

# SOFTWARE DEVELOPMENT

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## **1. DEFINITIONS**

- 1.1 'Acceptance Date' shall be the date certified by the Supervising Officer as the date when the Software has passed the Acceptance Tests and the Project has been completed in accordance with the Contract.
- 1.2 'Acceptance Tests' shall mean the test specified in the Contract and/or such other tests as may be agreed in writing between the Customer and the Contractor to be carried out by the Contractor and witnessed by the Customer on the Specified Equipment.
- 1.3 'Completion Date' shall mean the date included in the Contract or, where not so specified, the date included in the Programme of Work as the date upon which the Project is to be completed.
- 1.4 'Contract' shall mean the agreement between the Customer and the Contractor for the execution of the Project, including all documents to which reference may properly be made in order to ascertain the rights and obligations of the parties.
- 1.5 'Contractor' shall mean the person, firm or company identified in the Contract as responsible for carrying out the Project and shall include the Contractor's personal representatives, successors and permitted assigns.
- 1.6 'Contract Price' shall mean that sum so named in the Contract or the sum to be ascertained from the rates and prices contained in the Contract together with any additions thereto or deductions therefrom agreed in writing under the Contract.
- 1.7 'Customer' shall mean the person, firm or company identified in the Contract for whom the Project is to be carried out and shall include the Customer's legal representatives, successors and assigns.
- 1.8 'Euro Compliant' means in relation to the Software that it will be able to:-
- (a) process currency data inputs in the Euro currency; and
  - (b) convert currencies of participating Member States (which adopt the new Euro) from and into Euros at the conversion rates set by the European Council and in accordance with any relevant mandatory requirements which are passed by the European Council from time to time.
- 1.9 'Expert Determination' is defined in Clause 36
- 1.10 'Force Majeure' is defined in clause 30.
- 1.11 'Premises' shall mean the place or places other than the Contractor's premises to which the Software is to be delivered or where work is to be done.
- 1.12 'Programme of Work' shall mean the timing and sequence of events agreed between the Customer and the Contractor for the performance of the Contract.
- 1.13 'Project' shall mean and include the design, development, supply, delivery, installation, testing and implementation of the Software and all other work to be carried out by the Contractor under the Contract.
- 1.14 'Software' shall mean the programs and associated documentation, to be provided by the Contractor to the Customer under the Contract.
- 1.15 'Specified Equipment' shall mean the computer or computers (including operating systems) on which the Software is to function as specified in the Contract.
- 1.16 'Sub-Contractor' shall mean any person firm or company to whom any part of the Contract has been sublet in accordance with the Contract and its legal representatives, successors and permitted assigns.
- 1.17 'Supervising Officer' shall mean the person for the time being or from time to time duly appointed by the Customer and notified in writing to the Contractor, to act as the Customer's representative for the purpose of the Contract, or in default of such notification, the Customer.
- 1.18 'Virus' means any code which designed to harm, disrupt or otherwise impede the operation of the Software, or any other associated hardware, software, firmware, computer system or network, or would disable the Software or impair in any way its operation based on the elapsing of a period of time, exceeding an authorised number of copies, advancement to a particular date or other numeral, or that would permit the Licensor or any other person to access the Software to cause such impairment, or which contains any other similar harmful, malicious or hidden procedures, routines or mechanisms which would cause such programs to cease functioning or to damage or corrupt data, storage media, programs, equipment or communications, or otherwise interfere with operations, including without limitation, computer programs known as worms or Trojan horses.

## **2. STANDARD OF WORK**

- 2.1 The standard of work shall be as specified in the Contract. To the extent that the standard of work has not been specified the Contractor shall use good quality materials, the best applicable techniques and standards and execute the Project with care, skill and diligence.

- 2.2 The Contractor warrants and represents that all staff assigned to the performance of the Project shall possess such skill and experience as is necessary for the proper performance of the Project.
- 2.3 The Contractor warrants that:-
- (a) it has the right to enter into this Agreement and to grant the Customer the licence to use the Software and Documentation as provided in this Agreement
  - (b) the Software is Euro Compliant
  - (c) the Software does not contain any Viruses
  - (d) the media on which the Software is provided will be free from defects in workmanship and materials during normal use
  - (e) the Documentation will describe in detail and in a completely self-contained manner how the Customer may access and use the Software such that any reader of the Documentation can access, use and maintain all of the functionality of the Software without the need for further instruction
- 2.3 In the event of dispute as to the matters in Clause 2 above the matter shall be referred to Expert Determination.

### **3. FACILITIES TO BE PROVIDED**

- 3.1 Where provided for in the Contract, the Customer shall provide for each employee of the Contractor engaged in work on the Premises a suitable place of work and necessary supplies and amenities comparable to those provided for the Customer's staff of similar status.
- 3.2 Where provided for in the Contract, the Contractor shall provide for each employee of the Customer engaged in work on the Contractor's premises a suitable place of work and necessary supplies and amenities comparable to those provided for the Contractor's staff of similar status.
- 3.3 The Customer shall make available to the Contractor's authorised personnel such operational and/or systems programming staff, data, computer time and programs as shall be specified in the Contract.
- 3.4 Where these requirements are not so specified the Customer shall upon request by the Contractor use its reasonable endeavours to make available, on terms to be agreed, to the Contractor's authorised personnel such operational and/or system programming staff, data, computer time and programs as the Customer may consider appropriate for such purpose as shall be defined in the Contractor's request.
- 3.5 Nothing contained in this Sub-Clause 3.4 shall relieve the Contractor of its obligations under the Contract.

### **4. ACCESS TO THE PREMISES**

- 4.1 The Supervising Officer shall afford to the authorised personnel of the Contractor at all reasonable times and with prior agreement which shall not be unreasonably withheld such access to the Premises as may be necessary for the execution of the Project.
- 4.2 Provided always that the Supervising Officer shall have the right to refuse admittance to, or order the removal from, the Premises of any person employed by or acting on behalf of the Contractor who, in the opinion of the Supervising Officer (which shall be final) is not a fit and proper person to be on the Premises.
- 4.3 Action taken under Sub-Clause 4.2 shall forthwith be confirmed in writing to the Contractor by the Supervising Officer and shall not relieve the Contractor of its obligations under the Contract.

### **5. INTERFERENCE**

- The Contractor shall take reasonable care to ensure that, in the execution of the Project, it does not unnecessarily interfere with the operations of the Customer, its employees or any other contractor employed by the Customer.

### **6. MISTAKES IN INFORMATION**

- 6.1 The Contractor shall be responsible for and shall pay extra costs directly occasioned by any discrepancies, errors or omissions in documentation or other information supplied in writing by it, whether they have been approved by the Customer or not, provided that such discrepancies, errors or omissions are not due to inaccurate documentation and information supplied or decisions made in writing to the Contractor by the Customer.

## **7. PROGRAMME OF WORK**

- 7.1 The Project shall be carried out in accordance with the agreed Programme of Work.
- 7.2 If the Programme of Work is not sufficiently detailed to meet the requirements of both parties, the Contractor shall within 21 days of entering into the Contract, submit to the Supervising Officer for its approval a detailed programme showing the number of days or weeks required for each separate stage to ensure that the Completion Date is achieved.
- 7.3 On receipt of the detailed programme, the Supervising Officer shall either:
- (i) signify its approval in which event it shall form the Programme of Work or
  - (ii) reject the programme stating its reasons for so doing and require that the programme be amended and resubmitted by the Contractor.
- Approval, rejection and resubmission of the detailed programme (or amended programme) shall be effected without undue delay and within a time-scale which takes into account the total time available for the Project.

## **8. DELIVERY AND INSTALLATION**

- 8.1 Unless otherwise agreed the Contractor shall be responsible for the delivery of the Software to the Premises and the installation of the Software on the Specified Equipment.
- 8.2 The Software shall not be delivered to or installed at the Premises without the prior permission of the Supervising Officer.
- 8.3 The Contractor may carry out work on the Premises only with the authorisation of the Supervising Officer.

## **9. VARIATIONS**

- 9.1 The Customer may at any time prior to the Acceptance Date require the Contractor to revise the Programme of Work or the Completion Date and/or undertake any reasonable alteration or addition to or omission from the Project or any part thereof (hereinafter referred to as a 'Variation'), provided that no Variation shall, except with the consent in writing of the Contractor, be such as will, with any Variations already directed to be made, involve an addition to or reduction from the Contract Price of more than the percentage stated in the Appendix. In the event of a Variation being required, the Customer shall formally request the Contractor to state in writing the effect such Variation will have on the Project and the programme of Work and the cost thereof. The Contractor shall furnish the necessary details within 14 days from receipt of the Customer's request or such other period as may be agreed. The Contractor shall not implement any Variation to the Project unless instructed in writing to do so by the Customer.
- 9.2 The Contractor shall satisfy the Customer as to the reasonableness of the changes proposed to the Programme of Work and the additional costs or savings resulting from the proposed Variation. When it is satisfied that the proposed changes to the Programme of Work and/or the cost changes are reasonable, the Customer will instruct the Contractor in writing to implement the Variation and if the Variation involves an increase or decrease in the cost to the Contractor of carrying out the Project, an appropriate adjustment shall be made to the Contract Price.
- 9.3 If the Customer requests the Contractor to state in writing the effect of a proposed Variation to the Programme of Work and/or the cost of the Project, in accordance with Sub-Clause 9.1, 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 submission.

## **10. EXTENSION OF TIME FOR COMPLETION**

If, after the date of the award of the Contract, the Contractor shall have been delayed or impeded by any act or omission of the Customer or any circumstances beyond the reasonable control of the Contractor, and providing the Contractor shall without delay have notified the Customer in writing of such delay or impediment, the Supervising Officer shall grant to the Contractor from time to time in writing such extension of time as may be reasonable and the Completion Date shall be amended accordingly.

## **11. DELAYS**

- 11.1 Delays by the Contractor  
If the Contractor fails to complete the Project by the Completion Date or such revised date as may be

agreed or granted in accordance with Clauses 9 and 10 and the Customer shall have suffered a loss, the Customer shall have the right to deduct from the Contract Price for the Project or of such portion or portions only of the Project as cannot in consequence of the said failure be put to the use intended the percentage stated in the Appendix to these Conditions for each week between the Completion Date or revised Completion Date and the actual Acceptance date but the amount so deducted shall not in any case exceed the maximum percentage stated in the Appendix and such deduction shall be in full satisfaction of the Contractor's liability for the said failure. The parties agree that such sum is a reasonable pre-estimate of the loss in such circumstances. This clause is without prejudice to clause 30 (Force Majeure).

11.2 Delays by the Customer

All additional costs reasonably incurred by the Contractor by reason of the Contractor being prevented from or delayed in proceeding with the Project by the Customer or some other contractor employed by the Customer or by reason of suspension of the Project by the Customer (otherwise than in consequence of some default on the part of the Contractor) shall be reimbursed to the Contractor by the Customer provided that no claim shall be made under this Clause unless the Contractor has, within 14 days after the event giving rise to the claim, given notice to the Customer in writing of its intention to make such a claim.

**12. INSPECTING AND TESTING DURING DEVELOPMENT**

12.1 Subject to giving the Contractor reasonable prior notice, the Customer shall be entitled at all reasonable times during development to inspect and examine the design techniques and workmanship being used on the Project. Such inspection and examination shall not release the Contractor from its obligations under the Contract.

12.2 Where the Contract provides for testing during development at the Contractor's premises, the Contractor shall, except where otherwise specified, include in the Contract Price for such assistance: labour, materials, electricity, apparatus and instruments as may be reasonably required to carry out such inspection and testing.

12.3 If, after inspection and examination under Sub-Clause 12.1 or testing under Sub-Clause 12.2, the Software or any part thereof is not in accordance with the Contract, the Customer shall give notice in writing to the Contractor within 14 days of such inspection, examination or testing to remedy the deficiency. Such notice of deficiency shall not relieve the Contractor of its obligations under the Contract and in particular shall not affect the Customer's right to reject under Clause 13 (Acceptance Tests).

**13. ACCEPTANCE**

13.1 The Customer shall provide such information and facilities as is necessary to enable the Contractor to carry out the Acceptance Tests by the date specified in the Programme of Work or such other reasonable date as may be agreed.

13.2 The Contractor shall give to the Customer seven days' prior notice in writing or such notice as may be agreed, of the date when it will be ready to commence the Acceptance Tests or any part thereof in order that the Customer may witness the said tests. Unless otherwise agreed, the Acceptance Tests shall take place on the said date(s) or on such later date(s) in accordance with the Programme of Work as the Customer shall notify the Contractor in writing.

13.3 If, in the opinion of the Customer, the Acceptance Tests are being unreasonably delayed, it may by notice in writing require the Contractor to carry out the Acceptance Tests within seven days from receipt of the said notice and the Contractor shall carry out the Acceptance Tests on such date(s) within the said seven days as the Contractor may fix and of which it shall give reasonable notice to the Customer.

13.4 If the Acceptance Tests are delayed by the act or default of the Customer for more than the period specified in the Appendix from the agreed date for testing in accordance with the Programme of Work, the Software or the relevant parts of the Software shall be deemed to be accepted for payment purposes only.

13.5 If the Project or any portion thereof fails to pass the Acceptance Tests, repeat tests shall be carried out within a reasonable time upon the same terms and conditions. Unless the failure was due to an act or default of the Customer, the additional cost of these repeat tests shall be borne by the Contractor. In the event that the repeat tests show that the Software is not in accordance with the Contract, then the Customer shall within a reasonable time exercise its right to:

- (i) require the Contractor to supply, free of charge, such additional services to rectify such defects in the Software as may be necessary to enable the Software to pass the Acceptance Tests or
- (ii) accept and retain such of the Software as it may consider expedient at such reduced price as may be agreed between the Customer and the Contractor or
- (iii) reject the Software.

Where the Software is rejected the Contractor shall forthwith repay all sums paid hereunder to the Customer without prejudice to the Customer's other rights and remedies.

#### **14. ACCEPTANCE CERTIFICATE**

As soon as the Project or any part thereof has been completed in accordance with the Contract and has passed the Acceptance Tests, the Supervising Officer shall issue an Acceptance Certificate which will state the Acceptance Date for the Project or part thereof. The Acceptance Certificate will state any outstanding defects in the Software. The Contractor undertakes to rectify such outstanding defects without delay.

#### **15. OWNERSHIP AND RIGHTS**

##### **Option 'A'**

15.1 Those parts of the Software specifically developed or written under the Contract including the source code (hereinafter called 'the Developed Software') and the copyright and all other intellectual property rights therein shall belong to and vest in the Customer.

15.2 The Contractor warrants that the Developed Software was owned by it and shall at the request and at the expense of the Customer execute such assignments and assurances as may be necessary to perfect the title of the Customer thereto.

15.3 Those parts of the Software which are not Developed Software shall be provided to the Customer on the terms and conditions of the licence(s) as detailed in the Appendix.

##### **Option 'B'**

15.1 Those parts of the Software specifically developed or written under the Contract including the source code (hereinafter called collectively 'the Developed Software') and the copyright and all other intellectual property rights therein shall belong to and vest in the Contractor.

15.2 The Contractor shall grant to the Customer a non-exclusive licence to use the Developed Software free of further charge on the terms and conditions of the licence(s) as detailed in the Appendix.

15.3 Those parts of the Software which are not Developed Software shall be provided to the Customer on the terms and conditions of the licence(s) as detailed in the Appendix.

#### **16. FREE ISSUE MATERIALS**

16.1 All material or equipment supplied by the Customer for use in the Contract shall be kept by the Contractor strictly for use in the Contract and shall not be re-allocated to any other work whatsoever without the prior consent in writing of the Customer.

16.2 All material or equipment so supplied shall remain the property of the Customer and the Contractor shall at all times and places until completion of the Contract, keep and maintain such material and equipment under proper conditions and with all due and reasonable care subject in the case of equipment to fair wear and tear.

16.3 The Contractor shall be liable for all loss or damage however caused to such material and equipment throughout the whole of the period during which they are in its custody and until return to the Customer.

#### **17. TERMINATION FOR BREACH**

17.1 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.

17.2 On termination other than for the default of the Contractor the Customer shall pay to the Contractor

- the proportion of the fees payable in respect of the materials supplied and/or services performed by the Contractor up to the date of termination together with the costs of the commitments already entered into by the Contractor at the date of termination of the Contract less the amount of any payments already made to the Contractor up to the date of termination. If the amount of payments already made to the Contractor at the date of termination exceeds the sum due to the Contractor under this sub-Clause then the Contractor shall repay the balance due to the Customer. Any such payment shall be in full satisfaction of the Contractor's rights to payment, compensation or damages in respect of the termination or the breach of Contract giving rise to the right of termination.
- 17.3 On payment of the sum due under sub-Clause 2 above the Contractor shall transfer to the Customer the benefit of all work done and the property in all materials supplied by the Contractor or its sub-Contractors or subsuppliers in the performance of the Contract up to the date of termination which benefit shall include any rights in any licensed or developed software and licensed firmware so far as the rights in the same have already accrued to the Customer under the Contract or will do so on the payment under sub-Clause 2 above.
- 17.4 If the Contract is terminated by reason of the default of the Contractor the Customer shall be entitled to the like benefits and ownership of materials as are stated in sub-Clause 3 above. The Customer shall only pay to the Contractor the proportion of the fees payable in respect of the work done and/or services performed by the Contractor up to the date of termination after deduction of payments already made to the Contractor, the costs reasonably incurred by the Customer in obtaining the completion of the work to be performed under the Contract by others and any damages which may be payable by the Contractor in respect of the termination or the breach of the Contract giving rise to the right to termination. If the amount due to the Contractor is less than the amount which the Customer is entitled to deduct then the Contractor shall pay the balance to the Customer
- 17.5 Following the termination of the Contract neither party shall have any further rights or obligations in relation to the other party other than those stated in this Clause and in the Clauses listed in sub-Clause 6 below which shall continue in full effect. Subject to sub- Clause 2 above termination shall not however affect the rights of action and remedy of the parties which shall have accrued at the date of termination or shall thereafter accrue.
- 17.6 Continuing clauses:  
Confidentiality and Data Protection  
Publicity  
Waiver  
Infringement Indemnity  
Governing Law and Jurisdiction  
Intellectual property rights  
Property in materials  
Conditions and warranties relating to the goods supplied and/or services provided under the Contract.

## **18. INTELLECTUAL PROPERTY RIGHTS INDEMNITY**

- 18.1 The Contractor shall fully indemnify and hold the Customer harmless against all damages costs, charges and expenses, including legal fees on an indemnity basis, arising from or incurred by reason of any infringement or alleged infringement of intellectual property rights arising from use or possession by the Contractor in accordance with this Agreement of the Software supplied by the Contractor, subject to the following:
- (i) the Customer shall promptly notify the Contractor in writing of any alleged infringement of which it has notice
  - (ii) the Customer must make no admissions without the Contractor's prior written consent.
  - (iii) the Customer, at the Contractor's request and expense, shall allow the Contractor to conduct any negotiations or litigation and/or settle any claim. The Customer shall give the Contractor all reasonable assistance. The costs incurred or recovered in such negotiations or settled claim shall be for the Contractor's account.
- 18.2 If at any time an allegation of infringement of intellectual property rights is made in respect of the Software, 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 Software 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.

**19. ASSIGNMENT AND SUB-LETTING**

- 19.1 Neither party shall assign the Contract or any of its rights or obligations thereunder without first having received the written approval of the other party (provided that the Customer may assign the benefit of the Contract to any of its associated or subsidiary companies or to any leasing or financing company of its choice).
- 19.2 The Contractor shall not sub-Contract the Contract or any part thereof without having first obtained the written permission of the Customer, provided that this restriction shall not apply to sub-Contracts for materials or minor details or any part of the work to be performed or materials or equipment to be supplied for which the sub-Contractor is named in the Contract.
- 19.3 The Contractor shall be responsible for the acts, defaults and omissions of its sub-Contractors, whether approval has been given to their appointment under this Clause or not, as if they were its own and any consent given under this Clause shall not relieve the Contractor of any of its obligations under the Contract.

**20. INDEMNITY AND INSURANCE**

- 20.1 The Contractor shall indemnify and keep indemnified the Customer and hold it harmless, against injury (including death) to any persons or loss of or damage to any property which may arise out of the act, default or negligence of the Contractor, a Sub-Contractor, their 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 injuries or damage to persons or property to the extent that such injuries or damage result 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).
- 20.2 The Customer shall indemnify and keep indemnified the Contractor for the duration of the Contract against injury (including death) to any persons or loss of or damage to any property (excluding the Software) which may arise out of the act, default, or negligence of the Customer or any contractor employed by the Customer (other than the Contractor or a Sub-Contractor) and against all claims, demands, proceedings, damages, costs, charges and expenses whatsoever in respect thereof or in relation thereto.
- 20.3 Without thereby limiting their responsibilities under Sub-Clause 20.1 and 20.2 each party shall insure with a reputable insurance company against all loss of and damage to property and injury to persons (including death) arising out of or in consequence of its obligations under the Contract and against all actions, claims, demands, costs and expenses in respect thereof, save only as is set out in the exceptions in Sub-Clause 20.4 and Clause 21. Documentary proof of such insurance cover shall be made available on demand by either party to the other.
- 20.4 The liability of the parties under Sub-Clause 20.1 or 20.2, as appropriate, shall exclude damage or injury (other than injury including death resulting from negligence) consequent upon design, formula, specification or advice. Except in respect of personal injury and death due to negligence for which no limit applies, the liability of the parties under Sub-Clause 20.1 or 20.2 as appropriate shall not exceed the sums specified in the Appendix to these Conditions in respect of any event or series of connected events.
- 20.5 The Contractor shall, until the Acceptance Date, insure and keep insured with a reputable insurance company the Software against loss or damage including the additional costs, charges and expenses of reconstituting or recompiling the Software.

**21. CONSEQUENTIAL LOSS**

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.

**22. TERMS OF PAYMENT**

- 22.1 Where the Contract is placed on a fixed price basis the Contractor shall be entitled to claim payment of the Contract Price or any part thereof on the issue of an Acceptance Certificate therefor under Clause 14 or at the stages specified in the Contract. If at any time at which any payment would fall to be made under this Sub-Clause, there shall be any defect due to the fault of the Contractor in or

- affecting any portion of the Project in respect of which such payment is claimed, the Customer shall have the right to retain the whole of such payment, provided that in the event of such defect being of a minor character and not such as to affect the use of the Software or the said portion thereof for the purpose intended without serious risk, the Customer shall not retain a greater sum than represents the cost of making good the said defect. Any sum retained by the Customer under this Clause shall be paid to the Contractor upon the said defect being made good.
- 22.2 Where the Contract is placed on a time and material basis the Contractor shall be entitled to claim payment for work done at the times and in the manner stated in the Contract. Claims for payment shall be based on the rates and prices contained in the Contract.
- 22.3 The Contractor shall be entitled to invoice the Customer at the times and in the manner specified in the Contract.. Provided that the invoice was one which under the Contract the Contractor was entitled to submit the Customer shall pay Contractor within the period of days specified in the Contract from the date of receipt of the invoice, and in default of such specification, 30 days from the date of invoice, subject to any right of deduction which the Customer may have by way of setoff or abatement. If the Customer does make any such deduction then it shall notify the Contractor accordingly in writing with reasons.
- 22.4 The Customer reserves the right to withhold payment against any invoice which is not submitted in accordance with the Contract and shall forthwith notify the Contractor accordingly in writing.
- 22.5 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.

### **23. FLUCTUATIONS IN COSTS**

If, other than in relation to fixed priced contracts, by reason of any rise or fall in the cost of materials, labour or other related costs above or below such costs ruling at the date of quotation, the cost to the Contractor of performing its obligations under the Contract shall be increased or reduced, the Contractor shall notify the Customer and seek to negotiate a change in the Contract Price. The Customer undertakes to consider any such reasonable in good faith but shall have no obligation to agree.. No account shall be taken of any amount by which any cost incurred by the Contractor has been increased by any act default or negligence of the Contractor.

### **24. WARRANTY PERIOD**

- 24.1 The Contractor shall in accordance with acceptable computing practice to make good with all possible speed at its own expense any defect in any portion of the Project which may be identified on the Acceptance Certificate or develops and is notified to the Contractor during a period of twelve calendar months after the Acceptance Date and which results in a failure of the Software to fulfil the functions or meet the level of performance detailed in the Contract.
- 24.2 The provisions of this Clause shall not apply to any defects which arise or develop as a result of alterations made to the Software by the Customer.

### **25. MAINTENANCE**

- 25.1 If required by the Customer before the end of the Warranty Period the Contractor shall enter into a separate contract for maintenance of the Software on terms and conditions to be agreed.
- 25.2 If the maintenance contract commences on the Acceptance Date the maintenance charges during the Warranty Period shall reflect the Contractor's obligations under Clause 24.

### **26. INSOLVENCY AND BANKRUPTCY**

- 26.1 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. In the event of termination under this Sub-Clause the Customer shall have the right, by prior

- notice to the Contractor, to enter its premises for the purpose only of removal of any items of equipment or materials which are clearly marked as being the property of the Customer.
- 26.2 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 either to terminate the Contract forthwith by notice in writing to the Customer or to the administrative receiver or administrator or liquidator or to any person in whom the Contract may become vested. In the event of termination under this Sub-Clause the Contractor shall have the right, by prior notice to the Customer, to enter its premises for the purpose only of removal of any items of equipment or materials which are clearly marked as being the property of the Contractor.
- 26.3 The exercise of rights under this Clause shall not prejudice any existing rights or obligations of either party.
- 26.4 Where so specified on the Appendix the Contractor shall deposit a copy of the source code of the Software with a third party escrow agent named on the Appendix and the Contractor and Customer shall execute on the date hereof an escrow agreement with such agent providing for release of the source code in the release events specified in such agreement.

## **27. STATUTORY AND OTHER REGULATIONS**

- 27.1 The Contractor 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 also observe through its staff and work people any rules applicable to the Premises. The Customer shall on request afford all reasonable assistance to the Contractor in obtaining information as to local conditions. 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. The cost to the Contractor of meeting the requirements of this Sub-Clause shall be included in the Contract Price, except as provided under Sub-Clause 27.2.
- 27.2 If the cost to the Contractor of the performance of the Contract shall be increased or reduced 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 upon profits or revenue), the amount of such increase or reduction shall be added to or deducted from the Contract Price.
- 27.3 If the Contractor does not fulfil its responsibilities and obligations under the Contract and the Customer thereby incurs costs to which it would not otherwise be liable due to any law or any order, regulation or bye-law having the force of law, the amount of such costs shall be reimbursed by the Contractor to the Customer.
- 27.4 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.

## **28. 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.

**29. CONFIDENTIALITY AND DATA PROTECTION**

- 29.1 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.
- 29.2 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.
- 29.3 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.
- 29.4 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.
- 29.5 The provisions of this Clause shall continue in perpetuity

**30. FORCE MAJEURE**

- 30.1 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.
- 30.2 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.
- 30.3 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.
- 30.4 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.
- 30.5 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 30.6 below neither party shall be liable to the other as a result of such termination.

- 30.6 If the Contract is so terminated then subject to the transfer to the Customer of the benefit referred to in sub-Clause 30.7 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
- 30.7 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 30.6 above.

**31. TRAINING**

The Contractor shall provide instruction in the use of the Software for the Customer's personnel in accordance with the requirements of the Contract. Unless otherwise specified no charge shall be made for such instruction but the Customer shall be responsible for paying any travel or living expenses necessarily incurred by the Customer's personnel attending such instruction. If the extent of such instruction is not detailed in the Contract, the Contractor shall provide adequate instruction for a sufficient number of the Customer's personnel to secure the satisfactory operation of the Software.

**32. OFFERS OF EMPLOYMENT**

For the duration of the Contract and for a period of six months thereafter, persons in the employment of either party who have worked on the Contract shall not, except by the mutual consent of the Customer and the Contractor, be taken under a contract of employment by the other party.

**33. PUBLICITY**

Neither party shall without the written consent of the other (the giving of which consent shall be at the sole discretion of that party) advertise, publicly announce or provide to any other person information relating to the existence or details of the Contract or use the other party's name in any format for any promotion, publicity, marketing or advertising purpose.

**34. NOTICES**

- 34.1 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.

- 34.2 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.

**35. 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.

**36. 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) 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.

**37. DISPUTE RESOLUTION**

- 37.1 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.
- 37.2 The parties submit to the exclusive jurisdiction of the English courts in connection with any dispute it reunder.

**38. LAW**

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

## **APPENDIX**

### **Clause 9 Variations**

#### Sub-Clause 9.1

Except with the consent in writing of the Contractor the maximum percentage addition to or deduction from the

Contract Price of every Variation (including Variations already made) shall be %

### **Clause 11 Delays**

#### Sub-Clause 11.1 Delays by the Contractor

- (i) Percentage of Contract Price to be deducted as damages for each week between the Completion Date and the Acceptance Date %
- (ii) Maximum percentage of the Contract Price which the deductions may not exceed %

### **Clause 13 Acceptance Tests**

#### Sub-Clause 13.4

The period from the agreed date for testing shall be

### **Clause 15 Ownership and Rights**

#### OPTION A

The terms and conditions of the licence(s) under Sub-Clause 15.3 shall be

#### OPTION B

The terms and conditions of the licence(s) referred to under Sub-Clauses 15.2 and 15.3 shall be

### **Clause 20 Indemnity and Insurance**

#### Sub-Clause 20.4

The liability of either party to the other under Sub-Clause 20.1 or 20.2 in respect of any one event or series of connected events shall not exceed

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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.

*CIPS Model SD 1986*

*Revised August 2002*

# Notes for Guidance

## 1. INTRODUCTION

*The object of the publication by the Chartered Institute of Purchasing and Supply of the Model Forms of Conditions of Contract for Software Development is to provide firms with a contractual basis upon which they can buy or sell specially developed software.*

*These Conditions of Contract are intended to be used only in the situation where software is to be developed for a Customer's specific requirements or where extensive customisation is required to a standard package. Standard off-the-shelf software packages should be licensed using the Institute's Model Form of Licence Agreement which is a stand-alone Agreement for the use of Computer Software Products whereas this document is a model set of conditions.*

*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*

*CIPS Model IT in Schedule 4 contains an alternative Software Development Contract when read with Schedule 12, General*

*Conditions, of Model Form IT, to which reference can be made.*

*As with any contractual document, it is necessary both to understand the intent of the Clauses and apply them in the proper context. For this reason these Notes for Guidance are issued 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.*

*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.*

*The Model Conditions aim to achieve a balance position between Customer and Contractor. Many Customers and Contractors will prefer conditions more favourable to them.,*

## 2. INVITATIONS TO TENDER

### 2.1 Conditions

*Invitations to tender should include a copy of the Conditions or specific reference to them. If amendments or additions to the Conditions are required by the Customer, these should be listed on a separate schedule.*

*It is also essential that the Customer completes the Appendix to the Conditions before inviting tenders. Tenderers may amend or add to the Conditions included in the enquiry and these amendments or additions should be separately detailed as part of their tender. However, such amendments/additions will not be binding on the Customer unless accepted by it and incorporated in the Contract.*

### 2.2 Specification

*For any software development contract it is essential that a detailed functional specification be agreed between the parties. This may be achieved by:*

- (a) *the Customer, if it has the necessary expertise, including a detailed functional specification in the invitation to tender. This specification will then be accepted by the tenderer or the tenderer will propose amendments to the specification for agreement by the Customer or*
- (b) *the Customer, in the invitation to tender, requiring the tenderer to produce a detailed functional specification to meet the Customer's performance parameters.*

*It should be borne in mind that 'fitness for purpose' is dependent on the form of the Contract. In (a) above fitness for purpose will be established if tests demonstrate that the software meets the Customer's detailed specification. If software to that specification fails to meet the Customer's operational requirements but meets the specification the Customer may have no redress against the Contractor.*

*It is therefore important in (a) that the Customer either satisfies himself that its specification will meet its own operational parameters or builds both the specification and performance parameters into the invitation to tender and invites the Contractor to propose amendments if it feels the specification will not meet the performance requirements.*

*Whoever produces the functional specification it is necessary for the Customer to inform the Contractor of the environment in which the Software is to operate, ie, the type of computer, operating system, languages, utilities required etc.*

### 2.3 Test Criteria

*The specification is only half the battle. Not only must the Customer specify what it requires but also how it intends to check that the software meets these requirements.*

*The Customer must therefore build into its tender documentation the tests that it requires to be carried out on the software together with the criteria by which the performance of the software will be judged. Often however the tests are worked on by both Contractor and Customer before (or sometimes after) the contract is signed.*

*It is important that the tests and the evaluation criteria are included at this stage as it:*

- i) *assists the Contractor to evaluate the software to be developed, and*
- ii) *avoids arguments at the end of the Contract concerning the acceptability of the software produced.*

## 3. COMMENTS ON CLAUSES

### Clause 1.2

*These are the tests required to prove the acceptability of the software as referred to in Section 2 above.*

### Clause 1.3

*The Completion Date is the date when the Customer requires that the Project should be completed. It is therefore of prime importance to the Customer and should be specified precisely before a Contract is placed so that it forms part of the Contract. The Completion Date is also the key to the operation of Clause 10 (Extension of Time for Completion) and Clause 11 (Delays). Contractors will want non-binding indicative dates and Customers the converse perhaps backed up with liquidated damages for delay - see clause 11.1.*

### Clause 1.4

*Contracts are usually (a) by a formal Agreement incorporating the applicable conditions, specification 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. Whichever method is used, it is essential that reference to any conditions, other than those agreed to be applicable to the Contract, are withdrawn in writing.*

**Clause 1.11**

*If the Contractor is to perform work on the Customer's premises, it is essential that it be given either the opportunity to inspect the Premises or adequate information to enable it to take account of, and price for, all physical and environmental factors.*

**Clause 1.12**

*If the Customer requires a phased completion of the Project this must be clearly stated in the invitation to tender. Difficulties can arise if the Customer attempts to introduce a phased completion after the contract is placed as the Contractor will have priced its tender on the basis of its own programme for meeting the Completion Date.*

**Clause 1.17**

*The Customer is usually a company or large organisation and problems can occur in the day-to-day relationship between representatives/employees of both the Customer and the Contractor unless it is clearly established who is entitled to issue instructions and take actions on behalf of the Customer. For this reason the Supervising Officer should be appointed and the appointment notified to the Contractor as soon as possible after the placing of the Contract.*

**Clause 2**

*It is desirable for the Customer to specify, in its invitation to tender, the standard of work required including reference to applicable data processing standards. However, if the Customer fails, or is unable to do this, the wording of this Clause ensures that the Customer will have redress against the Contractor in the event that the Contractor fails to employ the best applicable techniques, standards etc. It is important to understand that, in this situation, the onus of proof will be on the Customer to show that the Contractor is in default.*

**Clause 4**

*Access to the Customer's Premises can cause problems if there are security or other constraints affecting the Contractor's freedom of access. Any special regulations or procedures applicable to the site must therefore be specified in the invitation to tender. The Contractor must decide what effect, if any, such restrictions will have on its operations and provide for any resultant additional costs in its tender price.*

*Note should also be taken of the Supervising Officer's right to refuse admittance to or have removed from the Premises any person employed by, or acting on behalf of, the Contractor who, in its opinion, is not a fit and proper person to be on the Premises. This right provides the Customer with the same control over the Contractor's staff as it has over its own.*

**Clause 5**

*The Contractor may not have sole access to the Premises and, as a result, must ensure that it does not interfere with any other activity which is taking place concurrently on the Premises.*

**Clause 6**

*This Clause makes clear the obligations and responsibilities of the parties in respect of errors, omissions, etc in documentation, information and decisions supplied by one party to the other. Although this Clause clarifies the liabilities of the parties in principle it will still be for the injured party when seeking reimbursement of additional costs to demonstrate that additional costs have been incurred as a direct result of the default and that it has taken all reasonable steps to minimise them.*

**Clause 7**

*The Programme of Work is a practical document which allows the Customer, at an early stage in the Contract, to study the Contractor's work programme and satisfy himself that all other things being equal, it will enable the Contractor to complete the Project by the Completion date.*

*It is prudent to include in the Contract the requirement for regular progress meetings between representatives of the Customer and the Contractor to monitor the progress of work against the Programme of Work. These meetings will also provide a vehicle for inspection, examination or testing required under Clause 12 and 13.*

#### **Clause 8**

*Sub-Clause 8.1 provides the Customer, if it wishes, with the right to install the Software himself. In general it is considered better to require the Contractor to load the Software as this prevents it from suggesting that failure on Acceptance Tests is the result of improper or insufficient Software installation.*

*Sub-Clause 8.2 allows the Supervising Officer to refuse to accept delivery or installation of the Software. This may be necessary for many reasons including (a) delivery is in advance of programme and the Customer is not ready to receive it; (b) the appropriate request for access has not been made; (c) the timing may not be reasonable etc.*

*Sub-Clause 8.3 states that the Supervising Officer's authority is required for the Contractor to work on the Premises. This ties in with Clause 4 which places upon the Supervising Officer the obligation to grant access at reasonable times by prior agreement.*

#### **Clause 9**

*This Clause gives the Customer the right, within certain specified constraints, to require the Contractor to revise the date and/or undertake reasonable alterations or additions to or omissions from the Project.*

*If such a Variation is required the Customer must first formally request the Contractor to state in writing what effect such Variation will have on the Project and the Programme of Work and the cost of the Project.*

*The Customer must then decide whether the effect on the Project, Programme of Work and cost of the Project are such that it wishes the Variation to be made. If it decides the Variation should proceed it must formally instruct the Contractor in writing to implement the Variation and,*

- (i) if it affects the cost of the Project, make an appropriate addition to or deduction from the Contract Price;*
- (ii) If it affects the Programme of Work, make an appropriate adjustment.*

*The Contractor must not in any way vary the Project without the Customer's formal instruction.*

*If the Customer decides not to proceed with the Variation it must appreciate that, to produce costings and evaluate the impact of the Variation on the Project, the Contractor will have incurred costs and may have had to stop work on the Project if only those closely involved with the Project could properly evaluate the effect of the Variation on the programme, cost etc. The Customer must therefore accept that this abortive exercise could have an effect on the Programme of Work and could involve payment to the Contractor of costs necessarily and properly incurred in the preparation of its submission.*

#### **Clause 10**

*If due to the fault of the Customer, or due to circumstances outside the Contractor's reasonable control, the Contractor is prevented from completing the Project by the Completion Date, the Contractor is entitled to claim an extension of time for completion. The extension will be calculated purely on the duration of the delay caused by the Customer or the circumstances outside the Contractor's control, although the latter situation is less easy to evaluate. The extension will not cover any slippage in the Programme of Work which is within the Contractor's control.*

*In addition to an extension of time for completion the Contractor may also be entitled to the payment of additional costs. If the Customer is in default then the Contractor may receive from the Customer any unavoidable additional costs which result from this default, subject to the legal requirement on the Contractor to mitigate such costs (see Clause 11.2). However, if the delay results from circumstances outside the control of the Contractor it is unreasonable to expect it to bear the consequences of failure to complete the Project by the Completion Date. The normal solution is to grant an extension of time and relieve the Contractor of its liability for late completion under Clause 11.1.*

*Because facts can become clouded by time, it is better to deal with situations giving rise to a possible claim for an extension of time as they arise.*

**Clause 11.1**

*This Clause allows the Customer to claim liquidated damages from the Contractor if the Contractor fails to complete the Project by the completion date, or extended completion date (see Clause 10) and, if as a result, the Customer has suffered loss.*

**Clause 11.2**

*This Clause covers the situation where completion is delayed by the Customer and enables the Contractor to claim from the Customer costs it has reasonably and necessarily incurred as a result of the delay. It is important to note that the Contractor is required to notify the Customer of its intention to submit a claim within 14 days of the event giving rise to the claim.*

*This notice alerts both parties to the situation and allows them to take such actions as are necessary to minimise the effect of the delay.*

**Clause 12**

*The development of Software is an expensive and time-consuming activity. It is essential therefore that the Customer should be able to monitor the progress of the work.*

*This Clause gives the Customer the right at all reasonable times and by prior notice to inspect, examine and if appropriate test the materials and workmanship being employed on the project. It is therefore able to detect whether any part of the Software is not in accordance with the Contract and request the Contractor to rectify the deficiency.*

*No action taken by the Customer under this Clause relieves the Contractor of its obligations under the Contract.*

**Clause 13**

*Notwithstanding any action taken by the Customer under Clause 12 the key contractual requirement is the Acceptance Tests. This Clause protects the Contractor from unreasonable delay by the Customer in allowing the Acceptance Tests to be carried out and the consequent delay in payment to the Contractor. It also specifies the courses of action open to the Customer in the event that (a) the Software fails the Acceptance Tests and (b) the Software fails repeat tests.*

**Clause 14**

*In the event that the Contract allows for a lump sum payment on completion, the Acceptance Certificate is the trigger for the Contractor to claim payment of the Contract Price. It should be noted that an Acceptance Certificate can be issued for part of the project and can also be issued if minor defects exist in the Software on the understanding that the Contractor will make good such defects without delay.*

**Clause 15**

*This Clause covers the ownership and rights in the Software. This is an extremely complicated area in which there are many possible alternative solutions, particularly in the area of rights once the ownership has been established.*

*Considering ownership first, it is likely that, in any Software development contract, the Contractor will write some Software specifically for the Customer and include some Software which it already owns either in its existing form or tailored to suit the requirements of the Contract. As far as the Software which is written specifically for the Contract is concerned (the Developed Software) the Customer may*

- (i) require the copyright and all other intellectual property rights to vest in its company, or*
- (ii) allow the copyright and all other intellectual property rights to vest in the Contractor.*

*If the contract is silent on the issue of ownership then under the Copyright, Designs and Patents Act 1988 the Contractor will retain ownership even though the Customer has paid for and commissioned the works. Thus if the Customer does require ownership a clause similar to Option A is required. These two alternatives are included in the Model Conditions as Options A and B. Under Option A some Contractor's may want ownership to pass on payment but Customers may instead as it re provide for immediate ownership which helps the Customer later if a dispute over completion of the Software arises. Option B should result in a lower Contract Price particularly if the Contractor can see a market for the software outside theContract.*

*If the Customer retains ownership of the copyright and other intellectual property, there are many possible alternative methods of exercising its rights in the Developed Software. As examples, the Customer may*

- (i) retain all rights and market the Software*
- (ii) grant the Contractor a royalty-free licence to use the Software for its own data processing requirements*
- (iii) grant the Contractor a royalty-free licence to market the Software and provide a maintenance service*
- (iv) grant to the Contractor a licence to market the Software and provide a maintenance service in recognition of which the Customer will require royalty payments, or a share of revenue from the Contractor in respect of each sub-licence entered into.*

*Alternatives (ii) to (iv) may be exclusive arrangements or the Customer may make the same arrangements with third parties.*

*Because of the complexity of the problem, exploitation of the Developed Software has been excluded from the Model Conditions and it is left to individual Customers to decide how they wish to proceed.*

*The reference to 'intellectual property rights' is generic terminology embracing patents in addition to copyright. If trade marks were to have relevance, they too are embraced by the term; an acronym of an abbreviated functional description of the program could become a trade mark and, if devised in the course of the work under the Contract, could be held to be within the scope of Clause 15.1 such that the terms of that Clause determine to whom the trade mark belongs.*

*To include patents is prudent since, although computer programs themselves are unpatentable in the UK, they may be patentable in appropriate applications. Even in the combination of a computer program with a computer there may be scope for a patent if the computer is caused by the program to operate in a different way from a technical point of view.*

#### **Clause 16**

*It may be necessary for the Customer to provide to the Contractor materials and/or equipment to assist it in its development work.*

*In this case it must be made clear that*

- (i) the materials and/or software may only be used for the purposes of the Contract;*
- (ii) the Contractor is responsible for their safe keeping;*
- (iii) the materials and/or software remain the property of the Customer, and*

- (iv) *the Contractor is liable for any loss or damage (fair wear and tear excepted) whilst the materials and/or equipment are in its custody.*

*In the event that the Customer provides to the Contractor materials which are rented from a supplier or financed through a leasing company, it will be necessary to amend (iii) above to reflect this third party ownership.*

#### **Clause 17**

*A normal Default clause is almost impossible to operate on a software development Contract, as the concept of another software supplier picking up the contract in the event of default by the Contractor, is virtually unworkable. It was for this reason that a termination clause covering breach of contract by either party has been included.*

*This Clause sets out the rights and obligations of the parties if termination is due to the default of the Customer or to the default of the Contractor. The list of continuing obligations is only a guide; there may be others depending upon the terms of the particular Contract.*

#### **Clause 18**

*This Clause makes it clear that any infringement of copyright resulting from the use or possession of the software is the Contractor's responsibility. Since such infringement calls for unauthorised copying, which ought not to occur unwittingly, this responsibility on the Contractor is quite reasonable.*

*The Clause also covers the mechanics of dealing with an alleged or actual infringement and the options open to the Contractor to avoid infringement, if it suspects that an allegation is likely to be made, whilst protecting the Customer from loss or reduced performance from the Software.*

#### **Clause 19**

*Clause 19.1 is a simple statement of law. Clause 19.2 reflects the fact that, having made a contract with a particular contractor the customer does not want suddenly to find himself dealing in part or in whole with another company that it has not selected and with whom it may in the past have had unsatisfactory dealing. However with consent of the other party assignments and sub-letting/subcontracting may take place.*

#### **Clause 20**

*Insurance of computers and computing services often cuts across the traditional divisions in the insurance industry thus creating special problems. These notes on insurance not only comment on the relevant Clauses but also outline the various areas which generally applicable policies cover. It is essential to consult professional advisors as there are many variations and combinations that can be used and policies can always be tailored to individual requirements. The Model Conditions do not require the Contractor to insure failure of performance (professional indemnity) as an integral part of the insurance clause as such cover is not always easy to obtain, can be costly, and is perhaps more appropriately taken as part of an overall commercial decision.*

#### **Clause 20.1 & 20.2**

*Both the Contractor and the Customer give an indemnity but they shall each be responsible for their acts, defaults or negligence in respect of causing injury or damage to persons or to property and included in such indemnity would be the associated legal costs and charges. The Clause is intended to encompass what is generally known as the public liability risk and if reference is made to Clause 20.4 it will be seen that performance or professional indemnity risk is excluded where reference is made to design, formula, specification or advice. It is important that this Clause is agreed with the third party insurers to ascertain that the policy gives the correct coverage.*

*The public liability policy does not normally become involved with the consequences of the supply of products or the inadequate provision of services. It deals with such matters as the failure to maintain the premises properly in case, for example, a visitor is injured. Such policies extend to*

*include the liability of the assured arising from the provision of canteen or sports facilities and can cover contractual obligations where, for example, an assured may have to give a 'hold harmless' or something similar to a landlord, consequent upon provisions in a lease. Such coverage would still be restricted to legal liability for bodily injury or property damage.*

*The one area where public liability has particular relevance in the computing industry is in respect of the installation risk where equipment is involved as this is normally regarded as a public liability exposure. Insurers should wish to know the extent of activities carried out on a customer's premises.*

#### **Clause 20.3**

*This makes reference to the fact that each party should insure with a reputable insurance company and your professional advisers should be able to give guidance on that point. Given the litigious climate today and the value of personal injury awards a limit of indemnity of a least £1m - £2m and preferably higher should be considered.*

#### **Clause 20.4**

*The purpose of Clause 20.4 is to exclude the performance risk or other risks associated with the giving of advice or the provision of services. Such cover would normally be insured by a professional indemnity policy. It should be noted, however, that under the Unfair Contract Terms Act 1977 it is not possible to exclude legal liability for injury to persons consequent upon negligence. Where the Software involved is of an engineering nature or the consequences of its failure may lead to bodily injury provision for this will have to be under a professional indemnity policy or a products liability policy both of which are defined further below. The public liability policy cannot normally be extended to cover this exposure.*

#### **Clause 20.5**

*The consequences of the Software being destroyed or damaged could be significant in that time and expense could be involved in rectifying the situation. Clause 20.5 identifies at what stage the responsibility for insurance passes from the Contractor to the Customer. Cover for all risks of physical loss or damage, including the reconstitution and rewriting of records and of Software is freely available. The sum insured should reflect the estimated costs involved.*

### **3. GENERAL COMMENTS ON INSURANCE**

#### **(a) Professional Indemnity**

*It is recommended that professional indemnity coverage is seriously considered by the contracting parties as it does afford some protection where matters do go wrong as a result of the negligence of the Contractor. Whilst Software may be sold as a product the insurance industry tends to regard it as a knowledge-based service and therefore normally will only cover it under a professional indemnity policy.*

*A professional indemnity policy would cover the policyholder against its legal liability for negligent act, error or omission arising out of the provision of services and will also pay its defence costs in meeting allegations which may subsequently be disproved. It is important to note that the policy is one of indemnity to the policyholder for legal liability arising out of the provision of Software. The recipient of a service cannot insure for the consequences of third parties giving an inadequate service, hence customers should check on the insurance arrangements of the Contractor.*

*A professional indemnity policy can also be extended to include liability for breach of copyright (Clause 18), and breach of confidentiality (Clause 29). There is increasing activity from parties alleging breach of copyright and a professional indemnity policy would respond not only for the defence costs but also for any damages awarded. Although generally unlikely, a breach of copyright or confidentiality can be inadvertent and still impose legal liabilities on the policyholder so the policy document should be checked to ensure that it is adequately worded.*

*It is important to note that a professional indemnity policy is not a policy of guarantee but of legal liability for negligence and should not be looked upon as a vehicle to transfer responsibility for warranties or undertakings given in the selling process. The policy will normally only respond if such liability would have attached in the absence of such warranty and in present circumstances the duty of care owed by a skilled supplier to its customer is such that the scope of a policy is broad. Whilst liability for consequential loss is excluded (Clause 21), a professional indemnity policy would cover such liability if the clause was not effective.*

*(b) Products Liability Insurance*

*Reference was made under the above comments on professional indemnity to the fact that the insurance industry does not regard software as a product. There are one or two exceptions where computing systems are an integral part of a product such as a robot or a computer-controlled machine tool. A products liability policy covers the insured for its legal liability for bodily injury and/or property damage arising out of the supply of a product. They can be extended normally to include legal liability for the design risk provided that bodily injury or property damage occurs. To obtain cover for what is termed 'financial loss', where losses accrue to a client without bodily injury or property damage being present, a special extension would have to be negotiated and presently it is very difficult to obtain cover. An example would be where a piece of machinery with software as an integral part of the machine was designed and the software malfunctioned thus making the machine unfit for its intended use.*

*Where the risk is of bodily injury or property damage, such as in engineering software, a products liability policy may have some relevance but such cover would also be given under a professional indemnity policy which would be normally more applicable to the supplier of software services.*

*(c) Legal Expenses Insurance*

*With an increasingly litigious climate, firms may wish to consider their position where they have a requirement to pursue third parties particularly over matters such as breach of copyright. Such policies cover the prosecution costs involved and can be designed to fit in with a professional indemnity policy. This means that defence costs are also covered where the matter at issue does not arise from the provision of professional services.*

*Such policies are applicable to both the Contractor and the Customer and could encompass legal costs involved over the whole range of contractual and employee related matters. The policy would not cover defence costs as would be associated with a professional indemnity policy.*

**Clause 22**

*This Clause covers terms of payment and reflects two possible forms of contract, one which is placed on a fixed price basis and the other which is placed on a time and material basis. In practice contracts for software development often incorporate both these methods of payment particularly if the project includes a number of separate phases, eg feasibility study, writing of performance specification etc. The important thing is to ensure that clear terms of payment are incorporated into the tendering documents and that they reflect the nature of the Contract.*

*Clause 22 is a realistic model clause and incorporates all the important requirements of a payment clause which are*

- (i) when payment can be claimed*
- (ii) time by which the Customer must pay a correct invoice*
- (iii) right of the Customer to withhold payment if invoice is not in accordance with the Contract.*

*The clause does not give a right of the Contractor to claim interest if payment is unjustifiably delayed by the Customer as few Customers would want such a provision but the Contractor is likely to have a right in any event to charge statutory interest and collection charges under the Commercial Debts (Interest) Act 1998 and subsequent late payment legislation.*

*NOTE: The term 'fixed price' has been included in this Clause as it is the term in common use by the trade for software development contracts. In other CIPS models the term 'lump sum' has been used. In both cases variations in the cost of labour, materials etc can trigger under Clause 23 a request for an increase or in theory a reduction in price but this cannot be imposed on the Customer.*

### **Clause 22.3**

*The details of the percentages to be paid and the events against which payment is to be made must be specified elsewhere in the Contract since they will clearly vary. This Clause allows the Customer to deduct amounts for defects, work not properly performed etc. Otherwise payment is to be made within 30 days or the date in the Contract. Some Customers may wish to extend this period but they must be careful if the Contract is one to which the Late Payment of Commercial Debts (Interest) Act 1998 applies and should take legal advice. 4% above base rate has been specified. It is possible that the Customer could, even if the Contract is subject to the Act, replace the statutory rate of 8% under the 1998 Act with a lower figure provided that the Contract gives the Contractor a substantial remedy or deters late payment, and is fair and reasonable.*

*The present CIPS term on "undue delay" in payment has been omitted. If it is considered appropriate to give the unpaid Contractor an additional remedy then there should be a definite period stated after which the Contractor could exercise the right to suspend - say another 30 days. In any event breach by the Customer of the payment would probably be considered a material breach, giving the right to terminate if payment was not made within another 30 days.*

### **Clause 23**

*This Clause provides for the Contract Price to be adjusted to reflect variations in the cost of labour, materials etc. but only if the Customer agrees. If the Contract is to be on a non-adjustable fixed price basis this Clause should be deleted from the Conditions in the tendering documents.*

*With software development contracts it will be often difficult for a contractor to evaluate the work with sufficient accuracy to quote a realistic non-adjustable fixed price. Care must therefore be taken to ensure that such a fixed price is only required when there is adequate information available to a contractor to allow it to price the Project. If there is not adequate information a contractor will be forced to include a heavy contingency sum which may well outweigh the benefit to a customer by way of reduced administration.*

*The requirement for a non-adjustable fixed price may also be unrealistic in times of high inflation if the Project has a long timescale*

*If the Contract Price is a fixed price and subject to fluctuations in costs, these fluctuations may be calculated on an actual cost basis or by formula. The actual cost basis requires the Contractor to break down its tender price into its various components, labour, materials, overheads, profit etc and establish the price/cost levels applicable. It must then produce documentation to prove the increased costs it has paid. This is a very cumbersome method and involves a heavy administrative load. However open book accounting is now frequently required by large buyers of IT and other services and many contractors are obliged to accept it.*

*The usual alternative is to use a formula which provides a broad-brush solution but minimises the administrative costs involved.*

*Most buyers whether on fixed priced contracts or not would want to delete clause 23.*

### **Clause 24**

*This Clause makes it clear that the Contractor is responsible for rectifying with all possible speed defects identified on the Acceptance Certificate and any other defects which develop during a period of 12 months from the Acceptance Date except such defects that arise as a result of alterations made to the Software by the Customer.*

*The Customer should recognise that the term 'with all possible speed' has to be interpreted in relation to the complexity of the defect to be rectified.*

*It is important that a fault-reporting procedure is agreed and incorporated in the Contract.*

#### **Clause 25**

*If a maintenance contract is taken out and operates from the Acceptance Date, it is important to ensure that the first year's charge properly reflects the Contractor's obligations under Clause 25.*

*The provision of on-going maintenance of developed software may not be attractive to a contractor who has to retain a resource to provide the service which either could be more profitably employed in writing new software or would not otherwise be required. For a customer to obtain the best possible terms for maintenance it should state in the invitation to tender that a maintenance contract is required, the extent of such service and the minimum cover period required. Ideally the cost of such a service should be agreed before a Contract for software development is signed.*

#### **Clause 26**

*Clause 26.1 is a typical insolvency or bankruptcy clause giving protection to the Customer in the event of the insolvency or bankruptcy of the Contractor. Clause 26.2 gives the Contractor reciprocal protection in the event of the Customer becoming insolvent or bankrupt. Both have been worded to take account of the 1985 Insolvency Act which introduces the new appointment of 'administrator' and changes the name of receiver to 'administrative receiver'.*

*In the event of a receiver being appointed to either party it is likely that, although it has the power to override contracts, it will endeavour to continue normal trading as this is usually in the best interests of the creditors. However, this Clause allows the other party to terminate the Contract if it considers this course of action to be in its best interests.*

*If the Customer considers that, in the event of the insolvency or bankruptcy of the Contractor, it would like a copy of the source code it can enter into a 'escrow' agreement so that from the beginning of the Contract the source code and other documentation is deposited by the Contractor with an escrow company. such as the National Computing Centre ([www.nccglobal.com](http://www.nccglobal.com)) as provided in this clause.*

#### **Clause 27**

*This is a typical clause requiring*

- (i) the Contractor to comply with all statutory and local authority regulations and the Customer's site regulations specified in tendering documents, and*
- (ii) the Customer to reimburse the Contractor for the cost of complying with regulations imposed after the Contract is placed.*

*If the Contractor fails to fulfil its obligations under (i) above and the Customer incurs costs as a result of this failure either by taking remedial action or otherwise, such costs are to be reimbursed by the Contractor to the Customer.*

#### **Clause 29**

*This Clause requires each party to keep confidential*

- (i) details of the software not owned by it and*
- (ii) any other information of the other party which is designated as confidential.*

*It is important therefore that each party carefully considers any information to be transmitted to the other in the light of (ii) above.*

*Neither party needs to keep confidential any information which is in the public domain or which is received from a third party unless it suspects that the third party is not entitled to divulge such information.*

*It should be noted that the constraints of this Clause apply equally to sub-contractors.*

**Clause 31**

*Customers should ensure that their training requirements are detailed in their tendering documentation. Failure to do this may entitle the Contractor to charge extra for training.*

**Clause 32**

*This Clause is an attempt to discourage each party from 'poaching' employees from the other.*

**Clause 33**

*Software suppliers are usually keen to publicise their important contracts and/or customers. This Clause allows the Customer to avoid publicity if it so wishes.*

**Clause 34**

*Notices 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 36**

*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.*

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

**Clause 37**

*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 38**

*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.*

#### **APPENDIX**

*It is important that the insertions required in the Appendix are completed before the invitation to tender is issued so that the tenderer(s) can take the requirements into account when submitting its tender.*

*Failure to do so will mean that*

- (a) the tenderer may complete the Appendix himself - in competition this can result in tenders being submitted on differing bases, or*
- (b) the tenderer may submit a tender ignoring the Appendix - the Customer may then be in a weaker position to negotiate the terms it requires.*

*Under Clause 15 it is recommended that the CIPS Model Form of Licence Agreement (L) is used but, whatever form of licence is adopted, it is essential to ensure that the commencement date for the licence is clearly stated.*

*Last revised by Susan Singleton, Singletons Solicitors, ([www.singlelaw.com](http://www.singlelaw.com)) who asserts her right to be identified as author pursuant to the Copyright, Designs and Patents Act 1988*

*CIPS Model SD 1986  
Revised August 2002*