to the Contract (other than any tax on profits), the amount of such increase or reduction shall be paid to or repaid by the Contractor as appropriate.

8.3 In the event that either party necessarily incurs costs to which it would not otherwise be liable due to the other party's failure to comply with any law or any order, regulation or bye-law having the force of law, the amount of such costs shall be reimbursed by the other party.

8.4 The Contractor undertakes that it and its employees, agents and sub-Contractors will at all times comply with all health and safety requirements relating to the carrying out of the work under the Contract. Such requirements include in addition to statutory laws and regulations any codes of practice and British Standards or their equivalent relating to Health or Safety which may be applicable to the performance of the Contract. In the performance of the Contract the Contractor shall conform to all relevant environmental standards, guidelines and Codes of Practice and shall take all practical steps in the design of the work to be performed under the Contract to minimise any risk to the environment.

9. **CONFIDENTIALITY, DATA PROTECTION AND PUBLICITY**

9.1 Each party shall treat the Contract and any information it may have obtained or received in relation thereto or arising out of or in connection with the performance of the Contract or its negotiation or relating to the business or affairs of the other as private and confidential and neither party shall publish or disclose the same or any particulars thereof without the prior written consent of the other or as may be permitted under the later provision of this Clause.

9.2 The obligations expressed in sub-Clause 1 above shall not apply to any information which:

- (a) is or subsequently comes into the public domain otherwise than by breach of this Clause
- (b) is already in the possession of the receiving party without an accompanying obligation of confidentiality
- (c) is obtained from a third party who is free to divulge the same
- (d) is independently and lawfully developed by the recipient or its sub-Contractor outside the scope of the Contract.

9.3 So far as it may be necessary for the performance of the Contract or for the operation and maintenance of the subject matter of the Contract each party may divulge any information to be kept confidential under sub-Clause 1 of this Clause to their employees, agents and approved sub-Contractors, if any, on a "need to know" basis but undertake that they will ensure compliance by such employees, agents, and sub-Contractors with the obligations as to confidentiality expressed in this Clause and will be responsible to the other party for any failure by any employee, agent or sub-Contractor to comply with such obligations whether such employee, agent or sub-Contractor was aware of them or not.

9.4 Both parties shall ensure that they, their employees, agents and sub-Contractors shall observe the requirements of the Data Protection Act 1998 and any amendments or revisions thereto in the provision and use of the subject matter of the Contract and shall comply with any request made or direction given to the other which is directly due to the requirements of such Act.

9.5 The Contractor shall not, without the prior written consent of the Customer, advertise or publicly announce that it is undertaking the Service or that the Contract is in existence or use the Customer's name in any format for any promotion, publicity, marketing or advertising purpose

9.6 The provisions of this Clause shall continue in perpetuity.

10. **TAX AND INDEMNITY**

10.1 The Contractor shall fully indemnify and hold the Customer harmless against any tax or national insurance liability on the charges paid hereunder. The Contractor warrants that it shall pay or ensure are paid any tax or national insurance liabilities on the wages of Staff and that Staff are not the employees or workers of the Customer.

10.2 The Contractor shall pay or ensure are paid any liabilities for holiday pay or similar employment legislative requirements in relation to Staff and shall fully indemnify and hold the Customer harmless against any such liabilities.

11. **PERIOD AND TERMINATION**

11.1 Subject to the provisions of Sub-Clauses 4.2, 11.2 to 11.4, the contract shall operate for at least the minimum period stated therein and shall continue thereafter unless terminated by either party giving at least three (3) months prior written notice to the other expiring on or after the end of the minimum period.

- 11.2 Either party may terminate this Contract forthwith by written notice to the other effective from the date of service of such notice if:
- (a) there is a breach by the other party of any provision of the Contract which expressly entitles the party not in breach to terminate the Contract.
 - (b) there is a material or persistent breach by the other party of any other term of the Contract, which is not remediable, or if it is remediable has not been remedied within 30 days of the service of written notice to the defaulting party specifying the breach and requiring it to be remedied.
- 11.3 If the Contractor shall become insolvent or bankrupt or have a receiving order or administration order made against it or compound with its creditors or being a corporation commence to be wound up not being a members' voluntary winding up for the purpose of reconstruction or amalgamation, or carry on its business under an administrator or administrative receiver for the benefit of its creditors or any of them, the Customer shall be at liberty either to terminate the Contract forthwith by notice in writing to the Contractor or to the administrative receiver or administrator or liquidator or to any person in whom the Contract may become vested or to give such administrative receiver, administrator, liquidator or other person the option of carrying out the Contract subject to its providing a guarantee for the due and faithful performance of the Contract up to an amount to be agreed.
- 11.4 If the Customer shall become insolvent or bankrupt or have a receiving order or administration order made against it or compound with its creditors or being a corporation commence to be wound up not being a members' voluntary winding up for the purpose of reconstruction or amalgamation, or carry on its business under an administrator or administrative receiver for the benefit of its creditors or any of them, the Contractor shall be at liberty to terminate the Contract forthwith by notice in writing to the Customer or the administrative receiver or administrator or liquidator or to any person in whom the Contract may become vested.
- 11.5 Termination of the Contract shall not prejudice any rights of either party which accrue up to and including the date of termination.

12. **VARIATIONS**

- 12.1 The Customer may, at any time, by written notice, request the Contractor to make any reasonable alteration to the Service (hereinafter referred to as a "Variation"). In the event of a Variation being required, the Customer shall instruct the Contractor to state in writing its ability to meet the requirements of the Variation and the effect such Variation will have on the cost of the Service. The Contractor shall respond within fourteen (14) days from receipt of the Customer's instruction or such other period as may be agreed.
- 12.2 The Contractor shall satisfy the Customer as to the reasonableness of the changes proposed to the Service and the additional costs or savings resulting from the proposed Variation. When satisfied that the proposed changes to the Service and/or the cost changes are reasonable, the Customer will instruct the Contractor in writing to implement the Variation.
- 12.3 If on written request the Customer instructs the Contractor to state in writing the effect of a proposed Variation to the Service, in accordance with Sub-Clause 12. 1, and subsequently decides not to proceed with the Variation, the Contractor shall have the right to be reimbursed by the Customer the costs necessarily and properly incurred in the preparation of its reply to the Customer's request.

13. **ASSIGNMENT**

Neither party shall assign any of its obligations under the Contract without the prior written consent of the other party. The Contractor shall not subcontract its obligations hereunder without the prior written consent of the Customer.

14. **WAIVER**

Any failure by the Customer to insist at any time upon the performance of any of the terms, provisions or undertakings of the Contractor contained in the Contract or to exercise any rights thereunder shall not constitute or be construed as a waiver thereof or a relinquishment of the Customer's rights to require the future performance of any such term, provision or undertaking but the obligation of the Contractor with regard to the same shall continue in full force and effect

15. **FORCE MAJEURE**

15.1 For the purpose of the Contract the term Force Majeure shall mean:

- (a) war and other hostilities including terrorist activities, (whether war be declared or not) invasion, act of foreign enemies, mobilisation, requisition or embargo
- (b) rebellion, revolution, insurrection, military or usurped power or civil war
- (c) riot, commotion or disorder except where solely restricted to employees of the Contractor or its sub-Contractors or subsuppliers
- (d) earthquake, flood, fire or other natural physical disasters except to the extent that any such disaster is caused by, or its effects contributed to by, the party claiming force majeure.

Force majeure shall not include a general industrial dispute or failure by approved sub-contractors.

15.2 If either party considers that any circumstance of Force Majeure has occurred which may affect materially the performance of its obligations then it shall forthwith notify the other in writing to that effect giving full details of the circumstances giving rise to the Force Majeure event.

15.3 Neither party shall be considered to be in default of its obligations under the Contract to the extent that it can establish that the performance of such obligations is prevented by any circumstance of Force Majeure which arises after the date of the Contract and which was not foreseeable at the date of the Contract.

15.4 If the performance of the obligations of either party under the Contract is so prevented by circumstances of Force Majeure and shall continue to be so prevented for a period less than 30 days then during that period the Contract shall be considered as suspended. Upon the ending of the Force Majeure event the Contractual obligations of the parties shall be reinstated with such reasonable modifications to take account of the consequences of the Force Majeure event as may be agreed between the parties or, in default of such agreement, as may be determined by an Expert appointed under this Agreement. Notwithstanding such suspension the Contractor shall use its reasonable endeavours to assist the Customer in the performance of the Contract.

15.5 If performance of the obligations of either party under the Contract is so prevented by circumstances of Force Majeure and shall continue to be so prevented for a period in excess of 30 days then the Contract shall be terminated by mutual consent and, subject to sub-Clause 15.6 below neither party shall be liable to the other as a result of such termination.

15.6 If the Contract is so terminated then subject to the transfer to the Customer of the benefit referred to in sub-Clause 15.7 below the Customer shall pay to the Contractor such reasonable sum as may be agreed between the parties or in default of agreement as may be determined by Expert Determination in accordance with this Agreement in respect of costs incurred and commitments already entered into by the Contractor at the date of the Force Majeure notice, less the amount of any payments already made to the Contractor at the date of the Force Majeure notice. If the amount of such advance payments made to the Contractor exceeds the sum due to the Contractor under this sub-Clause then the Contractor shall repay the balance to the Customer.

15.7 The Contractor shall transfer to the Customer the benefit of all work done by it or its approved sub-Contractors if any and sub-suppliers in the performance of the Contract up to the date of the Force Majeure notice, and if applicable it shall include the rights in any licensed and developed software and licensed firmware so far as the rights in the same have accrued to the Contractor prior to the Force Majeure notice or will do so on the payment under sub-Clause 15.6 above.

16. **OFFERS OF EMPLOYMENT**

For the duration of the Contract and for a period of six (6) months thereafter, persons in the employment of either party who have worked on the Contract shall not be taken under a contract of employment by the other party unless the prior consent of that party has been obtained in writing.

17. **NOTICES**

17.1 Any notice or other communication which either party is required by the Contract to serve on the other party shall be sufficiently served if sent to the other party at its address as specified in the Contract either (a) by hand; (b) by registered or first class post or recorded delivery or (c) by facsimile or electronic mail transmission confirmed by registered, first class post or recorded delivery within 24 hours of transmission.

17.2 Notices are deemed to have been served as follows: delivered by hand; on the day when they are actually received, sent by post or recorded delivery; two working days after posting, sent by facsimile

or electronic mail; on the day of transmission if transmitted before 16.00 hours on the working day, but otherwise 09.00 hours on the following working day, provided in each case that the required confirmation is sent.

18. **NO THIRD PARTY RIGHTS**

Nothing in this Contract shall confer, nor is it intended to confer, any enforceable right on any third party under the Contracts (Rights of Third Parties) Act 1999 except as otherwise expressly so stated.

19. **EXPERT DETERMINATION**

Where under the Contract any issue is to be determined by an Expert then:

- (a) either party may give 7 days' notice in writing to the other requiring expert determination by an Expert to be agreed between the parties or nominated as referred to below
- (b) within 14 days of the receipt of such notice the parties shall have agreed on the choice of an Expert or in default of agreement the Expert shall be nominated by the President for the time being of the British Computer Society on the application of either party
- (c) the Expert shall act in accordance with such procedure as the Expert may in its sole discretion decide provided that it shall act impartially as between the parties
- (d) the Expert shall reach a decision within 56 days of its appointment, which decision shall except in the case of fraud be final and binding on the parties
- (e) t the Expert shall sit as an expert and not as an arbitrator.

The Expert shall not be liable for anything done or omitted to be done in the discharge or purported discharge of its duties as an Expert unless the act or omission was done in bad faith.

20. **DISPUTE RESOLUTION**

20.1 If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract, except any matter which under the Contract is to be referred to Expert Determination, either party may give the other 7 days notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Dispute Resolution. If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be litigated, without prejudice to either party's right at any time to obtain immediate interim court relief.

20.2 The parties submit to the exclusive jurisdiction of the English courts in connection with any dispute hereunder.

21. **LAW**

Unless otherwise agreed in writing between the parties, the Contract shall be subject to and construed and interpreted in accordance with English law.

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Since we are unable to know the circumstances in which these conditions are used, CIPS will not accept any liability for their usage. It is the responsibility of you, the user to decide whether they are suitable for your purpose and what modifications, if any, are required to make them suitable and for which purpose you might need to take professional advice.

NOTES FOR GUIDANCE

1. **INTRODUCTION**

The objective of the publication of Model Conditions of Contract for the Hire of Computer Staff by the Chartered Institute of Purchasing and Supply is to provide a contractual basis upon which the Customer can hire staff and the Contractor supply them. The staff remain the employees of the Contractor or where they operate through their own limited companies those companies. However consideration should be given as to whether the individuals may in law become employees in certain cases Many employment agencies will produce their own contract terms. They should be used with caution but ideally conditions such as this model form be used instead. The key issues with computer staff are to ensure there is a clause stating clearly the services to be provided and to what standard, a clear written term about which party will own intellectual property rights such as copyright in computer source code written as part of the contract and that the parties liabilities are set out. Often staff are poached under these contracts so clear protection against this is often needed.

As with any set of conditions, it is necessary both to understand the intention of the conditions and to apply them in their proper context. For this reason, these Notes for Guidance are issued to buyers as an aid when using the Model Conditions but it must be understood that they do not form part of, or legally interpret the conditions in any way.

The Model Conditions aim to achieve a middle ground between buyer and seller being biased in favour of neither. Some buyers or sellers will prefer to have their own conditions drafted which are in their favour to a much greater extent.

It is stressed that these are Model Conditions and can be added to or amended to suit the requirements of particular contracts by agreement between the parties concerned. However, in order to secure the advantages of uniformity, it is recommended that such alterations be kept to a minimum.

*Model Conditions have been published for the following. This list includes this set:-
Supply and Installation (Purchase) of Computer Equipment - CIPS Model P
Servicing (Maintenance) of Computer Equipment - CIPS Model M
Licence Agreement for the Use of Computer Software Products - CIPS Model L
Software Development - CIPS Model SD
Support and Maintenance of Bespoke Software - CIPS Model S(M)
Hire of Computer Staff - CIPS Model CS
Facilities Management of Computer Operations - CIPS Model FM
Procurement of IT Systems - CIPS Model IT*

2. **INVITATIONS TO TENDER**

Specific reference to the Conditions or a copy of the Conditions should be included in all invitations to tender. If amendments or additions to the Conditions are required, these should be listed on a separate schedule.

3. **COMMENTS ON CLAUSES**

The buyer's attention is drawn to the following clauses to which, it is felt, particular notice should be given.

Clause 1.1

Contracts are usually:

- (a) by a formal Agreement incorporating the applicable conditions specification, schedules, etc or:*

- (b) *without a formal Agreement, the tender and its acceptance, together with other relevant correspondence, being relied upon as constituting the Contract between the parties.*

In the event that a contract of the format in (b) above is to be used, the Customer must ensure that its contract acceptance letter refers to all relevant documents and correspondence, e.g. the Invitation to Tender, the conditions of contract, the schedule of staff required including the minimum acceptable qualifications, the method of charging (e.g. frequency of invoices, whether travel and subsistence expenses are to be included in the rates or charged separately), the Contractor's tender and any relevant additions to, deletions from or amendments to these documents.

Once the contract is made, changes can only be incorporated by means of the formal variations procedure - see Clause 12.

Clause 1.4

If the Contractor's rates for Staff are to include travelling expenses, sufficient details of the Premises must be included in the Invitation to Tender to enable tenderers to take due account of this in their costings.

Clause 2.2

This clause requires Staff to comply with all reasonable directions of the Customer and with the Customer's site regulations and general rules. It is essential therefore that these regulations and rules are clearly stated in the Invitation to Tender. See also the note on Clause 6, concerning intellectual property.

The model form envisages that people will be provided at an agreed daily or other rates as set out in the Contract. However where instead "deliverables" such as software will be produced model form SD (Software Development) should be provided.

The clause suggests that the Contract might specify an undertaking to be signed - this may cover protection of intellectual property rights and confidentiality.

Clause 4

Clause 4.1 states that the Contractor may claim payment at the time and in the manner stated in the Contract. The Invitation to Tender should therefore state:

- (a) *the frequency of invoicing*
- (b) *whether travel, subsistence and any other expenses are to be claimed separately or incorporated in rates for Staff*
- (c) *whether overtime may be required and if so, the basis upon which overtime hours may be charged.*

Clause 4.2

This provides for rates/prices to remain fixed for a minimum period of twelve (12) months. It is important to understand that:

- (a) *rates/prices cannot be increased before the first day of the thirteenth month, and*
- (b) *agreed revised rates/prices will become effective three (3) months from the date of notice of such revision unless the notice is given before the end of the ninth month, in which case the revised prices will become effective on the first day of the thirteenth month, and*
- (c) *if agreement cannot be reached on the revised rates/prices, either party has the right to terminate the Contract at the end of the notice period.*

Clause 4.5

This clause does not provide that interest is paid if payment is late as most buyers would not want such a clause, however the Contractor may be able to charge statutory interest and collection charges under the Late Payment of Commercial Debts (Interest) Act 1998 and subsequent legislation.

Clause 5

This Clause may require amending to suit the Customer's own insurance policies and requirements, if so, such changes must be incorporated in the Invitation to Tender.

No limit of liability is specified in Clause 5. If the Customer wishes to place any limitation on the liability of the parties this should be assessed for each Contract and stated in the Invitation to Tender. Most suppliers of course would want an overall cap or limit on their liability.

Clause 6

Note that Clause 6 requires the Contractor to indemnify the Customer against any infringement, or alleged infringement, of intellectual property rights by the use or provision of the Service.

This Clause requires that the intellectual property in any work done in the performance of the Service shall vest in the Customer.

Many staff who are provided by staff agencies have formed themselves into limited companies. Under the Copyright Designs and Patents Act 1988 copyright in original work undertaken by employees vests in their company. However not all directors of small companies are employees. Self employed people retain their copyright unless they have effected an assignment in writing. To ensure that the provisions of Clause 6 can be applied the Customer should include in the Invitation to Tender:

- (a) a requirement that, for all Staff provided under the Contract, the Contractor must obtain a clear assignment of copyright and all other intellectual property to the Customer*
- (b) a requirement that evidence of such assignment must be provided before the Contract is placed.*

It would also be sound policy for the Customer to include this requirement in the form of undertaking referred to in Clause 2, which is to be signed by all Staff.

Clause 6.4

This clause has been included because often licences to the Customer from third parties for use of software by the Customer do not entitle the Customer to permit third parties such as the Contractor to work on such software. The Customer should check the position before contracting with the Contractor. The clause places an obligation on the Customer to seek the consents required but Contractors may require a stronger obligation or even an indemnity from the Customer against copyright infringement resulting therefrom.

Clause 7

Note that this Clause requires that, where the Customer refuses to admit, or orders the removal of, Staff who in its reasonable opinion are not fit or proper persons to be on the Premises, the Contractor shall use its best endeavours to obtain replacement Staff who meet the requirements of the Customer as specified in the Contract. At the time of issuing the Invitation to Tender, the Customer must decide whether the number of Staff specified is critical to its operations. If so the Customer should add a further Sub-Clause to Clause 7 stating that, in the event that the Contractor is unable to provide replacement Staff, the Customer shall have the right to endeavour to obtain such replacements) from other sources and will recharge to the Contractor the reasonable additional cost, if any, of so doing.

It will also be necessary to amend Clause (Consequential Loss) by including at the beginning of the first sentence, "Except as stated in Clause _____"

Clause 8

If so requested, the Customer should use all reasonable endeavours to assist the Contractor in establishing those orders, regulations, bye-laws, etc that are applicable to the Contract.

Clause 9

If the Customer requires Staff to sign an undertaking to maintain confidentiality of information obtained in connection with the Contract, this requirement should be specified in the Invitation to Tender. It is wise to have each individual Staff member sign a separate confidentiality and intellectual property rights agreement which is signed as a deed and witnessed and directly enforceable by the Customer against the individual member of staff, as well as the Customer having the protection of the clauses in this agreement with the Contractor. If confidential information is to be disclosed during the course of negotiations then a separate agreement covering this should be made and signed prior to the information being released.

Clause 10

Increasingly new employment legislation imposes obligations on companies who use the services of "workers", not just employees, worker often having a wider definition and encompassing persons such as those provided under a contract such as this. Users of contracted staff should take individual legal advice on their liabilities such as to pay holiday pay under the Working Time Regulations 1998 and their obligations in relation to the minimum wage. However this clause 10 seeks to ensure that the Contractor shall indemnify the Customer against any tax or national insurance liability for which the Customer may be held liable in relation to the use of the Staff. The clause will not provide complete protection as (a) the Contractor may go out of business and be unable to honour the indemnity or (b) individual legislation may impose liabilities which cannot be passed to a third party supplier such as the Contractor.

Under tax rules known as "IR35" which have had a huge impact in the IT sector, contractors offering their services through their own limited company are taxed almost as if they received the income direct, not their company even if they choose to extract income from their company by way of dividend on which national insurance contributions are not payable. This is an obligation of the contractor and should not be a responsibility of the Customer, although higher contractor fees may result as an indirect effect. Information on IR35 is at www.inlandrevenue.gov.uk.

Clause 11

Note that the "minimum period" referred to in Sub-Clause 11.1 is effectively a guarantee of work prior to which the Contract cannot be terminated at the whim of either party. Without such a provision the Contract could be terminated by either party after 3 months plus 1 day. The minimum period is particularly important when the actual duration of the Contract cannot easily be established and should be based on the best information available to the Customer. It must be specified in the Invitation to Tender as it defines to both parties their minimum commitment/guarantee.

Clause 12

See note on Clause 1.1. Changes to the Contract may only be made by means of the formal variation procedure set out in this Clause.

Clause 15

This Clause is longer than the previous CIPS versions. However it is essential to define Force Majeure, to state what is to happen if an event of Force Majeure occurs and how the rights and obligations of the parties are to be affected. Force Majeure is defined restrictively and it is for the Contractor to establish that the event prevents it from performing the Contract. If necessary other events could be included but it is strongly suggested that "beyond the Contractor's control" should never be used it is too broad a term. Some Contractors like to include strikes and industrial disputes as force majeure but most Customers would dispute such categorisation.

There is provided an initial period of suspension; the period could be lengthened if considered appropriate. If the force majeure event is then past the parties rights are adjusted. It should not be left to agreement of the parties without a third party reference as otherwise the obligation is unenforceable. If the event continues then the Contract is terminated by mutual consent; the

supplier is then paid for the work it has done provided that the purchaser is given the benefit of this.

Clause 16

Note the constraint on both parties from employing the other's Staff. Where a buyer believes it may wish to poach staff from the Contractor however it may wish to delete this clause and leave itself free to do so.

Clause 17

Notice may be provided by email and indeed fax under this clause as long as it is confirmed on paper as provided in this provision.

Clause 19

Expert Determination: This Clause is a suggestion to overcome the problem that there are Clauses under the CIPS Contract forms where the parties are required to agree on some issue e.g. Force Majeure, Training, Maintenance. Unless there is provision for a third party to decide should the parties not agree, then such a Clause is not enforceable under English law. The name of a suitable nominating body should be included e.g. the British Academy of Experts or the British Computer Society in the case of an IT Contract (as here). For telecommunications contracts an expert from the Institution of Electrical Engineers might be included in the clause instead of the British Computer Society.

The period of 56 days is a maximum and the parties may want to see a shorter period included..

Clause 20

Dispute Resolution: The Agreement provides for preliminary non-binding mediation, failing which disputes go to court. Most UK companies and their advisers agree that court litigation is cheaper than formal arbitration under the Arbitration Act. However arbitration is confidential so a considered judgment must be made in each case.

If the contract does not specify arbitration then disputes go to court and it is best in any event to specify which country's courts have jurisdiction (here English courts are chosen) and in clause 40 which country's laws apply to the contract (whether arbitration or litigation are chosen).

If arbitration is preferred then the following should be substituted:-

DISPUTE RESOLUTION ALTERNATIVE

1. If any dispute or difference whatsoever shall arise between the parties in connection with or arising out of the Contract, except any matter which under the Contract is to be referred to Expert Determination, either party may give the other 7 days notice to resolve the dispute or difference through Alternative Dispute Resolution (ADR) in accordance with the mediation procedure of the Centre for Dispute Resolution. If the parties fail to agree terms of settlement of their dispute or difference within 56 days of the receipt of such notice or the party to whom the notice was given refuses to participate in the ADR procedure then the matter shall be referred to Arbitration in accordance with sub-Clause 2.
2. Subject to sub-Clause 3 below if any dispute or difference which may arise between the parties in connection with or arising out of the Contract is referred to ADR mediation, but is not so settled as specified in sub-Clause 1, then either party shall give notice to the other and such dispute or difference shall be referred to Arbitration. The parties shall agree on the appointment of a single arbitrator within 14 days after the date of such notice or in default of agreement the arbitrator shall be nominated on the application of either party by the President for the time being of the Chartered Institute of Arbitrators. The Arbitration shall be conducted in accordance with the then current Arbitration Rules as published by the Chartered Institute of Arbitrators and in accordance with the Arbitration Act 1986.
3. There are excluded from Arbitration any proceedings brought by one party against the other which arise out of the failure by that other party to comply with the provisions of any binding agreement

setting out the terms upon which the dispute or difference was settled as a result of or following from the ADR mediation procedure referred to in sub- Clause 1 above."

This alternative Clause provides for a two-stage process of dispute resolution. The first stage is ADR mediation under the auspices of the CEDR. If in a defined time this is not successful then the dispute is referred to arbitration under the rules of the Institute of Arbitrators.

The only exception to the initial stage of ADR is if the Contract specifically provides for Expert Determination to resolve a specific issue. This is also the case with the started litigation clause in the Model Form. Sub-paragraph 3 is included to deal with the problem that if the Contract contains an arbitration Clause then all disputes must go to arbitration which would prevent one party from going to court, unless the other party agreed or did not object. Immediate reference to either the courts or arbitration is contrary to modern purchasing practice and indeed the Civil Procedure Rules 1998, so the first step should be to ADR.

One view is that arbitration under the 1996 Act is more flexible and retains the advantage of privacy as opposed to the courts. It is to be preferred generally therefore to the courts.

Clause 21

If other than English law is to apply (eg Scottish), this clause should be amended accordingly.

ENTIRE AGREEMENT: No Clause has been included because usually an entire agreement Clause is to the benefit only of the Contractor. The purpose of such a Clause is to prevent either party from relying on statements made or documents issued pre-Contract which are not included in the Contract but which in some circumstances would be regarded in law as misrepresentations and to ensure no documents such as pre-contract letters, assurances, tenders, specifications etc are part of the Agreement. It is more likely in practice that such statements will be made or documents issued by the Customer in the course of trying to conclude the sale. It therefore has the effect of preventing the Customer from relying on these in any action for misrepresentation. If the Customer however wants important documents such as its statements of requirements to be part of the contract rather than relying on the absence of the entire agreement the Customer must incorporate such documents by express reference in the contract. In addition pre-contract warranties should ideally also be expressly stated in the Contract.

Clause 18

If other than English law is to apply (eg Scottish), this Clause should be amended accordingly.

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