

Terms and Conditions of Government IT Procurement

INSTRUCTIONS FOR USE

INTRODUCTION

The Terms and Conditions of Government IT Procurement were adopted as a JHS recommendation on 8 October 2007. They replace the General Terms and Conditions of Government Procurement of Information Technology 1998 (VYSE 1998) and the related Special Terms and Conditions. The Terms and Conditions were revised in a project launched by the Ministry of Finance in June 2006, involving representatives of central government, ICT suppliers, government procurement units and local government.

The structure of these Terms and Conditions is essentially the same as that of the previous ones. A significant change is, however, in the adoption of completely new Special Terms and Conditions for Services. At the same time, the Special Terms and Conditions for Equipment and Software Maintenance Services (VHYE) and the Special Terms and Conditions for Facilities Management Services (VKÄE) were abolished.

The headings and sections of these Instructions for Use are numbered for ease of reference. Their numbering does not match the numbering in the Terms and Conditions.

1 GENERAL

1.1 The Terms and Conditions of Government IT Procurement consist of the following:

- (i) General Terms and Conditions (JIT 2007 – General Terms)
- (ii) Special Terms and Conditions for Procurement of Customized Applications (JIT 2007 – Customized Applications)
- (iii) Special Terms and Conditions for Services (JIT 2007 – Services)
- (iv) Special Terms and Conditions for Consulting Services (JIT 2007 – Consulting)
- (v) Special Terms and Conditions for Procurement of Standard Software (JIT 2007 – Standard Software)
- (vi) Special Terms and Conditions for Procurement of Hardware (JIT 2007 – Hardware)

- 1.2 The purpose of these Instructions for Use is to guide both customer and supplier in concluding government IT procurement contracts. The instructions also address certain points that the customer should take into account when drawing up a request for tender.
- 1.3 These instructions contain no specific guidelines regarding the drawing up of a request for tender or a tender. Public procurement must be subjected to competitive tendering in accordance with the Public Procurement Act (348/2007). It is also recommended that any separate instructions issued be read, such as the Government Procurement Manual.
- 1.4 When procurement is being planned, the contract framework must be planned at the same time. Particular attention should be given to cases which involve products from several suppliers. The Terms and Conditions are based on the assumption that the supplier decides which components to offer and that the supplier is thus solely responsible for the delivery regardless of whether that delivery includes products or services from third parties. However, if the customer requires the use of third-party products, it is possible to plan the procurement for example in such a way that the customer directly procures the said third-party products, in which case the procurement will only cover the work involved on those products.

There may be several parties to a contract. In practice, a tender is often submitted by a consortium, for example. If a contract is entered into with a consortium, these Terms and Conditions must be amended by agreeing in detail on the obligations and responsibilities of each of the members of the consortium.

2 USING THE TERMS AND CONDITIONS

- 2.1 A good contract is based on a well-prepared procurement and a request for tender.
- 2.2 It is recommended that central government units, municipalities and municipal federations use these Terms and Conditions as a basis for contracts in IT procurement.
- 2.3 The contract that must be drawn up in addition to these Terms and Conditions must specify the parties to the contract, the object of the contract, the content of the delivery or service involved, the requirements for the object of the contract, detailed obligations and responsibilities of the parties, timetables, prices, terms of payment and any terms and conditions which deviate from or add to these Terms and Conditions. The contract must always be carefully structured and take into account as necessary such matters as the continuation of the customer's operations after the termination of the contract. A

request for tender and a contract must often also take into account the possibility of extra work being required.

- 2.4 These Terms and Conditions as they stand are not necessarily suitable for all procurement situations. Their applicability must be assessed on a case-by-case basis. Individual conditions can be deviated from or agreed on in more detail. For points where such adjustment is often necessary, these Terms and Conditions include the clause “unless otherwise agreed in writing”.
- 2.5 In particular in extensive and demanding deliveries, it may be necessary to amend these Terms and Conditions, for example to agree in more detail on delivery phases, other issues related to the project, security issues (e.g. a separate security contract), liability issues and intellectual property rights. Regarding user rights, it is often necessary to specify that not only the customer but other government units too have the right to use the product or service procured.
- 2.6 The contract must clearly indicate which of the Terms and Conditions have been deviated from and what the deviation specifically is.
- 2.7 Any deviations from these Terms and Conditions must be entered in the contract or agreed in a separate appendix to the contract. To preserve the integrity of the Terms and Conditions, no deviations may be made to the Terms and Conditions documents specified in section 1.1.
- 2.8 A request for tender must contain the essential terms and conditions of the contract proposed, so that parties submitting tenders can take these into account. It is particularly important to include such terms and conditions that may have an impact on the pricing of tenders and such terms and conditions that the procuring unit considers to be absolute minimum requirements for the contract proposed. Setting out these terms and conditions ensures that the tenders submitted will be comparable. If a request for tender refers to these Terms and Conditions, it must also specify which terms and conditions, if any, will be deviated from or deviation from which can be agreed to on the basis of tenders submitted. It is important to review the Terms and Conditions of Government IT Procurement already when a request for tender is being prepared in order to ensure that they are applicable to the procurement in question.
- 2.9 When applying these Terms and Conditions, the General Terms and Conditions (JIT 2007 – General Terms) must be used together with the applicable Special Terms and Conditions (the Special Terms and Conditions must never be used without the General

Terms and Conditions). Which Special Terms and Conditions are selected depends on the nature of the procurement. The various Special Terms and Conditions contain differing provisions from the General Terms and Conditions, for example for sub-contractors, warranties and testing and approval procedures. If more than one set of Special Terms and Conditions apply to a particular procurement, their precedence must be carefully considered and specified in the contract.

- 2.10 It is recommended that the Terms and Conditions applying to a contract be appended to the contract, instead of merely being referred to. This helps avoid disagreement over the terms and conditions that apply and how binding they are.

3 GENERAL TERMS AND CONDITIONS OF GOVERNMENT IT PROCUREMENT (JIT 2007 – General terms): GENERAL REMARKS ON CONCLUDING CONTRACTS BASED ON THEM

3.1 Customer's requirements

When these Terms and Conditions are applied, it is crucial to specify in the request for tender any and all demands placed by the customer on the product or service in question. These may include technical, operational, performance, purpose of use, information security or other requirements. The contract must also specify all of the customer's requirements the fulfilling of which is specified as mandatory in the request for tender and which the supplier undertakes to fulfil in the tender. These requirements are of crucial importance in issues regarding acceptance of delivery, liability and warranties. The requirements must be presented clearly and in sufficient detail. Most of the disagreements arising from IT procurement and contracts are related to the issue of whether the product or service supplied fulfils the requirements specified for it or not.

3.2 Open source code

The use of open source code in IT projects has increased. These Terms and Conditions are based on the use of open source code being equivalent to the use of any other third-party component in a delivery. Because the licensing terms for open source code are not generally well known, these Terms and Conditions include a clause whereby the supplier must explain to the customer the terms and conditions under which open source code may be used and ensure that these terms and conditions do not become applicable to other software of the customer's, unless this is specifically agreed. If the customer requires open source code for the product to be created for the customer's use, the

parties must agree on the use and licensing of the open source code, such as terms of licensing and publication of the source code, on a case-by-case basis.

3.3 Intellectual property rights

3.3.1 These Terms and Conditions are based on the assumption that copyright and other intellectual property rights remain with the supplier as a rule.

3.3.2 The customer gains user rights as specified in the Terms and Conditions, which in most cases is sufficient for the customer.

3.3.3 An exception to the above, however, is the case where the customer acquires expertise and resources from the supplier in a consulting service. In this case, the assumption is that the supplier gains no intellectual property rights in the work of employees submitted by the supplier to the customer under such a contract.

3.3.4 In certain cases (e.g. for service centres), the customer may need extended user rights or even exclusive intellectual property rights to the product or service supplied. Extended user rights must be agreed upon if the product or service is intended for example for the use of the entire central government or several procurement units, or the partners or clients of the customer. Such extended user rights, as well as the reserving of intellectual property rights wholly to the customer, must be referred to in the request for tender.

3.3.5 If it is desired to transfer intellectual property rights to the customer, the request for tender and the contract proper may contain a clause such as the following:

“Intellectual property rights in all [specify what: e.g. documents, interim results, final results, software] delivered under the present contract shall remain with the customer, and the supplier shall have no right thereto.”

It is also possible to agree on joint or parallel copyright or other intellectual property rights, so that both parties to the contract can utilize these rights independently of one another. In this case, however, an attorney should always be consulted first.

Intellectual property rights and confidentiality are two different things. Even if a party has no intellectual property rights to some particular material, that material can still be declared confidential.

3.4 Information security

3.4.1 Good information security practice is provided for in the Act on the Openness of Government Activities (621/1999). The good information security practice required of

central government authorities aims at preserving the integrity, quality, usability, availability and confidentiality of information.

3.4.2 Ultimately, this is an issue of ensuring the quality of information and thereby enabling the authorities to function. Good information security practice is planned, careful and purposeful.

3.4.3 Good information processing practice as provided for in the Personal Data Act (523/1999) refers to the responsibility of the controller of a personal data file to ensure that good processing practice is observed in the processing of personal data.

3.4.4 The Personal Data Act governs when personal data may be collected and otherwise processed. The most important general principles with regard to good processing practice are the planning, necessity, carefulness and protection requirements, and consideration for the rights of the data subjects.

3.4.5 Good information management and information processing practice, and other obligations related to the processing of personal data and to information security, are also provided for in sector-specific legislation.

3.4.6 In addition to the above, an individual customer may have customer-specific information security requirements and can demand that any product or service tendered fulfil these requirements. In such cases, the customer must specify these requirements in the request for tender.

3.5 **Customer's auditing rights**

3.5.1 Especially in the case of indefinitely valid contracts or contracts with substantial financial impact, it is worthwhile considering the inclusion of the customer's auditing rights in the contract, for instance in a clause such as this:

“External or internal auditors of the customer's operations or an inspector authorized by the customer have the right to monitor compliance with the contract. The supplier must submit to the inspector free of charge any and all information and reports, documents, records and other material required for performing the inspection, and otherwise assist in the inspection as required. The inspector shall have the right to access the commercial, storage or other similar premises owned or used by the supplier to such an extent as is necessary for performing the inspection.”

**4 SPECIAL TERMS AND CONDITIONS FOR PROCUREMENT OF CUSTOMIZED APPLICATIONS
(JIT 2007 – CUSTOMIZED APPLICATIONS)**

4.1 In the Special Terms and Conditions for Procurement of Customized Applications (JIT 2007 – Customized Applications), ‘customized applications’ refers to software or parts thereof specifically created or tailored for the customer; extensions, alterations, additions (e.g. interfaces), configurations and parameters added to software by the supplier at the customer’s request; and any other software or materials delivered by the supplier as part of the taking into use (e.g. conversion tools). Customized applications may contain standard software components if this has been specifically agreed in the contract.

4.2 The contract must specify the customized application in more detail.

4.3 Customized applications must fulfil the requirements specified in the request for tender. Usually, more detailed specifications for implementation are drawn up on the basis of these requirements. It should be noted that the specifications must fulfil the requirements. If it becomes apparent during the specifications phase that a particular requirement is not being fulfilled or, for example, that it is not feasible to implement it, the supplier must inform the customer, and the matter must be discussed according to the change control procedure.

Customized applications are usually delivered as project-work. Delivery projects are very different from one another, and the contract must therefore specify the phases of delivery, the delivery schedule, the payment schedule, the responsibilities and obligations of the parties, and the resources needed. The contract must also describe the delivery project in sufficient detail, and there is often good reason to draw up a binding detailed project plan too.

4.4 The user rights gained by the customer in a customized application give the customer the right among other things to make or commission alterations to the application and to transfer the application to any service provider used by the customer for the customer’s purposes, and to transfer user rights in certain situations. The customer should also note what kind of documentation is maintained by the supplier.

4.5 In many cases, a customer acquires a system based on standard software which is then parametrized, altered or amended according to the customer’s requirements. In such cases, the contract must specify the customized application and any and all standard software it contains in detail. The following points should also be noted:

- 4.5.1 Testing and approval procedures apply to the entire customized application, including any standard software it contains. The Special Terms and Conditions for Procurement of Customized Applications have had provisions for testing and approval procedures added to them. It may be necessary, however, to agree on testing and approval procedures in more detail in the contract proper. Documentation is an essential part of any product or service, and testing thus involves reviewing the documentation too.
- 4.5.2 If a customized application contains standard software as specified in the contract, the user rights for this component are determined basically according to the Special Terms and Conditions for Procurement of Standard Software or the terms and conditions of the standard software component itself. Unless otherwise agreed, the Special Terms and Conditions for Procurement of Standard Software (JIT 2007 – Standard Software) shall apply. Terms and conditions must be considered particularly carefully in contracts of this kind. If necessary, the customer can require in the request for tender that the user rights gained by the customer in the customized application as a whole or in the standard software contained therein shall be as specified in the Special Terms and Conditions for Procurement of Customized Applications (JIT 2007 – Customized Applications), if this is relevant for the customer in terms of the overall use of the application.
- 4.5.3 As far as maintenance is concerned, it must be ensured that maintenance applies on the same terms to the entire application and to any customizations and modifications made for the customer.
- 4.5.4 If the contract concerns software of critical importance to the customer, provision should be made for cases where maintenance for the software is discontinued or the supplier goes out of business. The source code and related documentation of software critical for the customer can be deposited with an independent escrow agent using a separate source code deposit contract. The escrow agent will store the material and in problem situations will release the source code according to the terms and conditions specified in the deposit contract. In Finland, source code deposit services are provided by the Helsinki Region Chamber of Commerce and the Turku Chamber of Commerce, among others.

5 SPECIAL TERMS AND CONDITIONS FOR SERVICES (JIT 2007 – Services)

- 5.1 Because of the increased importance of services, the terms and conditions now contain new Special Terms and Conditions for Services (JIT 2007 – Services). At the same time, the Special Conditions for Facilities Management Services have been abandoned.
- 5.2 These Special Terms and Conditions are intended to apply to services of a continuous nature but not to consulting or expert services, to which the Special Terms and Conditions for Consulting Services apply.
- 5.3 A service contract should address the following phases of a service:
- (i) taking into use of the service (including any piloting),
 - (ii) production phase, in which the service is available as per the contract,
 - (iii) exiting the service.
- 5.4 The taking into use of a service varies greatly from one case to the next, and its terms and conditions are left for the parties to agree upon in the contract proper.
- 5.5 Concerning the production phase, the service contract must specify:
- (i) the service and the service processes (the service process depends on the supplier selected),
 - (ii) service environment (including testing environments) and responsibility interfaces between parties and between suppliers,
 - (iii) service times,
 - (iv) response times and urgency classes,¹

¹ For example:

Urgency classification:

A. Error which prevents use. Action to be taken immediately on receiving notification, and work to be continued on a 24/7 basis until the disruption is resolved.

B. Error which materially disrupts use. Action to be taken within four hours of receiving notification, and work to be continued on a 24/7 basis until the disruption is resolved.

C. Error which disrupts use. Action to be taken no later than the weekday immediately following receipt of the first notification, and work to be continued during the supplier's regular working hours and on overtime on weekdays if necessary, until the disruption is resolved.

D. (other)

Unless otherwise agreed, urgency class C applies by default.

During the guarantee period, the customer is guaranteed rights as per urgency class C.

- (v) service level, how it is measured and monitored, and sanctions for violations².

Attention should also be paid to

- (vi) service development,
(vii) data protection and information security issues.

- 5.6 The contract must also make provision for terminating the service and for new competitive tendering so that exiting the service does not cause disruption to the customer's operations. The terms and conditions include a clause providing for the supplier's obligation to assistance, the extent or necessity of which must be assessed on a case-by-case basis. It may be particularly advisable to consider and specify in more detail in advance what materials and what information the customer will need when the service is terminated. The relationship between obligation to assistance and confidentiality should also be considered.
- 5.7 The contract must specify what are considered to be the results of the service. Services of a continuous nature rarely produce tangible end results. On the other hand, the service contract may involve minor software development, for instance, which does produce measurable results.
- 5.8 The price information must clearly specify what is considered work subject to a separate charge, or which circumstances could cause changes to the fixed service fee (if there is one).

² Customer satisfaction can be measured for instance by grading on a scale from 1 to 10.

Availability can be evaluated using the following formula:

$\% = (\text{time online} - \text{time offline}) / \text{time online} \times 100$. The availability percentage calculated as a floating average over 4 weeks must not fall below a previously agreed figure.

Availability and related sanctions can be classified for instance as follows:

1) Slight reduction in availability

- monthly average availability is xx.x% - xx.x%.
- sanction: record quality deviation and agree on corrective action.

2) Significant reduction in availability

- monthly average availability is xx.x% - xx.x%.
- contract fine: X% of basic monthly fee.

3) Serious reduction in availability

- monthly average availability is xx.x% - xx.x%.
- contract fine: Y% of basic monthly fee.

4) Critical reduction in availability

- monthly average availability is less than xx.x%.
- contract fine: Z% of basic monthly fee.

6 SPECIAL TERMS AND CONDITIONS FOR CONSULTING SERVICES (JIT 2007 – Consulting Services)

- 6.1 The Special Terms and Conditions for Consulting Services (JIT 2007 – Consulting Services) apply to consulting and expert services. They are not meant to be applied to hired human resources.
- 6.2 Traditionally in consulting services, a consultant is commissioned to produce a specific end result such as a report or a plan. Unless otherwise agreed, this end result must be accepted as per the provisions on transfer and approval in section 9 of JIT 2007 – General.
- 6.3 On the other hand, these Special Terms and Conditions can also be applied where consulting services involve consultation and guidance provided for the customer without any tangible end result being produced. In these cases, there is no end result for the customer to inspect.

7 SPECIAL TERMS AND CONDITIONS FOR PROCUREMENT OF STANDARD SOFTWARE (JIT 2007 – STANDARD SOFTWARE)

- 7.1 No substantial changes have been made to the Special Terms and Conditions for Procurements of Standard Software 1998 (VVOE 1998), but the concepts used have been harmonized with the other Special Terms and Conditions.
- 7.2 The parties can agree to apply the terms and conditions of use specified by the intellectual property rights holders of the standard software involved instead of JIT 2007 – Standard Software, but in this case it should be ensured that the user rights defined by these terms and conditions are sufficient for the intended purpose of use.
- 7.3 The intended use and projected number of users should be specified in the request for tender so that the prices tendered will be comparable.
- 7.4 If the price depends on the number of users, provision should be made for any future changes to the number of users, and this should be taken into account in the request for tender.
- 7.5 The following should also be examined and agreed:
- (i) what technical demands of the software places on the customer's platform and operating system environment,
 - (ii) what kind of warranty the software carries,

(iii) what kind of support and maintenance services are provided for the software,

e.g.

- supplier helpline,
- diagnostics and repair performed by the supplier, possibly over a remote connection,
- a troubleshooting database provided to the customer by the supplier, where the customer can search for descriptions of errors encountered and how to resolve them,
- delivering software fixes and patches to the customer in a pre-agreed manner,
- informing the customer of any errors found in standard software and of the most recent published versions of the software.

(iv) how often version updates are expected, and which version(s) will be supported.

8 SPECIAL TERMS AND CONDITIONS FOR PROCUREMENT OF HARDWARE (JIT 2007 – Hardware)

8.1 No changes have been made to the content of the Special Terms and Conditions for Procurements of Equipment 1998 (VLAE 1998).

8.2 The following points should always be agreed on in hardware procurement:

- (i) demands on the location where the hardware is to be installed,
- (ii) whether the delivery includes installation of the hardware,
- (iii) what the acceptable Mean Time Between Failures is for the hardware.

8.3 Producers of electrical or electronic equipment (manufacturers, importers and sellers selling equipment under their own brands) are responsible for the organizing and the costs of the waste management of the equipment which they bring to market (producer responsibility) under Chapter 3a of the Waste Act (1072/1993) and the Government Decree on Waste Electrical and Electronic Equipment (852/2004). The waste management of equipment procured by public organizations is the responsibility of the producer if the equipment was procured after 13 August 2005. This also applies to older equipment that will be replaced with newly acquired equipment. A supplier who is not a producer is not liable for producer responsibility as per the Waste Act. However, it is the responsibility of the producer to ensure that such suppliers have the necessary information regarding how the waste management is arranged. If procurement is intended for replacing existing equipment, the customer can require in the request for tender that the supplier has a system in place for the appropriate disposal of old

equipment and that the supplier will remove the old equipment at no extra charge in connection with the delivery of new equipment or, if that is not convenient for the customer, at a place of reception within a reasonable distance (c. 30 km) of the customer's premises.

- 8.4 If the contract involves deliveries of equipment from a third party, it should be unequivocally agreed who is responsible for the delivery and who the customer's contract partner is in this respect.
- 8.5 The Special Terms and Conditions for Equipment and Software Maintenance Services (VHYE) have been abolished. Equipment maintenance contracts can be concluded by applying the Special Terms and Conditions for Services (JIT 2007 – Services). The content of the equipment maintenance service must be specified in the contract proper. Any relevant response times, urgency classification, service level monitoring and measurement, and sanctions for breaches must be agreed separately.