



**Australian Government**

**Digital Transformation Agency**

# Detailed guide to the Comprehensive Terms

Digital Marketplace Master Agreement version 1 July 2019

## Background

Where specified in a work order, the Comprehensive Terms operate in addition to the Master Agreement.

Read the [current version of the Comprehensive Terms](#). The DTA may make changes to the Comprehensive Terms.

Some of the terms in the Comprehensive Terms supplement clauses that are in the Master Agreement. Other clauses cover topics that are not addressed in the Master Agreement.

The DTA has prepared two templates for buyers which incorporate the comprehensive terms. One work order is for labour hire arrangements.

## Purpose of this guide

This guide is intended to assist buyers in deciding whether or not to incorporate the Comprehensive Terms into their work orders.

It also provides some additional guidance to buyers in completing work orders.

**Is your work order valued at over \$80,000 (or \$400,000 for Corporate Commonwealth Entities)?**

The DTA encourages Commonwealth agencies to use the Comprehensive Terms for work orders valued over \$80,000 (or \$400,000 for corporate entities) unless the sellers are SMEs who employ less than 100 employees.

This is because the Comprehensive Terms require the seller to confirm their compliance with Workplace Gender Equality Act 2012 (clause 27).

This is a Commonwealth government requirement for procurements above the relevant threshold.

[https://www.dss.gov.au/sites/default/files/documents/08\\_2013/workplace\\_gender\\_equality\\_procurement\\_principles\\_user\\_guide5\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/08_2013/workplace_gender_equality_procurement_principles_user_guide5_0.pdf)

Alternatively you can use the standard work order and ensure that you obtain a letter of compliance prior to contract.

## Is the work order for labour hire?

The labour hire template is drafted on the basis that the comprehensive terms will apply. This is because the comprehensive terms contain additional terms which address some of the common risk areas for labour hire arrangements. These include:

- work health and safety, particularly on the buyer's premises;
- agency;
- liability for wages and other employee entitlements; and
- removal of personnel.

These issues are addressed in:

- Clause 4 (Access to, and conduct at, the buyer's premises)
- Clause 7 (Relationship)
- Clause 8 (Your personnel)
- Clause 9 (Replacement of personnel)
- Clause 19 (Work health and safety)

There may be circumstances where you need to alter these provisions in your work order. For example, the work order allows you to specify circumstances where powers will be delegated to the seller's staff.

As noted in the work order template, you will be required to pay superannuation where the seller is not incorporated and the contract is primarily for their own labour. You need to consider this as part of the pricing.

## Could the seller be a trust?

Clause 2 of the Comprehensive Terms contains a warranty that the seller enters into the work order personally and in your capacity as trustee and have the power to perform your obligations under the work order.

Alternatively you can add these words to your work order.

## Will the seller be providing any third-party hardware?

Clause 5 (Third party warranties) of the Comprehensive Terms requires the seller to pass through any third-party warranties and assist you in resolving any issues with the third party.

## Will the seller be providing or modifying any existing software?

Clause 8 (Intellectual property rights) of the Master Agreement provides that the seller must ensure the buyer is provided with any intellectual property rights, licence or usage rights it needs to use any material provided with (or needed for the use of) the order material.

Clause 10 (Intellectual property rights – material other than order material) of the Comprehensive Terms sets out further details of this licence and the material that it relates to.

You can change or supplement this licence in the work order. For example:

- you may want the ability to provide existing software to other agencies as part of a shared services arrangement.
- you may agree that existing software (whether owned by the seller or a third party) is licensed under standard vendor terms.

You should read any standard vendor terms carefully and exclude any terms that you are not happy with. For example, standard vendor terms often:

- exclude or cap the vendor's liability;
- provide that the licence will terminate immediately (without notice) in the event of a breach;
- give the vendor rights to check compliance (either remotely or onsite); and
- require the licensee to upgrade to the next version.

Clause 8 (Intellectual property rights) of the Master Agreement provides that, in the event of a claim, the seller must either:

- Ensure that the buyer can continue to use the relevant material without liability or infringement;
- or

- Replace or modify the material so that it does not infringe the intellectual property rights of any other party, without degrading the performance or quality of the material.

Clause 11 (Intellectual property warranty and indemnity) supplements these obligations with a warranty and indemnity. It also allows the seller to conduct proceedings in the name of the agency so long as it complies with the Legal Services Directions.

Clause 12 (Intellectual property register) requires the seller to maintain an intellectual property register. You can turn "off" this obligation in a work order.

## Are you providing material to the seller to undertake the services?

Clause 13 (Buyer material) of the Comprehensive Terms applies in addition to clause 15 (Buyer material) of the Master Agreement.

It contains additional restrictions on the use of buyer material. It also requires the seller to indemnify you if they damage the material.

Clause 14 (No warranty) provides that the default position is that buyer material is not warranted.

If the buyer is making specific promises in relation to the quality or availability of buyer material, this should be set out in the work order.

The term 'buyer material' is defined in clause 30 of the Master Agreement.

## Will the seller have access to government databases or other personal information or official information?

Clause 15 of the Comprehensive Terms provides that the seller must comply with:

- the security requirements detailed in the Australian Government Information Security Manual and the Commonwealth's Protective Security Policy Framework, as amended or replaced from time to time; and
- any additional requirements advised by the buyer from time to time.

It also allows the buyer to undertake security checks and sets out each party's rights and obligations if:

- there is a security incident or security breach; or
- any of the seller's personnel lose their security clearance.

Clause 16 of the Comprehensive Terms contain additional obligations in relation to the use, modification and storage of buyer data.

Clause 22 of the Comprehensive Terms contains more detailed privacy obligations which are akin to the requirements that are normally included in Commonwealth agreements, including the procedure to be followed in the event of a data breach. It also contains an indemnity by the buyer for losses caused by privacy breaches. These provisions operate in addition to clause 17 of the Master Agreement.

The term "buyer data" is defined in clause 30 of the Master Agreement.

Buyers may specify additional security or privacy requirements in the work order.

## Could the seller introduce harmful code into your systems?

Clause 17 of the Comprehensive Terms contains a warranty that the seller will not, nor will it suffer or permit any third party under its direction or control to, negligently introduce into the buyer's systems or any deliverables any harmful code.

If any harmful code is introduced, the seller must use all reasonable efforts promptly to report that introduction to the buyer. If harmful code is introduced as a result of a breach of the warranty set out above, the seller must:

- take all necessary action to eliminate the harmful code; and
- promptly repair any harm or destruction caused by that harmful code.

Clause 17 does not expressly require the seller to compensate the buyer or allow the buyer to engage a third party at the seller's cost. If you want these obligations you will need to add them to your work order.

## Are you concerned about offshoring?

Clause 18 of the Comprehensive Terms prohibits the seller and its subcontractors and personnel from:

- transferring outside of Australia any personal information obtained as a result of, or in connection with, providing the services, or allow access to such personal information from a location outside of Australia; or
- taking or transferring any buyer data outside Australia; or
- allowing any buyer data to be taken or accessed outside of Australia.

The term "buyer data" is defined in clause 30 of the Master Agreement.

You can override this clause in a work order if you agree to offshoring in certain circumstances, such as 'follow the sun' type arrangements.

## Can the seller subcontract the services?

Clause 11 of the Master Agreement prohibits subcontracting without the buyer's consent. Buyers can set out any approved subcontractors in the work order.

Clause 20 of the Comprehensive Terms sets out the obligations of the seller if it subcontracts, including its obligation to ensure that subcontracting arrangements are consistent with its obligations to the buyer. It also:

- requires the seller to provide the buyer with the names of subcontractors and a copy of any subcontract where requested; and
- contains an acknowledgment that the buyer may disclose publicly the names of any subcontractors; and
- requires the contractor to ensure that it obtains its subcontractors' agreement to the buyer disclosing their name publicly.

## Will you (or the seller) need to share confidential information with third parties?

Clause 16 of the Master Agreement contains a basic confidentiality clause.

Clause 21 of the Comprehensive Terms contains additional rights to disclose the other party's confidential information.

It allows:

- either party to disclose the other party's confidential information to its advisers;
- either party to disclose the other party's confidential information where authorised or required by the work order or a licence;
- the seller to retain one copy of the buyer confidential information for audit and record keeping purposes provided that it complies with its confidentiality obligations; and
- the buyer to disclose the seller's confidential information within the buyer's organisation, or with another Commonwealth agency or body, when this serves the buyer's legitimate interests.

Whichever template you use, you will need to specify in the work order what information is confidential to you and the seller. There is further guidance about this on the Department of Finance's website:

<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/principles.html>

<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/practice.html>

<https://www.finance.gov.au/procurement/procurement-policy-and-guidance/buying/contract-issues/confidentiality-procurement-cycle/tips.html>

## Do you want the seller to transfer skills and knowledge to your staff?

Clause 23 of the Comprehensive Terms contains a warranty that the seller will facilitate an effective transfer of skills and knowledge to the buyer's personnel so that those personnel can make full use of the services and any associated documentation or other deliverables.

It also requires the seller to:

- provide the buyer with access to all information stored by whatever means held by the seller or under its control in connection with the work order; and
- make personnel available for discussions as required by the buyer on termination or expiration of the work order.

If buyers want the seller to develop a disengagement plan, they will need to specify this in a work order.

## Do you want the agreement to include a specific indemnity by the seller?

Clause 24 of the Comprehensive Terms provides that the seller will indemnify the buyer, and its subcontractors and other personnel (against losses reasonably sustained or incurred by those indemnified made or threatened by a third party arising out of or in connection with any negligent, unlawful or wilfully wrong act by the seller or its your or your subcontractors or other personnel.

Clause 24 also sets out the actions the buyer needs to take to enforce the indemnity.

## Do you want to include a liability cap?

The Master Agreement does not include any provision for a liability cap.

If you want to include a liability cap you need to use the Comprehensive Terms.

The work order will set out the amount of the cap and whether it is per event or in aggregate.

Clause 25 of the Comprehensive Terms sets out any uncapped items. It also provides for review of the cap if the work order is varied or extended.

You will need to follow any guidance issued by your agency about setting liability caps. For example, your Accountable Agency Instructions may require that you conduct a risk assessment before agreeing to cap the seller's liability.

If you do not want to specify a liability cap you can still use the Comprehensive Terms. You just need to delete the row in the work order setting out the liability cap.

## Do you require more detailed audit and access rights?

Clause 31 supplements the audit and access rights in clause 19 of the Master Agreement.

It requires the seller to provide you with:

- access to its premises or its subcontractors' premises to the extent relevant to the performance of the work order;
- records and information in a data format and storage medium accessible by the buyer by use of the buyer's existing computer hardware and software;
- documentation, books and records, however stored, in your custody or under the control of it or its employees, agents or subcontractors;
- assistance in respect of any inquiry into or concerning the services or the work order. Inquiry is widely defined; and
- access to its computer hardware and software reasonable assistance requested by the buyer to use that hardware and software.

## Is your contract for a long term?

Clause 32 of the Comprehensive Terms deals with circumstances beyond a party's reasonable control (other than lack of funds for any reason or any strike, lockout and labour disputes in respect of the seller only), including acts of God, natural disasters, acts of war, riots and strikes outside a party's organisation.

A party is excused from performing its obligations under the work order to the extent it is prevented by unforeseen event provided that the affected party following the procedure in clause 32.

If non-performance or diminished performance continues for a period of more than 30 consecutive days, the other party may terminate the work order.

## Do you want the right to suspend the work?

Clause 38 of the Comprehensive Terms allows the buyer to suspend the whole or part of the work for up to 10 business days without compensating the seller. It also limits the amount payable for suspensions of 10 business days or more.

## Is the seller is dependent on materials or other inputs from you?

Clause 39 allows the seller to request postponement if it has been delayed by circumstances outside its control which were not reasonably foreseeable to the seller at the date of entry into the work order. It also sets out the procedure the seller must follow if it wants to seek costs for a delay caused by the buyer's breach of contract.

## Government policies

The Comprehensive Terms also contain additional clauses in relation to:

- compliance with applicable Australian or New Zealand standards (clause 3)
- compliance with the *Workplace Gender Equality Act 2012* (clause 27);
- illegal workers (clause 28);
- preventing and notification of fraud (clause 29);
- maintenance of books and records in accordance with appropriate accounting standards (clause 30);
- management of conflicts of interest (clause 36); and
- change in control of the seller (clause 37).

If you are concerned about these issues you can either use the Comprehensive Terms or 'cut and paste' these clauses to your work order.

The template work order also includes an additional *Workplace Gender Equality Act 2012* obligation for contracts over 18 months.

## Other clauses

The Comprehensive Terms also contain additional clauses in relation to:

- the involvement of the buyer (clause 2);
- co-operation with other contractors (clause 7);
- proportionate liability (clause 26);
- disputed invoices and over or under payments (clause 33);
- management of disputes (clause 34);
- the consequences of a reduction in scope for convenience (clause 35);
- each party's ability to withhold its consent or approval (clause 41);

- each party's obligation to take further action where required to give full effect to the work order (clause 42);
- severability of illegal or unenforceable clauses (clause 43); and
- approval of any public announcements made by the seller (clause 44).

Consistently with the Commonwealth Contracting Suite and SourceIT Plus, the Comprehensive Terms do not exclude proportionate liability legislation. If you want to do this you will need to add it to the work order.